



Neutral Citation Number: [2019] EWCA Crim 647

Case No: 201804366/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
THE HONOURABLE MR JUSTICE EDIS
T20187054

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2019

Before :

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HONOURABLE MR JUSTICE SWEENEY
and
THE HONOURABLE MR JUSTICE POPPLEWELL

Between :

R
- and -
AJ

Respondent

Applicant

Andrew Hall QC, Richard Simons & Pippa Woodrow for the Applicant
Mark Heywood QC & Mark Weekes (instructed by the Crown Prosecution Service)
for the Respondent

Hearing date: 18 December 2018

Approved Judgment

Mr Justice Sweeney :

Introduction

1. On 15 October 2018, in a ruling which was given in the context of a preparatory hearing which had been convened in the Central Criminal Court on 5 October 2018, Edis J refused an application to stay the proceedings against the Applicant as an abuse of process. On 18 December 2018, at the conclusion of the Applicant's interlocutory application for leave to appeal against that decision, we refused leave but reserved our reasons for doing so, which we now give.
2. The provisions of s.37 of the Criminal Procedure and Investigations Act 1996 ("the 1996 Act") apply. Save for the formalities listed in s.37(9), the reporting of these proceedings, including this judgment, is prevented until the conclusion of the Applicant's trial.

Background

The facts

3. The Applicant is charged on an indictment containing 3 Counts, as follows:

Count 1: Engaging in conduct in preparation of terrorist acts on or before 30 August 2017, contrary to s.5(1)(a) of the Terrorism Act 2006 ("the 2006 Act").

Count 2: Attendance at a place used for terrorist training at Mahkmour [Iraq] on or before 1 October 2017, contrary to s.8(1)(a) & (2)(a) of the 2006 Act.

Count 3: Attendance at a place used for terrorist training at a place or places in Syria on or before 4 November 2017, contrary to s.8(1)(a) & (2)(a) of the 2006 Act.
4. The Prosecution case on Count 1, as ultimately articulated, is, in broad outline, that the preparatory steps taken by the Applicant included travelling to Wales to undergo physical and other training; acquiring clothing and equipment including body armour; communicating with others to arrange and facilitate travel and association; arranging and paying for travel; travelling to Iraq (Sulaymaniyah) via Jordan and going on to Makhmour in Iraq; and that his intention (as evidenced in his own writings and social media posts, and in records of conversations with the police prior to his departure) was to join and fight for the PKK (a Kurdish terrorist organisation which is proscribed in the UK) and to join with the wider aims of the YPG (the Kurdish People's Defence Force which is not proscribed in the UK) such as the establishment of a Kurdish homeland and against the Turkish state. The Prosecution case on Counts 2 and 3 is that thereafter the Applicant attended at a place of terrorist training in Makhmour (which was run by the PKK) and at a place or places of terrorist training in Syria (which was / were run by the YPG). On Counts 1 & 3 the Prosecution accept that if the Applicant's preparatory steps and / or attendance was / were (or may have been) solely and exclusively in preparation for giving effect to an intention to fight for the YPG against Daesh (ISIS) in Syria, he should be acquitted on those Counts. The reason why Count 2 is not included in that approach is because the relevant camp is alleged to have been run by the PKK.

5. The Applicant's case is that he never intended to join or to fight with the PKK, only with the YPG – and only in its fight against Daesh.

The Preparatory Hearing

6. Three Grounds of abuse of process were advanced by the Applicant before Edis J, each based on the contention that a trial of the Applicant, although fair, would offend the court's sense of justice and propriety, or undermine confidence in the criminal justice system and bring it into disrepute, in that:
 - 1) The decision to prosecute the Applicant was unpredictable and arbitrary, so that it was a violation of his Convention rights – it being a core principle that criminal offences must be defined with sufficient clarity and certainty so that ordinary people can identify what conduct is prohibited. They must also be prosecuted in a manner that is predictable, consistent, and in accordance with settled principles and practice, rather than enforced in a way that is arbitrary and discriminatory, otherwise the prosecution of serious offences becomes a game of chance, and not the rule of law.
 - 2) In the particular circumstances of the case, the decision to prosecute the Applicant was contrary to his legitimate expectation that he would not be prosecuted for an offence of terrorism, and that he acted to his detriment as a result of that expectation.
 - 3) The decision to prosecute was taken without any, or any adequate, consideration of the Applicant's mental illness and vulnerability, as required by the CPS Codes of Practice.
7. For the purposes of the application, it was not disputed that the Applicant had done the preparatory acts alleged and that he had done them with the intention of fighting in the civil war in Syria. Nor was it disputed that he had attended the places of training referred to in Counts 2 & 3, and that training of the requisite kind was being provided at the times that he was present at each.
8. Equally, for the purposes of the application, Edis J assumed that the primary facts asserted by the Applicant (as set out in [12] – [19] of the ruling) were true, save that he was not prepared to assume any bad faith by the UK authorities (as there was no sensible basis upon which any such assumption could rest), and that he was not prepared to go further than regarding assertions about various state and non-state agencies as being arguably correct. Edis J accepted the prosecution's assertion that neither the Attorney General nor the Director of Public Prosecutions had ever had a policy of only prosecuting returned fighters who had been fighting for Daesh or some other proscribed organisation.
9. The primary facts asserted by the Applicant included the following:
 - 1) Prior to his departure, and following postings on his Facebook account, he was seen by Prevent Officers on a number of occasions in the period from 24 April 2017 to 17 July 2017 – during the course of which he was arrested, his passport was seized, and he was bailed. On the last occasion, he was discharged from bail and his passport was returned. At the outset, and at the

end of those contacts, he was given letters which variously warned him that if he went to fight against Daesh and returned he “*could be arrested for criminal offences*” and that his activities “*may amount to offences under UK legislation (including war crimes) and you could be prosecuted on your return to the UK*”.

- 2) He travelled to Syria via Turkey and Iraq so that he could join a unit of the People’s Protection Group (known as the YPG). He joined in August 2017. Whilst he was present, the YPG became an important component of the Syrian Democratic Forces (“SDF”). He took part in fighting against Daesh elements which were active in Eastern Syria and had thus used violence, including firearms, on behalf of a non-state force in a military confrontation against an opposing non-state force.
- 3) The groups in which he fought were openly supported by the UK and its military allies – with the UK providing support by way of air strikes, and the United States providing weapons and direct military support to both the SDF and the YPG. There were also informal diplomatic relations between the SDF / YPG and the British Government – e.g. as to the fate of Daesh prisoners wanted for prosecution.
- 4) Having left the YPG in the autumn of 2017, he got back into contact with the Prevent Team as to his possible return to the UK. Thereafter, he was variously told, as logged by Chief Inspector Court (a senior Prevent officer, who was aware of the Applicant’s mental health problems and the deterioration of his condition), amongst other things that:
 - i) The police would help in any way that they could to repatriate him, and that steps would be taken to support him through that process.
 - ii) *“In terms of coming home let me be honest and tell you you will be arrested... nobody is saying that you are a terrorist and there are loads of people like you who have come back from Syria and to the best of my knowledge none of them have been charged... And so if you come home nobody is going to accuse you of being a terrorist and the process you will go through will be the same as what you have already been through. I don’t know of any case where someone has been charged for fighting in Syria against Daesh...”*
 - iii) *“I get that you don’t trust me and that you think that I am only saying what you want to hear. That isn’t the case.....there is only a single case that I know about of someone being charged having returned from Syria and that person was charged because they had a bomb manual.....Other than that, I don’t know of any case where people have been charged for simply fighting Daesh. That is the true and straight answer. I have no reason to lie – this stuff is all on Google and so there are no secrets.”*
- 5) He made it clear to the police that there were other places he could go to in the world, rather than return to the UK and be treated as a terrorist. It was his case that his return was as a result of the assurances that he had received that he

would not be treated as a terrorist and would not be prosecuted. However, he had been arrested immediately upon his return on 14 February 2018 and had been charged the following day with offences that required the consent of the Attorney General and the Director of Public Prosecutions. Therefore, what the police had told him must have been dishonest – in that a decision to prosecute him must already have been made. Thus, his case might have some parallel with the “kidnap” line of abuse of process authorities.

Ruling – legitimate expectation (Abuse Ground 2)

10. Edis J analysed *R v Maxwell* [2010] UKSC 48 and *R v Warren (Curtis)* [2011] UKPC 10 (the leading authorities on abuse of process via conduct offending the court’s sense of justice and propriety, or undermining confidence in the criminal justice system and bringing it into disrepute) at the outset of his ruling. Thereafter, having set out the factual basis of the indictment at [11]-[19] of his ruling, he dealt with this Ground first at [21]-[24]. He observed that conduct which might prevent a public authority from conducting itself as it might otherwise do as a matter of public law was not necessarily of such a kind as to present a challenge to the integrity of the criminal justice system, and to underline the fact that, for the powerful reasons given in *Sharma v Browne-Antoine* [2007] 1 WLR 780, orders to quash decisions to prosecute are very rarely granted. He opined that the observations of the court in that case were equally potent in suggesting that a stay should be even more rare. Equally, he said, the public law concept of legitimate expectation sat uneasily with the hopes and fears of a person suspected on reasonable grounds of having committed serious criminal offences and facing prosecution for them in a fair trial. Such expectation was inevitably limited, and he proposed to deal with the issue by deciding whether, in view of what the police did, the prosecution was an affront to the integrity of the criminal justice system.
11. Edis J continued that he was willing to assume (in favour of the Applicant) that a decision had already been made to prosecute the Applicant at the time of the last communication with him by the Police, and that that decision was withheld either by or from the senior officer who had communicated with him. However, Edis J saw no reason at all to assume that there had been a decision to prosecute prior to the earlier communications with the Police. Rather, he concluded, the Chief Inspector had been doing his job in trying to persuade the Applicant to return to the UK, was not in a position to promise that the Applicant would not be prosecuted and had not done so. Equally, it was apparent from emails that the Applicant did not trust the assurances that he had been given and knew that he would be taking a risk that he might be prosecuted if he returned. He had been told that in terms before he left and had never been given a categorical assurance that he would not be prosecuted from a person in a position to give it and, it seemed, he knew it. For those reasons, Edis J said, this Ground failed.

Ruling – failure to consider the Applicant’s state of health (Abuse Ground 3)

12. Edis J dealt with this Ground next, at [25]-[30] of his ruling. He underlined that the CPS guidance entitled *Guidance in relation to the prosecution of offences relating to Daesh and the conflict in Syria, Iraq and Libya (revised December 2016)* required consideration to be given to any vulnerability of a suspect arising from mental health issues; that the CPS guidance in relation to mentally disordered offenders also

contained provisions requiring prosecutors to take the mental health of a suspect into account; and that the CPS policy on charging required an evaluation of the public interest in prosecuting – including consideration of the mental health of a suspect.

13. Edis J then recorded that the Applicant had a significant history of mental illness (including PTSD, auditory hallucinations suggestive of a psychotic illness, suicide attempts, the prescription of anti-psychotic drugs, and in-patient treatment in the immediate run up to his departure to Syria) and was properly to be regarded as vulnerable; and that the Police were aware of that by April 2017 at the latest. Equally, he said, the Applicant had continued to suffer from mental illness whilst in Syria, and his condition had deteriorated towards the end of his stay. Finally, there were reports before the judge, which had been obtained after the Applicant had been charged, from the psychiatrists, Dr Latham and Dr Joseph.
14. The judge assumed that the charging decision was taken after inadequate consideration of the Applicant's mental health issues, but concluded (contrary to the argument advanced on the Applicant's behalf) that, rather than conducting a review on public law grounds, the correct test was whether it would damage the integrity of the prosecution for the proceedings to continue, given the Applicant's present state of health. In the result, he concluded that he could see nothing in the Applicant's medical history which would make it arguably contrary to the public interest to prosecute him, and that even if consideration of the public interest by the CPS had been flawed, it could only rationally have come to one conclusion – namely that there was no medical reason not to prosecute. People who commit this type of offence are quite likely, Edis J said, to have complicated motivations which might attract the attention of the medical profession and it would be irrational to accord those who did immunity on that ground. Equally, it would be an exceptional case where a person who suffered mental illness as a result of committing crime could rely on that illness to avoid prosecution.
15. It should be noted that, in the proceedings in this Court, no discrete Ground of Appeal was put forward in relation to this aspect of Edis J's ruling. However, it was argued that the Applicant's vulnerability remained a relevant factor for the purposes of the Grounds of Appeal that were advanced.

Ruling – law arbitrary or inaccessible (Abuse Ground 1)

16. Edis J dealt with this Ground last, at [31]-[47] of his ruling. He first rejected the Applicant's argument that s.1 of the Terrorism Act 2000 ("the 2000 Act") as amended, and ss.5 & 8 of the 2006 Act, rendered the law arbitrary and inaccessible – observing that the legislation, with its requirement for the Attorney General's consent for foreign terrorist offences, had been in its present form for a dozen years and had been very heavily used. He concluded that the Prosecution had been right in their submissions as to the elements of the offences and the lawfulness of the statutory regime – including that fighting against Daesh by an individual who is not part of the armed services of a state is terrorism (as defined in s.1 of the 2000 Act). Thus, the Applicant could have been prosecuted for a s.5 offence even if that had been his sole intention.
17. Equally, he concluded, s.8 offences only required proof that the Applicant had attended at a place; that whilst he was at that place training or instruction of the type

specified in s.54(1) of the 2000 Act, or s.6(1) of the 2006 Act, was provided; that such training or instruction was wholly or partly for purposes connected with terrorism; and that the Applicant knew or believed that, or could not reasonably have failed to understand that. Thus, in relation to offences under s.8, it was immaterial whether the Applicant himself received such instruction or training and, *a fortiori*, what his intention was in doing so.

18. Edis J also concluded that, given reliance by the Applicant on *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 (in which it was decided that interference with Article 8 rights as to choice of death could only be justified by the existence and application of a published policy so that those affected could have some certainty as to the consequences of their choices) there was no Convention right that guaranteed a freedom to travel abroad as an individual and to take part in a civil war in a foreign state, and that therefore the principle in *Purdy* was of no application, and the criminal law could be applied without any such restraint.
19. Edis J continued that the real question in the case, and the one that had caused him the most difficulty, was whether it was an affront to the system of justice to prosecute the case when, as shown by the last communication from the Chief Inspector to the Applicant (above) and by unchallenged additional information provided on behalf of the Applicant, many other apparently similar cases had not been prosecuted and the Prosecution had offered no explanation for the apparent difference in the treatment of the Applicant.
20. Edis J then set out what the Prosecution had described as a “self-denying ordinance” in relation to Counts 1 and 3, namely that (as foreshadowed in [4] above):

“...the prosecution will put its case on the basis that if the defendant’s conduct was done solely and exclusively in preparation for giving effect to an intention to fight for the YPG against Daesh in Syria he should be acquitted of those counts and will seek a judicial direction to the jury in those terms.”

The judge recorded that the reason why Count 2 was not included in that approach was because the relevant training camp was alleged to be run by the PKK (which was a proscribed organisation) whereas the camp(s) in Count 3 was / were run by the YPG (which was not proscribed).

21. Edis J observed that if fighting alongside the YPG involved acts of terrorism for the purposes of Count 1, it was not clear to him how attending at a YPG training camp was not an offence whether or not the YPG was proscribed and that, more generally, he could foresee serious problems in directing a jury in accordance with the law whilst, at the same time, securing the outcome sought by the Prosecution by its “self-denying ordinance”.
22. However, Edis J said, he had concluded that he should ignore those problems for present purposes and return to them at the conclusion of the Prosecution case to satisfy himself that the Prosecution had advanced not only a case to answer, but also a case which could fairly and intelligibly be left to the jury to decide in accordance with the law. If the former was achieved but the latter was not, there could be a stay at that stage. However, at the preparatory hearing stage, he would approach the case upon

the basis that the Applicant was not being prosecuted for preparing to fight against Daesh, nor for attending at a place of training which was run by the YPG only for the purpose of improving its ability to fight against Daesh, but rather the Prosecution had to show that there was some wider political cause that he was intending to advance by his preparatory acts, and which was being furthered by the training provided at the Count 3 camp(s). The Prosecution might also have assumed voluntarily, he said, the burden of showing that the Applicant shared the wider purpose and had intended to further it by attending at the Count 3 camp(s).

23. Edis J continued that, given that the “self-denying ordinance” involved a decision not to prosecute a person for serious criminal offences, it was rather surprising that it had not been explained. However, he said, it might rationally be thought that the criminal law could properly be used to discourage individual UK citizens from travelling to fight in armed groups (which were not the armed forces of a sovereign state) against the enemies of the UK. That was why, cases such as *R v F* [2007] 2 Cr App R 3 (at [27]), *Sarwar* [2016] 1 Cr App R (S) 54 (at [41]-[43]) and *Kahar* [2016] 1 WLR 3156 (at [13]), contained binding statements of principle to the effect that the legislation does not exempt, make an exception for, create a defence for, or otherwise exculpate, what some would describe as terrorism in a just or noble cause.
24. Edis J summarised the potential reasons for that approach, and the problems likely to arise during the trial, as follows:

“40. *The reasons for this approach may include these factors:*

- i) *Even properly conducted military operations by professional soldiers involve errors and other events which cause extensive “collateral damage” to civilians in the conflict zone. That risk may be higher where the combatants are amateurs under amateur leadership.*
- ii) *Those who are tempted to act in this way may well include the psychologically vulnerable who will return to the UK, if they do, traumatised and experienced in causing death. This creates harm to them and risk to others. They may be killed or taken captive and held hostage. In the latter event, they may become an impediment to the achievement of the policy of the UK in the relevant region.*
- iii) *In this case the defendant appears to have suffered PTSD and this has not improved his volatile mental state. Even though he was not killed, he has suffered harm. This illustrates why the criminal law might rationally be deployed to prevent or discourage vulnerable people from causing themselves further damage.*

- iv) *The nature of support provided by the government to foreign fighters with whom it is broadly in sympathy will be calibrated and, it is hoped, provided in accordance with UK domestic law, and International Humanitarian Law. That is not likely to be true of individuals who may be likely to end up supporting directly the kind of brutality which all sides in conflicts of this kind tend to inflict on the others.*
- v) *Alliances change rapidly in civil wars and individual non-state actors are not likely to have the necessary military intelligence capability to ensure that what they do is actually helpful to the cause they are seeking to promote, or that what they do is broadly in line with the national interest of the UK.*
- vi) *It might rationally be thought for these and other reasons that it is far better if individuals do not seek to fight abroad in support of causes which they have decided are worth fighting for on the basis of information they have obtained from the media or on the internet. It is unlikely they will achieve much good, and may do, or suffer, harm.*

41. *This is not an encouragement to retract the self-denying ordinance which is a course I would be unlikely to sanction if attempted. It simply points out the problems which are likely to arise during this trial. These problems can be accommodated within the trial process and do not amount to a reason to stay it.”*

25. Against that background, Edis J proceeded upon the basis that the Applicant’s case was the first of its type in which the CPS had determined to continue the proceedings to trial. Whilst the Prosecution had gone too far, he said, in conceding that the Crown Court would be likely to stay for abuse of process in circumstances where the High Court would quash a decision to prosecute as arbitrary and unfair, the common law obligation of public authorities to treat like cases alike, or at least not to treat them differently without some reasonable basis for doing so, was not irrelevant. He had not been informed of any basis for prosecuting the Applicant and not others, or for prosecuting the Applicant on the proposed limited basis. It followed that he had not been told of any rational basis on which the Prosecution had proceeded as it had. However, he concluded, in this case there would be no point in ordering disclosure as, given the very limited ambit of the relevant abuse of process cases, he could not envisage that it would give rise to any basis upon which he could sensibly conclude that the integrity of the system of criminal justice required a stay.

26. Edis J concluded:

- “45. *The Attorney General is answerable to Parliament. Prosecutions of this kind require his consent or, as it is sometimes called, his fiat. That is because decisions about who in foreign conflicts should be prosecuted are often political decisions in that the UK may choose to prosecute those who are its opponents and not those who are its allies, even though their methods might be equally unlawful. These are not judgments that a court can make because the court is not equipped with the relevant advice of the security services and officials and does not concern itself with UK foreign policy. These are not matters on which the court is able to adjudicate.*
46. *In the end, I am uneasy about the prosecution of a man who is able to say that at least some of the acts of terrorism for which he was preparing or trained were carried out with the support of the RAF.*
47. *I have eventually concluded that the scope of the second variety of abuse of process does not permit me to stay this prosecution despite my unease. I cannot say that it is an affront to the system of justice. The political character of the decision to bring these proceedings is written into statute. I do not think that this aspect of that decision is justiciable. In any event, whether that is right or wrong, this is a discretionary remedy and my assessment of the case is that the integrity of the system of justice will be best affirmed by a trial of these allegations and, if there are convictions, by a fair sentencing process. I have cited Sarwar and Kahar above. If there are convictions in this case some further anxious consideration will have to be given to the right approach to sentencing, and some further contribution will be required by the sentencing court from Her Majesty’s Ministers.*
48. *I therefore refuse the application.”*

27. Edis J refused leave to appeal as it appeared to him that this Court may decide that his was not a decision properly within a preparatory hearing and therefore no right of appeal existed; or that the appeal should not be heard prior to trial and should properly form part of a post-conviction appeal if the Applicant is convicted.

The Grounds of Appeal

28. Four Grounds of Appeal were advanced, as follows:
- 1) The judge was wrong in law and principle to conclude that breach of the Applicant’s legitimate expectation was not capable of amounting to an abuse.

- 2) The judge's approach and findings in relation to legality were wrong in law and principle.
 - 3) It was contrary to proper analysis to conclude that there was no affront to the criminal justice system to prosecute this case in circumstances where there is no explanation provided for the decision, which appears to be at odds with all previous decisions in like cases.
 - 4) The judge failed to consider the matters raised in favour of a stay cumulatively.
29. Before summarising the submissions in relation to each Ground and then giving our reasons, it is convenient to first outline the relevant legal framework.

Outline Legal Framework

The alleged offences

30. Section 5 of the 2006 Act provides that:

- “(1) A person commits an offence if, with the intention of –
- (a) committing acts of terrorism, or
 - (b) assisting another to commit such acts,
- he engages in any conduct in preparation for giving effect to his intention
- (2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description, or acts of terrorism generally...”

31. Section 8 of the 2006 Act provides that:

- “(1) A person commits an offence if –
- (a) he attends at any place, whether in the United Kingdom or elsewhere;
 - (b) whilst he is at that place, instruction or training of the type mentioned in section 6(1) of this Act or section 54(1) of the Terrorism Act 2000 (weapons training) is provided there;
 - (c) that instruction or training is provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention Offences; and

- (d) the requirements of subsection (2) are satisfied in relation to that person.*
- (2) *The requirements of this subsection are satisfied in relation to a person if –*
- (a) he knows or believes that instruction or training is being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or convention offences; or*
- (b) a person attending at that place throughout the period of that person’s attendance could not reasonably have failed to understand that instruction or training was being provided there wholly or partly for such purposes*
- (3) *It is immaterial for the purposes of this section –*
- (a) whether the person concerned receives the instruction or training himself; and*
- (b) whether the instruction or training is provided for purposes connected with one or more particular acts of terrorism or Convention offences, acts of terrorism or Convention offences of a particular description or acts of terrorism or Convention offences generally.*
- (4) *It is irrelevant for the purposes of subsection (1) and (2) –*
- (a) whether any instruction or training that is provided is provided to one or more particular persons or generally;*
- (b) whether the acts or offences in relation to which a person intends to use skills in which he is instructed or trained consist of one or more particular acts of terrorism or Convention offences, acts of terrorism or Convention offences of a particular description or acts of terrorism or Convention offences generally; and*
- (c) whether assistance that a person intends to provide to others is intended to be provided to one or more particular persons or to one or more persons whose identities are not yet known...”*

32. Section 19 of the 2006 Act provides that:

- “(1) *Proceedings for an offence under this Part –*

(a) May be instituted in England and Wales only with the consent of the Director of Public Prosecutions...

(2) But if it appears to the Director of Public Prosecutions... that an offence under this Part has been committed outside the United Kingdom or for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for the purposes of this section may be given only with the permission –

(a) in the case of the Director of Public Prosecutions, of the Attorney General..."

33. Section 20 of the 2006 Act provides that:

“(1) Expressions used in this Part and in the Terrorism Act 2000 have the same meanings in this part as in that Act.

(2) In this Part –

“act of terrorism” includes anything constituting an action taken for the purposes of terrorism, within the meaning of the Terrorism Act 2000 (see section 1(5) of that Act); ...”

34. As amended, s.1 of the 2000 Act provides that:

“(1) In this Act “terrorism” means the use or threat of action where –

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause

(2) Action falls within this subsection if it –

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person’s life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public,

or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) *The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.*

(4) *In this section –*

(a) “action” includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person or to property wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) “the government” means the government of the United Kingdom, or a part of the United Kingdom.”

35. For present purposes, the leading authorities in relation to the construction of the definition in s.1 of the 2000 Act are *R v F* (above), *R v Gul* [2013] UKSC 64; [2014] AC 1260, *Sarwar*, and *Kahar* (both above).

36. The charge in *R v F* was possession of documents containing information likely to be useful in committing or preparing an act of terrorism, contrary to s.58 of the 2000 Act. Sir Igor Judge P (as he then was) giving the judgment of this Court dismissed a submission that the fact that the documents planned the removal of an allegedly tyrannical regime (the then government of Colonel Gadaffi in Libya) could constitute a reasonable excuse under s.58(3). At [27], [28] & [32] he said this about s.1 of the 2000 Act:

“27. *What is striking about the language of section 1, read as a whole, is its breadth. It does not specify that the ambit of its protection is limited to countries abroad with governments of any particular type or possessed of what we, with our fortunate traditions, would regard as the desirable characteristics of representative government. There is no list or schedule or statutory instrument which identifies the countries whose governments are included in s.1(4)(d) or excluded from the application of the [2000] Act. Finally, the legislation does not exempt, nor make an exception, nor create a defence for, nor exculpate what some*

would describe as terrorism in a just cause. Such a concept is foreign to the 2000 Act. Terrorism is terrorism, whatever the motives of the perpetrators.

28. *...Terrorist action outside the United Kingdom which involves the use of firearms or explosives, resulting in danger to life or creating a serious risk to health or safety to the public in that country, or involving (not producing) serious personal violence or damage to property, or designed seriously to interfere with an electronic system, 'is terrorism'...*

...

32. *...the terrorist legislation applies to countries that are governed by tyrants and dictators. There is no exemption from criminal liability for terrorist activities which are motivated by, or said to be morally justified by, the alleged nobility of the terrorist cause."*

37. *Gul* (above) was convicted of five offences of disseminating terrorist publications with intent to encourage the commission of acts of terrorism, contrary to s.2 of the 2006 Act. He had uploaded onto the Internet videos which showed attacks by insurgents on coalition forces in Iraq and Afghanistan and excerpts from martyrdom videos accompanied by documentaries praising the attackers' bravery and encouraging others to emulate them. His case was that he believed that the insurgents were justified in resisting the invasion of their countries and that he was encouraging self-defence, not terrorism. In answer to a question from the jury in retirement, the judge said that the attacks seen on the videos came within the definition of terrorism in s.1 of the 2000 Act, as amended. Against the background that it was common ground that the conflicts in Iraq and Afghanistan were non-international armed conflicts at the relevant time, and that the criminal liability of the insurgents was a matter of domestic law, this Court upheld the convictions and certified a question of law as a matter of general public importance, namely whether the definition of "terrorism" in s.1 of the 2000 Act operated so as to include any or all military attacks by a non-state armed group against any or all state or inter-governmental organisation armed forces in the context of a non-international armed conflict.
38. The Supreme Court answered the certified question in the positive and upheld the convictions – ultimately concluding, after initial doubts, that the definition was intended to be very wide and that a wide interpretation accorded with the natural meaning of the words used in s.1(1)(b), which had not been ignored when the Act was being debated, and had been left effectively unchanged when considering subsequent amendments or extensions. Whilst there was no accepted norm in international law as to what constituted terrorism, and significant support for the idea that terrorism did not extend to the acts of insurgents or "freedom fighters" in non-international armed conflicts, any such support fell far short of amounting to a general understanding which could properly be invoked as an aid to statutory interpretation. There was no rule of international law which required s.1 to be read down in that way.

39. In *Sarwar* (above), which was an appeal against sentence for an offence contrary to s.5 of the 2006 Act, Treacy LJ said, at [41]:

“We were urged to accept that based on the political considerations, the appellants’ admitted involvement with the Free Syria Army could be regarded as some form of noble cause terrorism. It seems to us that it would be wrong for this court to endorse such an argument. It would involve a consideration of the policies of HM Government, an area which courts have hitherto been very wary of entering into. To adopt such an approach would necessitate the court having to consider fine political arguments in a situation which is inherently fluid and uncertain, and where loyalties are not fixed or clear-cut. It was acknowledged that the situation in Syria is one which was constantly changing. What is clear to us is that the appellants’ conduct clearly came within the ambit of terrorism as defined in s.1 of the 2000 Act.”

40. After citing parts of [27] and [32] from the judgment in *R v F*, Treacy LJ continued at [43]:

“Whilst we recognise that F was concerned with criminal liability under s.58, those observations are persuasive in the present context. Accordingly, we are not prepared to regard so-called noble cause terrorism as mitigating sentence.”

41. In *Kahar* (above), after hearing submissions on behalf of the Attorney General and of Her Majesty’s Ministers on the issue, the five-judge Court gave comprehensive guidance in relation to sentence for offences contrary to s.5 of the 2006 Act. At [4] of the judgment, Lord Thomas CJ said:

“By virtue of the combination of section 20 of the 2006 Act; the definition of ‘terrorism’ in section 1 of the 2000 Act; and the decision of the Supreme Court in R v Gul [2014] AC 1260, paras 26-41, section 5 requires proof that an individual had a specific intent (albeit that it may have been general in nature) to commit an act or acts of terrorism (which include the use or threat of serious violence, or serious damage to property, or creating a serious risk to public safety or health; which is designed to influence the Government of the UK or any other country, or an International Governmental Organisation, or to intimidate the public, for the purpose of advancing a political, religious, racial or ideological cause) in this country or abroad, or to assist another to do so, and that he or she engaged in conduct in preparation for giving effect to that intention.”

42. At [8] Lord Thomas CJ cited [27] and [32] of the judgment in *R v F* (above) and noted that: “... This approach was expressly confirmed by the Supreme Court in R v Gul [2014] AC 1260. Para 26.”

43. At [13] Lord Thomas CJ continued:

“We entirely agree with the reasoning, quoted above, in both R v F and R v Sarwar and are fortified in that conclusion by submissions made on behalf of the Secretary of State. It must be clearly understood, in relation to all terrorist offences and terrorist related offences, that so-called just or noble cause terrorism is irrelevant to sentence and does not provide any mitigation...”

44. It is thus clear from the above-mentioned cases (two of which involved appeals against conviction, and the other two appeals against sentence) that, under the terrorism legislation, if the relevant conduct, actual or intended, is within the definition of terrorism in s.1 of the 2000 Act, the fact that it is said to be in a just or noble cause provides neither a defence nor mitigation.

45. Against that background, the elements of the offence contrary to s.5 of the 2006 Act were identified at [4] of the judgment in *Kahar* (see [41] above), and the elements of the offence contrary to s.8 of the 2006 Act were correctly identified by Edis J (see [17] above).

Abuse of process

46. Adopting the formulation of Lord Dyson JSC in *R v Maxwell* (above) at [13] & [14]:

“... it is well established that the Court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial and (ii) where it offends the court’s sense of justice and propriety to be asked to try the accused in the particular circumstances of the case..... In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court’s sense of justice and propriety (per Lord Lowry in R v Horseferry Road Magistrates’ Court ex parte Bennett [1994] 1 AC 42, 74G) or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in R v Latif [1996] 1 WLR 104,112F).

In Latif at pp.112-113 Lord Steyn said that the law in relation to the second category was settled. As he put it: The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires criminal proceedings to be stayed; R v Horseferry Road Magistrates’ Court, ex parte Bennett [1994] 1 AC 42. Ex p. Bennett was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The

speeches in Ex p Bennett conclusively established that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances would not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest that the court will not adopt the approach that the end justifies any means."

47. Over the years, and under the umbrella of what is now recognised to be the second category of abuse of process, there have been a number of cases in relation to alleged breaches of promise (express or implied) not to prosecute – including *R v Croydon Justices ex parte Dean* [1993] QB 769; *Mahdi* (CA 15 March 1993); *Bloomfield* [1997] 1 Cr. App. R. 135; *Townsend* [1997] 2 Cr. App. R. 540; *R v D* [2000] 1 Archbold News 1; *DPP v Edgar* (2000) 164 JP 471; *DPP v Taylor* [2004] EWHC 1554 (Admin); *Abu Hamza* [2007] QB 659; *Guest v DPP* [2009] 2 Cr. App. R. 26; *Gripton* [2010] EWCA Crim 2260; and *Killick* [2012] 1 Cr. App. R. 10 (in which the Court applied *Abu Hamza* but was not referred to *Gripton*).

48. In *Bloomfield* Staughton LJ said, at p.143:

"...It seems to us that whether or not there was prejudice it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat the court as if it were at its beck and call, free to tell it one day that it was not going to prosecute and another day that it was."

Of course, the circumstances of each case have to be looked at carefully and many other factors considered. As the court said in the Mahdi decision, we are not seeking to establish any precedent or any general principle in regard to abuse of process. We simply find that in the exceptional circumstances of this case an injustice was done to this appellant."

49. In *Abu Hamza* Lord Phillips CJ reviewed the then current authorities, and at [54] of the judgment observed that:

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

50. However, in *Gripton* at [27] & [28], this Court concluded:

“Thirdly, so far as the approaches propounded in Bloomfield and Abu Hamza are concerned, we note that neither was intended by the court adopting it to be a comprehensive binding rule. In Bloomfield Staughton LJ expressly stated that that the court was not seeking to establish any precedent or any general principle in regard to abuse of process. Similarly, in Abu Hamza Lord Phillips CJ emphasised the difficulties of propounding a test of abuse of process, and the formulation adopted in that case is expressed in terms that conduct would be unlikely to constitute an abuse of process unless certain criteria were satisfied. He was certainly not laying down requirements which would be indispensable in any case. The reason for this is clear: the courts are concerned with considerations of fairness and they must be free to respond to the circumstances of each case.

It is not difficult to see why, exceptionally, in the particular circumstances of Bloomfield, the court concluded that to continue with the prosecution would be an abuse of process, notwithstanding the absence of detrimental reliance by that appellant. The ultimate question will be whether to proceed with the prosecution will be an affront to justice.”

51. In our view, the combination of *Gripton* and the wider authorities, in particular *R v Maxwell* and *R v Warren (Curtis)*, shows, in relation to an alleged breach of promise not to prosecute case, that:

- 1) The abuse of process jurisdiction is not of a disciplinary character (e.g. *Maxwell* at [24] and *Warren* at [37]).
- 2) The threshold for the second category of abuse is a very high one.
- 3) It involves the exercise of a discretion which depends on the particular circumstances of each case and rigid classifications are undesirable (e.g. *Warren* at [36]).
- 4) The observation of Lord Phillips CJ at [54] in *Abu Hamza* is not a binding rule, but it remains a valid observation and not a bad rule of thumb.
- 5) However, the ultimate question is simply whether, in all the circumstances, a trial would offend the court’s sense of justice and propriety or would undermine public confidence in the criminal justice system and bring it into disrepute (e.g. *Maxwell* at [13]).
- 6) In the context of criminal proceedings, that requires an evaluation of what has occurred in the light of the public interest in ensuring that those who are accused of serious crime should be tried and the competing public interest in ensuring that executive conduct does not undermine confidence in the criminal justice system and bring it into disrepute (e.g. *Warren* at [36]).

- 7) The existence of a causative link between the alleged promise and the proceedings is neither a pre-condition nor a conclusive demonstration of abuse, it is simply a relevant consideration (e.g. *Warren* at [30]).
- 8) The gravity of any misconduct and the degree of culpability on the part of any wrongdoer, including the existence of any wrongful ulterior motive, are also likely to be relevant considerations.

Preparatory hearings & interlocutory appeals

52. Section 29 of the 1996 Act provides, in so far as relevant, that:

“(1) Where it appears to a judge of the Crown Court that an indictment reveals a case of such complexity, a case of such seriousness or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing –

(a) before the time when the jury are sworn, and

(b) for any of the purposes mentioned in subsection (2),

he may order that such a hearing (in this Part referred to as a preparatory hearing) shall be held,

...

(1B) An order that a preparatory hearing shall be held must be made by a judge of the Crown Court in every case which (whether or not it falls within subsection (1) or (1A)) is a case in which at least one of the offences charged by the indictment against at least one of the persons charged is a terrorism offence.

(1C) An order that a preparatory hearing shall be held must also be made by a judge of the Crown Court in every case which (whether or not it falls within subsection (1) or (1A)) is a case in which –

(a) at least one of the offences charged by the indictment against at least one of the persons charged is an offence carrying a maximum of at least 10 years’ imprisonment; and

(b) it appears to the judge that evidence on the indictment reveals that conduct in respect of which that offence is charged had a terrorist connection.

(2) The purposes are those of –

(a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,

(b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,

(c) ...

(d) assisting the judge's management of the trial,

(e) considering questions as to the severance or joinder of charges.

...

(6) In this section 'terrorism offence' means –

...

(g) an offence under Part 1 of the Terrorism Act 2006 (miscellaneous terrorist related offences):

(8) For the purposes of this section conduct has a terrorist connection if it is or takes place in the course of an act of terrorism or is for the purposes of terrorism.

(9) In subsection (8) 'terrorism' has the same meaning as in the Terrorism Act 2000 (see section 1 of that Act)."

53. Section 30 of the 1996 Act stipulates that if a judge orders a Preparatory Hearing the trial starts with that hearing, and that arraignment must take place at the start of that hearing, unless it has taken place before then.

54. Section 31 of the 1996 Act provides that:

“(1) At the preparatory hearing the judge may exercise any of the powers specified in this section.

(2) The judge may adjourn a preparatory hearing from time to time.

(3) He may make a ruling as to –

(a) any question as to the admissibility of evidence;

(b) any other question of law relating to the case;

(c) any question as to the severance or joinder of charges.”

55. As to interlocutory appeals to the Court of Appeal, s.35 of the 1996 Act provides that:

- “(1) An appeal shall lie to the Court of Appeal from any ruling of a judge under section 31(3) ... but only with the leave of the judge or of the Court of Appeal.
- (2) The judge may continue a preparatory hearing notwithstanding that leave to appeal has been granted under subsection (1), but the preparatory hearing shall not be concluded until after the appeal has been determined or abandoned.
- (3) On the termination of the hearing of an appeal, the Court of Appeal may confirm, reverse or vary the decision appealed against.”

56. In *R v H* [2007] UKHL 7; [2007] 2 A.C. 270 the House of Lords was concerned with the predecessor power, under s.7(1) of the Criminal Justice Act 1987 (“the 1987 Act”), to hold Preparatory Hearings in serious fraud cases. At [32] of his judgment Lord Scott held that:

*“The common thread that runs through all these purposes is, surely, that of producing efficient and expeditious disposal of the criminal proceedings in question and thereby of avoiding, or reducing to a minimum, any waste of the judge’s time, the jury’s time or the time of the lawyers engaged in the case. Some of the previous case law had held that an application to quash an indictment (*R v Hedworth* [1997] 1 Cr. App. R. 421) or to stay proceedings (*Gunawardena* [1990] 1 WLR 703), or to obtain a ruling that the prosecution was bound to fail (*R v van Hoogstraten* [2003] EWCA Crim 3642; *The Times*, 24 December 2003), would fall outside the section 7(1) purposes and therefore could not be dealt with at a section 7(1) preparatory hearing. These cases should, in my opinion, be treated, on that point, as wrongly decided. Every such application would, unless it were unarguable, tend to promote the efficient and expeditious disposal of the criminal proceedings in question and would, in my opinion, come within the section 7(1) purposes, broadly and purposively construed. I am, therefore, in respectful agreement with the views about the breadth of section 7(1) purposes expressed by Lord Mance in para 91 of his opinion and by Lord Rodger in paras 50 and 53 of his.”*

57. However, that approach must be read in the light of the subsequent decisions of this Court in *R v I, P, O, I & G* [2009] EWCA Crim 1793, [2010] 1 Cr.App.R. 10; *R v Z* [2009] EWCA Crim 2476; *R v C* [2010] EWCA Crim 2578; *R v VJA* [2010] EWCA Crim 2742; and *Lear & Lear* [2018] EWCA Crim 69.
58. In *R v I, P, O, I & G* Hughes LJ (as he then was) explained the novel development of preparatory hearings that was contained within the 1987 Act and subsequent legislation and observed (at [3]) that case management had “*come a long way in the meantime*”. Having provided many examples of those developments he said at [4]:

“For all practical purposes, the court now has exactly the same powers of management in a non-preparatory hearing case as it has in one where a direction for a preparatory hearing is given. We leave to one side the special rules where non-jury trial is under consideration (sections 43-35 Criminal Justice Act 2003). Otherwise, the sole practical difference which counsel or we have been able to identify is that in the case of the preparatory hearing a ruling of law or as to severance may be challenged by either side by interlocutory appeal: section 35(1) and 31(3) CPIA or sections 9(11) and 9(3) CJA 1987. In the case of a ruling given outside a preparatory hearing there is no general power of interlocutory appeal; the only avenue of such appeal which exists is that available to the Crown under section 58 Criminal Justice Act 2003 in the limited circumstances in which it is willing to give the undertaking stipulated for in section 58(8) that acquittal shall follow a failure of its appeal.”

59. At [21] Hughes LJ continued:

“Virtually the only reason for directing such a hearing nowadays is if the judge is going to have to give a ruling which ought to be the subject of an interlocutory appeal. Such rulings are few and far between and do not extend to most rulings of law. An interlocutory appeal can be a most beneficial process in a few, very limited, circumstances. If a discrete point of law arises, its resolution in this court can if necessary be accomplished with a very short time-frame and this can avoid the risk of many weeks of wasted trial time. On the other hand, many points of law decided in the Crown Court turn out to be fact-sensitive and to appear differently, or for that matter to go away, by the time the evidence has been heard. Making a decision on one part of a case only and on necessarily hypothetical facts is normally very undesirable; whereas a ruling in the Crown Court can be varied from time to time if the case proceeds differently from what was expected, a ruling of this court cannot normally be treated similarly. An interlocutory appeal is apt to cause serious disruption to a carefully planned trial timetable, which may involve multiple defendants and their lawyers and large numbers of witnesses. If the timetable of one case is disrupted, it very often has a knock-on effect on the timetables of others. Moreover, if the tendency of an interlocutory appeal to have this consequence is to be minimised, it is essential for this court to give it priority over other waiting appeals. This is not only potentially unfair to those who are in custody following conviction; it is also impossible unless interlocutory appeals are very exceptional. The present case did, as we have indicated, present a good example of a justified interlocutory appeal. The point was discrete, novel, certain to arise rather than hypothetical or

contingent, involved no factual dispute and needed authoritatively to be determined lest the trial proceed on what might turn out to be a false footing, with consequent risk of the necessity of re-trial. By contrast, rulings where the judge has applied well-understood principles to the case will not be suitable for interlocutory appeal even if they may properly be described as questions of law; rulings upon severance are amongst those likely to fall into this category. Nor will those where the ruling is to any extent provisional or dependent upon the way in which the evidence emerges, it is important to remember that the decision to declare a preparatory hearing is for the Judge alone; it cannot be made by agreement between the parties. Nor is it reason for making an order for a preparatory hearing that one or other party would like the opportunity of testing some ruling by way of interlocutory appeal, unless the point is one of the few which is genuinely suitable for such a procedure.”

60. Finally, at [22(i)] Hughes LJ concluded:

“Given the co-extensive powers of case management outside the preparatory hearing regime, courts ought to be very cautious about directing a preparatory hearing under section 29 CPIA or section 7 CJA 1987; in particular, the desire of one party to test a ruling by interlocutory appeal is not a good enough reason for doing so, unless the point is one of the few which is genuinely suitable for that procedure (see para 21 above) and there is a real prospect of such appeal being both capable of resolution in the absence of evidence and avoiding significant wastage of time at the trial.”

61. That guidance was emphasised in *R v Z* (above), and was endorsed by Thomas LJ (as he then was) in *R v C* (above), in *R v VJA* (above) at [39], and by Sir Brian Leveson P in *Lear & Lear* (above) who said (at [53]): “...in the modern landscape of criminal procedure, it replaces the more generous formulation identified in *R v H*.”

62. As to interlocutory appeals to this court in relation to rulings made in the context of a preparatory hearing ordered under the 1987 Act, in *R v VJA* (above) at [43] Aikens LJ said:

“It is our view that, even if there was a question of law that comes within section 9(3)c of the 1987 Act and so this court has jurisdiction to grant leave to appeal pursuant to section 9(11), there remains a further exercise of judgment that this court must make before it decides whether or not to do so. The right to have an interlocutory appeal remains an exceptional right in Crown Court trials. Even if a question comes under section 9(3)b or (c), it is only in appropriate cases that the court should permit an applicant to exercise the right granted by section 9(11) of the 1987 Act.”

63. The same approach must apply in relation to interlocutory appeals under s.35(1) and 31(3) of the 1996 Act.

The submissions

Appeal Ground 1 – Legitimate expectation

64. On behalf of the Applicant, Mr Andrew Hall QC accepted (for present purposes) that the Applicant could have a fair trial and, having referred to *R v H* and *R v VJA* (at [37]), also accepted that he could only succeed on any of his Grounds if the relevant aspect of the ruling fell within s.31(3)(b) of the 1996 Act. Here there were, he submitted, underlying issues of law which went to the route of the trial that the Judge was wrong in law to conclude that the Applicant's legitimate expectation was of no relevance, given that by reference, for example, to *Ex parte Dean* (above), it is trite law that a prosecution in breach of an assurance upon which a defendant has relied is capable of amounting to an abuse of process, even in the absence of bad faith / misconduct, and even though such a stay should be rare. The test to be applied was that set out in *Abu Hamza*, which was a definitive statement of the law. It was also important to note that some who had returned from Iraq and Syria had been feted and had appeared on television; that in some cases charges had been dropped and the Respondent would not say why; that no one had been prosecuted to conviction; that no change of policy had been announced; and that the Respondent had no explanation for the sudden prosecution of the Applicant.
65. Whilst Mr Hall accepted that not every public law error justifying a quashing order must automatically result in a stay of criminal proceedings, he submitted that the review and abuse jurisdictions were analogous in the context of a legitimate expectation upon which a defendant had relied to his detriment, and circumstances sufficient to quash a decision to prosecute would be highly unlikely to be remitted for a fresh decision as envisaged by the judge. Rather, the case would be brought to a close because the decision was irrational, illogical and lacked transparency such that any future prosecution in the face of the legitimate expectation would undermine the integrity of the justice system and would amount to an abuse.
66. Further, Mr Hall submitted that the Judge's approach was wrong and that he had reached a conclusion that no judge should have reached in the circumstances. In particular, in view of *Ex parte Dean* and *Abu Hamza*, he had been wrong in law that there had to be a categorical assurance, bad faith and necessary authority. The judge was wrong to conclude that deliberate deception of police officers was not capable of undermining the Court's sense of justice and propriety. Rather, it was inconceivable that anything had been withheld from the Chief Inspector and was a factor to be weighed heavily in favour of a stay – all the more so in this case, given the Applicant's substantial vulnerability and desperate state at the time of his dealings with Chief Inspector Court. Equally, deliberate lies told in order to bring a person within the jurisdiction in order to imprison and prosecute him was manifestly capable of undermining public confidence in the criminal justice system – with many of the concerns in this case being analogous to those in the abduction and entrapment cases, which generally militate in favour of a stay.

67. In addition, Mr Hall submitted, in declining to grapple with the question of legitimate expectation, the Judge's ruling had ignored important matters that he was required to weigh in favour of a stay. In particular:
- 1) The Judge's ruling failed to recognise that the Applicant had acted to his detriment in returning into the jurisdiction, rather than going elsewhere (including EU states where he would have been entitled to reside without prosecution). Thus, but for the deliberate deception of the police, the Applicant would not have been facing prosecution and would not have lost his liberty in the process.
 - 2) The effect of the senior police officer's assurances had to be seen in the context of the other matters relied on as giving rise to the Applicant's legitimate expectation, including:
 - (a) The decision not to prosecute him for his conduct before his departure, and to facilitate his departure to Syria via the return of his passport, even though it was known that he intended to travel and to fight against Daesh.
 - (b) Public statements of HM Government ministers and parliamentarians from 2000 onwards refuting suggestions that terrorist legislation would ever be deployed against persons such as the Applicant and endorsing the activities of the Kurdish groups / the YPG.
 - (c) The consistent practice of non-prosecution in respect of all YPG volunteers, as demonstrated by the details in the Applicant's Annex A.
 - 3) The Judge's failure to acknowledge or to consider any of those matters was wrong in principle and unreasonable.
 - 4) The case law had repeatedly emphasised the important public interest in avoiding the impression that the end justified the means, and the Judge's reasoning gave just such an impression and was wrong in law and principle.
68. On behalf of the Respondent Mr Mark Heywood QC underlined that his primary general submission was that the Judge's decision was a fact-specific application of existing and uncontroversial legal principles and that, as with the issue of disclosure in *R v H* (above), either there was no question of law within the meaning of s.31(3)(b) of the 1996 Act, or no question that merited the consideration of this Court. In the alternative, if any question of law was raised, an appeal at this stage was premature, since questions such as extent and ambit of s.1 of the 2000 Act, and the way in which a jury ought to be directed about it, could only finally be resolved once evidence had been heard. Indeed, the Judge's ruling had made plain that the question of a potential stay would be reconsidered at the conclusion of the Respondent's case. In addition, no general issue of principle was created by this prosecution that may have ramifications for future cases, and while the Judge was prepared to assume certain facts for the purposes of the argument before him, those facts may not be established during the trial – therefore examination by this Court at such an early stage, in the absence of a completely established and agreed factual matrix, would not produce any clarity in respect of any potential prosecutions either.

69. As to legitimate expectation, Mr Heywood submitted that the Judge's findings of fact had entirely disposed of legitimate expectation. He had correctly concluded that the Applicant had no legitimate expectation that he would not be prosecuted - given that he had found as facts that no promise had been made to the Applicant by Chief Inspector Court (who was the officer with whom the Applicant had been in contact prior to his return) to the effect that he would not be prosecuted, and that the Chief Inspector had not been in a position to give any promise. Equally, Mr Heywood underlined, the Judge had made no finding that the Chief Inspector had employed any subterfuge. The Judge's approach was obviously correct both factually (given the text of the exchanges between the Applicant and the Chief Inspector) and legally (given that the Chief Inspector had no power to authorise or to initiate criminal proceedings). Whilst the Judge was prepared to assume in the Applicant's favour that a decision to prosecute him had been taken prior to the Chief Inspector's last email to him, and that that fact was deliberately withheld either by or from the Chief Inspector, the judge was entitled to conclude, as he did at [23] of his judgment, that:

“It is apparent from the emails that the defendant did not trust the assurances which he was given. He knew that he was taking a risk that he might be prosecuted if he returned, and had been told this in terms in the letter he received before his death. He never received a categorical assurance that he would not be prosecuted from a person in a position to give such assurances and, it seems, he knew it.”

70. Against that background, Mr Heywood submitted that the Applicant's submissions as to the extent and consequence of any overlap between legitimate expectation in public law and the abuse of process jurisdiction in criminal law was a matter of academic interest only; that the applicant's history of mental illness and alleged relative vulnerability were ultimately irrelevant to the issue; and that the issue of whether a deliberate lie told to lure an individual into the jurisdiction was analogous to a kidnap or unlawful rendition case was also ultimately irrelevant. As was whether or not the Applicant had acted on any mistaken reliance on what he perceived he was being told by the Chief Inspector.

71. Mr Heywood further submitted that, in reality, the chronology of engagement between the Applicant and the Chief Inspector did not support the suggestion that the Applicant's return to this country was the product of their exchanges. Rather the Applicant appeared to have made the decision without particular reference to what he had been told. For example, in November 2017 he had informed the Chief Inspector that he would be remaining in Syria “till ISIS are done” only to reverse that, without any further significant interaction, a month later; there had been a gap between the last communication and the Applicant's final return, during which the Applicant had recorded in his diary that he was being “fucked over by our government who are refusing to assist me to get home”; and his diary entries (which were confessional in nature) made clear that there were a number of reasons for his return – but there was no mention in the diary of any assurances playing a part in his thinking.

72. Mr Heywood continued that the return of the Applicant's passport before he had travelled to Syria had been because there was then insufficient evidence to charge him with any offence, and thus no ground upon which the passport could be retained by the police. In addition, the Applicant had, at least partially, disguised his route of

travel into Syria, which suggested a recognition on his part that a degree of concealment (inconsistent with a belief that his travel had been officially sanctioned) was required. Equally, no public statements by HM Government ministers about the activities of the YPG could possibly be said to amount to any promise, express or implied, to the Applicant that if he took the decision to travel and to fight with the YPG (and PKK) in its broader aims, he would not be prosecuted. Finally, the question of whether other EU states would or would not have prosecuted the Applicant on his return was irrelevant, and also ignored the European Arrest Warrant scheme.

Appeal Ground 2 – Legality

73. Mr Hall submitted that the prosecution and the way in which it was advanced lacked certainty, precision and predictability, was unprincipled and arbitrary and thus manifestly failed the test of legality and was a disproportionate interference with the Applicant's Convention rights. The Judge had been wrong to conclude otherwise. Mr Hall further submitted that the Judge's ruling had entirely failed to grapple with the issues raised as to the legality of the prosecution and uncertainty in the application of s.1 of the 2000 Act, and that in concluding that there was "*no Convention right which guarantees a freedom to travel abroad as an individual and take part in a civil war in a foreign state*" the Judge's approach had been fundamentally flawed, given that:

- (1) The Applicant is not being prosecuted for fighting as such, but rather for attendance at training camps and association with groups – which activities plainly engaged Convention rights (against the background that in its Third report the Joint Committee on Human Rights specifically doubted the compatibility with Article 10) and interference with such rights must, applying *R (Purdy) v DPP* (above) be 'in accordance with the law' – i.e. sufficiently accessible and precise to allow understanding so that individuals can regulate their conduct accordingly and not applied in an arbitrary way, in bad faith or disproportionately.
- (2) The Respondent's approach to the legislation had very significant and far reaching consequences more generally, given that:
 - (a) The decision to define the YPG (which was recognised and approved by the Syrian Government) as a terrorist organisation, effectively proscribed it by the back door, and criminalised anyone associating with it or providing support to it.
 - (b) It has the effect that any group (whether proscribed or not) which takes up arms to defend itself and/or others from terrorism may now be defined as "terrorist", with the activities of those who support them being criminalised – such as to result in a chilling effect and disproportionate interference with a very broad range of activities engaging basic freedoms of belief, expression and association.
 - (c) The positive obligations engaged by Article 2 to protect and preserve life are also arguably defeated by the over broad interpretation in criminalising as terrorist those using force to defend themselves and others from terrorism.

- (d) The requirement that the law must be sufficiently certain, both in its terms and in its application, is a core principle of the common law – as confirmed by the House of Lords in *R v Rimmington, R v Goldstein* [2006] 1 AC 459, and the law must be enforced in a manner that is predictable, consistent and in accordance with settled principle and practice, rather than enforced in a way that is arbitrary or discriminatory – otherwise the prosecution of offences becomes a game of chance, rather than the rule of law. Indeed, in *R v Gul* (above) the absence of certainty from an overwide definition of terrorism was raised as a concern.
- (e) It has a chilling effect on a broad range of civil activities - including a disproportionate interference with freedom of association.
- (3) In adopting the Respondent’s approach that legality was concerned only with whether the words of a provision were capable of comprehension, and failing to address the foreseeability of the law’s application, the Judge had ignored the significant body of authorities that highlighted the dangers of a ‘literal approach’ to the definition of terrorism, such as producing a result contrary to the intentions of Parliament; ignoring the requirements of internationally agreed conventions and norms; producing unintended and unpalatable consequences for a broad range of citizens, including disproportionate interference with the activities of journalists and academics; and the resultant danger of key terms such as ideology becoming so broad as to render the definition effectively meaningless.
- (4) The extent to which the definition contended for by the Crown was capable of certainty also had to be seen in the light of clear indications from parliament, the government and HM Armed Forces that the YPG was not to be considered a “terrorist” group, and of a consistent practice of non-prosecution in like cases.
74. Mr Heywood underlined that the Applicant faced charges of statutory (rather than common law) offences, and that all the relevant authorities, including *R v Gul*, indicate that the definition in s.1 of the 2000 Act is clear and ascertainable, albeit in wide terms. Likewise, the elements of the offences in sections 5 & 8 of the 2006 Act were also clear. In the result, all clearly met the test of being ascertainable with informed advice. The Judge was obviously correct to determine that no human rights issue arose from the applicant’s decision to travel to Syria and to take part in the civil war there; e.g. in light of *R v G* [2009] 1 AC 92 it was difficult to see how Article 8 was engaged; and that, in any event, any such interference as may have occurred was ‘according to law’.
75. Mr Heywood continued that the Applicant’s further criticism of the judge, on the basis of the Applicant’s contention that he “*is not being prosecuted for taking part in a civil war in a foreign state*”, was to adopt an overly literal reading of the Judge’s words. Whilst it was correct that the Counts on the indictment relate to narrower aspects of his conduct, it was meaningless to divorce that conduct from the wider factual underpinning of the Prosecution case - which is concerned with the Applicant’s decision to train in the UK to travel to Syria to take an armed part in a civil war there and, when there, to train to use weapons and to fight with the YPG and the PKK as part of their conflict with both ISIS and with other governmental bodies. It could not sensibly be suggested that a human right, protected by the ECHR, generally to engage in such activity existed.

76. In any event, Mr Heywood submitted, to any extent that the Applicant's Convention rights were interfered with by the prosecution, that was plainly 'in accordance with the law' – given that the offences were created by statute, the relevant sections (including s.1 of the 2000 Act) were clear and unambiguous on their face, and there was thus no uncertainty or lack of clarity.
77. Further, Mr Heywood submitted, the prosecution of the Applicant did not have the effect of proscribing the YPG by the back door. Rather, it amounted to no more than a decision to prosecute an individual on the specific facts in his case – it being the Respondent's case that the Applicant's conduct while with the YPG involved the use of firearms and/or explosives and using or threatening conduct within s.1(2) of the 2000 Act for the purpose of advancing a political, religious, racial or ideological cause. Thus, it was wrong to suggest that the decision to prosecute criminalised anyone associating with or providing support to the YPG – not least as, in general, those who do no more than associate with the YPG do not attend their training camps, or engage in preparation to commit acts caught by s.1(2) of the 2000 Act, or actually engage in armed combat with them (and the PKK) as the Applicant did.
78. Mr Heywood submitted that on any interlocutory appeal, to be decided before the evidence in the case has been heard and tested, this Court should be very slow to engage in analysis of hypothetical factual and legal scenarios not firmly rooted in the case – such as the position of other groups, including journalists and academics.
79. Finally, Mr Heywood submitted that it was unclear how reliance on indications from Parliament, the Armed Forces and HM Government that the YPG is not a terrorist organisation related to any alleged Convention right of the Applicant himself. There was a very considerable difference between officially sanctioned support for some of the aims of a paramilitary organisation such as the YPG (where they overlapped with those of the Government) and the creation of a positive ECHR-protected right for a private citizen unofficially to travel abroad to fight with it as a paramilitary soldier. Thus, for the reasons identified by the Judge at [40] of his ruling (see [24] above), they did not.

Appeal Ground 3 – Affront to the criminal justice system

80. Mr Hall submitted that the Judge's ruling failed to give any (or any adequate) reasons as to why the Respondent's failure to treat like cases alike, in the absence of any rational explanation for doing so, was not capable of offending against the Court's sense of justice and propriety, and that such a conclusion was not reasonable.
81. The Respondent's refusal, or inability, to provide a rational basis for the exercise of its discretion was, Mr Hall submitted, in itself a matter which seriously undermined public confidence and was particularly concerning in the context of the exercise of a discretion to prosecute which carried wide-ranging consequences of the utmost gravity – including remand in custody for a lengthy period prior to any determination of guilt.
82. Mr Hall continued that the decision to prosecute, and the absence of any rational explanation for it was all the more concerning given the very narrow and technical basis upon which the Respondent now advances its case, against the background of which the policy considerations cited by the judge (see [24] above) were irrelevant.

He underlined that the Respondent accepts that prosecution for military activity against Daesh is neither appropriate nor in the public interest, and that the Applicant is being prosecuted on a very narrow and technical basis for preparing to join a group which had some subsidiary political beliefs which might be pursued at some unspecified future time, and for mere attendance at camps specifically requiring no proof of terrorist intent – such that general policy reasons for preventing people fighting overseas could not weigh in favour of continued prosecution.

83. Further, Mr Hall submitted that the Judge was wrong in principle not to order disclosure of material which bore upon whether the exercise of the discretion to prosecute amounted to an abuse of process, and which had deprived him of the very information that he needed to properly adjudicate, and had put the cart before the horse in the process and had disabled himself and had disabled the Applicant from driving home his submissions. If the arbitrary exercise of the discretion to prosecute was capable of amounting to an abuse in law, then a direction should follow to require disclosure of any material that might cast light on the existence of a prosecution policy and its terms, or the factors taken into account in the decision to prosecute the Applicant but not others. Absent evidence, the judge was not entitled to presume that the decision was not arbitrary, contrary to settled policy or practice, or the product of improper considerations – all of which would weigh in favour of concluding that the prosecution undermined the integrity of, and public confidence in, the criminal justice system. This case was to be distinguished from those in which challenge to disclosure decisions by way of interlocutory appeal had been held to be inadmissible. Here disclosure related to abuse of process, not trial evidence.
84. Mr Heywood submitted that the Judge had properly considered the question of whether there was an affront to the criminal justice system as a result of the Respondent not providing reasons why others in a similar position to the Applicant have not been prosecuted, and in doing so had assumed the position most favourable to the Applicant - correctly directing himself as to his constitutional position in relation to this issue, and reaching a rational decision that was well within his discretion.
85. Mr Heywood submitted that this was not a novel prosecution. The Applicant was not the first to be tried for these offences, nor the first individual with associations with the PKK to be prosecuted. Nor was this the first prosecution of an individual returning from fighting in Syria. It was simply the first prosecution of an individual who had fought, in part, against Daesh. Equally, it was not uncommon for a selective approach to be taken by the prosecuting agencies to prosecutions and who to prosecute; and for many very good and sound public policy reasons, a prosecuting agency may be unable to reveal the full extent of its reasoning in relation to its decisions to prosecute or not prosecute. Indeed, in [47] of his ruling the Judge had recognised that his position did not give him oversight of the basis upon which the decisions to prosecute in this case, let alone in others, were made. No question of law arose.
86. Mr Heywood further submitted that, ultimately, the Applicant's complaint was that he had been prosecuted when others who were broadly (but not exactly) in the same position as he was had not been; and that the judge was right in his assessment of the case (at [47] of his ruling), namely that:

“...the integrity of the system of justice will be best affirmed by the trial of these allegations and, if there are convictions, by a fair sentencing process...”

87. Mr Heywood underlined that it was not accepted that the Applicant faced trial on a very narrow and technical basis, but submitted that, even if that was right, the trial process was plainly equipped to deal with it – as demonstrated by the fact that prosecutions are often brought on narrow bases, and prosecuting agencies have to accept that overcoming the burden and standard of proof in such cases is correspondingly more complex.
88. Further, Mr Heywood submitted that the Applicant’s complaints about the Judge’s failure to order greater disclosure ignored the fact that, in the absence of reasons why others had not been prosecuted, the Judge had made clear, at [42] and [43] of his ruling, that he was determining the application on the basis that no rational basis for the prosecution of the Applicant had been put forward and that the Applicant was correct in his assertions as to how other cases had been treated. Thus, the application had been considered on the most favourable basis to the Applicant.
89. Finally, Mr Heywood emphasised that the Respondent was well aware of its duty of candour and that it was required, under the disclosure regime, and as part of initial disclosure, to disclose any material that might reasonably be considered capable of supporting an abuse of process application. As recorded by the Judge in [32] of his ruling, the Respondent had asserted that the Crown had no policy as to when to prosecute persons who travel abroad to fight as individuals in foreign conflicts and when not to. However, there was a limited CPS policy statement in existence (see [12] above), and if there had been any material that fell to be disclosed in this regard, the Respondent would have discharged its duty in relation to it.
90. Mr Hall responded that no comparative case had been cited; that the Respondent had not contradicted the accuracy of the Applicant’s Appendix A; that whilst the Attorney General is answerable to Parliament a long line of authority as to the supervisory judgment of the courts and *Purdy* made clear that that should be exercised. It was cold comfort for the Applicant, in custody, if the judge was right that the best course was a fair trial and (if convicted) sentence.

Appeal Ground 4 – Cumulative consideration

91. Mr Hall submitted that it was beyond argument that, when weighing in the balance the competing public interests of ensuring that those accused of serious crime are tried and of ensuring that public confidence in the criminal justice system is not undermined or the system brought into disrepute, all relevant circumstances had to be considered. Thus, the judge had to consider the cumulative effect on public confidence of all the matters raised, including:
- (1) The fact that the prosecution appeared to be in direct contradiction of the Government’s stance as to the status of the YPG as a non-terrorist organisation.
 - (2) The effect on public confidence of the suggestion that the Applicant had carried out ‘terrorist acts’ with the support of the RAF and British military forces.

- (3) The fact that the prosecution appeared to be contrary to the intentions of parliament.
 - (4) The fact that the prosecution had been achieved through the deliberate deception of a vulnerable man in order to bring him within the jurisdiction in order to prosecute and imprison him.
 - (5) The fact that the Applicant had relied to his detriment on the deliberately misleading assurances given to him by the police.
 - (6) The Applicant's history of vulnerability and mental illness.
 - (7) The consistent practice of declining to prosecute similar cases.
 - (8) The refusal by the Respondent to provide any explanation for the failure to treat like cases alike.
 - (9) The fact that the prosecution of a man who had risked his life to fight against a murderous terrorist group alongside British Forces was likely to be seen by the public as being a disproportionate waste of public resources.
 - (10) The wide-ranging and undesirable 'chilling effect' that the Respondent's approach may have upon the exercise of Convention rights, including freedom of expression and association.
 - (11) The fact that the prosecution ignores the requirements of international Conventions and Directives.
 - (12) The fact that the Applicant is not being prosecuted for fighting, use of weapons or any other military action.
92. When all those matters were weighed in the balance it was clear, Mr Hall submitted, that this was an exceptional case likely to outrage the public and to seriously undermine confidence in the justice system. Thus, the prosecution ought properly to be stayed to preserve the integrity of the Court's process.
93. Mr Heywood submitted that none of the matters raised had any substantial merit and that it would have been wrong for the judge to conclude that, taken as a whole, they should result in a stay. The various matters were considered by the Judge, and he reached conclusions adverse to the Applicant which were well within his discretion. Thus, whether viewed individually or cumulatively, they did not give rise to any Ground upon which this Court ought to rule that the Judge's discretion was wrongly exercised.

Leave to appeal

94. Mr Hall submitted that the proper approach was that set out in the judgment of Lord Scott in *R v H* (see [57] above), and that accordingly the appeal ought properly to be determined at this stage, given that abuse of process was specifically recognised by the House of Lords to amount to a matter of law within a preparatory hearing (and from which an appeal should therefore lie); resolution of the abuse question now would be the most efficient and expeditious way to dispose of the proceedings; the

Judge's ruling fell squarely within the parameters of 'questions of law' envisaged in *R v H* and involved a discrete legal issue the factual background of which was clear; the decision to prosecute and the way in which it is advanced involved significant issues of principle and had wide-ranging implications, not least for others at risk of prosecution for supporting non-proscribed groups; the factual matrix accepted by the judge is novel; the case is exceptional in many respects and falls outside the scope of any circumstances previously considered by the criminal courts; and clarity is necessary, and urgently required, both in this case and for the benefit of the public.

95. Applying *R v VJA* at [43] the questions of law involved in the case were novel and complex; no-one had ever been prosecuted to conviction in the Applicant's circumstances; and the consequences for the Applicant were great because he was in custody. On a literal interpretation, section 1 of the 2000 Act put YPG supporters in jeopardy and criminalised not only members of the public but also journalists visiting camps. Absent a policy, prosecution was a lottery and there was no guarantee that the same approach would not be applied to offences relating to finance and other support.
96. As indicated above, Mr Heywood's primary submission was that the judge's decision was a fact-specific application of existing and uncontroversial legal principles – such that, as with the questions of disclosure in *R v H* (above) either there is no question of law within the meaning of s.31(3)(b) of the 1996 Act, or no question of law which merits consideration by this Court. Alternatively, if any question of law was raised, an appeal is premature at this stage, since questions such as the extent and ambit of s.1 of the 2000 Act can only finally be resolved once evidence has been heard, and Edis J made clear in his judgment that the question of a potential stay will be reconsidered at the conclusion of the Respondent's case.

Reasons

97. The Judge's ruling involved two principal decisions, namely that:
 - (1) On the assumed facts that he found, the prosecution of the Applicant up to that point was not an affront to the integrity of the criminal justice system.
 - (2) Despite his unease as to the prosecution of a man who was able to say that at least some of the acts of terrorism for which he was preparing or trained were carried out with the support of the RAF, he could not say that the continuation of the prosecution was an affront to the system of justice; but rather had concluded that the integrity of the system of justice would best be affirmed by a trial of the allegations in which, at the conclusion of the prosecution case, he would consider whether he was satisfied that the Respondent had advanced a case to answer and had also set out a case which could fairly and intelligibly be left to the jury (with a potential stay for abuse of process if they had failed in the latter); and at the conclusion of which, if convicted, there would be a fair sentencing process.
98. As to the first decision, we concluded that:
 - (1) The factual basis upon which the Judge proceeded (which included assumptions in favour of the Applicant) was clearly open to him.

- (2) It included (even assuming in the Applicant's favour that a decision to prosecute him had already been made by the time of his last communication with Chief Inspector Court, and that that was deliberately withheld either from or by the Chief Inspector) the conclusions that the Chief Inspector was doing his job in trying to persuade the Applicant to return to the UK; that the Chief Inspector was not in a position to give a promise that the Applicant would not be prosecuted and did not so; that, on the Applicant's case the information that the Chief Inspector had passed on was largely true; that the Applicant never received a categorical assurance that he would not be prosecuted from a person in a position to give such assurances and it seemed that he knew it; that the Applicant did not trust the assurances that he was given; and that the Applicant knew that he was taking a risk that he might be prosecuted if he returned (having been told that in terms in a letter that he had received before he had departed).
- (3) Albeit that, as to abuse of process, both parties invited the Judge to apply the approach in *Abu Hamza*, he was clearly right (not least in the light of *Gripton*) to decide the issue, as he did, by ultimately asking himself whether the prosecution was an affront to the integrity of the criminal justice system (which was clearly his shorthand expression of the test identified in *Maxwell*).
- (4) Equally, the Judge was right to identify the obvious differences between this case and the abuse of process cases involving kidnapping or entrapment.
- (5) The Judge was also right not to concern himself with whether there might have been, in public law terms, a legitimate expectation. As he concluded, the introduction of that concept into an application to stay as an abuse of process in criminal proceedings (on the basis that a trial would offend the court's sense of justice and propriety, or undermine confidence in the criminal justice system and bring it into disrepute) runs the risk of watering down the test and (we would add) of unnecessarily confusing the issue. As the Judge put it "*The public law concept of legitimate expectation sits uneasily with the hopes and fears of a person suspected on reasonable grounds of having committed serious criminal offences and facing prosecution for them. That person has the protections of the criminal law and of Article 6, and is entitled, as a matter of law to a fair trial. The role of any expectation that person might have as to how he will be treated.*" In any event, on the facts that the Judge found, legitimate expectation did not arise.
- (6) As he anticipated may be the position, we differed from the Judge only to the extent that, although the holding of a preparatory hearing was compulsory in this case, it was not appropriate, in our view, to include this decision within it as, applying the guidance of Hughes LJ at [21] in *R v I, P, O, I & G* (see [59] above), no question of law under s.31(3)(b) of the 1996 Act arose which, as Mr Hall accepted would be the case, was fatal to the application for leave.
- (7) In the alternative, if we were wrong about that, and in so far as any aspect of the decision did come within s.31(3)(b), given the factual findings and the application of the correct test, the Judge was clearly right to conclude as he did.
- (8) Ultimately, as to the first Ground of Appeal, that this was not one of the exceptional cases which raised issues suitable for an interlocutory appeal so as to

justify, in the exercise of the discretion identified by Aikens LJ at [43] in *R v VJA* (see [62] above) the grant of leave by this court.

99. As to the second decision, we concluded that:

- (1) As set out in [31] – [46] above, the relevant aspects of the 2000 and 2006 Acts are clearly sufficiently certain, both in their terms and their application.
- (2) Equally the Applicant’s argument that consideration of his Convention rights should be considered upon the basis that he was not being prosecuted for fighting as such ignored the wider realities of the case.
- (3) We doubted that the Applicant’s Convention rights were interfered with in the way suggested or at all, but to any extent that they were, the interference was in accordance with the relevant law.
- (4) The Applicant’s arguments as to a chilling effect were considerably overstated.
- (5) Against the background of the Respondent’s duty of disclosure, the Judge was entitled to deal with disclosure in the way that he did.
- (6) The Judge was entitled, for the reasons that he gave, to conclude that the integrity of the system of justice will be best affirmed by a trial of these allegations and, if there are convictions, by a fair sentencing process – with stock being taken at the conclusion of the Respondent’s case and consideration given, as necessary, to abuse of process.
- (7) As the Judge’s decision was expressly provisional and dependent on the way that the evidence emerges at trial, and as the Judge also anticipated may be the case, again applying the guidance of Hughes LJ in *R v I, P, O, I & G* (as in relation to the first Ground of Appeal) no question of law under s.31(3)(b) of the 1996 Act arose, and thus the second and third Grounds also failed. Equally, if we were wrong about that, and any aspect of the judge’s decision did come within s.31(3)(b), he was clearly right to conclude as he did.
- (8) Finally, as in relation to the first Ground, that the case did not raise issues suitable for an interlocutory appeal so as to justify, in the exercise of our discretion, the grant of leave.

100. Lastly, in our view there was no substance in the matters relied on in the fourth Ground, and thus in their combination. Accordingly, we decided, in the exercise of our discretion, to refuse leave on that Ground as well.

Conclusion

101. It was for those reasons that we refused leave to appeal.