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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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101750/2016

IN THE MATTER OF AN APPLICATION BY LUKE O'NEILL FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS BY THE NORTHERN IRELAND PRISON SERVICE AND THE SECRETARY OF STATE FOR NORTHERN IRELAND

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COLTON J

Background

[1] The applicant was arrested on 21 September 2016. Together with three others he was charged with offences of attempting to murder police officers in the period 30 August to 2 September 2016 and with the possession of explosives.

[2] He was remanded to Maghaberry Prison on 27 September 2016. Since then he has been seeking admission to the separated landing for Republican prisoners at Roe House. He argues that it is only in these conditions that he will be safe in prison.

[3] Ultimately his application for transfer to separated conditions was refused by way of a written notice on 26 October 2016 which stated in respect of the applicant:

> "You do not fulfil the criteria i.e. your safety may be at risk if you were transferred to the Republican Separated Unit."

[4] As a result of the refusal to transfer the applicant to separated conditions, he remains housed in integrated conditions in Quoile House where he is allocated a cell of his own. Since his allocation there he has refused to leave his cell other than for

visits. He remains isolated in his cell and refuses to integrate with other prisoners. He says he does this in order to protect himself from other prisoners so that he is not attacked. Unsurprisingly he avers that this is having a devastating impact on his mental health. Obviously such a course of action can only be harmful to him and the circumstances which have arisen are troubling.

[5] On 21 October 2016 the applicant sought leave for judicial review seeking an order quashing the on-going refusal of the respondents to permit the transfer of the applicant to the separated landing for Republican prisoners at Roe House and sought an order of mandamus compelling them to transfer him to that accommodation. The decision as to whether the applicant should be housed in separated conditions is a matter for the Secretary of State, the second respondent.

[6] The matter came before Mr Justice Maguire and was reviewed by him on a number of occasions.

[7] He sought affidavit evidence from the respondents dealing with the matters raised on behalf of the applicant. In particular the first respondent explained why the applicant had not been allocated to Roe House, why he had been allocated to Quoile House, how he had been dealt with in Quoile House and its assessment of any risk to the applicant whilst he was accommodated there.

[8] Mr Justice Maguire also had an opportunity to view CCTV evidence relating to an incident which occurred on 2 October 2016. He also dealt with interim applications for discovery in the course of which he had access to sensitive material relating to the matter held by the Prison Service.

[9] Having considered the material provided by the Prison Service he refused leave to the applicant to challenge the decision not to transfer him to Roe House. In short he took the view that the court had no reason to doubt the accuracy of the assessment of the respondents in respect of there being a risk to the applicant's safety if he were to be transferred to Roe House.

[10] However he was persuaded to the requisite standard for leave that the applicant should be permitted leave to challenge his on-going placement in Quoile House. The issue to be argued is whether there has been a breach of the applicant's rights under Article 2 or Article 3 of the ECHR.

[11] Therefore, the only challenge before the court is the decision to house the applicant in Quoile House. This challenge concerns only the first respondent. Accordingly, a new amended Order 53 statement was issued on behalf of the applicant on 4 January 2017.

The relief sought by the applicant

[12] The applicant now seeks the following relief:

> "(a) An order of certiorari quashing the decision of the NIPS to house the applicant in Quoile House in HMP Magherberry.
>
> (b) A declaration that the decision of the NIPS to house the applicant in Quoile House is unlawful; …"

[13] The grounds upon which this relief is sought are as follows:

> "(a) The decision to house the applicant in Quoile House places the applicant's safety at risk and is in breach of Article 2 ECHR in all the circumstances of the case.
>
> (b) The decision to house the applicant in Quoile House places the applicant's safety at risk and is in breach of Article 3 ECHR in all the circumstances of the case."

[14] I should add that after the granting of leave Mr Justice Maguire dealt with on-going issues in relation to disclosure and on 16 June directed enhanced gisting of the details of a Security Incident Report (SIR) to which I will refer later in the judgment.

Consideration of the arguments

[15] I am grateful to all the counsel who appeared in this case for their extremely helpful written and oral submissions. Mr Ronan Lavery QC appeared with Mr Aidan McGowan BL on behalf of the applicant. Mr Tony McGleenan QC and Ms Rachel Best appeared for the respondents. I am also grateful to the parties' solicitors for the helpful and well organised way in which the papers were presented.

[16] The applicant alleges that the decision to house him in Quoile House in Maghaberry Prison places his safety at risk and is in breach of Article 2 ECHR and Article 3 ECHR.

The Article 2 argument

[17] In the course of the hearing I was referred to a significant number of authorities. All of these cases are highly fact specific but nonetheless they are helpful in establishing the principles which should be applied to the unusual facts of this case.

[18] Article 2 provides that:

> "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."

[19] Article 2(1) imposes three different duties on the State. The first is the negative duty to refrain from taking life, save in the exceptional circumstances envisaged by Article 2(2). The second is a positive duty properly and openly to investigate deaths for which the State may be responsible – an investigatory duty. The third duty requires the State not only to refrain from taking life but to take positive steps to protect the lives of those in their jurisdiction in certain circumstances – the protective duty.

[20] It is this protective duty which is at play in this matter.

[21] The principles are perhaps best set out in the judgment of the ECHR in **Osman v United Kingdom [2000] 29 E.H.R.R.** at paragraphs 115 onwards:

> "115. The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties. …"

The court goes on to say as follows:

> "116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of

> priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. …. In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that 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." (My underlining)

[22] Thus the applicant needs to establish firstly that there is a real and immediate risk to him of which the authorities know or ought to know. Secondly he must establish that there has been a failure to take such measures which could reasonably be expected having regard to that risk and which might have been expected to avoid that risk.

Is there a real and immediate risk of which the authorities know or ought to know?

[23] The applicant says that this risk is evidenced by a number of matters.

[24] Firstly, the fact that the applicant is a "Republican prisoner" accused of participating in dissident Republican acts raises an issue about his safety. He points out that such a risk was recognised by the Steele Report which reported on 29 August 2003 to the then Secretary of State for Northern Ireland. The report was based on a review of safety at HMP Maghaberry and came to the conclusion that "separation of paramilitary prisoners is necessary in the interests of safety". This led to the "compact for separated prisoners" which set out the basis upon which a prisoner would be permitted to be housed in separated conditions. The applicant says that he falls into this category.

[25] Secondly, he says that after being admitted to Quoile House he regularly hears abusive language and threats from other prisoners who will be aware of his Republican background.

[26] Thirdly he relies on a specific incident which occurred on 2 October 2016 when there was a malfunction in the prison as a result of which the doors in Quoile House unlocked. When this happened other prisoners in the vicinity of the applicant's cell came out from their cells and were chanting and shouting verbal abuse at him. In the course of the incident one prisoner made a forceful and aggressive attempt to enter his cell by attempting to push the door open. He was only prevented from gaining access to the cell by the applicant holding the door closed. This incident was recorded on CCTV footage and it is clear that during the course of this incident two other prisoners approached his door and looked through the peephole. One prisoner in particular is seen standing on a table close to the applicant's cell chanting and raising his fist. The applicant avers that this confirms that he is under threat.

[27] Finally, the applicant refers to a matter which was reported to the prison authorities on 11 October 2016 and which was the subject matter of a Security Information Report (SIR). Pursuant to an order from Mr Justice Maguire the following enhanced gist has been provided in relation to that report:

> "A prisoner reported that a sum of money, from an unidentified source, had been offered to him and other prisoners 'to do in' the applicant. The sum of money referred to in the report was £50,000. This information emanated from a source viewed as 'untested'. The prisoner would not provide further details."

[28] The Head of Operations/High Security Facility within the Northern Ireland Prison Service based in HMP Maghaberry, Colin McCready, swore an affidavit on 1 November 2016 in which he asserts that the applicant's fears are not based in reality. His sworn evidence is that there are no credible risks to the applicant's safety whilst he resides in Quoile House. In relation to the complaints by the applicant that he regularly hears abusive language and threats from other prisoners he points out that no such incidents had been reported to staff. In relation to the incident on 2 October 2016 he refers to the fact that the applicant lodged a complaint regarding this incident. The thrust of the written complaint by the applicant was that "an attempt was made by other prisoners to get into my cell to do me harm". Mr McCready personally investigated this complaint and interviewed the prisoner who had been seen attempting to push open the door of the applicant's cell. Mr McCready provided a written reply to the applicant on 5 October 2016 in the following terms:

> "Luke
>
> There is no evidence of anyone threatening you, verbally or otherwise. The landing staff are keeping a close eye on you due to your SPAR and they assure

> me that no such threats have been issued. In regard to someone trying to force their way into your cell when the locking system; I have examined the CCTV footage. It does show the person in the next cell trying to push your door open and you are obviously pushing against him. When I interviewed this prisoner he said he was just being nosy and wondered why you didn't open the door when the lock clicked open. He stated that he has no issue with you and his landing record would show he is not a threat. I suggest you should try and integrate and associate with others."

[29] In subsequent affidavits he points out that this prisoner has been released from Quoile House. As to the threat reported on 11 October 2016 the first respondent says that this threat was assessed and considered not to have any merit. The prisoner who reported it has left the prison and nothing further has been reported since 11 October, over eight months ago.

[30] In relation to the Steele Report and the compact for separated prisoners the first respondent is not saying that there is no risk from integrated conditions as a general principle. Rather it says that in the circumstances of this case in its assessment the applicant would be at risk if he were placed in Roe House. Mr Justice Maguire did not give leave to the applicant to challenge the refusal to place him in Roe House. Thus he did not meet the grounds for being housed in separated conditions. Furthermore it is pointed out that he is not the only dissident prisoner who has been treated in this way.

[31] What is the court's assessment of this issue?

[32] I should indicate that I have had an opportunity to view the CCTV evidence. Unfortunately there is no sound available so it is not possible to assess what was being said. It is plain that the prisoner who is in the cell immediately next door to the applicant did try to gain entrance to his cell by pushing periodically at the door. Whilst on screen it did not look particularly threatening, the court can accept that from the applicant's perspective the matter will have been frightening. From my examination only one other prisoner, and only then fleetingly, appeared to pay any attention to what was happening at the applicant's cell. He went to the door of the applicant's cell at one point but his presence there was fleeting. The main culprit in the matter is no longer in Quoile House and when he was interviewed by the Governor he was adamant that he had no issues with the applicant and meant no harm towards him. He was assessed as not being a threat. Whilst I must be careful not to underestimate this incident and in particular the effect it had on the applicant I am not persuaded that it is sufficient to establish an objective risk to the life of the applicant. I will return to the way in which this was dealt with by the first respondent later. It may well be the case that the actions of the other prisoners were

motivated by the applicant's insistence on remaining in his cell which made him stand out from the other prisoners.

[33] In relation to the other alleged threats, there are no recorded incidents of any complaint, unlike 2 October incident and the report on 11 October has been assessed by the respondents as not representing a credible threat to the applicant.

[34] Another aspect of a potential real and immediate risk to the applicant arises from his mental health. The first respondent's approach to this issue is dealt with in paragraphs [38] to [41] in this judgment. It will be seen from this that the applicant's mental health has been fully considered and steps taken to assist him. The applicant refuses to engage with the support offered to him and according to Governor McCready the applicant maintains that these proceedings would rectify his issues.

[35] At the end of the day it is the Prison Service who has the obligation of looking after prisoners in its custody and ensuring that they are kept safe. In this case it has addressed the issue of alleged threats to the life of the applicant expressly and has exercised a professional judgment in which it enjoys a level of expertise.

[36] On the basis of the evidence produced I could not properly come to the conclusion that the judgment of the first-respondent in this matter is wrong or that I could second guess Governor McCready's assessment of the applicant's safety in his present location. I have come to the conclusion that the evidence is insufficient to support a finding that the applicant is confronted by a real and immediate risk to his life.

Reasonable measures

[37] As I have already indicated the court is troubled by the fact that the applicant continues to persist in his course of isolation which is clearly detrimental to his well-being. I think it is therefore important that the court does consider whether the first respondent has taken reasonable measures in relation to the applicant's subjective view that he is at risk in Quoile House. There must be a concern about the applicant's well-being and it is important to consider the steps that have been taken by the first respondent since he has been in custody.

[38] It is important to understand why Governor McCready chose to house the applicant in Quoile House. Quoile House is the newest and most modern accommodation in Maghaberry. The applicant has a cell on his own. It is located near to the staff desk which has clear sight lines of the landing. It is described as one of the most progressive units in Maghaberry. Prisoners are specifically selected to be housed there and any prisoner with a history of disruptive behaviour or drug use will not be selected. The population housed there is a mixture of varying religious, political and cultural backgrounds. The area of the applicant's cell is subject to CCTV coverage and is considered to be a safe and settled environment. In his first affidavit Mr McCready avers:

> "3. I made the decision to move the applicant from Bann House to Quoile House when he arrived at Maghaberry due to concerns I had regarding the applicant's mental health. A suicide note had been found and attributed to the applicant and due to his said concern for his mental health I placed the applicant on a SPAR (Supporting Prisoners at Risk). The SPAR has been reviewed and was removed from the applicant on 18 October 2016. A post closure review was held on 26 October 2016."

[39] Whilst the applicant was on the SPAR scheme he was kept under regular observation by staff and a daily log was maintained in relation to those observations between 28 September and 18 October 2016.

[40] I have considered the details of the log book which was exhibited to Mr McCready's affidavit. These clearly indicate that the applicant was settled and that he demonstrated no signs of aggression. He clearly engaged with prison staff whilst maintaining his refusal to leave his cell other than for the purposes of legal and family visits. There were no issues of concern raised in the log and no reports of any complaints.

[41] The record also contained notes of case reviews carried out by the applicant's case manager which indicate an assessment that he was not at risk of self-harming or suicide although it was recognised that the risk may increase if he was refused a move to Roe House which is the only place where the applicant felt he would be safe. Although he has not been seen by the mental health team after the post closure review assistance is available from that quarter but the applicant does not wish to avail of these services.

[42] The applicant was visited by the Chair of the Independent Monitoring Board (IMB) on 9 January 2017. The applicant left his cell and had a meeting with him in an interview room. The Chair has indicated that he is willing to conduct a follow up visit.

[43] The Governor avers that he is aware of the applicant's situation and has personally spoken to the applicant on a number of occasions with a view to assuaging his fears and encouraging him to come out from his cell and end his isolation.

[44] He has asked his staff to encourage the applicant to end his isolation.

[45] Specific accommodations and offers have been made to him. For example the Prison Service has offered to lock up prisoners 10 minutes earlier to allow him to use shower facilities on his own. He has been encouraged to make use of the phone

facilities in the prison. The Governor explains that in order to make a phone call a prisoner has to pre-programme the phone numbers that he wishes to use on to the prison system. The Governor has offered personally to log his numbers for him so that he could use the phone. Mr McCready avers that he refused this offer and told him that his solicitor advised him not to use the phone.

[46] In relation to his food the Governor explains that all prisoners receive their "breakfast pack" in their cell the day before. In relation to lunch and dinner prisoners are expected to leave their cell to collect their food. The applicant has been refusing to do this. As a result his food is delivered to his cell. The applicant also has access to the tuck shop whereby he can order food on a form which is thereafter delivered to the landing. As the applicant will not leave his cell, staff deliver his orders from the tuck shop directly to his cell and this is the facility of which the applicant avails.

[47] In the course of the proceedings a dispute arose in relation to delivery of food to the applicant's cell. It appears that in early December staff did not deliver his lunch and dinner to his cell "in order to encourage the applicant to integrate with the other prisoners as I was concerned about his self-imposed isolation" – as per affidavit from Governor McCready.

[48] This led to a complaint from the applicant's solicitors that the first respondent was attempting to "starve the applicant out of his cell". It was described as "the most egregious abuse by the prison authorities". The applicant also says that this practice continued for eight days between Monday 10 December and Tuesday 18 December and not "for a day or so". However the practice of bringing the applicant's meals to his cell has continued since that date.

[49] Because of the on-going concern about the applicant the prison staff have been instructed to observe him closely and a daily log of their observations has been maintained since 16 December 2016.

[50] I have had an opportunity to consider the details of the log which confirm his on-going course of conduct. There are no issues of complaints contained in the log other than his determination to be moved to Roe House. It is clear that he does communicate with prison staff. It is clear from the log and from what the prison authorities are saying that the applicant has invested all his hope in these proceedings as a means to him being relocated to Roe House.

[51] The Prison Service has also offered to move the applicant to Lagan House but he has rejected this on the grounds that it would be even more dangerous than Quoile House.

[52] Leaving aside the issue of where the applicant should be housed it is submitted by Mr Lavery that there are significant concerns about how the Prison Service has dealt with the applicant. He says that they have been unduly dismissive

of the concerns in relation to his safety. He is particularly critical of the investigation into the incident on 2 October. The prison Governor too readily accepted the explanation that the prisoner who attempted to enter the applicant's cell was simply being "nosy" which flies in the face of what one can see in the CCTV evidence.

[53] He is particularly critical of the way in which the Prison Service dealt with the issue of the refusal to deliver the applicant's food to his cell in December 2016. It is concerning, he says, that this matter was only dealt with after a complaint by the applicant's solicitor and in keeping with their attitude to the applicant's complaint understated the period during which this matter arose.

[54] He makes a similar complaint about the reported threat on 11 October 2016. This matter only came to light after the applicant vigorously pursued discovery. He was never informed about the matter. In his first affidavit of 1 November 2016 Mr McCready averred that "I checked the prism system, which is a system, used to record any threats or disputes between prisoners in order to risk manage the situation. I can report that there have been no recorded threats made against the applicant".

[55] In his subsequent affidavit of 26 January 2017 he says:

> "24. In relation to the applicant there has been one report, which was made by an officer on 11 October 2016. This report was entered onto the log on 14 October 2106 and the prism system on 17 October 2016.
>
> 25. Prior to the swearing of my first affidavit on 1 November I had asked my Grade V Governors if there were any new threats in relation to the applicant. I was provided with no information about threats to the applicant.
>
> 26. I met with the respondent's legal representatives on 6 January 2017 in order to prepare this affidavit. After this meeting I asked the system to be checked again and it was at this point that the SIR was brought to my attention.
>
> 27. Again I have considered this SIR and my opinion about the applicant's safety remains unchanged."

[56] On 2 March 2017 Mr McCready avers:

> "8. In relation to the remaining items requested of the prism record and the Security Incident Report (which are essentially the same thing), due to the confidential and sensitive nature of these documents they are unable to be provided to the applicant.
>
> 9. However a gist of this document is that a prisoner reported that a sum of money from an unidentified source has been offered to him to harm the applicant. The prisoner would not provide further details."

[57] I have already indicated that an enhanced gist was provided under the direction of Mr Justice Maguire and this has been set out above.

[58] Mr Lavery says that the failure of the Prison Service to carry out any further investigation in relation to this alleged report and the manner in which it has been disclosed suggests that they are simply not taking the threat to the applicant's life seriously and are not taking reasonable steps to deal with that threat.

[59] Significantly the only practical suggestion that has been made on behalf of the applicant to deal with this alleged objective risk to his life is that he be removed to Roe House. However the court has already made it clear that this decision cannot be subject to any challenge.

[60] I accept that some valid criticisms can be made of the first respondent's conduct, particularly in relation to the investigation of the incident on 2 October. It could be argued that the first respondent has underestimated the serious nature of the incident and there is no evidence for example that they spoke to other prisoners who were clearly showing some interest in the applicant. It does not appear that it was made clear to the prisoner who was interviewed that his conduct was simply unacceptable and it seems to me that more steps could have been taken to reassure the applicant.

[61] Overall however I do not see that it can be suggested that the first respondent has failed to take reasonable measures in relation to the safety of the applicant. It seems to me that the reverse is true.

[62] I also accept that the Prison Service can be criticised for the way in which they dealt with the reported threat on 11 October 2016. The disclosure of this matter was unsatisfactory, particularly having regard to the applicant's expressed fear. However, I am not in a position to second guess the assessment of this threat by the first respondent.

[63] If nothing else these proceedings and the on-going careful scrutiny by Mr Justice Maguire have ensured that the first respondent is acutely aware of its responsibilities in relation to the safety of the applicant.

[64] I have already indicated that I do not consider the first test in relation to an alleged breach of Article 2 has been established in this case, but even if it was it seems to me that the first respondent has taken all reasonable operational steps to deal with any risk which does exist.

[65] Of course this obligation continues.

[66] Late in the day the applicant has suggested that he should be transferred to the Care and Supervision Unit (CSU) within the prison. This is a unit reserved for prisoners in respect of whom it is necessary to negate any association with other prisoners. Prisoners are housed there when it is considered necessary for the good administration of the prison and the health, safety, well-being and welfare of staff and prisoners within the prison. It is an extreme measure which is subject to strict rules in relation to implementation and review – Rule 32 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995.

[67] I am told that the Prison Service do not consider that this is in the applicant's interests. Obviously this is a matter which can be kept under review. At this stage there is no material before the court which would justify an order compelling the Prison Service to admit the applicant to the CSU and in any event no such relief is sought in the Order 53 statement.

Article 3

[68] Article 3 provides that:

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

[69] As is the case with Article 2 the cases to which I have been referred are fact specific but clear principles emerge.

[70] Ill-treatment must attain a minimum of severity if it is to fall within the scope of Article 3.

[71] In **Keenan v United Kingdom [2001] 33 E.H.R.R. 38** the European Court of Human Rights said:

> "The assessment of this minimum is relevant. It depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or

> mental effects and, in some cases, the sex, age and state of health of the victim.
>
> [109] In considering whether a punishment or treatment is 'degrading' within the meaning of Article 3, the court will also have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned it adversely affected his or her personality in a manner incompatible with Article 3. This has also been described as involving treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance or as driving the victim to act against his will or conscience.
>
> [110] It is relevant in the context of the present application to recall also that the authorities are under an obligation to protect the health of persons deprived of liberty. The lack of appropriate medical treatment may amount to treatment contrary to Article 3. In particular the assessment of whether the treatment or punishment concerned is incompatible with the standard of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment."

[72] Pausing here, what is the "ill-treatment" alleged against the respondents? This is not a case where the respondents have imposed a regime of isolation. They have not inflicted any punishment on the applicant. The respondents submit simply that there is no evidence put forward by the applicant relating to an individual or individuals who have breached Article 3 in relation to the treatment afforded to him. Thus it is argued that the applicant has not even satisfied the threshold that he has suffered or will suffer ill-treatment.

[73] The respondents say that the requirement is engaged where a person raises a credible assertion that he has been ill-treated by agents of the State in breach of the article prohibition. They argue that this is not a case where the respondents are under a positive obligation to conduct an effective official investigation capable of leading to the identification and punishment of others responsible for inflicting ill-treatment.

[74] The applicant argues that Article 3 mirrors obligations imposed by Article 2 and that it also imposes a positive obligation to prevent ill-treatment administered

by private individuals. In this regard Mr Lavery relies on the decision in **Premininy v Russia [2016] 62 E.H.R.R. 18** where the courts said the following:

> "[83] In this connection, the court firstly reiterates that Article 3 enshrines one of the most fundamental values of democratic societies and, in accordance with this notion, prohibits in absolute terms torture and inhuman or degrading treatment or punishment. It imposes an obligation on the contracting States not only to refrain from provoking ill-treatment, but also to take the necessary preventive measures to preserve the physical and psychological integrity and well-being of persons deprived of their liberty. At the same time the court has consistently interpreted that obligation in such a manner as not to impose an impossible or disproportionate burden on the authorities. The court has also stated that the scope of the State's positive obligation under Article 3 must be compatible with the other rights and freedoms under the Convention.
>
> [84] Having regard to the absolute character of the protection guaranteed by Article 3 of the Convention and given its fundamental importance in the Convention system, the court has developed a test for cases concerning the State's positive obligation under that Convention provision. In particular, it has held that to successfully argue a violation of his Article 3 right it would be sufficient for an applicant to demonstrate that the authorities had not taken all steps which could have been reasonably expected of them to prevent real and immediate risk to the applicant's physical integrity, which the authorities had or ought to have knowledge. The test is not, however, required to be shown that 'but for' the failing or omission of the public authority the ill-treatment would not have occurred. The answer to the question whether the authorities would have fulfilled their positive obligation under Article 3 would depend on all the circumstances of the case under examination. The court also reiterates that State responsibility is engaged by a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm to the applicant."

[75] I acknowledge that the situation concerning the applicant is troubling. I accept that there must be a concern about his mental health. I do not consider however that there has been any failure by the first respondent to provide medical treatment to the applicant. He has been assessed by the Mental Health Team and he has been offered on-going assistance from that team, which assistance has been refused.

[76] I consider that this issue can be determined along similar lines to the allegations of a breach of Article 2. I do not consider that there is sufficient evidence to satisfy the threshold that the applicant has suffered or will suffer ill-treatment. Even if this was so, in the circumstances of this case I do not consider that there has been any failure to take reasonably available measures which would have a real prospect of altering the alleged harm which is said to constitute ill-treatment.

[77] Judicial review is therefore refused.

[78] I have already indicated that the circumstances of this case are troubling. The court expects that the first respondent will continue to monitor the applicant closely and ensure that all reasonable and practicable steps will be taken to ensure his health and safety.