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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY 'B'
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND

Before: Treacy LJ, O'Hara J & Sir John Gillen

David Scoffield QC with Gordon Anthony BL (instructed by McCartan Turkington & Breen Solicitors) for the Applicant
Tony McGleenan QC with Philip Henry BL for the Respondent
Ivor McAteer QC with David Heraghty BL (instructed by Desmond J Doherty & Co Solicitors) for the Notice Parties

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TREACY LJ ***(Delivering the Judgment of the Court)***

Introduction

[1] By this application the applicant, a former member of the British Army, challenges the decision of the Public Prosecution Service for Northern Ireland to prosecute him for the murder of Daniel Hegarty and the wounding with intent of Christopher Hegarty. The primary focus of his challenge is the contention that the impugned decision is unlawful on the ground that it is in breach of his right to life under Article 2 of the European Convention on Human Rights and contrary to the Human Rights Act 1998, by reason of the medical evidence of the consequences for the applicant of the decision.

[2] The court was informed that following the initiation of the judicial review process the PPS, at the invitation of the legal representatives of the applicant, have not taken any further steps to progress the prosecution.

[3] By agreement of the parties and the Court this is a "rolled-up" hearing which will determine whether the threshold for the grant of leave has been met and, if so, whether the judicial review should be allowed or dismissed.

Anonymity & Reporting Restrictions

[4] The Court granted anonymity to the applicant for the purposes of these proceedings. The application for anonymity was not opposed by the proposed respondent or the Notice Parties. The Court also made a reporting restriction in the following terms:

> "There shall be a reporting restriction imposed in this matter, until further Order, whereby the Applicant's name (if disclosed at any time during the course of the proceedings) and any personal information in relation to the Applicant (including his address or whereabouts, if disclosed; his age; and the condition of his health, including in particular the nature of the health problems which underlie his application to the Court) shall not be published or disclosed by any party to these proceedings or other person, including any media outlet, howsoever."

We record that the proposed respondent did not object to the making of such an Order, taking a neutral stance. The Notice Parties did not object to the making of the Order. Representatives of the press were contacted by the applicant's solicitors and no objection from the press to the making of the Order was received by the Court. In light of the authorities and the helpful skeleton argument which was furnished to the Court we were satisfied that it was appropriate at that stage to make the Order sought. The Court made it clear that the Order is only in respect of these proceedings. The issue of anonymity and reporting restrictions in any criminal proceedings will be a matter for those Courts.

In advance of delivering judgment the parties were given the opportunity to make written representations as to whether the reporting restrictions should be lifted. The respondent and the Notice Party do not object to the lifting of the Order. The applicant does object and reiterates the written submissions made in support of the original Order.

Cognisant of the fundamental principle of open justice we consider that the reporting restriction should now be lifted. We bear in mind that the applicant still retains his anonymity in these proceedings. Publishing a judgment without referring to the condition of the applicant's health would mean the very material, of

critical significance to a full and proper understanding of the reasoning of the Court, would be withheld from public scrutiny. Reference to the medical reports relied upon by the applicant is confined to that set out hereafter.

Representation

[5] The applicant is represented by Mr David Scoffield QC and Mr Gordon Anthony; the proposed respondent is represented by Mr Tony McGleenan QC and Mr Philip Henry; and the Notice Parties (Margaret Brady and Christopher Hegarty) are represented by Mr Ivor McAteer QC and Mr David Heraghty. We are indebted to counsel for the applicant and proposed respondent for their detailed and illuminating written submissions. We are indebted to all counsel for their equally constructive oral submissions.

Background

[6] The applicant, as already noted, challenges the decision of the PPS to prosecute him for the murder of Daniel Hegarty and the wounding with intent of Christopher Hegarty. Both young victims had been struck by rounds fired from a General Purpose Machine gun (GPMG) fired by the applicant on 31 July 1972 during 'Operation Motorman.'

[7] The fresh decision to prosecute was made after the decision of the Divisional Court in Re Brady [2018] NICA 20 quashing an earlier decision by the then Director of the PPS, Barra McGrory QC, not to prosecute the applicant. The general factual background leading to the killing of Daniel Hegarty and the wounding with intent of his cousin Christopher Hegarty is set out in some detail in that judgment but for reasons of economy need not be repeated here save for the observation of the court at paras [15]-[18] of that judgment:

> "[15] There is other evidence in this case including witness statements from people living close to the scene and medical evidence from the post mortem examination of Daniel's body. There was no ballistic evidence obtained in 1972. Some of this material will be considered below in the context of the challenge to the rationality of the respondent's decisions. For now we refer to the evidence gathered in the immediate aftermath of the incident and from the direct participants in the incident to illustrate a core aspect of this case - which is this. There are two narratives about what happened in the encounter between the two soldiers and the three civilians on that fateful morning. On one account a group of aggressive, threatening youths, one of whom was believed to be armed, approached soldiers they had already 'spotted' with the express and obvious intent of attacking them.

> The soldiers issued three clear warnings for them to halt but the youths continued their menacing approach. They were then fired upon from a distance of some 25m, and these shots resulted in the death of Daniel Hegarty and the wounding of his cousin Christopher.
>
> [16] In this scenario B's action is capable of being seen as a legally justified response of a frightened young soldier who believed he was facing a serious and imminent threat - a lawful act of self-defence.
>
> [17] In the second scenario a group of three local youths were retreating from the risk of an encounter with soldiers. They were heading in the direction of their home and were unaware of the two soldiers positioned in the front garden of 114 Creggan Heights. They were not challenged or warned by these soldiers. They only became aware of the presence of the soldiers when shots rang out from virtually point blank range killing Daniel and wounding Christopher.
>
> [18] In this scenario the action of Soldier B is capable of being found to be the unjustified use of force causing the unlawful death of Daniel Hegarty and the unlawful wounding of another."

[8] Following the decision in *Re Brady* the [new] Director of the PPS informed the applicant's legal representatives on 29 November 2018 that he had completed an evidential test review in the applicant's case and that he was moving to address the public interest limb. The Director stated that he had read the earlier [2015] reports from Professor Adgey, Consultant Cardiologist. The Director's letter of 29 November went on to state that:

> "… one of the public interest factors engaged here is whether your client suffers from significant mental or physical ill health. In this regard, particular focus is on (i) your client's general prognosis as a result of his anginal condition; (ii) the effect a prosecution might have on his health; and (iii) what effect his ill health might have on the trial process".

Medical Reports

The 2015 Reports

[9] Lawyers acting for the applicant had submitted medical reports from Professor Adgey to the former Director Mr McGrory QC. Professor Adgey's first report dated 28 October 2015 stated that if the applicant

> "…. is asked to give evidence the medical consequences could be very significant. I therefore do not feel that this man … could give evidence at present in view not only of his past history but also his present history".

In an addendum report dated 20 November 2015 she stated that the likely consequences of a decision to prosecute would be:

> "an increased risk of sudden death" and that "increased stress of any kind in someone [with his condition] … is likely to lead to either a further myocardial scar and or sudden death since it appears that the trigger for these two events is an increase in adrenalin levels …"

The 2019 Reports

[10] On 6 February 2019, Professor Adgey produced the first of two further reports. In it, she records her view that:

> "As per my previous opinion the likely consequences for this gentleman's health of a decision to prosecute him would be increasing frequency of chest pain and dyspnoea leading to a possible further myocardial infarction and the increased risk of sudden death."

[11] On 21 March 2019, Professor Adgey produced her second further report, which again was in the form of an addendum written in the light of questions from the PPS. The second question was:

> *"In your opinion what effect will a prosecution have on [his] health? That is, to what extent will it give rise to a real risk of heart failure and/or death?"*

Professor Adgey's response was:

> "No one can predict when a deterioration in heart failure will occur and/or death in [the applicant]. What we can

> say is that … it would be full hardy [sic] to ignore all the medical evidence particularly with regard to the factors likely to precipitate deterioration in [his] health."

[12] Following consideration of the reports and the written representations from the applicant's solicitors the Director issued his decision by letter dated the 15 April 2019 in which he had concluded that the public interest for test for prosecution was also met.

PPS Pre-Action Protocol Response ("PAP")

[13] The applicant sent a PAP letter dated 21 June 2019 and lodged proceedings before receiving a PAP response from the PPS. The response from the PPS, dated 23 October 2019, refers to the "no prosecution" decision taken by the former Director of Public Prosecutions (DPP), Mr McGrory QC in 2016. That decision was quashed by the Divisional Court in May 2018. After it was quashed, the current DPP, who had no prior dealings with the case, undertook to make the fresh decision. He instructed independent senior counsel who also had no prior involvement in the case. Senior counsel provided a first draft opinion on the 18 May 2018. Thereafter, he provided further advices in respect of specific questions to be posed to the ballistics experts on the 24 July 2018. The responses to those queries were received from the ballistics expert on the 19 September 2018 and senior counsel provided his final opinion on the evidential test on the 19 October 2018. Upon consideration of this advice the DPP reached his decision on the evidential test concluding that there was a reasonable prospect of securing a conviction.

[14] On 29 October 2018 the DPP asked senior counsel to advise separately on a number of issues relevant to the Director's consideration of the public interest limb of the test, including the significance of a change in the Code for Prosecutors, whether an updated medical report should be obtained and if so, the questions to pose to the expert. On 13 November 2018 senior counsel advised the DPP to obtain an updated medical report, as the existing medical evidence was over three years old, and he posed specific questions for the doctor to answer.

[15] The applicant's solicitor and the family of the deceased were informed through correspondence dated 29 November 2018 and 6 December 2018 respectively of the DPP's decision on the evidential test. The correspondence further advised that when considering the public interest limb of the prosecution test, the DPP wished to have an updated medical opinion.

[16] That prompted correspondence from the Hegarty family's solicitor dated 24 December 2018, which the PPS answered on the 23 January 2019. Their solicitor followed that up with a formal judicial review PAP letter dated the 1 February 2019, which the PPS responded to on the 11 February 2019. Essentially their case was that an accused's ill health should not be considered as part of the public interest test when the offence is serious, according to the Code for Prosecutors. There was no

further correspondence on the application of the public interest test after the PPS responded to the PAP letter.

[17] The applicant's solicitor responded to the PPS correspondence of 6 December 2018 providing further submissions dated 19 February 2019 in relation to whether the evidential test was satisfied. These submissions expressly did not address the public interest test as this was to be addressed in later submissions when the latest report from Professor Adgey had been completed and shared with the applicant's solicitors.

[18] Steps were taken to obtain the applicant's updated medical notes and to arrange a further examination by Professor Adgey. The examination took place on the 5 February 2019 and the resulting report was received on the 11 February 2019. This report did not address all of the questions drafted by counsel and an addendum was sought. Professor Adgey's addendum report was received on 27 March 2019. The applicant's solicitor had requested an opportunity to make representations on the updated medical evidence once received. It was therefore provided to the applicant's solicitor on 2 April 2019.

[19] On 3 April 2019 the applicant's solicitor wrote in respect of Professor Adgey's new report stating that he:

> "was slightly unclear what her position is on the fundamental question of the risk to …. B's health/life arising from the proposed prosecution. It may be a matter of semantics but *her choice of expression does not, to my mind, make the position particularly clear* (and not as clear as the opinion she gave in 2015)." [our emphasis]

He asked that certain specific matters be considered by the PPS. He then stated:

> "Finally, if the conclusion of the PPS is ultimately that the case <u>should</u> proceed because the (sic) Soldier B's health does not give rise to sufficiently compelling public interest reasons not to prosecute, I would wish to have the opportunity to seek a second medical opinion prior to that decision being finalised."

[20] On 5 April 2019 PPS responded to this request and stated that:

> "Whilst it is entirely a matter for you as to whether a second medical opinion is required or when same might be commissioned, I would advise that, as we have notified the family of Daniel Hegarty that a final decision on this matter will issue the week of 15th April 2019 we cannot agree to a further delay in notification of the

> decision to allow for a second medical to be obtained. I would request therefore that any representations or reports to be relied upon are received by Friday 12 April as previously indicated."

[21] The PAP response noted, inter alia, that further submissions were received from the applicant's representatives on the 9 April 2019 but no additional medical reports were relied upon and that none had, to date, been furnished to the PPS.

[22] The DPP took all of the above matters into account and reached a decision on the public interest test on the 15 April 2019. It was communicated to the applicant's solicitor and the deceased's family's solicitor on the same date.

[23] The DPP gave consideration to the history of the decision making process, the updated medical evidence, senior counsel's advice, the various representatives' submissions and the Code for Prosecutors (2016 Edition).

[24] The Director "closely examined" the specific answers provided by Professor Adgey in her most recent report (dated March 2019). The DPP considered the presumption in favour of prosecuting when the evidential test is met, noting that such presumption is particularly strong when the alleged offending is serious.

[25] The DPP weighed the factors in favour of not prosecuting, including the applicant's lack of criminal record and that it was unlikely he would repeat the offending and the long passage of time since the offending occurred. He weighed these considerations against the seriousness of the offence.

[26] He further considered the applicant's health problems and confirmed that he was giving considerable weight to the potential consequences on the applicant's health of the decision to prosecute him.

[27] The DPP also noted that there had been other instances of court-related potential stressors, such as the inquest findings and the previous Divisional Court case, which had not brought about specific health consequences for the applicant requiring medical attention.

[28] The DPP gave consideration to the fact that those who receive prosecution decisions may incur some degree of stress and acknowledged that the applicant was at an additional risk because of the nature of his health problems. He noted that he must take that into account when balancing the public interest in proceeding with a murder charge against the risk to the applicant arising from prosecution.

[29] The DPP then considered the issue of participation in the trial process, noting in particular, the commentary in Professor Adgey's medical reports. He noted that the applicant had been able to provide instructions to his legal advisors thus far.

[30] The DPP considered that there was a strong public interest presumption in prosecuting charges as serious as murder and concluded that, in the circumstances of this case, the presumption was not displaced, although he acknowledged that it must be kept under review.

[31] The response then addressed the presumption against satellite litigation, and the grounds of challenge relied upon namely human rights grounds (Art 2, 3 & 8) and the issue of irrationality.

Impugned Decision

[32] In its decision letter dated 15 April 2019 the PPS stated:

> "… The Director, having completed a review of this matter, has concluded that the test for prosecution is met in respect of Soldier B for the murder of Daniel Hegarty and the wounding with intent of Christopher Hegarty, and proceedings will issue accordingly.
>
> As you are aware the Director, with the benefit of advices from Senior Counsel, had first concluded that the evidential test for prosecution was met. As Soldier B's ill health was clearly an issue requiring careful consideration as part of the application of the public interest test, a further medical report was obtained and shared with you to allow submissions to be made. In line with the Code for Prosecutors, the Director has concluded, given the serious nature of the charges, that the public interest test for prosecution is also met. …"

The Applicant's Grounds of Challenge:

Illegality: Ground [5](i)(a)-(c)

[33] The applicant contends that the impugned decision is unlawful by reason of being in breach of his convention rights, contrary to Section 6 of the Human Rights Act 1998. It is argued that the decision is in breach of the applicant's right to life under Article 2 as public bodies cannot take steps that result in loss of life other than where such loss of life occurs within the narrow parameters established by Art 2(2) ECHR. It is asserted that the PPS knowingly took the decision to prosecute for murder and wounding with intent notwithstanding the medical evidence that such a decision will increase his risk of sudden death (i.e. materially increase a real and immediate threat to his life) and that there can never be any public interest justification for a decision that knowingly increases the risk of death and in the alternative that any such increase is neither justified nor proportionate. The applicant also contends that the decision breaches his right to be free from inhuman

and degrading treatment under Art 3 ECHR. The contention is that the impugned decision has been taken in circumstances where the medical evidence suggests that, even if the decision did not result in actual death, the applicant would not be able to participate effectively in the trial process, that other ill health is likely to result and that the applicant will be knowingly subject to an increased risk of sudden death. It is claimed that the medical evidence strongly suggests that a fitness to stand trial application would succeed, but in circumstances where he will be expected to endure increasing ill-health before he will be able to move any such application. Alternatively, the applicant also relies on Art 8 contending that public bodies can interfere with a person's right to bodily integrity only where it is proportionate and in the public interest to do so, and where reasons have been provided for that interference.

Material Considerations: Ground 5(ii)(a)-(d)

[34] The applicant also contends that the PPS either failed to 'have any regard whatsoever' to the medical evidence or failed to give it sufficient weight and left out of account the delay between the date of the alleged murder and wounding with intent and the likely date of trial (see Ground 5 (ii) (a)-(d)). The applicant in his amended Order 53 statement attacks the provisions of the PPS Code for Prosecutors, specifically paras 4.14(v), (vi) and (viii) insofar as they appear to require the PPS to leave out of account legally relevant matters in respect of a decision to prosecute (Ground 5(ii)(e)).

Procedural Unfairness: Ground 5(iii) – Reasons

[35] The applicant further contends in his amended Order 53 statement that the impugned decision was procedurally unfair and vitiated by a failure to give reasons contending in particular that his Art 8 right to bodily integrity is engaged because no reasons for the prosecution have been given, notably such as would address the medical evidence.

Irrationality: Ground 5(iv)(a)-(c)

[36] It is contended that the impugned decision is irrational as the evidence in the case has "neither materially changed nor improved" since earlier decisions not to prosecute and the impugned decision insofar as it related to the evidential test under the Code was therefore vitiated by inconsistency that was irrational given the available evidence; that the test of anxious scrutiny means that the decision is so unreasonable that no reasonable prosecutor could have taken it; that the decision failed to take into account all material considerations.

PPS Code for Prosecutors

[37] There are two limbs which must be satisfied in order for the PPS to conclude that the test for prosecution has been met. These are set out in para4 of the PPS Code for Prosecutors:

> "**Test for Prosecution**
>
> 4.1 Prosecutions are initiated or continued by the PPS only where it is satisfied that the test for Prosecution is met. The test for Prosecution is met if:
>
> (i) the evidence which can be presented in court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
>
> (ii) prosecution is required in the public interest – the Public Interest Test.
>
> 4.2 This is a two stage test and each stage of the test must be considered separately and passed before a decision to prosecute can be taken. The Evidential Test must be passed first before the Public Interest Test is considered. If this is also passed, the test for Prosecution is met. The tests are set out in detail at paragraph 4.7 et seq.
>
> …
>
> **The Evidential Test**
>
> 4.7 Public Prosecutors decide whether there is sufficient evidence to provide a reasonable prospect of conviction against each defendant on each charge.
>
> 4.8 A reasonable prospect of conviction exists if, in relation to an identifiable suspect, there is credible evidence which the prosecution can present to a court and upon which an impartial jury (or other tribunal), properly directed in accordance with the law, could reasonably be expected to find proved beyond reasonable doubt that that suspect had committed a criminal offence. This is different to the test which the court will apply, which is deciding whether the offence is proved beyond reasonable doubt ie it must be sure that the defendant is guilty before it can convict.

> 4.9 It is necessary that each element of this definition is fully examined when considering the Evidential Test for each particular offence (see below). The Public Prosecutor must also take into account what the defence case may be and whether it would affect the prospect of conviction. If a case does not pass the Evidential Test, it cannot proceed, no matter how serious or sensitive it may be."

[38] There is no challenge to the decision of the PPS that the evidential test is met. This is subject to the caveat that at para [5](iv)(a) of the Order 53 Statement it is contended that the impugned decision is irrational as the evidence in the case has "neither materially changed nor improved" since earlier decisions not to prosecute and the impugned decision insofar as it related to the evidential test under the Code was therefore vitiated by inconsistency that was irrational given the available evidence.

Public Interest Test

[39] The public interest test is elaborated upon at para 4.10 of the Code and following:

> "4.10 Once a Public Prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires prosecution through the courts. It is not the rule that all offences for which there is sufficient evidence must be prosecuted – prosecutors must exercise their discretion as to whether a prosecution is required in the public interest. The granting of such a discretion to the prosecutor is consistent with the prosecution process in similar legal jurisdictions. In taking decisions as to prosecution the prosecutor is taking decisions for the benefit of society as a whole.
>
> 4.11 Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case. In some instances the serious nature of the case will make the presumption a very strong one. However, there are circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, a court based outcome is not required in the public interest. For example, Public Prosecutors should

positively consider the appropriateness of prosecuting by way of a diversionary disposal, particularly where the defendant is a young person or a vulnerable adult (See Alternatives to Prosecution paragraph 4.27).

4.12 In deciding whether a prosecution is required in the public interest, prosecutors should take into account the views expressed by the victim and the impact of the offence on a victim and, in appropriate cases, their family, where such views are available. However, the PPS does not represent victims or their families in the same way as solicitors act for their clients. It is the duty of Public Prosecutors to form an overall view of the public interest.

4.13 The following sections list *some* public interest considerations for and against prosecution which may be relevant in an individual case and should be considered by a prosecutor. This list is not exhaustive. The factors identified as relevant and the weight to be attached to any individual factor may vary in each case and one factor in favour of prosecution may outweigh several factors against." [Our emphasis]

[40] There then follows a detailed but illustrative list only of the considerations for prosecution and the considerations against prosecution. Plainly, this being a prosecution for murder, where the evidential test has been satisfied, the presumption that the public interest requires a prosecution is particularly strong.

[41] Para 4.14 of the Code states:

"4.14 The following section lists some considerations against prosecution which may be relevant and require to be considered by a prosecutor when determining where the Public Interest lies in any particular case. Again, this list is illustrative only.

Considerations against prosecution

…

(v) Where there has been a long passage of time between an offence taking place and likely date of trial unless:

- The offence is serious;

- Delay has been caused in part by the suspect;

- The offence has only recently come to light; or

- The complexity of the offence has resulted in a lengthy investigation.

(vi) Where a prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness, particularly where they have been put in fear;

…

(viii) Where the suspect suffers at the time of the offence or trial from significant mental or physical ill-health; unless the offence is serious or there is a real possibility that it may be repeated. Public Prosecutors must balance a suspect's mental or physical ill-health with the need to safeguard the public or those providing services on behalf of the public;

…"

[42] Para 4.17 of the Code provides that:

> "4.17 Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether prosecution nonetheless should go ahead and for those factors to be put to the court for consideration when sentence is passed."

Consideration

Satellite Litigation

[43] A preliminary question arises as to whether the present challenge is a form of impermissible 'satellite litigation.' It is not in dispute between the parties that there is a strong public interest presumption against satellite litigation in criminal cases - see the review by Coghlin LJ of the leading authorities Re McVeighs's Application [2014] NIQB 57 at paras [8]–[11]. There may however exist exceptional circumstances which justify departure from the general rule forbidding satellite litigation in criminal cases - see paras [12]-[13] of McVeigh. We do not understand there to be any dispute between the parties as to the applicable principles and it is therefore unnecessary to recite further authority. It is also "clear that a challenge to a decision to prosecute is more difficult to sustain than one not to prosecute" see Kerr LCJ at para [23] Re McDaid [2007} NIQB 26. Some of the reasons for this distinction are summarised in Re Brady [2018] NICA 20 at paras [92]-[93]. The distinction is essentially because it is usually the victim of an alleged crime who seeks to challenge a no prosecution decision in circumstances where there will be no other forum in which to secure relief. In contrast, in a prosecution case the defendant can generally secure his or her relief in the criminal court. As the PPS points out the applicant in the present case faces the higher of the two exceptional thresholds.

[44] The reason for the strong public interest presumption against satellite litigation carries particular weight in criminal cases where an accused can raise any relevant issues touching on the criminal case before the trial judge or on appeal. Satellite challenges cause significant delay which is inimical to justice and the triangulation of interests in play. The present case is a prime example of this. The impugned decision, which itself takes place against a background of significant delay, commented upon by this court in Brady, was issued on 15 April 2019. The applicant's legal team requested that the criminal process be held in abeyance in light of the initiation of the judicial review process. That request was acceded to by the PPS and no further steps have been taken in the criminal process. We observe that had this approach not been requested by the applicant the grounds underpinning the present application could have formed the basis for in-trial applications such as abuse of process, fitness for trial, special measures applications. Such applications could by now have been determined in their proper forum.

[45] Criminal courts routinely in this jurisdiction deal with issues in and around defendants' ill health, whether in the form of abuse of process applications, fitness to plead applications, applications to adjourn, applications to adjust the trial process to accommodate those needs, or to excuse defendants, if required, from attending for their trial. Courts are empowered and required to put in place appropriate measures to address and mitigate so far as reasonably possible any identified risks to life and health and to put in place any special measures to address the needs of vulnerable witnesses, victims or defendants. Such issues are now a common feature of criminal trials notably in "historical" sexual offence prosecutions and "legacy" prosecutions.

[46] The application that is made in the present case is a bold one and highly unusual if not unprecedented. We remind ourselves that there are many unfortunate souls with whom the criminal justice process must deal – defendants, victims and witnesses. People with complex needs and problems many of whom present with serious physical and mental health issues and suicidal ideation for whom it could undoubtedly be said that the stress of being prosecuted for serious crime might increase the risk of suicide or mental health relapse. The consequence for the criminal justice system if such an increased risk could be deployed to challenge by way of judicial review the very decision to prosecute would have far-reaching repercussions. The extensive level of engagement between a suspect's lawyers and the PPS seen in the present case, were it to become widespread, would undoubtedly stretch resources. Prosecutors can anticipate being inundated with medical reports and detailed representations on behalf of suspects seeking to persuade the PPS that notwithstanding that the evidential test is satisfied, the public interest test, by reason of their ill-health, is not met. And if dissatisfied with the result they can begin a parallel process invoking the jurisdiction of the judicial review court, the expenditure of considerable resources and with rights of appeal. In the meantime the criminal proceedings stand postponed while the parallel litigation strategy is pursued causing further delay and endangering confidence in the criminal justice system. Of course if the judicial review litigation fails the same arguments can be reignited before the criminal courts and on appeal.

[47] We are not satisfied that there were exceptional circumstances justifying departure from the general rule forbidding satellite litigation in criminal cases. However, since we heard full argument on the grounds of challenge we have felt it appropriate to address all matters substantively. And we now turn to our examination of those grounds.

[48] As noted earlier the primary focus of the challenge to the decision to prosecute the applicant for murder and wounding another with intent is the contention that the decision is unlawful, principally on human rights grounds, by reason of the medical evidence. Before turning to our consideration of the main thrust of this challenge it is convenient for us to first address the other grounds of challenge. These can be dealt with briefly.

Material Considerations: Ground (v)(ii)(a)-(d)

[49] The contention that the Director of the PPS failed to 'have any regard whatsoever' to the medical evidence or failed to give it sufficient weight is without merit. There is an air of unreality about the complaint that the Director ignored the medical evidence he had himself commissioned to inform his judgment of whether in light of the ill health issues prosecution is required in the public interest.

[50] The submission ignores the lengthy engagement on the subject of the applicant's ill health evident from the extensive correspondence between his

solicitors and the PPS on this very issue. The submission also ignores the contents of the letter of 29 November 2018 from the PPS to the applicant's solicitors. In that letter the Director stated that he had read the 2015 medical reports from Professor Adgey and went on to expressly identify that one of the public interest factors engaged was whether the applicant suffers from significant mental or physical ill health. The letter noted in that regard that the particular focus is on:

> "(i) your client's general prognosis as a result of his angina condition;
>
> (ii) the effect a prosecution might have on his health; and
>
> (iii) what effect his ill health might have on the trial process."

[51] In furtherance of that public interest focus the PPS then obtained two further reports from Professor Adgey dated 6 February 2019 and 21 March 2019 which were shared with the applicant's solicitor. Following receipt of the updated medical evidence the applicant's solicitor wrote on 3 April 2019 in respect of Professor Adgey's report stating that he:

> "… was unclear what her position is on the fundamental question of the risk to Soldier B's health/life arising from the proposed prosecution. It may be a matter of semantics but her choice of expression does not, to my mind, make the position clear (and not as clear as the opinion she gave in 2015) … Finally, if the conclusion of the PPS is ultimately that the case <u>should</u> proceed because …Soldier B's health does not give rise to sufficiently compelling public interest reasons not to prosecute, I would wish to have the opportunity to seek a second medical opinion prior to the decision being finalised."

[52] On the 5 April 2019 the PPS responded requesting that any further representations or reports to be relied upon are received by 12 April as the PPS had already indicated to the family of Daniel Hegarty that a final decision would issue the week of the 15 April and could not agree to further delay to allow for a second medical to be obtained.

[53] The applicant's solicitor then made detailed representations on the public interest considerations in this matter by letter dated 9 April 2019. No additional medical reports were relied upon and none has been furnished since. Following receipt and consideration of those representations the Director issued his decision letter of 15 April stating that:

> "…*As Soldier B's health was clearly an issue requiring careful consideration of the public interest test,* a further medical report was obtained and shared with you to allow submissions to be made. In line with the Code for Prosecutors, the Director has concluded, given the serious nature of the charges, that the public interest test for prosecution is also met."

[54] We consider that it is clear from the above that the issue of the applicant's health was given very careful consideration in deciding whether the public interest test for prosecution was met. We are satisfied that there is no legitimate basis for contending that the Director failed to take into account properly or at all the medical evidence he had obtained.

Ground 5(ii)(e)

[55] In support of his attack on the impugned decision and as an independent head of relief the applicant attacks paras 4.14 (v), (vi) and (viii) of the Code for Prosecutors on the basis that they "appear" to require the PPS to leave out of account legally relevant matters in respect of a decision to prosecute. The relevant impugned provisions are set out at para [41].

[56] Whilst the Code could in certain respects be more clearly expressed it is abundantly clear that the Director did not interpret or apply the Code as requiring him to leave out of account legally relevant questions. For example, the applicant contends that 4.14 (viii) is worded in such a way that the Code apparently accepts that a putative defendant's ill health can be relevant to an assessment of the public interest, but only if the case is not a serious one. By implication, it is argued, this means that the applicant's ill health would either have been considered and then disregarded or left out of account altogether. However, it is abundantly clear from the detailed engagement earlier set out that the ill health of the applicant was not disregarded or left out of account by the Director when considering his assessment of whether the public interest test for prosecution was also met.

[57] The public interest limb of the prosecution test contains a presumption in favour of prosecution if the evidential test is met.

[58] Paragraph 4.11 states that the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case. The Code expressly recognises that the serious nature of the case will make the presumption a "very strong one." There is no more serious case than one of alleged murder.

[59] Where, as in the present case, there is evidence sufficient to provide a reasonable prospect of conviction for murder the circumstances in which the PPS in

the exercise of its discretion could reasonably and rationally conclude that it was not in the public interest to prosecute for murder are likely to be rare.

[60] As the Code makes clear it is prosecutors who must exercise their discretion as to whether a prosecution is required in the public interest. The decision in the present case was taken at the highest level, by the Director, who had no previous involvement with the case and with the benefit of the advices of independent Senior Counsel who also had no prior involvement. In taking his decision the Director was taking a decision for the benefit of society as a whole (para 4.10 of the Code).

[61] The factors identified as relevant and the weight to be attached to any individual factor may vary in each case and one factor in favour of prosecution may outweigh several factors against. We do not accept that the impugned paragraphs properly read in their overall context require or permit the leaving out of account relevant consideration. Moreover, we are quite satisfied that the PPS did not consider themselves constrained in the manner suggested. Further, as part of that careful consideration, the PPS obtained further medical reports which were shared with the applicant to enable submissions to be made. On the contrary, it is plain that the Director conducted a good faith exercise in which he fully took into account and carefully considered the applicant's ill-health as well as the detailed written submissions advanced on the applicant's behalf.

[62] The relevant provisions of the Code, properly and fairly read in their entirety do not support the applicant's contention. This is reflected in the fact that the Director did not interpret or apply the Code in a manner which he considered required him to leave out of account legally relevant questions. We note in passing that the contentions about the Code did not feature in the very detailed Pre-Action Protocol letter nor did it appear in the first version of the Order 53 Statement.

Reasons Challenge

[63] The applicant's challenge contends that the impugned decision is procedurally unfair and vitiated by a failure to give reasons. In fact reasons were given in the decision letter so the challenge is to the sufficiency of the reasons.

[64] The test for prosecution is contained in a publicly available document which sets out in some detail the nature of the test and how it is applied. We have set out the key provisions earlier in this judgment.

[65] In the present case the applicant can be in no doubt about the issues which informed the decision to prosecute. The lengthy engagement by correspondence between the applicant and the PPS over many years ending with the PPS PAP response of 23 October 2019 provides ample exposition of the Director's reasons and we reject the challenge to the sufficiency of the reasons.

Rationality Challenge

[66] An earlier 'no prosecution' decision having been quashed by the Divisional Court in Re Brady the current Director, who had no prior dealings with the case, undertook to make a fresh decision. He instructed independent senior counsel who also had no prior involvement in the case. Senior counsel provided a first draft opinion on 18 May 2018. Thereafter he provided further advices in respect of specific questions to be posed to the ballistics expert on 24 July 2018. The responses to those queries were received from the ballistics expert on 19 September 2018 and senior counsel provided his final opinion on the evidential test on 19 October 2018. Upon consideration of this advice the Director concluded that the evidential test was satisfied and that there was a reasonable prospect of securing a conviction. It has not been established that this decision is so unreasonable that no reasonable prosecutor could have taken it. Nor has it been established that the Director failed to take into account all material considerations. Accordingly, we reject this ground of challenge.

The Convention Challenge – Arts 2, 3 & 8

Right to Life

[67] Having dealt with the other grounds of challenge we now turn to the primary focus of this challenge to prosecute the applicant for murder and wounding another with intent. The principal contention is that the impugned decision is unlawful on the basis that it violates Art 2 of the Convention. Reliance is also placed upon Arts 3 and 8.

[68] Art 2 ECHR provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

[69] Art 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[70] Art 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[71] In Rabone v Pennine Care NHS Trust [2012] 2 AC 72 Lord Dyson JSC said at para [12]:

> "[12] Before I come to the issues that arise on this appeal, I need to set the scene by making a few introductory comments about article 2 of the Convention which provides: "Everyone's right to life shall be protected by law". These few words have been interpreted by the European Court of Human Rights ("the ECtHR") as imposing three distinct duties on the state: (i) a negative duty to refrain from taking life save in the exceptional circumstances described in article 2(2); (ii) a positive duty to conduct a proper and open investigation into deaths for which the state might be responsible; and (iii) a positive duty to protect life in certain circumstances. This latter positive duty contains two distinct elements. The first is a general duty on the state "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life": see *Oneryildiz v Turkey* (2005) 41 EHRR 20 (para 89) applying, mutatis mutandis, what the court said in *Osman v United Kingdom* (2000) 29 EHRR 245 (para 115). The second is what has been called the "operational duty" which was also articulated by the court in *Osman*. This was a case about the alleged failure of the police to protect the Osman family who had been subjected to threats and

harassment from a third party, culminating in the murder of Mr Osman and the wounding of his son. The court said that in "well-defined circumstances" the state should take "appropriate steps" to safeguard the lives of those within its jurisdiction including a positive obligation to take "preventative operational measures" to protect an individual whose life is at risk from the criminal acts of another (para 115). At para 116, the court went on to say that the positive obligation must be interpreted "in a way which does not impose an impossible or disproportionate burden on the authorities". In a case such as *Osman,* therefore, there will be a breach of the positive obligation where:

> "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

[72] Mr Scoffield relies principally on the first of the three distinct duties namely a negative duty to refrain from taking life but also on the third of these duties, that is the positive duty to protect life in certain circumstances. The factual basis in respect of the alleged breaches of the Art 2 duties is contained in the medical evidence rehearsed earlier.

[73] The crux of the applicant's case is that the decision to prosecute is unlawful principally by reason of being in breach of Art 2 of the Convention. This case is advanced on the basis that the decision to prosecute is in breach of the applicant's right to life under Art 2 as public bodies cannot take steps that result in the loss of life other than where such loss of life occurs within the narrow parameters of Art 2(2) of the Convention. It is asserted that the PPS knowingly took the decision to prosecute for murder and wounding with intent notwithstanding the medical evidence that such a decision will increase his risk of sudden death (i.e. materially increase a real and immediate threat to his life) and that there can never be any public interest justification for a decision that knowingly increases the risk of death and in the alternative that any such increase is neither justified nor proportionate. The applicant also contends that the decision breaches his right to be free from inhuman and degrading treatment under Art 3 ECHR. The contention is that the impugned decision has been taken in circumstances where the medical evidence suggests that, even if the decision did not result in actual death, the applicant would not be able to participate effectively in the trial process, that other ill health is likely

to result and that the applicant will be knowingly subject to an increased risk of sudden death. It is claimed that the medical evidence strongly suggests that a fitness to stand trial application would succeed, but in circumstances where he will be expected to endure increasing ill-health before he will be able to move any such application. Alternatively, the applicant also relies on Art 8 contending that public bodies can interfere with a person's right to bodily integrity only where it is proportionate and in the public interest to do so, and where reasons have been provided for that interference.

[74] The applicant argues that notwithstanding that there is sufficient evidence to prosecute for murder and wounding with intent it was not lawfully open to the Director to conclude that the public interest required a prosecution. This contention is based on the medical reports earlier summarised.

[75] It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether prosecution is required in the public interest. In taking decisions as to prosecutions the prosecutor is "taking decisions for the benefit of society as a whole" [para 4.10]. The duty of the PPS is to form an overall view of the public interest.

[76] The presumption is that the public interest requires prosecution when there has been a contravention of the criminal law. The serious nature of the case will make the presumption "a very strong one" [para 4.11 of the Code].

[77] The factors identified as relevant and the weight to be attached to any individual factor may vary in each case and one factor in favour of a prosecution may outweigh several factors against [para 4.13].

[78] We have already held, for the reasons given, that it is clear from the evidence that the issue of the applicant's health was given very careful consideration by the Director having properly taken into account the medical evidence he had obtained.

[79] We have set out the medical evidence relied upon above. As noted in this judgment at paras [45]-[46] criminal courts in this jurisdiction routinely deal with a variety of issues arising from the medical issues that can arise in relation to defendants, witnesses and victims. However, the present challenge is to the lawfulness of the anterior decision to prosecute a suspect in respect of whom "…there is sufficient evidence to provide a reasonable prospect of conviction" for, inter alia, murder. This challenge is based on the medical evidence and the contention that prosecuting the applicant breaches Art 2.

[80] Having considered the medical reports in this case we do not consider that the risk identified is of such a nature as to require an assessment by the Director that the public interest test is not met on the basis that to do so would violate the applicant's right to life under Art 2. The medical reports reveal, in effect, an unquantifiable risk. The 2019 report from Professor Adgey indicates that the likely

consequence in this case from a decision to prosecute would be increasing frequency of chest pain and dyspnoea leading to a "possible" further myocardial infarction and the increased risk of sudden death." In the most recent medical report the doctor notes that "no-one can predict when a deterioration in heart failure will occur and/or death… What we can say is that it would be foolhardy to ignore the medical evidence particularly with regard to the factors likely to precipitate deterioration in [the applicant's] health." Of course, as noted earlier it is plain that the Director did not "ignore" the medical evidence. On the contrary he gave it very careful consideration. Moreover, and this is a matter to which we shall shortly turn later in this judgment, the Director is well aware of the panoply of safeguards and mitigating measures that the criminal courts have at their disposal in dealing with health issues that can arise in relation to defendants and others.

[81] An unquantifiable increase in risk from a pre-existing condition occasioned by the stress of being prosecuted for serious crime (including murder) is ordinarily unlikely to be a proper basis for condemning as unlawful and in breach of Art 2 the decision to prosecute. It is unsurprising that the applicant has been unable to unearth any domestic or Convention jurisprudence in support for such a contention. Indeed, if such a risk in effect required the Prosecutor to conclude that the public interest test for prosecution is not met it would have far-reaching repercussions for the criminal justice system which regularly involves dealing with defendants (and others) who have severe mental and/or physical ill health problems which in many cases will be inevitably and adversely affected by prosecution.

[82] Moreover, if the argument of the applicant was accepted it would confer *de facto* immunity on any suspect with a medical condition capable of similarly increasing risk consequential upon higher levels of stress resulting from a decision to prosecute. If correct, a serial killer or rapist could not lawfully be prosecuted if the medical evidence established that a decision to prosecute would expose him to that risk. Taken to its logical conclusion, if prosecuted, he could rely on the same evidence to stop an otherwise fair trial with a reasonable prospect of conviction as an abuse of process. Or, if convicted, it would be open to him to argue on the same or similar evidence, that imprisonment would breach his Art 2 rights. Furthermore, if the applicant's contention was right, the increase in the risk of death arising from the prosecution could, as a matter of principle, be deployed more than once. Let us assume that Suspect A successfully persuaded the PPS or the Court to conclude that a prosecution for a serious offence would be unlawful and in breach of Art 2 by reason of his medical condition. If he were then to reoffend and his medical condition had either remained the same or worsened, could he successfully advance Art 2 again to prevent prosecution? On the applicant's argument it would appear that the last question would require an affirmative answer.

[83] Risks arising from ill-health are commonplace in the criminal justice system and such risks are accommodated within the existing legal framework of criminal

trials and the adoption of special measures enabling the court to take, so far as reasonably possible, appropriate measures to mitigate risk.

[84] The scope for public law challenges based on alleged breaches of Convention rights was considered by the Supreme Court in SXH v CPS [2017] UKSC 30. Although an Art 8 case the principles enunciated are illuminating in the context of the present case.

[85] At para 31 Lord Toulson observed that there is no support in the Strasbourg authorities for the argument that even if the conduct for which a person is prosecuted was not within Art 8, the article may apply to a decision to prosecute because of the attendant consequences. In para 31 and 32 the Court distinguished between the decision to prosecute on the one hand and the attendant consequences of that decision (namely a trial and possibly sentence on conviction) on the other:

> "[31] There is no support in the Strasbourg authorities for the argument that even if the conduct for which a person is prosecuted was not within the range of article 8, the article may apply to a decision to prosecute because of the attendant consequences.
>
> [32] *By commencing a criminal prosecution the CPS places the matter before a court.* In other Convention countries the court is itself in charge of deciding whether a person should be treated as an accused in a criminal case. There is a striking absence of any reported case in which it has been held that the institution of criminal proceedings for a matter which is properly the subject of the criminal law may be open to challenge on article 8 grounds (as Munby LJ observed in R (E) v Director of Public Prosecutions [2012] 1 Cr App R 6, paras 72-75). It would be illogical; for if the matter is properly the subject of the criminal law, it is a matter for the processes of the criminal law. The criminalisation of conduct may amount to interference with article 8 rights; and that will depend on the nature of the conduct. If the criminalisation does not amount to an unjustifiable interference with respect for an activity protected by article 8, no more does a decision to prosecute for that conduct. The consequences will be matters for the determination of the court. Article 6 protects the defendant's right to a fair hearing within a reasonable time by an independent and impartial tribunal."
>
> …

> [34] The decision which is challenged is the initial decision to prosecute. … The difficulty for the appellant in advancing the claim that the decision to prosecute her was a violation of her human rights is that *it is accepted that the offence* under section 25 *is compliant with her Convention rights, and* it was conceded in the courts below *that the CPS was reasonably entitled to conclude at the time of the decision to prosecute that the evidential test was satisfied. It is difficult to envisage circumstances in which the initiation of a prosecution against a person reasonably suspected of committing a criminal offence could itself be a breach of that person's human rights. It is true that the CPS is not bound to prosecute in every case, depending on its view of the public interest, but I do not see that the fact that in this jurisdiction a prosecution is not obligatory makes a difference. Whether it is in the public interest to prosecute is not the same as whether a prosecution would unjustifiably interfere with a right protected by article 8."*

[86] At para 34, albeit in the Art 8 context, the Supreme Court stated that "*a decision to prosecute* does not of itself involve a lack of respect for the autonomy of the defendant but *places the question of determining his or her guilt before the court, which will itself be responsible for deciding ancillary questions* of bail or remand in custody or the like."

[87] It is noteworthy that in SXH, in light of the developments that had taken place in that case (the appellant had been granted asylum), the CPS decided that the prosecution should not continue because it would not be in the public interest. This illustrates what is well known namely that the propriety of continuing a prosecution must be kept under review by the prosecuting authorities (see Lord Kerr at para 43). This obligation on the PPS, post-prosecution, of the duty of continuing review applies to both limbs of the prosecutorial test – the evidential test and the public interest test.

[88] We accept the submission that the decision in SXH renders the applicant's claim for breach of Article 8 untenable. This reasoning was applied by the Divisional Court in Re JR76 [2019] NIQB 103 – see para [50]-[54]. The latter case involved an unsuccessful challenge to the decision of the PPS to prosecute a mother and daughter for unlawfully obtaining and using 'abortion pills' obtained over the internet relying, inter alia, on Art 8 & Art 3 of the Convention.

[89] The particular obligations upon the prosecuting authorities where it is alleged that Article 2 and 3 obligations are engaged were considered in R (D) v Central Criminal Court [2003] EWHC 1212 (Admin). The applicant was one of three accused in a criminal trial. Part of his defence was that he was an informer. He wanted to include this in his defence statement. While the prosecution did not accept the

entirety of the applicant's account, it was accepted that the release of the defence statement to the co-accused undoubtedly created a risk of death for him and his family. It was described as a "*high risk to life*."

[90] In R(D), Lord Justice Scott Baker said:

> "20. …Both Articles [2 and 3 of ECHR] are relevant because the claimant and his family are at risk of death, or of reprisals involving serious injury short of death.
>
> 21. It was common ground that Articles 2 and 3 each placed both positive and negative obligations upon the State. Thus, for example, in a positive obligation case, the citizen need only show that the State has not done all that could reasonably be expected of it to avoid a real and imminent threat to life: Osman v United Kingdom [1999] 29 EHRR 245. But the present case is one in which the State's negative obligations arise as well. By continuing with the prosecution it is said that the claimant will be exposed to a real risk of harm, and it is said that whatever his conduct may have been that gives rise to this risk is irrelevant ….
>
> 22. Thus the negative obligation is of a more absolute nature than the positive obligation. But, in my judgment, it is necessary to define accurately the nature of the negative obligation in this case. It is not simply not to prosecute the claimant because of the risk to life et cetera, rather it is not to prosecute unless the prosecutor is satisfied that the risk can be adequately met. Of this, the prosecutor was satisfied.
>
> 25. There are two imponderables about the level of risk in this case: (1) what it is at the moment; and (2) the extent to which it will be increased if the trial proceeds. However, it cannot be doubted that whatever the answer to these imponderables, the claimant and his family will be under very serious risk if the defence statement is disclosed.
>
> 26. *What is the obligation of the prosecutor? In my judgment, it is to be aware that proceeding with the trial is going to create a significant risk, or increased risk to life or limb of the defendant and his family. He should then ask himself what measures can be taken to minimise that risk.*

….

29. The issue in the end comes down to whether the decision-maker has acted lawfully. In my judgment, he has because he was aware of the risk and satisfied himself that steps could be taken by others to meet it. Should the appropriate steps not be taken, then those who fail to take them might themselves be open to judicial review; but that is, if ever, for another day."

[91] In R(XY) v CPS & ors [2016] EWHC 1872 the court, took the same approach:

"94. The questions for this Court are:

(i) Did … [the prosecutor] properly identify the risk to XY and his family?

(ii) Did [the prosecutor] satisfy herself that steps could be taken by others to meet the risk?

The responsible authorities provided relevant information to the decision maker which permitted her to properly identify the risk. She was aware of the risk and took steps over a period of time and since to ensure that a system existed whereby the risk could be minimised and/or managed. In our view the steps taken by the prosecutor were appropriate, reliance was placed upon relevant information. A system of adequate protection to cover events from low to high risk existed sufficient to satisfy the Article 2 and 3 obligations of the State."

[92] In the present case the DPP identified the risk arising from the applicant's ill-health and thoroughly investigated it. He sought the advices of counsel who directed that updated medical evidence should be obtained to assess the applicant's current condition and that specific queries should be put to Professor Adgey. The DPP shared the medical evidence with the applicant's solicitor and received submissions based upon it. We accept that in making the decision to prosecute the DPP weighed the appropriate considerations. He was aware, inter alia, that it is open to the applicant to mount an abuse of process application arising out of his medical condition with such evidence as he chooses to place before the court; that the trial process would allow for various measures to mitigate risk; that all prosecution decisions are kept under continual review after a decision to prosecute is made.

[93] The Court acknowledged in R(D) that the prosecutor could rely on the assistance of and information from others in mitigating any risk to life. Similarly, in

the present case the DPP relied upon information from a medical expert and the future assistance of the criminal courts in ensuing that the trial process adjusts appropriately to reduce the risk to the applicant.

[94] We are satisfied that the steps taken by the prosecutor are appropriate. Further, there is a sensitive, well tested, calibrated system of safeguards and adequate protection within the criminal process requiring and allowing special measures to address and mitigate, so far as possible, risk arising from physical or mental ill-health. The system of safeguards and protections is sufficient to satisfy the obligations of the state under Art 2 and 3.

Conclusion

[95] As noted earlier this is a "rolled-up" hearing. We grant leave. However, for the reasons given we hold that none of the grounds of challenge are made out and therefore dismiss the application for judicial review.