Neutral Citation No [2014] NIQB 61 | *Ref:* **TRE9259**

Judgment: approved by the Court for handing down | *Delivered:* **09/05/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Doherty's (John) Application [2014] NIQB 61

IN THE MATTER OF AN APPLICATION BY JOHN DOHERTY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION BY JUDGE McELHOLM ON 1 MAY 2013

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TREACY J

Introduction

[1] The applicant is a personal litigant who seeks leave to challenge a decision of District Judge (Magistrates' Court) McElholm ("the District Judge") dated 1 May 2013 refusing to accede to the applicant's written request delivered to the Court Office on 30 April 2013 requesting the contest date be adjourned to a further date. On that date he was convicted in his absence.

Order 53 Statement

[2] The applicant sought relief by way of an order of mandamus and an order of certiorari on the grounds set out in his Order 53 Statement. The grounds upon which relief was sought can be summarised as follows:

> (i) Procedural impropriety: the applicant was denied his right to have his case heard in open court;
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> (ii) Breach of legitimate expectation: the applicant had a legitimate expectation to have a full and fair trial and an opportunity to have all facts and witnesses present in court for cross examination and questioning of knowledge of all relevant facts;

(iii) Human Rights Act 1998: Section 6 of the Act imposes an obligation on public authorities not to act incompatibly with rights enshrined in the European Convention on Human Rights.

Background

[3] The applicant was stopped by police on 5 February 2013 for the alleged use of his mobile phone while driving a vehicle and refused the offer of a Fixed Penalty Notice. He was reported to the Public Prosecution Service ("PPS") and was summoned to appear before Londonderry Magistrate's Court on 28 March 2013. The applicant avers that he attended on that date with the intention of contesting the charge brought against him; that the case was adjourned until 19 April for a contested hearing when he again attended and District Judge McElholm further adjourned the case until 1 May. The applicant further avers that on 30 April he telephoned the Court Office informing them he was unwell and that he felt he would not be in a position to attend the following day 1 May. The Court Office he avers instructed him to explain the position in letter form and have it hand-delivered to the Court Office on Bishop Street as his case was scheduled for the following day. The letter was hand-delivered as instructed and stamped by the court office on 30 April. On 22 May 2013 he contacted the court office by telephone to see if a date had been set aside to hear his case as he had received no notification of a new date. He was advised the court date was the following day 23 May. When he attended DJ Meehan informed him that he would not be dealing with the matter as it was a matter for DJ McElholm. The case was adjourned to the 30 May. The applicant again attended (4th attendance) and was asked by DJ McElholm to produce his licence. The applicant says he was shocked and asked why the judge wanted his licence. The DJ stated that he didn't believe he was sick on the 1 May and had already made a decision to impose a fine of £300 and a 9 month driving ban.

[4] The proposed respondent says that on 19 April 2013 the case was adjourned to 1 May 2013 for contest. The District Judge directed the PPS to send out an adjournment notice on 19 April 2013. On 1 May 2013 it appears the District Judge was informed by court staff that the applicant had delivered a note, *in person*, the previous day stating that he could not attend on 1 May due to illness. The District Judge did not find this an acceptable reason given that on the information provided to the District Judge it appeared the applicant was fit enough to attend the Courthouse on 30 April 2013. The District Judge was unable to understand how the applicant could have known in advance of 1 May 2013 that he would not be recovered sufficiently to attend court the following day.

[5] On 2 May 2013 the PPS sent the applicant a further notice advising him that as he was not in attendance the day before the matter was now listed for 23 May 2013. I was informed the Court has no record of any contact on 22 May 2013 from or with the applicant. However, the applicant exhibited to his affidavit a letter dated 22 May

from Courts and Tribunal Service to the applicant which states: "Mr Doherty called Londonderry court office on 22 May 2013 inquiring when his case was next up in court. Mr Doherty was advised that the case was next in court on 23 May 2013 for his licence to be produced"

[6] On 23 May 2013 District Judge (MC) Meehan indicated that the applicant was advised that he must produce his licence to the Court or face disqualification. The matter was adjourned to 30 May 2013 for District Judge McElholm to deal with the disposal. On 30 May 2013 the applicant was fined £300 and disqualified from driving for 9 months. Bail for appeal was fixed in the sum of £300 and the applicant was granted leave to drive pending appeal.

[7] On 30 May 2013 the applicant lodged a notice of appeal and the appeal was listed for 24 June 2013 but was adjourned at the request of the applicant. The case was listed for 6 September 2013 and as the applicant was not in attendance the PPS indicated that if a further date was fixed for hearing they would write to the applicant and advise him of the next date. The matter was adjourned to 5 November 2013.

Statutory Framework

[8] The applicant's leave application was listed for hearing on 27 February 2014 and was adjourned by consent to enable the applicant to pursue the alternative remedy of making an Article 158A application to set aside his conviction for using a mobile phone whilst driving in contravention of Regulation 125A(1)(a) of The Motor Vehicle (Construction and Use) Regulations (NI) 1999 contrary to Article 56A(b) of The Road Traffic (NI) Order 1995. The expectation was that all interested parties would cooperate to ensure that the conviction would be set aside using that mechanism and that a rehearing would be directed before a different District Judge. This course commended itself to the proposed respondent because they were not in a position to challenge the applicant's evidence that he had not hand-delivered the letter on 30 April. It also commended itself to the applicant and for that reason the judicial review was adjourned to enable the matter to be dealt with in this manner. The court considered this an advantageous course for reasons of expedition, cost and the fact that the applicant would have the conviction speedily set aside and the charge heard before a different District Judge.

[9] Art 158A of the Magistrates Court (NI) Order 1981 provides:

> "Power of magistrates' court to re-open cases to rectify mistakes etc.
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> 158A. (1) A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason

appears to be invalid by another which the court has power to impose or make.

(2) The power conferred on a magistrates' court by paragraph (1) shall not be exercisable in relation to any sentence or order imposed or made by it when dealing with an offender if—

(a) the county court has determined an appeal against—

(i) that sentence or order;
(ii) the conviction in respect of which that sentence or order was imposed or made; or
(iii) any other sentence or order imposed or made by the magistrates' court when dealing with the offender in respect of that conviction (including a sentence or order replaced by that sentence or order); or

(b)the Court of Appeal has determined a case stated for the opinion of that court on any question arising in any proceeding leading to or resulting from the imposition or making of the sentence or order.

(3) Where a person is convicted by a magistrates' court and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by another resident magistrate. . . the court may so direct.

(4) The power conferred on a magistrates' court by paragraph (3) shall not be exercisable in relation to a conviction if—

(a) the county court has determined an appeal against—

(i) the conviction; or
(ii) any sentence or order imposed or made by the magistrates' court when dealing with the offender in respect of the conviction; or

(b) the Court of Appeal has determined a case stated for the opinion of that court on any question arising in any proceeding leading to or resulting from the conviction.

(5) Where a court gives a direction under paragraph (3)—

(a) the conviction and any sentence or other order imposed or made in consequence of it shall be of no effect; and
(b) Article 47 shall apply as if the trial of the person in question had been adjourned.

> (6) Where a sentence or order is varied under paragraph (1), the sentence or other order, as so varied, shall take effect from the beginning of the day on which it was originally imposed or made, unless the court otherwise directs."

[10] The Judicial Review was adjourned pending the outcome of the Art 158A application. Once that application has been heard and the conviction and sentence imposed set aside and a new date set for hearing of the alleged offence the Judicial Review application was to be dismissed.

[11] Notwithstanding what had been previously agreed at a resumed hearing I learnt that the applicant had not made the Article 158A application and was now insisting on proceeding with the judicial review. [Although this was a criminal cause or matter the parties had earlier signified their consent to jurisdiction being exercised by myself.] I dismissed it on the basis that he had a suitable alternative remedy under Article 158A of the Magistrates' Courts (NI) Order 1981.

[12] Although for the reasons given I have dismissed the application I consider it to make some brief further remarks. Whether or not the District Justice was wrongly informed that it was the applicant who had hand-delivered the letter on 30 April he should not have proceeded to convict in the absence of the accused without having made further inquiries. Convicting someone in their absence is a very grave step and should only be undertaken after all necessary inquiries have been conducted into the reasons for the absence of the accused, especially in this case where the applicant had already attended on a number of occasions and evinced a clear intention to contest the charges.

[13] Even, if as the District Judge apparently understood, that it was the applicant who hand-delivered the letter, it by no means followed that he was fit to appear the following day and represent himself in a contested hearing. It may have been the cause for healthy scepticism but not, without further inquiry, a proper basis to deal with him in his absence.