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**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**v**

**HNC**

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**Before: Stephens LJ, Deeny LJ and Treacy LJ**

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**STEPHENS LJ (delivering the judgment of the court)**

**Introduction**

[1] This is an application for leave to appeal which purports to have been brought pursuant to section 159(1) of the Criminal Justice Act 1988 ("the 1988 Act") by various media organisations ("the applicants") in relation to reporting restriction orders imposed by Colton J ("the judge") under section 4(2) of the Contempt of Court Act 1981 and also under Article 3 ECHR and section 6 of the Human Rights Act 1998 ("HRA"). The accused was charged on an indictment with two serious offences but on 19 December 2018 pursuant to Article 49 of the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order") the judge held that the accused was unfit to be tried. This left proceedings under Article 49A of 1986 Order as to whether the accused did the act charged against him as the offence ("the fact finding trial"). The effect of the reporting restriction orders is that reporting of the fact finding trial is postponed until the conclusion of those proceedings at first instance. The media organisations wish to report the fact finding trial contemporaneously rather than when it has concluded.

[2] The media organisations are the BBC Northern Ireland, UTV, Irish News, Mirror Group Newspapers, Belfast Telegraph, the Irish Times and The Detail.

[3] Under section 4(2) of the Contempt of Court Act 1981 and at the commencement of the hearing of the application for leave to appeal we imposed a reporting restriction order that there should be no report of these appellate proceedings until the conclusion of the fact finding trial or further order of this court

whichever is the earlier. That was an order that we made at the commencement of the hearing in this court. We expressly stated that it was necessary at that stage to enable this court to hear and give proper consideration to the appeal before arriving at a concluded view as to whether to maintain the reporting restriction order so as to protect the integrity of the fact finding trial which is to take place with a jury, see *Cream Holdings Limited and others v. Banerjee and others* [2004] UKHL 44 at paragraph [22]. We have anonymised and limited the factual details contained in this judgment with a view to amending the reporting restriction order so as to permit publication of this judgment. The parties are requested to consider the terms of this judgment and to inform the Court of Appeal Office in writing within one week as to whether there is any reason why the judgment should not be published on the JudiciaryNI website or as to whether it requires any further anonymisation prior to publication.

[4] Mr Simpson QC appeared on behalf of the media organisations in this court though he did not do so before the judge. Mr Hutton appeared on behalf of the *accused* and Mr Murphy QC and Mr Russell appeared on behalf of the *prosecution*. We are grateful to counsel for their assistance.

[5] We adopt the terminology of "accused" and "prosecution" as for instance even after there has been a finding that the accused is unfit to be tried and as a consequence the trial shall not proceed or further proceed, Article 49A(3) of the 1986 Order refers to one outcome of the fact finding trial being "a finding that the *accused* did the act or made the omission *charged* against him" (emphasis added). The indictment which is a necessary pre-condition to a fact finding trial was preferred by the prosecution which after a finding of unfitness has the responsibility to present the evidence in relation to the facts with which the accused is charged. As will become apparent we consider that the fact finding trial is ancillary to a trial on indictment which further supports the use of this terminology. Furthermore, Schedule 1 paragraph 10 of the Contempt of Court Act 1981 provides that criminal proceedings cease to be active if the *accused* is found to be under a disability such as to render him unfit to be tried. This has the effect that the proceedings are no longer "active criminal proceedings" for the purposes of that legislation. It does not have the effect that they are no longer criminal proceedings.

[6] The hearing before this court took place on Wednesday 3 April 2019 in the context that the fact finding trial was due to commence on Monday 29 April 2019 which was the first Monday after the two week Easter vacation which commenced on 15 April 2019. After the conclusion of the hearing before this court and on Monday 8 April 2019 we dismissed the appeal with reasons to follow. We now give those reasons.

**The reporting restriction orders**

[7] The judge made three reporting restrictions orders.

[8] On 10 May 2018 the judge ordered that "the medical issues heard in respect of the defendant's medical condition are not to be reported in any publication of any sort." The order stated it was made under section 4(2) of the Contempt of Court Act 1981. There was no express limit to the duration of this order nor was there express liberty to apply to vary or rescind the order. However we consider that the order is only operative until the conclusion at first instance of the fact finding trial and that the order must encompass liberty to apply. This order was not subject to the appeal to this court.

[9] On 19 December 2018 the judge having given a full and careful judgment ordered that "there be no reporting of today's decision or subsequent proceedings save for the fact that there will be a hearing concerning the counts alleged against the defendant under Article 49A of the Mental Health (Northern Ireland) Order 1986 to determine whether the defendant did the acts charged against him. This order shall remain in force until the completion of the proceedings or further order of the court." The order stated that it was made under section 4(2) of the Contempt of Court Act 1981.

[10] On 6 March 2019 the judge having given a further judgment ordered that the reporting restriction made on 19 December 2018 was to remain in place.

[11] The orders of 10 May 2018 and 19 December 2018 stated that they were made pursuant to section 4(2) of the Contempt of Court Act 1981. That section concentrates on prejudice to the administration of justice. However, it is clear from the judgment of the judge dated 6 March 2019 that he was in the alternative maintaining the reporting restriction order of 19 December 2018 under Article 3 ECHR and section 6 HRA. Article 3 concentrates on the impact of treatment on an individual rather than on the administration of justice. Given that the order of 6 March 2019 did not refer to Article 3 ECHR ordinarily we would have referred the matter back to the judge pursuant to section 159(5)(c) of the 1988 Act for his consideration as to whether to amend the order so that reference was also made to that Article and to section 6 HRA. If we had adopted that course we would have adjourned the appeal to a date to be fixed following any amendment. However, it was vital that this appeal was heard and determined in a short timescale given that the fact finding trial was due to commence on 29 April 2019 and that trial involves highly important, sensitive and emotional issues. For that reason we were prepared to and did proceed with the application for leave to appeal on the basis that the order of 6 March 2019 was made not only under section 4(2) of the Contempt of Court Act 1981 but was also made under Article 3 ECHR and section 6 HRA.

[12] It was suggested on behalf of the prosecution that all three orders prohibited "press" reports. They do, but the reports which are prohibited are not confined to reports by members of the press. The orders affect everyone. Accordingly, anyone attending court and listening to the evidence is restrained from "reporting." A report would include an oral report of the hearing and would also include publication on the internet. If the judge wished to restrict the order to reporting by members of the

press then that would have been made clear in the order. The order has been brought to the attention of the media organisations and we consider that it should be brought to the attention of anyone attending the fact finding trial.

[13] There was an issue as to the duration of the orders. We consider that they postpone reporting until completion at first instance of the fact finding trial after which if there is an appeal the orders would not apply to those appellate proceedings. If there is to be a reporting restriction order in relation to any appellate proceedings then an application should be made to this court.

**Factual background to the orders**

[14] An indictment charged the accused with two serious offences. Prior to trial an application was brought on behalf of the accused for an order pursuant to Article 49 of the 1986 Order that the accused was unfit to be tried. Extensive medical evidence was obtained both by the accused and by the prosecution as to the accused's dementia. On the basis of that medical evidence it was accepted by the prosecution and the judge held that the accused was unfit to be tried. That then left proceedings under Article 49A of the 1986 Order. The accused sought to stay those proceedings on the basis that the increased stress associated with them would seriously affect his dementia significantly affecting his prognosis and shorten his life expectancy. It was submitted that the continuation of the proceedings would constitute inhuman and degrading treatment, contrary to Article 3 ECHR and section 6 HRA. The judge heard conflicting medical evidence from Dr H Kennedy called on behalf of the accused and Dr Anderson called on behalf of the prosecution. The judge did not consider it necessary to resolve those conflicts as neither would have led to a finding of a breach of Article 3 ECHR.

[15] The judge declined to order a stay of the proceedings ruling that there was no sufficient medical evidence to suggest that to date the proceedings have caused anything which would meet the stringent test necessary to engage Article 3. The judge not only considered the impact of the proceedings on the accused to date but also considered the future impact of the proceedings. The judge held that he was not satisfied that the medical evidence established that there would be ill-treatment or degrading treatment which attained the minimum level of severity required to fall within the scope of Article 3. However in arriving at that conclusion the judge took into account the nature of the proceedings and the mitigating factors available to the accused supported by the medical evidence. Those mitigating factors included restrictions on reporting which would be of assistance in reducing the risk of stress contributing adversely to his condition. This led the judge to make the reporting restriction order which we have set out in paragraph [9] and he stated that this order shall remain in place until the completion of the proceedings or further order of the court.

[16] The media organisations not having been involved at an earlier stage then made written and oral submissions to the judge who made a further ruling on 6

March 2019. In that ruling the judge relied upon section 4(2) of the Contempt of Court Act 1981. The judge posed the question as to what was the prejudice to the administration of justice in these proceedings. At paragraph [40] of his judgment the judge answered that question in the following terms:

> "As is clear from its ruling the court takes the view that the administration of justice requires a hearing on the facts in this case. The prejudice to the administration of justice in that context in these proceedings is that absent the mitigating factor of a reporting restriction the court *may* have been compelled to grant a stay of the proceedings." (emphasis added)

The judge continued that a significant factor in reaching the conclusion that a stay should not be imposed was:

> "The ability of the court to impose reporting restrictions so as to avoid a substantial risk to the health of the defendant. The court was not dealing with the normal stress, humiliation or embarrassment that may be experienced by a defendant in a criminal trial, rather with an assertion supported by expert medical evidence of a potential reduction in life expectancy."

The judge continued that it was the court's intention that the order remain in place until the end of the proceedings whilst emphasising that it was a postponement and not an absolute prohibition. On that basis the judge continued the order of 19 December 2018 under section 4(2) of the Contempt of Court Act 1981.

[17] In addition to making the reporting restriction order under section 4(2) of the Contempt of Court Act 1981 the judge also made it under Article 3 ECHR and section 6 HRA. He considered that the court, as a public authority within the meaning of section 6 HRA had an obligation to consider and, if appropriate, take steps to protect the defendant's rights under Article 3. The judge stated that in the light of the medical evidence in this case and having heard all the submissions from counsel the court comes to the conclusion that the reporting restriction order in this case is necessary to protect the defendant's Article 3 rights. The judge continued that to order a hearing on the facts without the mitigating factors expressly recommended by the medical experts, retained by the prosecution and the defence *would* in the court's view amount to a breach of the defendant's Article 3 rights. It can be seen that there were conflicting findings by the judge in that in his judgment of 19 December 2018 he stated he *may* have been compelled to grant a stay whereas in his judgment of 6 March 2019 he stated that it *would* amount to a breach of Article 3 ECHR. We tend to the view on reading the words in context of the entire judgments that "may" is the most likely wording on both occasions.

[18] It can be seen that the judge declined to discharge the reporting restriction order made on 19 December 2018 both on the basis that the order was appropriately made under section 4(2) of the Contempt of Court Act 1981 and in the alternative could and should have been made under Article 3 ECHR and section 6 HRA. It can

also be seen that the judge in making an order under section 4 of the Contempt of Court Act 1981 was relying on Article 3 ECHR in that absent a reporting restriction order he *may* have been compelled to grant a stay of the fact finding trial. He stated that "there *may* be no hearing at all in the absence of the reporting restriction …" (emphasis added). In that way there was a substantial risk of prejudice to the administration of justice in that the fact finding trial might not take place.

[19] Various other measures which reduced the amount of stress to the accused caused by the fact finding trial were identified by the judge. They were that:

(a) the accused could be informed that even if the jury found that he did the act charged that would not be a criminal conviction, see *R v H* [2003] 1 W.L.R. 411;

(b) the judge stated that "he considered it inevitable that if the jury finds the defendant did commit the act with which he is charged the imposition of an absolute discharge would be the outcome." The accused could be informed of this judicial view as to an absolute discharge under Article 50A(2)(b)(iii) of the 1986 Order;

(c) the judge indicated that there was no requirement on the accused to attend the fact finding trial. In this way the accused could be informed that he did not have to be in court but could remain at home following his normal daily routines with family and friends during the course of the fact finding trial.

(d) The accused was to be represented by counsel and solicitors and they together with his family members could provide him with proper explanations of the fact finding trial as it progressed.

All these measures would reduce the amount of stress quite irrespective of a reporting restriction order. Furthermore, these measures had to be seen in the context that the accused's health risk factors had been and would continue to be properly managed with medical intervention. For instance his blood pressure was 130 over 70 with a cholesterol of 1.8 and there was medical evidence that there was no physical evidence that stress was affecting his risk factors directly.

[20] In relation to a reporting restriction order there was no evidence before the judge as to how the accused would be exposed to fair and accurate contemporaneous reports of the fact finding trial if he was not attending that trial. For instance there was no evidence as to whether the accused read newspapers, had access to the internet, followed the news on television or on the radio or was only informed of the news by others and if so by whom. There was no evidence as to his personal circumstances such as whether he lived alone or whether there were other family members who lived with him and if so whether they would manage the news to which the accused would be exposed during the fact finding trial. There was no consideration of any mitigating measures that could have been put in place to mitigate the risk of the accused being exposed to media reports during the course of

the fact finding trial such as to cause stress to him or stress of such a nature that would lead to a breach of Article 3 particularly given the other measures which reduced stress. The question of mitigating measures was not raised by senior counsel then representing the media organisations. It was not asserted on behalf of the media organisations that consideration should be given to ways of managing the accused in his home setting for a short period during the fact finding trial in such a way as to maintain open justice without any reporting restrictions. Furthermore, it was not suggested that there could be scope for a more limited reporting restriction order such as prohibiting the publication of photographs during the fact finding trial so that if by chance the accused was passing a television he would not see his own image. As a consequence of the failure to advance these issues mitigating measures or a more restricted reporting restriction order were not considered or adjudicated on by the judge. Despite this failure to raise these issues before the judge and on this appeal Mr Simpson submitted that this was a necessary fact finding exercise which ought to have been carried out by the judge prior to imposing any reporting restriction order.

[21] A question arose on this appeal as to why if the order was made under Article 3 ECHR and section 6 HRA on the basis of stress causing inhuman or degrading treatment then why should it come to an end at the conclusion of the first instance fact finding trial. Mr Simpson submitted that the judge had jurisdiction to make an indefinite order under Article 3 and then posed the question as to what was the distinction between stress during the fact finding trial and stress at the conclusion of that trial. On this basis it was suggested that the judge ought to have but did not hear evidence as to that distinction. As Deeny LJ observed during oral submissions if the jury acquitted the accused then it would be hard to conceive as to how a report at the end of the fact finding trial would increase stress. Alternatively, if the jury found that the accused did the act charged then the reports would not have been over the whole period of the fact finding trial but could be concentrated at the end of the trial over a shorter period of time with the added advantage that the reports could be more easily managed by the accused's family. On that alternative basis it was suggested that even if the judge in the Crown Court had jurisdiction to make an indefinite order under Article 3 ECHR (rather than this jurisdiction being reserved to the civil court) that these might have been the valid reasons for limiting the restriction until the end of the fact finding trial. In any event after the hearing on 3 April 2019 Phoenix Law, the solicitors for the accused, in a letter dated 4 April 2019 analysed their appointment to represent the interests of the accused in relation to the fact finding trial under Article 49A(2)(b) of the 1986 Order and concluded that they did not have locus to make application for a life-long or indeterminate injunction preventing reporting of the proceedings after the conclusion of the fact finding trial.

**Jurisdiction to hear the application for leave to appeal under section 159 of the 1988 Act**

[22] Section 159 of the 1988 Act applies to Northern Ireland by virtue of section 172(3).

[23] Section 159 provides a right to apply to this court for leave to appeal in relation to orders restricting or preventing reports or public access to Crown Court proceedings.

[24] In so far as relevant to this appeal section 159 (1) provides that:

> "A person aggrieved may appeal to the Court of Appeal, if that court grants leave, against—
>
> (a) an order under section 4 or 11 of the Contempt of Court Act 1981 made in relation to a trial on indictment;
>
> (aa) …
>
> (b) any order restricting the access of the public to the whole or any part of a trial on indictment or to any proceedings ancillary to such a trial; and
>
> (c) any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings;
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> and the decision of the Court of Appeal shall be final."

[25] Accordingly, for there to be an appeal to this court under section 159(1)(a) there has to be both (i) an order under section 4 or 11 of the Contempt of Court Act 1981 and (ii) the order has to have been made in relation to a trial on indictment. In this case all three orders were made under section 4 of the Contempt of Court Act 1981 so that the first condition is met. The issue on this appeal relates to the second condition, namely "is an order made in relation to a fact finding trial an order made in relation to a trial on indictment"? If it is, then the media organisations have a right to appeal to this court.

[26] In addition to relying on section 159(1)(a) the media organisations rely on section 159(1)(c). That subsection does not require that the order restricting publication is made under the Contempt of Court Act 1981 so that an appeal by the media organisations is not precluded in so far as the orders in this case were also made under Article 3 ECHR and section 6 HRA. Again, two conditions have to be met. First, there has to be an order restricting publication of any report. Second, the restriction has to be of the whole or any part of a trial on indictment or of any "proceedings ancillary to such a trial." In this case the first condition has been met. The issue on this appeal is whether a fact finding trial is part of or ancillary to a trial on indictment.

[27] It was submitted on behalf of both the prosecution and the accused that this court does not have jurisdiction to hear and determine this appeal under section

159(1) of the 1988 Act as the fact finding trial under Article 49A of the 1986 Order is not "a trial on indictment" nor is it "ancillary to any such trial." The media organisations submit that a fact finding trial is either a trial on indictment or it is ancillary to such a trial.

[28] Following a finding of unfitness under Article 49 of the 1986 Order it is provided by Article 49A that "the trial shall not proceed or further proceed." In *R v Antoine* [2000] 2 All ER 2008 Lord Hutton stated at 213(B)-(C) that the trial terminates and under the equivalent provision in England to Article 49A any finding by the jury that the accused did the act charged is not a conviction. We were referred to further authorities supporting the proposition that the trial terminated; see *R v M, Kerr and H* [2002] 1 WLR 824 at 836 and *Young v Central Criminal Court* [2002] 2 Cr App R 12 at paragraph [4].

[29] On the basis that the trial terminated it was submitted on behalf of the accused that the fact finding trial under Article 49A was not a trial on indictment within section 159. Furthermore, it was submitted that it was not ancillary to a trial on indictment. It was submitted that the fact finding trial cannot be ancillary to a trial on indictment that does not take place and cannot take place. It was said that the fact finding trial was "instead of" rather than being "ancillary to" a trial on indictment.

[30] On behalf of the media organisations Mr Simpson relied on section 3 HRA which provides that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." He submitted that this court should read down the 1988 Act to be compatible with Article 10 ECHR, so that a fact finding trial for charges arising out of a bill of indictment could properly be said to be either a trial on indictment or ancillary to a trial on indictment. Mr Simpson also relied on Article 13 ECHR which provides that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." He submitted that if the media organisations cannot rely on the provisions of section 159(1) of the 1988 Act, then as they cannot bring proceedings by way of judicial review to challenge the reporting restriction orders, then the media has no effective remedy. In the alternative it was submitted that if the Court of Appeal decided that section 159(1) either does not apply to a fact finding trial or cannot be appropriately read down so that it does so apply, then that the court has an inherent jurisdiction to grant the relief sought, if relief is deemed appropriate. Finally, Mr Simpson pointed out that the media challenge reporting restrictions on behalf of the public, and as the public's watchdog. He stated that they have no mechanism to claim costs and cannot recover costs regardless of their success. On that additional basis it was submitted that the media's ability to challenge these reporting restrictions should not be unnecessarily restricted.

[31] We agree that the fact finding trial under Article 49A is not a trial on indictment so the only question is whether it is a proceeding which is ancillary to such a trial.

[32] Mr Hutton relied on *Mackay & BBC Scotland v United Kingdom* (2011) 53 EHRR 19 for the proposition that if Article 13 ECHR had been incorporated into domestic law (which is not the case) the hearing before the judge resulting in the ruling of 6 March 2019 represented an "effective remedy" for the media organisations' Article 10 rights, notwithstanding any inability to appeal. On that basis it was submitted that section 159(1) does not have to be read down to comply with Article 13 ECHR given that the media organisations were permitted to make representations to the judge. They had a hearing and what they are seeking is a right to appeal to this court. A similar submission was made relying on the proposition that Article 6(1) ECHR does not guarantee a right of appeal from a decision of a court, whether in a criminal or non-criminal case. It was stated that if Article 6(1) does not require a right of appeal then why should Article 13 require one in order to provide an effective remedy. However, it was recognised that if a right of appeal was granted then that right had to comply with Article 6 ECHR. In that respect we note the decision of this court in *R v McGreechan* [2014] NICA 5 where words were read into section 159(1) to prevent a violation of Article 6.

[33] Mr Simpson was unable to provide an authority to persuade us that to be Convention compliant there had to be a right of appeal for the media organisations.

[34] However, we do not consider it necessary to express any concluded view in relation to the issue as to whether section 159(1) should be read down in accordance with section 3 HRA in view of the purposive interpretation which we have adopted of section 159(1) applying domestic rules of construction. We were also referred to the decision of the Court of Appeal in England and Wales in *ITN News Ltd and others (Willis and others intervening)* [2014] 1 WLR 199. In that case Lord Judge CJ delivering the judgment of the court stated at paragraph [26] that given "the importance attached to the principle that criminal justice should, so far as possible, be exercised in public, (section 159(1)) should therefore be given the widest possible construction."

[35] We consider that the purpose of section 159(1) of the 1988 Act is to facilitate appeals by media organisations so as to enhance open justice so that the construction of what is ancillary to a trial on indictment should be informed by that purpose. It is not possible to have a fact finding trial under Article 49A without first commencing proceedings by serving an indictment on the accused. The indictment together with the anticipated trial on indictment is a necessary pre-condition to the subsequent fact finding trial under Article 49A. In that sense the fact finding trial grows out of and is incidental to the trial on indictment. We also note that if an accused recovers then in certain circumstances the accused can be remitted to the Crown Court for trial, see Article 50A(7) of the 1986 Order, *R v H* at paragraph [18] and *O'Callaghan v DPP* [2011] IESC 30, [2011] 3 IR 357. This means that after a fact finding trial one can have

a full criminal trial if the accused recovers. An indictment is not only a precondition to a fact finding trial but a trial on indictment can be subsequent to a fact finding trial. Finally, if an accused becomes unfit during the course of a trial on indictment the jury may determine whether he did the act charged on the evidence already given in the trial. In that way the finding of fact would be further linked to or ancillary to a trial on indictment. For all of those reasons we consider that the reporting restriction in relation to the fact finding trial is a reporting restriction in relation to proceedings which are ancillary to a trial on indictment within the meaning of section 159(1)(c) of the 1988 Act.

[36] We consider that we have jurisdiction to hear and determine this application for leave to appeal.

**The role of this court on an appeal under section 159(1) of the 1988 Act, the stance of this court on such an appeal towards a point which was not raised at first instance and the discretion to grant leave to appeal**

[37] This court when exercising the section 159(1) jurisdiction is not merely to review the decision of the trial judge, but rather to come to its own independent conclusions on the material placed before it — *Ex parte Telegraph plc* [1993] 1WLR 980 at 986D and *Ex parte The Telegraph Group plc and others* [2001] 1 WLR 1983 at paragraph [3].

[38] Mr Simpson submitted that this test permitted the media organisations to place additional material before this court, that is to make legal submissions that were not made at first instance and then this court was bound to come to its own conclusions on that additional material. In this way Mr Simpson sought to circumvent the ordinary rule that the leave of this court is required before a point not taken at first instance is permitted to be taken on appeal. We reject those submissions. If the application of the test in *Ex parte Telegraph plc* had such a consequence then criminal trials or fact finding trials in the Crown Court could be disrupted by unnecessary delay with new points being taken on appeal. The disruption of criminal or fact finding trials would not be in the public interest. There is another important public interest in play which is securing open justice and for that reason the test for leave to raise a point not raised at first instance may not be exactly the same as in a civil case, for which see *Kelly (Vincent) v Prison Service of Northern Ireland* [2019] NICA 25. However, there is discretion in this court as to whether a new point can be taken on appeal and one of the factors in the exercise of discretion must be what if any impact allowing the point to be taken on appeal will have on the administration of justice in the Crown Court.

[39] We consider that there are not one but rather two discretions in play. The first is whether to grant leave to appeal which is the statutory discretion and the second is discretion as to whether to allow a point not taken at first instance to be taken on appeal. A factor affecting both discretions must be the impact on the administration of justice in the Crown Court.

**Article 3 ECHR and the principle of open justice**

[40] Article 3 ECHR provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[41] An individual alleging a breach of Article 3 ECHR has the burden of establishing that he has been or will be subjected to torture or to inhuman or degrading treatment, see *AM (Zimbabwe) and Another v Secretary of State for the Home Department* [2018] EWCA Civ 64 at paragraph [16].

[42] In this court Mr Simpson, whilst emphasising the minimum level of severity required, conceded that a criminal trial can amount to *treatment* within Article 3 ECHR. For the purposes of this appeal and without deciding whether that concession is correct we are content to proceed on that basis.

[43] As the ECtHR stated in *Gafgen v Germany* (22978/05) (2011) 52 E.H.R.R. 1 "in order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity." The ECtHR went on to state that:

> "the assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it, as well as its context, such as an atmosphere of heightened tension and emotions."

An indication of the minimum level of severity can be discerned in that the ECtHR stated that it "has considered treatment to be "inhuman" because, inter alia, it *was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering*. Treatment has been held to be "degrading" when it was such as to arouse in its victims *feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience*" (emphasis added).

[44] In relation to anticipated treatment in contravention of Article 3 ECHR the ECtHR reiterated "that a threat of conduct prohibited by Article 3, provided *it is sufficiently real and immediate*, may fall foul of that provision" (emphasis added).

[45] An authority in this jurisdiction which considered anticipated treatment in contravention of Article 3 ECHR was *A Police Officer's Application (Leave Stage)* [2012] NIQB 3. In that case McCloskey J considered the question of granting anonymity to an applicant for judicial review. The application for anonymity relied not only on Article 8 but also on Articles 2 and 3 ECHR. At paragraph [13] McCloskey J stated:

> "Where the Convention right at stake is that protected by … Article 3 and the court is *satisfied of a real and immediate risk* (of) *the infliction of treatment proscribed by Article 3*, it is difficult to envisage the balancing exercise having an outcome in which the principle of open justice prevails fully. In contrast, the claims of a litigant whose quest for anonymity is based on Article 8 may, in principle, be weaker" (emphasis added).

We agree that the burden is on the person alleging the infliction of treatment proscribed by Article 3. We also agree that in relation to anticipated treatment in contravention of Article 3 what has to be established is a real and immediate risk. However, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15(2) even in the event of a public emergency threatening the life of the nation. It is an absolute right which does not involve any balance with a competing interest. Once facts have been established that lead to the conclusion that there has been or that there is a real and immediate risk of inhuman and degrading treatment then there can be no question of a balance with the principle of open justice. However, there is an anterior stage when consideration is being given as to whether the treatment is proscribed by Article 3. At that anterior stage the importance of the principle of open justice comes into play. At that stage a court is obliged to consider ways in which the risks can be mitigated and the treatment ameliorated so as to leave open the conclusion either that the treatment will not meet the minimum level of severity required or that the risk is no longer real or immediate. This obligation on the court is of particular importance where, as here, both the prosecution and the accused agree that there should be a derogation from the principle of open justice, see *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at page 977 letters C to G. So at the anterior stage the court must take into account the constitutional importance of open justice by a careful scrutiny of and if necessary evidence as to mitigating or ameliorating measures. The constitutional imperative of open justice should drive a careful search for those measures so that open justice is maintained without a breach of Article 3.

**The submissions**

[46] Mr Simpson on behalf of the applicants had two central submissions. First that the judge ought to have but failed to consider mitigating or ameliorating measures so as to maintain open justice without a breach of Article 3. The second was that the judge when considering whether a reporting restriction was "necessary" ought to have but failed to apply the three-stage series of tests by which to determine the matter as set out in *Ex parte The Telegraph Group plc and others* at paragraphs [19]–[22]. Mr Simpson acknowledged that none of the mitigating or ameliorating measures had been suggested to the judge and accordingly none of the facts in relation to the potential measures had been determined. Mr Simpson stated and we agree that there can be no criticism of the judge in circumstances where as here the issue was not raised before him. He also accepted that it was an unattractive proposition to advance a case that had not been made at first instance.

Mr Simpson recognised that the failure of the media organisations to raise this issue meant that this court could not form a view as to whether the measures could lead to the reporting restriction being removed. This in Mr Simpson's view meant that the only potential course of action open to this court if leave to appeal was granted and if the appeal was allowed on this ground would be to remit to the judge to hear further evidence which might include hearing again from the medical witnesses. Mr Simpson recognised that the remittal of the matter to the judge would most probably lead the accused to renew his application for a stay given that a reporting restriction order was part of a package of measures that diminished stress. In such circumstances it is clear and Mr Simpson did not attempt to persuade us that remittal of the matter to the judge would most probably have resulted in the substantive fact finding hearing being adjourned.

[47] Mr Hutton on behalf of the accused whilst accepting that the judge did not consider mitigating or ameliorating measures highlighted that these were not raised by the media organisations before the judge. Mr Hutton also opened various parts of the medical reports but we were unable from those parts to obtain a clear view of the extent to which the accused was exposed to media reports or how that exposure could be mitigated. Mr Hutton also stated that whilst the judge could obtain evidence as to how members of the family would assist with mitigating measures he was not in a position to order members of the family to undertake those measures.

[48] Mr Murphy on behalf of the prosecution emphasised the disruption to the fact finding trial if leave to appeal was granted and if the appeal was allowed. The disruption to the trial was to be seen in the context not only of the public interest in the fact finding trial proceeding but also in the context that in this case the family of the victim would not be aware of the content of some of the evidence except during the fact finding trial. They would be particularly interested in hearing that evidence and doing so within an appropriate period of time. He anticipated that the stay application would be reactivated if the appeal was successful. He stated that the jury were due to be sworn on 29 April 2019 and that it was not possible to hear any further stay application prior to that date. There were particular problems about witnesses who were to attend the fact finding trial and we are content that there were substantial difficulties in organising those witnesses.

**Discussion**

[49] As we have set out there is a requirement for the judge to consider the way in which the risks could be managed and whether those risks could be overcome by some less restrictive measures. If the sole test for the exercise of discretion to give leave to appeal was the same as the grant of leave to apply for judicial review then this court would grant leave to appeal in relation to that issue. However, that is not the only matter relevant to the exercise of discretion.

[50] We note that the order that was made was an order which was envisaged as being a relatively short postponement of reporting of the fact finding trial until it

was concluded at first instance. That trial was due to start on 29 April 2019 and if there was no interruption it would have concluded in a period of some two weeks with a jury verdict. We take into account in the exercise of discretion what was envisaged to be the short duration of the reporting restriction order. We also note that if the proceedings are more protracted than envisaged or if there is some other material change of circumstance such as another application to stay the proceedings then there can be a further application by the media organisations to the trial judge to remove or vary the reporting restriction orders on foot of the liberty to apply.

[51] A significant factor in the exercise of discretion is that the point raised by the media organisations as to mitigating and ameliorating measures was not raised before the judge. Inevitably, if leave to appeal was granted and the appeal was allowed further evidence would have to be called, the conflict of evidence as between Dr Kennedy and Dr Anderson may well have to be resolved and there might well be a further application to stay the fact finding trial.

[52] We consider for the reasons set out by Mr Murphy that it is imperative that there should be no delay to the fact finding trial. This is the most significant factor in the exercise of discretion.

**Conclusion**

[53] The point raised in relation to mitigating and ameliorating measures was not raised at first instance and we do not consider in the exercise of discretion that the media organisations should be permitted to raise it on this appeal. That is a factor that we take into account in relation to the overall discretion as to whether to grant leave to appeal.

[54] If leave to appeal was granted there would be substantial disruption to the fact finding trial which was to commence on 29 April 2019.

[55] Taking both of those circumstances into account in the exercise of discretion we refuse leave to appeal to the media organisations.

[56] We will hear counsel in relation to the reporting restriction order that relates to these appellate proceedings.