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(subject to editorial corrections)*

17/122172

IN THE CROWN COURT FOR NORTHERN IRELAND
SITTING AT LAGANSIDE

_____

BETWEEN:

THE QUEEN

v

(1) SOLDIER A
(2) SOLDIER C

Defendants

_____

MAGUIRE J

Background

[1] In this case, the two defendants each seek from the court a stay of the proceedings against them. The proceedings as constituted are said to represent an abuse of process.

[2] The charge found in the Bill of Indictment which the defendants face, in its material part, reads:

> "**Charge**
>
> Soldier A and Soldier C are jointly charged with the following offence:
>
> First Count – statement of offence – murder, contrary to common law.
>
> Particulars of Offence – Soldier A and Soldier C, on 15 April 1972, murdered Joseph McCann."

[3] A summary of the grounds upon which the application of each is based can be taken from the joint skeleton argument for the defendants. It reads:

"In summary, the defendants submit that:

(a) It will be impossible for them to receive a fair trial. Due to the delay of over 47 years since the incident took place and the inadequacy of the investigation in 1972, directly relevant evidence has been lost. In particular:

> (i) Soldier B, who most probably caused the fatal wound to Mr McCann has died without ever providing a proper account of his actions.
>
> (ii) Key witnesses are either unavailable or unable to recollect the incident and statements taken at the time are insufficiently detailed. The identities of members of the security forces present were not recorded. Policeman B, who spoke to Soldier B immediately before he shot at Mr McCann, cannot be traced.
>
> (iii) The defendants cannot remember the precise events or details relevant to their defences. The opportunity to interview the defendants fully and under caution has been lost.
>
> (iv) There is little or no forensic evidence and the opportunity to analyse the rounds fired and injuries sustained has been lost.
>
> There is a significant and demonstrable chance that the missing evidence amounts to decisive or strongly supportive evidence on specific issues, such as the circumstances as the defendants perceived them to be for the purposes of their defences. The inconsistencies and lack of detail in the documents available mean it is impossible to compensate for the evidence that is no longer available, or was never obtained. The prejudice to the defendants would be so serious that there are no measures that could remedy the defects at trial.

(b) It would be unfair for them to be tried. The defendants received unequivocal representations that they would not be prosecuted in 1972. The 1972 decision by the DPP endorsed by the AG, was reviewed by the DPP in 1973 and was based upon the conclusion that there was no sufficient likelihood of conviction to

> warrant a prosecution. The defendants were led to believe that the Historical Enquiries Team ("HET") process in 2010 was intended to bring some form of resolution to the family of Mr McCann and were reassured that they would not be prosecuted in the absence of fresh evidence. They acted upon those representations to their detriment by providing statements under caution about the incident to HET and not retaining or preserving evidence to support their defence in the intervening years. The subsequent decision to prosecute is not predicated on any material change in the evidential position, but relies on a fresh assessment on the likelihood of conviction. The prosecution also fails to recognise the improprieties of the HET process and calls into question the integrity of the justice system. The review of the decision not to prosecute appears to have been taken in a manner that violates the principles on review in the Code for Prosecutors. In particular the reference of the case to the DPP in 2014 was unprincipled."

[4] The court heard the abuse of process application for just over a day in December 2018 but, as a result of disputes which arose about disclosure of documents, at the request of the parties, the court agreed to adjourn the application in the hope that such matters could be resolved as between the prosecution and the defendants.

[5] No agreement was in fact arrived at and while the width of the gulf between the parties in respect of disclosure was narrowed, ultimately the defendants made an application in respect of disclosure to the court. This application was heard in May 2019 and the court provided a ruling in respect of this matter at the beginning of July 2019.

[6] The hearing of the abuse of process application resumed in these circumstances and occupied 2 days towards the end of September 2019. In these proceedings Soldier A is represented by Clare Montgomery QC and Helen Law BL. Soldier C is represented by Liam McCollum QC and Ian Turkington BL. The prosecution is represented by Louis Mably QC and Samuel Magee BL. The court wishes to express its gratitude to counsel for their helpful and able written and oral submissions.

Chronology of Events

[7] In order to set the defendants' application in context, it is necessary for the court to provide a chronology of the main landmarks relevant to the evolution of events in this case. The court will seek to do this succinctly but it should not be

thought that an omission by the court to refer to any specific event indicates that the court has not considered it. On the contrary, the court has considered all of the material put before it but inevitably it has had to make a selection as to which matters it sets out in this judgment.

[8] In tabular form the court provides below the sequence of events with the date being found in the left hand column and the event to the right of this.

Date	***Event***
15/4/72	Mr McCann shot on Joy Street, Belfast. Statements taken from Soldiers A, B, C and Police Officers A and B. Autopsy carried out.
17/4/72	Paddy Devlin MP writes to DPP raising possible breach of the yellow card instructions.
3/5/72	Forensic report.
16/5/72	Police report of DCI Agar. Report of Chief Superintendent Wilson.
30/6/72	Mr McCann's family solicitor identifies 7 witnesses to the DPP.
18/7/72	Fatal Accident Act Writ issued.
11/9/72	Statement taken from Josephine Connolly. Sir Barry Shaw (DPP) advises no prosecution.
12/9/72	AG endorses decision of DPP.
1/3/73	Inquest opened and adjourned.
30/3/73	DPP offers review of evidence following inquest.
8/6/73	Inquest jury returns open verdict.
12/5/75	DPP received no response to offers to review of evidence following inquest.
26/10/86	Civil claim against MOD. The court infers it was settled.
9/8/05	Soldier A is taken to hospital exhibiting stroke symptoms. A CT scan reveals multiple mature cerebellar infarcts.

26/2/07	Initial meeting between HET and Devonshires, solicitors acting for the soldiers.
25/6/09	Devonshires meeting with HET.
2/9/09	HET writes to Soldiers A and C inviting them for interview.
13/1/10	Devonshires meeting with HET.
14/1/10	Devonshires email Soldier A with reassurance that there has been no criticism of his actions for 38 years.
5/3/10	Letter from Mr McCann's family provided to Devonshires.
11/3/10	Devonshires advise Soldier A in writing that he should answer questions in interview because there is a risk of adverse inferences and he cannot make his situation worse.
17/3/10	Soldier A interviewed by HET, after which Paul Johnston tells Soldier A that Mr McCann's family appreciate him being there and tells him that this is the end of it.
19/3/10	Soldier C after his interview by HET told by one of their staff that the matter ends here.
2010/2011	HET report.
20/2/13	Mr McCann's family request AGNI direct a new inquest.
20/11/13	AGNI publicly states that there should be no further prosecutions of Troubles cases and is heavily criticised.
11/3/14	AGNI refers the case to the DPP to review the 1972 decision stating "I have not been provided with material outlining the reasons behind the DPP decision … From my reading of these papers [the HET report] it strikes me that you may find a review worthwhile".
9/5/16	PPS writes to Devonshires.
16/11/17	Soldiers A and C summonsed to appear on 6/12/17.
6-7/12/18	Abuse of process hearing – adjourned part heard.
28/1/19	AGNI tells PPS that "the suggestion that legacy prosecutions should not be pursued … was put forward as a possible change dependent on broad agreement and a future change in the law. In the absence of

such a change in the law the Attorney General could not have … refused to refer troubles related deaths to the Director of Public Prosecutions in circumstances whenever he perceived that a potential offence may have been committed and that further investigation could be appropriate."

3/5/19 Disclosure hearing.

5/7/19 Disclosure ruling.

1/8/19 PPS served with Dr Z's report re Soldier A.

6/9/19 PPS serve response to remaining outstanding disclosure requests, including:

1. That the AGNI material regarding the referral to the DPP in 2014 is not disclosable.

2. That there are no records of any discussion in relation to the prosecution of Troubles cases generally between 2013-2016 or the referral of this case and no records of any advice in connection with the prosecution of this case or Troubles cases generally.

3. Confirmation of the lack of any retained MOD material.

4. Refusing to disclose correspondence between Mr McCann's family and the PPS.

11/9/19 Mention in respect of disclosure issue at which Maguire J directs that the prosecution must disclose correspondence between Mr McCann's family and the PPS, as per the July ruling.
Disclosure subsequently provided.

13/9/19 PPS confirm that they intend to cross examine Dr Z. Later the PPS commission a report of their own from Dr Y.

[9] In terms of the significance of the events in the chronology it will be of assistance for the court to provide a limited measure of additional detail under appropriate headings.

The Incident

[10] The death of Mr Joseph McCann lies at the centre of this case. This occurred on the afternoon of 15 April 1972. By this time civil disturbances had been ongoing in Northern Ireland for 3-4 years. It had been thought that the ordinary security

forces could not cope and as a result soldiers had been drafted into Northern Ireland in aid of the Civil Power. Serious paramilitary activity involving both the IRA and Loyalist terrorists was commonplace. Mr McCann was believed to be an active and prominent member of the Official IRA. Around 3.00pm a group of soldiers from the Parachute Regiment were conducting a vehicle checkpoint at the junction of May Street and Joy Street in Belfast. This location was adjacent to the Markets area of the city and it appears that a police officer approached the soldiers in order to obtain their assistance in arresting Mr McCann, who was said to be wanted on suspicion of terrorist offences. There was an encounter (it is alleged) between Mr McCann and the police officer and it is said that Mr McCann pushed the police officer and ran down Joy Street towards Hamilton Street. It is further alleged that members of the security forces shouted at him to stop but that he continued running. Shots were discharged by three soldiers at Mr McCann who died as a result. The three soldiers are known in these proceedings as Soldiers A, B and C. A and C are the defendants herein. B died some years after the incident. The two defendants each fired a single shot at Mr McCann. However, Soldier B probably fired the balance of the shots fired.

[11] Mr McCann died as a result of his injuries. In essence he sustained gunshot wounds to his left shoulder, his left wrist and to his trunk. In respect of the latter injury, a bullet entered the upper part of the back of the left buttock and from there passed upwards through the left sacroiliac joint, severing main blood vessels on the left side of the pelvis and lacerating the bowel before leaving through the front of the abdomen. A fragment of a bullet was removed from the clothing after death and later it was forensically declared to be a small portion of bullet jacket consistent with the use of a 7.62 calibre British army SLR.

The first phase - the investigation

[12] As would be expected, an investigation into Mr McCann's death ensued. As already noted, an autopsy was carried out. In addition, statements were taken by an officer of the Royal Military Police Special Investigations Branch from Soldiers A, B and C.

[13] Each of these statements was taken on 15 April 1972, the day of the incident. Soldier A recounts that when he was in Little May Street he was approached by Soldier B who indicated to him that police had asked for assistance as Mr McCann had been seen in Little May Street. Soldier A indicates that he knew that Mr McCann was an important IRA officer who had been responsible for the death of a soldier in the Markets area of Belfast and for other murders elsewhere. In his statement Soldier A commented that his experience led him to expect that Mr McCann would be armed and that he would use his weapon to evade arrest. In a later part of the statement he referred to recognising Mr McCann who he could see was speaking to a police officer (Police Officer B). In other words, he knew Mr McCann to see. Soldier A said that he heard the officer tell Mr McCann he was going to be arrested and he said he saw Mr McCann push the officer away. At this

point Mr McCann ran down Joy Street towards Hamilton Street and Soldier A indicated that he shouted to him to halt or he would fire.

[14] At this point Soldier A said he saw Soldier B fire 2 rounds and shortly afterwards 2 more rounds.

[15] Soldier A said he fired one round at Mr McCann himself.

[16] Soldier C made a statement to the Special Investigations Branch on the same day. In that statement he recounts that Soldier B spoke to him and told him about the request from the police for assistance. Soldier B indicated that the police wanted to arrest Mr McCann. Further, Soldier B briefed Soldier C but Soldier C initially took on the role of a lookout and did not recognise Mr McCann.

[17] Soldier C, however, indicated that he had seen photos of Mr McCann and knew him to be a high placed person in the IRA and a person who had been responsible for the deaths of at least two members of the security forces. Soldier C indicated that he expected Mr McCann to be armed and likely to use a weapon for his defence.

[18] As in the case of Soldier A, Soldier C said he saw Mr McCann push Police Officer B away and run off. He said he heard Police Officer B who had fallen on the ground shout stop. He then heard soldiers shouting "halt or I'll fire". However, Mr McCann took no notice of the warnings.

[19] At this point Soldier C said he heard 2 rounds being fired from an SLR which he thought were in the nature of warning shots. Thereafter he heard 2 further shots from an SLR. He says he saw Mr McCann twist to one side as if one had hit him. He realised that Mr McCann was likely to escape. He took aim at the central part of Mr McCann's body and fired one round. He also indicated that at this point he heard 2-3 rounds being fired.

[20] Soldier C only recognised Mr McCann when he got to him for the purpose of restraining him.

[21] Soldier B also made a statement on 15 April 1972, the day of the incident.

[22] He said he was among nine men on duty at a VCP at the junction of May Street/Joy Street.

[23] He said he was approached by a man in civilian clothing (Police Officer B). The officer showed him his warrant card. The officer then briefed Soldier B that Mr McCann was in Little May Street and that there were only two police in the area and that they felt they did not want to handle any arrest on their own.

[24] Soldier B says he noticed that Police Officer B was armed.

[25] At this point Soldier B called Soldier A and C to where he was and he then briefed them as to what was going on.

[26] At this stage they went into Joy Street and at this point they could see Police Officer B speaking to Mr McCann.

[27] Soldier B indicated that he recognised Mr McCann as a high ranking officer of the IRA and as the person who was directly involved in the murder of two soldiers. He said that he reasoned that Mr McCann would be armed. In these circumstances he thought that Mr McCann would use his weapon to resist arrest or to escape.

[28] Soldier B heard Police Officer B say to Mr McCann he was going arrest him and he then saw Mr McCann push Police Officer B and turn and run off. As he ran off he ducked and weaved.

[29] Soldier B said he saw Police Officer B lie prone on the ground and he (Soldier B) shouted to Mr McCann to halt or he would fire. Notwithstanding this Mr McCann continued to run and even when he repeated the order to stop Mr McCann did not do so. Soldier B described how the two other soldiers and the police officer were shouting for Mr McCann to stop.

[30] Soldier B said he fired 2 shots above Mr McCann's head. At this point he was about 50-60 metres away from Mr McCann. The effect of this however was that Mr McCann speeded up. At this point Soldier B said he took aim and fired 2 shots at Mr McCann's body area. One of these shots hit him but he did not slow down. Soldier B said he heard shots being fired by others as well. He saw Mr McCann fall to the ground. He then went to where Mr McCann had fallen. When Mr McCann was searched he was found not to be in possession of any weapon.

[31] Two key police officers made statements in the immediate aftermath of the event. These officers have been described as Police Officer A and Police Officer B. On the afternoon in question they were in plain clothes and were patrolling in a motor vehicle in or about the centre of Belfast. Police Officer A was the driver of the vehicle and Police Officer B was the observer. In the course of their patrol, B observed Mr McCann who he knew to be wanted. As a result of this sighting, Police Officer B spoke to soldiers who were at the junction of May Street and Joy Street. He said he showed his warrant card to a soldier and told him that Mr McCann was in the area and was wanted. He later spoke to Mr McCann and told him that he was a police officer. However, Mr McCann pushed hard against him and ran off down Joy Street. The officer said that he dropped to the ground and shouted 'Halt' several times. He also heard similar calls from behind him. He then described how he heard gunfire from immediately behind him and saw Mr McCann fall to the ground. Police Officer B was adamant that he had not himself fired his weapon.

Decision Not to Prosecute

[32] On 16 May 1972 a report on the incident was prepared by Detective Inspector Agar. This included a summary of the statements above as well as the autopsy evidence. This report referred to Mr McCann as a dangerous member of the IRA and made reference to him being involved in an attack on a police vehicle on 21 September 1971 when a number of police came under fire.

[33] On 16 May 1972 Chief Inspector Wilson in a one page report rehearsed the background. He indicated that the security force members involved, that is two police officers and three soldiers, were aware that Mr McCann was wanted for murder, attempted murder, illegal possession of firearms and ancillary offences. In consequence each of the members of the security forces, he said, had a legal power to arrest Mr McCann without warrant. They were also legally empowered to use reasonable force in the circumstances to effect an arrest.

[34] In his view there was justification for the shooting of Mr McCann. He said it was obviously based upon two grounds namely:

(i) that there was no other means of arresting him; and

(ii) those involved had reason to believe he would be armed with firearms and likely to use these against anyone attempting to arrest him.

However, Chief Inspector Wilson noted that on search after the event Mr McCann was not in possession of any firearms or ammunition.

[35] It was in September 1972 that the Director of Public Prosecutions directed that there be no criminal proceedings against any soldier or police officer involved in Mr McCann's death on the evidence currently before him. His reasoning is the subject of discussion over two pages in his note of his decision but, in essence, it was that the use of force in relation to this case was related to the effecting of the arrest of Mr McCann in accordance with the terms of section 3(1) of the Criminal Law Act (Northern Ireland) 1967. The test to be applied, he said, was whether such force as was used was reasonable in the circumstances. On this issue he thought that a reasonable jury properly directed would be likely in relation to the facts of the case to come to the conclusion that the soldiers were entitled to fire and to shoot at Mr McCann. This direction was a short time later endorsed by the Attorney General.

The Inquest

[36] This does not require extensive discussion and the court will simply note that an inquest was held and concluded on 8 June 1973. An open verdict was entered.

The second phase – the involvement of the HET

[37] Very little occurred in this case for many years prior to 2009. However, in that year the HET turned their attention to the death of Mr McCann.

[38] The HET had been established in the mid-2000s as a unit within the Police Service for Northern Ireland reporting directly to the Chief Constable. Its mission was to assist in bringing resolution to the families of victims of the 'Troubles' in Northern Ireland in the aftermath of the Belfast Agreement. This would involve the re-examination of deaths to ensure that all investigative and evidential opportunities had been exhausted. This included identification of new lines of enquiry and missed opportunities and the exploitation of advances in forensic science. An important element in its work was to be its independence.

[39] In respect of the death of Mr McCann the HET decided it should interview the soldiers it could locate who were involved in his death. The object was to consider the circumstances of the shooting. Over the summer of that year contact was made with these soldiers by letter. It was explained to them that there would be an interview which was to be carried out in a formal manner under the regime of the Police and Criminal Evidence Act/Order.

[40] Soldier C's letter was sent on 23 July 2009 whereas Soldier A's was sent on 2 September 2009.

[41] These letters stimulated contact between the recipients and a firm of solicitors called Devonshires which was acting for any soldiers or former soldiers who were being contacted by the HET. Devonshires were active in pursuing the interests of Soldier A and Soldier C.

[42] The court can see from the extensive documentation from this time provided to it, which it has carefully considered but which it is unnecessary to set out, that Soldiers A and C throughout this period had the benefit of legal representation and advice from Devonshires. Helpfully, the principal solicitor who was dealing with the soldiers provided a statement to the court containing a commentary on events from his perspective. Indeed, legal professional privilege was waived for this purpose. While in his statement the solicitor referred to a belief on his part that the HET was not interested in prosecution of the soldiers, when cross-examined by counsel on behalf of the prosecution on the first day of the hearing, it emerged clearly, especially when the contents of contemporaneous documents were put to him, that there could be no serious doubt that not only were the soldiers advised that they (or either of them) could decline to be interviewed but they were advised specifically of the danger that if they participated this could lead to a fresh decision being made in relation to the issue of prosecution. The impression left with the court was that, however sanguine the solicitor might have been that the matter would not go as far as prosecution, the soldiers were properly alerted to the advantages and disadvantages of the options available to them and, in particular, to the risk that they

could end up being prosecuted. The existence of this risk was a theme to be found time and time again in the contemporaneous documents and equated to a message to the soldiers which could not have been overlooked or misunderstood, especially as it appears to have been, and was described as such by the solicitor, as a focus in the advice he gave.

[43] In the event, both Soldier A and Soldier C did agree to be interviewed, each separately, and it is to these interviews that the court will now turn. In each case, the way the matter progressed was that at the interview the soldier signed a statement which had been provided in draft in advance of the interview and then engaged in a question and answer interview.

Soldier A's Evidence to HET

[44] A's interview took place on 17 March 2010. In his statement he provided information in relation to his personal background. He joined the Parachute Regiment in 1966 and had served in Aden and Northern Ireland, the latter on and off from 1969 to 1988. 'A' left the army in 1990.

[45] In relation to his memory of the incident, he said he had barely any recollection of the day and minimal recollection of the incident itself. As regards Mr McCann, he recalled that soldiers carried wallets containing photographs of known terrorists. His name came up often as he had shot people in the Markets area of Belfast. He was, he said, known to be armed all the time. He only remembered Mr McCann lying on the floor and a woman screaming. He had no greater recollection than this and had no reason to question the contents of the statement he made at the time.

[46] In respect of how his original statement was made he believed that most likely he told whoever was taking it what had happened. He then read it and signed it.

[47] Because of the passage of time he considered that he was severely prejudiced by the HET investigation as he could recall hardly anything about the incident. However, he believed that any action that he took involved the use of reasonable force in the circumstances, a belief fortified by the fact that at the time he was not disciplined and the matter was not followed up further by the RUC.

[48] When questioned, Soldier A did not depart significantly from his original statement. He said he knew who Soldiers B and C were but he said he did not know who was B and who was C. He said he had not spoken to them since he had been contacted by the HET.

[49] When asked about briefings, A said he could not recall who may have been the briefer on the day of the incident. He thought that the whole day had to do with VCPs stopping vehicles. He thought he would have been in charge of a VCP that

day. He was the senior rank there. When asked about the particular details of the incident, Soldier A's response was that it was as contained in his statement as it was on this he had to rely.

[50] When Soldier A was asked about whether he had been involved in arresting people while he was in Northern Ireland, he said not as he could recall. He also had no recall of the police officer drawing his weapon, though he believed he would be armed, as he imagined all police officers serving in the RUC, especially plain clothes officers, would be.

[51] In respect of specific details of the circumstances in which he had fired, Soldier A said that he very much doubted that there was any discussion between him and the other soldiers before the event. When asked whether Mr McCann was causing a threat to other members of the public, his response was he could not recall. When asked whether he considered arresting or detaining Mr McCann he said he could not recall other than what was in his statement but said that it would be a matter of seconds or minutes before making a decision. In similar vein, he was asked why he shouted 'halt or I'll fire' at an unarmed man who was running away. He said he should imagine this was procedure in the yellow or pink card. When asked if he ran after Mr McCann, he said he should imagine 'we' stayed where we were. He couldn't remember who fired first. When asked where he aimed at when he fired from his kneeling position, he said the centre of the target. He didn't know if his shot had struck Mr McCann. He surmised that there would have been other people in the street but had no recollection of women and children being there. He also had no recollection of a civilian vehicle being present.

[52] In respect of many matters of detail, Soldier A could not recall. He didn't know what happened spent cases or how many there were; he did not know where the police officer had gone after the incident; or how long soldiers involved in the incident had remained, though he thought they probably would have gone within minutes. On the other hand, he thought a crowd had gathered and that other military vehicles arrived. He had no recollection of a priest turning up and he doubted that any threats would have been made by soldiers to local residents after the shooting.

[53] When asked whether he was told what to put in his statement made on the day of the incident, he replied emphatically in the negative ("no way"). He also denied any suggestion that a specific operation had been mounted to shoot and kill Mr McCann. When asked whether he felt justified in shooting Mr McCann when he was running away and was no threat to him or others, he said, in effect, that he was, as Mr McCann had been pointed out and he was a terrorist and all terrorists carried weapons.

[54] Soldier A considered he must have been aware of the rules of engagement. In his final remarks Soldier A laid emphasis upon his statement made at the time as the

only thing he could go by in the absence of any real recollection of the incident apart from what he had expressed at the interview.

Solder C's Evidence to HET

[55] Soldier C's interview took place on 19 March 2010. In his prepared statement he indicated that he had been in the army for some 23 and a half years, having joined when he was 19 years. He left the army in 1993. He was first posted to Northern Ireland in 1970. He recounted some incidents he had been involved in but made it clear that he had not himself shot at anyone, save in respect of the incident under investigation. He indicated that he was making his statement as a way of adding further detail which he could remember to his army statement made at the time.

[56] In respect of the incident Soldier C's account was generally in conformity with the statement he made at the time. He said that after being told that it was Mr McCann they were going to arrest, he was concerned as he was infamous at that time. He was 'notoriously dangerous' and it was 'inconceivable' that someone of his reputation, experience and position within the IRA would not have been armed or would be operating alone. Accordingly, 'we' believed he would have back up in the area.

[57] When Mr McCann ran away from the police man, Soldier C said he could recall feeling quite impressed by the way he was moving – running from side to side as if he was trying to avoid being shot at. This made him feel that Mr McCann was well trained. He remembered cocking his rifle and dropping to a kneeling position. He did the latter to make himself a smaller target in case there were other people in the area who may want to fire at him. All of the soldiers (and the policeman), he said, shouted warnings but the soldiers fired "when it was obvious that McCann was not going to stop". He fired a single shot.

[58] After Mr McCann has fallen, Soldier C said that he approached him and saw him put his hand across his body, which he thought looked like he was going for a weapon. He therefore shouted a warning. He said he heard Mr McCann say something like "it's okay, you've got me". The soldier said he could not recall if a weapon was found on Mr McCann. From this point onward, he said his recollection was not great. In particular, he could not remember giving his original statement but he believed that his actions were consistent with the yellow card.

[59] Soldier C's statement to the HET ends by his saying that because of the passage of time since the incident, he was severely prejudiced by the current investigation but he was of the view that the incident involved the use of what he believed to be reasonable force in the circumstances.

[60] When questioned he said he was able to remember the names of the other two soldiers involved in the shooting, though he had not contacted them since he had been contacted himself by the HET.

[61] Soldier C said that being a parachute battalion soldier in Northern Ireland was an on-going battle and daunting and, at times, terrifying.

[62] Soldier C was unable to recall details of any briefing on the date of the incident but thought it was unlikely that police would be present at any such briefing or involved in military operations.

[63] Soldier C did not think that soldiers were working on specific information that day. The use of VCPs that day, he thought, was to prevent bombers from driving bombs into the city centre.

[64] In respect of a specific enquiry as to when his VCP had been set up that day, he could not recall. He thought that 6 to 8 soldiers might have been involved as well as a commanding officer and driver, though he could not be definite. There was no radio communication with the police, he thought, but there would have been radio communication with company headquarters and the soldiers on the ground would have had a radio operator.

[65] Soldier C was of the view that only his vehicle had been involved in the VCP. Others might be deployed somewhere across the city but he could not be sure.

[66] In respect of the details of the incident itself, his recollection was it began when Soldier A or B came to him and told him that a policeman had requested military assistance to apprehend or arrest Mr McCann. He was, however, extremely vague about precise words. He did not himself know the policeman and did not see him get out of a car and could not describe how he was dressed, other than a vague recollection that he was in dark clothes.

[67] When he was asked about whether he had received information before going out that day that Mr McCann may have been in the area, his response was "definitely not".

[68] Soldier C said he knew Mr McCann by reputation and had been shown photographs of him as part of a rogues' gallery. He had quite early in his career become aware of Mr McCann as he was infamous and held in the highest esteem by the IRA. He said he did not know of the circumstances surrounding a murder Mr McCann was suspected of but had been aware of an occasion when a soldier had been shot dead by someone using a Thompson sub-machine gun. He did not know the name of this soldier but the incident had occurred in the Markets area. Soldier C also mentioned that Mr McCann had been involved in the murder of two soldiers and referred also to an incident at a bakery on the Ormeau Road. Mr McCann was reported to be involved in this.

[69] When asked about his experience in arresting suspects, Soldier C said that at times he was detailed to give support to the RUC in this context but he did not recollect any occasion when he had been involved in arresting or detaining anyone without police officers being there.

[70] As regards the details of the events on the day, Soldier C said his recollection was vague and what occurred happened extremely fast. He remembered being 10 yards or metres behind the policeman and he said he could hear words spoken between the policeman and Mr McCann. When asked why he had not referred to this in his original statement, he said that this was the first time he had been involved in actually firing a shot in action and that he did not think there had been a time to sit down and take stock of actually what happened or have had time to recall. Subsequently, he had thought about it and other things had come to mind. He added that, in truth, he could not remember being interviewed at the time.

[71] Soldier C was unsure as to whether Mr McCann pushed the policeman down and thought the policeman had been armed but did not know whether he drew his weapon. The policeman did, he thought, shout at Mr McCann but he did not know what he said, though somebody shouted halt or stop. This started the ball rolling. He believed he was central in the line of three soldiers following the police officer but qualified this by saying that he was not sure. He was sure that there had not been discussion between him and the other soldiers before he fired as there was no time.

[72] When asked if he saw Mr McCann with anything that could have been mistaken for a weapon, Soldier C's reply was no, and that initially Mr McCann's body was shielded from him by the policeman. In similar vein, Soldier C did not believe that at the time Mr McCann posed a definite threat to the public but, in his opinion, Mr McCann was a definite threat to the soldiers and the policeman.

[73] Soldier C explained that Mr McCann was running before "we" had even had time to react and had built up a considerable gap before "we" even started shouting or reacting. As soldiers, they were in riot gear, including wearing a helmet, carrying a gas mask, and carrying a weapon. They were also wearing flak jackets. Everyone was shouting "halt or I'll fire".

[74] Soldier C was asked directly why would anyone shout "halt or I'll fire" at a man who was running away and who did not appear to have a weapon. In response he replied that "we" had to challenge if the circumstances allowed before firing and it was a reflex thing to do. To his knowledge, no one give the order to fire. He saw two rounds strike a wall high above Mr McCann. When it was suggested that it might be a bit dangerous to fire when there might be people in houses that could get hit, Soldier C conceded that they could be in danger but that "we" were acting on reflex with the intention solely of giving support to the police to arrest Mr McCann.

[75] At a later stage in the interview, Soldier C described Mr McCann's movements as he ran off from the police officer as being upright but zig zagging on the pavement. He did not recall seeing his hands. When he fired he said he aimed at the centre of his mass i.e. the centre of his torso. Soldier C said that at this time he was focused on what he was doing and that his colleagues would have been in his peripheral vision. As already described, he had knelt down to make himself a smaller target. The interviewer then asked him whether he was shooting to kill Mr McCann. Soldier C's response was that at the time it was not in his mind that he was going to kill Mr McCann or any other person but his intention would have been to stop him.

[76] Later Soldier C said he did not recall where Mr McCann was when first hit or how his body may have spun around. Moreover, Soldier C did not know if the shot he fired hit Mr McCann. He was not certain how many shots were fired but said 8 or 9. He added that this estimate could be wrong. The shooting, he thought, was over in a blink, literally seconds.

[77] Soldier C was asked in detail about events after the shooting, in particular about his approach to Mr McCann as he lay on the ground. At one point, he said, that Mr McCann, as he approached him, was on his own and no one was with him. After the event, Soldier C said the soldiers collected spent cases though he was not 100% certain of this. When asked about why he would collect them his response was that you would not want other people collecting them as they could be reused.

[78] Soldier C stated that the whole scenario after the shooting was very vague, including the making of his original statement afterwards. His belief was that he was asked to sit down and write out the sequence of events.

[79] Towards the end of Soldier C's interview, there was a discussion about whether he had acted consistently with the Army's yellow card. He believed he had. He said that if he was in an area where there was a member of the IRA who had carried out murders you could do anything in your power so long as you applied minimum force to stop or apprehend.

Aftermath of the interviews

[80] It is clear that in the case of Soldier A, indeed on the same day, a member of the HET spoke to him and told him that he could say after the interview that the interview was the end of it and that the matter was not going anywhere. He also said he appreciated the soldier coming as, he said, did the McCann family.

[81] A similar conversation occurred in the context of Soldier C's HET interview. The member of the HET staff said to him that in his professional experience "this ends here for you". Ultimately, however, he said that "the decisions aren't mine" but anything that would happen is done on his recommendation. He acknowledged the risk of private prosecution.

[82] Interestingly, a solicitor in Devonshires a few days after the interviews had been conducted was in contact with the HET. In his correspondence he spoke of the interviews going smoothly but nonetheless offered an analysis of the test for criminal liability *vis a vis* his clients. Among the points made was that it was the state of mind of the soldier at the time which was paramount.

The HET Report

[83] The court notes, without entering into its detail, that the HET published a report to the McCann family about Mr McCann's death. The report was produced either later in 2010 or in 2011. It runs to some 119 pages. It is not possible to provide here a full description of all that it contains. Of importance however is its description of the circumstances of Mr McCann's death; the summary of the accounts of witnesses which it contains, including the accounts of members of the security forces; and its review of the original police investigation.

[84] It is noted that the HET recognised that there was real concern about the effectiveness and independence of the original investigation carried out into the shooting. This was evidenced by the arrangement which then existed between the RUC Chief Constable and the General Officer Commanding that the Royal Military Police/Special Investigation Branch would be responsible for interviewing soldiers who were involved in such incidents. Moreover, it appears plain from the report that there were gaps in the records of the investigation. For example, the names of the police officers involved at the outset (as described above at paragraph [31]) did not appear on any document which had been located by the HET. It was also noted that the officer of the Special Investigations Branch who took the statements from Soldiers A, B and C at the time, who was located by the HET, only had a sketchy recollection of the circumstances of the death when approached. He thought that no ammunition count was made after the incident in respect of the ammunition held by the soldiers when interviewed and was of the view that if there was a record, for example held by the Quarter Master Sergeant, this would not have been retained.

[85] In its key conclusion, the HET report expressed the opinion that there were no lines of enquiry or investigative opportunities which could be pursued to bring more clarity to the circumstances of Mr McCann's death. There is no reference expressly in the report to the issue of future prosecution of any member of the security forces but the clear implication appears to be that such would not have been worthwhile. This was so notwithstanding that one of the report's conclusions was that "…the HET considers that [Mr McCann's] actions did not amount to the level of specific threat which could have justified the soldiers opening fire in accordance with the specific army rules of engagement or their standard operating procedures" (page 100).

The third phase - the AGNI's involvement

[86] Following the production of the HET report, probably in 2011, little of substance occurred until 20 February 2013. At this time, there was a request by members of Mr McCann's family to the Attorney General for Northern Ireland ("AGNI") that he direct a new inquest into Mr McCann's death.

[87] While this request was under consideration by the AGNI, in what appears to have been a separate development, the AGNI in November 2013 made a number of public statements on the subject of further prosecutions in Northern Ireland "Troubles related" deaths. It was the AGNI's view that there should be no more such prosecutions as there was a low likelihood of investigations leading to convictions. To take this step, would, said the AGNI, help move Northern Ireland beyond its divisive past. In his view, in respect of the killings that took place before the Good Friday Agreement was signed in 1998, there should be a moratorium on prosecutions. The AGNI was quoted as saying that the time had "come to think about [drawing] a line, set at the Good Friday Agreement 1998, with respect to prosecutions, inquests and other inquiries".

[88] Notably, the AGNI's initiative met with very limited public support with a wide range of politicians giving it a frosty reception. In these circumstances, it failed substantially to obtain political traction.

[89] On 11 March 2014, the AGNI wrote to the Director of Public Prosecutions in relation to the death of Mr McCann. In this letter, he outlined the background and made reference to the decision of the Director in 1972 to direct that no charges be brought against any of the soldiers. He went on:

> "I have not been provided with materials outlining the reasons behind the DPP decision [in 1972] and it may well be the case that the breach of the yellow card rules was accepted and considered as part of the decision-making process, but for other evidential or public interest reasons the prosecution was not directed. In any event from my reading of these papers it strikes me that you may find a review worthwhile.
>
> Although I am content to consider whether or not to exercise my discretion to direct an inquest under Section 14(1) of the 1959 Act [Coroner's Act (Northern Ireland) 1959], it seems to me that it may be much more appropriate, at this stage, for you to consider reviewing the original decision not to prosecute, in accordance with the Code for Prosecutors."

[90] It appears that as a result of the above, the PPS did carry out a review. On 9 May 2016 the PPS wrote to Devonshires to advise them that a review was on-going. This led, in December 2016, to the communication of the decision made by the PPS that the test for prosecution had been satisfied in respect of Soldiers A and C.

[91] Subsequently, in 2017 the prosecutions herein were initiated.

Civilian Witnesses

[92] Over the period since 1972, the evidence of civilian witnesses has gradually built up and it is helpful to have at least a broad understanding of what these witnesses have said, whether in the media, at the inquest or, later, as a result of the work done by the HET. While it is not proposed to seek to summarise every statement which has been made by a civilian witness, the court will provide a gist of the evidence of the main witnesses in this category.

[93] Josephine Connolly was the owner of a shop at 9 Joy Street. She provided a statement to police in respect of Mr McCann's death on 11 September 1972. She also gave evidence at the inquest and there is extant a sworn deposition in this regard.

[94] In essence, she said that she saw Mr McCann running down Joy Street. She said she heard shooting. Mr McCann ran on and there was more shooting. The front of her shop faced on to Joy Street and she indicated that she could see a soldier shooting. At this stage she was downstairs in the shop. She later went upstairs where she said she could see three soldiers shooting. She also referred to a soldier at the bookmakers opposite. She ran back downstairs. She said she could see someone on the ground and at a later stage a body being taken away. She said she overheard a soldier saying that they had "got the fucking bastard anyway". There were spent cartridges outside her shop, she said. There were ten of these. She saw a soldier lifting some of them from the ground.

[95] Mrs Connolly's statement can be read alongside that of Nuala O'Donnell. She was 19 at the time of Mr McCann's death. She, however, did not make a statement until contacted by the HET many years later.

[96] On that afternoon at one point she set off to go to Connolly's shop on Joy Street. En route she saw a Saracen parked on a side street off Joy Street. She saw a soldier wearing a maroon beret and from this she said she knew that he was a Parachute Regiment soldier. She thought it was a bit unusual to see Parachute Regiment soldiers in the area. She went into Connolly's shop. The shop window looked out onto Joy Street. She had only just got there when she heard a shot or shots fired. She was unable to say whether there was a burst of gunfire or single shots. She could not say how many shots were fired. She said she could see four soldiers in a straight line on Joy Street opposite Little May Street. All four appeared

to be kneeling down and they were all aiming guns down Joy Street towards Hamilton Street. The guns were big and not handguns. She could not say if all the soldiers fired shots.

[97] A man was running down Joy Street in the middle of the road and was ducking and zigzagging as he ran. She could not see anything in his hand and could not remember seeing him putting his hands to any part of his body. He appeared to be trying to get out of the way of the shooting. She vaguely remembered seeing him fall. After that her mind was blank.

[98] A civilian witness described as witness A made a statement to police on 18 April 1972. The man was a dock worker and said that he saw four soldiers - two kneeling and two standing. He heard shouts of halt. All four soldiers, he thought, fired. He saw shots hit brickwork above where Mr McCann was. He thought these were warning shots. Thereafter, he saw Mr McCann being struck by bullets.

[99] A statement was made by Alexander Worland. This witness describes how he was introduced to Mr McCann on the afternoon of the incident. The witness thought Mr McCann was in disguise and had dyed his hair. He knew that Mr McCann was wanted by the police and army. Later that afternoon, he heard shots being fired and saw people gathering at Joy Street/Hamilton Street junction. Soldiers were present. He said he could see Mr McCann lying on the pavement. A soldier was trying to give him the kiss of life. He said a large crowd began to gather.

[100] Sean Bannon was a man aged 27 at the time. He made a statement in 2009 and recently, in connection with these proceedings, swore a deposition.

[101] As he was going into a pub in the Markets area he said he heard a Saracen door clattering. He looked up and saw a Saracen parked near the junction between Joy Street and May Street. There was a line of soldiers, diagonally across Joy Street facing towards where he was. He thought there were 5-6 soldiers. He then saw a man walking down Joy Street on the left hand side of the pavement from May Street. He was wearing civilian clothes. He met with another man and there was an altercation between the two men. They appeared to be pushing and shoving each other. The taller of the two men then started to run down Joy Street on the left hand side of the pavement in a straight line. He then saw soldiers fire 5 or 6 shots. He believed the soldiers were kneeling down at the time. The tall man fell to the ground. He said he was shocked as he had not heard any warnings shouted prior to the firing. The smaller man who had been involved in the initial altercation, he said, was not involved in the shooting. Later he said he was interviewed by RTE at the time.

[102] Joseph Anthony Donaldson was but a child at the time of the incident. He made a deposition on 22 March 2018. In an earlier statement he had said that there were soldiers in the area and that he saw Saracens on both sides of Little May Street at the junction with Joy Street. When he and his friends were in Henrietta Street he

heard shooting coming from Joy Street. There was a series of shots - high velocity shots from a SLR. He went to Joy Street with a friend on bikes. There he saw the body of a man lying. He saw a soldier at one point nudge the body with his foot and turn it over. There was a lot of blood running down the footpath. He saw a bandage being put on the man. People were trying to get to the body but soldiers were stopping them.

[103] He tried at one point to get bullets out of the wall of a house at the south east corner of Joy Street and Hamilton Street. He saw his grandmother in the crowd of people trying to get to the body. She said to a soldier that she wanted to say the last rites into the man's ear. The soldier slapped her on the side of her face and pushed her. He later heard the dead man was Mr McCann.

[104] There is a statement in the papers from Edel Conlon. She made a deposition at the original inquest. She said she saw 7 or 8 soldiers at or about Joy Street at the time. Some were kneeling down and started to fire. She said she saw a man fall and later discovered that he was Mr McCann. After the incident she heard a ginger moustached soldier say "ha I shot him".

Forensic and kindred evidence

[105] As in the case of civilian evidence, over time the volume of forensic and kindred evidence has enlarged.

[106] At the stage of the original investigation, an Ordinance Survey map was used and it survives. Two sets of photographs were taken: one was from post mortem and the other was of the scene (6 photographs). Both sets are available. There was a scientific report produced at the time. This deals principally with the recovery of a bullet fragment from Mr McCann's clothes and its examination but, in addition, it contains reference to the consideration of the samples taken from the body.

[107] Much of the ground has been the subject of re-consideration in recent times either by experts commissioned by the Legacy Branch of the PSNI or by the defence. The recovery of the bullet fragment, in particular, has attracted attention and there are two recent reports featuring this: one from a Mr Greer (commissioned by the PSNI) and one from Keith Borer Associates (commissioned by the defence).

[108] A theme which runs through the more recent reports is that of the inadequacy of the original investigation of the scene and its scientific examination. Recent reports highlight, in particular, the gaps in the evidence and what is unavailable from the time.

The availability of the evidence

[109] Given the passage of time, it is inevitable that, in particular, some of the witnesses are now either dead or for other reasons unavailable. Of course, this does

not necessarily mean that their evidence is lost altogether if the witness made a statement or deposition in relation to the case when alive.

Legal Principles

[110] The application before the court is in respect of alleged abuse of process and the remedy sought on behalf of each defendant is that the court should stay the proceedings against each.

[111] The circumstances in which such a step may be taken by the court is ground which has been well trampled over. In general terms, the doctrine of abuse of process is conventionally divided up into two categories. The first is where the court, having considered the application in question, concludes that the defendant cannot receive a fair trial. The second is where the court concludes that the case is one in which it would be unfair for the defendant to be tried. Ordinarily, the burden of proof is on the party seeking the stay and the standard of proof is that of the balance of probabilities.

[112] In this jurisdiction, Colton J recently has had reason to summarise the applicable law in his judgment in the case of *R v Hutchings* [2018] NICC 5 and it is convenient to set this out, as it features leading authorities on this issue in Northern Ireland:

> "[28] There is no real dispute about the applicable law. Essentially there are two basic grounds upon which a criminal trial may be stayed; the first is where a defendant is, or will be, prejudiced in the preparation or conduct of his defence and not be able to receive a fair trial. The second is where a prosecutor has manipulated the court process so as to deprive the defendant of a legal protection or take unfair advantage of a technicality or the particular circumstances would undermine his human rights or the rule of law or would offend the court's sense of justice or propriety.
>
> [29] In ***R v McNally and McManus*** [2009] NICA 3 the Court of Appeal comprehensively set out how these principles should be applied at paragraph [14] onwards:
>
> *'**The principles***
>
> *[14] The general principles governing the grant of a stay of proceedings on the basis that to continue them would amount to an abuse of process are now well settled. There are two principal grounds on which a stay may be granted. The first is that if the proceedings continue, the accused cannot obtain a fair trial – see, for instance,* ***R v Sadler***

[2002] EWCA Crim 1722 and ***R (Ebrahim) v Feltham Magistrates' Court*** *[2001] EWHC Admin 130. The second is that, even if a fair trial is possible, it would be otherwise unfair to the accused to allow the trial to continue – see,* ***Attorney General's reference (No 2 of 2001)*** *[2004] 1 All ER 1049 and* ***R v. Murray and others*** *[2006] NICA 33.*

[15] These grounds require to be separately considered. They should not be conflated for the prosaic and obvious reason that considerations that will be relevant to one are not necessarily germane to the other. The first ground requires a careful analysis of the circumstances which are said to give rise to the possibility that a fair trial cannot take place and a close examination of whether the trial process itself can cater for the shortcomings of the prosecution or police investigation. These inquiries should be informed by two important principles. They were set out in paragraph 25 of ***Ebrahim*** *as follows: -*

> *'(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.*
>
> *(ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.'*

[16] The principles governing the grant of a stay in circumstances where a fair trial is possible but it would be unfair that the defendant should be required to stand trial were summarised by this court in **R v. Murray and others**. In that case we referred to the judgment of Lord Bingham of Cornhill in **Attorney General's Reference (No 2 of 2001)** and made the following observations on it at paragraph [23] et seq: -

> *'[23] It is, we believe, important to focus carefully on what Lord Bingham said about the category of cases where a fair trial is*

possible but some other species of unfairness to the accused makes a stay appropriate. We therefore set out in full paragraph [25] of his opinion: -

"The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by ***Bennett v Horseferry Road Magistrates' Court*** *[1993] 3 All ER 138, [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which* ***Darmalingum v State*** *(2000) 8 BHRC 662 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (****Martin v Tauranga DC*** *[1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right."*

[17] The first thing to observe is Lord Bingham's acceptance of the proposition that this category extends beyond those cases where there has been bad faith, unlawful action or manipulation by the executive. Secondly, the examples that he gives of other cases (gross delay and breach of a prosecutor's professional duty) are merely illustrative of the type of situation that will warrant this course. Thirdly, he considers that while it is not profitable to attempt to list all types of case where this disposal will be appropriate, this type of case will be obviously recognisable – no doubt because of their exceptional quality. Finally, he makes an emphatic statement that where any lesser remedy to reflect the breach of the defendant's Convention right is possible, a stay will never be appropriate.

[18] We do not consider that Lord Bingham sought to confine this category of cases to those where to allow the trial to continue would outrage one's sense of justice. It is absolutely clear, however, that he considered that such cases should be wholly exceptional – to the point that they would be readily identifiable. The exceptionality requirement is, in our judgment, central to the theme of this passage of his speech and it is not surprising that this should be so. Where a fair trial of someone charged with a criminal offence can take place, society would expect such trial to proceed unless there are exceptional reasons that it should not."

[19] Although Lord Bingham was discussing the question of when it would be appropriate to grant a stay where a fair trial was possible and in this case, the focus of the debate has been on whether such a fair trial can in fact take place, these passages serve to highlight the rule that where an alternative course is available to remedy a breach of a defendant's Convention right (in this case the right to a fair trial under Article 6 of the European Convention on Human Rights) a stay will never be appropriate. By parity of reasoning, a judge should never grant a stay if there is some other means of mitigating the unfairness that would otherwise accrue. Where shortcomings in the investigation of a crime or in the presentation of a prosecution are identified which give rise to potential unfairness, the emphasis should be on a careful examination by the judge of the steps that might be taken in the context of the trial itself to ensure that unfairness to the defendant is avoided.

[20] It appears to us that this examination must be conducted at two levels. The first involves an inquiry into the individual defects in the prosecution case or the police investigation and the measures that might be taken to deal with each. The second entails the weighing of the impact of the various factors on a collective basis. It does not necessarily follow that, because some steps to mitigate each item of potential unfairness can be taken, the stay must be refused. A judgment can still be made that the overall level of unfairness that is likely to remain is of such

significance that the proceedings should not be allowed to continue. It is to be remembered, of course, that the judge must be persuaded of this proposition by the defence, albeit only on a balance of probabilities."

[30] All of the authorities that have considered the principles underlying a stay for abuse of process emphasise that the imposition of a stay can only be justified in exceptional circumstances. Thus in ***R v Derby Crown Court ex p Brooks*** [1984] 80 Cr App R 164 Sir Roger Ormerod who gave the judgment of the court, says at 168-169:

> *'In our judgment, bearing in mind Viscount Dilhorne's warning in* ***Director of Public Prosecutions v. Humphreys*** *(1976) 63 Cr App R 95 (at) 107; [1977] AC 1, 26 , that this power to stop a prosecution should only be used 'in most exceptional circumstances', and Lord Lane CJ's similar observation in* ***Oxford City Justices, Ex parte Smith*** *(1982) 75 Cr App R 200 (at) 204 , which was specifically directed to Magistrates' courts, that the power of the justices to decline to hear a summons is 'very strictly confined' …'*

[31] In ***Ex parte Bennett*** [1994] 1 AC 42 at page 74 Lord Lowry says that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons.

[32] The courts in this jurisdiction have repeatedly endorsed the view that the imposition of a stay is an exceptional course – see ***Re DPP's Application*** [1999] NI 106; ***R v P*** [2010] NICA 44 and ***R v McNally and McManus***, to which I have referred above."

[113] As the cases before the court raise particular issues, which have been the subject of specific consideration in the case law, the court will make, albeit sparingly, some reference to these.

Delay

[114] Delay is most often viewed as an issue which goes to the question of whether a fair trial is possible, though it can arise in other circumstances. The reason or

reasons for the delay will usually be important, as is the question of who is responsible for it, but of central significance will be the issue of whether, by reason of the delay, the defendant suffers serious prejudice to the extent that no fair trial can be held. This will be a matter of assessment for the court which should bear in mind such circumstances as his or her ability to regulate the admissibility of evidence and to ensure that all relevant factual issues arising from the delay are placed before the tribunal of fact and his or her ability to provide directions to the tribunal of fact.

[115] Lord Lane in *Attorney General's Reference (No 1 of 1990)* [1992] 1 QB 630 referred to this approach at page 644 where he said:

> "In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law and under PACE to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from the delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict".

[116] More recently, the Court of Appeal in England and Wales adverted to this subject area in *R v F* (S) [2012] QB 703. The general principle operative in this sphere was expressed succinctly when Lord Judge CJ said:

> "An application to stay for abuse of process on the grounds of delay must be determined in accordance with *Attorney General's Reference (No 1 of 1990)*…It cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice to the defendant occasioned by the delay which cannot be fairly addressed in the normal trial process. The presence or absence of explanation or justification for the delay is relevant only in so far as it bears on that question".

[117] Lord Judge further approved the following passage from the judgment of Rose LJ in *R v S* (P) [2006] 2 Cr App R 341 at paragraph [21] in respect of the principles that trial judges should bear in mind in this context:

> "(i) even where delay is unjustifiable, a permanent stay should be the exception rather than the rule; (ii) where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted; (iii) no stay should be granted in the absence

> of serious prejudice to the defence so that no fair trial can be held; (iv) when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate directions from the judge; (v) if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted".

[118] The case of *R v RD* [2013] EWCA Crim 1592, a historical sex abuse case, was an exceptionally delayed case relating to events which had occurred between 39 and 63 years before the date of hearing. In that case, the focus was on the loss of various items of documentation. The court was, however, reluctant to accept the assumption that the missing records would have supported the defendant's defence. The sort of evidence which was missing was not of a degree of cogency which could amount to a finding of serious prejudice in its absence. At paragraph [15] Treacy LJ stated:

> "In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a Defendant."

Assurances and Promises

[119] A suggestion which arises in this case is whether a stay should be granted because the defendants had received assurances or promises from the prosecution authorities that they would not face prosecution and that subsequently these were reneged on.

[120] In terms of legal principles the leading authority on an issue of this type is *R v Abu Hamza* [2007] QB 659. In that case, beginning at paragraph 50, Lord Phillips said:

> "…circumstances can exist where it will be an abuse of process to prosecute a man for conduct in respect of which he has been given an assurance that no prosecution will be brought. It is by no means easy to define a test for those circumstances, other than to say that they must be such as to render the proposed prosecution an affront to justice. The judge expressed reservations as to the extent to which one can apply the common law principle of "legitimate expectation" in this field, and we share those reservations. That principle usually applies to the expectation generated in respect of the exercise of an administrative discretion by or on behalf of the person whose duty it is to exercise that discretion. The duty to prosecute offenders cannot be treated as an administrative discretion, for it is usually in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only in rare circumstances will it be offensive to justice to give effect to this public interest.
>
> [51] Such circumstances can arise if police, who are carrying out a criminal investigation, give an unequivocal assurance that a suspect will not be prosecuted and the suspect, in reliance upon that undertaking, acts to his detriment."

[121] Having considered a series of cases Lord Phillips continued:

> "[54] These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation."

[122] *Abu Hamza* has been followed in Northern Ireland in a slightly different context on more than one occasion. In *R v Brown and Taylor* [2009] NICC 58 the second named defendant, Taylor, in respect of a murder charge, had been told by the prosecution that he would not be prosecuted. However, this was subsequently the subject of a review as a result of which it was decided to prosecute him. Later Taylor made an abuse of process application on the basis that he had been in receipt of a promise from which the prosecution authority could not resile. Hart J rejected his claim for a stay of the proceedings, notwithstanding that there had been no new evidence discovered and the change, in effect, was one of opinion, following a new senior counsel being appointed to advise the prosecution authority. Having considered an extensive line of recent cases, most importantly that of *Abu Hamza*, the Judge expressed the view that he was satisfied that, at least in the majority of cases, the defendant had to show that he had acted to his detriment or that some sort of detriment had been brought about as a result of the prosecution making a representation that he would not be prosecuted. The Judge expressed himself as follows:

> "Taylor is charged with the gravest crime in the criminal calendar, and the court has found that there is sufficient evidence against him to justify his being put on trial… There has not been any impropriety on the part of the prosecution remotely comparable to the type of 'executive lawlessness' found in *Ex Parte Bennett*, nor has there been any detriment caused to the defendant by the prosecution change of position on whether he should be prosecuted…there is sufficient evidence to justify putting Taylor on trial".

In a later judicial review application a Divisional Court in *Re Wilson's Application* [2014] NIJB 101 also followed *Hamza*. At paragraph [14] of the judgment of the court, Morgan LCJ stated that:

> "The underlying rule of legal policy revealed in *R v Hamza* is that where the complaint relates solely to an unequivocal representation that a prosecution will not be pursued but the applicant has not acted to his detriment on that representation, it will not then be necessary to prevent the prosecution proceeding in order to protect the integrity of the criminal justice process. That was the test adopted by the Supreme Court in *Warren v Attorney-General for Jersey*…The reason is that there is a countervailing public interest in ensuring that those in respect of whom a fair trial is possible should be prosecuted. *R v Hamza* strikes the balance between the public interest and the interest of the applicant".

Loss of Evidence

[123] Another issue which arises in these proceedings is concern on the defendants' part of loss of evidence in this case. Needless to say this is apt to occur, in particular, in cases where there has been a significant delay in proceedings being taken or heard. Unsurprisingly, therefore, the response of the law in this area is not dissimilar to that which applies and is discussed above in relation to delay *per se*.

[124] The question will largely turn on the issues of whether, notwithstanding any difficulties which arise, a fair trial is still possible and the related question of whether the power of the court to regulate its proceedings can be effective so as to prevent unfairness.

[125] The matter was the subject of some discussion in the case of *R (Ebrahim) v Feltham Magistrates' Court; Mouat v Director of Public Prosecutions* [2001] 1 WLR 1293. In the first case, a videotape of what was viewed as material essential to the defendant's defence had been destroyed whereas in the second case a videotape recording taken by the police of them pursuing the accused had been destroyed. In both cases it was claimed that the defendant could not obtain a fair trial.

[126] At paragraph [25] of his judgment Brooke LJ stated that "two well-known principles are frequently involved in this context when a court is invited to stay proceedings for abuse of process. (i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those about whose guilt there is any reasonable doubt should be acquitted. (ii) The trial process itself is equipped to deal with the bulk of complaints on which applications for a stay are founded". Consequently, he went on at paragraph [27] to say:

> "It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or justices not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

[127] This approach was also applied in the later case of *Director of Prosecutions v Fell* [2013] EWHC 562 Admin.

The Defendants' Case

[128] The defendants' case in broad outline has been summarised above at paragraph [3]. In the defendants' skeleton argument this outline has been expanded upon in depth. While the court has considered the totality of the argument presented, the court will seek to summarise its main pillars succinctly. The following main points stand out:

(i) In general, it is not possible for the defendants to receive a fair trial due to the delay of over 47 years since the incident.

(ii) This is due, *inter alia*, to delay, particularly as it has had an impact on each of the defendant's ability fully to explain their actions at the time of the incident in 1972. There is, it is alleged, a dearth of evidence as to the state of mind of each soldier at the time and it has not been possible to re-create the investigative opportunities of the time later. Contextual materials surrounding the events of the incident, especially as regards Mr McCann's antecedents and *modus operandi*, are now not available, and it is not now possible for the soldiers to justify their use of force, as the soldiers are left with little more than vague memories. For example, they are faced with being unable to demonstrate that they did not intend to assist others in the fatal shooting of Mr McCann. The reality, unfortunately, is that each's ability to recollect crucial exculpatory material as to the circumstances at or about the time of the shooting has dissipated and this cannot now be remedied at trial.

(iii) Key witnesses are not now available. This applies, in particular, to Police Officers A and B who are untraceable; and Soldier B whose statement contains only minimal details of his perception and intention at the time, especially at the point when he fired. It is also not now possible to recover the situation. Other witnesses have also died since the incident. An example is Josephine Connolly who gave evidence at the inquest and who, it is asserted, would have been called as a defence witness, if available. Likewise civilian witness A (sometimes referred to as civilian witness C) described hearing soldiers shout "halt" and therefore may have been called by the defence, to give evidence at the trial, but has died since.

(iv) There was an inadequate investigation in 1972 which has meant that significant exculpatory evidence was not collected in the immediate aftermath of the event. This was a view expressed in the HET report. One obvious deficiency was that the identities of Police Officers A and B were not recorded which has meant that it has not been possible to trace them with a view to their giving evidence. In the context of forensic examinations, there were failures to photograph key locations, for example, the wall alleged to be struck by bullets, and a failure to collect weapons, magazines and bullets from military and police present. There was also a failure to collect relevant

materials emanating from military intelligence about the briefing the soldiers (if their statements are correct) had received in respect of Mr McCann. Such briefings, it is said, could form an important part of the defence case.

(v) There are inconsistencies in the evidence which have made it difficult to piece together much of the detail of events that afternoon. This embraces a range of issues, such as who all was in the area at the time of the shooting about which different views are found in the papers; the numbers of soldiers present about which there was no clarity; the number of soldiers who fired; the number of shots fired in respect of which there are a variety of versions; and the differing accounts of which soldiers had shouted a warning to Mr McCann.

(vi) It is also suggested that even if a fair trial of the defendants, contrary to the soldiers' case, was possible, it would be an affront to the public conscience for the soldiers to be tried in circumstances where, in view of the no prosecution decision, each took no steps to preserve relevant evidence or ensure continuing contact with potential defence witnesses.

(vii) It is also maintained by the defendants that a 'second category' abuse of process eventuated in this case in the form of the disappointment of the soldiers' expectations in the light of the assurance each received that they would not be prosecuted. In essence, the matter is put as follows in the defendant's skeleton argument. In 1972 the DPP directed that no criminal proceedings would be instigated against any soldier or police officer arising out of Mr McCann's death. In respect of that decision, while there is no express proof of the publication of this decision to the soldiers, it has been accepted and conceded by the PPS, in correspondence in 2016 which is now before the court, that there has never been any dispute as to the fact that a decision of this nature was made. In these circumstances, the PPS has accepted that the matter should be approached "on the basis that this [decision] was communicated [to the soldiers] by some means". For the PPS now to go back on that position and prosecute the soldiers, it is contended, is not unlike the breach of the public law principle of legitimate expectation and is unfair, especially since in 2010 the soldiers' engaged with the HET to provide answers to the family's questions. The object of the exercise was not to secure a prosecution.

(viii) The defendants and their legal advisers, it is said, co-operated in 2010 on the basis that a prosecution was highly unlikely and could not happen, absent a referral by the HET where there had been discovery of new and compelling evidence. The skeleton argument states that "the defendants were entitled to assume that simply repeating in interview an account that they had given previously and in relation to which there had been an undertaking of no prosecution would not then … lead to a prosecution." Reliance is placed, additionally, on statements made after the interviews by HET officers to each soldier that the matter was likely to end at that point. In fact, there was no

new or compelling evidence which arose from those interviews with the consequence that the decision to prosecute made in 2017 was abusive. Further, it is a situation in which the defendants suffered detriment in 1972 by their omission at the time to take steps to preserve evidence fundamental to their defence and in 2010 by engaging with the HET. Finally, "[a]lthough [in 2010] the defendants understood that they were to be interviewed under caution the interviews took place against the background of assurances given by the McCann family that they wanted "truth not retribution". It would be unconscionable that in these circumstances their interviews and statements at that time should now form the basis of the prosecution's case.

The prosecution response to the defendants' case

[129] In a 28 page skeleton argument in response to the defendants' case, the prosecution's central submission is that the proceedings are not an abuse of process. Rather, the defendants can have a fair trial. It is simply not unfair for the soldiers to be tried: indeed, the charge they face should be determined on its merits.

[130] As before, the court has considered the totality of the prosecution skeleton argument. The court, however, will seek to summarise the main pillars of it succinctly.

[131] The following main points stand out:

(i) It is contended that, unlike many historic cases, this is a case where an investigation was carried out contemporaneously to the events. In particular, witness statements were taken, expert evidence was obtained and the defendants (as well as Soldier B) provided accounts, on the very day of the incident, to the Royal Military Police. Accordingly, there is a significant body of contemporaneous evidence which the defendants either brought into existence or have access to on which they can rely or on the basis of which they can refresh their memories. Moreover, Soldier C has added to his statement of 1972 to a considerable degree based on his independent recollection, as recounted to the HET.

(ii) Moreover, the prosecution say that in this case the factual issues are narrow. There is no dispute that the defendants shot at the deceased as he ran away, trying to evade arrest. The principal issues are:

(a) Why the defendants shot at the deceased (i.e. was it necessary); and

(b) Was the force used reasonable in the circumstances as they believed them to be? A further issue is likely to be the question of secondary party liability which may be relevant to the question of whether the defendants are guilty of a substantive offence (murder) or an attempt (attempted murder/wounding with intent).

(iii) The defendants' reasons for shooting and the general circumstances are matters dealt with in the defendants' statements. Matters, including Mr McCann's status at the time of his death, are background issues and would not be likely to be a matter of significant dispute. Indeed, the status of Mr McCann is evident on the face of the prosecution papers.

(iv) It is accepted that two individuals who were at the scene are not available to give evidence. This does not give rise to unfairness. Soldier B died in the intervening period having declined to be interviewed by the HET and Police Officer B cannot be traced. However, both individuals made contemporaneous statements concerning the events and it is open to the defendants, if they wish, to seek the admission of either statement as hearsay evidence.

(v) In assessing any unfairness in relation to the absence of Soldier B, it must be recognised that it is highly uncertain that he would have given evidence in the proceedings, if alive. In any event, it is suggested that it would be highly speculative that either of these two absent witnesses would have given evidence favourable to the defendants or that any other missing evidence would have been favourable. The issue is one of conjecture.

(vi) Importantly, it is the prosecution which bears the burden on each and every factual point. This includes in the context of joint enterprise. If a gap in the evidence gives rise to doubt, that is to the benefit of the accused.

(vii) In any event, the trial process itself has safeguards that will ensure that the proceedings are fair notwithstanding delay and its effects. The judge will be able to direct him or herself in relation to delay, missing evidence and potential unfairness.

(viii) Trying the defendants on the merits of the allegations cannot fairly be characterised as an affront to justice. It is not an abuse of the court. Rather, the reverse is true: it would undermine public confidence in the criminal justice system if the charge of murder is not resolved on its merits.

(ix) While the prosecution accept that a decision not to prosecute was taken in 1972 and that that decision was operative for many years, it is a feature of the criminal justice system that the police/prosecution can, if circumstances arise, reopen an investigation and consider the question of bringing proceedings. As the skeleton puts it:

> "The circumstances which may lead to a reconsideration are varied, and there is no rule that dictates when reconsideration is or may be appropriate."

(x) In this case the defendants did not act on the 1972 decision to their detriment and there is no evidence of this.

(xi) The defendants prior to the 2010 interviews were aware that the matter was to be reinvestigated by HET. They could not have reasonably come to the conclusion that evidence gathered by the HET would or could not be used in a criminal prosecution or that any matter under investigation would not be capable of prosecution.

(xii) The defendants prior to the 2010 interviews were not given any representation or unequivocal representation by those with conduct of the investigation or by the prosecution or anyone else that they would not be prosecuted. In fact the defendants agreed to be interviewed by the HET and the issue of the soundness of otherwise of the advice that they had been given in advance of this is not to the point. In fact, throughout the process the defendants' legal representatives were alive to the possibility of action being taken beyond the HET interviews. The letter from the McCann family for practical purposes was irrelevant, especially as it could itself not amount to any kind of assurance.

(xiii) There is clear material in the papers which shows that the defendants' advisers knew of and acknowledged that there existed a risk of prosecution. For example, A and C were each advised that he should be as concerned as anyone else facing a cautioned interview. The defendants were interviewed under caution by the HET and there is no room for doubt that what was said in the course of the interviews would be considered by investigators and potential prosecutors and could be used in evidence in criminal proceedings.

(xiv) Consequently, it is untenable to suggest that in 2010 the defendants had an immunity and, whatever they said, they could not be prosecuted.

(xv) Decisions in Northern Ireland to prosecute lie with the DPP, not the HET, and the defendants' lawyers will have been aware of this as well as other possible routes to prosecution. In the end, there is no basis for the contention that the 2010 interviews were given in reliance on any unequivocal assurance of no prosecution. In any event, the defendants did not act to their detriment at that time.

The Court's Assessment

[132] The court has considered the totality of the arguments which have been put forward by each side and wishes to make clear that simply because a particular point is not referred to in its assessment does not mean that it has not been considered and evaluated. In respect of a judgment of this nature there are limits to the extent that the court can expressly deal with every point which has been

canvassed before it. What it proposes to do, in the interests of economy, is to consider the main issues which arise on an issue by issue basis.

Delay

[133] The essential basis of the defendant's case on this issue is the passage of time which has elapsed since the incident giving rise to the charges. At 47 years there could be no serious doubt but that this is a case of extreme delay. It is inevitable that a delay of this magnitude is likely to bring with it a range of disadvantages for each party to the proceedings.

[134] The main question therefore becomes centred on the extent to which, given the overall factual matrix of the case, these proceedings can be managed to enable them to be conducted fairly, if they are to be conducted at all.

[135] With the above in mind, an important starting point must be a consideration of what, on proper analysis, may be viewed as the issues in the case, as it seems to the court that there is strength in the prosecution's point that the issues which most divide the parties, having regard to their respective positions, are relatively narrow ones.

[136] The court is not starting from a situation in which there has been a complete absence of investigation of the incident by the authorities. There plainly was an investigation – as the court has discussed at some length heretofore. But the standard of investigation – while probably far from the worst of its day – was deficient in a variety of respects. As inevitably is the case, some of these deficiencies are of greater importance than others.

[137] A more positive feature of the process is that it can be said that on the day of the incident those soldiers who were believed to have fired their weapons (A, B and C) were interviewed and made statements of evidence which they signed. Unfortunately, they were not interviewed by the police, which is regrettable, but it is notable that other witnesses, including other security force witnesses, did provide statements to the police. Examples include Police Officer A and Police Officer B. There was also a range of witness statements or depositions compiled with the assistance of police. This volume of material is largely available, though the witnesses may not be because of intervening death or the witness not being capable of being traced or the witness suffering from illness or injury.

[138] There was an expert post mortem carried out, which ascertained the cause of death, but unfortunately there was an inadequate forensic approach to issues such as the recovery of weapons and ammunition from those who had been involved; the testing of same; and the discovery of basic information about which weapon fired which bullet. There appears to have been no proper system which was used to recover bullets or empty cartridge cases, information which may have been able,

together with the weapons used, to reveal a picture of what had occurred not just in general terms but in detail.

[139] Fortunately, it seems clear that in the light of recent detailed forensic reports which have been prepared on behalf of the PSNI and on behalf of the defence, the court will have available to it expert reports which will go some way towards explaining the extent of the loss of missing material. The experts who have been commissioned should, the court believes, be able to explain to the tribunal of fact the importance of the loss of forensic opportunities which were not taken at the time and the implications of same for the case as a whole. This, in the court's judgment, should mitigate substantially the impact which arises from the investigative omissions which have occurred.

[140] Overall, from the fund of potential evidence now available, the court is of the view that a picture of the contours of the case appears to emerge, at least in general terms. That picture is that there is, or appears to be, a substantial number of the main issues where it can be said that there is a relatively high level of agreement as to the events which likely occurred. Of course, this is not to say that every witness agrees with every other witness but there is a relatively wide consensus on many of the major features which go to make up the unfolding of events that afternoon.

[141] By way of illustration, the court tends to the view that this is true of the main landmarks. There is a substantial level of broadly common ground. There seems to be little disagreement that Parachute Regiment soldiers were in the Markets area that afternoon and that, *inter alia*, at least one VCP was being manned. Police, albeit undercover police, also appear to have been in the vicinity and there appears to be little reason (at this time) not to accept that the police sought to enlist the assistance of soldiers in the area after they had observed the presence of Mr McCann, as they claim. This led to an encounter between one of the undercover police officers and Mr McCann. While the details of the encounter in the accounts of witnesses vary, the preponderant account is that this ends up with Mr McCann seeking to run away from the police officer with a view to escape and him being shouted at to halt. While there is not unanimity about the terms of the shouting which went on and the exact personnel shouting, there is evidence both from soldiers and police and from some civilians that such a shout or shouts occurred but that Mr McCann ignored these, leading to the firing of weapons, probably initially by way of warning but later, aimed shots, leading to Mr McCann's death.

[142] All of the above evidence is capable of going a substantial way towards the establishment of facts which appear to offer, at least, *prima facie*, answers to questions such as –

(a) Did Soldiers A and C each see Mr McCann running away from the police officer?

(b) Did each warn Mr McCann that he should stop or the soldier would fire?

(c) Did each discharge his weapon?

(d) When discharged, was the weapon aimed at Mr McCann?

[143] Certainly an affirmative answer to each of these questions would not be inconsistent with the evidence of Soldiers A and C, whether viewed only in accordance with each's interview on the day of the incident or later, in the light of their involvement with the HET. It would also be generally consistent with the accounts of others at the scene available to the court.

[144] The court hastens to say that the answers to the above referred to questions are in no sense to be viewed as a definitive expression of opinion or a finding of fact by the court but are intended for present purposes only to demonstrate that there is a basis for believing that the width of what is in dispute is not as great as might be supposed. Nor is it suggested that affirmative answers to these questions necessarily dispose of the case, as it is evident that additional issues may arise focused on the state of mind of the soldiers at the time and each's intention in firing, if that is what each did. The court acknowledges that, to take an example, it might be expected that, as is foreshadowed in the soldiers' statements, questions may arise about their states of mind in respect of how they viewed any threat to them that Mr McCann might be viewed as representing and each's purpose at the point when Mr McCann was seeking to escape from them.

[145] In this area, as in others, the court bears in mind that the onus of proof remains on the prosecution and it will be for it to prove the *mens rea* of each of accused soldiers. It may be supposed that, subject to any specific ruling the court may make as to the admissibility of the statements of A and C (whether those made in 1972 or later), the likely course which the prosecution would adopt is to seek to rely on the account of each of the soldiers which was offered during the interviews they participated in. Notwithstanding the possibility that such evidence will be adduced, A and C do, of course, retain the right themselves to give evidence, though neither is obliged to do so. It may or may not be the case that each would exercise the option of seeking to explain or elucidate his thinking at critical points.

[146] It is in this more confined area that the defence has raised the scenario that, in fact, the ability of the soldiers effectively to give evidence in these circumstances is more apparent than real, as the question of each's state of mind at the time, it is said, is not adequately dealt with in their original statements to the Royal Military Police and each, it is alleged, is unable, at this distance in time, fully to recollect what was in their mind.

[147] In the court's opinion, having read and re-read the original statements of the soldiers involved in Mr McCann's death (A, B and C) as well as the statements of police officers A and B, the accounts provide a sufficient description of events that afternoon to make the decision to prosecute understandable and to make it

unsurprising that each has been returned for trial. Indeed, A and C's individual statements alone may reasonably be viewed as achieving these goals. The weight ultimately to be attributed to each's written accounts, however, will inevitably be an open question at this stage. On one view, it seems to the court, that the statements could be viewed as speaking largely for themselves, although this is not to say that individual statements could not be supplemented at the discretion of the accused, assuming that either defendant wished to do so.

[148] The court is unpersuaded that at this time there is a basis for it to view the prosecution as an abuse of process on the footing that a fair trial is not possible by reason of the absence of key information from the original statements. Subject to the issue of Soldier A's medical prognosis, which will be discussed later, the court is not satisfied that it has been shown or is the case that each soldier cannot avail of the usual trial facilities further to explain his outlook at the time of the incident and throughout it, if he desires to do so. The strength of any such account would then be a matter for the tribunal of fact.

[149] Additionally, the object of the statements of the soldiers being compiled at the time was to enable their accounts to be placed on the record and it seems to the court that this was done. The reality therefore must be that subject to the facility to add to their statements at trial (which is available) and to any issue about the admissibility of statements (which will be a matter for the trial) it is not the case that by reason of the defence submissions on this aspect either defendant cannot obtain a fair trial.

[150] As is clear already, there are a variety of other points raised by the defence under the heading of delay.

[151] However, these must be considered in the light of the importance of the particular issue under discussion as well as the ability of the trial process to mitigate the ill-effects of a particular complaint or series of complaints. In many instances what can be achieved is that the tribunal of fact is made fully aware of the particular problems so that it can decide, in the light of this information, how it should deal with them, in terms especially of the weight it should give to particular aspects of the evidence.

[152] The court will briefly record its view on the main points raised by the defence.

The absence of materials which have been provided to the defence about briefings at the time in respect of Mr McCann

[153] While it is correct that, despite the discovery process, little has been disclosed about the briefing process by which soldiers in 1972 would have received information about alleged IRA suspects and their activities, and while this is a disappointment, the court doubts very much that this state of affairs when viewed in context could give rise to a conclusion by the court that by reason of non-disclosure, the defendants could not receive a fair trial.

[154] The court says this for two main reasons. Firstly, it is evident from the statements of the soldiers and police from the time that Mr McCann was a person of some notoriety in the IRA and was a person about whom police and soldiers would have been briefed. In particular, the soldiers centrally concerned with this incident, it seems, were aware of Mr McCann's standing in the IRA; of his prominence; of his leadership role; of some at least of his alleged past activities; and of the likelihood of him being armed and engaging in an IRA operation targeted, *inter alia*, at the security forces. Each of the soldier's statements refer extensively to these factors. Moreover, insofar as it may have been required, it seems likely to the court, that the soldiers were briefed by Police Officer B about Mr McCann being in the vicinity. This was in connection with Police Officer B's proposal that the soldiers assist the police officers in arresting him.

[155] It may safely be assumed that in these circumstances the soldiers will have been on their mettle and aware of their own security and the risk that Mr McCann might represent to it, including the risk that other members of the IRA might be adjacent.

[156] Secondly, it is clear that disclosure has been made of a variety of pieces of information, including a short resume of Mr McCann's involvement in the IRA and some material based on intelligence reports concerning him which, while limited, nevertheless add support to the sorts of concerns the soldiers appear to have had, as discussed above. Much, if not all of this, will likely be capable of being admitted in evidence.

[157] There is, in short, enough information to cause the court to believe that sufficient material is available to the soldiers' defence team to avoid any serious disadvantage in this area.

The absence of important witnesses

[158] It is inevitable that with the passage of time, there has been the loss of important witnesses in this case, because of death or injury or their untraceability. There are a number of witnesses who are unavailable. The most important witnesses who are unavailable include Soldier B (now dead) and Police Officer B (untraceable). There are a number of persons who had been involved in the investigation of Mr McCann's death and also civilian witnesses, who fall into these or similar categories. In evaluating these losses, the court finds itself not of the view that this situation is likely to bring about a situation where Soldiers A and C cannot obtain a fair trial so that the proceedings are an abuse of process. The court is of this view because, notwithstanding these losses, there remains a substantial volume of evidential material which nonetheless is available and, in addition, the trial judge will have available to him or her powers which would enable him or her to introduce into evidence the statements or depositions of witnesses, where same have been made, who are not now available. While the court accepts that such a

statement or deposition in many cases will be likely to be inferior to having a live witness give evidence and being cross-examined, the exercise of judicial discretion will, it seems to the court, mitigate to a substantial degree, the negative effects of this situation. On this basis, it may reasonably be anticipated that, for example, the statement of Soldier B and the statement of Police Officer B could, on the application of the defence, be admitted in evidence. The same principles would of course apply to the evidence of others.

The gaps left by the inadequate investigation at the time

[159] In this area the court can see that there are evidential gaps which arise out of the inadequate investigation which was carried out at the time. A good example of this is in the area of the extent of the forensic examinations carried out in the immediate aftermath of the incident.

[160] The court accepts that it would have been preferable for these gaps to have been filled by a rigorous process of investigation at the time, but it is not of the view that the existence, even of substantial gaps, means the defendants cannot obtain a fair trial. In the court's estimation, the existence of gaps in the evidence affects both prosecution and defence and any handicap caused by this is unlikely to be one sided. What can be acknowledged is that, in relation to a problem of this sort, the situation is not unprecedented or even all that rare, especially in cases where the original investigation was carried out to a standard redolent of another era.

[161] What can be achieved by way of mitigation is a situation in which the tribunal of fact is placed in a position in which it can understand and take into account, as appropriate, the omissions which are relevant and their effects, and the inferences which properly may be drawn from them in the circumstances.

[162] The court's view is that, particularly in the light of recent reviews of the forensic evidence, both on the part of the PSNI and on the part of the defence, it should be possible for the tribunal of fact to be assisted and it would be unduly pessimistic to conclude that this feature of the case savours of an abuse of process.

Alleged inconsistencies in the evidence

[163] The court acknowledges that as between different witnesses there exists in this case inconsistencies in the accounts which have been given. Some of these will be minor and some more than minor. However, this in itself is not unusual where you have the occurrence of a serious incident during hours of daylight in an inner city location. It would be surprising if all of the witnesses agreed about all of the details.

[164] The additional problem in this case is that the ability to explore the different versions of events will be bound to be affected by reason of diminishing memories due to the efflux of time and/or the availability of the witnesses to be

cross-examined, as it can be anticipated that in some instances the evidence in question may be available only in statement form.

[165] Examples of problems in relation to this aspect have been provided by the defendants which the court has considered alongside its consideration of the full range of evidential material available to it.

[166] Making the best assessment it can, and bearing in mind the court's remarks *supra* about the narrowness of the likely battleground, the court does not consider that this problem is of such an acute nature as to be likely to prevent the accused from obtaining a fair trial.

The cumulative effect of factors which reduce the scope for a fair trial to be provided

[167] Heretofore, the court has sought to express its view on the main points within the defendants' argument in respect of this application individually.

[168] But it also is important for the court to consider whether the combined effect of the various individual points should dictate an overall conclusion that in this case no fair trial is possible. Inevitably, this is a matter of the weight the court gives to each point and an assessment of overall impact. The court will stand back and make an overall judgment.

[169] In doing so, it will remind itself of the account it has given of the relevant legal principles in this area.

[170] Looked at cumulatively, the court is not satisfied at this time that, on an overall assessment of the effects of delay, no fair trial is available to each defendant. Rather, it is the court's opinion, despite the difficulties created by the long delay in this case, that it is still possible to have a fair trial.

Even if a fair trial could be achieved, is the prosecution of the defendants an affront to justice?

[171] The above question divides the parties. The soldiers seek to rely on the second of the general principles governing the grant of a stay of proceedings discussed earlier in this judgment.

[172] The particular aspect of the case highlighted under this head is that the defendants say that as a result of the decision not to prosecute them in 1972 they did not take steps to preserve evidence or keep up contact with witnesses who could assist them.

[173] As is clear from the authorities, it would only be in an exceptional case that the court would grant a stay of the proceedings under this head.

[174] Having regard to the particular way in which this aspect of the challenge has been put, as well as the various matters discussed above, under the heading Delay, the court does not conclude that if the trial was to proceed this should be viewed as an affront to justice on the basis referred to specifically under this head or more generally.

Unkept Promises

[175] In respect of the above issue, the court accepts that in 1972, the defendants will have learnt that the prosecution authority had made a decision that no soldiers were to be prosecuted in respect of the death of Mr McCann. The concession made by the PPS that the prosecutor's decision will have been communicated to the soldiers at that time is properly made.

[176] While it is the case that the decision made by the PPS in December 2016 that the test for prosecution had been satisfied must therefore have come as a great disappointment to the applicants, the question which arises now is that of whether this latter decision amounts to an abuse of process in accordance with the principles discussed above at paragraphs [119] to [122] *supra*.

[177] For analytical reasons, the court will address this issue, bearing in mind the chronology of events beginning in 1972.

[178] As regards the 1972 decision itself, it seems to the court that paragraph [54] of *Abu Hamza* contains the relevant test the court should apply. Two particular matters fall to be considered.

[179] In respect of the first, the court accepts that the representation made to the soldiers in 1972 may reasonably be viewed as an unequivocal statement that they would not be prosecuted. However, the court finds itself unpersuaded that it has been shown that either of the defendants acted on that representation to his detriment, as there is no, or no substantial, evidence before the court which demonstrates that either defendant – in any material respect – altered his position as a result of the decision or took any step to their disadvantage because of it.

[180] In those circumstances the reality appears to be that no doubt the decision of the then DPP will have been noted but it was simply followed by a vacuum which practically remained until the point when the HET came on the scene and sought in 2009 an interview with each of the soldiers involved.

[181] It appears to the court that the request made at that time was no more than that – a request – and it was open to the individual soldier requested to decide whether he was willing to participate in an interview or not. In the court's opinion, the posture of non-cooperation adopted by Soldier B shows that this must have been the case.

[182] Soldiers A and C did agree to make a further statement and to be interviewed by the HET and the court is satisfied that this was their own decision made with the benefit of legal advice. In this regard, the court has little doubt that each of the soldiers who accepted the invitation to participate must have known that a re-investigation was integral to the exercise being conducted and that the evidence gathered would or could be used for the purpose of a potential criminal prosecution. In the court's opinion, it is wholly unconvincing for the soldiers now to maintain that they were unaware of such a possibility or had not been alerted to it. Likewise, it is unconvincing for the soldiers to say that for the purpose of this exercise they enjoyed any form of immunity from prosecution or that there was no risk of same.

[183] Moreover, once they had provided their further statements and been questioned about them, in the court's opinion, there could be no question but that their responses would fall to be considered by those dealing with the case thereafter, whether investigators or prosecutors.

[184] Additionally, the court rejects the view that the response of HET investigators after their interviews had been completed (see paragraphs [80] and [81]) would or could be a guarantee that there could be no prosecution in the future. In this regard, it is important to note that what was said at this stage was *post* not *pre* interview and the person saying it could not realistically have been saying more than words of encouragement. The words used did not, moreover, deter or put Devonshires off from advising the HET subsequently about an issue of criminal liability in connection with the soldiers.

[185] In short form, the court is satisfied that Soldiers A and C were not misled into agreeing to participate in the process at that time and were not misled in any salient respect.

[186] In particular, the court does not accept that, in any way, the defendants were tricked or induced improperly into participating in the HET interview process by the letter made available to them from the McCann family which referred to the family's outlook being that they wanted truth rather than retribution. In view of the expert legal advice available to Soldiers A and C at the time, such a proposition seems to the court to be fanciful and unrealistic.

[187] In the above circumstances, the court agrees with the prosecution's contention that the defendants and their advisers were throughout the process of the defendants' involvement with the HET alive to the possibility of action being taken in the aftermath of the interviews, especially in view of the unmistakeable acknowledgement by the lawyers advising the soldiers that there all along was a risk of prosecution arising from after caution interviews.

[188] The court is of the opinion that the 2010 interview process contained no unequivocal assurance of no prosecution and it finds that there is no evidence that either of the defendants acted to their detriment at that time.

[189] In respect of this topic the court does not consider that any abuse of process can be said to arise from any action on the part of the AGNI recorded earlier in this judgment (see paragraph [86] *et seq*). The AGNI in 2013 did express certain views about further prosecutions in Northern Ireland in the period prior to the Good Friday Agreement in respect of Troubles related deaths. As noted at paragraph [88] above, the AGNI's invitation met with very limited public support. In March 2014, the AGNI asked the PPS to consider the original decision in this case not to prosecute.

[190] The court does not consider that the AGNI was acting improperly when he asked the PPS to review it in March 2014 or that, as a result of his actions, the court should now interfere with the decision to prosecute later made by the PPS following the review it carried out.

[191] Rather, a reasonable interpretation of these events is that the AGNI, who was dealing with many legacy cases at the time, was entitled to raise the question of the value of Troubles related prosecutions in cases prior to the Good Friday Agreement at the policy level and to seek to stimulate public discussion about the worthwhileness of pursuing these. While public debate on this issue then ensued and was generally not favourable to the AGNI's suggestions, this did not thereafter, in the court's judgment, disable him legally from dealing with issues which came before him, such as the issue of the McCann family desiring him to order a fresh inquest into Mr McCann's death – a power vested by Section 14(1) of the Coroners Act (Northern Ireland) 1959 in the AGNI. In responding to the request of the family aforesaid, the court does not consider that the AGNI was not entitled to look at all the options available to him, one of which was to consider asking the PPS to review the original 'no prosecution' decision. The AGNI's letter to the DPP plainly demonstrated that he had concern about the 'no prosecution' decision and, in these circumstances, it was open to him – in the exercise of his broad discretion - to ask the DPP to review the case, as he did, in accordance with paragraph 4.60 of the Code for Prosecutors. The decision, as a result of the review, was a decision of the PPS not the AGNI and, in the court's judgment, that decision is not vitiated by the above sequence of events. There is also no basis for believing that the actual review carried out by the PPS was in any way defective or breached the Code for Prosecutors.

[192] In the end, the court is of the view that it was open to the PPS to arrive at the decision it arrived at. It was not an abuse of process in all of the circumstances for the decision to have been made to change the original no prosecution decision in the light of further consideration of the issues. Taking account of all of the material then available, it seems to the court that the PPS had to strike a balance between the public interest in prosecution as against the interests of the applicants, much as was described in *Re Wilson's Application* (see paragraph [122] *supra*).

[193] The court is also satisfied that there is no evidence to support the proposition that in any material way the defendants acted in respect of unfolding events at that time to their detriment.

[194] Finally, the court wishes to acknowledge that it has found the judgment of Colton J in the case of *R v Hutchings* of particular value in this context. The decision is helpful, as it dealt with a set of circumstances which at the least were and are similar to those in the present case. In that case there had been a 'no prosecution' decision in November 1974, followed a long time afterwards by a HET interview of the soldiers concerned, including the defendant, in September 2011. This led on to the AGNI in that case asking the DPP to consider a review in accordance with the Code. This ultimately resulted in a change to the decision not to prosecute. The judge held that the case was not one of executive manipulation or bad faith (see paragraph [91]) and there additionally was no finding that the defendant had acted to his detriment. Any detriment the defendant suffered in that case related to the potential unfairness of the trial, a matter the judge had already dealt with in his judgment, which is a similar pattern to that established in the present case.

[195] In his conclusion in *Hutchings*, the judge said:

> "I do not therefore consider that this is a case in which the public interest in prosecution is outweighed by the fact that the defendant was informed in 1974 that he would not be prosecuted arising from the incident. I do not consider that the continuation of the proceedings amounts to an affront to the public conscience or that a stay is necessary to protect the integrity of the criminal justice system."

These words seem apt for use in the present case also.

The personal medical circumstances of Soldier A

[196] Up until now the court has been able to consider the arguments which have been made in the context of Soldiers A and C together and this is the way they have been presented by the applicants.

[197] However, for the first time in September 2019, an issue which relates only to Soldier A was raised which hitherto had not featured in the arguments originally opened to the court.

[198] The issue which arose relates to an additional argument in Soldier A's case that he would not be able to have a fair trial. The same argument did not arise and does not arise in Soldier C's case.

[199] The argument is based on a medical report provided to the court just before the completion of the abuse of process hearing in September 2019. The report was the product of an examination of Soldier A carried out by Dr Z, a Consultant Clinical Psychologist and Neuropsychologist on 7 June 2019.

[200] It will be recalled that at the date of Soldier A's interview with the HET on 17 March 2010 he had told his interviewers that he had barely any recollection of the incident giving rise to Mr McCann's death and was effectively substantially reliant on the statement he made to the Royal Military Police immediately after the incident in 1972 (see paragraphs [44]-[54] *supra*).

[201] It is notable, however, that in 2010 during his interview Soldier A did not claim that he had any medical cause for being unable to recall events and his reliance on his 1972 statement seems to have been simply attributed to the period of time which had elapsed between the original event and the HET interview.

[202] While he was able to provide information in 2010 in relation to his personal background and about certain limited aspects of the events of 15 April 1972 and was able to say that he believed that any action he had engaged in that day involved the use of reasonable force in the circumstances, it is right to say that his account throughout did not depart significantly from that he had provided in the past.

[203] It appears from what the court has been told that at some point after the first hearing in this case in December 2018, Soldier A's lawyers sought and obtained access to Soldier A's medical records, which were later provided to Dr Z.

[204] Dr Z, in the report he has compiled, has summarised those parts of the records which he considered relevant for present purposes. In particular, he refers to Soldier A being seen in the Accident and Emergency Department of his local hospital on 9 August 2005. It appears that he had had a Transient Ischaemic Attack, usually referred to as a 'TIA'. A CT scan was carried out on that day. Importantly, it disclosed multiple mature cerebellar infarcts.

[205] The TIA itself appears to have resolved within a relatively short period of time and Soldier A was retained in hospital for two days.

[206] Unfortunately, the original scans have not survived. As a result, Dr Z's report relies instead on the limited written records found in the file.

[207] From these, it is clear that no MRI scan was carried out which, according to Dr Z, would have been a step he would have expected to be taken, especially as it would provide significantly greater detail.

[208] The infarcts, it appears, had been present for some time. They were not themselves due to the TIA and they relate to earlier problems with blood supply to the brain. Dr Z relates that there were 2-3 areas noted as visibly showing damage on

the CT scan but there was no way of telling how old they were. Indeed, it could not be said what the exact location of these was in relation to the cerebellum.

[209] It was how those infarcts affected Soldier A's memory function which is the central subject in Dr Z's assessment. He approached this issue by means of both subjective and objective forms of testing. Certain tests involved Soldier A responding to a questionnaire concerning everyday memory problems. But, of perhaps greater interest, was a test in the nature of a comparison between Soldier A's memory and the memory of another person – a good friend – who had served in the armed forces at the same time as him. The object was to compare the relevant level of detail Soldier A could provide in relation to information imparted by his contemporary based on what was believed to be likely common experiences.

[210] It is unnecessary to set out in detail the various tests carried out by Dr Z in respect of Soldier A but, in general, over a range of subject areas, Soldier A performed poorly, especially in certain specific fields. It is helpful is to record Dr Z's main conclusions.

[211] These were:

(i) There was evidence from hospital reports of the CT scan in 2005 that the soldier had already suffered from several infarcts in the cerebellum prior to his admission with the TIA.

(ii) Dr Z was satisfied that the subject did suffer from brain damage in areas which could produce problems with memory.

(iii) Neuropsychological assessment showed that Soldier A had problems with memory in excess of what would be expected for someone his age. This was particularly the case in respect of visual memory.

(iv) An investigation in respect of his autobiographical i.e. very long term, memory, from 1967 to the 1980s was carried out. This showed marked problems with recall of events over many years.

(v) Dr Z was satisfied that Soldier A had suffered from damage to the memory structures of his brain in 2005 or earlier.

(vi) He was also satisfied that the deficits in his autobiographical memory were real and related to brain damage.

(vii) The most reliable account of events in 1972, according to Dr Z, was that likely to have been obtained from the soldier at the time.

(viii) A test of memory malingering was carried out to assess any evidence of reduced effort or "faking bad". In respect of this test Soldier A scored at a satisfactory level.

[212] The case made on behalf of Soldier A by counsel in the light of these results was that at trial Soldier A would be gravely prejudiced due to the fact that he was suffering from a neurological deficit which had impaired his memory function. In a case which turns, it was argued, on exactly what he saw and heard, it was submitted that there could be no greater prejudice than his inability to be able to recall the events themselves.

[213] In those circumstances, the court was urged to conclude that it was effectively impossible for Soldier A to have a fair trial.

[214] The prosecution resisted the court drawing any such conclusion. Its reaction to Dr Z's evidence was twofold. First, it had commissioned a report of its own and, secondly, it challenged some parts of Dr Z's evidence.

[215] The report which had been commissioned came from Dr Y, a Consultant Clinical Neuropsychologist. It was dated 20 September 2019 and was in the nature of a 'desk top' report. It was, therefore, reliant substantially on the description provided by Dr Z.

[216] In general, however, Dr Y's report cautiously tended to agree with the main conclusions arrived at by Dr Z. In particular, he accepted that while the TIA cleared up before long, the brain scan had disclosed multiple cerebellar infarcts which were indicative of old established damage. These, he accepted, were injuries usually associated with movement control and co-ordination, but he acknowledged that more recently such an insult can be viewed as affecting cognitive domains such as language, memory and attention. Broadly, he offered little criticism of Dr Z's methodology, and he was also willing to accept that Soldier A had shown appropriate levels of engagement during his completion of the tests carried out in respect of performance validity.

[217] Overall he indicated that:

- Assuming Soldier A was of average intelligence, it was reasonable to conclude that the assessment of memory function pointed to decrements in terms of both auditory memory and, in particular, visual memory.

- Whilst Dr Z did not undertake a comprehensive neuropsychological assessment, nonetheless use of a structured clinical interview to examine autobiographical memory recall, as well as the use of sub-texts extracted from the standardised memory test, were appropriate.

- Dr Z's approach to examining autobiographical memory for events in the years preceding and post-dating 1972, was reasonable and nuanced but it is to be noted that Dr Z had indicated that he had been expressly asked not to consider the events of 1972 and had excluded those events from his inquiry.

- Dr Z's assessment of memory utilising both objective standardised measures as well as a nuanced and bespoke approach to autobiographical recall in Soldier A's case was appropriate.

[218] At the same time Dr Y offered some suggestions. In particular, he felt that MR imaging even now would be of benefit as it could establish an up to date perspective on the extent of the brain insult. Like Dr Z, he was surprised that such imaging had not utilised at the time.

[219] In cross examination of Dr Z, it is the court's estimation that while there was some trimming achieved at the edges of his report, ultimately there was little substantial damage done to it, which perhaps, given the contents of Dr Y's report, is unsurprising. It was, for example, accepted by Dr Z that Soldier A's autobiographic memory loss had not been catastrophic. He also accepted that some events generally will be more memorable than others. In terms of the tests, he accepted that he had not been in a position where he could check on the accuracy of the recall of the former soldier who was being used for comparison purposes.

[220] Nonetheless, the prosecution was clear in maintaining its overall submission that these matters, even taken at their height, did not warrant in Soldier A's case a stay being imposed on the basis upon which it had been sought.

The court's assessment

[221] It appears to the court that the correct approach in principle to this aspect of Soldier A's case is similar, if not the same, as the approach adopted in the court's earlier discussion of delay at paragraphs [133]-[151] *supra*. In that section the court acknowledged the extreme delay in this case and accepted that it would bring with it disadvantages and difficulties, raising questions about whether the proceedings at trial could be managed in a fair way.

[222] For reasons advanced in the paragraphs referred to by the court above, the court has already concluded that despite a variety of disadvantages, including the risk of fading memories, nonetheless it was unpersuaded that a fair trial was not possible. The court was of the view that it had not been shown that each solider could not avail of the usual trial facilities to explain his outlook at the time. It also felt that there was scope for the trial process to mitigate the ill-effects of a complaint or complaints, in many cases by enabling the tribunal of fact to be made aware of the particular problems so that it is put in a position to decide, in the light of that information, how it should deal with them, in terms of the weight it should give to particular aspects of the evidence.

[223] In coming to its conclusions on the effects of delay the court, *inter alia*, had in mind the particular issue of loss of memory which may result from the passage of time. What the medical evidence now brought before the court in the case of Soldier A shows is that there is a real risk, for reasons advanced by both Dr Z and Dr Y, that in this case the problem may be deeper than it might first have been thought to be in view of the information now available.

[224] The court has no reason not to accept the gravamen of the medical evidence it has summarised above but this does not mean that it sees the issue as a black and white one, with acceptance that it must follow from the medical reports it has seen that inevitably Soldier A cannot get a fair trial.

[225] First of all, the court considers that the problem before it of Soldier A's long term memory has yet fully to be tested in respect in particular of the issues which arise or are likely to arise at the trial. It will be recalled that those issues were not touched upon in any way by Dr Z or Dr Y in each's reports. Secondly, the court, as it did in its earlier discussion of the effect of delay on recollection, must bear in mind that the evidence which has or is likely to have survived over the years since the incident occurred, which includes statements from key witnesses, including the statements made in 1972 by Soldiers A and C themselves, remains largely available and can be used to assist the process, should Soldier A wish to give evidence at the trial. Thirdly, the court finds itself unconvinced that greater clarity cannot be brought to the medical issue, a matter the parties may have to consider further if the case goes to trial. In this regard Dr Y did offer some suggestions of what steps might yet be taken. Finally, it does seem to the court that to go straight to the conclusion that a fair trial is not possible *simpliciter* fails to give full recognition to the ability of the trial process to respond to an issue of this nature.

[226] In this last regard, the court is of the view that it should not underestimate the Trial Judge's ability to give directions to the tribunal of fact about the effect of delay. The court has in mind a direction in respect of the need for the tribunal of fact to bear in mind that the passage of time is likely to have affected the memory, not just of witnesses, but of the accused and not just on the basis of forgetfulness but also on the basis that there may be damage to long term memory by reason of previously sustained cerebellar infarcts. The court will be able to explain to the tribunal of fact, where appropriate, that an accused, for reasons beyond his control may not be able to remember details which could have assisted him.

[227] It may, for example, be perfectly reasonable for the court in proper circumstances to tell the tribunal of fact that the long delay should be taken into account in the accused's favour as should medical evidence adduced before it which demonstrates particular difficulties.

[228] It is the court's understanding that these type of directions are not uncommon and can be moulded to the particular facts of the case.

[229] In respect of the issue now under discussion, while the court takes seriously the problems alluded to by both doctors, it considers that it is unnecessarily defeatist in respect of the trial process to decide at this juncture that, notwithstanding, the ways in which trial craft can assist, a fair trial is not possible. This is not the approach of the court and it is not its view. It follows, that while the court can understand why this aspect of Soldier A's position has been the subject of particular evidence and targeted submissions, nonetheless the court remains of the view that it is unpersuaded that this factor, whether taken by itself or alongside or in combination with other factors on a cumulative basis, should cause it to grant the stay sought.

[230] The court reminds itself of the exceptional nature of a stay on the ground of a fair trial not being possible, and the importance of serious cases, such as this, going to trial.

[231] In the circumstances, the court endorses the view of Lord Judge in *F(S)* [2012] QB 703 at [45] when he said that:

> "It is only in exceptional cases where a fair trial is not possible that [abuse of process] applications are justified on the ground of delay … The best safeguard against unfairness to either side in such cases is the trial process itself, and an evaluation by the jury of the evidence."

Conclusion

[232] Notwithstanding the wide ranging basis of the application made by each of the defendants, which has been considered in its totality, the court concludes that this is not a case, for the reasons it has given, for a stay of these proceedings to be imposed. The court is confident that the trial process should be able to deal effectively with the points raised and that this is, consistent with the legal principles set out in this judgment, the correct way to proceed. While the court has hitherto approached the matter on the basis that the burden of proof in respect of abuse of process rests on the soldiers in this case, for the avoidance of doubt, the court wishes to make it clear that even if its judgment had been on the basis of general judicial assessment without resort to the burden of proof, it would have reached the same conclusion.