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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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IN THE MATTER OF AN APPLICATION BY TAMMI LEE DIVER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (LAPSE OF LEAVE)

AND IN THE MATTER OF DECISIONS OF THE POLICE SERVICE OF NORTHERN IRELAND AND OF DUNGANNON MAGISTRATES' COURT

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Joseph McCann (instructed by Quigley MacManus, Solicitors) for the applicant
Mark Robinson QC and Ben Thompson (instructed by the Crown Solicitor's Office) for the first proposed respondent, the Police Service of Northern Ireland
Philip Henry (instructed by the Departmental Solicitor's Office) for the second proposed respondent, District Judge (Magistrates' Court) Ranaghan

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SCOFFIELD J

Introduction

[1] This application arises consequent upon an application for leave to apply for judicial review of a variety of decisions and actions on the part of the Police Service of Northern Ireland (PSNI) and of the decision of District Judge (Magistrates' Court) Ranaghan, sitting at Dungannon Magistrates' Court.

[2] The case concerns the initial arrest and detention of the applicant by the police in January of this year in relation to an offence under the Health Protection (Coronavirus, Restrictions) (No 2) Regulations (Northern Ireland) 2020, as amended, ('the Coronavirus Regulations'). The alleged offence involved breach of the restrictions on gatherings in private dwellings in force at that time. She was arrested in the early hours of 21 January 2021, detained by the police until being produced at court on 22 January 2021 and, thereafter, was granted bail on a variety of conditions. The applicant's basic contentions are that (a) she ought not to have been arrested; (b) she ought to have been released immediately after arrest by police, or at some later

point during police detention; and/or (c) at the very least she ought to have been released unconditionally when brought before the Magistrates' Court.

[3] The grounds on which these contentions are advanced include that (i) at the time of her arrest, the applicant was no longer committing the offence which is alleged against her; (ii) her arrest was not necessary in order to maintain public health; but (iii) even if that were not the case, protection of public health is not a proper basis for post-charge detention and risk of further offending is only a basis for such detention in relation to imprisonable offences; whilst (iv) the offence in question was triable summarily only and punishable by a fine only, without any potential for a sentence of imprisonment. For similar reasons, the applicant contends that it was not open to the District Judge (Magistrates' Court) to impose bail conditions upon her relating to her conduct. On the applicant's case, the District Judge should simply have found that she had been unlawfully detained by police and have ordered her immediate release.

[4] The applicant lodged her application for leave to apply for judicial review on 21 April 2021; and was granted leave on the papers by Colton J by Order dated 27 May 2021. In that Order, it was also ordered that, "the applicant shall file a Notice of Motion within 14 days in accordance with Order 53." The present issue arises because the applicant's notice of motion was not issued within 14 days of the grant of leave. Pursuant to RCJ Order 53, rule 5(5), "A notice of motion must be issued within 14 days after the grant of leave or else leave shall lapse." In light of this, the applicant seeks an extension of time for issue and service of the notice of motion. The first respondent contends that it is not open to the court to extend time once leave has lapsed and that (a) a further application for leave to apply for judicial review requires to be made; and (b) in that event, leave should be refused.

[5] A short hearing was convened to consider this issue. The applicant was represented by Mr McCann, of counsel (who is led by Mr O'Rourke QC in the case); and the first respondent was represented by Mr Robinson QC, appearing with Mr Thompson. I am grateful to counsel for their helpful written and oral submissions. The second respondent, represented by Mr Henry, took a neutral position on this application. I should also add that, although I have concluded that these proceedings constitute a criminal cause or matter for the purpose of RCJ Order 53, rule 2(1) (see [2021] NIQB 84), that provision is expressly subject to rule 8(1) which deals with interlocutory matters in judicial review and which, when read together with Order 32, rule 1, makes clear that such matters may be dealt with by a single judge.

Factual Background

[6] The factual context for the substantive claim is not of particular relevance for present purposes and need not be summarised otherwise than as above. I proceed on the basis that the applicant has established an arguable case, or a case worthy of

further investigation, in relation to the pleaded grounds of judicial review. That was certainly the view taken by Colton J when granting leave on the papers.

[7] The result of RCJ Order 53, rule 5(5) – set out at paragraph [4] above – is that the applicant was obliged to issue her notice of motion within 14 days of the grant of leave. A notice of motion is issued upon it being sealed by an officer of the office out of which it is issued, in this case the Central Office: see RCJ Order 8, rule 3(5) and (6). It is common case that that did not occur in this case, for the reasons discussed further below. The provision in Colton J's Order of 27 May reinforcing the requirement in the Rules was probably superfluous; but it is not uncommon for a judge granting leave to include in their order a requirement that the notice of motion be issued (or issued and served) within 14 days as a reminder of the time limit set out in the Court Rules for this step to be taken.

[8] On 2 August 2021, the Judicial Review Office notified the parties by email that the grant of leave had lapsed, as the notice of motion had not been issued. Around that time, there were further communications between the parties in relation to timetabling and the provision of skeleton arguments on an ancillary issue (whether the application constituted a 'criminal cause or matter'); but the lapse of leave does not appear to have been the subject of any significant step or communication by any party.

[9] By email of 16 September 2021, shortly before this case was due for review, the applicant's solicitor provided the following explanation:

> "The writer posted by ordinary post the said Notice along with all relevant pleadings to the Court Office on 4th of June 2021.
>
> We did not deliver the documents in person to the Court Office because of the pandemic, and the Court Office had previously informed the writer that email service would not be acceptable.
>
> In the intervening period further skeleton arguments were directed by the Court and shared between the parties.
>
> It was only latterly that we have been informed that the Court Office has not received the Notice of Motion and other appendices.
>
> It appears that through some failing in the postal system or other reason the items have not reached the correct recipient. The writer accepts that the matter ought to have been sent by recorded delivery.

> The writer would be willing, should it be required to provide an affidavit to aver that we posted the Notice and appendices."

[10] Mr MacManus went on to request that the court "consider deeming service good, and allowing for the date of the issuing of the Notice of Motion to be backdated to the date of posting." The question for the court on this application is framed in different terms. Issue of the notice of motion is not a question of service. In substance, however, the effect of the application is the same; and the question is whether that is permissible under the Rules.

[11] The applicant also made the case that no prejudice had been caused to any of the other parties to the proceedings. However, the first respondent took issue with this suggestion. The Crown Solicitor's Office (CSO) responded to Mr MacManus' email to say that, upon checking their file, the notice of motion had not been served on the first respondent either (as at 16 September 2021). It was also argued that the challenge to the police actions could, and should, have been made by way of ordinary civil proceedings, rather than by way of judicial review. I return to that argument below.

[12] At the review hearing on 17 September 2021, I suggested that the applicant might require to lodge a fresh application for the grant of leave. Mr O'Rourke QC indicated that, instead, the applicant would be making an application for an extension of time under RCJ Order 3, rule 5; and that is the application to which this judgment relates. In support of this application, Mr MacManus has filed a further affidavit explaining the sequence of events giving rise to the present position, the main features of which are as follows:

(1) After the grant of leave by Colton J, a draft notice of motion was prepared by counsel and received in the applicant's solicitors' office by email on 2 June 2021. The notice of motion was sent by Mr MacManus' firm to the High Court under cover of a letter dated 4 June 2021 (an office copy of which has been exhibited to his affidavit). The letter of 4 June 2021 asked the Court Office to deduct any applicable payment from the firm's ICOS account (which is a now commonly used method of payment for court fees).

(2) Mr MacManus was waiting for the notice of motion to be 'stamped' by the office (or 'sealed', using the formal term) before it would be served on the respondents to the applicant's proposed application for judicial review. That is why there ought to be no surprise that no copy was received by the respondents, as the CSO has confirmed.

(3) In pre-pandemic times, a member of staff would personally attend at the relevant court office in order to pay the fee and have the document sealed. However, due to the changed procedures which were introduced in response to the coronavirus pandemic, such business is now routinely conducted by

post. Mr MacManus has made a check with the administrative staff in his office, who have confirmed that the notice of motion was posted by way of first class post in accordance with his instructions under cover of the letter dated 4 June.

(4) Mr MacManus accepted that he had failed to follow up on the issue with the court office on any subsequent date. He assumed the sealed notice of motion would be returned to his office in due course, albeit he was aware that there were some administrative delays as a result of new Covid-related procedures. In the meantime, he and counsel proceeded on the basis that the case was continuing, attending to other ancillary matters which had been raised by the court. In retrospect, he accepts that he could have queried with the court what the status of the notice of motion was.

[13] Mr MacManus' affidavit noted that he had recently asked the Judicial Review Office to check its records for receipt of the letter of 4 June 2021 and enclosed documentation. I outlined to the parties during the course of the hearing that the court office had confirmed that, notwithstanding that the processing of incoming post was up-to-date, there was no record or evidence of the letter of 4 June 2021 ever having been received either at the Front of House Office or in the Central Office (of which the Judicial Review Office forms part). Precisely what happened to the letter therefore remains a mystery.

Summary of the parties' submissions

[14] The applicant contends that the time limit in Order 53, rule 5(5) is subject to the general provision allowing the court to extend time under RCJ Order 3, rule 5, which provides (insofar as material) as follows:

> "(1) The Court may, on such term as it thinks just, extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
>
> (3) The period within which a person is required by these Rules or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose."

[15] Relying on the affidavit evidence of Mr MacManus which is summarised above, the applicant contends that appropriate steps were taken to seek to issue the notice of motion within time and that, in light of the importance of the issues raised by this application for judicial review, along with the absence of any prejudice to the respondents, an extension of time for the issue of the notice of motion ought to be granted.

[16] The first respondent contends that, leave having lapsed, it is not open to the court simply to extend time for the issue of the notice of motion (which presupposes that leave to commence the substantive application for judicial review is extant). The PSNI's position is that a further application for leave is now required and, further, that any such application ought not to be granted. This latter submission is made on the basis that any fresh application for leave to apply for judicial review would be out of time; that there is no good reason to extend time; the prejudice has accrued to the first respondent; and that the case against the first respondent should in any event be pursued by way of private action. The respondent's submissions were critical of the applicant for failing to observe the requirements of the Judicial Review Pre-Action Protocol when initially commencing these proceedings; and critical of the failure on the part of the applicant's representatives to pick up on the difficulty with the notice of motion sooner and seek to correct it more expeditiously.

Discussion

[17] This application raises a discrete but important point of practice in the Judicial Review Court in this jurisdiction. The approach in recent years, reflected in the email from the Judicial Review Office to the applicant's solicitor of 2 August 2021, has been to require applicants to make a further application for leave to apply for judicial review in circumstances where leave has lapsed. It is not possible to describe this as an invariable practice but it has certainly been the usual practice for quite some time in my experience. The applicant in the present case is perfectly entitled to contend that this is not required; and the response of the respondent means that it is now necessary for the court to determine the issue formally.

Does the court have power to extend time?

[18] The key issue of principle raised by this application is whether, once the time limit set out in Order 53, rule 5(5) has elapsed without issue of the notice of motion and, therefore, once leave has lapsed, the court nonetheless has power to extend time for issue of the notice of motion. Although this issue may be easily stated, its resolution is not quite so simple. On the one hand, the power to extend time which is set out in Order 3, rule 5(1) is in extremely wide terms. On the other, Order 53, rule 5(5) provides for the consequence of failure to comply with the time limit which is set out in that provision. Leave lapses. In those circumstances, how can the court permit issue and service of a notice of motion commencing judicial review proceedings, since (subject to one exception which is not relevant for present purposes) such proceedings can only be commenced with leave of the court? It is

clear that the substantive application for judicial review can only be made (by notice of motion) where leave has been granted: see also Order 53, rules 3(1) and 5(1). In turn, an application for leave to apply for judicial review must be made in compliance with the provisions of Order 53, rule 3(2).

[19] The relevant textbooks provide little assistance on the precise issue which falls for consideration in this application and also tend to express differing views:

(a) The applicant relied upon Valentine, *Civil Proceedings: The Supreme Court* (SLS) – published in 1997 – which states at paragraph 19.66 that the 14 day time limit in Order 53, rule 5(5) is extendable. However, the author did not address whether this was merely extendable prospectively, or also retrospectively. He did emphasise that the time limit "should be strictly adhered to as it may be the first intimation to the other parties of the existence of the challenge."

(b) Assuming Valentine provides support for the view that the time limit in Order 53, rule 5(5) is extendable retrospectively, as the respondent has observed the authority noted in the relevant footnote as supporting this view is *R v Institute of Chartered Accountants, ex parte Andreou* (1996) 8 Admin LR 557. However, in that case, the relevant rule – Order 53, rule 5(5) of the Rules of the Supreme Court of England and Wales – was in materially different terms. It stated merely that, "A motion must be entered for hearing within 14 days after the grant of leave." It did not include the important provision that, in the absence of the notice of motion being issued within time, "leave shall lapse." I accept the respondent's submission, therefore, that this authority is of little assistance to the construction of the rule applicable in this jurisdiction.

(c) When Valentine's current, annotated Rules of the Court of Judicature in *All the Laws of Northern Ireland* (LexisNexis) is consulted, his commentary is now in different terms:

> "Although the 14-day time limit is extendable <u>in England</u>, it should be strictly adhered to as it may be the first intimation to the other parties of the existence of the challenge: *R v Institute of Chartered Accountants ex p Andreou (1996) 8 Admin LR 557*. <u>It has been held in Northern Ireland that the wording of this rule means that the operation of the grant of leave lapses after 14 days and that therefore on application after the expiry of 14 days the Court cannot extend the time for issue of the notice of motion</u>. Instead a new application for leave can be made."
> [underlined emphasis added]

(d) Although the above commentary records that it has been held in this jurisdiction that the court *cannot* extend time after the expiry of the 14 day time limit, no particular authority is cited in support of this proposition.

(e) For what it may be worth, the authors of Larkin & Scoffield, *Judicial Review in Northern Ireland: A Practitioner's Guide* (2007, SLS) also considered that if the notice of motion was not issued within time, leave would lapse and a fresh application for leave would have to be made, although the issue of possible extension of the time limit was not specifically addressed: see paragraph 10.11.

(f) In Professor Anthony's more recent text, *Judicial Review in Northern Ireland* (2nd edition, 2014, Hart), he expresses the view (at paragraph 3.34) that, where leave has lapsed, "an application for extension of time or for a further grant of leave must be made by summons and an affidavit that explains the failure to issue and serve the notice of motion in time."

(g) The only authority suggested in Prof Anthony's text for there being two possible routes to remedy the situation is the Judicial Review Practice Note 01/2006. That has now been replaced by the Judicial Review Practice Direction 03/2018, on which the applicant relies, which contains similar text to the earlier Practice Note, at paragraph (24) in Part C, in the following terms:

> "Where leave has been granted an originating motion must be **issued** in 14 days or leave lapses [RCC Order 53, R5(5)]. Where leave has lapsed an application for extension of time for a further grant of leave must be made by summons and an affidavit explaining the failure to issue and serve the notice of motion in time." [bold emphasis in original]

(h) Of course, the relevant Practice Direction is not, of itself, an authoritative statement of the law. It is expressly accepted at paragraph [2] of its introductory section that it does not modify or amend the relevant Rules of Court; and is implicitly accepted that it could not do so. Moreover, the reference to a possible application for extension of time *or* an application for a further grant of leave might simply be expressed in those terms since, as the argument in this case illustrates, there is no reported case deciding which of these options is available or appropriate and, when the Practice Direction was compiled, this remained an open question.

[20] My conclusion is that time for issue of the notice of motion can be extended *prospectively* only, that is to say, before leave has lapsed by automatic operation of Order 53, rule 5(5). During that period, leave has been granted and is extant. The time limit set for issue of the notice of motion is a period within which the applicant is required by the Rules to do an act in the (prospective) proceedings which he has

leave to bring. In those circumstances, the court is entitled, in the exercise of its powers under Order 3, rule 5(1) to extend (or, indeed, abridge) that time period.

[21] I have reached a contrary conclusion in relation to the position once the time limit has expired and leave has lapsed. I recognise that an objection to this conclusion may be found in the provisions of Order 3, rule 5(2), which suggests that any time period which is extendable prospectively must also be extendable retrospectively. However, that rule must be read alongside and reconciled with the express provision of the Rules which provides that leave will automatically lapse if the notice of motion is not issued within time. Accordingly, once leave has lapsed by operation of law, the matter is not merely one of extending time for a step in extant proceedings. Rather, to permit the notice of motion to be issued and served, there must be a fresh grant of leave. That is because the purpose of issuing the notice of motion is to commence proceedings which can only be commenced with leave, where the only leave which has been granted has lapsed. Indeed, the requirement that leave be obtained before the substantive application for judicial review is made is not merely a requirement created by the Rules but is a requirement set out in statute: see section 18(2)(a) of the Judicature (Northern Ireland) Act 1978. In those circumstances, more than an extension of time is required. There must be a further grant of leave, which goes beyond the mere extension of time which is catered for in Order 3. The further grant of leave also requires an application which conforms to the Rules. This follows from the provisions of Order 53, rules 3(1), 3(2) and 5(1).

[22] Although there may appear to be an element of circular reasoning to the above analysis, to hold otherwise would be to denude Order 53, rule 5(5) of any proper effect. The Rules specifically provide for a consequence of failure to issue the notice of motion within time. That consequence was provided for a reason; and the obvious and natural interpretation of rule 5(5) is that it was designed to send the applicant back to square one where there is non-compliance with the time-limit.

[23] Another way of approaching the matter is that the general provision made in Order 3, rule 5 must give way to the specific provision dealing with this scenario in Order 53, rule 5(5): see *Bennion on Statutory Interpretation* (7th edition, 2017, LexisNexis) at section 21.4.

[24] Although the applicant has not prayed in aid Order 2, rule 1 – which she might have done by issuing her notice of motion with leave having lapsed (assuming an official within the court office would permit the document to be sealed in those circumstances) and claiming that the absence of leave arising from non-compliance with the time limit in Order 53, rule 5(5) was a mere irregularity – I also do not consider that that would avail her. As noted above, the requirement to have obtained leave before commencing proceedings is set out in section 18(2)(a) of the Judicature Act. In my view, this must mean leave which remains extant at the time when the application for judicial review is made by way of issue and service of the notice of motion. As confirmed in *Official Receiver v McDaid* [2016] NICA 62 at paragraph [9], although the power to cure irregularities under Order 2, rule 1 is

great, proceedings will be a nullity, rather than a mere irregularity, in circumstances where (a) the proceedings never started at all owing to some fundamental defect in issuing the proceedings, and/or (b) the proceedings appear to be duly issued but fail to comply with a statutory requirement.

[25] For these reasons, I accept the respondent's submission that, leave having lapsed, it is not open to me to accede to the applicant's application simply to extend time to put her back in the position where leave had not lapsed. A fresh application for leave to apply for judicial review is required.

Approach to the re-grant of leave on a fresh application

[26] Although there is not (yet) a fresh application for the grant of leave before the court, it may be helpful to set out the approach the court will take to such an application where leave has lapsed through failure to issue the notice of motion within the prescribed timescale.

[27] In determining whether or not leave should be granted for a further time, the court's assessment of the merits of the case is unlikely to be different from that which pertained at the time when leave was originally granted (unless there has been some material change of circumstance in the meantime). The factors the court will consider in determining whether to re-grant leave will be broadly similar to those which are considered when addressing an application to extend time after the event (summarised in *Davis v Northern Ireland Carriers* [1979] NI 19, at 20, and reiterated and endorsed by Gillen J in *Benson v Morrow Retail Limited, trading as Morrows Supervalu* [2010] NIQB 140, at paragraphs [15]-[19]). In summary, the court will consider the following:

(i) The reason for failure to issue the notice of motion within time and, in particular, the extent to which the party applying is in default both in terms of lateness and culpability (including whether the default is on the part of the applicant personally, their representatives or, for instance, some third party), with the court expecting a full, honest and plausible explanation to be provided for this purpose;

(ii) Any prejudice arising to the respondent, or any relevant interested or notice party, arising from the failure to issue the notice of motion within time;

(iii) Whether a hearing on the merits will be denied if leave is not re-granted and, in particular, whether there is an issue of public interest or importance which ought to be addressed (bearing in mind that the court had previously seen fit to grant leave); and

(iv) The overriding objective in RCJ Order 1, rule 1A of enabling the court to deal with cases justly, including by ensuring that the case is dealt with expeditiously and fairly.

[28] It is likely to be rare that prejudice will arise to a respondent or notice party merely as a result of a failure to issue a notice of motion within time. In such circumstances, an application for leave to apply for judicial review will have been made previously and, in all likelihood, given the practice in this jurisdiction of proposed respondents being put on notice of leave applications and invited to participate, the respondent will be aware of the proposed application for judicial review and of leave having been granted. The court will be reluctant to allow a respondent to benefit opportunistically from an applicant's failure to issue a notice of motion within time, at least where that has been the result of a good reason or excusable oversight. Prejudice to the respondent or a notice party for this purpose will not, save exceptionally, be considered to arise simply because the fresh grant of leave will require the respondent to answer proceedings which they hoped to avoid. The focus on prejudice ought to be on prejudice caused by the delay. Examples may include where the respondent or notice party justifiably considered that the substantive application for judicial review was not going to be pursued and acted to their detriment in reliance on this; or where there is a significant passage of time during which documents or evidence have been lost.

[29] In summary, provided the applicant seeks to rectify the situation expeditiously after the error has been identified and there is a reasonable explanation for the default, the court is likely to be sympathetic to a re-grant of leave made on foot of a further application. Experience also shows that respondents in such circumstances often take a pragmatic approach, choosing to consent, or at least not to object, in such circumstances.

[30] That said, the re-grant of leave ought not to be taken for granted. As the authorities emphasise, the Rules of Court are there to be observed. The responsibility for compliance with Order 53, rule 5(5) lies with an applicant and his or her legal representatives. There will be cases where failure to observe the requirements of the Rules will have the consequence that the case will not proceed. Where this is the fault of the applicant's representatives, it is conceivable that a remedy against them may then be available.

[31] A necessary corollary of the requirement to apply again for the grant of leave is that an application will have to be submitted in compliance with Order 53, rule 3(2), requiring the payment of a court fee on the *ex parte* docket (which is currently £261), unless the applicant qualifies for an exemption or refund under article 9 of the Court of Judicature Fees Order (Northern Ireland) 1996 ('the Fees Order'). There may also be some additional costs incurred in the further application, although these are likely to be modest. In circumstances where the lapse of leave is clearly the fault of an applicant's solicitor, it is possible that the court may consider that its powers under RCJ Order 62, rule 11 should be exercised to disallow those costs as between the solicitor responsible and his client or to require the solicitor to indemnify the paying party against those costs. In exceptional cases – for instance where it was clear that the relevant failure was a result of default on the part of court staff and

requiring the applicant to pay it would involve undue hardship – the Lord Chancellor might be invited to reduce or remit the additional court fee in the exercise of his power under article 4(2) of the Fees Order. In the majority of cases, however, any additional costs are simply likely to be costs in the cause.

Disposal in the present case

[32] The result of the reasoning above in the present case is that I do not consider that I have a discretion to extend the relevant time limit retrospectively, as the applicant submits. The further grant of leave will require a fresh application. That has not yet been submitted. Assuming such an application were to be submitted, what would the court's approach be? Having heard argument on this issue, and in the hope of saving further time and costs, I propose to outline the approach I would take to this issue in the event that a further application for leave is submitted (assuming, of course, that the Senior Judicial Review Judge assigned the case again to me to deal with).

[33] I accept the submission on the part of the applicant that she is not personally at fault for the non-compliance which has arisen in this case. I also have no reason to doubt the averment of Mr MacManus that, as far as he was concerned, the relevant steps had been taken, shortly after the grant of leave, for the notice of motion to be delivered to the court office and sealed within time. I accept the respondent's submission – which is also accepted, in terms, by Mr MacManus in his affidavit – that he could (and should) have been more proactive in following the matter up and that he could also have minimised the risk of things going awry by sending the correspondence of 4 June 2021 by way of recorded delivery. I also take this opportunity to observe that practitioners too regularly ignore the requirements of Order 53, rule 5(6), which requires an affidavit of service to be lodged in respect of the notice of motion. If this rule was more assiduously observed, issues such as that which has arisen in the present case may be identified and resolved more expeditiously.

[34] I also accept the applicant's submission that the respondents have not been prejudiced by the delay in regularising matters. I further accept that the question of the powers of the police and the criminal courts in dealing with suspects and accused persons under the Coronavirus Regulations is an issue of novelty and importance which ought to be addressed by the courts. All of these factors tends towards the further grant of leave provided an application is made promptly in the proper form.

[35] I also accept that re-applying for leave will result in some additional cost (at the very least, in the form of an additional court fee which is required on the *ex parte* docket); and that a further application for legal aid may be required, although whether or not this was the case was a matter of doubt. This may also give rise to further delay, although I do not consider it is likely to materially alter the timescale to full hearing from this point. However, these are all natural consequences of the non-compliance with the Rules.

[36] In light of the above factors, I would be inclined to re-grant leave in this case if a further application is made promptly. There are, however, two matters which have given me pause for thought.

[37] First, in the present case, the issue in relation to the powers of the District Judge (Magistrates' Court) would not go unexamined in the event that leave was refused. That is because leave to apply for judicial review has been granted in another case (*Re Sinead Corrigan's Application*) raising materially similar issues, and in fact arising from the same events, which is now being case managed alongside this case with both cases to be heard together. In that case, there is also a challenge to the District Judge's failure to grant bail without conditions on similar grounds to those raised in the present case. The grounds are not identical, however, since in the present case there is an additional focus on the alleged illegality of the initial arrest and detention which, it is contended, meant that the judge could not legitimately do other than order the applicant's release. A further distinction in the present case is that a significant case is also being made against the police, which is not a feature of the *Corrigan* challenge. However, the first respondent submits that this aspect of the case is equally suitable – indeed, more suitable – to resolution in an action by way of civil proceedings for tort. The applicant would still be within time to bring such proceedings as a plaintiff.

[38] This is the second point which causes me concern about the further grant of leave. The question of alternative remedy was not raised by the PSNI in advance of leave to apply for judicial review having been granted by Colton J. However, that is because the applicant did not at that time send pre-action correspondence in accordance with the High Court's Judicial Review Pre-Action Protocol. In the section of her Order 53 statement which directs the solicitor with carriage of the action to certify compliance with the Pre-Action Protocol, the applicant's solicitor noted that "the Applicant considers that the Respondent PSNI and Respondent District Judge are functus officio" and that, since they had no power to correct their decisions which were in the past, "no Pre Action Protocol Letter has been served."

[39] I accept the respondent's submission that the applicant wrongly failed to comply with the Pre-Action Protocol. The relevant portion of the Practice Direction to which the Protocol is annexed provides that the standard pre-action letters should be "used in every case"; and that there is a duty of "strict compliance" with the Protocol, except in the most urgent or compelling circumstances, and, importantly, "irrespective of whether the proposed Respondent is legally empowered to revoke or alter the impugned decision or action." Had the Protocol been complied with, the PSNI would have been able to articulate their objection to leave being granted on the basis of the applicant having an alternative remedy by way of civil action, whether or not they were in a position to now do anything practical to improve the applicant's position.

[40] The substance of the respondent's point is that in *Re Alexander's Application* [2009] NIQB 20 Kerr LCJ, giving the judgment of the Divisional Court in a challenge to arrests and detention, dismissed all but one of the four cases "on the basis that proceedings in this form are not suited to a proper consideration of the issues which arise" (see paragraph [25]). He went on to hold as follows, at paragraph [27]:

> "It will be clear from the foregoing that we consider that a challenge to the lawfulness of an arrest should in virtually every conceivable instance be pursued by way of a conventional *lis inter partes*. There are two obvious reasons for this. In many cases (Bull's is an obvious example) a challenge by way of judicial review is an unacceptable type of satellite litigation which not only distracts from the proper conduct of the criminal proceedings but seeks to remove a discrete issue from the criminal court which is its natural home. The second reason is that in almost all cases, the issues which arise are far more comfortably and satisfactorily accommodated in a form of proceeding which involves the giving of oral testimony and the testing of claims and counterclaims under cross examination."

[41] There is a strong case that the factual issues raised in this litigation concerning the actions of the arresting and detaining officers would be better dealt with by way of a civil action with oral evidence (and I note that the applicant has included damages for wrongful arrest and unlawful detention as one of the forms of relief which she seeks in her Order 53 statement). If I was considering this matter afresh, I would be inclined to refuse leave on this basis. However, I must also take into account that Colton J did not consider this a proper basis on which leave should be refused. Although the applicant's failure to adhere to the Pre-Action Protocol did not allow this issue to be fully ventilated before the earlier grant of leave, the *Alexander* case was referred to in the applicant's supporting written submissions and I have no doubt that Colton J – whether through consideration of that case or more generally – will have been fully aware that a remedy by way of civil action was available to the applicant. He did not consider that a reason for refusing leave, largely, I imagine, because of the novelty of the Coronavirus Regulations and the fact that a number of applications, in various forms, had started to come before the courts relating to the proper approach to their application and enforcement. In those circumstances, I consider he is likely to have given greater weight to the need for a superior court to give guidance on these matters than to the availability of an alternative remedy. None of that is to suggest that the legal issues in this case would not receive careful and proper consideration in an action in the County Court; but, viewing the matter pragmatically, if either party was dissatisfied with the legal ruling made by that court, they could appeal, as a matter of right, to the High Court by way of full re-hearing, in which case the issues would require to be considered in this court again.

[42] It is also undoubtedly the case that, if the applicant proceeds by way of judicial review in the High Court, there may be certain tactical disadvantages to her in terms of her testing the evidence given on the part of police officers concerned (in the absence, exceptionally, of leave to cross-examine being granted or the application being converted into an action by writ pursuant to RCJ Order 53, rule 9(5)). That is a result of the tactical decision taken by her representatives to bring these proceedings by way of judicial review, which she may simply have to accept.

[43] Taking all of the above together, I would be inclined to re-grant leave in this case, if an application is made promptly (say, within seven days of the date of this judgment), in order to allow the legal issues which Colton J considered to be arguable and to merit consideration by this court to be determined. In light of the ventilation of the relevant issues in the course of the hearing of this application, I would excuse the applicant from compliance with the Pre-Action Protocol for the purpose of that fresh application and would be inclined to re-grant leave on the papers.

Conclusion

[44] For the reasons given above, I refuse the applicant's application for an extension of time.

[45] I will make an order for the first respondent's costs to be borne by the applicant (not to be enforced without further order of the court, in light of the fact that she is a legally assisted party); and will order legal aid taxation of the applicant's costs. The costs order against the applicant reflects both the fact that the application made on her behalf was unsuccessful and the fact that the Judicial Review Pre-Action Protocol was not complied with, as it ought to have been, when the proceedings were originally commenced.