Neutral Citation No: [2026] NICA 20 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:*	KEE13033
	ICOS No:	19/101922/A01
	Delivered:	08/05/2026

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT OF NORTHERN IRELAND SITTING AT BELFAST

THE KING

v

SEAN RODGERS

Mr Liam McCollum KC with Ms Suzanne Gallagher (instructed by the Public Prosecution Service) for the Crown
Mr Martin O'Rourke KC with Mr Colm Fegan (instructed by McIvor Farrell Solicitors) for the Applicant

---

Before: Keegan LCJ, Treacy LJ and Colton LJ

<u>KEEGAN LCJ</u> (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against a conviction for murder on 15 March 2022 following a jury trial before Her Honour Judge McColgan KC ("the judge") at Belfast Crown Court. The victim Edward Meenan was murdered on 25 November 2018. The applicant, and two co-accused Derek Cresswell and Ryan Walters were jointly charged on indictment with the murder of Edward Meenan, perverting the course of justice by the destruction of evidence, and with section 18 wounding with intent in respect of a William McConnell who was also assaulted. Ms Sinead White was separately charged with withholding information. Cresswell pleaded guilty to the murder, and Walters was convicted of manslaughter. The applicant also pleaded guilty to perverting the course of justice.

[2] Leave to appeal was refused by the single judge, McFarland J on 13 May 2024, however, an extension of time was granted. The applicant renews his application for leave to appeal against the murder conviction on three grounds as (as amended):

(i) That the applicant was convicted following an unfair trial, in circumstances where his legal representatives were discharged at the close of the prosecution case and the trial thereafter proceeded with the applicant unrepresented.

(ii) That the trial judge failed to properly direct the jury on the issue of self-defence, including the elements of necessity and reasonable force; and

(iii) That the jury were materially misdirected, or not adequately directed, on the statutory defence of loss of control.

[3] There is a large measure of overlap in the above grounds. Hence, the second and third grounds are capable of being treated either as freestanding grounds or as illustrative of the unfairness relied upon under the first ground. We have taken the latter approach and have assessed the overall fairness of the proceedings from the point when the applicant represented himself.

[4] Applying the well-established approach in *R v Pollock* [2004] NICA 34, the court must ultimately stand back and consider whether, having regard to the proceedings as a whole, any material irregularity or combination of factors means that the verdict is unsafe.

Factual background

[5] The background is not in dispute and so we confine ourselves to the salient facts. In the early hours of 25 November 2018, an incident occurred at the home of Sinead White at 20 Creggan Street, Derry, which resulted in the death of Edward Meenan. The applicant, together with Cresswell and Walters, had been consuming alcohol at the property during the evening of 24 November 2018. Ms White herself was not present at the material time.

[6] At approximately 2:00am, Edward Meenan and William (Billy) McConnell attended at the rear of the property wearing balaclavas and latex gloves and may have been armed with sewer rods. A confrontation developed outside the back door of the property involving the applicant, Cresswell and Walters. Mr McConnell was injured but managed to escape. Mr Meenan was subjected to a brutal assault, sustained multiple injuries including stab wounds and died at the scene.

[7] In the aftermath of the incident, the deceased's clothing, together with items belonging to the applicant and a knife, were burned at the applicant's mother's address. The police were subsequently contacted. The applicant participated in a police interview in which he made largely no comment responses. However, his account of events evolved over time. In his first defence statement of 30 September 2020, he denied being present when the murder occurred. In a second defence statement of 7 November 2021, he maintained that he was asleep when the murder

occurred. The applicant's account which was eventually given in evidence once he became unrepresented was that he acted in self-defence and/or was provoked (now replaced by statute as a partial defence under the heading "Loss of self-control"). The significance of these differing accounts is addressed later in this judgment.

Fresh evidence

[8] The updated report from Mr Joe Dwyer educational psychologist of 10 July 2025 who reported during this trial is not controversial and so we have admitted and considered it. However, the applicant also applied to introduce fresh evidence post-trial on a new issue of the effect of medication on the applicant from Professor Thomas Trinick, Consultant Chemical Pathologist and General Physician. His reports are dated 16 April 2025, 22 May 2025, 3 June 2025 and 21 December 2025. He opines on the effect the applicant's medication may have had on his ability to conduct his defence. The applicant was taking four medications to deal with substance misuse and depression, anxiety and sleep deprivation. Professor Trinick opined that some of the medications, namely Gabapentin and Sertraline may have affected the applicant's cognitive ability and his ability to make informed choices and decisions in his case although he did not suggest that this would apply in every case.

[9] The prosecution obtained its own report on the medication issue from Mr Stephen Morely, Consultant Chemical Pathologist and Forensic Toxicologist. This report is dated 4 November 2025. It disputes Professor Trinick's opinion on the basis that "the generic comments made by Professor Trinick about each of the four drugs are basically accurate but provide minimal consideration of context and issues such as drug tolerance."

[10] We admitted this body of evidence *de bene esse* to allow us to assess its relevance in the overall context of the case.

Procedural background

[11] A first trial commenced before the judge on 8 November 2021. On 11 November 2021, White pleaded guilty to withholding information. On the same date, the applicant was rearraigned and pleaded guilty to perverting the course of justice. The following day, 12 November 2021, the trial was aborted due to concerns arising from the applicant's presentation and behaviour in court. This gave rise to questions regarding his fitness to stand trial.

[12] Following the collapse of the first trial, the court directed that expert assessments be obtained. Reports were prepared by Dr Curran (consultant psychiatrist), Dr Weir (consultant clinical psychologist), and Mr Dwyer. Dr Curran concluded that the applicant was fit to stand trial, attributing his presentation during the first trial to dissociation rather than lack of fitness. However, the applicant was assessed as a vulnerable individual with a number of physical, mental and cognitive

difficulties, including an IQ of 63. Mr Dwyer's report indicated that he has a mild to moderate learning disability with which the prosecution took no issue.

[13] In light of the expert evidence, the court made a special measures direction appointing a Registered Intermediary ("RI"), Ms Tara Thompson, to assist the applicant in advance of the retrial. An intermediary report was prepared and was before the court at the commencement of the second trial.

[14] The retrial began on 31 January 2022. At that stage, the defendants on trial were the applicant, Cresswell and Walters, White having already pleaded guilty. The prosecution case was presented between 31 January and 25 February 2022.

[15] During the course of the Crown case, on 17 February 2022, Cresswell was rearraigned and entered guilty pleas to the murder of Edward Meenan, to perverting the course of justice, and to section 20 grievous bodily harm ("GBH") in respect of William McConnell, which was accepted by the Crown in lieu of the section 18 count. An agreed basis of plea was entered.

[16] The prosecution case against the applicant and Walters closed on 25 February 2022. On 28 February 2022, following the refusal of submissions of no case to answer made on behalf of both defendants, a dispute arose between the applicant and his legal team. Discussions took place later that day in chambers concerning the position of the applicant's legal representatives, followed by written correspondence between the court and the representatives.

[17] The next day, 1 March 2022, senior counsel for the applicant formally applied in open court to withdraw from the case citing an irretrievable breakdown in the professional relationship with his client. The application was granted and the trial proceeded immediately with the applicant acting in person. The applicant was afforded a short opportunity, of approximately 30 minutes, to consult with the RI before commencing his evidence.

[18] The applicant's evidence-in-chief was conducted by the judge with the assistance of the RI. In summary, contrary to his previous defence statements, he admitted that he was involved a physical altercation with the deceased. He said that he, Creswell and Walters went to the door when they were approached by two masked men, one of whom was the deceased. His evidence was that he freaked out, it "triggered" him, it was "fight or flight." He says that he ran to the back door to try to stop the men coming in but they tried to push the door to get in. He says he was punched in the eye by one of the men. He then engaged with the deceased whilst the other two co-defendants engaged with McConnell. When McConnell ran away his evidence was that the co-defendants joined him in attacking the deceased. He asserted that one of the other co-accused, but he did not know who, stabbed the deceased and one of them used a weapon. He said that Walters used a baseball bat on the deceased and that Walters forensically wiped and cleaned items after the incident. He said he was terrified when the masked men arrived at the door with

weapons, that he freaked out, that it scared the life out of them and it was just a trigger. They did not know for example if there were more people in the back yard because it was pitch black with barely any light. He thought it might have the "RA" coming to do a punishment attack. He did not know if the deceased had a gun; he did not know if there was more people in the yard.

[19] He was subsequently cross-examined by senior counsel for the Crown Mr McCollum KC and by senior counsel for Walters Mr Kearney KC. Walters gave evidence on 2 and 3 March 2022 and was cross-examined by the applicant in person, followed by extensive cross-examination by Crown counsel.

[20] The defendant's co-accused, Mr Walters gave evidence to the effect that it was the applicant who had inflicted the injuries on the deceased and who was responsible for his death. Walters denied laying a glove on the deceased. In short, the jury was considering a "cut-throat" defence.

[21] During the defence case on 28 February 2022, additional evidence was introduced on behalf of Walters concerning a discussion in a prison van on 23 February 2022. This was to the effect that the applicant was overheard threatening Walters. He was alleged to have said "are you going to stick by your statement when giving evidence? … If you say anything about me in court, you'll be coming to Maghaberry Ryan remember that … Now's the time to sort it Ryan, get it done." There was no formal application made to admit this evidence or formal consideration of it. Rather, a statement of a prison officer was produced along with an audio recording of the conversation in the back of the prison van. The prison officer gave evidence in relation to that incident and was cross-examined by the applicant.

[22] Closing speeches were delivered on 7 and 8 March 2022. The applicant's closing address lasted approximately eight minutes. Counsel for Walters, Mr Kearney, addressed the jury over the course of approximately one and a half days.

[23] The jury returned their verdicts on 15 March 2022. The applicant was convicted of the murder of Edward Meenan and acquitted of the section 18 wounding of William McConnell. Walters was acquitted of murder, convicted of the manslaughter of Meenan, acquitted of section 18 wounding, and convicted of section 20 GBH of McConnell. On 5 July 2022, the applicant was sentenced to life imprisonment with a tariff of 18 years. Cresswell received a life sentence with a tariff of 15 years, Walters received a determinate sentence of eight years' imprisonment in respect of the manslaughter conviction, and White received a probation order.

The applicant's case

[24] Mr O'Rourke KC argued that a number of procedural irregularities flowed from the withdrawal of legal representatives for the applicant and that thereafter the trial was not fair due to a myriad of errors that were made including the lack of time afforded to the applicant to prepare his case, the way questions were asked and the evidence presented. He also maintained that the judge provided a flawed *Lucas* direction, misdirected the jury on self-defence which the applicant put in issue and gave no adequate direction on loss of control which the applicant also put in issue.

[25] In advancing his case Mr O'Rourke stressed the applicant's vulnerability and the role of the RI. He referred to the fact that the experts concluded that the applicant was fit to stand trial, but identified substantial cognitive and communicative limitations, including a very low IQ, poor comprehension, difficulty processing information under pressure, and impaired concentration. On the basis of that material, a special measures direction was made appointing an RI in advance of the retrial.

[26] Mr O'Rourke contended that the judge approached the applicant's lawyers withdrawal from the case as presenting a binary choice between abandoning the trial or proceeding immediately without representation, without giving sufficient consideration to adjourning the proceedings to permit the applicant to obtain legal advice or alternative representation, contrary to the principles articulated in *R v Bain* [2020] UKPC 10 and *R v Reid* [2024] EWCA Crim 308. In addition, Mr O'Rourke maintained that the judge misdirected the jury in several material respects in relation to the case of self-defence and loss of control the applicant made when representing himself and as to the *Lucas* direction she gave.

[27] Mr O'Rourke highlighted the fact that when counsel were permitted to withdraw, the judge expressly relied upon the continued presence of the RI as a factor in determining that the trial could proceed. It was not disputed that the RI remained present throughout the relevant stages of the trial and intervened on a limited number of occasions. The applicant's case, however, is that the RI was implicitly treated as a compensatory safeguard for the loss of legal representation, notwithstanding the limits of the RI's role.

[28] The argument was advanced that an RI may assist with communication but cannot provide legal advice, conduct an examination-in-chief, object to improper questioning, regulate forensic imbalance, or mitigate the strategic disadvantages of self-representation in a cut-throat murder trial. It was contended that the procedural safeguards identified as necessary were not implemented in substance, including the failure to convene a ground rules hearing ("GRH"), and that reliance on the RI could not cure the underlying unfairness. Counsel argued that his concerns were borne out by the number of questions put to the applicant which breached the recommendations of the RI report - Schedule 1 of the applicant's supplementary

skeleton argument references 492 such questions the majority of which were from Mr Kearney.

[29] Mr O'Rourke also focussed on disparity in the manner in which the respective defence cases were presented once the applicant became unrepresented. Reference was made to the following. His evidence-in-chief, conducted by the judge, lasted approximately sixteen minutes and was followed by extensive cross-examination by senior counsel for the Crown and the co-accused. By contrast, his cross-examination of the co-accused Walters, a key adversarial witness in a cut-throat case, lasted a matter of minutes. A similar imbalance is relied upon in relation to closing submissions, where the applicant addressed the jury for approximately eight minutes following a lengthy and complex trial, compared with approximately one and a half days addressed by Mr Kearney for Walters.

[30] Mr O'Rourke asked the court to consider the applicant's complaints about the trial process not in isolation but cumulatively. He maintained that they were illustrative of the structural and inevitable disadvantage faced by a vulnerable defendant required to represent himself in a murder trial. The applicant's case was essentially that these disadvantages compounded the inequality of arms arising from the loss of legal representation and formed part of the cumulative unfairness relied upon as Ground 1 of appeal.

The prosecution reply

[31] Mr McCollum KC submitted that the applicant received a fair trial and that the conviction is safe. While accepting that a conviction following an unfair trial cannot stand, Mr McCollum emphasised that not every procedural irregularity gives rise to unfairness and that the appellate focus must remain on whether any prejudice capable of affecting the verdict has been demonstrated.

[32] During exchanges Mr McCollum frankly accepted that some procedural irregularities had occurred. However, he maintained that these errors had no impact on the fairness of the trial given the strength of the evidence against the applicant and the fact that self-defence and or loss of control was not open to him on the evidence.

[33] The core of Mr McCollum's submission was that the judge's directions on self-defence and loss of control did not amount to misdirection. It was contended that neither defence arose to a prima facie level on the evidence and that, in any event, any imperfections in the summing-up could not realistically have affected the jury's conclusions.

[34] Mr McCollum stressed the brutal circumstances in which this murder occurred. He contended that there was CCTV and other evidence placing the defendants together following the incident at the applicant's mother's address, where the deceased's clothing, together with items belonging to the applicant and a

knife, were burned. Emphasis was placed by Mr McCollum on the evolution of the applicant's accounts, culminating in evidence in which he admitted active participation in a sustained attack while denying intent to kill. Thus, it was submitted that the jury was entitled to reject that final account.

[35] Mr McCollum also reminded the court that the applicant was fully and competently represented throughout the entirety of the prosecution case, which spanned several weeks and involved extensive forensic, CCTV and technical evidence. It was emphasised that the decision to terminate the solicitor-client relationship was taken by the applicant himself, without adequate justification, and only after adverse rulings had been made and after the prosecution case had closed.

[36] The fraught history of proceedings was also highlighted as the first trial was aborted due to concerns arising from the applicant's conduct. During the second trial the applicant behaved disruptively on occasions. Therefore, the case was made that the judge was entitled to regard these matters as relevant when considering whether the applicant was seeking to manipulate the trial process.

[37] Mr McCollum argued that the trial judge faced a genuinely binary choice. This was because any adjournment to seek alternative representation would, in practical terms, have required discharge of the jury and the recommencement of the trial. Given the advanced stage of the proceedings, the presence of a co-accused, and the interests of the deceased's family and the public, the respondent submits that it was open to the judge to direct that the trial continue.

[38] He also maintained that the presence of the RI was evidence that the judge was alive to the applicant's vulnerabilities and put safeguards in place, including conducting the applicant's evidence-in-chief herself and ensuring the availability of the intermediary throughout. It was contended that the limited number of intermediary interventions demonstrates that the applicant was able to understand and respond appropriately to questioning, and that the transcripts reveal meaningful engagement with the proceedings.

[39] Furthermore, the submission was made that, irrespective of representation, the applicant would inevitably have been cross-examined by both the prosecution and the co-accused. It was argued that legal representation could not have altered the substance of the applicant's evidence, which amounted to an admission of active participation in a prolonged and violent assault, coupled with post-offence concealment. The respondent characterises the applicant's evidence as, in effect, a confession and submits that no plausible evidential avenue was left unexplored as a result of self-representation.

[40] Addressing the applicant's reliance on disparities in the duration of questioning and closing submissions, Mr McCollum argued that such matters must be assessed in context. It was contended that the length of questioning and submissions reflected the differing evidential positions of the defendants, that the

applicant was afforded as much time as he wished, and that the brevity of his closing address reflected the nature of his case rather than any procedural unfairness.

[41] In relation to self-defence, the point was forcefully made that while it may arguably have arisen at the outset of the encounter, once the deceased was helpless on the ground the scale, duration and savagery of the attack rendered any suggestion of reasonable or necessary force untenable. Reliance was placed on the applicant's own evidence that three individuals attacking one man on the ground could not amount to self-defence.

[42] As to loss of control, Mr McCollum submitted that the statutory criteria under sections 54 and 55 of the Coroners and Justice Act 2009 were simply not satisfied. That was because the applicant repeatedly denied having lost control, instead characterising his conduct as reactive or defensive. Therefore, it was contended that there was no basis upon which the trial judge could leave the partial defence of loss of control to the jury.

[43] In summary, the prosecution maintained that the judge exercised her discretion lawfully in difficult circumstances, that the applicant brought about the loss of legal representation by his own actions, that appropriate safeguards were adopted, and that no prejudice capable of impacting the verdict has been established. Therefore, the prosecution maintained that the conviction was safe and the appeal should be dismissed.

Relevant legal principles

[44] Under common law and article 6 of the European Convention on Human Rights ("ECHR"), every criminal defendant has a right to a fair trial. The parameters of this right are found in Article 6(3). Article 6(3) ECHR guarantees every defendant the following minimum rights:

> "(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) **to have adequate time and facilities for the preparation of his defence**;
>
> (c) to defend himself in person or **through legal assistance of his own choosing or,** if he has not sufficient means to pay for legal assistance, to be **given it free when the interests of justice so require**;

(d) to examine or **have examined witnesses against him** and to obtain the attendance and examination of witnesses on his behalf **under the same conditions as witnesses against him**;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[emphasis added]

[45] Strasbourg jurisprudence in relation to fair trial rights emphasises that the focus is on the fairness of the proceedings as a whole rather than the entitlement to any particular configuration of representation in every case.

[46] *R v Randall* [2002] UKPC 19 at [27]-[28], *R v Naz* [2017] EWCA Crim 482 at [32], *R v Valliday* [2020] NICA 43 at [27]-[40] are core authorities which discuss the consequences of a breach of fair trial rights in a criminal context. In *R v Randall* at para [28], Lord Bingham explained how the strength or otherwise of a case does not neutralise the right to a fair trial in the following terms:

> "The right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross or so persistent or so prejudicial or so irremediable that an appellate court will have no alternative but to condemn a trial as unfair and quash a conviction as unsafe however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

[47] In *R v Naz* the court reiterated the point of principle at para [32]:

> "We can dispense with that line of response straight away. If the matters complained of rendered the trial unfair, then the strength of the case against the applicant is totally irrelevant. Every defendant, including a defendant faced with a strong prosecution case, is entitled to a fair trial. That is an absolute right irrespective of the strength of the evidence."

[48] In addition to fair trial rights which attach to every defendant further safeguards are provided to vulnerable witnesses. In Northern Ireland the treatment of vulnerable defendants is governed by a statutory framework and by Practice Direction. The Criminal Evidence (Northern Ireland) Order 1999 makes provision for measures designed to facilitate effective participation in criminal proceedings

where an accused's ability to give evidence or engage with the trial is compromised, known as "special measures." Part 2A of the 1999 Order provides for the use of live link and for the examination of an accused person through an intermediary.

[49] Article 21BA of the 1999 Order applies to any criminal proceedings against an accused person. Where the court is satisfied that the statutory conditions are met and that the giving of the direction is necessary in order to ensure that the accused receives a fair trial, the court may direct that any examination of the accused be conducted through an intermediary. Article 21BA(4) provides that:

> "The function of an intermediary is to communicate—
>
> (a) to the accused, questions put to the accused, and
>
> (b) to any person asking such questions, the answers given by the accused in reply to them,
>
> and to explain such questions or answers so far as necessary to enable them to be understood by the accused or the person in question."

[50] This statutory scheme is supplemented in Northern Ireland by a comprehensive Practice Direction No. 2 of 2019 (as revised in December 2025) ("PD2 of 2019"). Annex B of PD2/ 19 applies where a defendant is identified as vulnerable and makes provision for adaptations to trial process and procedure to ensure understanding and participation including express provision for the use of ground rules hearings ("GRH"):

> "GRHs must be arranged where the defendant is a child, or where a Registered Intermediary has been appointed to aid communication."

[51] PD2 of 2019 further provides that a GRH is to be held before the trial and attended by the trial judge, all legal representatives, and the intermediary where appointed, for the purpose of establishing the questioning framework.

[52] In *R v Bain* (reaffirmed in *R v Reid*), the principles governing the continuation of criminal proceedings following the loss, dismissal, or withdrawal of legal representatives are set out. Essentially, the trial judge retains a discretion as to whether and how the trial should continue. In exercising that discretion, the judge is required to consider whether continuation would be consistent with the overall fairness of the proceedings, having regard to the stage reached, the seriousness and complexity of the case, and the defendant's ability to participate effectively. An accused may represent himself, subject to the court's continuing responsibility to ensure the fairness of the proceedings.

[53] In *R v Bain* the Privy Council considered previous authority before summarising its guidance emanating as follows (at [40]):

> "(1) There is no absolute right to legal representation.
>
> (2) When counsel seeks to withdraw during the course of a trial consideration should be given to (i) persuading counsel to remain; (ii) explaining clearly to the defendant the difficulties he may face if he tries to proceed at trial on his own and without representation; (iii) affording, where appropriate, time for reflection or a cooling-off period; (iv) the prejudice that the defendant will suffer if counsel withdraws, and (v) whether there should be an adjournment to enable the defendant to try to obtain alternative representation.
>
> (3) The decision to allow a trial to continue with an unrepresented defendant is a matter of the trial judge's discretion, but it is a discretion which must be carefully exercised. Relevant factors will include (i) whether the defendant is at fault and, if so, the degree of such fault; (ii) whether there is any suggestion of manipulation or abuse; (iii) whether the defendant wishes to represent himself and, if so, the extent to which that is a matter of free and informed choice; (iv) the history of the proceedings and the stage which the trial has reached; (v) the apparent abilities of the defendant; (vi) the seriousness of the charges and the complexity of the issues in the case and the extent to which skilled representation is likely to be needed; (vii) the availability of alternative representation; (viii) whether an adjournment will be required and, if so, the impact of any adjournment on the proper conduct of the case, including in relation to the availability of witnesses.
>
> (4) The fact that a defendant is unrepresented does not in itself mean that the trial is unfair. If it is the result of the free and informed choice of the defendant or if he has brought it upon himself, as, for example, if he is judged to be manipulating the system, then it is unlikely to be unfair. Even if there is no such choice or fault, the prejudicial effect of the lack of representation needs to be

> considered. All relevant circumstances must be taken into account, including the impact of the defendant's lack of representation on the conduct of the trial, the evidence and the outcome.

> The Board would expand upon (2) to say that if there appears to be an impasse between the defendant and his counsel, consideration should be given to exploring whether there are any ways in which it might be overcome, if need be with a degree of compromise on both sides. This is especially important in a trial on a charge of murder or other grave offence, reflecting the observation in *Dunkley* (p 427) that it is highly desirable that a defendant in a murder trial should be continuously represented "where possible."

[54] Paras [58]-[75] of *R v Bain* are particularly useful as there the court set out a series of questions which are a ready reckoner for any judge dealing with this issue. They are:

> "(i) Did the judge seek to persuade counsel to remain?
>
> (ii) Did the judge explain clearly to the defendant the difficulties he may face if he tries to proceed at trial on his own and without representation?
>
> (iii) Did the judge afford time for reflection or a cooling-off period?
>
> (iv) Did the judge consider the prejudice that the defendant would suffer if counsel withdrew?
>
> (v) Did the judge consider whether there should be an adjournment to enable the defendant to try to obtain alternative representation?
>
> (vi) Whether the defendant is at fault and, if so, the degree of such fault?
>
> (vii) Whether there is any suggestion of manipulation or abuse?
>
> (viii) Whether the defendant wishes to represent himself and, if so, the extent to which that is a matter of free and informed choice?

(ix) The history of the proceedings and the stage which the trial has reached?

(x) The apparent abilities of the defendant?

(xi) The seriousness of the charges and the complexity of the issues in the case and the extent to which skilled representation is likely to be needed?

(xii) The availability of alternative representation?

(xiii) Whether an adjournment would be required and, if so, the impact of any adjournment on the proper conduct of the case, including in relation to the availability of witnesses?"

[55] Some caution should be applied to Privy Council cases which concern capital murder. However, the broad principles are applicable. In this jurisdiction in *R v Maguire* [2015] NICA 71, the above principles were applied. Having considered the case law, the court in *Maguire* said:

> "[98] What is apparent from this overview of the relevant authorities is that it is necessary to examine carefully the precise circumstances and facts in the individual case. The outcome of the individual case cannot be determined simply by finding that a defendant was unrepresented or simply by finding that his lack of representation was caused by the failure of counsel to represent him. What is called for in each case is a careful scrutiny of the actions of the defendant, the legal representatives and the trial judge."

This is the approach we adopt.

Our consideration

[56] A central aspect of the appeal concerns the circumstances in which the applicant ceased to be legally represented and the decision thereafter to allow the trial to proceed with the applicant acting in person. That decision arose at a critical juncture, immediately following the close of the prosecution case and the refusal of submissions of no case to answer, but before any part of the defence case had been presented.

[57] We begin by examining how the application to come off record was made. We can see that whilst senior counsel applied in open court, this followed prior discussions in chambers and written correspondence between the judge and counsel

on the preceding day. It is unfortunate and a breach of good practice that these discussions were not recorded see *R v Daniels* [2021] EWCA Crim 44. In any event, the subsequent exchanges demonstrate that a significant period of reflection and deliberation was devoted to whether counsel should be permitted to withdraw at that stage, with the judge expressing reluctance to do so given the advanced state of the proceedings and the imminence of the defence case.

[58] When the matter was addressed in open court the next day, senior counsel applied to withdraw, citing an irretrievable breakdown in the professional relationship. The focus then turned to the applicant's position and the manner in which the trial would continue. At this point further breaches of good practice occur. First, the formal application to come off record was only partially made in the presence of the applicant as he arrived in court mid application. Once counsel withdrew, the court does not appear to have explored whether allowing time might enable the applicant to obtain advice, seek alternative representation, or reflect upon his position with proper support. There was no cooling off period given. Rather, the judge proceeded on the basis that the trial would continue immediately, with RI and judicial assistance as the principal safeguards.

[59] The transcript demonstrates that, when addressing the applicant, the judge spoke to him at some length and largely uninterrupted. During that exchange, the judge posed a series of questions and statements which, viewed through the lens of the RI framework, may be regarded as compound, tagged or front-loaded in form, and at times as inviting agreement rather than eliciting free narrative responses. The applicant responded with evident uncertainty. Specifically, when told that the trial could continue with him representing himself, he responded "Sorry?", and when informed that this was the likely outcome, he stated in terms:

> "Well I don't know like. I don't know how I am going to defend myself like … I need legal advice. I need help."

[60] The above quotation is significant for several inter-related reasons. First, it represents an express articulation by the applicant that he did not consider himself able to defend the case unaided and that he wished to receive legal advice. Second, it was made in circumstances where the judge was already aware that the applicant had been assessed as a vulnerable defendant and required the assistance of a RI. Third, it formed part of the factual foundation upon which the decision to proceed without representation was taken.

[61] Surprisingly ,despite the representation made by the applicant and set out at para [59] above the judge indicated that the most likely way forward was for the trial to continue as she had to take a number of matters into consideration including the advanced stage of the trial, the views of the co-accused and the views of the victim, as well as the need to guard against manipulation of the trial process. When the applicant reiterated that he was not attempting to stop or derail the trial, the judge stated:

> "That's fine, as long as we understand that the defendant is actually indicating formally that he did not intend to stop the trial and is willing to represent himself in proceedings."

[62] On any read the conclusion reached by the judge is not correct as the applicant did not say he was willing to represent himself. The manner in which the applicant was addressed, the structure of the questioning, and the speed with which his reassurance that he was not seeking to disrupt the trial was translated into an apparent acceptance of self-representation, bears upon an assessment of whether he fully appreciated the nature and consequences of what lay ahead. We cannot be sure that he did.

[63] Nevertheless, the judge proceeded and said that she would guide the applicant through his examination-in-chief. She noted that the RI was court appointed and was not tied to the defence team *per se*. There is then another cursory exchange between the judge and Mr Kearney on ground rules which concludes with Mr Kearney simply saying he is aware of the RI issue. However, the ground rules were not agreed and committed to writing as they should have been.

[64] Following this exchange, we note that the court rose briefly, during which time the applicant spoke with the RI. The trial then resumed some 30 minutes later, and the applicant's evidence-in-chief commenced shortly thereafter. By comparison with the time and care taken in considering counsel's withdrawal, the period afforded to the applicant to assimilate his position and reflect upon his options was limited. Obviously, a longer period should have been afforded to the applicant.

[65] What happened is highly unfortunate as we think that with some further time (by which we mean days at most) the issues that arose from loss from representation could have been addressed satisfactorily. Applying a measure of realism, we acknowledge that the applicant may not have retained his lawyers after reflection or obtained a new legal team. However, it appears obvious to us that he should have had greater time to prepare his own defence.

[66] If we ask ourselves the thirteen questions from *R v Bain* set out at para [54] above the answers we reach speak to the very significant problems that arose in this case:

> "(i) Did the judge seek to persuade counsel to remain?
>
> **No**
>
> (ii) Did the judge explain clearly to the defendant the difficulties he may face if he tries to proceed at trial on his own and without representation?

No

(iii) Did the judge afford time for reflection or a cooling-off period?

No

(iv) Did the judge consider the prejudice that the defendant would suffer if counsel withdrew?

Partially.

(v) Did the judge consider whether there should be an adjournment to enable the defendant to try to obtain alternative representation?

No

(vi) Whether the defendant is at fault and, if so, the degree of such fault?

There is fault on the part of the applicant but the judge did not make any positive finding that he was deliberately disrupting the trial.

(vii) Whether there is any suggestion of manipulation or abuse?

As above the judge did not find this established although it was raised by the prosecution.

(viii) Whether the defendant wishes to represent himself and, if so, the extent to which that is a matter of free and informed choice?

The applicant said he did not want to represent himself but the judge then misrepresented his position

(ix) The history of the proceedings and the stage which the trial has reached?

The trial had reached the end of the prosecution case but given there was a co-accused and new evidence from the prison officer there was still evidence of substance to be heard. It was

particularly important in the context of a "cut-throat" defence.

(x) The apparent abilities of the defendant?

He has low IQ, mild to moderate learning difficulty

(xi) The seriousness of the charges and the complexity of the issues in the case and the extent to which skilled representation is likely to be needed?

This was a murder case which is a most serious charge which needed skilled representation.

(xii) The availability of alternative representation?

This was not canvassed but realistically would not likely have transpired.

(xiii) Whether an adjournment would be required and, if so, the impact of any adjournment on the proper conduct of the case, including in relation to the availability of witnesses?"

This was not considered, even for a short time to allow the applicant to prepare his defence."

[67] Predictably, the early missteps we have identified above had an adverse effect on the conduct of the defence case, the operation of intermediary support, and the adequacy of the safeguards employed once the trial proceeded with the applicant unrepresented.

[68] As it transpired the applicant had little time or effective support in presenting his case, cross-examining a co-accused and examining a witness and closing his case. In addition, he was questioned in a manner by Mr McCollum and Mr Kearney that offended the RI detailed communication assessment which identified specific risks in the applicant's ability to understand and respond to questioning, particularly where questions were tagged, front-loaded or complex. We acknowledge that this flawed approach to questioning made no difference when dealing with uncontroversial issues. However, it was also deployed on disputed core issues.

[69] The problem is even more stark as the majority of Mr Kearney's questions on behalf of the co-accused were tagged and front-loaded ending with a question such as "isn't that right?" or "didn't you?" Contrast that approach with the RI report which recommended that a GRH be convened, that questioning be carefully structured and paced and that front loaded and tagged questions should be avoided.

Rightly, the applicant relies on those recommendations as setting the benchmark against which fairness should be assessed once he became unrepresented.

[70] The absence of a GRH assumes particular importance because, once representation was lost, there was no pre-agreed structure governing how questioning was to be conducted, how explanations were to be given, or how the RI's statutory role was to be respected and contained. In that vacuum, there appears to have been an implicit expectation, shared by the judge and by counsel for both the Crown and the co-accused, that the continued presence of the RI, together with limited judicial assistance for the purposes of examination-in-chief of the applicant, could be utilised to alleviate the consequences of the loss of independent legal advice.

[71] The same tension is apparent in the judge's intervention in the applicant's evidence-in-chief. The judge later explained to the jury that she had taken the applicant through his evidence, but "not in a very, very thorough way, because that would have been wrong." That frank observation reflects an awareness that judicial assistance has limits. Read alongside reliance on the RI, it illustrates that neither safeguard, individually or cumulatively, could replicate the protection afforded by independent legal advice. These features lead us to think that the intermediary framework was being relied upon, in effect, to do work for which it was never designed.

[72] Matters did not improve once the defence case began with the applicant representing himself. The applicant was required, with limited time for reflection, to decide whether to give evidence and to navigate a complex and evolving evidential landscape (as regards the evidence of what was said in the prison van and how this impacted the trial) in a cut-throat murder trial. Such decisions are ordinarily taken with the benefit of experienced legal advice and adequate time.

[73] The judge conducted the applicant's evidence-in-chief, with assistance from the RI. The judge later explained to the jury that this was done in a deliberately limited way, recognising the constraints on judicial intervention. While this approach ensured that the applicant was able to give an account, it necessarily lacked the forensic shaping and strategic judgment inherent in counsel-led examination. The RI's role in this process was limited to communication assistance and could not extend to advising on the substance or structure of the applicant's evidence.

[74] The applicant was then cross-examined by senior counsel for the Crown and the co-accused. Reading the transcript of this it is immediately apparent that in the absence of legal representation, the usual safeguards provided by defence counsel, control of questioning, timely objection, and strategic decision-making, were unavailable. The RI could not intervene on forensic grounds, and no GRH had been held to regulate questioning in light of the applicant's vulnerabilities. Responsibility for safeguarding fairness therefore rested with judicial intervention exercised in real

time. Counsel for the prosecution and co-accused had earlier indicated to the judge that they would stay within the recommendations of the RI report, notwithstanding the absence of a formal rule structure following a GRH, but it appears evident from the applicant's Schedule 1 to their supplementary skeleton argument that those guarantees were not adhered to or marshalled appropriately.

[75] Beyond the giving of evidence, the applicant was also required to make a series of consequential decisions during the remainder of the defence case, including how to respond to adverse material namely an alleged threat to the co-accused in a prison van, whether to seek to be recalled to deal with that evidence, and how to address the jury. These are decisions which the statutory framework assumes will be guided by experienced counsel in murder trials. In this case, they fell to the applicant alone, assisted only by an RI whose role did not include legal advice.

[76] In relation to the evidence from the prison officer there is an added difficulty in that there was no formal consideration of whether this evidence should be admitted as permissible hearsay which would have happened if the applicant was represented. Furthermore, the evidence was served in a very unsatisfactory manner which may have resulted in Walter's legal team having it before the applicant. What is proven by the transcript is the applicant did not have the audio recording of the prison van conversation provided to him prior to him coming into court. To deal with this the judge said that he could listen to it in court. This was on any read a cursory and inadequate way to deal with the issue.

[77] Furthermore, there were obviously difficulties deciphering what was said due to the quality of the audio recording. However, Walters' junior counsel, Mr Devlin (now KC), appeared to translate the recording himself and lead the witness through a series of leading questions. Yet this evidence was potentially very prejudicial to the applicant. The judge intervened at a very late stage to try to correct this once the applicant himself objected. The following extracts from the transcripts of evidence illustrate how irremediable prejudice had already been caused by then:

[78] To begin with, Mr Devlin's questioning of the prison officer was clearly leading as the following sequence shows:

> "Q. Does he use the word 'assault' …?
>
> A. I can't make that out.
>
> Q. Do you hear the word 'kill' in that?
>
> A. No.

Q. I want to suggest that he says, 'I'd smoother him with a pillow', and then he appears to do the hand gesture?

A. I can't hear that.

A. Yes, that's correct … I can hear that now …"

[79] At this point the applicant intervened and there was the following exchange with the judge and Mr Devlin:

"Applicant: Your Honour, I believe that he's leading the witness … trying to … put stuff in his mouth …

Judge: Well, there is an element of that Mr Devlin …

Mr Devlin: Yes, except Mr Walters, but what I will say is this, no one has suggested in an objection that any word I have said has been incorrect. And if, in fairness …

Judge: When you put the suggestions he said I can't make it out but you've already told the jury what your interpretation

Mr Devlin: I'm happy to provide a transcript and give it to everyone.

Judge: Well it will be a transcript based on your interpretation of what is said.

Mr Devlin: Yes, but Mr Rodgers has had an opportunity to listen to this.

Judge: Yes.

Mr Devlin: And he has not suggested that I've put anything that's incorrect.

Judge: He is suggesting that you are leading the witness which you are to a degree.

Mr Devlin: About a piece of real evidence.

Judge:	Yes, about a piece of real evidence. Look, I think you should move this on very quickly now. There's, it's absolutely clear that the jury will have got the picture at this stage.
Mr Devlin:	I'm sorry your Honour, I can't do that.
Judge :	Well you can play each clip and if the witness says I didn't get that then you move to the next one and that's the way it's going to be.
Mr Devlin:	Well, with respect your Honour, I was told this morning I couldn't lead the witness.
Judge:	Well you should know that anyway.
Mr Devlin:	Well perhaps not in real evidence where it's not contentious what is actually said. Perhaps not in that situation your Honour.
Judge:	My ruling is that you continue with it, you play the clip, if the witness says I can't make it out you move the next clip."

[80] The judge's belated intervention highlights the issue in clear terms. Mr Devlin was impermissibly leading the witness and interpreting the audio himself. The consequences of this do not end with the evidence because they bear on the *Lucas* direction given by the judge which we discuss later in this judgment.

[81] Viewed as a whole, the conduct of the defence case which we have discussed above illustrates how the applicant's vulnerability, the limited statutory function of the RI, and the loss of a representation structure deemed necessary by law interacted in practice. We are entirely satisfied that cumulatively these issues resulted in unfairness. In truth, all of Mr O'Rourke criticisms have traction and amount to prejudice save the judge's failure to advise the applicant that he could call witnesses himself which was not material.

[82] The final strand of the appeal concerns the adequacy of the judge's directions to the jury, viewed both in isolation and in the round, in a case where the applicant was required to conduct his defence without legal representation in a murder trial. By the time of the summing-up, the jury were being asked to assess the evidence of a vulnerable, self-represented defendant against a professionally advanced prosecution case and a co-accused represented by senior counsel. That context is material when evaluating whether the jury were properly equipped to approach the applicant's case fairly.

[83] The Crown Court Compendium recognises that trials involving defendants in person require particular care. At Part I, section 3-5 ("Defendant in person"), the Compendium emphasises that the judge should explain the position to the jury in neutral terms, ensure that no adverse inference is drawn from the absence of legal representation, and take appropriate steps to assist the jury in understanding the defendant's case, while avoiding any perception of advocacy. The underlying concern is that jurors may otherwise mistake the absence of professional advocacy, forensic structure, or legal fluency for an absence of substance or credibility.

[84] In the present case, the judge did inform the jury that the applicant was no longer legally represented and explained that she had taken him through his evidence-in-chief. She acknowledged the difficulty of doing so and stated that she had not conducted a "very, very thorough" examination, recognising the limits of judicial intervention. She further indicated that the applicant had not had the benefit of a lengthy closing speech from counsel and that she would endeavour to identify for the jury the points he had sought to make. Those remarks were plainly intended to comply with the guidance reflected in section 3-5 of the Compendium and to ensure transparency as to why the applicant's case had been presented differently.

[85] However, the question which arises is whether those explanations were sufficient to neutralise the forensic imbalance inherent in the situation. The Compendium cautions that, while a judge must avoid entering the arena, the summing-up must nevertheless ensure that the jury are not left with an implicit comparison between a professionally argued prosecution case and a diffuse or fragmented lay defence. Where a defendant's case has emerged through evidence-in-chief conducted by the judge, responses in cross-examination, and a short lay closing, the summing-up becomes the principal mechanism by which the defence is rendered intelligible to the jury.

[86] The importance of this function of the summing up has been underscored by the Court of Appeal in *R v QP* [2022] NICA 36. There, the court reaffirmed that it is a core obligation of the trial judge not merely to acknowledge that a defence has been advanced, but to identify and adequately put the defence case before the jury in a way that conveys its significance. The court emphasised that unfairness may arise where a judge, despite giving orthodox legal directions, fails to explain why a particular defence contention matters, or frames it in such a way that the jury are subtly encouraged not to grapple with it.

[87] Crucially, the duty is not discharged by stating the legal tests in the abstract as the judge must explain how the defence case, as actually advanced, fits within the issues the jury are required to determine. As *QP* makes clear, where this does not occur, there is a real risk that a central aspect of the defence is effectively neutralised rather than fairly evaluated.

[88] The applicant's defence, as it was advanced by him, was that the events occurred suddenly and unpredictably, that he reacted instinctively to what he perceived as a threatening situation, and that he did not intend to kill or cause really serious harm. He repeatedly framed his case in terms of "provocation" and loss of control. Although provocation is no longer a defence to murder, the Crown Court Compendium (Part I, Chapter 19, particularly sections 19-1 and 19-3) indicates that where a defendant advances an account capable of bearing upon intent, self-control, or mental state at the material time, the judge must accurately translate that narrative into the correct legal framework so that the jury understand its relevance to the issues they must decide.

[89] The judge did direct the jury on self-defence and explained the need for necessity and proportionality, consistent with Part I, section 18-1 of the Compendium. She also directed that, once self-defence was raised, the burden lay on the prosecution to disprove it. Further, she directed on the distinction between murder and manslaughter, explaining that a failure by the prosecution to prove an intention to kill or to cause really serious harm could result in a verdict of manslaughter rather than murder, in line with the guidance in Chapter 19. In that sense, the legal ingredients were covered.

[90] However, when dealing with the issue of self-defence, she used the opening paragraphs from the *NI Bench Book* (which are introductory paragraphs on the law of self-defence). Thereafter, the charge on self-defence is, seriously flawed and deficient. First, there is no indication from the charge that the judge took into account or appreciated the fact that the issue of necessity is a subjective test, while the issue of reasonableness is an objective test. In the Crown Court Compendium (Part 1, section 18-1), it is explained that self-defence has two elements:

> "(1) Did D believe, or may D have believed, that it was necessary to use force to defend themselves from an attack, or imminent attack, on them or others, or to protect property or prevent crime? (Subjective question); and
>
> (2) Was the amount of force D used reasonable in the circumstances, including the dangers as D believed them to be? (Objective question)"

[91] In *R v Sun* [2025] EWCA Crim 422, the Court of Appeal explained that:

> "17. In directing a jury upon the issue of self-defence it is incumbent upon the judge to provide clear written directions upon its meaning in the context of the issues within the trial. Those issues were clearly stated within paragraph 11(iii) of the written directions and were included within the Route to Verdicts. The elements of

> self-defence are, firstly, whether the defendant believed that it was necessary for him to use force to defend himself from an imminent attack upon him or another and, secondly, was or might the amount of force used, have been reasonable in the circumstances. Further explanation of those principles is usually required to assist the jury to measure the conduct of a defendant against those principal questions."

This approach was not followed.

[92] The final matter in relation to the judge's charge concerning self-defence relates to the 'householder defence.' Section 76 of the Criminal Justice and Immigration Act 2008 was enacted for two purposes. The first was to clarify the law on reasonableness in pre-existing defences (common law self-defence, common law defence of property and the defences provided for by section 3(1) of the Criminal Law Act (Northern Ireland) 1967 in relation to the use of force in prevention of crime or making arrest). The second purpose was to modify the common law defence in a householder case, but this provision (section 76(5A) does not apply in Northern Ireland and was not raised at the trial. As originally enacted, and as it still applies in Northern Ireland, section 76 does not deal with the common law defence of property.

[93] In the course of his closing speech, the applicant argued that he had been provoked. This issue was raised by the judge in her charge.

[94] On the first day of her charge, the judge told the jury that the applicant told them he was not guilty because he was raising "provocation." The judge went on to tell the jury that this created a difficulty for her because provocation was no longer a defence to murder; that it had been replaced by a different type of defence; and said:

> "It hasn't been raised through the others, so I am going to have to deal with it as best I can in terms of putting Mr Rodgers' case that he is making when it comes to deal with that particular issue. But, essentially what he was saying was he had a loss of control which meant that he was unable to form the intent. I will deal with that in due course when I come to give you the various elements of each of the offences. He urged you in his closing speech to consider provocation, which isn't provocation anymore, but he urged you. What he was saying was that he should be – certainly you should consider manslaughter as opposed to murder because of the circumstances that he has raised in front of you."

[95] When later discussing issues raised by the defendants, the judge said:

> "So those are things that the defendants have raised that I have explained to you – self-defence, duress of circumstances, intoxication, and something akin to provocation."

[96] On the second day of her charge when recounting the applicant's evidence to the jury she said:

> "So, basically he's mounting something of an element of self-defence, and he has also - he referred to it as provocation but he is basically saying that he flew out and that he reacted to the situation as it unfolded before him."

[97] She went on later in her speech to say:

> "… and he asked you in the course of his speech on the basis of that account that he has given to consider a verdict of manslaughter … you will have to assess his evidence, you will have to assess what the he said to you in his closing speech, he was essentially relying in that account that he gave you from the witness box."

[98] After the closing speech, the applicant made a number of points to the judge by way of requisition. In the course of the representations he again referred to provocation saying:

> "But what else? And the provocation, you addressed provocation."

[99] The judge's response was:

> "I have left that to the jury. I have left your account in terms of if they accept your account then where that falls in the route to verdict. I have already left that to the jury."

[100] It will be seen from these excerpts that the judge accepted that the applicant was raising loss of control, and she agreed that she would leave that issue with the jury. However, having done so, she did not give any direction on the ingredients of loss of control. The only reference she made was to the fact that loss of control is about being "unable to form the intent." This, in fact, is not the legal position. However, leaving that aside, no direction at all was given on this issue. Rather the judge never properly described the legal ingredients of loss of control and how it related to the applicant's evidence. Indeed, she potentially misdescribed it.

[101] It is also of note that none of the issues relating to self-defence and a loss of control were included in the route to verdict which was provided to the jury.

[102] A subsidiary point is that the judge's *Lucas* direction was misleading. A *Lucas* direction operates to remind a jury that a lie is only relevant to the issues, as a lie, if it is a deliberate untruth. That is because lies may result from confusion, mistake, or misunderstanding.

[103] This appeal argument is advanced on the basis that the judge referenced the threats in the prison van when dealing with lies. She said:

> "But you know he has told lies and you know that when Mr Kearney [for Walters] put to him that he had threatened Walters on the prison van, that he denied that he had threatened him, and then you did hear evidence where it was quite clear that threats were issued on the prison van. [emphasis added]

[104] After being requisitioned by Mr Kearney on whether she had told the jury that both defendants had lied in their evidence the judge replied:

> I didn't do that and I will deal with that in the evidence also. I made it clear that Mr Rodgers had been effectively caught on a lie from the witness box, but I will also tell the jury about the fact that at that stage he hadn't heard the tapes et cetera." [emphasis added]

[105] Mr Kearney made the point that there was an important distinction between lies told in the police station at interview and lies on oath. He pursued this in his closing to the jury suggesting that the applicant had committed perjury.

[106] Following from this the applicant's argument is that prejudice arises as the judge may have endorsed the allegation of perjury. We have assessed this argument against the transcript of proceedings. Having done so, we agree that the judge did not address this matter in a satisfactory or complete way and, therefore, that a misleading impression was potentially given to the jury. Instead of directing the jury that the applicant has "lied from the witness box", the judge ought to have emphasised the first limb of *Lucas*, namely the possibility of mistake or confusion. We agree with Mr O'Rourke's submissions that this was particularly important given that the applicant was unrepresented, had intellectual limitations and when he was cross-examined, the applicant had yet not been afforded the opportunity to see or hear the relevant recordings.

[107] One final issue arises in relation to the judge's charge. This is how the judge dealt with the intellectual deficits of this applicant to the jury. A judge should explain the exact nature of a defendant's intellectual limitations as per *R v Pringle*

[2019] EWCA Crim 1722 because otherwise the jury lose sense of the context of how an applicant is presenting. This obligation increases once an applicant with intellectual limitations is self-representing. However, in this case the judge did not explain the applicant's limitations in any detail. This is a material omission which inevitably causes prejudice.

[108] The errors we have identified make the judges charge defective. Practice issues arise which we must address. In summary, the lesson to take from what happened is that where a defendant has not been able to frame his case in orthodox legal terms, particular care may be required to ensure that the jury understand how the defendant's factual account, if accepted in whole or in part, fits into the legal questions they must answer. It is not enough for the prosecution to say that with hindsight these matters should not have been left to the jury or that they may not be left at a retrial. That is to reinvent what happened in this trial which is all we are concerned about.

[109] Therefore, having conducted our analysis, we can find little fault with the applicant's summary of the prejudice that has arisen set out at para 134 of the supplementary submissions (save 134.11 which criticised the judge for failing to advise the applicant that he could call his own witnesses) as follows(replicated below with some minor edits):

> "134.1 None of the steps and safeguards identified in *R v Bain* were considered or were not properly applied by the judge.
>
> 134.2 The applicant was not offered a chance to seek alternative representation.
>
> 134.3 The applicant had to proceed to give evidence immediately after the loss of representation.
>
> 134.4 He had no real time to reconsider giving evidence.
>
> 134.5 A comprehensive evidence-in-chief focussing on the relevant legal and evidential issues for his defence was not conducted.
>
> 134.6 He was cross-examined on the prison-van material before he had heard the recordings (in breach of common law fairness and article 6(3)(b) ECHR).
>
> 135.7 This was compounded by the lack of adherence to the RI safeguards. Given his vulnerabilities and education difficulties, RI safeguards were

identified and promised, but crucially, they were not implemented (no ground rules hearing; countless tag/front-loaded questions used throughout the cross-examination of him).

134.8 Irregular leading of the prison officer witness by Walters' counsel using suggested content from poor audio.

134.9 Matters put to the prison officer witness that were not put to the applicant.

134.10 No timely explanation of recall, or no recall at all, when the applicant asked to explain himself in respect of the prison van evidence.

134.11 …

134.12 No explanation given to the jury of the applicant's intellectual limitations, contrary to *Pringle*.

134.13 Compressed preparation time for critical cross-examination of Walters (in breach of common law fairness and article 6(3)(b) and 6(3)(d) ECHR).

134.14 Lack of an effective cross-examination of Walters and the prison officer.

134.15 Lack of an effective closing speech focussing on the legal and evidential issues relevant for his case (ie on self-defence and loss of control).

134.16 Points were argued to the jury in his co-accused's closing that he did not have a proper opportunity comment on in his evidence or raise to the LTJ's attention.

134.17 Unable to make proper and informed representations to the judge about her charge and route to verdict, and for the purposes of requisitions.

134.18 This was particularly relevant given that there were a number of material errors in the charge, including (but not limited to):

134.18.1 The issue of lies (*Lucas* direction);

134.18.2 Self-defence;

134.18.3 Loss of control;

134.18.4 The need for the judge to tell the jury about the applicant's cognitive difficulties (see *Pringle*);

134.18.5 The judge also failed to direct the jury to bear in mind the difficulty the applicant faced in representing himself (see *Reid* at [41])."

Conclusion

[110] It is not necessary for us to admit the fresh evidence of Professor Trinick and Mr Morley as we do not consider it material to our consideration and note the difference of opinion between the prosecution and defence experts on the potentially deleterious effects of medication. We therefore refuse those applications for fresh evidence without any adjudication on the merits of the defence argument which has not been tested.

[111] We reach our conclusion having assessed the arguments with the benefit of detailed submissions and the extensive transcripts of trial. Having done so we are not satisfied that the applicant received a trial that met the standard of fairness required for a charge of murder for the following reasons. He was a vulnerable defendant who was required to proceed without the representation structure the law itself envisages; the safeguards designed to mitigate vulnerability, including intermediary assistance and ground rules, were not properly and lawfully deployed; the sudden loss of legal representation was not adequately addressed by the court through active consideration of adjournment or other protective measures; the conduct of the defence case placed the applicant at a material forensic disadvantage particularly in circumstances where a co-accused was running a cut throat defence; the jury were not given sufficient assistance to understand and fairly evaluate the applicant's case, articulated without professional advocacy, alongside a professionally advanced prosecution and co-defendant case. Plainly the applicant has been prejudiced. In addition, the judge's charge was defective. The appeal succeeds on all grounds.

[112] Furthermore, Mr McCollum's argument that the fairness issues are not determinative because of the strength of the evidence against the applicant is misconceived. We must consider the safety of the conviction through the prism of

an unfair trial. As Lord Bingham said in *R v Randall* the right to a fair trial is absolute and applies to every defendant.

[113] Unfortunately, this case was beset with errors from the moment that counsel withdrew. These persisted throughout the trial and could not be remedied. The applicant was a vulnerable defendant the handling of whom required additional care and adherence to PD2/19 on vulnerable witnesses. This case is a salutary lesson for all professionals concerned that there is no substitute for following good practice and that to proceed with undue haste leads to repentance at leisure.

[114] Accordingly, when viewed cumulatively and in their procedural context, the inevitable conclusion which flows from the catalogue of errors in this case is that the conviction is unsafe. We therefore grant leave, allow the appeal, quash the conviction. We will hear from counsel as to a retrial and any other ancillary matters.

Postscript

[115] We order a retrial.

[116] Having canvassed the views of the prosecution and defence and no objection being raised on the basis of potential prejudice to the retrial, this judgment will be published now given the practice issues that arise.