Neutral Citation No: [2021] NIQB 110	*Ref:* **KEE11673**
	ICOS No: **21/226649 21/36798/01**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **26/11/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

BEFORE A DIVISIONAL COURT

_____

IN THE MATTER OF AN APPLICATION BY DAITHI McKAY
AND IN THE MATTER OF AN APPLICATION BY JAMIE BRYSON
FOR JUDICIAL REVIEW

_____

Between:

DAITHI McKAY
and
JAMIE BRYSON

Applicants

and

DOWNPATRICK MAGISTRATES COURT

Respondent

_____

Mr Martin O'Rourke QC with Mr Desmond Hutton QC (instructed by Madden & Finucane Solicitors) for the First Applicant Mr McKay
Mr John Larkin QC with Mr Alistair Fletcher (instructed by Phoenix Law Solicitors) for the Second Applicant Mr Bryson
Dr Tony McGleenan QC with Mr Philip Henry BL (instructed by the Departmental Solicitor's Office) for the Public Prosecution Service
Mr Joseph Kennedy (instructed by the Departmental Solicitor's Office) for the District Judge
Mr Mark Mulholland QC with Mr Eugene McKenna (instructed by O'Muirigh Solicitors) for the Notice Party Mr Thomas O'Hara

_____

Before: Keegan LCJ, Treacy LJ and Maguire LJ

_____

KEEGAN LCJ

Introduction

[1] In this case both applicants Daithí McKay and Jamie Bryson seek judicial review of their committal by a Magistrates Court on 5 March 2021 for trial on indictment in relation to the charge of conspiracy to commit misconduct in public office. A third person, Mr Thomas O'Hara, was also committed for trial on the same date and on the same charge. He has not brought a judicial review but he is a notice party to these proceedings. Leave was granted on the papers.

[2] The grounds upon which the applicants seek judicial review are essentially these:

(a) That the committal was procedurally unfair;

(b) That there was no evidence upon which the District Judge could have committed for trial in relation to the elements of the specific offence; and

(c) That committal for this offence was in breach of Article 7 and Article 10 of the European Convention on Human Rights ("the Convention").

[3] The committal order having issued, the arraignment of the three accused was listed for a date in April 2021 before the Crown Court. That has been held in abeyance pending these judicial review proceedings. We were also told that a certificate for hearing before a judge alone rather than jury was issued and is under separate legal challenge.

[4] In response to the applications it was submitted that the court could properly return the applicants for trial and, in any event, that this was not an appropriate case for judicial review of the decision of the District Judge as there was sufficient remedy in the Crown Court applying the principles from the case of *R v DPP ex parte Kebeline* [2002] AC 326.

Factual Background

[5] The prosecution arose out of events relating to the working of the Committee for Finance and Personnel (CFP) of the Northern Ireland Assembly which occurred in September 2015. At that time Mr Daithí McKay was a Member of the Legislative Assembly (MLA) and Chair of the Committee. The CFP conducted a review of the sale of the National Asset Management Agency (NAMA) property loan portfolio in Northern Ireland at this time. As the papers illustrate and as is common case this sale had become controversial with allegations that there was corruption in the sale and it was obviously a matter of public interest. In parallel to the Assembly Committee's review an investigation was undertaken into the NAMA process by the

National Crime Agency (NCA). This obviously raised the possibility that certain individuals might be prosecuted.

[6] The parallel process was clearly in the mind of the CFP in constructing Terms of Reference for its inquiry given the risk of inadvertently prejudicing the ongoing criminal investigation by the NCA. The Terms of Reference stated that the CFP should undertake a fact finding review in relation to the operations of NAMA in Northern Ireland including the Project Eagle sale and related policy and regulatory issues that fell within the Department of Finance and Personnel remit. Key objectives would include establishing the factual position as regards the relationship between the Department and NAMA, the NAMA Northern Ireland Advisory Committee and matters relating to the sale of the NAMA property loan portfolio particularly where the Department had any involvement.

[7] As part of this process Mr Bryson offered himself as a witness to the CFP. Ultimately, the Committee decided that evidence should be called from Mr Bryson. That position was communicated in correspondence to Mr Bryson in August 2015. Thereafter, there were three core meetings of the Committee on 3 September 2015, 16 September 2015 and on the day when Mr Bryson gave evidence, namely 23 September 2015.

[8] It is clear from our reading of the minutes that these meetings considered how the evidence of Mr Bryson would be taken among other matters. It is also clear that there was an anxiety among the Committee members as to whether or not the evidence of Mr Bryson should be taken in public or private session given the anticipated import of the evidence. Article 50 of the Northern Ireland Act 1998 provides that for the purposes of the law of defamation, absolute privilege shall apply to the making of a statement in proceedings of the Assembly.

[9] On 3 September 2015 there were discussions within the CFP Committee on the issue of how the evidence would be provided. On that date a vote was held and it was decided that the CFP would proceed to hear oral evidence on the basis that the CFP remained within its Terms of Reference and specifically that there would be a "direct link" between any evidence and the matters under investigation.

[10] The subsequent meeting on 16 September 2015 also discussed the issue of how the oral evidence would be taken. As part of an open session (which Mr Bryson himself was aware of and has commented on), a number of proposals were put forward about how this oral evidence would be heard. One member of the Committee, Mrs Cochrane, proposed a certain course which was ultimately accepted after a vote as follows:

> "That the general approach of the Committee in taking further oral evidence on the review will be on the following basis: where the witness can demonstrate their direct link with any of the parties referred to in the review

> of the Terms of Reference, their oral evidence will be taken in public session with the proceedings transmitted live and published in full in the official report by Hansard; or where a witness is unable to demonstrate the direct link with any of the parties referred to in the reviewed Terms of Reference, their oral evidence will be taken in closed session with no live transmission of proceedings but with a verbatim transcript being published in a redacted form if necessary (with decisions on any redactions being taken on the basis of legal advice.)"

[11] There was a further discussion between the committee members on 23 September 2015 in advance of the evidence of Mr Bryson. This was as to whether or not this particular evidence would be heard in public or closed session. Mr Bryson provided a summary of what his evidence would be. It was then agreed that Mr Bryson's evidence would be held in open session.

[12] There is a record of this evidence before us. From that we can see that an introduction was made by Mr Bryson after which there was a pause and the members of the Committee discussed the way forward. Thereafter, Mr Bryson provided further evidence and was questioned as a result of which he made various comments about alleged political influence in relation to the sale and alleged involvement of a specific politician in relation to a £7.5m success fee paid in relation to a specific part of the NAMA loan transaction sale. This evidence is controversial. It subsequently transpired that contacts had been made between Mr Bryson and Mr McKay and Mr O'Hara prior to this evidence being given. None of this was known by other members of the committee.

[13] We have been taken through the bulk of the messages which are before the court. The messages via Twitter started on 2 September 2015 and were initially said to be between Mr McKay and Mr Bryson. It is clear from these that there was general conversation about the fact that Mr Bryson was due to give evidence in Committee. We summarise some of the salient parts as follows.

[14] The exchanges start on 2 September 2015 and appear to be between Mr McKay and Mr Bryson directly. They refer to the Committee meeting and the process by which Mr Bryson may be called to give evidence.

[15] From 17 September 2015 correspondence comes via a Mr Thomas O'Hara after a message from Mr McKay which refers to a Twitter handle in his name. The reply from Mr Bryson to this is "done." The import of these messages is that there was discussion about how Mr Bryson would give his evidence and how he would deal with potential challenge to giving the evidence by Democratic Unionist Party (DUP) members of the Committee.

[16] A message of 18 September 2015 from Mr O'Hara reads:

> "The behaviour of Cerberus after the sale isn't strictly in terms of reference. Would be better if you worded it that the accounts relate to the sale of the NAMA portfolio
>
> Don't mention the 7.5 million and who stood to benefit. This is too close to the NCA investigation and DUP will use it as excuse to go into private session.
>
> Talk about it after we get you into public session.
>
> Also state that you have information relating to Fortress who were the failed bidder. Directly relevant to the sale.
>
> Keep letter simple, DUP may try and hang you on some of the details.
>
> Send me a draft of the letter you are sending and I will suggest changes. Keen to get you in public session."

The response is:

> "Bad timing I have just sent letter back to DFP committee. Here it is."

[17] There follows an exchange about this letter and further direction is provided by Mr O'Hara in relation to how the information is shared naming various people. As part of this exchange Mr O'Hara corresponds in the following terms:

> "The tricky one is the £7.5m as it is what the NCA is looking at. You may only get 10-15 seconds on this before Daithí as Chair has to pull you on it, so squeeze your best points on this into 1-2 lines and come straight to the point."

[18] The message back from Mr Bryson reads:

> "Is there an email I could send draft of opening statement to? Whats your view of my correspondence. Enough to get it public?

An e-mail address is then provided by Mr O'Hara and in the course of a further exchange he says:

> "It is my view that Daithi wants as much out as possible. If you play this right you will get most of your material out and will be better than grahams testimony. Fact you have documents adds a lot of credibility. Remember documents have privilege too."

The reply is:

> "When he steps in I will respectfully pull back apologise and move on. Just don't want kicked out. We need to get [Person A's] name out under privilege so media can report it's 100% him."

[19] Then Mr Bryson asks "let me know thoughts on opening statement, just sent." The reply states as follows:

> "Its good stuff. I suggest you restructure your approach. Dont give the committee an outline of what you're going to tell them until you tell them. You could reframe some of those points, the political message, for the closing of your statements."

[20] This advice is provided by Mr O'Hara:

> "A wee suggestion for your closing paragraph. When talking about – refer to him as Person A.
>
> So say all you have to say about him referring to him as Person A. Then in your final line say:
>
> Person A is –[the name is given in the text]
>
> Means that the committee cannot interrupt you and means that you don't have to say – name until the very last second
>
> So then its job done."

[21] There follows a further comprehensive exchange about how the evidence should be framed and how the Committee regulates its procedures. During the course of this reference is made to specific members of the Committee and their attitude. This ends with a message from Mr O'Hara

> "Spot on Jamie. Hopefully this with media pressure gets you over the line. Good luck tomorrow, everyone wants to hear you get this out in the public domain."

[22] The above is only a snapshot however it gives a flavour of the nature of the interactions in this case. It is also apparent from the exchanges that documentation was shared including a copy of Mr Bryson's written submissions in advance of him giving evidence.

[23] On 17 August 2016 an assistant to Jim Allister MLA received an email from an account in the name of Mr Bryson. This contained a selection of Twitter private messages said to be between Mr Bryson and Mr McKay and Mr Bryson and Mr O'Hara. These were sent to the police by Mr Allister. Following from this, Mr McKay tendered his resignation as an MLA for North Antrim on 18 August 2016. He issued a public apology in which he acknowledged and accepted that his conduct with a witness to the Committee's NAMA Inquiry in advance of his evidence was "inappropriate, ill-advised and wrong." Thereafter criminal proceedings ensued.

[24] The criminal process began with a complaint being initiated and directed to a Lay Magistrate on 24 December 2019. This charged the three persons who we have referred to namely, Mr McKay, Mr Bryson and Mr O'Hara, with conspiracy to commit an offence of misconduct in public office between 1 September 2015 and 24 September 2015, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law.

[25] These persons were served with Statements of Complaint and committal papers and the case proceeded by way of preliminary inquiry. Mr Bryson requested a mixed committal and for the calling of various witnesses to give evidence and this took place at Downpatrick Courthouse between 1 March and 5 March 2021. We have seen the witness list and a transcript of the evidence. The committal hearing was before District Judge Mr McGarrity ("the District Judge"). Mr Bryson appeared as a litigant in person and the other parties were represented by both senior and junior counsel. Written submissions were provided after the evidence by all counsel.

[26] It is accepted that no issues of procedural unfairness were raised at the committal hearing. However, it is also clear that substantial argument was made to the District Judge on the substantive issues. Upon considering the evidence before him, the District Judge determined that the test for committal was met and that the three accused should be committed for trial. The District Judge subsequently provided a "speaking note" which sets out his reasoning and which has helpfully been provided to the parties in these proceedings.

[27] During the course of the hearing before this court Dr McGleenan took us through the evidence of the alleged contacts between Mr McKay and Mr Bryson and Mr O'Hara which as we have said comprised electronic exchanges and exchange of documents. Mr O'Rourke and Mr Larkin did not take any specific issue with this grounding material for the purposes of this challenge. In addition, Mr O'Rourke said that this case could proceed on the basis that there was in fact an agreement between the parties and that for the purpose of this challenge the exchanges were in

effect designed to reduce the ability of the Committee to raise objection to any evidence given by Mr Bryson in public session and that this was improper. Therefore, the challenge focused on alleged procedural error at the committal hearing and the argument that there was no evidence to ground the committal applying domestic and Convention law. In these circumstances it was argued that the court could quash the committal and issue an Order of Prohibition or alternatively Mr O'Rourke suggested that the court could remit the case for reconsideration.

Legal considerations

[28] First, we examine the test to be applied by the District Judge when determining whether a case should be committed for trial on indictment in the Crown Court. Second, we set out the legal test on judicial review of a committal decision. Third, we consider issue of alternative remedy. Fourth, we discuss the ingredients of the legal offence at issue.

i. The Committal Test

[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." [our emphasis]

[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."

ii. The Test on Judicial Review

[32] This test was established in *Neill v Antrim Magistrates' Court* [1992] 4 All ER 846 and *R v Bedwellty Justices ex parte Williams* [1997] AC 225. Counsel all accepted that the standard of review is high and exacting however committal decisions may be impugned in certain circumstances depending on the particular facts at issue.

[33] These cases were subsequently examined by Carswell LCJ in the case of *Re Mackin*. 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.

[34] In the *Bedwellty* case the committing magistrates wrongly received in evidence inadmissible statements. There was no other evidence before the court to ground the committal and so it was quashed. In that case Lord Cooke also considered whether there was a valid distinction between a committal based solely on inadmissible evidence and a committal based on evidence not reasonably capable

of supporting it. This point is referenced in *Mackin* where Carswell LCJ quotes from Lord Cooke in the following passage:

> "My Lords, in my respectful opinion, it would be both illogical and unsatisfactory to hold that the law of judicial review should distinguish in principle between a committal based solely on inadmissible evidence and a committal based solely on evidence not reasonably capable of supporting it. In each case there is in truth no evidence not reasonably capable of supporting it. In each case there is in truth no evidence to support the committal and the committal is therefore open to quashing on judicial review. Nonetheless, there is a practical distinction. If justices had been of the opinion on admissible evidence that there is sufficient to put the accused on trial, I suggest that normally on a judicial review application a court will rightly be slow to interfere at that stage. The question will more appropriately be dealt with on a no case submission at the close of the prosecution evidence, when the worth of that evidence can be better assessed by a judge who has heard it, or even on a pre-trial application grounded on an abuse of process. In practice successful judicial review proceedings are likely to be rare in both classes of case, and especially rare in the second class."

[35] The outcome in *Mackin* was that the court did not consider that the test which it described as a "demanding test" propounded in the cited decisions was met. The court concluded that the facts of that case were "a long way from the grave miscarriage of justice" referred to in the cases cited.

iii. Alternative Remedy

[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."

[37] At page 371 H Lord Steyn also said that:

> "Such satellite litigation should rarely be permitted in our criminal justice system. In my view the Divisional Court should have dismissed the Applicant's application."

[38] In *Re Hegarty's Application* [2012] NIQB 14 Morgan LCJ when deciding that a judicial review was a collateral challenge of the type contemplated in *Kebeline* 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."

iv. The ingredients of the offence

[39] The offence of conspiracy derives from Article 9 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 which reads as follows:

> "(1) Subject to the following provisions of this Part, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either-
>
> (a) will necessarily amount to or involve the commission of any offence or offences by more or more of the parties to the agreement, or
>
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

> he is guilty of conspiracy to commit the offence or offences in question."

[40] The original charge on the Statement of Complaint read as follows:

> "That you, on dates between the 1st day of September 2015 and the 24th day of September 2015, conspired together to commit an offence of misconduct in a public office in respect of a public office holder, namely Daithí McKay, who without reasonable excuse or justification wilfully misconducted himself to such a degree as to amount to an abuse of the public's trust, by the manipulation of the presentation of evidence before the Northern Ireland Assembly Committee for Finance and Personnel, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law."

[41] It is common case that at the opening of the committal the defence made submissions on the charge and requested further particulars as to what it was the Crown sought to prove for the purposes of the committal. This was because of the issue of conspiracy and the substantive offence being charged together. Following from this particulars were sought and there was an exchange between the parties which led to an amended charge which read as follows:

> "That you, on dates between the 1st day of September 2015 and the 24th day of September 2015, conspired together to commit an offence of misconduct in a public office in respect of a public office holder, namely Daithí McKay, who without reasonable excuse or justification would wilfully misconduct himself to such a degree as to amount to an abuse of the public's trust, by the manipulation of the presentation of evidence before the Northern Ireland Assembly Committee for Finance and Personnel, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law."

[42] It was also clarified that the relevant public office was that of the applicant being a member of the Committee cited above. The "manipulation of presentation of evidence" was particularised to say that it meant:

> "The giving of evidence in open session of the Committee which the defendant knew would not otherwise have been permitted by the Committee to have been given in open session."

[43] The ingredients of the common law offence of misconduct in public office were identified in *AG's Reference (No.3/2003)* [2004] EWCA Crim 868 and restated by the Court of Appeal in *Chapman* [2015] EWCA Crim 539 [2015] QB 883. See also *Blackstone's Criminal Practice* B paragraphs 15.26 to 15.30.

[44] There are four elements to the offence to the effect that that it is committed where:

> "(i) A public officer acting as such;
>
> (ii) wilfully neglects to perform his duty and/or wilfully misconducts himself;
>
> (iii) to such a degree as to amount to an abuse of the public's trust in the office holder; and
>
> (iv) does so without reasonable excuse or justification."

[45] We were referred to a Law Commission report on the subject charge which is also referenced in *Blackstone*. This report points to the complexity of this area of law and recommends some changes. However, the law is as it stands at present and that was the law that the District Judge had to apply.

[46] Of course there will be cases where these ingredients have not been made out. This is illustrated by the quashing of a complaint in the case of *Johnson v Westminster Magistrates' Court* [2019] EWHC 1709. Rafferty LJ said that:

> "The offence will be made out only if the manner in which the specific powers or duties of the office are discharged brings the misconduct within its ambit. Consequently, at the time of the alleged misconduct the individual must be acting as, not simply whilst, a public official."

That case foundered as the first part of the test was not met.

[47] In *Attorney General's Reference No 3 of 2003* there is some useful consideration of the other ingredients of the offence, in particular, the issue of seriousness. At paragraph [46] of that decision the court said that:

> "[46] Having considered the authorities, we agree that the misconduct complained of must be serious misconduct. Whether it is of a sufficiently serious nature will depend on the factors stated by Sir Anthony Mason along with the seriousness of the consequences which

> may follow from an act or omission. An act or omission which may have as its consequence a death, viewed in terms of the need for maintenance of public standards to be marked and the public interest to be asserted, is likely to be more serious than one which would cause a trivial injury. This factor is likely to have less significance where, as in *Shum Kwok Sher,* the allegation is of corruption where the judgment upon the conduct may not vary directly in proportion to the amount of money involved."

[48] Paragraph [56] of that decision also draws on a case of *Shum Kwok Sher* reported at [2002] 5 HKCFAR 381 and states that:

> "[56] There must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice."

[49] At paragraph [57] the court said:

> "As Lord Widgery CJ put it in *R v Dytham* [1979] 3 All ER 641 at 644:
>
> > 'the element of culpability must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.'"

[50] Also at paragraph [58]:

> "It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer so as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively as in *R v G* [2003] 4 All ER 765, will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer. A default where the consequences are likely to be trivial may not possess the criminal quality required; a similar default where the

> damage to the public or members of the public is likely to be great may do so. In a case like the present, for example, was the death or serious injury of the man arrested the likely consequence, viewed subjectively, of inaction, or was it merely an uncomfortable night? There will be some conduct which possesses the criminal quality even if serious consequences are unlikely but it is always necessary to assess the conduct in the circumstances in which it occurs.
>
> [59] The consequences of some conduct, such as corrupt conduct, may be obvious; the likely consequences of other conduct of public officers will be less clear but it is impossible to gauge the seriousness of defaulting conduct without considering the circumstances in which the conduct occurs and its likely consequences."

Conclusions

[51] In reaching our conclusions we have considered the legal framework rehearsed above. We stress that this is a supervisory court. It is not a court of merit. Whilst certain factual matters have been opened to us this court is not deciding the ultimate outcome in this case and forms no view on factual disputes.

[52] The first argument relates to alleged procedural unfairness at the committal hearing. In advancing this case Mr O'Rourke accepted the point that notwithstanding the fact that his client was represented at the committal hearing by senior and junior counsel this point was not raised there. We also observe that both applicants were well aware of the issues, namely the request to particularise the ingredients of the charge and the subsequent change of the charge.

[53] Once provided with the revised particulars none of the applicants asked to recall witnesses, adjourn or make further submissions. In these circumstances we cannot see that there was any prejudice or unfairness caused. Any issue could have been corrected. Also, the terms of Article 37 of the Order which we have set out above are clearly a strong contra-indicator to this argument in that the provision empowers the District Judge to commit for trial for any indictable offence upon being satisfied that the evidence is sufficient. The case of *R v Ramsey* [2016] NICA 13 which is relied on is an entirely different circumstance. Overall, we do not believe that there is any merit in a procedural unfairness argument on the basis of how the case proceeded before the District Judge.

[54] The second limb of this challenge is substantive in nature. This has been raised by both counsel in different ways but the common thread is that it is related to the ingredients of the offence. Counsel for both applicants maintain that there was no evidence upon which this committal could be based rather than a case of

insufficient evidence. We acknowledge that in such a scenario a decision is susceptible to judicial review but the threshold is obviously high.

[55] The first point in support of the substantive argument is that the judge did not consider the seriousness element of this charge, either properly or at all. Secondly, it is argued that the judge did not consider the reasonable excuse aspect of the charge which coincides with the case being made in reliance of Article 10 rights under the Convention. Article 7 of the Convention is also raised as it is argued that there is an absence of certainty with a charge of this nature. A subsidiary argument is that, in fact, the Northern Ireland Act 1998 provides for an offence of non-registration of interests in Section 43 and this should have been the charge.

[56] We have considered these substantive arguments. In doing so we are mindful of the broad discretionary remit that a District Judge has when considering committal for trial. In that regard the elements of an offence must be established at a prima facie level without a final determination being made. We also proceed on the basis that substantive arguments can be made at trial as Mr O'Rourke expressly conceded.

[57] The obvious difficulty with the substantive arguments being advanced is that they are based on a claim of no evidence. It follows that to succeed with this argument the District Judge must be found to have made an irrational decision. That is a high hurdle particularly in this area where a court is considering committal. We do not consider that such an argument is sustainable for the following reasons.

[58] First, unlike the case of *Johnson,* the applicants here cannot rely on the public office point. This was also a conspiracy charge. Given the undisputed factual background of the exchanges between the parties who have been charged it cannot be said that there was no evidence. The interpretation to be applied to the evidence is another matter to be determined at trial.

[59] It seems to us that there is sufficient evidence to meet the committal test that this charge would arguably offend the public to the extent referred to in the case of *Attorney General's Reference No 3*. This offence may arise in a range of different circumstances. Whether or not it does is a factual issue to be examined at any trial taking into account all of the facts including any consequences.

[60] We accept the point that there was no express Assembly rule prohibiting contact with a witness. However, in our view, it is obvious that this case goes beyond contact between Committee members and witnesses into an alleged manipulation of the Committee process itself.

[61] We are not attracted to the argument that because there is no direct precedent in relation to this type of behaviour which took place before a Committee of the Assembly that committal for trial on the charge is unsustainable. This is an area of law which is developing based as it is on common law.

[62] We understand the point made by Mr Larkin that there is no direct reference to reasonable justification or excuse in the District Judge's speaking note however that must be seen in context. In real terms, certainly as regards to Mr McKay, no reasonable explanation or excuse was given. As regards Mr Bryson this argument relates to Article 10 rights which we have discussed above. In terms of the Article 10 Convention arguments, we observe that this prosecution seems to concern the method by which the information was imparted rather than anything said. In any event we consider that this Convention point, the Article 7 consideration and any other Convention points are eminently suitable for debate within a trial process.

[63] Finally, we are not convinced that the potential of an alternative offence under the Northern Ireland Act 1998 is a persuasive point. We cannot easily see that the alternative offence encompasses the entire course of alleged conduct at issue in this case. It can only relate to Mr Mc Kay. Even if available, we cannot see that this would be an automatic bar to the conspiracy charge proceeding to trial.

[64] Therefore, we do not consider that any of the substantive points can succeed within the framework of judicial review. We consider that there was enough to justify committing the applicants for trial. Overall, we do not consider that the District Judge has fallen into error in applying the statutory test.

[65] Whilst we have considered the merits of the arguments made in the foregoing paragraphs, we come back to the fact that the *Kebeline* principle is clearly engaged in this case. Any complaints or substantive arguments made in relation to the adequacy of the evidence and/or Convention rights can very well be accommodated within the criminal trial process. This court considers that a collateral challenge such as this brought to the Divisional Court is not appropriate when other options are clearly available. This court is a court of last resort. The specialist criminal framework is better suited to determination of these types of issues. The applicants are not prejudiced by this outcome because they can bring pre-trial applications for No Bill or applications at trial including abuse of process and thereafter there are appeal rights embedded in the criminal law process. Also, there is nothing stopping the applicants raising any points of law in the Crown Court.

[66] The delay occasioned by this judicial review has not been in the interests of those charged or the public. It seems to us that this case has been an unnecessary distraction in a case which is important and which should now be brought to a conclusion before the relevant court which we consider to be the Crown Court.

Disposal

[67] Accordingly, we are not minded to quash the decision to commit the applicants for trial or remit the matter back to the District Judge. The argument that this committal can be quashed on the basis of no evidence is unsustainable and so the applications will be refused.