England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2009] EWHC 106 (Admin)
Case No: CO/7895/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
27/01/2009

B e f o r e :

LORD JUSTICE TOULSON
and
MR JUSTICE FORBES

Between:

THE QUEEN ON THE APPLICATION OF B — **Claimant**

- and -

DIRECTOR OF PUBLIC PROSECUTIONS — **Defendant**

-and-

EQUALITY AND HUMAN RIGHTS COMMISSION — **Intervener**

Paul Bowen and Alison Macdonald (instructed by Bindmans LLP) for the Claimant
David Perry QC and Clair Dobbin (instructed by the Treasury Solicitor) for the Defendant
Hearing dates: 19-21 November 20008

HTML VERSION OF JUDGMENT

Lord Justice Toulson :

1. The claimant, FB, applies for judicial review of a decision by the Crown Prosecution Service (CPS), for which the defendant is responsible, to discontinue a prosecution brought against the interested party, HR. The accusation against HR was that he bit off part of FB's left ear during an incident on Boxing Day 2005 and threatened reprisals against FB and his family if he went to the police. HR was charged with wounding with intent to cause grievous bodily harm and witness intimidation.

2. FB has a history of mental illness. The prosecution was discontinued on the advice of counsel, AW, who formed the opinion that he could not put FB before the jury as a reliable witness in the light of a medical report by Dr. C, a consultant psychiatrist. The result was that no evidence was offered against HR and he was acquitted on both counts.

3. It is submitted on FB's behalf that the decision to discontinue the prosecution was unlawful on three grounds. First, applying domestic public law principles, the decision was premature and irrational. Secondly, in reaching its decision to offer no evidence the CPS failed to have due regard to the need to promote equality of opportunity between disabled persons and other persons, contrary to its duty under Section 49 A (1) (c) of the Disability Discrimination Act 1995, as amended (the DDA). Thirdly, the decision was in violation of FB's rights under the Human Rights Convention, Article 3 (or, as a fall-back, Articles 8 and/or 14).

4. The Equality and Human Rights Commission was given leave to intervene by way of written submissions.

5. Before turning to the legal issues it is necessary to set out the facts in some detail. Readers who are more interested in a summary of the facts than a detailed account are advised to jump to para 40.

Facts

6. FB was born on 20 November 1983 in Bangladesh. He came to England at the age of 16. There was a history of contact with psychiatric services from 2004. His understanding of English is limited. At the time of the incident giving rise to the prosecution he was living at home with his parents and sister.

7. He set out his version of events in a witness statement made on 4 January 2006 through an interpreter. He said that the incident took place between 8.30 and 9 p.m. at premises at 363 Hornsey Road known as Khan Coffee. He had been there on the previous day for a party to which the HR had invited him. On the day of the incident he was picked up by HR by car. Present at the coffee shop were five other people, whom he named and in some cases described. After he had been there for a short time people started to smoke cannabis and play cards. HR asked him for £10 to buy some food. FB replied that he only had on him £1.20, which his mother had given him for his bus-fare home. At that point he decided to go and stood up to leave. HR asked why he wanted to go when HR had just brought him. FB said that he did not like the cannabis smoking. An argument developed which led to violence. According to FB, when he tried to open the door HR put his arm

round FB's neck from behind and pulled him back. One of the other men, S, brandished a knife. Others tried to pull HR and S away from him. While this was going on he felt HR bite his ear. He could also see from the corner of his eye that HR's head was very close to his left shoulder. FB put his hand to his ear and saw that his hand was full of blood. Two of the others, who had not been involved in the attack on him, took him to hospital. HR also went with them. Before they left he saw HR take from his mouth the piece of FB's ear which had been bitten off but then put it back in his mouth. On the way to hospital HR threatened violence to FB's family and himself if he were to report the matter to the police. The others joined in telling him to keep his mouth shut. At the hospital two police officers were called. FB initially told them untruthfully that he had lost his ear in an incident on Camden High Street, because one of the others was still present with him and he was scared about the threats which had been made. Later the police returned to say that there was no such incident recorded on CCTV. By this time FB was on his own and he then told the police the truth about how the incident happened. He subsequently identified HR as his attacker at an identification parade.

8. HR was arrested and interviewed by the police on 11 January 2006. He agreed that there had been an incident at the premises identified by FB on the evening of Boxing Day. He agreed that there were seven people present and he agreed about the identity of six of them. He said that FB had not been brought there by HR but had come of his own accord. FB had become involved in a fight with two other men (not himself) as a result of a silly quarrel in the course of a card game, and HR had tried to calm things down. However, at that stage FB had gone to the kitchen and returned with a knife. One of the others disarmed him, but FB then jumped on that person's back and grabbed again for the knife. The knife was again removed from him and HR told him to leave. He opened the door and pushed FB out of the property. Two minutes later FB returned to say that somebody had bitten off his ear. Up to that time nobody had realised that he had lost an ear. When asked further questions about this, HR made it clear that he was not suggesting that FB's ear might have been bitten off by a passer by. It must have happened inside the property, but HR had not noticed it and had no idea how it happened. He denied threatening FB.

9. HR was charged and committed for trial at Snaresbrook Crown Court.

10. FB reported to the police that he subsequently received threats from three of HR's associates. This led to separate proceedings being brought against those defendants, who were committed for trial at Wood Green Crown Court. Those defendants and HR were all represented by the same firm of solicitors, but the Wood Green prosecution and the Snaresbrook prosecution were handled by different branches of the CPS.

11. On 14 August 2006 the defending solicitors procured the issue of a witness summons in the Snaresbrook proceedings requiring someone from FB's doctor's surgery to attend and produce all medical records relating to FB. On receipt of the summons the practice disclosed the records to the solicitors without FB's consent.

12. The solicitors also obtained copies of FB's hospital records, although it is not entirely clear how this happened. On 15 February 2007 FB's solicitors, Bindmans LLP ("Bindmans"), issued proceedings for judicial review aimed at obtaining the return of FB's medical records held by the defending solicitors. Leave was given and a consent order was made requiring the defending solicitors to deliver up all copies of FB's medical records to Bindmans. There followed applications in both sets of proceedings by the defending solicitors for disclosure of the documents.

13. On 20 March 2007, at Snaresbrook Crown Court, HHJ Kennedy refused to order disclosure of FB's medical records.

14. On 4 April 2007, at Wood Green Crown Court, HHJ Lyons dealt with a similar application. He indicated that he did not consider that disclosure of the documents was appropriate at that stage, but he suggested that a letter should be written to Dr C listing a series of questions based on "the test adumbrated" in *Toohey v Metropolitan Police Commissioner* [1965] AC 595 and *R v MacKenney* [2003] EWCA Crim 3643. If the parties could not reach agreement on the drafting of the letter, they were to return to court. A note of the hearing prepared by the judge's clerk and distributed to the parties explained the purpose of the letter as follows :

> "Once the letter had been agreed the CPS would seek Dr C's further opinion. Based upon the reply to that letter the CPS would then consider whether or not they would continue with the trial. The issue would be the rationality of the complainer witness."

15. Dr C was named because he had been involved in FB's treatment. He had also written a short letter stating that FB would be distressed by the release of a significant amount of personal information contained in his mental health records and that this was likely to have a harmful effect on his mental health.

16. In *Toohey* the trial judge had refused to allow the defendant to adduce evidence from a doctor that the key prosecution witness was suffering from such a form of mental disease that the doctor would regard his evidence as unreliable. The issue in the case was whether the defendants had assaulted the complainant. Their case was that there had been no such assault and that the complainant's account was "the figment of an hysterical imagination". It was held by the House of Lords that the evidence should have been admitted. Lord Pearce said at 608:

> "Human evidence shares the frailties of those who give it. It is subject to many cross currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross examination and common sense, must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, he must surely be allowable for medical science to reveal this vital hidden fact to them."

17. Lord Pearce went on to observe that if a witness purported to have seen something at a distance of 50 yards it must be permissible for the defence to call a surgeon who shortly afterwards had removed a cataract from which the witness was suffering at the material time and which would have prevented him from seeing what he thought he saw. He continued:

> "So, too, must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise."

18. In *MacKenney* the Court of Appeal admitted evidence from a doctor who stated that the witness suffered from a personality disorder of such a severe nature as to make his evidence "wholly unreliable".

19. A letter of instruction to Dr C was duly drafted by Bindmans and agreed by the other interested parties. By way of summarising the circumstances giving rise to the request, the letter stated that FB had made allegations that on 26 December 2005 HR had bitten off his ear, that in April 2006 HR had sought to intimidate him into withdrawing the charge and that on 19 July 2006 the other defendants had similarly sought to intimidate him. Dr C was not provided with FB's witness statements or any of the other evidence in either the Snaresbrook or the Wood Green proceedings,

nor was he told what matters were and were not in issue. He was told that FB was the chief prosecution witness in both sets of proceedings and that the defence had sought his medical records because they believed that they contained details of his psychiatric condition "which may cast doubt on [FB's] reliability as a prosecution witness". Dr C was then asked to give his opinion on the following questions:

> "Was [FB]:
>
> 1. (a) on 26 December 2005,
>
> (b) in April 2006, or
>
> (c) in 19 July 2006
>
> > suffering from a mental disorder of a *kind and to a degree* which affected, or may have affected, his *perception* and *recollection* of events so as to undermine the reliability of his account of those events at those times.
>
> 2. Is [FB] *now* suffering from a mental disorder of a *kind* and to a *degree* which affects, or may affect his p*erception* and *recollection* of events so as to undermine the reliability of his account of those events now?
>
> 3. If your answer to any of these questions is "Yes", please indicate (with your reasons) the extent to which you consider [FB's] reliability as a witness of the truth is undermined."

20. The letter of instruction went on to say:

> "Please bear in mind that your report will be disclosed to the defendants and you should therefore restrict any confidential information contained in it to the absolute minimum."

21. Although the idea behind the writing of the letter was well intentioned, it was an unusual course and not one which I would recommend should ordinarily be repeated. The orthodox course would have been to deal with the defendant's application for disclosure of FB's medical records on ordinary principles. This would have involved the judge looking, if necessary, at the records and forming his view as to what, if any, disclosure should be ordered. In performing that exercise he would have had the advantage of knowing the state of the evidence and the nature of the issues in the case, and he would have been able to keep the matter under review as the case developed.

22. If the prosecution wished to obtain expert opinion on the mental state of FB, it would have been open to it to do so (subject to any necessary co-operation by FB) and it may be that a resulting report would have been disclosed.

23. In accordance with his instructions Dr C provided a report dated 3 May 2007. It was not a long report but it is necessary to set out a large part of it. It began:

> "This report is prepared for Wood Green Crown Court on the instructions of Bindman and Partners, solicitors acting for [FB], with the agreement of other parties involved in the case. The report will be disclosed only to the Crown Prosecution Service."

24. Under the head "My Instructions" he noted that he had been asked to restrict confidential

information contained in the report to the absolute minimum. He recorded that he had been asked to consider FB's GP records (of which he had had access to a summary) and his hospital records and to answer the questions set out in the letter of instructions.

25. Under the heading "My Investigation of these matters", he stated that he had read records of three interviews which he had had with FB (in September 2004, August 2006 and February 2007), and a summary of his admission to hospital as an inpatient on 17 June to 24 July 2006 (written by a psychiatric senior house officer). He had also spoken to FB's community care co-coordinator.

26. He set out his findings as follows:

> "The medical records suggest that [FB] has experienced episodic or persistent psychotic symptoms since the middle of 2004. When I interviewed [FB] on 24 September 2004 I found evidence of paranoid delusions that have been present for some months. For example, he believed that strangers knew things about him and that at times he believed he was followed by a spirit. He recognised that these beliefs and experiences were abnormal but they appeared real to him. He did not attend follow-up appointments and did not receive treatment. At the time of his admission to the Huntley Centre he is described as experiencing having paranoid ideas about his sister's friends as well as hallucionary voices. He was started on treatment with Olanzapine, an anti psychotic medication, which is used to treat delusions and hallucinations and to prevent relapse. On 27 February 2007 [FB] told me that he hadn't been remembering to take his medication regularly and had been missing most doses. His mood was changeable and he had been experiencing visual hallucinations when watching television. He appeared distractible and there were some problems with concentration. [FB] had subsequently missed several appointments with the Community Mental Health Team (CMHT). He was last seen by [his care coordinator] on 29 March, at which time there was no significant change in his mental state."

27. In answer to the specific questions put to him, he expressed the following opinion:

> "1. [FB] was suffering from a mental disorder of a kind and to a degree which may have affected his perception and recollection of events so as to undermine the reliability of his account of those events on 26 December 2005, in April 20006 and on 19 July 2006. Specifically, his illness caused him to experience delusions (false beliefs that seemed real to him) and hallucinations (unreal experiences that seem real).
>
> ...
>
> 3. [FB] continues now to suffer from a mental disorder of a kind and to a degree which may affect his perception and recollection of events so as to undermine the reliability of his account of those events now.
>
> 4. [FB's] distractibility and impairment of concentration may make it difficult for him to recollect, for example, precise dates and the exact sequence of events. Because of his illness he may experience delusions and hallucinations (beliefs and experiences that are not linked to reality)."

28. On 5 June 2007 Bindmans wrote to the branch prosecutor responsible for the Wood Green prosecution because they understood that the defence had asked for the matter to be listed to find out what view the CPS had reached following Dr C's report, and wondered whether the CPS

intended to disclose the report to Bindmans and to the defence. Dr C's report had in fact been disclosed a few days earlier to the defending solicitors in the Wood Green proceedings, but not to Bindmans nor to the branch prosecutor responsible for the Snaresbrook proceedings. The Wood Green prosecutor replied speedily saying that their view as to the continuation of the Wood Green prosecution had not been changed by Dr C's report and that the report had been sent to the defending solicitors as unused material. He added that it would be unusual for unused material to be sent to the complainant in a criminal matter, but that he could see no objection to Bindmans receiving the report, and a copy was sent to them.

29. The trial of HR in the Snaresbrook Crown Court was due to start on Monday 11 June 2007. At the request of HR's solicitors, the case was listed before HHJ Kennedy on Thursday 7 June 2007 in order to reconsider the position regarding medical evidence. The prosecution were represented by counsel, AW. HR was also represented by counsel. FB was not represented. The judge was presented with a difficult situation. HR's counsel told the judge that his solicitors, in their capacity as solicitors for the defendants in the Wood Green proceedings, had a copy of Dr C's report but had not felt that they could properly disclose it to him. However, he understood that it cast considerable doubt on the reliability of FB. It is clear from the transcript that the Snaresbrook prosecutor and AW at that stage also were in possession of the report. The judge was conscious of the past problems regarding irregular disclosure of medical evidence and the previous judicial review proceedings. He was rightly concerned to avoid any risk of repetition. He was conscious also that it would be wrong, on authority, to direct disclosure of medical reports relating to FB without FB having had the opportunity of making representations to the court. He decided that the case should keep its place in the list on Monday 11 June but that no witnesses should attend on that day. He also made it clear that FB's solicitors were to be put on notice that on the Monday morning the court would be considering further the question of the disclosure of the medical evidence, so that they would have the chance of putting forward any submissions. During the course of that hearing HR's counsel indicated that, subject to seeing Dr C's report , he would want Dr C present in the court to give evidence to the jury.

30. After the hearing there was some telephone discussion between HR's counsel and Mr Bowen, who had been instructed by Bindmans on behalf of FB (and has represented FB in these proceedings), as a result of which the matter was mentioned again to HHJ Kennedy in chambers later on the same day.

1. HR's counsel told the judge that Mr Bowen had received authorisation for Dr C's report to be disclosed to him by the CPS. They had also agreed that if HR wanted to see parts of the medical records themselves, HR's counsel would let Mr Bowen have his written submissions so as to give Mr Bowen the opportunity to prepare submissions in response. The judge indicated that he was happy with that arrangement. HR's counsel also told the judge that Dr C was available to attend court on the following Wednesday, 13 June 2007.

32. The position, therefore, at that stage was that the trial remained in the list for Monday 11 June 2007, but the trial proper would not begin on that day because there would be no witnesses. HR might be going to seek disclosure of further medical records and Dr C would be available to attend court on the following Wednesday.

33. On 8 June 2007 HR's solicitors gave notice by letter that they would be seeking an order for disclosure of details from FB's medical records. Over the weekend counsel for HR and Mr Bowen exchanged detailed written submissions. Mr Bowen did not attend court on Monday 11 June 2007 (because he was not funded to do so), but he sent his submissions to the court. It is unclear from the record whether the CPS had them but it would be surprising if they neither had them nor were

aware of them.

34. In his written submissions, Mr Bowen said that:

> "... it is accepted that in the light of Dr C's report it is necessary for the jury to hear evidence about the defendant's (sic) reliability as a witness caused by his mental disorder, considering *Toohey v MPC* [1965] AC 595 and *MacKenny* [2003] EWCA 3643. However, this can and should be done by adducing evidence from Dr C orally, as it is anticipated will take place on Wednesday 13 June."

35. On Monday 11 June 2007 the case took an unpredicted turn. The recorder who was to hear the case was told by AW that "the Crown do not feel able to rely upon the evidence of [FB] for the reasons set out by the doctor in his report". The Crown therefore offered no evidence on both counts of the indictment and the recorder directed that verdicts of not guilty be entered. There is no evidence in these proceedings from the CPS branch prosecutor who had responsibility for the conduct of the matter up to that date, but there are witnesses statements from AW, from a CPS representative (LP) who was present at Snaresbrook Crown Court on the day and authorised the offering of no evidence, and from a woman detective constable who was the officer in the case. The statements are all brief.

36. AW said in his statement:

> "4. When I attended court on 11 June I read the background medical documents relating to FB. I believe that these referred to his history of mental illness and also to his use of cannabis in the past and that he had a history of harming himself...
>
> 5. I believe that I first saw Dr C's report dated 3 May 2007 about FB at court on 11 June. [The transcript of the hearing on 7 June 2007 shows that his memory in this respect is incorrect.]... After reading Dr C's report on 11 June I concluded that there was no realistic prospect of conviction. I believe at this time that FB had not arrived at court or at least had not made his presence known. In accordance with standing instructions I went to the CPS office in the court building to obtain further instructions in company with ... the officer in the case.
>
> 6. I was referred to Mr L P of counsel, who was one of CPS lawyers based at Snaresbrook. We reviewed the factual evidence in the case and the opinion of Dr. C. There was no evidence to support the Crown's case other than that of FB. There was also the outstanding issue of a renewed application being made to disclose FB's medical records. The decision reached was to discontinue the prosecution and offer no evidence. Mr P made notes of the discussion. In my opinion this was the correct decision.
>
> 7. I have been asked to comment upon whether the contents of Dr C's report were decisive or not. The conclusion that Dr C were that on 26 December 2006 FB was suffering from a mental disorder of a kind and to a degree which may have affected his perception and recollection of events so as to undermine the liability of his account of those events on 26 December 2006. Specifically, his illness caused him to experience delusion and hallucinations. FB continues to suffer from a mental disorder of a kind and to a degree which may affect his perception and recollection of events so as to undermine the reliability of his account of those events now. In my opinion the conclusion set out in the report would have precluded me from putting FB before a jury

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as a reliable witness.""

37. LP stated:

> "3. I have checked my diary and can confirm that I was present at Snaresbrook Crown Court on 11 June 2007. I was in court myself on that day, appearing for the prosecution in pleas and case management hearings PCMH. I recall that prosecution counsel Mr AW came to see me in the CPS office at the court accompanied by ... the officer in the case. AW wished to discuss the trial of HR which was listed that day and whether the prosecution case continued to satisfy the evidential test in the Code for Crown Prosecutors in the light of the psychiatric report which had been prepared about the victim and witness, FB. Until then, I had nothing to do with the trial of HR.
>
> > AW and I discussed the evidence in the case and, in particular, the psychiatric report of Dr C dated 3 May 2007. That report concluded amongst other things, that FB "continues now to suffer from a mental disorder of a kind and to a degree which may affect his perception and recollection of events so as to undermine the reliability of his account of those events now". My recollection of that discussion is that we concluded that, due to the essential importance of FB's evidence to the prosecution case and the doubt cast upon it by Dr C's conclusions, there was no longer any realistic prospect of a conviction. In particular, we concluded that we could not rely on FB's evidence as to which of the people present when he was assaulted was actually responsible. In the light of our conclusions I decided that the prosecution should offer no evidence, with the result that HR would be formally acquitted.
>
> "5. I have a habit of recording such decisions in my notebook, and I am sure I did so in this occasion. However I have not been able to find any note of this discussion and decision..."

38. The WDC said:

> "4. I met AW, the barrister who was prosecuting the matter. He provided me with a copy of the psychiatric report from Dr C. This was the first time that I had seen this report and I was shocked of how blunt it was. It had two or three lines, which, in effect, stated that the claimant would be an unreliable witness due to his mental health problems and that his testimony could not be relied upon due to his history.
>
> 5. AW suggested that we should seek the advice of a member of the Crown Prosecution Service... We spoke to the Duty Lawyer who viewed the psychiatric report. I believe that, due to the content of that report it was felt that there was no other option but to offer no evidence.
>
> 6. I went to the Witness Service Room to check whether the claimant had arrived yet but he hadn't. I then went into court to hear the matter being dealt with. When the hearing had finished I went to the main reception to see whether the interpreter had arrived and was waiting in the reception

area...

7. I met the claimant C for the first time at court, in the witness room. By this time the interpreter had also arrived. I explained to the interpreter about the content of the report from Dr C, what had happened in court, the reason why this had happened and asked him to explain this to the claimant. I checked that the claimant understood what had been explained to him and the claimant confirmed that he did understand it.

8. The claimant was upset; I could see tears in his eyes. He kept on asking me if he could leave - he didn't want to sit and discuss the matter further. I asked him if he was ok to travel and he left the court building. "

39. FB contacted Bindmans, who wrote to the CPS on the same day asking to know the full reasons for discontinuing the prosecution. There was no reply. Bindmans wrote a second letter on 19 June 2007. There was no reply. Bindmans wrote a third letter on 27 June 2007. There was no reply. Thereafter they instituted the present proceedings. Mr Perry Q.C. on behalf of the CPS tendered his apology for the failure to respond to those letters, for which he acknowledged that there was no excuse. Those lamentable failures after the event cannot affect the legality of the decision to offer no evidence, although they could possibly have an effect, albeit modest, when considering the issue of just satisfaction if FB's human rights claim succeeds.

Facts in summary

40. From that lengthy account the circumstances in which the CPS discontinued the prosecution of FB by offering no evidence against him can be summarised as follows:

1. FB suffered a serious assault on Boxing Day 2005 in which part of his ear was bitten off.

2. Whoever may have been responsible for the first use of violence, no one could plausibly suggest that the biting of FB's ear could have been an act done in lawful self defence, so the only real issue in relation to the assault was the identity of the ear biter.

3. FB gave a coherent and, on its face, credible account of events at a time when they were still fresh in his mind, in which he identified HR as the ear biter. He later identified HR, whom he knew, at an identification parade.

4. There was no doubt that FB was right in his identification of the time and place of the incident, the number of people present and (subject to one possible exception) who they were. Whether or not FB was right in his identification of HR as the ear biter, his general account of the episode was not an imaginary account of something which had never taken place.

5. FB had a history of psychotic illness in which he at times held paranoid beliefs about certain people and also suffered auditory and visual hallucinations.

6. He had insight into his condition in that he recognised that such beliefs and experiences were abnormal but they appeared normal to him.

7. There was no evidence that FB had shown previous hostility towards HR or held paranoid beliefs about him.

8. Dr C concluded that at all material times FB suffered from a mental condition which *might* affect his perception and recollection of events so as to make his account unreliable. Dr C did not suggest that FB was incapable of giving reliable evidence. His opinion was expressed in general terms. He was not asked, for example, to comment on whether there was any medical reason to think that FB's identification of HR as the ear biter, in the context described above, might suggest that he was hallucinating or be explicable on that basis. Although no attempt had been made to explore such matters with Dr C, he was due to attend the trial when further questions could be put to him.

9. No attempt was made to discuss Dr C's report with FB or his solicitors, or to explore with FB his ability to discern when his beliefs and auditory or visual experiences were abnormal, although he was expected at court at the time when the decision to offer no evidence was being taken (and arrived shortly after the decision had been carried out).

41. The reasons for the decision to offer no evidence against HR were clear and simple. AW formed the view that the conclusion set out in Dr C's report precluded him from putting FB before the jury as a reliable witness in the absence of any other evidence to confirm that HR was the ear biter.

The MIND Report

42. The logical implication of such reasoning is to place FB (or anyone who suffers from similar mental illness) in the position of one who may be assaulted with impunity so long as there is no independent evidence of the assailant's guilt. The defendant disclaims this, but it is a worrying matter not only for FB.

43. As background material, the court was supplied with a witness statement by a policy officer at Mind (National Association for Mental Health) attaching a report entitled "Another assault: MIND's campaign for equal access to justice for people with mental heath problems". The report expresses concern, among other things, about cases being too frequently dropped before they reach court because a victim's evidence is too readily seen as unreliable because of mental health problems. We must address this case on its facts, uninfluenced by what may have happened in other cases, but the relevance of the MIND report is that it shows that the outcome of this case is a matter of wider concern than for FB alone.

The Code for Crown Prosecutors

44. The defendant is the head of an independent, professional prosecuting service, and is entrusted by Parliament with the responsibility of deciding whether or not a person should be prosecuted at public expense. He is required by s10 of the Prosecution of Offences Act 1985 to issue a Code for crown prosecutors ("the Code"), giving guidance as to the general principles to be applied by prosecutors in deciding whether an individual should be prosecuted.

45. Para 5 of the Code provides:

"THE FULL CODE TEST

5.1 The Full Code Test has two stages. The first stage is consideration of the evidence. If the case does not pass the evidential stage it does not go ahead no matter how important or serious it may be. If it does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide if a prosecution is needed in the public interest. The evidential and public interest stages are explained below.

THE EVIDENTIAL STAGE

5.2 Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge. They must consider what the defence case may be, and how that is likely to affect the prosecution case.

5.3 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates or judge hearing the case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A court should only convict if satisfied so that it is sure of a defendant's guilt.

5.4 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable...."

46. The Code goes on to suggest questions which the crown prosecutors should ask themselves in cases where the evidence may not be as strong as it first appears, including whether there is further evidence which may support or detract from the account of the witness.

47. Mr Bowen submitted that in considering whether the evidence of a witness was reliable, so as to provide a realistic prospect of conviction, a crown prosecutor should set no higher test than would be applied by a judge ruling on a submission of no case to answer at the close of the prosecution's evidence. In short, where the strength or weakness of the prosecution case turns on the reliability of a witness and "where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty" (*R v Gallbraith* (1981) 73 Cr App R 124, 127 per Lord Lane CJ), the evidential test should be considered to be met. Any other approach would impermissibly usurp the role of the jury, whose task it should be to decide such matters.

48. I do not accept the analogy or the submission. It confuses two separate matters. When ruling on a submission of no case to answer at the close of the prosecution case, the judge is limited to considering the evidence in the case as it then stands. By contrast, para 5.2 of the Code requires crown prosecutors to consider what the defence case may be, and how it is likely to affect the prosecution case. Moreover the questions which para 5.4 suggests that crown prosecutors should ask themselves, when considering whether evidence is reliable, presuppose that their role is not as limited as Mr Bowen submits. Common sense also tells against the submission. Take a simple case. A person alleges that he was assaulted by the manager of a restaurant. The police investigate and take statements from the other diners, all of whom say that the complainant was drunk and aggressive and that the manager did no more than attempt to evict him from the premises after the man had refused to leave. The witnesses are independent and there is no evidence of collusion between them. It runs counter to common sense to suppose that a crown prosecutor would be bound in such circumstances to conclude that there was a realistic prospect of conviction merely because if a prosecution were brought – at public expense- and the complainant gave his account of events, the judge would not be entitled to dismiss the case at half time. Mr Bowen's answer is that in such circumstances the crown prosecutor could decide not to prosecute on public interest grounds. So he could, but that is a less natural justification for not prosecuting than the simple fact that there would be no realistic prospect of conviction.

49. There was also discussion whether in applying the "realistic prospect of conviction test" a prosecutor should adopt a "bookmaker's approach" (as it was referred to in argument) or should imagine himself to be the fact finder and ask himself whether, on balance, the evidence was

sufficient to merit a conviction taking into account what he knew about the defence case. In many cases it would make no difference, but in some it might. Mr Perry QC submitted that the latter was the correct approach. Mr Bowen made no submissions on the point. I agree with Mr Perry.

50. There are some types of case where it is notorious that convictions are hard to obtain, even though the officer in the case and the crown prosecutor may believe that the complainant is truthful and reliable. So-called "date rape" cases are an obvious example. If the crown prosecutor were to apply a purely predictive approach based on past experience of similar cases (the bookmaker's approach), he might well feel unable to conclude that a jury was more likely than not to convict the defendant. But for a crown prosecutor effectively to adopt a corroboration requirement in such cases, which Parliament has abolished, would be wrong. On the alternative "merits based" approach, the question whether the evidential test was satisfied would not depend on statistical guesswork.

51. That is not to say that a crown prosecutor should be bound to ignore how a jury is likely to see a case. There may, for example, be cases where the prosecutor is satisfied that there is sufficient evidence to show on a balance of probability that the defendant committed an offence in strict law, but where the circumstances are such that a jury is likely to regard the defendant as having acted in a morally justifiable or excusable way and therefore be unwilling to convict. In such a case the prosecutor would have to take a view whether it was overall in the public interest to incur the expense of a prosecution.

Irrationality and the proper application of the Code

52. There is now a substantial body of authority on judicial review of decisions not to prosecute. The leading authorities are *R v DPP ex parte Manning* [2001] 1 QB 330, *R (Da Silva) v DPP* [2006] EWHC 3204 (Admin), *Sharma v Brown-Antoine* [2006] UKPC 57 and *Marshall v DPP* [2007] UKPC 4. In summary, judicial review of a prosecutorial decision is available but is a highly exceptional remedy. The exercise of the court's power of judicial review is less rare in the case of a decision not to prosecute than a decision to prosecute (because a decision not to prosecute is final, subject to judicial review, whereas a decision to prosecute leaves the defendant free to challenge the prosecution's case in the usual way through the criminal court) but is still exceptional. The reason for this was stated by Lord Bingham CJ in *Manning*, para 23:

> "In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting an effective remedy would be denied."

53. There is an assumption underlying this passage (with its reference to the exercise of an informed judgment) that a prosecutor can ordinarily be expected to have properly informed himself (within the limits of what is reasonably practical) and asked himself the right questions before arriving at a decision whether or not to prosecute.

54. In the present case, if the prosecutor had applied the merits based approach and asked himself

whether he thought that it was more likely than not, or at least as likely as not, that FB's identification of HR as the ear biter was the result of an hallucination, I cannot see how merely on the strength of Dr C's report he could have answered that question in the affirmative. There was an opportunity to explore the matter further, because Dr C was due to be available to answer further questions, but the decision to offer no evidence forestalled that.

55. The reasoning process (summarised in para 41) for concluding that FB could not be placed before the jury as a credible witness was irrational in the true sense of the term. It did not follow from Dr C's report that the jury could not properly be invited to regard FB as a true witness when he described the assault which he undoubtedly suffered. The conclusion that he could not be put forward as a credible witness, despite the apparent factual credibility of his account, suggests either a misreading of Dr C's report (as though it had said that FB was incapable of being regarded as a credible witness) or an unfounded stereotyping of FB as someone who was not to be regarded as credible on any matter because of his history of mental problems.

56. For those reasons I conclude that the decision to terminate the prosecution was unlawful. Unfortunately, because it was immediately followed by the prosecution offering no evidence, it was also irreversible.

Disability Discrimination Act 1995

57. It is common ground that FB has a disability for the purposes of the Act.

58. Section 21B makes it unlawful for a public authority to discriminate against a disabled person in carrying out its functions; but s21C(4) provides that s21B(1) does not apply to decisions not to institute or not to continue criminal proceedings. The reason for this exception is not hard to see. Section 21D provides that for the purposes of s21B(1) a public authority discriminates against a disabled person if, for a reason which relates to the disabled person's disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply, unless it can show that the treatment in question is justified under one of various subsections. The consequence of applying s21B to decisions not to prosecute could be that if the prosecutor reasonably considered that a complainant's evidence was unreliable, as a result of a disability, a decision not to prosecute in such circumstances might amount to unlawful discrimination.

59. In the case of public authorities there is also a more general duty under s49A, on which Mr Bower relies. This provides:

> "(1) Every public authority shall when carrying out its functions have due regard to –
>
> (a) the need to eliminate discrimination that is unlawful under this Act;
>
> (b) the need to eliminate harassment of disabled persons that is related to their disabilities;
>
> (c) the need to promote equality of opportunity between disabled persons and other persons;
>
> (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;

> (e) the need to promote positive attitudes towards disabled persons; and
>
> (f) the need to encourage participation by disabled persons in public life."

60. There are a number of exceptions to that general duty, but none is relevant in this case. A number of the needs specified in paragraphs (a) to (f) have no relevance to the present case, but Mr Bowen relies on para (c). He submitted that the defendant failed to have due regard to the need to promote equality protection by the criminal law.

61. Mr Perry emphasised the reference to "due regard" in the opening words of s49A. He accepted that the duty may be relevant to all sorts of decisions made by the defendant and to the policies which he adopts in respect of prosecutions, but he submitted that it cannot be relevant to the application of the evidential test under the Code in a specific case.

62. I can see that the general duty may have significance at the investigative stage and when considering how a witness may be assisted to give evidence to the court (which might in some cases include the use of special measures under Part II of the Youth Justice and Criminal Evidence Act 1999). If, for example, a witness suffers from a disorder which would make their speech unintelligible to a jury, it may nevertheless be possible with suitable expert assistance for that impediment to be overcome. That may in turn have a bearing on the application of the evidential test under the Code. But when it comes to assessing the substantive merits of the evidence which the prosecution is able to place before the court, measured against the likely defence or defences, it is difficult to see what scope s49A has or should have to affect the decision. If the substantive quality of the evidence is such as to pass the merits test, the prosecution should go ahead (subject to the public interest test). If not, there should not be a prosecution. In other words, in that situation s49A adds nothing to the ordinary position under public law principles.

63. In this case I have set out my reasons for concluding that the decision to abandon the prosecution because of FB's mental disability involved a misapplication of the Code and was irrational. It could be said that it follows from that conclusion that the defendant was in breach of the general duty under s49A(1)(c), but the case for regarding the decision not to prosecute as unlawful is not advanced by looking at it through the lens of s49A. If the prosecutor had applied the Code properly and arrived at a reasonable decision that the evidential test was not met, there would have been no breach of s49A, since the duty of the prosecutor was to apply the Code.

Article 3

64. Article 3 of the Human Rights Convention provides:

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

65. It is established law that Article 3 carries with it a positive obligation on a state to provide protection through its legal system against a person suffering such ill-treatment at the hands of others, but the positive obligation does not have clearly defined boundaries. One aspect of the duty is the provision of a legal system for bringing to justice those who commit serious acts of violence against others.

66. In *MC v Bulgaria*, App no 39272/98 4 December 2003, the European Court of Human Rights held that Bulgaria had violated Article 3 by failing to establish and apply effectively a criminal justice

system for punishing rape.

67. Similarly, in relation to cases of unlawful killing and Article 2, the European Court of Human Rights said in *Nikolova v Bulgaria,* App no 7888/03, 20 December 2007, para 57:

> "The requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law."

68. We were referred to a considerable number of other authorities, but, as Mr Perry rightly observed, they contain no definitive statement about when Article 3 gives rise to a duty to prosecute. This is unsurprising because circumstances may vary infinitely.

69. Mr Perry also submitted that if the termination of the prosecution was unlawful as a matter of domestic law, it did not follow necessarily that there was a violation of Article 3. As an abstract proposition I agree that there is not a necessary linkage (and in some instances judicial review of a decision not to prosecute might avoid a violation of the Convention); but we are concerned only with the facts of the present case.

70. In this case FB suffered a serious assault. The decision to terminate the prosecution on the eve of the trial, on the ground that it was not thought that FB could be put before the jury as a credible witness, was to add insult to injury. It was a humiliation for him and understandably caused him to feel that he was being treated as a second class citizen. Looking at the proceedings as a whole, far from them serving the State's positive obligation to provide protection against serious assaults through the criminal justice system, the nature and manner of their abandonment increased the victim's sense of vulnerability and of being beyond the protection of the law. It was not reasonably defensible and I conclude that there was a violation of his rights under Article 3.

71. There remains the question of just satisfaction. This judgment will itself go some way to providing such satisfaction but there should also be some monetary compensation. It cannot be assumed that a trial would necessarily have resulted in the conviction of HR, but FB is to be compensated for being deprived of the opportunity of the proceedings running their proper course and the damage to his self respect from being made to feel that he was beyond the effective protection of the law (as he graphically expressed in a witness statement). The amount should be in line with the customary level of the Strasbourg awards in this area, which tend to be relatively modest. I would assess the award at £8000.

Mr Justice Forbes:

72. I agree.