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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Morrison's (Maria) Application and The Director of Public Prosecutions Application [2013] NIQB 67

IN THE MATTER OF AN APPLICATION BY MARIA MORRISON TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF DISTRICT JUDGE CONNOR MADE ON 10 MARCH 2011

IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF DEPUTY DISTRICT JUDGE CONWAY ON 6 JULY 2011

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Before: Morgan LCJ, Higgins LJ and Treacy J

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MORGAN LCJ

[1] These are two applications for judicial review arising from prosecution applications for adjournment of summary proceedings. In each case the proceedings were dismissed. Ms Connolly appeared for Ms Morrison, Mr McAlister for the Director of Public Prosecutions and Mr Coll for the District Judges. We are grateful to counsel for their helpful oral and written submissions.

[2] This court has recently considered the case law on adjournments in the Magistrates Courts in Re Millar, Re DPP [2013] NIQB and we set it out here again for the benefit of those reading this judgment.

The cases on Magistrates' Courts adjournments

[3] The power to adjourn proceedings in the Magistrates' Court is stated in general terms and is contained in Article 161(1) of the Magistrates Courts (Northern

Ireland) Order 1981. The relevant principles are not controversial. They can be derived from a series of well-known cases which we summarise below. Much of this material repeats a discussion of this issue by McCloskey J in Re Quigley and others [2010] NIQB 132.

[4] In R v Hereford Magistrate's Court ex parte Rowlands [1998] QB 110 the applicant received late disclosure of two witness statements which were helpful to the defence. His solicitors contacted the witnesses who indicated that they would give evidence but one could not take time off work on the day fixed for the hearing and the other had an interview for admission to a university on that day and was also not available. The justices refused an application for adjournment. The applicant sought judicial review. Lord Bingham reviewed the law.

> "It is not possible or desirable to identify hard and fast rules as to when adjournments should or should not be granted. The guiding principle must be that justices should fully examine the circumstances leading to applications for delay, the reasons for those applications and the consequences both to the prosecution and the defence. Ultimately, they must decide what is fair in the light of all those circumstances.
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> This court will only interfere with the exercise of the justices' discretion whether to grant an adjournment in cases where it is plain that a refusal will cause substantial unfairness to one of the parties. Such unfairness may arise when a defendant is denied a full opportunity to present his case. But neither defendants nor their legal advisers should be permitted to frustrate the objective of a speedy trial without substantial grounds.
>
> Applications for adjournments must be subjected to rigorous scrutiny. Any defendant who is guilty of deliberately seeking to postpone a trial without good reason has no cause for complaint if his application for an adjournment is refused: see, for example, Reg. v. Macclesfield Justices, Ex parte Jones [1983] R.T.R. 143. In deciding whether to grant an adjournment justices will bear in mind that they have a responsibility for ensuring, so far as possible, that summary justice is speedy justice. This is not a matter of mere administrative convenience, although efficient administration and economy are in

> themselves very desirable ends. Delays in bringing summary charges to trial are, unfortunately, not infrequent; last minute adjournments deprive other defendants of the opportunity of speedy trials when recollections are fresh. The difficulties adjournments cause give rise to a proper sense of frustration in justices confronted with frequent such applications:"

The court concluded that the applicants were deprived of a reasonable opportunity to bring forward relevant witnesses through no fault of their own and quashed the convictions.

[5] DPP v Picton [2006] EWHC 1108 (Admin) was an assault case in which at a pre-hearing review it was agreed that three prosecution witnesses and four defence witnesses would be called. The case was fixed for 10 am in 1 August 2005. By mistake the prosecution had asked their witnesses to attend at 2 pm that day. There was no explanation for that mistake. Although the justices had another case listed that day which proceeded for some of the morning they refused the prosecution application for the following reasons.

> "They concluded that the prosecution failure was unreasonable; that in accordance with *R (Walden and Stern) v Highbury Corner Magistrates' Court [2003] EWHC 708* (Admin) the request for an adjournment should be subject to rigorous scrutiny; that in accordance with *Essen v Director of Public Prosecutions [2005] EWHC 1077* (Admin) they should consider carefully whether it was right to rescue the prosecution from the consequences of its own neglect; that in accordance with Walden and Stern to do so would encourage such failings; that the interests of the accused and his witnesses had to be considered as well as those of the victim; that on any basis if they granted an adjournment there was likely to be significant delay before the trial could be completed; and, finally, that given the unreasonable failure of the prosecution and balancing the interests of the victim and the accused and the likely delay, it was not in the interests of justice to grant an adjournment until later that day or to a new trial date."

The defendant was acquitted in the absence of any prosecution evidence. The Divisional Court concluded that the decision to adjourn was within the area of discretionary judgment open to the justices. There was no need to wait until lunchtime even where there was another case to start in the meantime. The estimate

for the hearing was one day and the case would therefore have gone part heard. A further hearing might not be possible without significant delay. The following factors were suggested as relevant when considering such applications:

> "(a) A decision whether to adjourn is a decision within the discretion of the trial court. An appellate court will interfere only if very clear grounds for doing so are shown.
>
> (b) Magistrates should pay great attention to the need for expedition in the prosecution of criminal proceedings; delays are scandalous; they bring the law into disrepute; summary justice should be speedy justice; an application for an adjournment should be rigorously scrutinised.
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> (c) Where an adjournment is sought by the prosecution, magistrates must consider both the interest of the defendant in getting the matter dealt with, and the interest of the public that criminal charges should be adjudicated upon, and the guilty convicted as well as the innocent acquitted. With a more serious charge the public interest that there be a trial will carry greater weight.
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> (d) Where an adjournment is sought by the accused, the magistrates must consider whether, if it is not granted, he will be able fully to present his defence and, if he will not be able to do so, the degree to which his ability to do so is compromised.
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> (e) In considering the competing interests of the parties the magistrates should examine the likely consequences of the proposed adjournment, in particular its likely length, and the need to decide the facts while recollections are fresh.
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> (f) The reason that the adjournment is required should be examined and, if it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. If that party was not at fault, that may favour an adjournment. Likewise if the party opposing the

> adjournment has been at fault, that will favour an adjournment.
>
> (g) The magistrates should take appropriate account of the history of the case, and whether there have been earlier adjournments and at whose request and why.
>
> (h) Lastly, of course the factors to be considered cannot be comprehensively stated but depend upon the particular circumstances of each case, and they will often overlap. The court's duty is to do justice between the parties in the circumstances as they have arisen."

[6] There are two points to note about this decision. First there is a line of authority in England and Wales suggesting that the courts should be slow to adjourn cases because of prosecution failures because to do so is to condone such failures. The point is put clearly in a passage from Mitchell J's judgment in R(Walden and Stern) v Highbury Magistrates' Court [2002] EWCA 708. That was a driving with excess alcohol case listed for contest on the first occasion where the application to adjourn was made because the prosecution witnesses had not attended as they had not been warned.

> "The longer the courts tolerate the sort of inefficiency which seems, in each of these cases, to be the explanation for the failure of the witnesses to attend court on the date fixed for the hearing, the longer it will continue. To tolerate it is to encourage it … delays in the administration of justice are a scandal. They are the more scandalous when it is criminal proceedings with which the court is concerned."

The cases tend to suggest that the Divisional Court and the Court of Appeal in that jurisdiction encouraged the view that a culture of adjournment within the prosecution service needed to be addressed in a robust fashion. We do not consider that in this jurisdiction we have yet reached the point where such action by the courts is either necessary or appropriate. We do, of course, accept that fault on the part of a party applying for an adjournment is relevant.

[7] The second issue to note is the absence of any specific reference to the interests of the victim in the matters which Picton suggests should be considered as relevant. The justices referred to the interests of the victim in their decision but the case tends to suggest that the interests of the victim were significantly outweighed by the fault of the prosecution even in circumstances where another case was ready

to proceed and the position could have been reviewed at lunchtime. We consider that Picton would have been decided differently in this jurisdiction. The interests of the victim and the desirability of having prosecutions determined on their merits would have made it unfair not to wait until later in the day to assess the position once the witnesses arrived and in particular to assess whether the case might have been completed in a shorter time or possibly finished shortly thereafter.

[8] There are two relevant decisions of the Divisional Court in this jurisdiction decided within a short time of each other. In Re DPP [2007] NIQB 3 the defendant faced burglary charges. His defence was that he had permission to enter the premises. The person who lived in the flat was an essential witness. She attended court but was not located in her waiting room. The prosecutor sought an adjournment on the basis that she had not attended. The district judge refused the application as a result of which the defendant was acquitted.

[9] The court noted the interests involved in the criminal law as stated by Lord Steyn in Attorney General's reference (No 3 of 1999) [2001] 2 AC 91.

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

It is important to note the emphasis on the public interest in effective prosecution and the place of the victim in the criminal justice system.

[10] The court looked at the relevance of fault at paragraphs 12 and 13.

> "[12] In *R v Enfield Magistrates' Court ex parte DPP* 153 JP 415, the Divisional Court in England and Wales (Parker LJ and Henry J) held that it was a breach of the rules of natural justice for justices to refuse an application by the prosecutor for an adjournment to enable his witnesses to attend the trial in circumstances where through no fault of their own the prosecution were unable to present their case. In that case the defendant, having agreed to be tried summarily, at first pleaded guilty but then, having taken advice on the suggestion of the justices, changed her plea. The prosecutor applied for an

> adjournment to enable his witnesses to attend. The application was refused and the justices dismissed the case.
>
> [13] It is unsurprising that this decision was quashed for it cannot be right to refuse an application for an adjournment where there has been no fault on the part of the prosecuting authorities for the absence of witnesses and no compelling reason that the matter should not be adjourned. The case is significant in the present context principally because of its recognition that the question of the fault (or the lack of it) on the part of the prosecution in bringing about the state of affairs that a necessary witness is absent is plainly germane to the question whether an adjournment should be granted. In the present case, the resident magistrate had no basis on which he might reasonably have concluded that the prosecution was to blame for the absence of the witness."

[11] Finally the court was critical of the failure of the magistrate to carry out an adequate enquiry.

> "[19] In the present case the magistrate made no inquiry of the prosecutor as to whether the witness had indicated a willingness to attend to give evidence. He asked merely whether there was an explanation for her failure to attend. He made no inquiry as to the steps taken by the police to ascertain Mrs McGurk's whereabouts. He did not ask if the defendant had contributed to adjournments in the past nor whether a short adjournment would have allowed the matter to proceed without substantial delay. He does not appear to have addressed the question whether the prosecution was in any way responsible for the non-attendance of the witness."

The Divisional Court quashed the acquittal and directed a hearing before a different magistrate.

[12] Re DPP [2007] NIQB 10 was another judicial review of a decision not to adjourn, this time an assault case in the Youth Court. The case had been reviewed on 1 August 2006 in preparation for a hearing on 15 August. The prosecutor dealing with the court on 15 August was not provided with the prosecution file for the case and was unaware that it was listed. She was able to examine a police file and asked

an inspector to enquire if the witnesses were present. She was advised that they were not. She informed the district judge that the file was not present and that she was not in a position to proceed. Her application for an adjournment was refused. As it happened on leaving the court she discovered that the civilian witnesses had been in the court building all along but were placed in a discrete waiting room.

[13] The Divisional Court referred to AG Ref (No 3 of 1999) and stated that the Picton checklist was useful. The decision was quashed, however, on the basis of lack of enquiry as set out at paragraph 25.

> "[25] Mr Maguire accepted that it was incumbent on the magistrates to examine whether a short or lengthy adjournment would have been required in order to allow the case to proceed. This was, after all, the first occasion on which the case was listed to proceed as a contest. It is clear that this was not considered by the Youth Court. In relation to the only matter that had been canvassed as a reason for the adjournment (the absence of the file) it might well have proved possible to rectify the omission within a very short time indeed. It appears to us that the failure of the court to inquire into this issue constitutes an omission to take a relevant consideration into account and for that reason the decision must be quashed."

[14] In the course of the hearing in the cases before us Mr McAlister submitted that it was only in highly exceptional circumstances that an adjournment application made by the prosecution on the first occasion a case was listed for hearing as a contest would be refused. The only possible support for such a submission was an interpretation of the passage set out in the preceding paragraph. We do not accept that proposition. It is undoubtedly right that the history of the progress of the case including any adjournment history is relevant in exercising the discretion but a case listed on the first occasion should proceed unless the court is persuaded by other relevant factors that it should be adjourned. We do not consider that the passage quoted supports any different interpretation.

[15] There are two further cases to which we wish to refer. The first is Re Quigley and others [2010] NIQB 132. Mc Closkey J set out a very helpful and comprehensive review of the authorities for which we are grateful. He discussed the reasonable time guarantee in Article 6 of the Convention. He noted that Lord Bingham stated in Dyer v Watson [2004] 1 AC 379 that the threshold for breach of the reasonable time guarantee was an elevated one. It will be a very rare case indeed where the threshold would be reached in a summary case.

[16] At paragraph 30 of his judgment McCloskey J set out some general principles.

> "The overarching general principle which emerges is that it is in the public interest that every person charged with a criminal offence should *normally* be tried: a prosecution should *usually* result in an adjudication of guilt or innocence and should not *ordinarily* be concluded in any other way. This, in my view, is properly characterised a strong general rule. General principles of this nature are the bedrock of both the common law and the jurisprudence of the European Court of Human Rights. "

We agree with these observations. One of the objectives of the criminal law is to protect the innocent by convicting and punishing the guilty. There is a strong general rule that a trial should take place where a charge is maintained. The learned judge went on however to assert that the general principle can only be displaced in exceptional or truly exceptional cases. There is no authority in this jurisdiction to support that assertion and in our view it introduces too stringent a test. Each case should be considered on its individual merits bearing in mind the general rule at all times.

[17] The last case to which we refer is Visnaratnam v Brent Magistrates' Court [2009] EWHC 33017 (Admin). The applicant was charged with driving while unfit through drugs. The contest was listed for 6 June 2008. The first necessary witness was a doctor who examined the applicant and expressed an opinion on his fitness to drive. The doctor's report was not disclosed in advance of the hearing, he was not warned to attend the hearing and consequently was not present for the hearing. The second necessary witness for the prosecution was a forensic analyst. He had indicated to the prosecution in good time that he was unable to attend on the day fixed. No application was made in advance of the hearing to vacate the date because of his unavailability. The outcome was that the prosecution arrived for the hearing without any witnesses. The magistrates granted an adjournment application.

[18] The Divisional Court overturned the magistrate's order. There are difficult issues about the remedy resulting from such a conclusion which were also touched on by McCloskey J in Quigley and upon which we wish to reserve our opinion. The Divisional Court gave the following reasons.

> "17. The magistrates here had to balance the public interest in the claimant's trial for driving under the influence of drugs against the gravity of a series of very serious errors made by the prosecution, which were unexplained and indeed inexplicable. There was no indication of when it would be possible to re-fix the trial, but we all know that very frequently trial

> dates are set in the Magistrates' Courts very many months in the future. I do not doubt that this would have caused further anxiety and costs to the claimant. It is true that this was the first date that the case was set for trial and there was no history of other ineffective hearings. It is also true that this was not a case which depended upon recollection.
>
> 18. The prosecution must not think that they are always allowed at least one application to adjourn the case. If that idea were to gain currency, no trial would ever start on the first date set for trial.
>
> 19. So these are the competing considerations. I have no doubt that there is a high public interest in trials taking place on the date set for trial, and that trials should not be adjourned unless there is a good and compelling reason to do so. The sooner the prosecution understand this - that they cannot rely on their own serious failures properly to warn witnesses - the sooner the efficiency in the Magistrates' Court system improves. An improvement in timeliness and the achievement of a more effective and efficient system of criminal justice in the Magistrates' Court will bring about great benefits to victims and to witnesses and huge savings in time and money."

[19] We consider that the observations in paragraphs 17, 18 and the first half of paragraph 19 would have justified the Divisional Court's conclusion. We would have taken into account the fact that there was no direct victim in this case. We do not accept that the observations in the last sentence of paragraph 19 would be of significance in this jurisdiction. The duty to ensure an effective and efficient system of prosecution is placed upon the Director of Public Prosecutions.

Morrison's application

[20] At approximately 20:50 on 7 August 2010 the applicant complained to police that her brother-in-law, John Morrison, was outside her house harassing her and her family. Police arrived and statements were taken from the applicant and her son. These disclosed an allegation that John Morrison had come to the gate of their house, become very agitated and pulled out a small knife from his jacket pocket. He gestured forward with it. He remained on the footpath at all times and the gate into the house was chained. The applicant's son lifted a bicycle in case he tried to get over the gate. The statements taken indicate that John Morrison was always calling at the house. As a result of this John Morrison was summoned to answer a complaint that

he on 7 August 2010 without lawful authority or reasonable excuse had with him in a public place an offensive weapon, namely a knife, contrary to article 22 (1) of the Public Order (Northern Ireland) Order 1987.

[21] The summons was returnable for 18 November 2010. Mr Morrison pleaded not guilty and the case was adjourned until 2 December 2010 to consider witness availability. An affidavit on behalf of the Public Prosecution Service indicates that a member of staff contacted the applicant by telephone and confirmed the availability of herself and her son for a period up to April 2011 and also confirmed the accuracy of the addresses at which they lived. On 2 December 2010 the case was fixed as a contest for 10 March 2011. On 10 January 2011 the PPS stated that they sent out letters requesting the applicant and her son to attend court on 10 March 2011. A completed notice of intention to attend was not received as requested. The case was again reviewed on 13 January 2011 to make sure that there were no difficulties in relation to the trial proceeding on the date fixed and both the prosecution and the defence indicated they were ready. The applicant has no recollection of the telephone call and states that neither she nor her son received any correspondence.

[22] The evidence filed on behalf of the PPS indicates that where a prospective witness has not returned a completed notification to attend, staff in the community liaison department try to make contact with the witness by telephone. Where contact is not made the staff member should e-mail the PSNI investigating officer to ask them to contact the witness to confirm attendance. It appears that these procedures were not followed in the case of Mrs Morrison and her son.

[23] On 10 March 2011 the main list before the District Judge comprised 78 cases of which four were listed as contests. The case against Mr Morrison was reached before lunchtime. Counsel for the PPS indicated that two civilian prosecution witnesses had not attended court. Because these judicial review proceedings were not issued until 9 June 2011 and the Notice of Motion was not issued until 9 September 2011 the affidavit from the District Judge was not made until 30 September 2011. His recollection is that prosecution counsel indicated that police had made efforts to contact the witnesses that morning without success. That is supported by a letter from the PPS dated 7 June 2011 in which it is stated that police attempted to contact the witnesses by telephone and by calling at the house throughout the morning but were unable to make contact with them. That is disputed by the applicant.

[24] The District Judge believes that he was told that the defendant was related to the civilian witnesses. Correspondence from the PPS also suggests that he was told that there had been reconciliation between the defendant and the civilian witnesses by the defendant's solicitor. The District Judge has indicated that he did not take into account the relationship of the defendant to the witnesses and would not have taken into account the suggestion of reconciliation although he did not recollect that being mentioned.

[25] It is common case that the District Judge had not read the witness statements which had been served along with the papers and which were available to him. He explained that in contested cases it was his practice not to do so in case there was any issue about the admissibility of any of the evidence. It does not appear, therefore, that he was made aware of the background to the complaint. Although no express application for an adjournment was made by counsel for the PPS when explaining the witness difficulties, the District Judge correctly interpreted the submission as such an application. He indicated that he would be content to hold the case over until after lunch so that further enquiries could be made and the position reviewed at that stage. Prosecution counsel indicated that there was no point in leaving the matter until after lunch and that a decision about the progress of the case should be made.

[26] The learned District Judge took into account the triangulation of interests. The defendant was present at the hearing of the complaint. Both prosecution and defence had previously confirmed that the hearing date suitable. There was no explanation as to why the witnesses had not attended. The prosecutor declined the offer to carry out further enquiries and review the matter in the afternoon. The prosecutor went as far as to tell the District Judge that there was no point in leaving the matter until after lunch. The police had attempted to contact the witnesses unsuccessfully. There was no suggestion that the witnesses had not been informed of the date of the hearing and of their required attendance. The District Judge noted the adverse effect of adjournments on the efficiency of the Magistrates' Court in dealing with the volumes of business which that court has to manage. Balancing all those considerations the District Judge concluded that he should refuse the adjournment application as a result of which the complaint was dismissed.

[27] In her grounding affidavit the applicant disclosed further matters relating to the history between the defendant and her family. She believed that the defendant suffered from mental health problems and that he had been harassing her son Patrick who suffered heavily from depression. After the incident of 7 August 2010 she obtained a non molestation order. She learned that the summons had been dismissed when told by her solicitor at a non molestation hearing on 16 March 2011. Later that evening she said that the defendant and her son Patrick met as a result of which Patrick was threatened. There is no indication as to whether that was reported to police. Patrick's mental health deteriorated thereafter and tragically he committed suicide on 21 March 2011. The applicant feels that the defendant's actions contributed to his death.

[28] None of these matters were known to the District Judge and there is no reason to think that they were known by the prosecution. It is not difficult to understand, however, the deep distress caused to the applicant and her family as a result of the manner in which these proceedings terminated.

[29] It is accepted that at no stage during these proceedings did the District Judge read the statements from the witnesses despite the fact that these were contained within the papers before him. Although the prosecution clearly failed to draw to the attention of the District Judge that there was a background to this charge in terms of some history between the applicant and her son and the defendant there remained a duty on the District Judge to conduct his own rigorous enquiry. In every case in which an adjournment application is made in circumstances such as these that requires the judge to examine the statements and any other available material on the file relating to the case before determining an adjournment application.

[30] While we accept that the District Judge was entitled to accept the prosecution indication efforts had been made in the course of the morning to locate the witnesses we consider that where no explanation for the absence of the witness was given by the prosecutor the court should have required an account of the communications between the witness and the PPS. That information should be available on every prosecution file to ensure that it can be provided to the court. In fact the prosecution had not adhered to its own procedure for the confirmation of attendance of witnesses who had not responded to the witness invitation.

[31] If the applicant is right the prosecution had not in fact telephoned or written to her. What is perhaps most telling in this case is the indication from prosecution counsel that there was no point in continuing investigations in relation to the attendance of witnesses until after lunch. In the circumstances of this case that was effectively an invitation to the District Judge to dismiss the complaint. It is self evident that further time would have allowed the police to carry out further attendance at the home over lunchtime. According to the applicant her son was there all the time and she was present apart from a short period. If that is right it is difficult to understand why it was impossible to make contact during the morning of 10 March. If the suggestion of an adjournment over lunch had been taken and attendance at her home had been arranged the attendance of the witnesses might have been secured if they were present in the house.

[32] The applicant's case was presented on the basis that her Article 8 rights to private life were engaged. It was argued that this imposed a positive obligation on the court ensure that the case was heard because she had been sufficiently affected by the circumstances of the commission of the offence. We accept that her connection with the offence was sufficient to give her standing in any event to pursue judicial review. We also can see no basis upon which the positive duty under Article 8 in this case could impose any obligation beyond that arising from the cases discussed above. In particular the role of the prosecutor is to prosecute the case by having the witnesses in court. The role of the court is to adjudicate. The importance of not confusing those roles was emphasised by the Grand Chamber in Kyprianou v Cyprus.

[33] We accept, therefore, that in this case the decision not to adjourn was made without the rigorous enquiry which the case law requires. We also have to take into account that the District Judge properly invited the prosecutor to continue the enquiries to trace the witnesses. The refusal of this invitation by the prosecutor is inexplicable in the context of a prosecutor who wishes to progress the case. It is difficult to resist the inference that the conduct of the prosecutor was an invitation to dismiss the complaint. That may explain why the DPP declined the applicant's invitation to judicially review the decision not to adjourn. We consider that to subject the defendant to a renewed prosecution at this stage against that background is not appropriate. We are of the view that we should vindicate the applicant's rights by declaring that the decision to refuse this adjournment application was made without the rigorous scrutiny required by law.

DPP's application

[34] In this application the defendant was summoned to answer a complaint that he drove a mechanically propelled vehicle dangerously on a road on 1 July 2010 contrary to the Road Traffic (Northern Ireland) Order 1995. It was alleged that the defendant had reversed at speed out of his drive and stopped within a short distance of a next-door-neighbour's 12 year old child who was playing on the street. The child's mother claimed that she witnessed this from her living room, screamed and ran outside. A neighbour also claimed that she had witnessed the incident as she was looking out at her own child in the garden from her living room. The statements suggested that this took place in the context of an on-going neighbour dispute and that something similar happened just over a week later although there was no charge in relation to that. The defendant was a man in his seventies. He said that he reversed slowly out of his drive, saw the child at all times and stopped well before reaching him.

[35] The defendant entered a not guilty plea on 26 January 2011. On 16 February 2011 the case was fixed for contest on 18 March 2011. The contest was not reached because of other matters on the list. Although the court could have continued the mother had to leave court at 5pm. On 28 April 2011 the case was listed for contest. It came before the court in the early afternoon and the prosecution requested further time to consult with the witnesses. Following this it became apparent that the child witness was unwilling to give evidence and it appears that he was crying at the thought of doing so. The prosecution wished to proceed with the case. The defence indicated that it would make an application to compel the child to give evidence as there were alleged inconsistencies between the child's account and the mother's statement. There were various discussions between the parties as a result of which the court ran out of time to hear the case and it was adjourned to 12 May 2011 for mention.

[36] On 12 May 2011 the case was adjourned to 18 May 2011 to check availability of witnesses for a possible contest date of 20 July 2011. The PPS sent invitations to

the witnesses and acceptances were received from the mother and her son for that date. The neighbour witness informed the PPS she did not wish to attend but a summons was not issued. Ms Nicholl, the prosecutor, believed that she might re-consider. On 22 June 2011 the defence sought to oppose a Special Measures application to enable the child witness to give evidence by video link which had been served in February 2011. Ms. Nicholl averred that it emerged the Deputy District Judge was available on 6 July 2011 and it would be of assistance if the contested hearing could be moved to that date. The parties were to check availability. Ms. Nicholl stated that she checked in the Community Liaison folder that the witnesses would be available on 6 July 2011 but, on learning that defence counsel were unavailable, assumed that the hearing would not go ahead on that date. She therefore decided not to contact the witnesses about 6 July 2011 to avoid confusion.

[37] On 30 June 2011 the case was listed for mention and District Judge McElholm indicated that the contested hearing must proceed on 6 July 2011. He was not informed that no steps had been taken to alert the prosecution witnesses to that date. The PPS court progress report was marked Issue Witness Invites Urgent. Despite this the file was tasked to Community Liaison, who deal with witness availability, with normal priority. While preparing for court on the afternoon before the hearing Ms Nicholl became aware that the witness invitations had not been sent. She asked a member of Community Liaison to telephone the witnesses but was told that that person had not been able to get through to the witnesses. Ms Nicholl made further efforts on the morning of the contested hearing but was informed that Community Liaison had not contacted the witnesses because they were short-staffed, it was too late and they had tried the previous day.

[38] The learned judge established what steps had been taken since 30 June 2011 to determine if the witnesses were available to attend. He asked whether the child witness intended to give evidence. The prosecutor responded that she did not know because she had not spoken with the child, the PPS having been of the view that it would be best to consult on the day of the contest. In light of the child's distress on the previous day the case had been listed, the judge considered that this was one of those exceptional cases where there should have been a consultation in advance of the hearing. The judge was also informed that the neighbour witness was not willing to give evidence. The adjournment application was refused and the case dismissed as the prosecution then called no evidence.

[39] In outlining the reasons for his decision, the judge stated that the triangulation of interests was to the fore of his mind. He viewed the child as a victim as a pedestrian road user with an interest in the case and not as a mere witness. The prosecutor had previously stated that the child was not a direct victim in the sense that he had not suffered injuries. The judge recognised the child's interest in the outcome of the case but was mindful of the impact on the child's welfare of having to come back to court, given the distress shown on the previous date. He was also

conscious that the defendant had been in court to contest the charge three times and that he and the public had an interest in timely conclusion of criminal proceedings. He was of the view that a self-funding defendant should not be in a more or less favourable position than a legally-assisted person. He also noted that if the case was listed for contest for a fourth time a question still remained as to what evidence the defence would face given that the child's willingness to give evidence had not been ascertained.

[40] There were a number of criticisms of the decision. Although it was contended that the judge had not taken into account the status of the child as a victim it is expressly stated by the Deputy District Judge that he did so. Secondly it was submitted that he erred in taking into account the distress shown by the child on the earlier occasion. The learned judge had earlier indicated that in light of that distress the child should have been spoken to in advance of the hearing to see whether he was going to give evidence. If he was to be brought again to court without prior enquiry as to whether he was able to give evidence there was every possibility that he would suffer in the same way. There was therefore a real risk that he would not give evidence and the other neighbour had already indicated her unwillingness to give evidence. It was material therefore that the only witness on the substantive issue committed to giving evidence was the mother. If the case was adjourned the defendant would have been brought back for a fourth time. There was a public interest in the timely conclusion of summary proceedings.

[41] In our view this was a decision well within the area of judgment open to the Deputy District Judge. The PPS had failed to notify the witnesses after the hearing on 22 June. They failed to alert the District Judge on 30 June. They failed to take the urgent steps required after that and apparently did not consider it worthwhile to try again on the morning of the hearing. Where there are serious failings of this kind in getting cases ready for hearing the PPS must realise that an adjournment application may well not succeed. The application is dismissed.