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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY ISSAM BASSALAT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE PUBLIC PROSECUTION SERVICE AND DISTRICT JUDGE (MAGISTRATES COURTS) RANAGHAN

Ms Campbell KC with Mr McGowan (instructed by Phoenix Law Solicitors) for the Applicant
Dr McGleenan KC with Mr Henry (instructed by the Public Prosecution Service) for the first Respondent
Mr Joseph Kennedy (instructed by the Departmental Solicitor) for the second Respondent
Mr Philip McAteer on behalf of the Security Service, Notice Party

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Before: Keegan LCJ and Treacy LJ

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

Introduction

[1] The applicant seeks leave to challenge two proposed respondents, namely the Public Prosecution Service ("PPS") and District Judge Ranaghan ("the District Judge"). The target of the challenge is the District Judge's ruling on disclosure made on 21 October 2022. This ruling accepted that the PPS had satisfied disclosure obligations at the committal stage. There are ancillary claims that the District Judge has erred in preventing some questioning by counsel in relation to the alleged role of a state agent and that M15 are investigators and therefore subject to a disclosure obligation independent of the PPS.

[2] We have heard this matter on an expedited basis given the ongoing criminal process. As to that we understand that 34 ring binders of evidence have been filed before the District Judge. Attempts to schedule the committal began in July 2021 however it was not until October 2022 that the hearing began. We make no assessment as to what caused this delay save to say that it is a significant period and inimical to the administration of justice to have proceedings such as this protracted.

[3] In Northern Ireland legislative provisions for the abolition of preliminary investigations and mixed committals have been anticipated for some time. These provisions came into operation on 17 October 2022 and mean that committal proceedings will only be by way of a preliminary inquiry. Therefore, victims and witnesses cannot be called to give oral evidence at the committal hearing. The new arrangements are outlined in sections 1 to 3 of, and the Schedule to, the Criminal Justice (Committal Reform) Act (Northern Ireland) 2022 ("the Act").

[4] In summary, section 1 abolishes preliminary investigations, section 2 abolishes mixed committal and section 3 and the Schedule contain amendments and repeals consequential on sections 1 and 2 above. The provisions were commenced by the Criminal Justice (Committal Reform) Act (Northern Ireland) 2022 (Commencement No.1) Order (Northern Ireland) 2022 and the Magistrates' Courts (Amendment) Rules (Northern Ireland) 2022 on 17 October 2022. Transitional arrangements apply to cases which have been instituted on/after 17 October 2022. In cases instituted before this date an accused will still have the right to call witnesses at committal until these cases are phased out. Therefore, in future the type of mixed committal taking place in this case is abolished and cases will be returned to the Crown Court at an earlier stage.

Context

[5] Before turning to the limbs of challenge it is important to note the overall context of this case. The applicant is one of a number of co-accused charged with terrorist offences arising out of covert recordings of persons said to be part of the new IRA.

[6] Dr Bassalat is a doctor aged 63 years of age, based in Scotland. The court was informed that he has a history of campaigning for Palestine and the Palestinian people. He was arrested on Saturday 22 August 2020 at Heathrow Airport under section 41 of the Terrorism Act 2000. He was interviewed in relation to terrorist offences. He was subsequently charged with a terrorism offence and now faces two charges which are inter-related.

[7] The first charge is pursuant to section 5 of the Terrorism Act 2000, namely engaging in conduct in preparation for giving effect to his intention of committing acts of terrorism or assisting another to commit such acts between 31 December 2018 and 19 August 2020. The acts identified now include four elements:

(i) That he attended a meeting of the executive of the IRA at 14 Buninver Road, Gortin, on 19 July 2020.

(ii) Met with the chair of the IRA in Edinburgh on a number of occasions.

(iii) Met with the chair and Chief of Staff of the IRA in Brussels.

(iv) Met with the chair and Chief of Staff of the IRA in Lebanon.

[8] The second charge is that of addressing a meeting for the purposes of encouraging support for terrorism, contrary to section 12(3) of the Terrorism Act 2000. This relates to the meeting on 19 July 2020 at Gortin referred to above.

[9] The evidence against Dr Bassalat comprises material gathered from a search of his home, evidence of meetings with persons said to be in the IRA and covert recordings of meetings. We do not propose to comment any further on the evidence given the ongoing proceedings.

[10] When Dr Bassalat was interviewed, in the presence of his solicitor, he provided a detailed prepared statement. In that statement he denied that any offences had been committed by him. In addition, he said that he was encouraged to attend with Irish Republicans including Saoradh and attend the meeting on 19 July 2020 by another person Mr Denis McFadden who it is alleged is a state agent.

[11] Dr Bassalat is now on bail subject to conditions.

The judicial review claims

[12] The applicant's committal proceedings commenced on 24 October 2022 and are due to recommence on 30 January 2023. In the context of these ongoing committal proceedings, the challenge that is raised is essentially fourfold:

(i) That the PPS have not approached their disclosure obligations according to law or in a transparent way.

(ii) That the District Judge has therefore failed to direct disclosure which would be relevant to Dr Bassalat making an application for abuse of process relating to his case of targeting and attempted entrapment.

(iii) That the District Judge has erred in law by refusing to allow counsel to ask questions of witnesses regarding the alleged attempted entrapment.

(iv) That there is a standalone obligation on the Security Services (MI5) to provide disclosure in accordance with section 26 of the Criminal Procedure and Investigation Act 1996 ("CPIA") and its Code of Practice.

[13] The applicant seeks declaratory relief to the effect that the impugned decisions were irrational and unlawful and in breach of his common law right to a fair hearing and section 6 of the Human Rights Act 1998 being incompatible with article 6 of the European Convention on Human Rights ("ECHR"). The applicant also seeks an order of certiorari quashing the impugned decisions.

The law in relation to committal proceedings

[14] In the case of *McKay and another's Application* [2021] NIQB 110, the Divisional Court had cause to consider judicial review of committal proceedings. This decision at para [29] refers to the committal test as follows:

> "[29] The standard of proof which is required for a Magistrates' Court to return an accused for trial is statutory. It is contained in Article 37(1) of the Magistrates' Courts (Northern Ireland) Order 1981 which reads as follows:
>
> > '37.—(1) Subject to this Order, and any other enactment relating to the summary trial of indictable offences, where the court conducting the preliminary investigation is of opinion after taking into account any statement of the accused and any evidence given by him or on his behalf that the evidence is sufficient to put the accused upon trial by jury for any indictable offence it shall commit him for trial; and, if it is not of that opinion, it shall, if he is in custody for no cause other than the offence which is the subject of the investigation, discharge him.'
>
> [30] In *Re Hamill* [2017] NIQB 118 the Divisional Court considered the legal aspects to this test as follows. At paragraph [41] the Court said this:
>
> > '[41] The committal stage is a pre-trial screening procedure the purpose of which is to ensure that there is sufficient evidence to commit the accused to trial so that the question as to whether the accused is guilty or not guilty is determined at trial.'
>
> [31] In *Re Mackin's Application* [2000] NIJB 78 the test to be applied when deciding on sufficiency of evidence was examined. When determining whether there is sufficient evidence the test that applies is made pursuant to the case

of *R v Galbraith* [1981] 1 WLR 1039. The *Galbraith* test enjoins a court to take the prosecution case at its height as follows:

> '(1) If there is no evidence that the crime alleged has been committed by the defendant, then there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (3) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (4) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.'"

[15] The test on judicial review of committal proceedings has been described as a high standard following from cases such as *Neill v Antrim Magistrates' Court* [1992] 4 All ER 846 and *R v Bedwellty Justices ex parte Williams* [1997] AC 225. These cases were examined by Carswell LCJ in the case of *Re Mackin* referred to above. That decision makes clear that the Divisional Court can review committal for lack of evidence, but only in the clearest of cases where the only supporting evidence is inadmissible or, in exceptional cases, the admissible evidence is incapable of supporting the charge.

[16] In this case which involves a challenge to an interlocutory ruling the threshold remains high given the established law. The applicant faces the additional burden of convincing a court that it should intervene whilst proceedings are ongoing. Such applications are discouraged in our courts given the need to avoid satellite litigation. The current position in coronial law provides a template for good practice. This was

emphasised in para [16] of *An Application by Officers C, D, H & R* [2012] NICA 47 where the Court of Appeal stated:

> "[16] The overriding objective in Rule 1A of the Rules of the Court of Judicature requires the court to deal with cases justly. What is just in any case will depend upon the context but it clearly includes avoiding, if possible, a proliferation of litigation which is likely to cause delay in the vindication of substantive rights and considerable cost to the participants or the public purse. In criminal proceedings this principle is the basis for the strong presumption against a judicial review application to the Divisional Court where the issue can be raised in the substantive criminal proceedings (See *R v DPP (Ex parte Kebeline)* [2000] 2 AC 326)"

Ms Campbell is alive to the point and argues that this is an exceptional case which means that we should exercise our jurisdiction mid-committal.

[17] The need to consider alternative remedies is clearly in focus. The authority of *Kebeline* highlights the force of this principle. When examining the point in *McKay and another* we said at para [36]:

> "[36] The requirement to utilise alternative remedies when specialist criminal courts are available is firmly articulated in *Kebeline* in the context of a prosecutorial decision. At page 389 H, page 390 A and B of his opinion Lord Hobhouse commented as follows:
>
> > 'Disputed questions of fact and law which arise in the course of a criminal prosecution are for the relevant criminal court to determine. That is the function of the trial in the Crown Court and any appeal to the Court of Appeal. Inevitably, from time to time, the prosecutor may take a view of the law which is not subsequently upheld. If he has acted upon competent and responsible advice, this is not a ground for criticising him. Still less should a ruling adverse to the prosecution provide the defence with an opportunity to by-pass the criminal process or escape, otherwise than by appeal, other decisions of the criminal court.'"

[18] In *Re Hegarty's Application* [2012] NIQB the Divisional Court when deciding that a judicial review was a collateral challenge of the type contemplated in *Kebeline* also said as follows:

> "The Divisional Court has a supervisory jurisdiction while the case is before the District Judge but there is no decision of that court which is sought to be reviewed in this case. Even if there was a dispute about such a decision it is likely that it would be for the Crown Court to resolve the issue in the course of the trial. In light of the extensive and careful arguments which were advanced in the course of the hearing in respect of the proper interpretation of paragraph 4.19 of Code E we have given our ruling but wish to make it clear that the principle in *Kebeline* also applies to that issue."

[19] With these principles in mind, we turn to the challenge in this case. Upon analysis, the point at issue is a discrete one which turns upon the obligation of disclosure at committal proceedings. Any disclosure obligation is, of course, related to the purpose of committal proceedings, ie whether there is sufficient evidence against an accused to warrant putting the accused on trial for an indictable offence.

The disclosure obligation

[20] The statutory scheme governing disclosure at trial is set out in CPIA. This Act coincided with direct committal in England & Wales. It provides a structure for the provision of disclosure in criminal proceedings at trial. Part 11 relates to criminal investigations and is most relevant for present purposes particularly the sections 22 and 26 as follows:

> "22(1) For the purposes of this Part a criminal investigation is an investigation conducted by police officers with a view to it being ascertained—
>
> (a) whether a person should be charged with an offence, or
>
> (b) whether a person charged with an offence is guilty of it.
>
> (2) In this Part references to material are to material of all kinds, and in particular include references to—
>
> (a) information, and
>
> (b) objects of all descriptions.

(3) In this Part references to recording information are to putting it in a durable or retrievable form (such as writing or tape).

Effect of code

26(1) A person other than a police officer who is charged with the duty of conducting an investigation with a view to it being ascertained—

(a) whether a person should be charged with an offence, or

(b) whether a person charged with an offence is guilty of it,

shall in discharging that duty have regard to any relevant provision of a code which would apply if the investigation were conducted by police officers.

(2) A failure—

(a) by a police officer to comply with any provision of a code for the time being in operation by virtue of an order under section 25, or

(b) by a person to comply with subsection (1),

shall not in itself render him liable to any criminal or civil proceedings.

(3) In all criminal and civil proceedings a code in operation at any time by virtue of an order under section 25 shall be admissible in evidence.

(4) If it appears to a court or tribunal conducting criminal or civil proceedings that—

(a) any provision of a code in operation at any time by virtue of an order under section 25, or

(b) any failure mentioned in subsection (2)(a) or (b),

is relevant to any question arising in the proceedings, the provision or failure shall be taken into account in deciding the question."

[21] In addition, we highlight the terms of section 8 of CPIA as this provides a mechanism for an accused to apply for disclosure during criminal proceedings.

> **"8. Application by accused for disclosure**
>
> (1) This section applies where the accused has given a defence statement under section 5, 6 or 6B and the prosecutor has complied with section 7A(5) or has purported to comply with it or has failed to comply with it.
>
> (2) If the accused has at any time reasonable cause to believe that there is prosecution material which is required by section 7A to be disclosed to him and has not been, he may apply to the court for an order requiring the prosecutor to disclose it to him.
>
> (3) For the purposes of this section prosecution material is material—
>
> (a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused,
>
> (b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused, or
>
> (c) which falls within subsection (4).
>
> (4) Material falls within this subsection if in pursuance of a code operative under Part II the prosecutor must, if he asks for the material, be given a copy of it or be allowed to inspect it in connection with the case for the prosecution against the accused.
>
> (5) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

(6) Material must not be disclosed under this section to the extent that it is material the disclosure of which is prohibited by section 56 of the Investigatory Powers Act 2016]."

[22] The CPIA does not apply at committal stage. Instead, any residual obligation for disclosure at committal stage is governed by common law. As to the parameters of the obligation the main authority relied upon is *R v DPP, ex parte Lee* [1999] 2 All ER 737. In that case Kennedy LJ provided a summary of the law regarding disclosure at committal. For present purposes the relevant parts are as follows:

"(5) The 1996 Act does not specifically address the period between arrest and committal, and whereas in most cases prosecution disclosure can wait until after committal without jeopardising the defendant's right to a fair trial the prosecutor must always be alive to the need to make advance disclosure of material of which he is aware (either from his own consideration of the papers or because his attention has been drawn to it by the defence) and which he, as a responsible prosecutor, recognises should be disclosed at an earlier stage. Examples canvassed before us were:

(a) Previous convictions of a complainant or deceased if that information could reasonably be expected to assist the defence when applying for bail;

(b) Material which might enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process:

(c) Material which might enable a defendant to submit that he should only be committed for trial on a lesser charge, or perhaps that he should not be committed for trial at all:

(d) Material which will enable the defendant and his legal advisors to make preparations for trial which may be significantly less effective if disclosure is delayed (eg names of eye witnesses who the prosecution do not intend to use).

(6) Clearly any disclosure by the prosecution prior to committal cannot normally exceed the primary disclosure which after committal would be required by section 3 of the 1996 Act (ie disclosure of material which in the

> prosecutor's opinion might undermine the case for the prosecution). However, to the extent that a defendant or his solicitor chooses to reveal what he would normally only disclose in his defence statement (at the Crown Court stage) the prosecutor may in advance if justice requires give the secondary disclosure which such a revelation would trigger, so whereas no difficulty would arise in relation to disclosing material of the type referred to in sub-paragraph 5(a)(b) and (c) above, and I accept that such material should be disclosed, the disclosure of material of the type referred to in sub-paragraph 5(d) would depend very much on what the defendant chose to reveal about his case.
>
> (7) No doubt additions can be made to the list of material which in a particular case ought to be disclosed at an early stage, but what is not required of the prosecutor in any case is to give what might be described as full blown common law discovery at the pre-committal stage. Although the 1996 Act has not abolished pre-committal discovery the provisions of the Act taken as whole are such as to require that the common law obligations in relation to the pre-committal period be radically recast in the way that I have indicated.
>
> (8) Within the framework which I have attempted to outline, I would accept Mr Turner's submission that even before committal a responsible prosecutor should be asking himself what if any immediate disclosure justice and fairness requires him to make in the particular circumstances of the case. Very often the answer will be none, and rarely if at all should the prosecutor's answer to that continuing piece of self-examination be the subject matter of dispute in this court. If the matter does have to be ventilated it should, save in a very exceptional case, be before the trial judge."

[23] In *R (on the application of Nunn) v Chief Constable of Suffolk* [2014] UKSC 37 the Supreme Court examined the disclosure obligation in another context post-conviction. The court commented on the contours of the common law duty as follows:

> "23. The common law of England and Wales has proved capable of adapting the duty of disclosure to the different stages of the criminal process. In *R v Director of Public Prosecutions, Ex p Lee* [1999] 1 WLR 1950 the Divisional Court dealt with the position before committal to the

> Crown Court, and thus before the statutory duties under the Criminal Proceedings and Investigations Act apply. It held that some disclosure was indeed required at that early stage but not what Kennedy LJ described, at p 1963, as the "full blown" version applicable under the Act once Crown Court proceedings are under way. Examples of material which ought to be disclosed before committal would include evidence which bears on a bail application, or which is relevant to an application to stay for abuse, or which relates to unused eye witnesses whose evidence might be less effective unless promptly proofed. That illustrates the proposition that the common law duty did not remain the same throughout. Rather, it was tailored to the needs of the stage of the proceedings in question."

[24] In this jurisdiction an authority of particular assistance to us is *McManus (Gerard's) Application* [2013] NIQB 104. In that case the issue arose as to the extent of the disclosure obligation in relation to information which would allow the applicant to mount an abuse of process application based on entrapment. The decision discusses *Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 which was decided by the House of Lords and remains of importance in this area.

[25] In *ex-parte Bennett* the House of Lords affirmed the power of Magistrates, when sitting in committal proceedings or exercising their summary jurisdiction to exercise control over their proceedings through an abuse of process jurisdiction. The House of Lords stressed that the jurisdiction should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court. Lord Griffiths went on to say that the "wider responsibility for upholding the rule of law must be that of the High Court."

[26] There was a difference of view between the majority and Lord Lowry who considered that Magistrates had no power to stay proceedings for abuse of process (approving the Australian decision to that effect in *Grassby v R* 168 CLR 1). However, all were agreed that it was undesirable for Magistrates to be drawn into reaching determinations on abuse of process allegations in cases other than those strictly related to the procedural fairness of exposing the accused to trial. The case of alleged entrapment by state agents is not a case relating to procedural fairness of the kind referred to in *ex-parte Bennett* but rather a case involving potential interference with the administration of justice.

[27] This type of case was discussed *Re Nolan* [2011] NIQB 128. In that case, the court set out the reasons why it would be undesirable for a magistrate to become embroiled in deciding an application to stay proceedings in a case of alleged entrapment as follows:

"[31] There are sound practical reasons why it would be wrong and undesirable for a magistrate to become embroiled in deciding an application to stay proceedings in an entrapment case at, prior to or subsequent to committal proceedings. As Auld LJ accepted, in committal proceedings before a magistrate there is no final airing of the evidence. The function of the magistrate is to determine whether there is a prima facie case which justifies committal for trial. The ultimate determination whether he does in fact stand trial does not rest with the magistrate (as Lord Lowry accepted citing with approval what Dawson J said in Grassy v R 168 CLR.) In a stay application in which the onus is on the applicant the court must make findings of fact which lay a sound evidential basis for concluding that it would be wrong to try the defendant. In an entrapment case this involves careful scrutiny of the relationship between the actions of the defendant and the alleged entrapper and between the alleged entrapper and the state, issues which will generally only become clear at trial. The magistrate's decision would not, as Lord Lowry points out, bind the court of trial if a voluntary bill were preferred. A rejection at committal stage of an abuse application of this nature could not bind the trial court because it could not give rise to a res judicata or prevent the induction of further evidence or a review of the evidence by the trial judge. Entrapment only becomes a relevant issue if it is established or admitted that the defendant committed an offence brought about by the alleged entrapper. The magistrate at the preliminary investigation stage must determine whether there is a prima facie case that the defendant committed the alleged offence. He does not and should not determine that the accused has committed the offence. That can only be determined after full trial or on a plea of guilty by the accused. Having found a prima facie case, the magistrate has carried out his statutory function. If, having so decided he proceeds not to commit because of alleged entrapment, he is carrying out a quite different exercise from that arising in the committal proceedings. He would be carrying out a function vested normally in the High Court under its inherent supervisory jurisdiction or in the Crown Court, whether before or at the trial. Preliminary investigation proceedings would provide a quite unsatisfactory forum to reach a definitive conclusion on the question whether to grant a stay on the grounds of abuse of process because of entrapment."

[28] We acknowledge that the facts of *McManus* differ somewhat in that no suggestion of entrapment was raised prior to committal. However, some principles emerge which are of general application from paras [21] and [22]:

> "[21] … As Lord Lowry pointed out in *Bennett*, the ultimate decision whether a defendant stands trial does not rest with the magistrate. In a stay application in an entrapment case the onus is on the applicant to lay a sound evidential basis for concluding that it would be wrong to try the defendant. In such a case this involves careful scrutiny of the relationship between the actions of the defendant and the alleged entrapper and between the entrapper and the state. At committal stage the function of the District Judge is to determine whether there is a prima facie case that the defendant committed the offence sufficient to return him for trial, not to determine whether he did commit the offence. If an issue of entrapment is raised, it could only be in the clearest of circumstances that a District Judge could consider that a stay for abuse of process would be appropriate. If the issue of entrapment is raised, unless the circumstances are clear cut, there will be at best, from the defendant's point of view, a triable issue on the question. If, however, for example, disclosure by the Crown established clearly that the defendant had been wrongfully entrapped by state agents it might be open to the District Judge to consider staying the proceedings. Even if he did so, the decision would not be final since a voluntary bill might be presented or alternatively the Crown might challenge the District Judge's assessment of the case by means of a judicial review application.
>
> [22] Thus, taken at its very height, the appellant's case of alleged entrapment would at best have raised a triable issue on the question. The Crown (which must at this stage be presumed to have acted in good faith) has disclosed no material suggestive of entrapment. The appellant made no case of entrapment in his interview with the police. The entrapment now alleged provides no possible justification for the firing at officers to prevent arrest. At the height of the appellant's case, it is alleged that he should have had the opportunity to explore the issue at the committal proceedings. Since it was inevitable that all that could be established at the height of the appellant's case was that there was a triable issue on the question of entrapment, the appellant has suffered no injustice or prejudice in the event

> of a trial when the evidence establishes a prima facie case that he committed the offences charged. As made clear by the court in *Nolan* the issue of entrapment can be fully explored through the trial process. There is no breach of Article 6."

[29] From the above passages two points of principle emerge which we endorse. First, the PPS should at the stage of committal be presumed to have acted in good faith as regards disclosure. Second, at its height allegations of entrapment may raise a triable issue.

Abuse of process

[30] In *ex parte Lee*, the facilitation of an abuse of process application is cited as one basis for disclosure. The prosecution concede that such an application may be made before the District Judge. However, it is plain that such circumstances will be rare indeed. Also, if there is a triable issue rather than an issue amenable to determination within the parameters of the committal test it should go to the trial judge.

[31] The meaning of abuse of process is well trammelled ground. In *Beckford* [1996] 1 Cr App R 94, Neill LJ said (at p. 100) that:

> "The constitutional principle which underlies the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and functions.'

Neill LJ quoted the words of Lord Devlin in *Connelly v DPP* [1964] AC 1254 at p 1354, that the courts have 'an inescapable duty to secure fair treatment for those who come or are brought before them.'

[32] In *Maxwell* [2010] UKSC 48 Lord Dyson summarised the two categories of case in which the court has the power to stay proceedings for abuse of process:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the

> circumstances a trial will offend the court's sense of justice and propriety (per Lord Lowry in *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 (at 74G)), or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in *Latif* [1996] 1 WLR 104 (at 112F))."

[33] There are thus two main categories of abuse of process:

(a) cases where the court concludes that the accused cannot receive a fair trial;

(b) cases where the court concludes that it would be unfair for the accused to be tried.

[34] The first category focuses on the trial process; the second category is applicable where the accused should not be standing trial at all (irrespective of the fairness of the actual trial). Two key questions run through many of the authorities in this area (i) to what extent is the accused prejudiced (ii) to what degree are the rule of law and the administration of justice undermined by the behaviour of the investigators or the prosecution.

[35] There is no definitive list of complaints which are capable of amounting to abuse of process, but it is possible to derive some broad categories of abuse of process from the case law we have examined. Examples are lengthy delay which causes prejudice to the accused; failure to honour an undertaking given to the accused; failing to secure evidence or destroying evidence; tactical manipulation or misuse of procedures to deprive the accused of some protection provided by the law; taking unfair advantage of a technicality and abuse of executive power.

[36] *Blackstone's Criminal Practice and Procedure* 2023 refers to the position in the Magistrates Court at Section D3.71. *In Mansfield v DPP* [2021] EWHC 2938 (Admin), [2022] QB 335, the issue was whether the district judge was correct to hold that a magistrates' court had no jurisdiction to grant a stay on the basis of the second category of abuse of process. May J at para [20] accepted the submission that "it was evidently not Lord Griffiths' intention in *Ex Parte Bennett* to exclude from the magistrates' jurisdiction all category 2 cases of abuse."

[37] Whether a case is suitable for a determination of the issue of entrapment is of course another question and will depend upon the facts of an individual case. In *R (Salubi) v Bow Street Magistrates' Court* [2002] EWHC 919 (Admin), [2002] 1 WLR 3073, it was held that the fact that magistrates are required, under the transfer procedure in England & Wales , to send cases to Crown Court "forthwith" does not necessarily preclude them from exercising their jurisdiction to stay the proceedings as an abuse of process in an appropriate case. However, Auld LJ stated that the onus is on the defence to establish bad faith or serious misconduct and that in "most cases the Crown Court is likely to be better equipped to make such value judgments." The court

also highlighted that an abuse of process application may be made immediately after the case arrives at the Crown Court.

[38] The same point was made in *Re Hamill's Application* [2014] NIQB 29 at paras [28] and [29] by Morgan LCJ as follows:

> "[28] … Where the issue concerns the integrity of the criminal justice system the District Judge should generally return the accused for trial so that the issue can be dealt within the Crown Court or alternatively adjourn the proceedings to facilitate an application to the Divisional Court if there is some good reason to follow that course.
>
> [29] We wish to emphasise again that the leading authority in this jurisdiction on the general principles applicable when considering any application to stay for abuse of process remains *Re DPP's Application* [1999] NI 106:
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> > 'The jurisdiction to stay proceedings should be exercised carefully and sparingly and only for very compelling reasons. It was not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct.'"

This case

[39] During the course of the hearing Ms Campbell reiterated her core claim that the PPS has not explained what disclosure test it had applied and that she was hampered in making an abuse of process application for her client due to lack of disclosure. On the first point we asked the PPS to confirm the position outlined in oral submissions by Dr McGleenan in writing for the sake of clarity. This direction was attended to in correspondence of 20 January 2023 supplemented by a skeleton argument which crystallises the PPS case in clear terms.

[40] The legal submission made can be distilled as follows. First, the PPS have stated that they apply the disclosure test in accordance with settled case law and Chapter 33 of the disclosure manual. That is essentially - if there is material that will assist the defence or undermine the prosecution case it is disclosed, subject to PII. If there is no material which meets the disclosure test, no duty of disclosure arises. That is the position that has been reached in this case before the District Judge.

[41] In addition, following from the specific claim made by the applicant, the PPS stated as follows:

> "In these circumstances the position of the prosecution in this case is that the allegation made by the applicant was considered carefully and the prosecution complied fully with its disclosure obligations. The outcome of the disclosure process at this stage in proceedings is that there was no duty to disclose any material to the applicant. The prosecution neither confirms nor denies whether material specific to the allegation required to be reviewed in order to reach that decision."

[42] We are satisfied that this response sufficiently deals with the disclosure issue at the committal stage. The PPS has set out the disclosure test applied and dealt with the allegation made by the applicant of alleged state agent involvement. The District Judge also satisfied himself as to the disclosure obligations in a detailed ruling in which he applied the law correctly and made an evaluation which is within the margin of discretion afforded to him conducting a committal hearing. The District Judge is undoubtedly best placed to make such a decision having seen and heard evidence. Absent a clear error of law which we do not discern it is not appropriate for this court to intervene. In agreement with the decision in *McManus* this court takes the PPS position at face value and on good faith at this stage of proceedings.

[43] In addition, we do not see that the approach taken offends procedural fairness or the Article 6 rights of the applicant. There are number of reasons why we reach this conclusion. First, the applicant's primary case is that he has committed no crime. The committal will decide whether there is sufficient evidence that he may have committed a crime. However, the committal process cannot go beyond its statutory purpose. True it is that the issue of attempted entrapment has been raised at an early stage by the applicant. However, the import of that claim must be broken down. Simply stated, the presence or otherwise of a state agent is not of itself enough to prove entrapment. Rather the agent must have effectively caused the crime.

[44] The current law on entrapment is found in *R v Looseley* [2001] UKHL 53 [37] which has been applied in this jurisdiction in *R v Hill* [2020] NICA 30 and *R v Corbett* [2022] NICA 44. In *Looseley* the House of Lords affirmed the principle that entrapment is not a defence under English law. However, a court has discretion to stay proceedings for abuse of process in any given case where it would be an affront to the public conscience to continue. This may arise in circumstances of entrapment by law officers or state actors in the Northern Ireland context in the commission of criminal offences. Whether the claim does result in the quashing of a conviction will depend on all the circumstances.

[45] At paras [26]-[29] of *Looseley* the House of Lords provided guidance as to how to proceed as follows:

> "26. The nature of the offence. The use of pro-active techniques is more needed and, hence, more appropriate,

in some circumstances than others. The secrecy and difficulty of detection, and the manner in which the particular criminal activity is carried on, are relevant considerations.

27. The reason for the particular police operation. It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one way good faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centred on a particular place, such as a particular public house. Sometimes random testing may be the only practicable way of policing a particular trading activity.

28. The nature and extent of police participation in the crime. The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to the police inducement, regard is to be had to the defendant's circumstances, including his vulnerability. This is not because the standards of acceptable behaviour are variable. Rather, this is a recognition that what may be a significant inducement to one person may not be so to another. For the police to behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant will not normally be regarded as objectionable.

29. The defendant's criminal record. The defendant's criminal record is unlikely to be relevant unless it can be linked to other factors grounding reasonable suspicion that the defendant is currently engaged in criminal activity. As Frankfurter J said, past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing repeated convictions, from which the ordinary citizen is protected: see *Sherman v United States* [1957] 356 US 369, 383."

[46] This guidance was utilised by the Court of Appeal in *R v Hill*. In that case the court found that entrapment was not made out, rather it was a case of "unexceptional

opportunity" which the defendant had accepted and admitted. Therefore, the court concluded that:

> "the failure to disclose the participation of informers in the commission of the crime did not deprive the appellant of any opportunity to stay the proceedings on the basis of entrapment."

[47] It is readily apparent from the above summary that the law on entrapment raises complex factual and legal issues. That is why entrapment is pre-eminently a trial issue. We do not consider that the District Judge's court is best equipped to deal with this issue if it arises.

[48] In any event, we do not consider that this is an exceptional case which requires the court to intervene. The point is illustrated by the defence case itself which is not clear cut. Alleged entrapment is raised in the alternative as the primary position of the accused is that there is insufficient evidence to ground the offences. An entrapment claim can only progress on the basis of an offence having occurred. In the circumstances of this case the applicant is entitled to challenge the evidence in relation to the offences for which he is charged. There is no discernible unfairness in relation to the current process as regards this aspect of the defence case.

[49] The alternative position concerns the integrity of the criminal justice system. We are not satisfied that the District Judge is obliged to deal with this claim definitively. If the District Judge considers that the evidence is sufficient to return for trial, he should return the accused for trial. Save in the clearest of circumstances a District Judge's court could at best declare entrapment to be a triable issue. There is no unfairness to this process and no infringement with article 6 rights.

[50] There is also an effective alternative remedy in the specialist criminal court. The Crown Court has the facility to deal with this type of issue and has done so in the past in this jurisdiction. Judicial review is a measure of last resort and should only be exercised where alternative remedies are exhausted. That means that whilst there is a residual jurisdiction it should only need to be utilised in cases after alternative remedies are tried or unavailable. In addition to avoidance of delay in criminal cases and the duplication of judicial effort this has the significant advantage of saving the public funds expended on judicial reviews of this nature.

[51] We therefore reject the applicant's core argument that the PPS and District Judge have erred in law as regards disclosure. The PPS has clarified the test it has applied. The District Judge has examined the facts in an impressive written ruling and on our analysis has committed no error of law or acted irrationally.

[52] Overall, we do not consider that there is an arguable judicial review claim on the facts of the case in the context of committal where the court takes the PPS position

in good faith. In addition, there is an alternative remedy in the Crown Court which is the proper forum for issues of this nature to be determined if they arise.

[53] We can deal with the remaining pillars of challenge in short compass. As regards questioning of witnesses the District Judge has a wide discretion. He has the additional advantage of familiarity with the entire case papers. As the law stands questions on whether someone is a state agent are forbidden in criminal proceedings, whether or not an objection is raised by the prosecution. *Blackstone* refers at Section F9.14:

> "There is a long-established rule of law that in public prosecutions witnesses may not be asked, and should not be allowed to disclose, the names of informers or the nature of the information given (Hardy [1974] 24 St Tr 199) …"

[54] By way of exception such a question *may* be allowed to prevent a miscarriage of justice. *Blackstone* states at Section F9.15:

> "This outcome, however, results from performing the balancing exercise [of public versus private interests], not dispensing with it (Keane [1994] 2 All ER 478…). Judges should scrutinise application for disclosure of details about informants with very great care and should be astute to whether assertions that knowledge of such details is essential to the running of a defence are justified."

[55] We see no basis whatsoever to interfere with what is essentially the District Judge's approach. The issue of whether or not to allow questioning about Mr McFadden, whether related to the defence assertion he was a state agent or otherwise, is pre-eminently for the criminal court possessed of all the relevant information to decide upon and is not a matter for a collateral ruling in another court. If some unfairness is occasioned it can be challenged at the conclusion of the committal proceedings rather than mid proceedings.

[56] The PPS has been given access to MI5 material to consider for the purposes of disclosure. That access has not been restricted. Material was reviewed that was necessary to deal with the prosecution's disclosure obligations at this stage in light of what was known about the case (if any) made by each of the defendants, which includes the issues raised by the applicant.

[57] Chapter 33 of the PPS Disclosure Manual states in the clearest terms that MI5, as a security agency, is a "third party" for the purposes of disclosure and not an "investigator":

"33.1 This chapter provides guidance to investigators and prosecutors who have to deal with sensitive material generated by or in possession of security and intelligence agencies (the Agencies).

33.2 The Agencies are third parties under the Act. They are not deemed to be 'investigators.'"

[58] The content of the equivalent chapter of the Disclosure Manual used by the Crown Prosecution Service in England and Wales is the same as the PPS Manual quoted above. We agree that the content of both Disclosure Manuals reflects the position in statute namely that sections 22 and 26 of CPIA do not apply to third parties and that and section 1 of the Security Service Act 1989 defines the position of the Security Service. The later statute reads:

"**1. The Security Service**

(1) There shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State.

(2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

(3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.

(4) It shall also be the function of the Service to act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.

(5) Section 81(5) of the Regulation of Investigatory Powers Act 2000 (meaning of "prevention" and "detection"), so far as it relates to serious crime, shall apply for the purposes of this Act as it applies for the purposes of that Act."

[59] The Security Service can assist police forces in the UK, but they do not submit files for prosecution/no prosecution decisions. That duty falls on the PPS who are

then bound by CPIA and the associated codes of practice. Therefore, we dismiss the argument that the Security Service have a standalone disclosure obligation under the statutory scheme.

Overall Conclusion

[60] This court repeats the fact that committal is a pre-trial screening procedure. There is a high threshold for challenge of committal proceedings given the protections which are available at trial. In addition, this court deprecates the use of judicial review challenges of interlocutory decisions save in the most exceptional of circumstances. This is not such a case.

[61] Accordingly, we find that no arguable case has been established on any of the grounds raised. We dismiss the claim for judicial review. In doing so we reiterate the necessity for the good administration of justice that the committal proceedings are concluded without any further delay. We understand the points argued with skill by Ms Campbell. However, in cases where entrapment has been raised the authorities emphasise the limited role of District Judges in committal proceedings and the importance of the trial court as the appropriate forum for determining the issue.

[62] This case illustrates the fact that committal proceedings do not provide a satisfactory forum to reach definitive conclusions on whether entrapment occurred and whether, if it did, this should lead to a stay of proceedings resulting in no trial at all. The procedure, it has been said is "not apt" to enable a District Judge to make a finding of fact that entrapment had occurred. At best the District Judge may find that there is a triable issue for the Crown Court. Where the issue of entrapment has been raised "it could only be in the clearest of circumstances that a District Judge could consider that a stay for abuse of process could be appropriate …unless the circumstances are clear cut, there will be at best … a triable issue" (para [21] of *McManus*). The import of this consistent line of jurisprudence needs to be recognised by practitioners to avoid delay and the proliferation of satellite litigation.

[63] If there is insufficient evidence against the applicant, the applicant will not be returned by the District Judge. If there is sufficient evidence the case will be committed to the Crown Court where the applicant has the facility to make applications to court as we have said. On any showing we consider that the process is fair, that the applicant's rights are protected, and that the administration of justice is not imperilled.