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Judgment: approved by the Court for handing down (subject to editorial corrections)*	***Delivered:*** **19/12/2018**

IN THE CROWN COURT SITTING AT BELFAST

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THE QUEEN

-v-

IVOR MALACHY BELL

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COLTON J

Background

[1] The defendant faces two counts on the indictment as follows.

Count 1 – Encouraging persons to murder.

The particulars of that count are that between 31 October 1972 and 1 January 1973 the defendant encouraged persons not before the court to murder Jean McConville, contrary to section 4 of the Offences Against the Person Act 1861 and common law.

Count 2 – Endeavouring to persuade persons to murder.

The particulars of that count are that between 31 October 1972 and 1 January 1973 the defendant endeavoured to persuade persons not before the court to murder Jean McConville contrary to section 4 of the Offences Against the Person Act 1861 and common law.

[2] The counts relate to the controversial and notorious murder of Jean McConville. She was a widowed mother of ten who was abducted in front of some of her children by paramilitaries, murdered and secretly buried on a beach in the Republic of Ireland.

[3] The evidence upon which the counts are founded has also been the subject of public controversy. The prosecution is based on audio interviews said to have been conducted in Northern Ireland by Anthony McIntyre with the defendant. The recordings are part of what have become known as the "Boston Tapes" which were part of an oral history project conducted via Boston College in the United States of

America whereby persons involved in the "Troubles" in Northern Ireland gave oral accounts of their involvement. The tapes were collated under what was referred to as "the Belfast project" which was housed at the John J Burns Library of Rare Books and Special Collections at Boston College. The Director of the project was the well-known journalist and writer, Ed Maloney. McIntyre is a former IRA member and was one of the researchers on the project. Interviewees entered into "donation agreements" with Boston College whereby it was agreed that access to the tapes and transcripts of the interviews would not be released until after their death except in cases where they provided prior written approval following consultation with the Burns Librarian, Boston College. After the death of any interviewee the ultimate power of release rested exclusively with the Librarian.

[4] In order to guard against unauthorised disclosure of the tapes, interviewers and interviewees signed confidentiality agreements forbidding them from disclosing the existence or scope of the project without the permission of Boston College. The agreement also required the use of a coding system to maintain the anonymity of interviewees and provided that only the Burns Librarian and the Director would have access to the key identifying the interviewees.

[5] The PSNI obtained access to the "Boston Tapes" after protracted legal proceedings in the USA.

[6] Part of the audio material includes interviews between the interviewer identifying himself as Anthony McIntyre and "Z". The prosecution case is that Z is the defendant. McIntyre is not a prosecution witness. The prosecution purport to identify Z by way of forensic voice analysis together with corroborating evidence to include the defendant's birth certificate, marriage certificate and decree nisi in relation to that marriage which the prosecution say supports the contention that Z is the person interviewed.

[7] In the course of the interviews Z speaks about his involvement in the Provisional IRA at the time of Jean McConville's murder. He refers to conversations he had with two men he identifies as senior IRA members who were advocating the murder of Jean McConville because she was alleged to be informing on the Provisional IRA to the security forces.

[8] In the course of the interviews Z distances himself from any direct involvement in the murder but says that "the fact is I was on the brigade staff and there is collective responsibility and you can't walk away from that". Later he says in relation to the murder "I said whatever is decided I will back that up". He says that he disagreed with the proposal to bury the deceased and that if he had known she had children he would have said not to do it.

The defence application

[9] The defendant has brought an application to stay the proceedings on a number of grounds. These can be summarised as:

(a) The defendant cannot have a fair trial – nor a fair "finding of facts" if found to be unfit due to his medical condition.

(b) It is oppressive, unfair and unlawful to try the defendant in the circumstances of this case.

[10] I will elaborate on the submissions later in the judgment, but it is necessary to deal at the outset with the defendant's medical condition.

[11] I am obliged to counsel for their able written and oral submissions in this application. Mr Barry MacDonald QC appeared with Mr Dessie Hutton for the defendant. Mr Ciaran Murphy QC appeared with Mr David Russell for the prosecution.

The defendant's medical condition

[12] The court has received a significant volume of written medical evidence and heard oral evidence from three of the medical experts.

[13] The written reports received were as follows.

[14] Reports obtained on the instruction of the defendant:

(a) Reports from Professor H Kennedy, consultant forensic psychiatrist dated 22 November 2016 and 13 November 2017.

(b) Report from Professor David Cotter, consultant neuropsychiatrist dated 22 February 2017.

(c) Report from Professor Declan McLoughlin, consultant in old age psychiatry dated 7 April 2017.

[15] Reports prepared on the instructions of the prosecution:

(a) Reports from Dr Christine Kennedy, consultant forensic psychiatrist dated 3 February 2017 and 29 May 2017.

(b) Reports from Dr James Anderson, consultant old age psychiatrist dated 3 May 2017 and 22 November 2017.

[16] Arising from the medical evidence the defendant asked the prosecution to reconsider the decision to prosecute. Having reviewed the medical evidence it was decided to proceed with the prosecution and the defendant now seeks a stay.

Is the defendant fit to be tried?

[17] It is clear from the medical evidence that the defendant's fitness to be tried is an issue.

[18] The procedure in relation to unfitness to be tried is governed by Article 49 of the Mental Health Order (Northern Ireland) 1986 as amended.

[19] In particular:

> "(4) The question of fitness to be tried shall be determined by the court without a jury.
>
> (4A) The court shall not make a determination under paragraph (4) except on the oral evidence of a medical practitioner appointed for the purposes of Part II by RQIA and on the written or oral evidence of one other medical practitioner."

[20] The onus of establishing unfitness to stand trial is upon the party seeking a determination. In essence there is no dispute between the legal representatives that the defendant is in fact unfit to be tried, but ultimately this is a matter for the court.

[21] The test of unfitness to plead has been established as long as ago as the case of Pritchard [1836] 7 C and P 303. The direction given by Alderson B to the jury in the Pritchard case was later said to have become "firmly embodied in our law" (Podola [1960] 1 QB 325 at page 353) by Parker CJ. Alderson B said in Pritchard:

> "There are three points to be enquired into; first whether the prisoner is mute of malice or not; secondly whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings in the trial so as to make a proper defence – to know that he may challenge (any jurors to whom he may object – and to comprehend the details of the evidence, …. If you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and to be able to properly make his defence to the charge; you have find that he is not of sane mind. It is not enough that he may have

> a general capacity for communicating on ordinary matters."

[22] The criteria for determining unfitness set out in Pritchard have been reiterated in modern form by the Court of Appeal in the case of M [2003] EWCA Crim 3452.

[23] The test of unfitness to plead is whether the accused is capable of understanding the proceedings so that he can:

(a) Put forward his defence.

(b) Exercise his right to challenge any juror to whom he has cause to object.

(c) Follow and understand the details of the evidence as it is given.

(d) Give proper instructions to his legal representatives and give evidence himself if he so desires. This includes consideration of not only whether an accused can give evidence but whether he can be cross-examined.

[24] In applying these principles essentially the court has to determine whether the accused lacks fitness to participate in a trial process.

[25] In applying the Pritchard criteria the court should not do so in an abstract fashion but must undertake an assessment of the accused's capabilities in the context of the particular proceedings.

[26] I turn now to the medical evidence before the court.

[27] Mr Bell was born on 16 December 1936 and is therefore approaching his 82nd birthday. In his report of 22 November 2016 Professor Kennedy notes that from 25 June 2008 onwards the defendant was at risk of multi-infarct dementia caused by small thrombotic emboli forming in the atria of his heart and travelling to his brain. He noted that this was protected against to some extent by anti-coagulation. He also notes that his vascular dementia may also be caused by other forms of vascular disease including his high blood pressure, high cholesterol and low thyroid hormone. Having examined the defendant and reviewed his extensive medical notes and records it was Professor Kennedy's opinion that the defendant meets the diagnostic criteria for vascular dementia (ICD 10 F01.1 and F01.8) with other symptoms, predominantly depressive (F01.3). He also said that he could not rule out a mixed type with features also of Alzheimer's disease. I heard oral evidence from Professor Kennedy in the course of the stay application.

[28] It was his opinion that:

> "Mr Bell is suffering from a dementing illness because of which he lacks the mental capacity to retain and retrieve short term and longer term memories. Mr Bell's abilities to understand the train of reasoning when putting the defence, giving proper instructions to his legal representatives or following evidence at trial is all severely impaired. Even with assistance, Mr Bell's memory impairments would render him incapable in relation to these matters."

[29] He goes on to say that:

> "In my opinion further progression is inevitable."

[30] Dr Christine Kennedy who is a consultant forensic psychiatrist based at Shannon Clinic, Knockbracken Health Care Park, Saintfield Road, Belfast agrees that the defendant was suffering from dementia but was unclear as to the underlying sub-type of dementia and indicates that she "would defer to a specialist old age psychiatrist in establishing the precise diagnosis/sub-type of any dementia syndrome". With the consent of the defendant and his solicitor she made arrangements about a treatment plan for the defendant in this jurisdiction.

[31] In any event she agreed with Professor Kennedy that the defendant was not fit for trial. She gave oral evidence before me on 17 May 2018 confirming this opinion. She is an approved medical practitioner for the purposes of Part II of the Order by RQIA.

[32] Professor David Cotter, consultant neuropsychiatrist agrees that the defendant suffers from dementia. He refers to a CT brain scan performed on 30 January 2015 which he says is significant in reporting "cortical low density changes consistent with mild chronic small vessel ischaemia".

[33] His opinion is that these subtle changes in the brain are supportive of the on-going presence of organic brain changes. His opinion was that "a multi-infarct picture is the most likely". He goes on to say that it is fair to conclude that whilst Mr Bell's history is indicative of elevated risk for multi-infarct dementia, the likelihood that Alzheimer's disease is also contributing to his presentation is at least 50% based on the literature. His conclusion was that the defendant was unable to (1) retain and (2) weigh evidence sufficiently to instruct his legal representatives and challenge jurors and therefore is unfit to plead.

[34] Professor Declan McLoughlin who is a consultant in old age psychiatry opined in April 2017 that the defendant had a dementia, that the most likely cause was cerebrovascular disease as evidenced by vascular pathology on scans and the prominent history of extensive cardiovascular disease, that the process will continue and is irreversible, and that the defendant was unfit to stand trial.

[35] Dr Anderson, who is also a consultant in old age psychiatry, reported on 3 May 2017 and was of the view that the defendant's cerebrovascular disease was more likely than not the cause of his cognitive impairments and that the clinical evidence met the diagnostic criteria for probable dementia and that he was unfit for trial.

[36] Dr Anderson also gave evidence before me. He too is a medical practitioner appointed for the purposes of Part II of the Order by RQIA.

[37] In light of the medical evidence I have no doubt that the defendant is unfit to be tried. He cannot give proper instructions to his legal representatives and he is unable to follow the purported evidence because of his medical condition. I am satisfied that he cannot effectively participate in the trial process.

[38] Recognising that this finding was inevitable the prosecution made it clear in the course of submissions in relation to the application to stay the proceedings that it intended to proceed with a trial "on the facts" pursuant to Article 49A of the Mental Health (Northern Ireland) Order 1986.

[39] The application for the stay must therefore be considered in that context.

Consideration of the stay application

[40] The consideration of the application to stay the proceedings must be considered in the context of the defendant's medical condition and I will return to this in the course of the ruling.

[41] The principles in relation to stays in trials generally are well settled.

[42] 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.

[43] 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 R v Derby Crown Court Ex parte Brooks [1984] 80 Cr App R 164 Sir Roger Ormrod 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 Humphrys [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'."

[44] 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.

[45] The courts in this jurisdiction have repeatedly endorsed the view that the imposition of a stay is an exceptional course – see DPP's Application [1989] NI 106; R v P [2010] NICA 44 and R v McNally and McManus [2009] NICA 3.

[46] These authorities related to criminal trials and the well-established principles contained therein. This case has to be considered in the context of a trial or hearing under Article 49A. The effect of the finding that the defendant is unfit to be tried is that the criminal trial has ended. What has to be decided now is whether the defendant did the act charged against him as the offence.

The nature of an Article 49A hearing

[47] The key authority on the nature of a hearing as to whether a defendant who has been found unfit to plead did the criminal act charged is the House of Lords decision in R v Antoine [2001] 1 AC 340.

[48] In that case the issue was whether an accused person charged with murder is entitled to rely on the defence of diminished responsibility under section 2 of the Homicide Act 1957 when he has been found by a jury to be unfit to plead by reason of mental disability and a jury proceeds under the equivalent provisions of our Mental Health Order to determine whether he did the act charged against him as the offence.

[49] In the judgment of the court Lord Hutton upheld the decision of the Court of Appeal to the effect that no such defence was available.

[50] The fundamental basis for the decision was that the issue of diminished responsibility only arises in circumstances where a defendant would be liable to be convicted of murder. At page 366 paragraph (h) Lord Hutton said:

> "The provisions of section 2 only apply where 'but for this section (a person) would be liable ... to be

> convicted of murder'. Section 4A(2) of the 1964 Act provides that where it is determined by the jury that the accused is under a disability 'the trial shall not proceed or further proceed' but a jury shall determine whether they are satisfied that the accused did the act charged against him as the offence. Therefore, once it has been determined by the jury that the accused is under a disability the trial terminates and the accused is no longer liable within the procedure laid down by section 4A to be convicted of murder so that the defence under section 2 does not arise. It is also clear that if a jury determines under section 4(2) that the accused did the act charged against him as the offence, that finding is not a conviction."

[51] The House of Lords went on to consider the wider question as to when a jury has to determine whether an accused did the act or made the omission charged against him as the offence, must it be satisfied of more than the actus reus of the offence? Must the jury be satisfied of mens rea?

[52] The court analysed the statutory provisions in relation to hearings as to whether a defendant did the act with which he was charged and answered the wider question in the negative subject to the rights of defence counsel to raise the defence of mistake, accident, self-defence or involuntariness in certain circumstances.

[53] However, an important passage which was relied on by Mr McDonald in the judgment of Lord Hutton is to be found at page 375 paragraph (h) where he says:

> "The purpose of section 4A , in my opinion, is to strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite *mens rea*. The need to protect the public is particularly important when the act done has been one which caused death or physical injury to another person and there is a risk that the defendant may carry out a similar act in the future. I consider that the section strikes this balance by distinguishing between a person who has not carried out the *actus reus* of the crime charged against him and a person who has carried out an act (or made an omission) which would constitute a crime if done (or made) with the requisite *mens rea*."

[54] In the context of the basic purpose behind a hearing to determine whether the defendant did the act Lord Hutton referred to the Court of Appeal judgment in the Antoine case where Lord Bingham said that:

> "The whole purpose of sections 4 and 4A is to protect a person who is unfit to stand trial against the return of a verdict of guilty. The procedure under section 4A(2) for determining whether the defendant did the act or made the omission charged against him as the offence is to protect the defendant against the making of an order under section 5(2) of the 1964 Act in circumstances where he is not shown to have done the act charged against him."

[55] Thus Antoine makes it clear that once a person has been found unfit to be tried the criminal trial comes to an end and the hearing to determine whether or not the defendant committed the act charged does not result in a criminal conviction.

[56] The approach a court should adopt to an application for a stay of such a hearing was subsequently considered by the Court of Appeal in England and Wales in conjoined appeals of R v M; R v Kerr and R v H [2002] 1 WLR 824. These cases were decided after Antoine and the Court of Appeal was fully sighted of Lord Hutton's judgment and that of Lord Bingham in the Court of Appeal.

[57] The facts giving rise to the appeals are succinctly set out in the headnote as follows:

> "In separate cases the three defendants, M, K and H, were charged with various offences of indecent assault and in K's case also of rape. Each defendant was found by a jury, pursuant to the procedure under section 4 of the Criminal Procedure (Insanity) Act 1964, to be unfit to plead. In each case it was contended that to proceed under section 4A of the 1964 Act to determine whether the defendant did the acts charged would be an abuse of process and infringe his right to a fair trial under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Since the defendant, being under a mental disability, would be unable to follow the proceedings or give instructions. …
>
> In the case of K, a consultant psychiatrist, whose alleged victims had been his own patients, the judge concluded that the public interest in investigating such serious allegations against a member of the

> medical profession outweighed the defendant's private interest. A different jury then found that K had done the act constituting one of the indecent assaults charged against him, but were unable to agree a verdict on the other counts, and he was discharged absolutely. He applied for leave to appeal against the findings. In the case of H, who was 13, at the time of the alleged indecent assaults against a girl under 16, the judge ruled that a section 4A hearing did not involve a consideration of criminal charges, so there had been no breach of article 6. A second jury then found that he had done the acts forming the basis of the allegations and he was discharged absolutely. …"

[58] I do not propose to refer to the facts of M which turned on whether or not a ruling to stay the proceedings was an interlocutory matter.

[59] The issues before the court related to whether the procedure for a hearing on the facts was compatible with article 6 of the ECHR and the scope and exercise of the relevant judicial discretion. Rose LJ handed down the judgment of the court and he records the submissions made by the parties before the trial judges. Many of those submissions resonate with the submissions made before me on behalf of the parties in this application.

[60] On the issues to be determined, echoing Antoine, the court concluded that the finding of a jury that an accused person has committed the act lacks a finding as to intent. It cannot therefore be a finding of guilt of the offence. The court further analysed the options for orders to be made pursuant to a finding that an accused did commit the act and concluded that although they might result in a loss of liberty by reason of an order being made for his admission to hospital they did not result in the imposition of any penalty (my underlining). Such proceedings would either result in his acquittal or in the event of a finding that he did the act charged would not result in any conviction or punishment. Therefore, the proceedings did not fall under the protection conferred by article 6 of the Convention. This is the logical outcome of the decision in Antoine.

[61] The court went on to consider whether, if it was wrong on this point, the proceedings under the relevant provisions complied with the requirements of Article 6. The court went on to conclude that it did. At page 841 paragraph 34 of the judgment Rose LJ said:

> "The object of the Criminal Procedure (Insanity Unfitness to Plead) Act 1991, which introduced the present procedures in relation to the trial of those unfit to plead and amended 1964 Act into the form set

> out in paragraph [9] above, was to protect accused persons under a disability. … Sections 4 and 4A, in our view, constitute a fair procedure, providing an opportunity for investigation of the facts on behalf of a disabled person so far as is possible. In our judgment it fairly balances the public interest both in ascertaining whether acts have been committed and in identifying and treating, or otherwise dealing with, persons who have committed the acts, and the interests of those persons. If article 6 applies, it has not been infringed in any of the cases before us."

[62] The court then went on to consider the scope and exercise of the court's discretion to stay such proceedings.

[63] At page 841 paragraph [35] Rose LJ says:

> "As to the refusal of Hooper J and Judge Adams to order a stay, the court has, of course an inherent power to suppress abuses of process and a right in its discretion to decline to hear proceedings on the ground that they were oppressive (see R v Telford Justices, ex p Badhan [1991] 2 QB 78, and Connelly v Director of Public Prosecutions [1964] AC 1254 and R v Humphrys [1977] AC 1) at least insofar as the power is not plainly contrary to the intention of parliament."

[64] The judgment then goes on to consider when an application to stay for abuse can be made and points out that such application can be made before a determination of the question of disability. The court agreed that there was no reason in principle why an application that the proceedings against the defendant should never have been entertained by the court should not be made at any stage.

[65] On the specific exercise of the discretion Rose LJ said at page 842 paragraph [37]:

> "However, the defendant's disability, or matters related to it, cannot in our judgment, in themselves found a successful abuse application. This would avoid the whole point of sections 4 and 4A, as both Judge Adams in H and Rougier J in M pointed out. (See also per Lord Bingham of Cornhill CJ in R v Antoine [2001] 1 AC 340, 351). An abuse application, whenever made, must be founded on matters independent of the defendant's disability, such as

> oppressive behaviour of the Crown or agencies of the State, or circumstances or conduct which would deprive the defendant of a fair trial, e.g. destruction of vital records during a long period of delay or an earlier assurance that he would not be prosecuted.
>
> [38] Accordingly, Dr Kerr's personal circumstances and conditions, the likelihood of an absolute discharge, and the lack of risk to the pubic are, in our view, irrelevant to the question of stay for abuse. Nor, in our judgment, is it appropriate, in relation to sections 4 and 4A procedure, to conduct a balancing exercise as Hooper J did, taking account of the public interest in having serious allegations against medical practitioners investigated and hearing the complainant's allegations investigated in the public forum. All these factors are, no doubt, matters for the Crown Prosecution Service to consider when deciding whether to prosecute in the first place, or to pursue a prosecution, once started. The public interest in having serious allegations investigated is a factor behind the general principle of the power to order a stay should be exercised sparingly, even when there are proper, i.e. non-disability grounds. For the reasons which we have given, even had Hooper J approached the matter as, in our judgment, he should, the outcome of Dr Kerr's case could not have been different, for there was no ground on which a stay could properly have been ordered." (My underlining)

[66] Mr McDonald relies heavily on the "purpose" of section 4A as described by Lord Hutton in Antoine as a ground to support a stay in this case. His judgment has been routinely referred to in reported cases which deal with section 4A hearings, including the cases of M, Kerr and H, to which I have referred.

[67] Based on the medical evidence in this case I consider that it is inevitable that if the jury finds the defendant did commit the act with which he is charged the imposition of an absolute discharge would be the outcome. His medical condition will not improve. There is nothing in the evidence to suggest that he constitutes a risk to the public and none of the other orders available to the court on such a finding would be appropriate. Thus, no issue of protecting the public arises.

[68] In these circumstances Mr McDonald argues that it would be wrong for the court to take into account matters outwith the purpose of the procedure as described by Lord Hutton.

[69] However, it seems to me that Lord Hutton's comments should be seen in the context of the question the court was determining, namely whether or not the proceedings were criminal and whether the defendant's state of mind at the time of the alleged commission of the offence was relevant. The effect of the decision was that the court's enquiry in a section 4A hearing is to focus upon the defendant's actions as opposed to his state of mind. Article 49A of the Order in this jurisdiction provides that when it is determined by a court that the accused is unfit to be tried:

> "(2) The trial shall not proceed or further proceed but it shall be determined by a jury –
>
> …
>
> (b) On such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this article to put the case for the defence,
>
> whether it is satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, they did the act or made the omission charged against him as the offence."

Thus, the statutory process clearly envisages that there shall be a determination as to whether or not an accused has done the act. That is part of the purpose of the procedure. It is also important that a potential consequence of such a fact-finding exercise is the acquittal of the accused person. Such a finding is final and cannot be appealed.

[70] If the sole purpose of the legislation was protection of the public then it is difficult to see why Parliament would have provided for the granting of an absolute discharge in cases where there was a finding that the defendant had done the act. The very fact that it has been included as a disposal is relevant, as Parliament clearly envisaged cases, which might proceed as a trial of the facts where the circumstances were such that orders for treatment might not be made.

[71] Tellingly I have not been referred to any authority where the court has ordered a stay of section 4A proceedings on the basis that continuation would be outwith the purpose referred to in Lord Hutton's judgment.

[72] In this regard Mr MacDonald referred me to the authority of Crown Prosecution Service v P [2007] EWHC 946 (Admin).

[73] In that case P had been diagnosed as having Attention Deficit Hyperactivity Disorder at the age of seven and had been assessed as requiring special educational needs. In 2004 he appeared before the Crown Court. That court considered a number of psychological and psychiatric reports on the basis of which the prosecution accepted that P was unfit to plead. The proceedings were then stayed. A year later P appeared before the Youth Court and entered denials to criminal charges involving an assault and a motor vehicle. In so doing, he implicitly accepted that he was fit to plead. Subsequently an application was made to have the proceedings stayed as an abuse of process. It was contended that P did not have a sufficient level of maturity or intellectual capacity to understand and to participate effectively in the proceedings. All parties agreed that P did not have the capacity to participate effectively in a criminal trial. The District Judge stayed the proceedings as an abuse of process on the basis that he was satisfied by the medical evidence provided on a balance of probabilities that P would not be able to participate effectively to the extent required to afford him a fair trial. The Crown Prosecution Service appealed the judge's ruling by way of case stated.

[74] For the purposes of this application the important findings of the Divisional Court were that if the court decided that it should call a halt to the criminal trial on the ground that the child cannot take an effective part in proceedings it should then consider whether to switch to a consideration of whether the child has done the acts alleged. It is clear that the fact that a child cannot take an effective part in the fact-finding process does not infringe his article 6 rights. That process is part of the protective jurisdiction contemplated by the Mental Health Act 1983 and the child's article 6 rights are not even engaged. The decision as to whether or not to switch to the fact-finding is one for the discretion of the court.

[75] In P the Divisional Court held that the District Judge ought not to have stayed the proceedings at the outset as this did not allow for consideration of the alternative of allowing the trial to proceed whilst keeping the defendant's situation under constant review. The court determined that if the court proceeds with fact-finding only, the fact that the defendant does not or cannot take part in the proceedings does not render them unfair or in any way improper; the defendant's article 6 rights are not engaged by that process. Although this constituted an error in law the court held that it would not be appropriate to remit the matter to the Youth Court because of the period that had passed since the relevant events had occurred. The court was also influenced by the fact that care proceedings had been commenced in respect of P.

[76] Mr MacDonald relied on the comments of Lady Justice Smith in paragraph [56] of her judgment to the effect:

> "I consider that proceedings should be stayed as an abuse of process before fact-finding only if no useful purpose at all could be served by finding the facts."

[77] Mr MacDonald says that this is consistent with the theme of Lord Hutton's judgment in Antoine focusing on the importance of the protection of the public and the defendant's interests. He argues that in the circumstances of this case no useful purpose can be served by finding the facts.

[78] I consider that the law was accurately set out in the Court of Appeal judgment in R v M, Kerr and H. As the court said, the likelihood of an absolute discharge and the lack of risk to the public, are irrelevant to the question of a stay for abuse. The public interest in having serious allegations investigated is a factor behind the general principle that the power to order a stay should be exercised sparingly even where there are proper i.e. non-disability related grounds. Standing back, weight must be given to that public interest and this is so whether or not other public interests, such as protecting the public, will be served by the proceedings. It cannot be argued in my view that the continuation of these proceedings serves no useful purpose at all.

Fairness of the proceedings

[79] The defendant argues that the proceedings cannot be "fair" given:

(i) The pronounced passage of time.

(ii) The police delays in investigating the alleged offences.

(iii) The fact that Z, who is alleged to be the defendant, is the only "witness" against the defendant. He is a witness the defendant cannot cross-examine. He cannot give reliable instructions about witness Z or call evidence to counteract what Z has said.

(iv) The defendant cannot rely at trial on any fulsome reply to these allegations that he would otherwise have made in his PACE interview given the inappropriate way in which the interview was conducted by the PSNI.

[80] In relation to the passage of time and delays in investigating the alleged offences I consider that these are matters that can be properly drawn to the attention of the jury at any hearing and they can be fully apprised of any prejudice that arises as a result of these factors. In my view these factors would be insufficient to justify a stay.

[81] I do not consider that it is correct to categorise Z as a "witness" against the defendant. The prosecution case is that Z is the defendant and as such his evidence is sought to be admitted as admissions by him of his involvement in the offence. Since the prosecution purport to identify Z as the defendant by way of expert evidence the defendant will have every facility to challenge such evidence by way of

expert evidence on his own behalf and by way of legal submissions in relation to any weaknesses in reliability of the purported identification.

[82] In relation to the PACE issue the defendant further submits that the PSNI's handling of the Boston materials at interview was in breach of the limited purposes for which the PSNI received the recordings. This is described as a prosecutorial misstep which has serious prejudicial consequences for the defendant which makes the prosecution itself or any hearing which may result unfair.

[83] Mr Bell was arrested on a charge of IRA membership.

[84] It appears that the ILOR request to the judicial authorities of the United States indicated that the investigation for which the materials were sought related to 17 named suspects which were considered in relation to the investigation of offences of murder, conspiracy to murder, incitement to murder, aggravated burglary, false imprisonment, kidnapping and causing grievous bodily harm with intent to cause grievous bodily harm.

[85] The ILOR specifically asked for audio recordings, written documents and computer records which relate to the interviews of any member of the IRA, the Provisional IRA or Cumann Na mBann who discussed the abductions or death of Jean McConville.

[86] The relevant materials were provided with a "caveat" in the following terms:

> "(1) The United States requires the United Kingdom not to use or disclose any information in these materials for any purpose other than the proceedings stated in the request by the United Kingdom and the United States that was the basis of the subpoenas.
>
> (2) The information is not to be used for any other purposes even if the contents of these materials are disclosed in a public, judicial or administrative hearing related to the United Kingdom's request ….."

[87] The language used in this caveat mirrors the restrictions upon use of transmitted materials that operate under the UK-US Mutual Legal Assistance Treaty which in effect require the requesting party not to use or disclose any information or evidence obtained under the Treaty for any purposes other than for the proceedings stated in the request without the prior consent of the requesting authority.

[88] The defendant argues that the use of these materials in this investigation in order to justify his arrest and interview in respect of IRA membership and to

conduct the wide-ranging inquiry into that alleged offence was done in breach of the caveat and the treaty.

[89] The defendant argues, that as a result, he was inhibited in addressing what should have been the principal and only basis for any arrest namely charges relating to the McConville murder.

[90] I am not persuaded that this is a ground for a stay of these proceedings. I consider that these are classically matters that could be dealt with in the course of any hearing. In any event I note that when the defendant was interviewed after his arrest he expressly states that he had no part in the abduction or the murder or the hiding of Jean McConville. He makes the case that he was not in Belfast in December 1972 and that he was at a caravan site in Clogherhead outside Drogheda. He referred to the fact that he had a broken wrist which he had got a friend to strap. He is asked about membership of the IRA at the time of Jean McConville's abduction in 1972. It is put to him that as a result of that membership he was involved in the decision-making which led to the murder of Jean McConville.

[91] In general terms he does not answer most questions.

[92] The contents of the tapes upon which the prosecution rely in this case are specifically put to the defendant in the course of the interview.

[93] In the course of one of the interviews the defendant is recorded as saying:

> "I was at, brought here because of ahh, Jean McConville, and I want to state that I had no part in the abduction, murder or anything else of Jean McConville, right and that is all I have got to say."

[94] On a number of other occasions he specifically said that he had no involvement or part in the abduction or the murder of Jean McConville. Again in the course of being questioned about the murder he says:

> "That it is to say, I don't believe I was in Belfast during the whole period, cause I believe I was in the south, and I repeat I had nothing to do with the murder of Jean McConville or her disappearance or anything else."

[95] It is clear that the defendant was given ample opportunity to deal with the question of the murder of Jean McConville and in fact made the case that he was not in the jurisdiction at the relevant time.

[96] Matters such as prejudice arising from delay, the inability to corroborate a purported alibi, the lack of any evidence arising from any police investigation at the

time are all matters that can be dealt with in the course of the hearing. Indeed if the court comes to the view that the defendant suffers incurable prejudice as a result of such issues that cannot be dealt with by appropriate warnings to the jury then the question of a stay can be revisited.

[97] Whilst an application for a stay can be made at any time as was said in the context of a criminal trial by the court in the case of R v F [2011] EWCA Crim 726:

> "It is now recognised that usually the proper time for the defence to make such an application and for the judge to rule upon it is at trial, after all the evidence has been called."

[98] In order for the prosecution to prove that the defendant committed the acts in respect of which he is charged it will be necessary firstly to establish that Z is the defendant, secondly, that what Z said was true and thirdly that what Z said supports the facts of the alleged offence charged against the defendant.

[99] In relation to the first issue, as I have already pointed out, this evidence can be tested in the trial context. As to the second issue the defendant has raised important issues about the circumstances in which these interviews took place. Essentially it is suggested that there is ample evidence to support the contention that the interviewer of Z was not an appropriate person to carry out such a project, was someone with a particular bias and agenda namely to point the finger towards other persons as being involved in the murder of Jean McConville. I consider that it is possible for the defendant to explore any potential weaknesses in the prosecution case on this issue. The onus will remain on the prosecution to prove this case beyond reasonable doubt and the matters raised in the submissions on this issue can be drawn to the attention of the jury which can be directed appropriately. As is always the case the court retains the option of bringing the proceedings to an end if it comes to the conclusion having heard the evidence that it would be unfair to proceed. The third issue is a matter which can be dealt with in the trial context with appropriate directions to the jury.

Article 3

[100] I return now to the medical evidence with a particular focus on the argument that these proceedings should be stayed on the grounds of the defendant's rights under article 3 of the ECHR.

[101] Apart from the written medical reports to which I have referred I heard oral evidence on this specific issue. The key witnesses were Dr James Anderson and Professor Harry Kennedy, both of whom were eminently qualified. Dr Anderson is a consultant old age psychiatrist who is duly accredited for adult and old age psychiatry on the GMC's Special Register. He has worked as a consultant old age psychiatrist with the NHS since 1998, holding his current position at the Ulster

Hospital in the South Eastern HSC Trust since 1999. He held the positon of Clinical Director for Mental Health and also Community Hospital HSC Trust 2004-2008 and Associate Clinical Director for Mental Health for Older People in the larger South Eastern HSC Trust 2008-2013. He is clinical lecturer at Queen's University in Medical Ethics and Law.

[102] Professor Kennedy is the Executive Clinical Director, consultant forensic psychiatrist, National Forensic Mental Service of the Central Mental Health Hospital and is a clinical professor of Forensic Psychiatry, University of Dublin, Trinity College.

[103] I have already referred to their written reports. Dr Anderson accepts that Mr Bell has developed cognitive impairments sufficient to cause deterioration of his intellectual function and change in his personality and social function with the advent of apathy and dyspraxia, such that he is unable to carry out many of the activities of daily living. His opinion is supported by a series of Addenbrooke's cognitive examinations which have taken place over the years and which are set out in a table in his report of 3 May 2017. The examinations were spread over a period between February 2015 to May 2017. He regards it as significant that the scores were initially better, deteriorated throughout 2015/2016 and improved again. He attributes the improvement to the treatment which Mr Bell is now receiving for depression under Dr Nicks, pursuant to the treatment plan suggested by Dr Christine Kennedy.

[104] He is quite satisfied that the dementia is of vascular aetiology as opposed to Alzheimer or any other frontal temporal dementia. He is also happy that the sub-type is more likely to be the subcortical ischemic vascular type as opposed to the multi-infarct or stroke dementia. This is based on the pattern on the various scans conducted on Mr Bell which do not have a "step-wise pattern". Based on his consultation with Mrs Bell he concluded that it was clear that his initial symptoms had developed as far back as ten years prior to his assessment.

[105] Dr Anderson was engaged by the prosecution to comment on the initial written report of Professor Cotter to the effect that "the literature supports the view that dementia is likely to be affected by stress (if stress can lead to dementia it is also likely to make it worse) and that could/might lead to deterioration in his (Bell's) dementia (stress is clearly associated with the deterioration and the risk factors associated with dementia)".

[106] In addition he was asked to comment on the views of Professor Kennedy expressed in his report of 30 November 2017 and elaborated upon in oral evidence before the court, to the effect that referring to Mr Bell "the unique stress of delay due to court proceedings is exacerbated by his impaired ability to cope in the normal way by cognitively processing (understanding and reasoning about his situation)". In particular Professor Kennedy's opinion was that:

> "Under these circumstances, continued delay and uncertainty is likely to be harmful to Mr Bell's physical and mental health. The likelihood is greater than the balance of probability. It would best be described in my opinion as on the preponderance of probabilities. Given his age and infirmity, in my opinion this would have serious effects on his health, his prognosis and his life expectancy."

[107] In his evidence before the court Dr Anderson accepted that the basic premise was sound i.e. that continuing stress could or might lead to deterioration of Mr Bell's dementia. As to the impact of stress Dr Anderson said as follows:

> "Stress, as it affects us to our middle years, into our older life, changes the way our bodies are, with a deposition of atheroma in our arteries of our hearts and of our brains, and stress increases blood pressure if you are prone to it and can affect you cortisol activation adrenalin that you would know about, that can affect your control, blood pressure, all of these things. One of the central tenets of treatment, as an old age psychiatrist of 20 years standing, we try to promote the management and risk factors from the earliest point, that means exercise, dietary restraint, avoiding excess alcohol, and avoiding head injury, managing blood pressure, cholesterol, sugar, all of these things, and I reviewed Mr Bell's medical history, and for 13 years all of his parameters had been in the normal range, indeed many of them better than my own. So from the point of view of him taking care of himself, those risk factors are as good as they can be for him, and that was right through to the most recent notes of January 2017, with the blood pressure of 130 over 70, a cholesterol of 1.8. <u>So whilst the stress is there there is no physical evidence that is affecting those risk factors directly."</u> (My underlining)

[108] Thus it is his view that the impact of any stress arising from the continuation and delay of these proceedings will not significantly increase the impact of the vascular risk factors evident being smoking, hypertension, hypercholesterolemia and cerebral micro-embolism. He points out that the CT scans suggested the progression of the dementia in Mr Bell's case is slow.

[109] It was his view that the risk factors in this case were being properly managed with medical intervention. The risk factors are being managed optimally and have been so over the last 13 years. The more recent engagement with his NHS consultant

and community mental health team is, in his opinion, more likely than not to ensure optimal management of his depression and anxiety symptoms during any period of continuing stress.

[110] He did not agree with Professor Kennedy that the effects on Mr Bell would be serious, significantly affect his prognosis or shorten his life expectancy. He does accept that delay in these proceedings could be detrimental to Mr Bell, but he does not regard the risks as significant.

[111] He also took the view that, in addition to the medical assistance he currently receives, the management of the proceedings could further reduce any risk. His view was that a trial on the facts, with no punishment and no requirement for Mr Bell to attend, means the proceedings are much less likely to cause significant change for him, especially if he is kept abreast of developments in an appropriate and regular way. He thought that this could be achieved both through his legal representatives and those responsible for his medical care. He also agreed the restrictions on reporting would be of assistance in reducing the risk of stress contributing adversely to his condition. This relates specifically to his mood.

[112] His view was that the efforts to optimise risk factors had been quite effective to this point. Whilst he accepted that one cannot predict the future all he could say was "I think it is less likely, not more" that he would succumb to any life threatening catastrophic incident in the short term. Essentially, it was Dr Anderson's opinion that any depressive or anxiety symptoms would resolve after the stress of the proceedings is removed.

[113] He pointed out that when he assessed him in May 2016 the applicant knew he was facing proceedings and that they were significant.

[114] In cross-examination Dr Anderson accepted that Dr Cotter in his report had set out the various risk factors namely, stress induced increased neuro-inflammation, increased cardio-vascular disease and hypertension. He accepted that stress can impact on the risk factors and that the risk factors then can impact upon the development of the condition. He accepted that one could not eradicate the risk factors but one could go a long way towards mitigating or modifying them. He accepted that exacerbation of vascular dementia is a significant matter. He did not consider that any exacerbation on dementia in Mr Bell's case would shorten his life expectancy.

[115] Professor Kennedy took the view that the difference between him and Dr Anderson was essentially one of degree. He points out that Dr Anderson accepts that the on-going stress is likely to contribute to a decline in his overall condition. The experts part company when Dr Anderson asserts that it is not likely on the balance of probabilities to cause serious adverse effects on either his physical or mental health or significantly impact on his prognosis or reduce his life expectancy. He considers that he, that is Dr Anderson, considers that the risk is much less

significant than stated by Professor Kennedy particularly since all the risk factors in question are being addressed optimally.

[116] Professor Kennedy differed from Dr Anderson in that he felt the CT PET scans did show some symmetry which can be difficult to detect. He felt that this was significant as Dr Anderson failed to take into account the risk of thrombotic episodes which can be significant in terms of giving rise to small strokes and he felt there was a "step wise progression" demonstrated which might expose the defendant to a sudden catastrophic incident. Professor Kennedy felt it was significant that Mr Bell was aware of the fact that he was losing his facilities and had some insight to his condition which was one of the most distressing aspects of the procedure.

[117] It was clear from cross-examination of Professor Kennedy that he had not been specifically asked to address the difference between a criminal trial and a trial on the facts although he was familiar with the procedure. He accepted that absence from the proceedings and proper explanations of the proceedings, together with restrictions on publicity could ameliorate some of the stress but may not sufficiently alleviate it. Any beneficial effects would be limited to the extent that the defendant would "understand, reason about it, retain it, reason about it, appreciate the importance of it to himself and indeed believe it, and have all those facilities, those abilities to understand to reason about consequences to appreciate, are impaired because of the nature of the dementia illness". The key point from Professor Kennedy's point of view was that as a clinician, anything that has the potential to shorten life is "serious".

[118] The defendant contends that the continuation of these proceedings in light of the medical evidence would be a breach of his rights under article 3 of the ECHR. He also argues that the medical evidence should be considered in the context of what can be achieved in these proceedings. Even if no breach of article 3 is established it is argued it would be unfair or oppressive to continue these proceedings in that context at common law.

[119] Article 3 provides:

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

[120] It is submitted that the medical evidence established the proposition that continuation of the proceedings is likely to accelerate and exacerbate Mr Bell's condition, including the risk of the reduction of life expectancy in such a way as to constitute "inhuman and degrading treatment" contrary to the article. The prohibition in article 3 is absolute and is not limited by exceptions.

[121] The guidelines given by the European Court in Ireland v UK [1979] 2 EHRR are a useful starting point for the meaning of inhuman or degrading treatment. Ill-treatment must attain a minimum level of severity in order to fall within the scope of

article 3. Inhuman treatment is treatment that causes intense physical and mental suffering and degrading treatment is treatment that arises in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing the victim. It is also important to understand that degrading treatment can be considered as a separate category from inhumane treatment.

[122] These guidelines should not be applied too rigidly and the assessment of what constitutes inhumane and degrading treatment should be interpreted according to currently prevailing norms in democratic societies.

[123] What is involved in this case is the absolute negative obligation on the State not to subject the defendant to inhuman or degrading treatment.

[124] The authorities dealing with the negative obligation on the State primarily relate to cases involving extradition or deportation to third countries where deportees face a "real risk" of torture or other treatment or punishment contrary to article 3.

[125] A review of the extradition/deportation cases such as Paposhvili v Belgium, Application No. 41738/10 and D v United Kingdom, Application No. 30240/96 suggests that the deportation or extradition of a person by a contracting State to another State may give rise to an issue under Article 3 where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment in the receiving country. (My underlining)

[126] It has been held that the suffering which flows from naturally occurring illness may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures for which the state can be held responsible – see Pretty v United Kingdom [2002] ECHR 2346/01.

[127] In D v United Kingdom the ECtHR held that article 3 would be violated if a man was deported to his native St Kitts, having served a sentence for importing drugs. He was in the last stages of Aids, and if deported, would be deprived of vital medical treatment, and exposed to a real risk of dying in destitution under most distressing circumstances. The court held that it would be inhuman for the UK to deport him, even though the conditions he would face in St Kitts did not themselves amount to a breach of article 3 standards on the part of St Kitts' government.

[128] The court is not aware of any case subsequent to D which has resulted in a failure to deport on the grounds of a breach of article 3 due to ill-health. In N v UK [2008] 47 EHRR 39, the Grand Chamber, considering the case in which the applicant's removal was likely to result in an early death preceded by acute suffering, distinguished D on the facts and held that there were no exceptional

circumstances, or compelling humanitarian considerations, which were sufficient to result in a violation of article 3.

[129] Article 3 therefore provides protection only against the most serious ill-treatment. The requirement for "substantial grounds" of a "real risk" reinforces the high threshold required to satisfy the test for such a case.

[130] It is clear from the authorities that the assessment for the court is fact specific, relative and depends on various factors.

[131] The situation of the defendant is not comparable with that of the applicant in **D** - nor does the potential risk to the defendant constitute the "serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" referred to in the Paposhvili decision.

[132] The circumstances of this case differ substantially from extradition/deportation cases in that once deported the domestic court has no continuing role in the matter. Thus in the extradition/deportation cases an element of speculation is required.

[133] In the circumstances of this case it is significant that despite the fact that these proceedings have been on-going for a number of years there is actually no evidence before me that that has had a significant adverse impact on the defendant's health. To the contrary, the evidence suggests that as a result of Dr Kennedy's intervention the defendant is in receipt of appropriate medical intervention in respect of his depressive symptoms which are the most likely to be affected by the stress of the continuation of proceedings.

[134] Professor Kennedy interviewed the defendant on 12 November 2016. In the history of the examination concerning the present case Mr Bell said that "I get depressed from time to time over if it … your age has to do with it too, when you're 80". There is no further comment on any adverse impacts these proceedings have had on the defendant's health.

[135] Dr Christine Kennedy based on her interview of 12 January 2017 focussed on the defendant's fitness to plead. The report records that:

> "When asked about the charges against him, Mr Bell told me that he was charged with the murder of Jean McConville and he thinks with another one. He did not know what the other charge was and was unable to give any further details regarding the background to the charges being brought, the nature of the evidence etc. He said that the offence(s) with which he was charged dated back to the 70s and he believed he had been charged approximately three years ago.

> He was not sure of the reason for the delay in the case coming to court. He understood that involvement in murder was a serious charge and admitted that this was all quite worrying but felt it was not abnormal for court cases to take this length of time. He advised me to ask his wife for more information; she has to help me I'm worried about my memory, I'm walking down the road and not knowing who I am and where I am.
>
> He was able to explain the difference between guilty you done it and not guilty you didn't. He told me his solicitor is Peter Corrigan from KLM (it is in fact KRW Law). He knew the solicitor's job was to defend him and speak for him in court. On enquiry about the role of a judge he said the judge will hear what has been said. On further discussion about the nature of a jury panel and potentially having to challenge a juror if he felt it necessary, Mr Bell advised there would be no jury. He volunteered that he forgets what is said in court, gets lost in any long conversation but his solicitor explains what he can. Mr Bell folded his arms and he became defensive when questioning about his understanding of what was going on in court and stated that he doesn't understand what's going on, no way am I going to remember what is being said ten minutes ago even with input from Peter.
>
> When asked he said that there had been some media attention at the courts, he had been at court a lot but then there was some report and he was excused from it."

[136] When discussing his mental state Mr Bell reported that he "gets down and is depressed a fair bit but he puts this down to the court case". Later he says that "he was aware of a bit of pressure on himself but denied any panic attacks. He reported normal worries about his case". The main complaint related to his memory. It was as a result of this examination that Dr Kennedy, with the consent of the defendant's solicitor, spoke to Mr Bell's general practitioner about appropriate future medical treatment.

[137] When Dr Anderson examined the defendant in May 2017 there was nothing to suggest that the proceedings *per se* were contributing to his illness.

[138] I have not received any reports based on a medical examination of the defendant since May 2017.

[139] There is no sufficient medical evidence to suggest that to date these proceedings have caused anything which would meet the stringent test necessary to engage article 3. I have been asked to find that on the basis of the medical evidence I have heard there are substantial grounds for believing that there is a real risk that the continuation of the proceedings could cause a deterioration in the defendant's medical condition sufficient to engage article 3. It is submitted that I do not have to resolve any dispute between Professor Kennedy and Dr Anderson to make this finding.

[140] Having assessed the medical evidence carefully I am not satisfied that it establishes ill-treatment or degrading treatment which attains the minimum level of severity required to fall within the scope of article 3.

[141] In considering the question of a stay I also take into account that the purpose of these proceedings is not to cause inhumane treatment to the defendant or to humiliate or debase him, recognising that this factor on its own cannot conclusively defeat a finding of a violation of article 3.

[142] I take into account the nature of these proceedings and the mitigating factors available to the defendant supported by the medical evidence in this case.

[143] This is matter which can be kept under constant review by this court.

[144] The most advantageous way to proceed would be to have the trial on the facts dealt with as expeditiously as possible. The focus of the defence application has been on delay rather than the conduct of the proceedings themselves.

[145] Whilst I have considered the points raised on behalf of the defendant individually I also have had regard to them cumulatively in coming to my decision. In particular I have considered all the submissions against the background of the defendant's medical condition.

Legal Aid

[146] The defendant also relies on the contention that there is no provision for legal aid in circumstances where there has been a finding of "unfitness" under the Mental Health (Northern Ireland) Order 1986 for the finding of fact hearing which would follow in which it shall be determined by a jury on such evidence as may be adduced by the prosecution or adduced by a person appointed by the court under the order to put the case for the defence whether it is satisfied that the defendant did the act or made the omission charged against him as the offence.

[147] This rests on a construction of what can be covered by a "Defence Certificate" issued to a defendant in criminal proceedings in Northern Ireland.

[148] A Defence Certificate has been issued in this case under Article 29 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. The defendant argues that such a certificate only provides for payment for the "preparation and conduct of a defendant at trial". The effect of a finding of unfitness under the 1986 Order is that the criminal trial shall not proceed. It is argued therefore that the proposed hearing to determine the facts is outwith the scope of the Defence Certificate which has been issued.

[149] Even if this submission is incorrect the defendant points out that no provision has been made for the "finding of fact" procedure in the Rules which provide for payment i.e. the Legal Aid and Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005.

[150] This lacuna has been recognised by legislators in England and Wales which provides for a special costs regime to provide for payment from central funds the proper fee or costs of a person appointed by the Crown Court under the equivalent of the 1986 Order to put the case for the defence, namely section 19(3)(d) of the Prosecution of Offences Act 1985 and the Costs in Criminal Cases (General) Regulations 1986, as amended by the Costs and Criminal Cases (General) (Amendment) Regulations 1992.

[151] There are no similar legislation or regulations in this jurisdiction.

[152] It is therefore submitted on behalf of the defendant that having been found unfit to be tried he loses the right to publicly funded legal representation in order to defend himself against the accusation that he did the act charged in the offences.

[153] This issue has been the subject matter of collateral correspondence between the defendant and the Legal Services Agency ("LSA").

[154] The court is aware that as a matter of practice lawyers, including two counsel, appointed to represent defendants in unfitness to be tried cases have in fact been paid from legal aid funds under a Criminal Aid Certificate for many years in this jurisdiction. As a result of the correspondence raising this issue, the LSA has written to the defendant's current lawyers who have indicated that in their view those appointed to represent defendants who are subject to findings of unfitness can be accommodated within the Criminal Aid Certificate given the stipulations of Article 29(5) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 which provides for legal aid for "persons who appear or are brought before the Crown Court to be dealt with" .

[155] Notwithstanding the existing practice to date and the open confirmation of this practice in correspondence from the LSA the defendant maintains his position.

[156] Thus we have the somewhat unique situation where the defendant's lawyers are arguing that there is no provision for payment from the public purse for representing the defendant on appointment by the court in circumstances where the LSA, having consulted with the Department of Justice, confirm that the existing Defence Certificate will provide cover for a fitness to be tried hearing. It is argued that notwithstanding this correspondence any such payment would be ultra vires as a matter of legal construction of the Order and also that there would be no provision for payment in the event of a dispute about the amount paid by the LSA should the matter come before the Taxing Master or Court of Appeal.

[157] Returning to the construction point, as I have set out above, Article 29(5) makes additional provision for legal aid for a specific category of persons "who appear or are brought before the Crown Court to be dealt with". In respect of those persons, who are not addressed by the foregoing provisions of the Article, Article 29(5) makes adapted provision for them akin to that which is provided for those who in fact were "returned for trial for an indictable offence", or in respect of whom a notice of transfer issued or certain other cases involving children.

[158] The defence argue that even if the defendant is someone who is appearing or brought before the Crown Court he is not someone "to be dealt with" under the Order. The court takes the view that "to be dealt with" is sufficiently wide to cover a trial on the facts.

[159] The court does not consider that the fact that a legal team representing a defendant in a "finding of facts" case is "appointed by the court" as opposed to being "assigned" a certificate under the Rules prohibits the interpretation placed on Article 29(5) of the Order by the LSA. The defendant argues that the assignment point is further supported by the fact that under the Criminal Aid Certificate Rules the provision of two counsel is only open to the judge of the Crown Court (before which the accused is to be tried). Because the accused has not in fact being "tried" it is argued that it is not open to the court to grant a certificate for two counsel for the purposes of the proceedings under Article 49A of the 1986 Order. I am satisfied that the certificate for two counsel in this case will cover legal representation for the Article 49A hearing.

[160] In terms of the assessment of fees I see no difficulty with solicitors and counsel being paid in accordance with the appropriate fee for a trial as this will be a contested hearing.

[161] Counsel for the defendant have prepared a very detailed and erudite analysis of the interlinking orders and regulations in relation to payment for legal aid. I agree that it would be preferable if express provision was made for the payment of lawyers appointed under the Mental Health Order for trials involving findings on the facts. However, pending such provision I am satisfied that under Article 29(5) lawyers appointed to represent the defendant in a finding of facts hearing can and

will be remunerated. I accept that the defendant will be provided with adequate public funding for legal representation at the proposed hearing.

[162] I cannot foresee that any court would declare payments in these circumstances to be ultra vires or that an appellate court would refuse to sanction or assess payment of fees. In these circumstances the legislation will undoubtedly be construed purposefully.

[163] Whilst the House of Lords has held that the trial on the facts procedure is not subject to the provisions of article 6 of the Convention, article 5 expressly contemplates special provisions in relation to those of unsound mind in relation to deprivation of liberty. It seems to me therefore that in addition to the purposive interpretation to which I have referred any court dealing with the issue would interpret Article 29(5) of the Legal Aid Order so as to be compatible with the State's obligations under article 5(e) of the Convention which favours the interpretation of the LSA.

Conclusion

[164] The defendant is unfit to be tried in accordance with Article 49(4) of the Mental Health (Northern Ireland) Order 1986.

[165] The criminal trial shall not proceed further but it shall be determined by a jury on such evidence as may be adduced by the prosecution, or adduced by a person appointed by the court under Article 49 to put the case for the defence whether it is satisfied as respects the counts on which the accused was to be tried that he did the act or made the omission charged against him as the offence in accordance with Article 49A of the Order.

[166] The application to stay the proceedings for abuse of process is refused.

[167] In light of the medical evidence which I have heard in this case there shall be no reporting of this decision or the subsequent proceedings, save for the fact that the court has ordered that there be a hearing concerning the counts alleged against the defendant in accordance with Article 49A of the Mental Health (Northern Ireland) Order 1986 to determine whether the defendant did the acts charged against him. This Order shall remain in place until the completion of the proceedings or further order of the court.