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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **15/06/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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PUBLIC PROSECUTION SERVICE

v

CHRISTOPHER WALSH

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The applicant appeared as a Litigant in person
Mr Sam Magee KC and Mr Henry (instructed by the PPS) appeared for the Respondent

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Before: Treacy LJ, Horner LJ and Kinney J

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TREACY LJ (*delivering the judgment of the court*)

Introduction

[1] In dismissing the applicant's appeal against conviction for drink driving and related offences the county court judge ("CCJ") said as follows:

> "I have no doubt that the prosecution case - that there was no post collision consumption of alcohol - is correct and proved beyond reasonable doubt. The factors which inform the court are, on this issue, this failed to be a feature of his defence in this case until very recently. The evidence from the prosecution undermines it as a proposition in any event. On arrest there was no bottle retrieved, his account of drinking it only when he got out of sight and in the short distance and time available is wholly implausible, in my view, and I found the appellant, when he gave evidence to be a witness lacking in all credibility in this regard."

[2] The case comes before us in this way. Pursuant to Article 61(6) of the County Court (NI) Order 1980 the applicant applies to this court for an order directing the CCJ to state a case. This application arises because the judge by certificate dated 28

November 2022 refused to state a case on any of the eight questions contained within the applicant's request to state a case.

[3] Order 61 rule 4 of the Rules of the Court of Judicature (NI) 1980 ("the Rules") provides that such an application must be made by motion "within a period of 14 days commencing on the date of the refusal or failure of the court or tribunal to state the case." However Order 3 rule 5 also provides that the court may, on such terms as it considers just, extend or abridge the period required by the Rules. The court may extend any such period although the application for an extension is not made until after the expiration of that period.

[4] The application to compel the CCJ to state a case was not made until the 27 March 2003. It was, as the applicant candidly acknowledged, hopelessly out of time.

[5] Prior to the judge's ruling on the application to state a case, the applicant in October 2022 lodged judicial review proceedings regarding his county court appeal against conviction for drink driving and related offences. There is a considerable overlap between the subject matter of the judicial review and the application before this court since both concern the use of "the notes" by prosecuting counsel in the following circumstances. During the applicant's appeal to the county court against his conviction, notes made by his previous solicitor of the evidence given in the magistrate's court were deployed by the defence and the prosecution, the latter deployment, being central to the applicant's complaints. The applicant says that contrary to his instructions, his junior counsel in the county court agreed to the use of these notes both by the defence and, crucially, by the prosecution. Consistent with this agreement these notes were deployed by both parties and when used by prosecuting counsel in her cross-examination of the applicant his senior counsel, Greg Berry KC, did not object to their use. On this date, 7 January 2022, the evidence concluded. It was sometime after this that an issue was raised by the applicant culminating in the sacking of the junior counsel on 29 June following which Mr Berry KC and his solicitor came off record. The applicant confirmed that no complaint has been lodged by him in respect of his allegation that his junior counsel had acted contrary to his express instructions.

[6] On 9 November 2022 the Divisional Court stayed the judicial review proceedings pending the outcome of the application before the county court judge to state a case. At that stage the case stated application was still under consideration. On 28 November 2022 the county court judge issued a certificate refusing to state a case in which he stated:

> "Now I, being of the opinion that the application by the appellant in respect of questions 5 and 6 is frivolous, hereby certify that such application is refused for the following reasons:

- The notes of the evidence, the use of which complaint is made were prepared by the appellant's solicitor during the course of a public trial conducted in the magistrates' court. There was no sensitivity attaching to the information the notes contained.
- The appellant made use of the notes, first during the course of the appeal, before me, and took positive steps to inform the prosecution of his intention to do so. Having done so it was open to the prosecution to cross-examine any witness on them.
- There was no significant issue as to the reliability raised during the course of the appeal.
- Before any issue arose as to the use by either party of these notes, I had notified both parties of the limitations I would place upon [them] as the magistrates' court is not a court of record."

He then goes on to say:

> "And I, further being of the opinion that the application by the appellant in respect of questions 1, 2, 3, 4, 7 and 8 is frivolous and unreasonable hereby certify that such application is refused for the following reasons:
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> - In respect of question 1 the appellant had retained solicitor and counsel until all the evidence had been concluded and written legal submissions from both parties placed before the court on the issues impugned in questions 5 and 6. The appellant had sufficient time to instruct alternative legal representation for the concluding and limited phase of the trial.
> - Further, in respect of question 1 the appellant had retained solicitor, senior and junior counsel from his own resources prior to their dismissal/withdrawal from the case. In extending legal aid for solicitor and junior counsel, I was not deciding any question of law.
> - In respect of questions 2-4 and 7-8 these issues were not litigated before me and, therefore, no point of law arose during the course of the hearing for me to decide."

[7] At the stage at which this certificate was issued the judicial review had obviously been lodged and, indeed, stayed pending the determination of the application for a case stated. For the judicial review the applicant retained Phoenix law as his solicitor and John Larkin KC and Mr O'Keefe BL. Phoenix Law had represented him in the county court appeal but came off record at a late stage of the proceedings in the circumstances which I have earlier outlined. So since in or about October 2022 the applicant has had the benefit of very experienced legal advisors in respect of his closely related judicial review. Both the judicial review and this application overlap in relation to the use of the notes by prosecuting counsel. The judicial review had been stayed, as already mentioned, pending the outcome of the case stated application. When the outcome of the case stated application was promulgated on 28 November, absent any other application, the stay ended. The case stated application was exhausted.

[8] What we find curious is the applicant's unsupported averment, at para 6 of his affidavit that "when I thought the case stated application was exhausted, I sought advice from my legal advisors in the week commencing 27 February [2023] for the purpose of removing the stay in my judicial review." This sentence is difficult for us because the applicant knew as a fact, by in or about 28 November 2022 that the application was exhausted. So why wait until February 2023 to seek advice? He then states in the same paragraph that it was only in the context of this advice that he became aware that he could apply directly to the court when the judge refused to state a case. As a result, he says "I have only since discovered that I am out of time to make this application."

[9] The applicant could easily and quickly have established the existence of the mechanism that he now belatedly seeks to utilise by speaking to his legal advisors. The natural time to do this was when the county court judge issued his decision in November. We have already noted the obvious overlap of subject-matter between the judicial review and the application to state a case, with the former stayed pending the outcome of the latter. Not only would it have been natural to discuss the county court judge's decision at this point – it may have been necessary to do so in order to progress the judicial review.

[10] In deciding whether to exercise its discretion to extend time the court has had regard to the principles set out by Lowry LCJ in *Davis v Northern Ireland Carriers* [1979] NI 19. In *Davis* the appellant had complained to an industrial tribunal alleging unfair dismissal and had been unsuccessful in September 1978 and he then applied to the tribunal for a review of this decision. This application was rejected in November 1978. In March 1979 the appellant wishing to obtain a case stated concerning the tribunal's original decision applied to the Court of Appeal to extend beyond 21 days the time allowed for requesting the case stated. The court holding that the application would be refused set out the applicable principles as follows:

"Where a time limit is imposed by rules of court which embody a dispensing power, the court must exercise its discretion in each case and the relevant principles are :

(i) Whether the time is already sped, a court will look more favourably on an application made before the time is up.

(ii) When the time limit has expired the extent to which the party applying is in default.

(iii) The effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs.

(iv) Whether a hearing on the merits has taken place or would be denied by refusing an extension.

(v) Whether this is a point of substance to be made which could not otherwise be put forward.

(vi) Whether the point is of general and not merely particular significance.

(vii) That the rules of court are there to be observed."

[11] Many of those principles are clearly in play in the present application.

[12] We have considered the merits of the somewhat overlapping grounds upon which the applicant seeks a case stated. So far as the notes are concerned it is clear that junior defence counsel agreed to the use of these notes by both parties at the hearing of the appeal. This is confirmed by the way in which both legal teams conducted the appeal with no one objecting to prosecution counsel deploying the notes in her cross-examination. This use was done by agreement between counsel and without challenge. Not only did his counsel not object, the applicant himself, did not protest their use when he was on the receiving end of their use. It is difficult to discern any arguable point arising out of this and the belated self-generated aftermath.

[13] As for the alleged breaches of article 6 of the European Convention the applicant appears to have been the author of the circumstances which led to him having no lawyers after the evidence was finished. The county court had the benefit of written submissions on the relevant points and the applicant was given the opportunity to address the court but declined to take this offer up. In fact, neither the prosecution nor the defence, made any closing submissions. He was also given a reasonable opportunity to instruct an alternative legal team but was unable to do so.

[14] There was, in any event, no merit in any of the points grounded on the use of the notes which had been deployed by the prosecution as a result of agreement as to their use. Shortly put, there is no merit in any of the points raised and the trial judge was well placed to conclude as he did that the requested questions for consideration by the Court of Appeal were frivolous.

[15] Our conclusion, therefore, is that the application is hopelessly out of time and we do not, having considered the absence of any merit in the overlapping grounds of appeal accept that any good reason has been established to extend time to pursue this application and, accordingly, the application is dismissed.