Neutral Citation No: [2024] NICA 48	*Ref:*	**McC12545**
	ICOS No:	**20/087346/02**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**10/06/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF A CASE STATED BY DISTRICT JUDGE BRODERICK IN RESPECT OF HIS ADJUDICATION AT A MAGISTRATES' COURT SITTING AT BALLYMENA

BETWEEN:

PUBLIC PROSECUTION SERVICE

Complainant/Respondent

and

LEWIS BOYD

Respondent/Appellant

Donal Sayers KC with Lara Smyth (instructed by MacElhatton Solicitors) for the Appellant
Philip Henry KC with Lauren Cheshire (instructed by the High Court & International Section of the PPS) for the Respondent

---

Before: McCloskey LJ and Horner LJ

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

Glossary

Given the profusion of abbreviations and acronyms in the papers, it is necessary to explain their meaning.

DJ (MC):	District Judge (Magistrates' Court)
DO:	PPS Directing Officer
NICA:	Northern Ireland Court of Appeal
NICTS:	Northern Ireland Court Service
PDIR:	Post-Decision Information Request (emanating from the PPS to the PSNI)
PPS:	Public Prosecution Service
PSNI:	Police Service of Northern Ireland

INDEX

Subject	Paragraph No
Introduction	1
Relevant Statutory Provisions	2
Chronology of Material Facts	3
Guidance from the Decided Cases	4-6
The Two Initial Orders	7-8
The First Question of Law	9-10
The First Question Determined	11-19
The Second Question of Law	20-24
Disposal	25-62

Introduction

[1] By this appeal by case stated two questions of law have been formulated for consideration by this court:

(i) Does Article 158A of the Magistrates' Courts (NI) Order 1981 (the "1981 Order") empower the magistrates' court to vary a sentence by imposing a compensation order in circumstances where a compensation order was not previously imposed?

(ii) Was the purpose for which he purported to exercise the power a lawful purpose?

In an admirably careful and thorough written decision District Judge Broderick initially refused the application to state a case: see [2023] NIMag1. This was successfully challenged by the appellant in this court, differently constituted: see [2024] NICA 17.

Relevant Statutory Provisions

[2] These are:

Article 158A of the Magistrates' Courts (Northern Ireland) Order 1981

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

for any reason appears to be invalid by another which the court has power to impose or make."

Article 14 of the Criminal Justice (Northern Ireland) Order 1994

> "14.—(1) Subject to the provisions of this Article, **a court by or before which a person is convicted of an offence**, **instead of or in addition to dealing with him in any other way**, may, on application or otherwise, **make an order** (in this Article and Articles 15 to 17 referred to as "a compensation order") requiring him to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence or to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road; and a court shall give reasons, on passing sentence, if it does not make such an order in a case where this Article empowers it to do so."
> [emphasis added]

Chronology of Material Facts

[3] This is the following:

(a) The appellant was charged with three offences that occurred on 10 December 2020:

(i) Possession of an offensive weapon (a spanner) in a public place
(ii) Common assault
(iii) Criminal damage

The criminal damage charge related to damage to the home of a person who was unknown to the appellant. In her statement to the police dated 10 December 2020, the homeowner undertook to forward the repairs estimate to police when received.

(b) On 28 June 2021 the appellant pleaded guilty to all charges. Sentencing was adjourned to 10 August 2021 to facilitate a pre-sentence report.

(c) The sentencing hearing proceeded on 10 August 2021. Counsel appeared on behalf of the appellant. The District Judge enquired of the PPS whether they had received either an estimate for the cost of the damage caused or an invoice. The PPS advised the court that they had received neither. The District Judge imposed a probation order for a period of 12 months with two additional

conditions attached to the order (requiring the defendant to actively engage in any treatment/programme of work recommended by his supervising officer and prohibiting him from developing any intimate relationships without first notifying his probation officer). The District Judge also imposed a restraining order for a period of two years. A hiatus of two years followed.

(d) On 6 April 2023, the PPS sent an email to the Court Office attaching an application pursuant to Article 158A of the 1981 Order and requested that the matter be listed before the magistrates' court on 2 May 2023. The application requested that an order be made under Article 158A(1) of the 1981 Order 'varying the sentence imposed by Ballymena Magistrates' Court on 10th August 2021'. It was submitted that:

> "The sentence should be varied to include a Compensation Order of whatever amount the Court deems appropriate, due to response of the IO to the PDIR issued by the Directing Officer following conviction which was received after the Directing Officer had left the PPS and has only now come to light."

At a subsequent listing, the District Judge was informed that the figure of compensation being sought by the PPS was £500, which equated to the insurance excess incurred by the houseowner.

(e) On 22 August 2023, the appellant's solicitors lodged written submissions objecting to the application on his behalf. The PPS Directing Officer replied to these written submissions by email dated 29 August 2023. She stated (underlining added):

> "<u>Please ask the court prosecutor to inform the court that it is not accepted there was a 'mistake' in this case.</u>
>
> The court can be advised that following on from the DJ's handling of the case on 10th August 2021 details were requested to enable the court to make a Compensation Order. The DO did this by way of PDIR on 31st August 2021, it was responded to on 7th September and further clarification was requested by the DO on 8th September 2021. That request was unfortunately not responded to by police until 19th October 2021, by which stage the DO had left the PPS and as the matter was no longer in the court listings it did not come to anyone's attention.
>
> This was an unfortunate combination of circumstances, and it is a matter which the Article 158a seeks to address.'"

(f) On 31 August 2023, having considered the parties' oral submissions, the District Judge granted the Article 158A application and made a compensation order in the amount of £250.

Guidance from the Decided Cases

[4] In *R v Leighton Buzzard JJ, ex p Director of Public Prosecutions* (1990) 154 JP 41 at 44, when dealing with the equivalent provision which applies in England and Wales, namely section 142(1) of the Magistrates' Courts Act 1980, which replicates the language of Article 158A of the 1981 Order, with the exception that it omits the words "… If it appears to the court to be in the interests of justice to do so …", Woolf LJ said:

> "Clearly what is in mind, by the reference to 'other order', is an order such as a conditional discharge, a probation order or some sort of order of that sort which is **akin to a sentence but not necessarily a sentence**."
> [emphasis added]

It is of note that this was an application for judicial review brought in circumstances where the Justices had purported to exercise this statutory power in (a) permitting the defendant to alter his plea from guilty to not guilty and (b) dismissing the information. The English Divisional Court ruled that the Justices had acted without jurisdiction, on the basis that a dismissal was not a "sentence or other order."

[5] This interpretation was endorsed in this jurisdiction by Carswell LCJ in *Re DPP's Application* [2000] NI 49. The Lord Chief Justice stated at p 54:

> "The main purpose of art 158A(1) is to enable magistrates to remedy mistakes or to amend a sentence or order when they have imposed or made it under a misapprehension, and it is in the interests of justice that they should put matters right. In particular the provision allows them to impose a sentence or make an order within their jurisdiction if they have inadvertently exceeded their powers, without the necessity to come to this court to have the sentence quashed. **It is not, however, restricted to this and the court may vary or rescind any sentence or order whenever it is in the interests of justice to do so.** We do not feel that we should attempt to define the power any more closely."
> [emphasis added]

Thus, there is no exhaustive prescription, statutory or judicial.

[6] In *R v Williamson* [2012] EWHC 1444 the Divisional Court in England observed that the intention behind the equivalent of Article 158A in that jurisdiction was to enable a magistrates' court to correct errors without having to resort to the Court of Appeal or Divisional Court for relief:

> "31. The purpose of section 142 as originally enacted was to enable the magistrates' court itself to correct mistakes in limited circumstances to avoid the need for parties to appeal to the Crown Court, or to the High Court by way of case stated, or to bring judicial review proceedings. In our judgement the introduction of the section 142 power was designed to deal with an obvious mischief: namely the waste of time, energy and resources in correcting clear mistakes made in magistrates' courts by using appellate or review proceedings."

Article 158A of the 1981 Order has the same purpose.

The two initial orders

[7] The two orders of the magistrates' court made on 10 August 2021 were provided upon the request of this court. The first, the probation order, is expressed in these terms:

> "It is ordered that the defendant, who will reside in the area of Ballymena be required for the period of 12 months ; next ensuing to be under the supervision of a Probation Officer appointed for or assigned to that area and it is further ordered that the defendant shall during the said period comply with the following requirements:-
>
> Defendant shall keep in touch with the Probation Officer in accordance with such instructions as may from time to time be given,
>
> Defendant shall notify the Probation Officer of any change of address;
>
> You must actively participate in any programme of work recommended by your supervising officer, designed to reduce any risk you may present and to attend and co-operate in assessments by PBNI as to your suitability for programmes and other offence focused work.

> You must not develop any intimate relationships without first notifying your Probation Officer who will take appropriate steps to ensure that verifiable disclosure has been made and liaise with Social Services in respect of child protection concerns, if appropriate.
>
> And the defendant has expressed willingness to comply with the said requirements."

The second order, the restraining order, is couched in the following terms:

> "**It is ordered** that a restraining order is made in the following terms:
>
> The defendant is forbidden to use or threaten violence against [AB and XY] and must not instruct/encourage or, in any way, suggest that any other person should do so. The defendant is forbidden to intimidate, harass or posture [AB or XY] and must not instruct, encourage or, in any way, suggest that any other person should do so ….
>
> This order takes effect forthwith and will last until 10 August 2023 …
>
> You may apply to the court to have this order varied or discharged."

[8] The later order of the magistrates' court, impugned before this court, was made on a date – 31 August 2023 – when each of the aforementioned orders had expired. This circumstance did not feature in either parties' arguments, and we decline to explore it further accordingly. It suffices to observe that this would be worthy of more detailed argument in an appropriate future case.

The First Question of Law

[9] The central submission of Mr Sayers KC was:

(a) Article 158A(1) of the 1981 Order empowers the court to vary or rescind a 'sentence', or alternatively, to vary or rescind an 'other order'.

(b) A sentence is, as a matter of law, distinct from an 'other order'.

(c) A compensation order is not a sentence, but an 'other order'.

(d) A court cannot vary a sentence by imposing an additional 'other order'.

(e) A court cannot as a matter of law vary an order that does not exist, that order never having previously been imposed or made by the court when dealing with the offender.

[10] The PPS skeleton argument includes the following passage:

> " … a compensation order was a live issue at the original sentencing hearing. The DJ expressed his intention to revisit the issue of a compensation order as an aspect of the sentencing exercise. The process ought to have been better managed. The Court ought to have adjourned the original sentencing hearing, even if it meant being part heard; the PPS should have raised this (case management) issue with the DJ; and thereafter the PPS should not have allowed the matter to remain uncorrected for such a long time. A series of mistakes were clearly made, of the kind Article 158A was intended to rectify."

Mr Henry KC, on behalf of the PPS, submitted that a compensation order fits neatly within the interpretation proffered by Carswell LCJ and Woolf LJ, being an order akin to, though not necessarily, a sentence. A compensation order can be imposed "instead of or in addition to dealing with [the defendant] in any other way."

The First Question Determined

[11] The two courses of action made possible by Article 158A(1) are (a) rescission and (b) variation of an extant sentencing order or other order of a magistrates' court. Rescission does not arise in the present case. The central issue is whether what the District Judge ordered on the second occasion was a variation of an extant sentencing order or other order. The first question for this court is: what is the correct characterisation of the probation order and restraining order made by the judge on 10 August 2021?

[12] While Article 2 of the 1981 Order defines "order" as including "a decree or refusal to make an order", there is no definition of "sentence", nor is such a definition found in the Interpretation Act (NI) 1954. We consider that a "sentence" embraces any order made by a court following a plea of guilty or conviction enshrining any of the well-established traits of every sentencing order, namely the retribution of the offender, the deterrence of the offender and others from further offending, the rehabilitation of the offender, and in certain contexts, reparation to the victim. The genesis of the probation order which the magistrates' court made lies in Article 10 of the Criminal Justice (NI) Order 1996. Considered in its full statutory context it is in our view clear that a probation order is a "sentence."

[13] The correct classification of the restraining order imposed in this case is not as straightforward. As its terms indicate, its overarching purpose was to protect the two named persons concerned. We take into account that this order was made in the context of a sentencing exercise, and, further, in substance it instructed the appellant not to commit any further offence vis-à-vis either of the named persons. Given these two factors we consider that it has the characteristics of a sentence in this case. This may not, however, be the correct analysis in all cases, particularly those in which this type of order is made in a litigation context other than a criminal prosecution.

[14] The correct classification of the compensation order made by the magistrates' court on 31 August 2023 is not germane to either of the questions raised for the determination of this court. Notwithstanding we consider it appropriate to make clear that the language of Article 14 of the 1994 Order – reproduced in para [2] above – in particular the words "… is convicted of an offence" and "… deal with him …" impels - inexorably to the conclusion that this is a sentence. The consideration that an order of this kind is also designed to provide reparation for an injured party does not deflect from this analysis.

[15] We return to the exercise to be performed. The statutory word "vary" is not defined. However, it is a familiar and uncomplicated member of the English language, to be given its natural and ordinary meaning. Having noted above that this court is concerned with variation only, an intense concentration on the terms of the two orders made by the magistrates' court initially (on 10 August 2021), reproduced in para [7] above, together with the later compensation order is necessary. The question is whether the compensation order made by the court some two years later constituted a variation of either of these orders.

[16] In our view a negative response to this question is appropriate, for the following reasons. First, the compensation order did not vary either of the earlier orders. The terms of both remained unchanged. Second, the compensation order was something new and additional. It was freestanding of both earlier orders, being a detached and self-contained new order.

[17] Furthermore, we reject the argument, based on the heading of Article 158A, that the exercise of this power was triggered because the PPS had made a "mistake" at the initial sentencing stage by not having available the necessary information or not applying for an adjournment of sentencing. First this was no mistake in the ordinary meaning of this word: the fact is that the relevant information was simply not available. Second, we find it extremely difficult to envisage any case in which a PPS mistake, to be contrasted with a mistake of the court, would generate the exercise of the Article 158A power. Furthermore, we take judicial notice of the fact that the stimulus for the introduction of Article 158A was a series of cases in which magistrates' courts had either convicted a defendant who had not been given notice of the hearing or had imposed a sentence in excess of their statutory powers. The absence of what later became the Article 158A power was frequently lamented by

Lowry LCJ in dealing with the judicial review applications to the Divisional Court which represented the only mechanism for correcting the aberrations of magistrates' courts, usually giving rise to a quashing order.

[18] Finally, we would make clear our view that the failure of the District Judge to adjourn the sentencing hearing to enable the PPS to secure the missing information was not a judicial "mistake" within the embrace of Article 158A. The peculiar kind of "mistake" contemplated by Article 158A, exemplified by the two illustrations in the preceding paragraph, which are not designed as an exhaustive list, does not include the case in which, *ex post facto*, the view is formed that it might have been better or more prudent for a magistrates' court to have taken a different course in a given case on a given listing date. The principle of legal certainty, coupled with the discernible legislative intention, is plainly antithetical to this suggestion.

[19] For the foregoing reasons, subject to rephrasing of the first question in the case stated (see *infra*), our resolution of this issue favours the appellant.

The Second Question of Law

[20] The case stated raises the further question of whether the impugned order of the District Judge had a lawful purpose. The essence of the submission of Mr Sayers KC was the following. The interests of justice, which govern the availability of the power under Article 158A(1), include certainty and finality: see *R v Croydon Youth Court, ex parte DPP* [1997] 2 Cr App R 411. Those interests are plainly undermined by the approach of the District Judge in the present case, which if correct would effectively permit the reopening of cases years after the event where further information was obtained, even where no mistake had in fact been made at the relevant time.

[21] On behalf of the PPS the riposte of Mr Henry KC was threefold. There are (he contended) three considerations relevant to the lawful purpose of the Order issued by the DJ, namely:

(i) First, the District Judge was attempting to serve the interests of justice, which is an overriding consideration within Article 158A(1). The Judge has made it clear that he considered all the relevant factors when determining where the interests of justice lay. This included "the delay in the prosecution in bringing the application under Article 158A and the need for finality in criminal cases." That is reflected in the fact that the compensation awarded was less than that which had been requested, and also having regard to the applicant's means. The Judge states, at (ii)(3) of the case stated:

> "the Compensation Order, although badly delayed, was not completely new to the defendant."

Notwithstanding the delay, he had not been taken completely by surprise.

(ii) Second, the purpose of the statutory compensation regime must also be taken into account when considering whether there is a lawful purpose to granting the Article 158A request. Article 14 of the 1994 Order provides the Court with power to award full or partial compensation to a victim of crime. That is what the Judge wanted to do in this case, to place the victim in a position closer to where they were before the offence was committed. By granting the Article 158A (application), he was giving effect to this lawful purpose.

(iii) Third, one facet of the lawful purpose is the avoidance of unnecessary proceedings in higher courts to deal with straightforward errors which are capable of being corrected in the magistrates' court: see *R v Williamson (supra)*.

[22] In our view, the second question in the case stated must be viewed as presupposing the determination of the first question in favour of the PPS. The reason for this is that having ruled that the magistrates' court's purported exercise of the power in Article 158A of the 1981 Order was unlawful, it would make no sense for this court to hold that the court nonetheless exercised the power for a lawful purpose. This would be illogical and incongruous. Illegality in this context does not have different shades or ingredients: rather, it constitutes a complete condemnation. Given this analysis, the second question in the case stated does not in our judgement arise. However, having received full argument, including further written submissions, and in deference to the District Judge's earnest endeavours we shall provide the following guidance.

[23] On the hypothetical premise of having resolved the first question in favour of the PPS, we prefer the submission of Mr Henry. Summarising our reasons, the principle of public law engaged by this second question of law is the familiar *Padfield* principle, which requires that the exercise of statutory powers be in furtherance of the aims and objectives of the statute. (*Padfield v Minister for Agriculture* [1968] AC 997). We are satisfied that the impugned order of the District Judge is harmonious with this principle. Furthermore, the judge plainly took into account material facts and factors and nothing immaterial intruded. The impugned order clearly lay within the scope of courses reasonably open to him. Finally, the judge was alert to the factor of delay and took this into account in measuring the appropriate amount of compensation. This disposes of the second question.

[24] An adjournment of the hearing became necessary for the purpose of enabling the parties to provide further submissions addressing certain questions raised by the court, including the reasonable time requirement enshrined in Article 6 ECHR. Given our resolution of the two questions, and bearing in mind that the District Judge was expressly alert to this issue, it is unnecessary for this court to venture further. It will suffice to remind practitioners of the decision of this court in *R v Dunlop* [2019] NICA 72, paras [19]–[30].

Disposal

[25] We consider that the first question in the case stated should be reformulated thus: Was the compensation order imposed by the magistrates' court on 31 August 2023 a variation of either the probation order or the restraining order imposed on 10 August 2021? For the reasons given the answer to this question is "No." As explained above, the second question does not arise given our answer to the first.

[26] It is appropriate to commend District Judge Broderick for the care and clarity which shine brightly in both his initial case stated ruling and the case stated itself.