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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 19/02/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

BEFORE A DIVISIONAL COURT

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY SAMUEL NICHOLL  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Before: Treacy LJ, Maguire J and Huddleston J

**MAGUIRE J (delivering the judgment of the court)**

**Introduction**

[1] The court has before it an application on the part of Samuel Nicholl (“the applicant”) for leave to apply for judicial review. The applicant is a man currently aged 30 years.

[2] The facts giving rise to the application may be summarised as follows:

- (i) The applicant in 2017 had been charged with offences which related to his driving of a motor vehicle on two separate dates. The first of these was 26 July 2017 when he was charged with having, on that day, driven while disqualified and driven without insurance. The second of these was 2 August 2017 when he was charged with having, on that day, done the same thing *viz* driven while disqualified and without insurance.
- (ii) In respect of these charges the applicant appeared before Lisburn Magistrates’ Court on 9 March 2018. On this occasion, he pleaded “guilty” to the charges and the case was adjourned so that a pre-sentence report in respect of him could be prepared. The applicant was released on bail and the date of 13 April 2018 was fixed as the date of sentencing.

- (iii) The applicant duly appeared at Lisburn Magistrates' Court on 13 April 2018. He was accompanied by a solicitor and counsel. On that day the presiding judge was Deputy District Judge Perry ("the DDJ"). He heard a plea in mitigation addressed to him by the applicant's counsel. Clearly an important aspect of the plea (which the court assumes was raised by counsel) was the possibility of the DDJ deferring sentence to a later date. The applicant in his grounding affidavit has averred that this "was a disposal he (the DDJ) was considering" (para 8) and he has later in his affidavit (para 17) further averred that he (the DDJ) had said that "notwithstanding a very relevant record, and that immediate custody was a likely disposal, that the circumstances of the case were such that he would have readily considered imposing a deferral of sentence". Notably, the DDJ, in an affidavit sworn on 4 February 2019, has averred that what he said was that:

"There were two possible outcomes, immediate custody or deferral. In relation to the latter I said that I might use deferral. The applicant's use of the word "readily" implies that I had given a clear indication as to the sentencing disposal in open court. This was not the case and I made that plain to him and his legal representatives at the time." (Para 5)

At all events on 13 April 2018 there was no dispute that the DDJ adjourned sentencing to a date when District Judge (MC) Watters, the Resident District Judge (DJ) would be sitting. The reason for the DDJ taking this course is not as clear as one might have hoped. According to the applicant's affidavit, in the course of the hearing on 13 April 2018, the DDJ "indicated that he was restrained [from imposing a deferred sentence]" (para 18). He, according to the applicant, observed that "as a Deputy District Judge he was restricted from deferring sentence" (ibid). However, again according to the applicant, the DDJ "did not elaborate on the nature of the restriction on him". The applicant further avers at para 19 of his affidavit, however, that "he [the DDJ] would adjourn the sentencing to allow the matter to be considered by the Resident District Judge (MC), who would have the power and/or freedom to impose a defer (sic) sentence unencumbered". The DDJ, in his affidavit, responded to the above by saying that "I made it clear in open court that the matter was entirely for the District Judge and that any comment I made did not and could not fetter her discretion; she could and would sentence as she saw fit (para 6).

All of this is consistent with what occurred, but the DDJ in his affidavit says no more than he was "aware ... of the desirability of ensuring continuity in the allocation of a judge in cases where deferral may be considered" (para 3). He also notes in his affidavit that "I am very clear in my recollection of events at the hearing as counsel for the applicant came to see me in Chambers immediately after the hearing, advising me that he had instructions to

judicially review my decision to adjourn his client's case" (para 5). Finally, he has averred further that he "had not seen a copy of [the Guidance which is impugned in these proceedings] when I dealt with the case" (para 3).

- (iv) On 14 May 2018<sup>1</sup>, the sentencing hearing seems to have begun again *de novo* as the DJ heard the applicant's plea in mitigation (applicant's affidavit at para 13). Moreover, according to the applicant, "the comments of Mr Perry [were] advanced before her" (ibid). At the end of the hearing, however, the DJ declined to defer sentencing in the matter and chose to impose an immediate custodial sentence of 5 months' imprisonment on each offence, concurrent with each other. She also activated in full a suspended sentence of imprisonment of 5 months which was to run consecutively to the custodial sentences she had already imposed. The applicant was also disqualified from driving for 4 years.
- (v) After handing down the sentence of the court on that date the DJ fixed bail for appeal and later a Notice of Appeal to the County Court was lodged by the applicant. However, that appeal has not progressed in view of these judicial review proceedings being initiated.
- (vi) In an unusual turn of events, the factual matrix of this application altered in the following way. On the day before the court was to deliver judgment the solicitor acting for the applicant filed an affidavit which took issue with some of the averments made on the part of the DDJ. Shortly afterwards the solicitor for the intended respondents, just before close of business, wrote to the court and asked it not to give judgment on the following day as "Counsel had identified significant irregularities in the affidavit evidence". The court convened to give judgment, as planned, but was then told by counsel on behalf of the intended respondents that he was withdrawing reliance on paragraphs 5 and 6 of the DDJ's sworn affidavit. No explanation was given for this. However, he made clear that this step had no impact on the legal arguments he had advanced at the original hearing. In the light of this, the court indicated that it would consider this development. Having done so, the court has decided that those parts of the DDJ's affidavit which have been cited above and which derive from paragraph 5 or 6 of his affidavit would be excluded from the court's consideration of the merits of the case. However, in the interests of transparency, the court also decided that it should, in its judgment, make clear what had occurred, as it has now done.

## **The Judicial Review Application**

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<sup>1</sup> This appears to be the correct date though the applicant's affidavit refers to the hearing before the DJ having been on 14 April 2018.

[3] There is agreement between the parties as a result of the hearing conducted in relation to this application in respect of three matters which the court considers should be mentioned.

[4] First of all, counsel for the applicant and counsel for the intended respondent both are of the view that this judicial review is in respect of a criminal cause or matter. The court respectfully accepts the correctness of this view.

[5] Secondly, it is now agreed that the focus of this judicial review is the role played by a guidance note for Deputy District Judges, and the terms in which it had been prepared. The question for the court is whether this guidance note, as it manifested itself in this case, operated lawfully. This will be addressed below.

[6] Thirdly, it has been agreed that if the guidance note indeed was unlawful, and affected the outcome in this case, the court should so declare and should, if appropriate, consider the question of whether it affected the decision of the DDJ to decline to deal with the issue of deferring sentence himself in favour of adjourning the case to the DJ. If this was the position, the court, it was jointly submitted to the court, should make consequential orders which include that the DDJ's decision to adjourn should be quashed, as should also the decision of the DJ in respect of her sentencing.

### **Delay**

[7] The court records that no issue about delay on the part of the applicant in initiating these proceedings has been taken by the intended respondents.

### **Replying Affidavits**

[8] Following the hearing before the court, in the interests of fairness, the court allowed time for the two judges - the DDJ and the DJ - to be further contacted so that, if they wished, they could file replying affidavits to that of the applicant and his solicitor. In the event, only the DDJ filed an affidavit, the contents of which have already been referred to above. The DJ has not filed a response.

[9] As will be made clear in due course, the Presiding District Judge, Judge Bagnall, on 8 November 2018 filed an affidavit in these proceedings dealing principally with deferred sentencing and the guidance note prepared for DDJ's.

### **The guidance note for DDJs**

[10] As already noted, this note lies at the centre of this application.

[11] From the affidavit of Judge Bagnall, it was issued under her authority on 12 November 2013 through the Judicial Studies Board. It was directed to DDJs. She notes at paragraph 9 of her affidavit:

“Given that DDJs may sit in a variety of NICTS locations, this guidance was issued in an attempt to ensure that courtesies were extended by DDJs to the permanently appointed Resident DJs and to avoid unnecessary disruption to the court deployment and lists.”

[12] This was expanded upon a little at paragraph 13 of her affidavit where she said:

“The guidance was intended to allow for the smooth running of the sentencing of offenders to enable a cohesive and consistent line of sentencing authority and decision making within the operational context of Magistrates’ Courts. This is reflected in that the guidance states that DDJs covering for Resident DJs should avoid becoming seised of cases unless absolutely necessary, which is a relevant case management consideration when deciding whether to exercise the discretionary power of deferment in a particular case.”

[13] The guidance itself is brief but was accompanied by a paper which was distributed with it. It was written by His Honour Judge David McFarland. This paper included the statutory provisions which related to deferred sentences and will be touched upon below.

[14] The key parts of the guidance are the two opening paragraphs, which read as follows:

**“Guidance Note to Deputy District Judges (MC)**

Please note when Deputy District Judges (MC) are covering for Resident District Judges they should avoid becoming seised of a case unless this is absolutely necessary. I would therefore be grateful if all Deputies would observe the following practices:

- A Deputy should defer sentence only in very exceptional cases. If you consider that deferral may be an appropriate option please adjourn the case to the next sitting day of the Resident DJ with a full note of what has happened and what you were considering to allow him/her to determine whether to defer.”

[15] There are then three further bullet points dealing with such matters as cases in which a DDJ has to return to complete a case; when a DDJ should consider him or

herself seized of a case; and the avoidance of discussions in Chambers where a DDJ is not going to be able to hear a case on a particular day. It is unnecessary for present purposes for the court to set these out.

[16] Judge McFarland's paper on deferred sentences accompanied the guidance.

[17] In respect of it, there is no dispute in this case about its accuracy. It draws attention to and provides the terms of Article 3 of the Criminal Justice (Northern Ireland) Order 1996 which is the statutory provision dealing with this issue. Under that provision, a Magistrates' Court may defer passing sentence on an offender "for the purpose of enabling the court to have regard, in determining a sentence, to his conduct after conviction (including, where appropriate, the making by him of reparation for his offence) or to any change of circumstances". The deferment must be to a date specified by the court, not being more than 6 months after the date on which the deferment is announced by the court. The court need not set out the detail of the provision which is fully dealt with in Judge McFarland's paper.

#### **Is the Guidance Note as regards deferred sentences lawful?**

[18] The problem with the guidance note, as exposed at the hearing before the court, is that there may be a real risk that it is written in terms which are unduly rigid and which have the effect of interfering with the judicial function of sentencing.

[19] For the applicant, Mr Macdonald QC SC, who appeared with Mr Coiley BL, submitted that, whether intended or not, the guidance restricts judicial discretion by instructing judges of a particular class (DDJs) only to defer sentence "in very exceptional cases". This, he argued, fettered their discretion unlawfully. There was nothing in the legislation, he asserted, which dealt with DJs or with deferred sentencing which warranted this form of restriction in respect of the carrying out of their sentencing function.

[20] In support of his argument, counsel relied on Section 10(2) of the Magistrates' Courts Act (Northern Ireland) 1964. This dealt with the appointment of DDJs and at sub-section (2) indicated that:

“(2) Any Deputy Magistrate may exercise and perform all the functions of a Resident Magistrate.”

[21] In other words, Mr Macdonald argued that in terms of the DDJ's sentencing function a DDJ has all the powers of a DJ. Consequently, there could be no warrant for limiting his ability to defer a sentence (or exercise any other power of a DJ) by telling him or her that he could only use the power in very exceptional cases.

[22] Likewise, Mr Macdonald pointed out that there was nothing in the scheme for deferring sentence which could justify distinguishing between the authority of the

DJ as against a DDJ. As he put it: “There was no two tier system in the Magistrates’ Court”. Otherwise, an offender who appeared before a DDJ and who wished to persuade the court to use the option of deferring sentence would be disadvantaged.

[23] Mr McGleenan QC, who appeared with Ms McMahon BL, for all of the intended respondents, argued that there was a real risk that the court could view the guidance as being about much more than it truly was. It had, he submitted, to be viewed in the round and in perspective.

[24] The inspiration for it, counsel argued, was that it was designed to deal with case management problems. It was therefore managerial in nature. It was not intended to cut down or limit the powers of DDJs, as Judge Bagnall had stated in her affidavit (see paragraph 12 where she stated that the guidance was not intended to serve to operate, to restrict or impose limits on sentencing judges so as to nullify discretionary power: see also paragraph 14).

[25] In any event, Mr McGleenan argued that in no sense had the statutory discretion been displaced. That this was so, moreover, was evidenced by the fact that Judge McFarland’s paper accompanied the guidance and the very terms of Article 3 of the 1996 Order dealing with deferrals – wholly unvarnished – had been provided to every DDJ who received the guidance, together with the assistance provided in understanding these documents from Judge McFarland. This left no room for confusion or doubt.

[26] However, when pressed about the use of the words “very exceptional” in the first bullet point of the guidance, Mr McGleenan was constrained to accept that this could have “some chilling effect”.

### **The court’s conclusion on this point**

[27] The court is persuaded by the arguments advanced on behalf of the applicant. In its view, the terms in which the guidance was cast were too strong and meant that there was a real risk that a DDJ would not bring his or her mind freely to bear on the discretionary sentencing exercise of considering whether or not to use the sentencing option of a deferred sentence. A headwind was thus created against a DDJ using such power by the use of the limiting phrase which stands out in the document *viz* that a Deputy should use the deferral power only in very exceptional cases.

[28] While the court acknowledges that not all of the language used in the guidance is written in the same vein and that, at least in its introduction, the language deployed in the guidance is that of a “request”, the court considers that it must approach the matter realistically. When it does so, it cannot escape from the conclusion that the guidance is marred by undue rigidity and is defective in this regard.

[29] Plainly, it is of the greatest importance that the width of judicial discretion in a matter as sensitive as the sentencing of offenders, in the absence of limiting statutory language, is safeguarded and that a DDJ should not feel constrained about exercising his or her authority on an equal basis as a DJ and without the pressure which flows or may flow from an unfortunate use of language which, whatever the intention, is antithetical to the unencumbered use of judicial discretion.

[30] Nor, in the court's view, can the difficulty erected by the language in this case be avoided by the guidance being accompanied by Judge McFarland's paper. In this area, the court believes that it will be the language of the guidance, especially that of the test the judge is being asked to apply, which would stick in a judge's mind rather than Judge McFarland's exposition of the law on deferred sentences.

**Was the DDJ's decision to adjourn affected by the existence of the guidance?**

[31] On the above issue, there is no agreed view among counsel. The matter must be determined by the court. Prior to the filing of DDJ Perry's affidavit, the court would not have hesitated to conclude that the evidence before it was such that the DDJ's decision to adjourn the matter on 13 April 2018 to DJ Watters must have been influenced by the tone and language of the guidance, especially in view of the averments of the applicant in his affidavit filed in these proceedings. At that stage, all of the evidence pointed in the same direction.

[32] The emergence of DDJ Perry's affidavit has created an area of doubt, in view of his averment (at para 3 which is a paragraph which has not been withdrawn) that he had not seen a copy of this guidance when he dealt with the case.

[33] As a result of this averment, the court has scrutinised this aspect of the matter with renewed vigour. It notes that the DDJ has averred that he was aware that guidance had been issued prior to his retirement from his position as a permanent DJ in 2016. He then goes on to say that he was "aware of the general content and of the desirability of ensuring continuity in the allocation of a judge in cases where deferral may be considered" (para 3).

[34] It seems likely to the court that the guidance the DDJ is referring to in these references is that which is at issue in this case.

[35] It is also likely that the DDJ, consciously or unconsciously, has taken from it the message that a DDJ should not deal with cases where deferral of sentence is a live issue but should adjourn the case to the Resident DJ.

[36] No other explanation for the overall course of events in this case occurs to the court.

[37] The limited basis on which the DDJ has directly challenged the applicant's affidavit, especially in the light of paragraphs 5 and 6 not now being relied upon,



points also towards the view that something was restraining him from going down the deferral of sentence road.

[38] In all the circumstances, the conclusion of the court is that it is likely that the use of his discretionary power to adjourn the matter to the DJ's court was significantly affected by the terms of the guidance and that it is likely that the DDJ regarded himself as bound to take this step.

### **Remedies**

[40] In view of the above the court will grant leave to apply for judicial review in this case and as the proceedings were conducted as a rolled-up hearing the court is in a position to indicate that it will grant judicial review substantively.

[41] Having received submissions from counsel in respect of the remedies which may be appropriate the court has decided as follows:

- (i) To make a declaration that those parts of the guidance contained in the first bullet point are unlawful and of no force or effect.
- (ii) To make an Order of Certiorari to bring up and quash the order of DDJ Perry to adjourn the sentencing hearing in respect of the applicant and to refer the case to DJ Watters.
- (iii) To make an Order of Certiorari to bring up and quash the sentence imposed by DJ Watters in respect of the applicant.
- (iv) To make an order remitting the matter to a Judge other than DJ Watters or DDJ Perry for the purpose of imposing such sentence on the applicant as the Judge considers fit.

[42] The court will hear from counsel on the issue of costs.

### **Parting Thoughts**

[43] The court is of the view, while not making a specific order in respect of it, that the best course of action should be that the requisite authority should withdraw the existing guidance in its entirety and should give consideration, in the light of this judgment, as to whether it should be replaced and, if so, to the terms of any replacement.

[44] The situation revealed by this case, it seems to the court, requires careful attention from a number of points of view and it would be worthwhile for greater clarity to be achieved as to the purpose or purposes of guidance of this type. That part of the evidence touching upon the purpose of the guidance in question, the court found to be lacking in clarity.

[45] Finally, it is impossible for the court to leave the case without commenting on the fact that in this case there were, in effect, two separate sentencing hearings; two separate openings of the facts and two separate pleas in mitigation by counsel. It is trite to observe that on the face of it this is an unusually resource intensive way of achieving case management goals.