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Judgment: approved by the Court for handing down  
(subject to editorial corrections)\*

Delivered: 14/03/2016

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF BELFAST

Between

SEAN DILLON

Appellant

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF  
NORTHERN IRELAND

Respondent

Weatherup LJ, Treacy J and McBride J

WEATHERUP LJ (delivering the judgment of the Court)

[1] This is an appeal by way of Case Stated under Article 61 of the County Courts (Northern Ireland) Order 1980 by Her Honour Judge Kennedy. Mr O'Donoghue QC and Mr Girvan appeared for the appellant and Mr Coll QC for the respondent.

*The proceedings in the County Court*

[2] The appellant commenced proceedings against the respondent in the County Court by way of Civil Bill claiming £15,000 damages for unlawful arrest, assault, battery, trespass to the person and unlawful detention by the respondent in Omagh and later at Antrim Serious Crime Custody Suite between 19 and 25 June 2010.

[3] The respondent applied to the County Court Judge for the appellant's claim to be set aside under section 30 of the Police (Northern Ireland) Act 1998 which provides as follows -

“(1) No action shall be brought against a member of the police force in respect of any act done in execution of a warrant by reason of:

(a) any irregularity in the issuing of the warrant; or

(b) any lack of jurisdiction in the person who issued it.

(2) Where any such action is commenced, the judge may, on an application by the defendant supported by an affidavit of facts, order that the proceedings in such action be set aside with or without costs.”

[4] The Judge upheld the application and set aside the proceedings. The appellant appeals that decision by way of Case Stated.

*The Case Stated*

[5] The Case Stated sets out the facts relied on in the section 30 application as including the following -

“(a) The appellant was arrested on 19 June 2010.

(b) On 21 June 2010 Her Honour Judge Loughran issued a warrant of further detention authorising further detention of the appellant pursuant to Part III of Schedule 8 of the Terrorism Act 2000.

(c) On 24 June 2010 at 2pm Her Honour Judge Loughran issued a warrant for the further detention of the appellant.

(d) On 25 June the said warrant was quashed by the Divisional Court of the High Court on the basis that the Judge had erred in law in her application of the statutory test for the issue of an extension of the warrant. The appellant was then released.”

[6] HH Judge Kennedy stated her reasons for setting aside the appellant’s Civil Bill under section 30 -

“When the learned judge granted the first extension she determined that the original arrest was lawful as this is one of the requirements of the decision making process.

She would not have granted the extension if she had not been satisfied with the lawfulness of the arrest. That matter has therefore been decided and cannot be reopened as it was not challenged at the time. The challenge came upon the second extension being granted. The detention ended upon the High Court's decision to quash the warrants or any potential case would, in my view, have been limited to the few hours between the two hearings. However, I consider that the respondent was not involved in any irregularity as it was merely acting in execution of the warrant. The statutory protection provided by Section 30 does, in my view, protect the respondent from being sued. There is also the provision in Schedule 8 paragraph 5 of the Terrorism Act upon which the respondent can also rely (which states that a detained person shall be deemed to be in legal custody throughout the period of his detention)."

[7] The questions of law upon which the opinion of the Court of Appeal is sought are set out in the Case Stated as follows -

- (i) Can section 30 of the Police (NI) Act 1998 have retrospective effect so as to give immunity from suit to the respondent for the period of detention by police prior to a court order for an extension of detention?
- (ii) Does an order for extension of detention pursuant to paragraph 29 of Schedule 8 of the Terrorism Act 2000 determine the lawfulness of arrest and detention so that res judicata applied to any subsequent claim for unlawful arrest or detention?
- (iii) Was I, as a matter of law, entitled to draw an inference that the court making an order for extension of detention has determined whether the arrest was lawful so that this issue was therefore res judicata.

*The transmission of the Case Stated*

[8] The respondent raised a preliminary point concerning the appellant's compliance with the requirements as to the transmission of the Case Stated to the Court of Appeal.

[9] Article 61(3) of the County Courts (Northern Ireland) Order 1980 provides:

"Within a period of 14 days commencing on the date on which the Chief Clerk dispatches to the applicant the case stated (such date to be stamped by the Chief Clerk or by a member of his office staff on the front of the case stated)

the applicant shall transmit the case stated to the Master (Queens' Bench and Appeals) and serve on the respondent a copy of the case stated with the date of transmission endorsed thereon."

[10] Order 32 Rule 6(4) of the County Court Rules provides that -

".... the Chief Clerk on receiving the signed case stated shall:

- (a) endorse thereon the date of receipt; and
- (b) transmit to the applicant a signed case with the date of transmission also endorsed."

[11] The steps required by the statute and the rules therefore include -

- (1) The Chief Clerk endorsing the Case Stated (i) with the date of receipt from the Judge and (ii) the date of dispatch/transmission of the Case Stated to the appellant (and with that date stamped on the front).
- (2) The appellant, within 14 days of the dispatch/transmission by the Chief Clerk to the appellant, transmitting the Case Stated to the Court.

[12] The Case Stated was signed by the Deputy Judge and dated 11 April 2014. The Case Stated was despatched to the appellant by the Chief Clerk on 14 April 2014. The Case Stated did not comply with Order 32 Rule 6(4) as the Chief Clerk had not endorsed on the Case Stated (i) the date of receipt or (ii) the date of transmission. Nor did the Case Stated comply with Article 61(3) as the date of despatch of the Case Stated to the appellant was not stamped on the front of the Case Stated.

[13] The Case Stated, having been despatched/transmitted to the appellant's solicitors on 14 April 2014, was not transmitted to the Court of Appeal by the appellant's solicitors. This was described as an administrative oversight. Thereafter the appellant had issues about legal aid being obtained for the purposes of the appeal. The matter then remained in abeyance until 10 March 2015.

[14] On 10 March 2015 the appellant sought from the Chief Clerk a form of the Case Stated that was compliant with Order 32 Rule 6(4). The appellant sought to achieve this by an application to the County Court for an Order that the Judge transmit the Case Stated to the Chief Clerk and that the Chief Clerk be directed, upon receiving the Case Stated, to endorse thereon the date of receipt and to transmit the Case Stated to the appellant with the date of transmission endorsed on the Case Stated. His Honour Judge Devlin dismissed the application on the basis that he had no jurisdiction to make such an Order.

[15] The appellant's solicitors then requested the Chief Clerk to transmit a compliant Case Stated by endorsing on the Case Stated the date of receipt of the Case Stated from the Judge and the date of transmission of the Case Stated to the appellant. Thereafter, the Chief Clerk endorsed on a copy of the Case Stated the date of receipt from the Deputy Judge, being 11 April 2014, and the date of transmission to the parties, being 14 April 2014. The front of the Case Stated was date stamped 8 June 2015, being the date the compliant Case Stated was dispatched to the appellant. The compliant Case Stated was transmitted by the appellant to the Master (Queen's Bench and Appeals) on 16 June 2015.

[16] The appellant submits that a compliant Case Stated was transmitted to the Court of Appeal within the requisite 14 day time limit when the copy of the Case Stated, duly endorsed by the Chief Clerk with the date of receipt and the date of transmission and date stamped on the front, was sent to the appellant on 8 June 2015 and transmitted by the appellant to the Court of Appeal on 16 June 2015.

*The approach to non-compliance with the requirements for a Case Stated.*

[17] The approach to non-compliance with requirements has changed over the years. Initially the approach was to consider whether the requirement was directory or mandatory, where non-compliance with a mandatory requirement resulted in the Court being deprived of jurisdiction. Later that distinction gave way to a more nuanced approach to the requirements.

[18] The mandatory nature of such statutory requirements was established in Dolan v O'Hara [1975] NI 125 and Pigs Marketing Board (NI) v Redmond [1978] NI 73. Both concerned Cases Stated by the Resident Magistrate to the Court of Appeal, the former involving non-compliance by the appellant with the time limit for the appellant transmitting the Case Stated to the Court of Appeal and the latter involving non-compliance by the appellant with the requirement that the appellant date stamp the Case Stated with the date of transmission to the respondent.

[19] After the introduction of the Human Rights Act 1998 the issue of non-compliance with statutory requirements was reassessed to take into account the issue of interference with the right of access to the Court under Article 6 of the European Convention on Human Rights.

[20] In Foyle, Carlingford and Irish Lights Commission v McGillion [2002] NI 86, on an appeal by Case Stated from the Magistrates' Court, the appellant failed to serve a copy of the Case Stated on the respondent within the 14 day time limit. While the decisions in Dolan and Pigs Marketing Board remained binding, it was now necessary to have regard to the right of access to the Court under Article 6. It would be disproportionate if an appellant were barred from presenting an appeal by reason of a failure to serve a copy of the Case on the other party, even though no prejudice had occurred to that party. The Court had power to read the statutory requirement

in a compatible manner and did so by construing the requirement to serve on the other party as being directory rather than mandatory.

[21] In Wallace v Quinn [2004] NI 164, on appeal by Case Stated from the Magistrates' Court, the appellant failed to copy to the respondent the requisition for a Case Stated, a copy of the draft case and a copy of the Case Stated. In considering the issue the focus moved from the conventional approach of asking whether the requirement was mandatory or directory to the question of what the legislator should be judged to have intended would be the consequence of non-compliance with the requirement. The Court asked whether there had been substantial compliance with the requirement and concluded that there had not. Where the appellant had failed completely to copy the requisition to the respondent, 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, the Court could not suppose that this could be regarded as substantial compliance. The Court concluded at paragraph [13] that "... it was the legislative intent that almost, if not completely, invariably in such cases the appeal will be barred". There had been no substantial compliance, the time requirement would not be waived, the appeal would be dismissed and that result did not involve any breach of Article 6 of the Convention.

[22] However in DPP v Harris [2007] NICA 51, another Case Stated from the Magistrates' Court, the Public Prosecution Service was the appellant and failed to serve a copy of the requisition on the respondent within the time limit. It was common case that the fair trial rights under Article 6 of the European Convention were not engaged on behalf of the PPS as a public body. As there were no Convention rights in play the binding decisions of Dolan and Pigs Marketing Board applied. The Court did not have jurisdiction to hear the appeal.

[23] The change of approach in Northern Ireland followed that outlined by Lord Woolf MR in England and Wales in R (Jeyanthan) v Secretary of State [1999] EWCA Civ 3010. An appellant failed to use the prescribed form contrary to the Immigration Appeals (Procedure) Rules. There had not been substantial compliance with the Rules, although the irregularity had been waived by the Tribunal. In any event the irregularity could have been cured by the Tribunal under the Rules. The application for leave to appeal was not to be treated as a nullity. Lord Woolf stated -

" 16.... I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows:

- (a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has

there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)

(b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.

(c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)

17. Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

*The nature of the non-compliance in the present case*

[24] In the present case there was non-compliance by the Chief Clerk with the requirements as to endorsement on the Case Stated of the dates of receipt and despatch/transmission and with stamping the date of transmission to the appellant on the face of the Case Stated. Also in issue in the present case was the requirement on the appellant to send the Case Stated to the Court within the statutory time limit of 14 days. The appellant contends that the non-compliant Case Stated was a nullity.

[25] Thus, the appellant contends that the Chief Clerk, having elected to despatch further a compliant Case Stated to the appellant on 8 June 2015, thereby invoked the 14 day requirement of Article 61(3) in respect of that compliant version of the Case Stated and the appellant complied with the 14 day requirement by transmitting the same to the Court on 14 June 2015.

[26] The respondent replies that the time limit for the appellant's transmission of the Case Stated to the Court ran from the date of despatch of the original version of the Case Stated on 14 April 2014. The non-compliant Case Stated was not a nullity. The Case Stated despatched on 8 June 2015 was an amendment of the Case Stated. Thus, says the respondent, the relevant Case Stated and the only Case Stated was not transmitted to the Court of Appeal within the 14 day period.

[27] The respondent seeks support in Dolan v O'Hara [1975] NI 125. The requirement in section 146(8) of the Magistrates' Courts Act (NI) 1964 that a Case Stated be transmitted to the Court of Appeal within 14 days was held to be mandatory and not directory. A Case Stated was despatched from the Magistrates' Court to the appellant on 16 May 1974. The appellant's solicitor wished an amendment to be made to the content of the Case Stated, the amendment was made and the Clerk despatched the amended Case Stated on 16 October 1974. The case was not transmitted to the Court of Appeal until 17 December 1974 so the 14 day period had elapsed from the date of the second despatch on 16 October 1974. The Court of Appeal found that time ran from the date of the first despatch on 16 May 1974. However, the Case Stated had been compliant with the statutory requirements.

[28] The appellant relies on Foyle Carlingford and Irish Lights v McGillion to contend that the requirements of Article 61(3) are to be regarded as directory rather than mandatory and therefore the Court of Appeal has power to extend the 14 day time limit for the appellant to transmit the Case Stated to the Court, and should exercise its discretion to do so in the present case. McGillion was concerned with Article 146(9) of the Magistrates' Courts (NI) Order 1981 which has the same framework as Article 61(3) and includes the twin requirements that the appellant should serve a copy of the Case Stated on the other party and should transmit the Case Stated to the Court. McGillion was concerned with the failure of the appellant to serve a copy of the Case Stated on the other party. The Court of Appeal concluded that it was disproportionate to prevent the appellant from presenting his appeal by reason of the failure to serve a copy of the Case Stated on the other party. Carswell LCJ stated -

“We do not find it possible, however, to accept that there is a reasonable relationship of proportionality when the applicant is altogether barred from presenting his appeal because he fails for a period to serve a copy of the case on the other party, even though no prejudice is accrued to that party. We consider that this would constitute a breach of Article 6(1) of the Convention. It is incumbent upon us by virtue of Section 3 of the 1998 Act to read and give effect to legislation in a way that is compatible with Convention rights. This can be done by construing Article 146(9) as directory rather than mandatory, contrary to the previous case law, whose binding authority is overridden by the 1998 Act.”

[29] The appellant contends that the same approach should be applied to the other requirement that an appellant should transmit a copy of the Case Stated to the Court and indeed contends that the passage cited above, in referring to construing Article 146(9) as directory rather than mandatory, applies to both the requirement to



serve a copy of the Case Stated on the other party and to serve the Case Stated on the Court.

*The effect of non-compliance in the present case.*

[30] First of all it is necessary to determine the status of the Case Stated forwarded to the appellant on 14 April 2014. That Case Stated was irregular in not being endorsed with the date of receipt of the Case Stated from the Judge and not being endorsed with the date of despatch/transmission of the Case Stated to the appellant and not having that date stamped on the front of the Case Stated. The appellant contends that the irregular Case Stated was a nullity. We look to the nature of the requirements with which the Chief Clerk did not comply. The irregularities were the result of the actions of the Chief Clerk in processing the Case Stated. The irregularities related to procedural matters intended to create a record of material dates and to avoid disputes as to the time of occurrence of particular steps in the process. Hence the date of despatch of the Case Stated to the appellant was to be stamped on the front of the Case Stated and that date was to be endorsed on the Case Stated. That date was significant as it marked the start of the running of the 14 day period for the Case Stated to be forwarded by the appellant to the Court. The omission of the dates created no prejudice to the appellant. The appellant received the Case Stated and must have been aware that the same was to be transmitted to the Court. The legal consequence of non-compliance with these requirements cannot have been intended to be to invalidate the Case Stated. We are satisfied that the Case Stated transmitted to the appellant on 14 April 2014 was not a nullity.

[31] Next it is necessary to consider the appellant's non-compliance with the requirement to transmit the Case Stated to the Court within 14 days of 14 April 2014. As we have found, the Case Stated of 14 April 2014 was not a nullity and the requirement to transmit the case to the Court applied. There was non-compliance with that requirement. The requirement is clearly directed towards the avoidance of delay in the processing of appeals by way of Case Stated. The obligation on the appellant is the administrative act of transferring the Case Stated to the Court. In general the courts have adopted a strict approach to time requirements for appeals. This is an instance of a statutory time limit with no express provision for extension of time. Such compliance with the requirement as occurred was not until transmission of the amended Case Stated on 16 June 2015. That transmission, over a year late, could not be said to amount to substantial compliance with the requirement.

[32] As to whether that non-compliance was capable of being waived or should be waived in this particular case, we turn to the circumstances in which there was non-compliance. The failure to transmit the Case Stated was said to be an administrative oversight. Thus there was no excuse for non-compliance. Thereafter there were said to be issues with legal aid. The absence of sympathy for such a factor in explaining delay is apparent from the recent decision of the Court of Appeal in England and Wales in R (Kigen) v Secretary of State [2015] EWCA Civ 1286. Then the matter lay

in abeyance pending instructions to new Counsel. Then a novel approach was adopted on behalf of the appellant in seeking to have the County Court make an Order that would have purported to correct the non-compliance with the requirements. Thereafter the matter was returned to the Chief Clerk for the reissue of the Case Stated in a manner that purported to comply with the requirements. By this means the appellant secured a copy of the Case Stated with the date of despatch stamped on the front as 8 June 2015.

[33] This date is the date of despatch relied on by the appellant. We cannot accept this approach. There was but one Case Stated and it was despatched to the appellant on 14 April 2014. The omissions by the Chief Clerk did not invalidate the Case Stated. Later amendment, whether by the Judge to the content of the Case Stated or by the Chief Clerk to the administrative aspects of the Case Stated, do not alter the status of the Case Stated. Nor can we accept that the reissue of the Case Stated in some manner allows the recommencement of the 14 day time limit for transmission of the Case Stated to the Court.

[34] This is not a case where non-compliance with a statutory time limit should be waived.

[35] The legal consequence of non-compliance with the statutory time limit is that the Court lacks jurisdiction to hear the appeal.

*The one year time limit under the Human Rights Act 1998*

[36] The applicant contends, calling in aid section 7(5) of the Human Rights Act 1998, that a one year time limit applies from the date of the decision of the County Court Judge to the lodging of the appeal. The argument runs as follows. By section 6 of the 1998 Act it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The public authority is the County Court Judge and the decision setting aside the appellant's claim is said to be unlawful as being incompatible with a Convention right. By section 7(1) of the 1998 Act a person who claims that a public authority has acted in a way which is unlawful may (a) bring proceedings against the public authority under the 1998 Act or (b) rely on the Convention right in any legal proceedings. By section 9(1) of the 1998 Act proceedings under section 7(1)(a) in respect of a judicial act may be brought only by exercising a right of appeal. By section 7(5) of the 1998 Act proceedings under section 7(1)(a) must be brought before the end of the period of one year beginning with the date on which the act complained of took place, subject to any rule of court imposing a stricter time limit.

[37] We are unable to accept this argument. The one year limit applies to proceedings under section 7(1)(a) which operates when an appellant brings proceedings under the 1998 Act for an incompatible act. However, proceedings for an incompatible judicial act may be brought only by exercising a right of appeal. The appellant has not brought section 7(1)(a) proceedings against the Judge under

the 1998 Act. Rather, the appellant is relying on Convention rights in the appeal, which arises under section 7(1)(b). The one year time limit relates to section 7(1)(a) and does not apply. Clearly the relevant time limits when proceeding by way of appeal are those that apply to the appeal in question.

*Extension of time under the Rules of Court*

[38] The appellant further relied on the Rules of the Court of Judicature. Order 61 Rule 1 provides:

“(1) Subject to any statutory provision, the party .... at whose instance a case has been stated by a court, tribunal or person on a point of law for the opinion of the Court of Appeal must, within 14 days after receiving it -

- (a) enter the appeal for hearing by lodging the case stated with a duly stamped requisition for hearing in the Central Office;
- (b) serve upon every other party to the appeal a copy of the case stated with the date of such entry endorsed thereon.”

[39] The appellant submits that, as the 14 day period for lodging the Case Stated with the Court is here to be found in the Rules of Court, there will be power to extend time. Order 3 Rule 5 provides that the Court may extend the period within which a person is required by the Rules to do any act and thus the Court may extend the 14 days within which the appellant is required by Order 61 to lodge the Case Stated. In such circumstances the appellant submits that the principles in Davis v Northern Ireland Carriers [1979] NI 19 and Hegarty v Enforcement of Judgments Office [2013] NICA 56 would apply to the exercise of the Court’s discretion to extend time.

[40] This Court cannot accept this submission. The operation of Order 61 Rule 1 is stated to be “subject to any statutory provision”. There is here a relevant statutory provision in Article 61(3) of the County Courts (Northern Ireland) Order 1980, as set out above. This statutory provision contains a 14 day limitation period for transmission of the Case Stated to the Court of Appeal. This statutory provision cannot be overridden by Rules of Court or by any power to extend any time prescribed by Rules of Court.

[41] For the reasons given above, this Court lacks jurisdiction to deal with the Case Stated.