Neutral Citation Number: [2016] EWHC 1872 (Admin)

Case No: CO/1482/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
LEEDS DISTRICT REGISTRY
HHJ MORELAND SITTING AT NEWCASTLE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2016

Before:

LORD JUSTICE TREACY
and
MRS JUSTICE NICOLA DAVIES

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Between:

The Queen	**Claimant**
(on the application of XY)	
- and -	
(1) The Crown Court sitting at Newcastle	
(2) The Chief Constable of Northumbria	
(3) The Director of Public Prosecutions	**Defendants**
- and –	
26 Interested Parties	

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Mr Charles Holland (instructed by Lambert Taylor & Gregory Solicitors) for the Claimant
Mr Alan Payne (instructed by Legal Department of Northumbria Police) for the 2nd Defendant
Mr Tom Little (instructed by North East Area Complex Casework Unit of CPS) for the 3rd Defendant
Ms Arabella MacDonald (instructed by Shaw Graham Kersh) for the 6th and 21st Interested Parties
Mr David Hislop QC and Ms Sarah Mallett (instructed by Crowe Hamble Wesencraft Solicitors) for the 9th Interested Party
Ms Hannah Lynch (instructed by KK & Co Solicitors) for the 11th Interested Party
Mr Brian Hegarty (instructed by David Gray Solicitors LLP) for the 19th Interested Party

Hearing dates: 6th and 7th July 2016

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Judgment Approved

Lord Justice Treacy:

1. Both members of the Court have contributed to this judgment. There shall be no publication of any report of the proceedings or any part of the proceedings including this judgment until the last verdict is entered in the Operation Shelter and Operation Emerald trials or until further order, whichever is the earlier in time.

Introduction

2. This case is concerned with whether it was lawful to permit the identity of the claimant, an informant, to be disclosed to defendants in forthcoming criminal trials. Those trials resulted from the investigation and prosecution of serious criminal offences relating to the trafficking and sexual exploitation of girls and young women over a 5 year period. Very serious sexual offences including rape, sexual assault, sexual activity with children and trafficking are alleged to have been committed. In addition there are allegations of witness intimidation, physical assault and drug supply. The complainants are young and vulnerable witnesses.

3. XY was a Registered Covert Human Intelligence Source (CHIS) for the second defendant for approximately 5 years. In that capacity he signed an agreement, one term of which was that "Northumbria Police will not disclose [XY's] identity as a CHIS and will protect his identity as far as is reasonably practicable. You in turn must never reveal your role to anyone, including family, friends, your solicitor and other police forces." In December 2015 the agreement was terminated after XY had, in breach of the agreement, informed police officers other than his handler of his status as a CHIS. He also claimed to have informed the media of his role.

4. Early in 2016 he made further contact with other police officers and a social worker disclosing details of his activity as a CHIS and making other allegations. Those allegations were notified for the Independent Police Complaints Commission (IPCC) to consider. An independent investigation into the allegations was directed. In mid-February 2016 officers from the National Crime Agency (NCA) interviewed XY. In the course of those interviews he made a number of very serious allegations of police corruption and of criminal conduct committed by himself at the instigation of the police in relation to the matters under investigation. Those allegations directly impacted upon the subject matter of the prosecutions referred to above. If true, they would appear to strike at the very integrity of the trials.

5. As a result of XY's assertions, he had a number of meetings at about this time with the United Kingdom Protected Persons Services (UKPPS) to discuss and identify suitable safety measures for his protection and that of his immediate family. XY at various stages retracted and then reasserted his allegations of police corruption. His co-operation with UKPPS was intermittent.

6. It was anticipated in 2015 that there would be four trials involving about 25 defendants arising from the police investigation. Her Honour Judge Moreland was assigned to deal with them. One of those trials was completed in autumn 2015. A defendant convicted at that trial was the 6th interested party, Mohammed Azram. The three remaining trials are scheduled to take place later this year or early in 2017. They have been held up because of these proceedings. Amongst the defendants in those prospective trials are the interested parties Habibur Rahim (9th Interested

Party); Abdul Kawsar (11th Interested Party); Nadeem Aslam (15th Interested Party); Eisa Mousavi (19th Interested Party); Badrul Hussain (21st Interested Party). Each of those has made written submissions and we received oral submissions in support from counsel for the 6th, 9th, 11th, 19th and 21st Interested Parties.

7. Once the CPS received the transcripts of XY's interviews with the NCA it decided that the information was disclosable in the proceedings since, given the allegations of police corruption or malfeasance in relation to those proceedings, XY was potentially capable of being a witness for the defence, and since the material contained in the interviews had the potential to undermine the prosecution's case.

8. On 15th February 2016 the CPS notified the judge of the issue. On 17th February 2016 an ex parte hearing before the judge was adjourned to the following day. The judge then ordered redacted interviews to be disclosed in a form which concealed anything identifying or potentially leading to disclosure of XY's identity. By then XY had both attended and telephoned the Crown Court offices revealing to staff that he was an informant and wishing to provide information to the judge. He said that defendants had been wrongly convicted and that he had been told by the police to plant drugs and to arrange for under-age girls to attend premises. Notes of those contacts were disclosed along with the initially redacted interviews, and were before the judge.

9. On 23rd February UKPPS advised XY that he was in danger and that his identity might be revealed. They offered him and his family protection. He declined help and stated that he was not afraid. On 26th February there was a further ex parte hearing at which the judge again considered XY's interviews and approved the redactions made. This material was disclosed to defence counsel on 1st March. It was a more complete and accurate version of that which had initially been disclosed to defendants in forthcoming trials.

10. Throughout this period anxious consideration had been given to the position by very senior Crown prosecutors, including the reviewing lawyer, Diane Spence. There had also been consultations with senior police officers, leading counsel and representatives of UKPPS and IPCC. On 29th February the CPS decided that it would continue to seek PII in relation to the identity of XY, but that if the decision of the court was to disclose XY's identity the CPS would do so subject to a risk assessment on XY and consideration of any contrary views of the police. In deciding to make application to the court on the question of disclosure of the identity of XY, Ms Spence had in mind the decision of this court in *R (WV) v CPS* [2011] EWHC 2480 (Admin), where Thomas LJ (as he then was), said that in such circumstances the Crown prosecutor must apply to the court if it wished to disclose the identity of an informant.

11. At this stage the CPS's position was that it would not disclose XY's identity, but that it would do so if the judge considered that it was necessary in order to secure a fair trial, in accordance with the principles set out in *R v H&C* [2004] 2 WLR 335. Mr Holland relied on this as an indicator that the CPS had in some way fettered its discretion. We do not accept this. It is clear that this was merely a stage in the process of the CPS' consideration of the matter, and, as will be seen below, that subsequent to the judge's ruling, full consideration was given by Ms Spence. She

then approached the matter on a broader basis and balanced all relevant interests including, importantly, those of the claimant and his family.

12. On 1st March two UKPPS officers met XY and read to him a form of words prepared by the CPS. It referred to the allegations which XY had made and went on to say that some of the content of the allegations made in interview had been disclosed to lawyers representing defendants. It informed XY that a hearing was to take place on 3rd March at the Crown Court at which a judge would be asked to consider providing additional information including XY's identity. It said that the CPS had applied to conceal XY's identity in order to protect his status as an informant and out of concerns about the impact of disclosure upon his physical safety, but went on to say that defence representatives said that they needed to know XY's identity in order to enquire into the allegations. They might wish to speak to XY or call him as a witness. The statement said that before making a decision about disclosing XY's name the judge would want to know what he had to say about disclosure of those details. This was a very important issue and he was strongly urged to seek independent legal advice. A CPS telephone number for any solicitor instructed to call was provided; he could communicate his views in writing or orally through a UKPPS officer.

13. One of the police officers then wrote down what XY wished to say in response in the form of a letter for the attention of the judge. It is plain from the content of that letter that XY must have understood clearly the import of what the officers had told him. The evidence also showed that he had already been alerted to the position on an occasion prior to 1st March. He stated he did not want his details disclosed as this would put his and his family's life in danger. He said he wanted to withdraw his allegations and that they were false. Since he did not trust solicitors he was not going to seek legal advice. He would not attend court unless it was a closed court with only the judge and no defence barristers. By this stage XY was under UKPPS protection.

14. On 3rd March there was an ex parte PII hearing before the judge. She ordered disclosure of XY's details to all defendants in the various trials. The CPS was given 24 hours to indicate whether it would disclose XY's details. XY was at court with UKPPS officers but did not attend the hearing.

15. On 4th March the CPS, having further considered the position in the light of the judge's order, decided to proceed with the prosecutions and to comply with the judge's direction as to disclosure of XY's identity. They sought and obtained an extension of time until 11th March for compliance with the direction so that the police and UKPPS could put in place safeguarding measures for XY. Shortly afterwards a solicitor for XY indicated an intention to seek judicial review. In the light of that the Recorder of Newcastle postponed the date for revealing details pending outcome of a judicial review application to be made by XY. Such an application was lodged on 18th March 2016. On 29th March 2016 His Honour Judge Kaye QC sitting in the Administrative Court at Leeds held a hearing. He gave directions in the claim and accepted an undertaking from the second and third defendants not to disclose XY's identity until 31st March in anticipation of an appearance by XY and/or his counsel before Judge Moreland on 30th March.

16. On the same day Judge Moreland, who was appraised of the hearing before Judge Kaye directed a hearing for the following day. Following an ex parte hearing the judge adjourned to open court and (inter alia) said, "His Honour Judge Kaye QC is

dealing with XY's application for judicial review of my decision. The judge is aware of the parties' request that I hear submissions and evidence from and on behalf of XY and from Northumbria police about the risk to XY if his identity is disclosed. I have agreed to hear such submissions and will do so tomorrow. Any defence counsel who wishes to address me about that before I do so, may do so at 10.30 am tomorrow …".

17. The court convened on 30th March before HHJ Moreland. Miss Smith of counsel attended on behalf of XY. Arrangements had been put in place for XY to appear by remote link. Officers of UKPPS who continued to have XY under their protection were at court. The judge heard from Miss Smith and Mr Lane for the Crown. She was satisfied that there had been no change in circumstances since her ruling of 3rd March when she had assessed the risk to XY at that time as "extremely high". As a result she declined to hear evidence and submissions ex parte about the risk to XY and declined to review her original ruling. The order requiring the prosecution to disclose XY's details was extended until the resolution of XY's application for judicial review. Following this hearing solicitors lodged additional amended grounds of behalf of XY.

18. On 26th April 2016 Kerr J granted permission to seek judicial review. He observed, somewhat euphemistically, that the grounds and amended grounds for challenge were not formulated with precision but he did not propose to reformulate them or limit the permitted grounds. He commented:

> "At the heart of the case (if the Administrative Court has jurisdiction to adjudicate on the merits of the claim) is whether it was lawful to permit the identity of the claimant to be disclosed to the defendants in the criminal trials. This issue is arguable."

The grounds

19. The original and amended grounds which were before Kerr J were indeed unfocussed and discursive as well as being repetitive. A scattershot technique appears to have been adopted. In essence, however, the challenge was to HHJ Moreland's decisions of 3rd March and 30th March 2016 that XY's identity should be disclosed to the defendants and her refusal to alter that order. As against the third defendant, the CPS, the decision complained of was the decision of 4th March 2016 to proceed with the prosecutions and to disclose XY's identity to defendants. The claim against the second defendant, the Chief Constable, appears to have been on the basis that he made or was party to an unlawful decision to disclose XY's identity and to continue the prosecutions and that he had failed to comply with obligations owed to XY under articles 2 and 3. No disclosure of XY's identity has taken place and XY remains under the protection of UKPPS.

20. Relatively recently new counsel, Mr Holland, has been instructed for XY. The result of this has been a substantial recasting of the original and amended claims. That recasting sets out the claim in much clearer form. It discards many of the original grounds and changes the focus of this application to one in which procedural issues come very much to the fore. The claim against the second defendant was abandoned at the start of the hearing. The grounds against the first and third defendants are reduced in number and are in a considerably more coherent form. Mr Holland has

provided an appendix summarising his recast grounds. We reproduce it below as indicating the issues raised before this Court and propose to adjudicate upon this application on the basis of these grounds rather than on the original and amended grounds advanced.

21. This document was not received until Friday afternoon, 1st July, with the hearing being listed for 6th July. Mr Little for the third defendant reacted with commendable speed and resilience and was prepared to meet the recast claim, subject to objection to permission being granted on what he submitted were in substance and in form entirely new grounds.

22. The grounds to which objection was taken are recast ground 4, which Mr Little, (erroneously as it turns out), thought was to be a challenge to the legality of the disclosure decision of the court in relation to the redacted transcripts of XY's interviews and the failure to give notice to XY in mid-February of such disclosure; recast ground 7 urging that the third defendant failed to give proper consideration to the prospects of conviction having changed by virtue of a decision to disclose XY's identity; and recast ground 8 asserting that the third defendant had an obligation to consult XY before making the decision to disclose his identity. Mr Little submitted that those grounds were not previously raised or pleaded and that they are now time barred by reason of CPR Part 54.5. The court was urged to refuse permission to the claimant to pursue them. We decided to hear substantive submissions on a provisional basis on all of the recast grounds and to rule upon Mr Little's objection as part of the judgment in the case.

23. Having heard submissions and having considered the claim documentation as it stood prior to the grant of permission by Kerr J, we have concluded that there was sufficient indication given of the matters set out in the grounds objected to to defeat Mr Little's objection on the basis of delay.

24. We set out below Mr Holland's appendix showing the grounds now advanced.

"Re-cast summary of grounds for Judicial Review

Relating to D1

1. The ruling of the Judge on 3/3/16 to refuse to grant PII in respect of C's identity was a ruling which the Judge did not have jurisdiction to make, and was therefore ultra vires, because in breach of impositions made by s.16 CPIA 1996 as properly interpreted or implicit thereto, she did not afford C an opportunity to make representations to her before making the ruling she did.

2. The ruling of the Judge of 30/3/16 to refuse to hear from C and to refuse to rule her ruling of 3/3/16 meant that the lack of jurisdiction she had to make the order of 3/3/16 was not corrected in a review, as it should have been. Her refusal was irrational and unlawful.

> 3. The Judge's refusal to hear from C on 30/3/16 breached C's legitimate expectation.
>
> 4. The application considered by the Judge at the hearings leading up to and culminating in the ruling of 3/3/16 was so defective as to independently make ruling the Judge thereby made *ultra vires* and quashable for want of jurisdiction.
>
> 5. The Judge erred in law in that she directed herself not to conduct a balancing exercise when the same is required by *R.* v. *Turner* and *R (WV)* v. *CPS*). This similarly made the Judge's rulings *ultra vires* and quashable for want of jurisdiction.
>
> 6. The Judge's rulings breached C's rights under Article 6(1) ECHR with the consequence that his rights under Articles 2, 3 and 8 ECHR will be infringed.
>
> Relating to D3
>
> 7. In deciding on 3/3/16 to continue with the Trials, D3 did not take all relevant matters into account in that it gave no or no adequate consideration to the prospects of convictions therein given C's allegations and conduct.
>
> 8. In circumstances where C had been deprived of an opportunity to make representations to the Court, D3 was independently obliged to consult with C prior to making the said decision.
>
> 9. Further, in making the said decision, D3 failed to have due regard to C's rights under Articles 2, 3 and 8 ECHR."

The judge's rulings

25. The judge's ruling of 3rd March was made in response to the application to withhold disclosure of material in the interviews which would reveal XY's identity, and in response to cross-applications for disclosure of identity made by some defendants pursuant to section 8 of the Criminal Procedure and Investigations Act 1996 (CPIA). The judge specifically referred to the principles in *R v H&C* and also to *R v Turner* [1995] 1 WLR 264. She analysed the defence contentions that XY's allegations undermined the prosecution and assisted the defence and that in order for those matters to be developed it was necessary for XY's identity to be revealed. The judge also referred to the Crown's submissions that disclosure would pose a real risk of serious prejudice to the welfare of XY as well as the more general public interest in protecting the identities of informants as a weapon in the overall investigation of crime. The judge noted that the material disclosed containing XY's allegations was disputed so that the Crown could not present it in the form of agreed evidence or admissions. The judge concluded that XY's role impinged on issues of interest to the defence to such an extent that that the only way in which their interests could be protected was for the identity of XY to be disclosed. This was done after considering

whether some lesser alternative not involving disclosure of XY's identity was feasible.

26. As to the hearing of 30th March the judge said that the first issue to be resolved was whether there was a proper basis for her to hear further evidence and submissions about the risk to XY. She was addressed on this by Miss Smith for XY and Mr Lane for the Crown. The judge declined to hear evidence and submissions ex parte about the risk to XY and declined to review her earlier ruling. She said that she had made a ruling under rule 15.3 of the Criminal Procedure Rules 2015, and that rule 15.6 did not permit a review since that only applied where the court had ordered that it was not in the public interest to disclose material that the prosecutor would have otherwise have had to disclose. In any event, on enquiring of the prosecutor she had been informed that there was no fresh information about the level of risk to XY to change the position as understood on 3rd March. Since there was no new material for her to hear she declined to hear evidence or submissions from Mr Lane or Miss Smith. The judge noted that she was required to follow the steps set out in *R v H&C* in dealing with the PII application, rather than balancing the risk to XY on the one hand with the need for a fair trial on the other.

27. In ruling the judge also made the following points:

    a) She was not satisfied that Miss Smith had any standing in the current proceedings. She said that section 16 CPIA did not apply to applications made under Rule 15.3.

    b) She was unaware as to whether the application had been served on XY as required under rule 15.3 but said it was plain that he knew about the hearing of the application and that she had considered representations made by him on 3rd March. Since there was no new material as to risk and since Miss Smith had said that Mr Lane was best placed to tell her about the risks to XY, she would not reopen the proceedings to permit XY to revisit the question of risk.

    c) She rejected a submission that XY had a legitimate expectation that he would be permitted to give evidence on 30th March because the judge had indicated on 29th March that she would hear submissions.

    d) The judge stated that she had assessed the risk to XY to be extremely high on the basis of material put before her at the hearing on 3rd March. She doubted that she could envisage any greater level of risk, but said that the level of risk was not determinative of the PII application. Accordingly she adhered to the ruling of 3rd March.

28. Prior to the hearing of 30th March the judge had been provided with a skeleton argument by Miss Smith urging that concerns relating to XY and the public interest outweighed those of the defendants in the proposed criminal trials. She reiterated that XY had retracted the allegations he had made and submitted that, since there had been retraction, disclosure of XY's identity would lead to undesirable satellite litigation as to whether his original allegations had been true or false. This would contribute little to the criminal trials and would only serve to disclose XY's identity to no good effect.

Reference was made to *R v H&C, R v Turner* and *R (WV) v CPS*, copies of which had been provided to the judge by the Crown.

29. There appears to have been no issue at these proceedings as to whether XY was owed a duty of confidentiality relating to his role as CHIS, or that he was owed a duty of care by the second and third defendants.

Submissions relating to the judge's ruling

30. Mr Holland acknowledged that a core issue was whether the judge's ruling was capable of being judicially reviewed. Section 29(3) of the Senior Courts' Act 1981 provides:

> "In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make mandatory, prohibiting or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court."

No counsel on behalf of the claimant or the interested parties sought to contradict the defendants' position that ordinarily the decisions of HHJ Moreland of 3rd and 30th March 2016 would not come within the High Court's supervisory jurisdiction. Such a concession was correctly made in the light of decisions such as *R v Smalley* [1985] AC 622, *R v Manchester Crown Court, ex parte Director of Public Prosecutions* [1993] 1 WLR 1524, and *Re: Ashton & ors* [1993] 97 Cr App R 203. We agree that on the face of it the decision to be made by HHJ Moreland was of a type which is not amenable to judicial review.

31. Mr Holland's submission, however, was that we did have jurisdiction on the basis that the procedures adopted by the judge were so fundamentally flawed as to deprive the court below of jurisdiction. These submissions were heavily based upon the decision in *R v Maidstone Crown Court ex parte Harrow LBC* [2000] 1 Cr App R 177. This court had held that where an event falling within section 29(3) was challenged on the basis of want of jurisdiction, then the court would not decline jurisdiction solely on the basis that the challenge related to a matter within section 29(3). Instead, it would determine whether the Crown Court had jurisdiction to act as it did. If the Crown Court did not have jurisdiction, then section 29(3) would not prevent the Divisional Court exercising a supervisory jurisdiction.

32. Mr Holland submitted that if the judge's decision was amenable to judicial review, it should be quashed. In support of this he submitted that there were serious procedural failings in that the judge not heard oral submissions and/or evidence by or on behalf of the claimant on 3rd or 30th March and, indeed, the claimant had not been served with application papers prior to the hearing of 3rd March. Secondly, the judge had failed to apply the correct test in making her decision that XY's identity should be disclosed. Thirdly, he argued that the failure of procedures breached XY's Article 6 rights.

33. Mr Holland developed his procedural criticisms by observing that XY was known to be a vulnerable and unpredictable individual. His refusal to attend court in the letter he sent to the judge was not unconditional, and he had in fact attended the court

building on 3rd March but the judge had not asked to hear from him. He suggested that additionally efforts could have been made, notwithstanding what XY said in his letter, to obtain a solicitor to advise him from outside the immediate area.

34. Even if the CPS' reasons for not serving documents upon the claimant were good, (they had explained in their evidence that, given XY's unpredictability, they were concerned he might misuse documents and put them into the public domain and thus risk comprising his anonymity), arrangements could have been made by providing documents at a police station at which location they could have been viewed by XY. Of these criticisms, it was the failure to hear XY upon which Mr Holland placed by far the greatest weight.

35. Mr Holland relied on section 16 of the CPIA which provides:

> "Where –
>
> (a) an application is made under section 3(6), 7A(8), 8(5), 14(2) or 15(4),
>
> (b) a person claiming to have an interest in the material applies to be heard by the court and,
>
> (c) he shows that he was involved (whether alone or with others and whether directly or indirectly) in the prosecutor's attention being brought to the material, the court must not make an order … unless the person applying under paragraph (b) has been given an opportunity to be heard."

He submitted that sub-section (c) should be given a broad meaning and that in the circumstances the claimant fell within section 16. On this basis the failure by the judge to hear the claimant was a fundamental defect which invalidated the judge's order. It enabled the matter to be challenged by judicial review.

36. Additionally Mr Holland relied on Part 15 of the Criminal Procedure Rules 2015. This rule applies where, without a court order, the prosecutor would have to disclose material and the prosecutor wants the court to decide whether it would be in the public interest to disclose it; see rule 15.3(1). Mr Holland pointed to a failure to comply with rule 15.3(2)(ii) in that the rule states that the prosecutor must serve the application on any person who he thinks would be directly affected by disclosure of the material. Additionally there was a failure to comply with rule 15.3(a)(iii) which states that a prosecutor must explain why the prosecutor thinks that no measure such as admissions etc would adequately protect both the public and the defendant's right to a fair trial. He drew attention to rule 15.3(7)(a)(i) which states that the general rule is that the court must consider "representations first by the prosecutor and any other person served with the application, and then by the defendant, in the presence of them all".

37. He also drew attention to rule 15.3(8) which provides that the court may only determine the application if satisfied that it has been able to take adequate account of rights of confidentiality applying to the material and the defendant's right to a fair trial.

38. Finally he cited Article 6(1) ECHR:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

39. In relation to 30th March, it was additionally argued that the judge was at fault in not hearing evidence from the claimant on that occasion, particularly since it was said that the judge's comments on 29th March had created a legitimate expectation that he would be allowed to give evidence. The areas in which the claimant could have given useful evidence to the court would have been on whether alternative measures falling short of disclosure of his identity were possible, and secondly on the issue of risk.

40. The second strand of Mr Holland's argument was to the effect that the judge had applied the wrong test to her decision. She had failed to conduct a balancing exercise between the risk to claimant on the one hand and the need for a fair trial on the other. Accordingly, she had failed to follow the approach prescribed in *R (WV) v CPS*.

Interested parties' submissions

41. These fell into something of a pattern. Counsel for the 6th, 9th, 11th, 19th and 21st interested parties all made oral submissions rebutting the claimant's case in relation to the first defendant (the judge's decision). However, they generally supported the claimant's case in relation to the third defendant (CPS), urging that in the circumstances the risks to the claimant could not be handled in reality so that the only proper decision available to the CPS was to drop the proceedings.

The third defendant's submissions

42. In relation to the judge's decision, there were no submissions before the court from the first defendant, but Mr Little for the third defendant addressed that part of the claim. He acknowledged that information from informants plays a vital role in the prevention, detection and prosecution of crime and acknowledged the general public interest in maintaining confidentiality so as to ensure the retention and future recruitment of those who would act as informants. However, he pointed out that the right of informants to confidentiality is not an absolute right as was acknowledged at [19] of *WV*. He submitted that the judge had a different decision to make from the prosecutor. The judge was making a public interest immunity decision as to whether or not the informant's identity had to be disclosed in order to secure a fair trial. The judge's decision was informed by the process identified in *R v H&C*. The prosecutor's decision would have to be made in the light of the judge's decision to disclose and was a wider, more multi-layered decision than the judge's, involving a balancing of the interests of XY against the public interest.

43. He submitted that this court had no jurisdiction to entertain the claim against the first defendant by reason of section 29(3). In this context he submitted that the decision in *R v Maidstone Crown Court ex parte Harrow LBC* did not apply to this case. In that case a clear condition precedent to the Crown Court making a decision as to fitness to plead had not been fulfilled. The Crown Court judge had made a decision which the relevant statute provided could only be made by a jury. In those circumstances the

judge was not to be regarded as exercising his jurisdiction in a matter relating to trial on indictment. It was unsurprising that this Court felt able to grant judicial review.

44. Mr Little instead relied on the approach in *R v Chester Crown Court ex parte Cheshire County Council* [1996] 1 FLR 651 where Rose LJ said at page 657D:

> "There is expressly excluded from the jurisdiction of this Court the Crown Court's jurisdiction in matters relating to trial on indictment. It is to be noted that the section does not say "The way in which the jurisdiction is exercised" or any formula to similar effect. Indeed, had it been Parliament's intention that a Crown Court purporting to exercise a jurisdiction which it did not have should be subject to judicial review by this Court, one would have expected Parliament to say so."

He submitted that the present case related to a decision as to the admissibility of evidence since it concerned the defendants' ability to obtain and rely on evidence at their trial. It was a decision of a type akin to that pertaining in *Chester Crown Court* since that too was a decision on the admissibility or non-admissibility of evidence. Accordingly, this Court should follow *Chester* and hold that section 29(3) precluded a challenge to the judge's decision.

45. Were the Court to hold differently, it would have to be satisfied that the defects in the judge's decision were fundamental and went well beyond qualitative or purely procedural defects.

46. As to section 16 of CPIA, he submitted that it was irrelevant. He contended that section 16(c) was not to be construed in the very broad way contended for by the claimant. Such a construction would add little or nothing to the category of person identified at section 16(b), that is a person claiming to have an interest in the material. Such a construction would cause very serious practical difficulties for the courts and the CPS. The focus under section 16(c) should be on those who brought the material to the attention of the prosecutor, not on an individual's interest in the material under consideration.

47. Mr Little accepted that the claimant had a right to be heard but argued that that derived from the fact that his human rights were affected by the possibility of a decision to disclose his identity as an informant. It did not derive from section 16. He accepted that a fair reading of rule 15.3 gave the claimant a right to be heard. He submitted that in the light of *R v Soneji & anor* [2006] 1 AC 240, and in particular the speech of Lord Steyn at [14] to [23], Parliament could not have intended section 16 (if it applied) or Part 15 of the Criminal Procedure Rules to render unlawful a disclosure decision made by a judge where an individual's contemporaneous representations had been considered in writing by that judge as opposed to being made orally. These provisions were clearly procedural and its requirements are directory not mandatory. None of the matters raised were sufficient to lead to the conclusion that the judge had no jurisdiction to order disclosure of XY's identity so that section 29(3) did not apply.

48. On the separate matter advanced by the claimant in relation to the judge's decision, namely the question of whether the judge had adopted the wrong approach, Mr Little contended that she had not.

Conclusions in relation to the first defendant

49. We will deal with the issue of the judge's approach before we deal with the procedural matters. The decision before the judge concerned whether or not the public interest in a fair trial of the defendants in the forthcoming proceedings required disclosure to them of XY's identity. That decision is governed by the well-known series of questions posed by Lord Bingham in the seven steps set out at [36] of *R v H&C*. There is no issue as to whether what XY had revealed to the IPCC and others involved matters which might weaken the prosecution case or strengthen that of the defence. Accordingly, disclosure of the material was necessary and there can be no criticism of the judge's decision to order initial disclosure in redacted form prior to a ruling as to whether disclosure of XY's identity was necessary. In that context, there was a duty of confidentiality owed to XY as an informant and a need to consider the potential impact of full disclosure upon his safety and that of his family. Those, along with wider considerations about maintaining confidence in the informant system were clearly important public interests which the court had to consider at step 4. This is an important step in the proceedings as the court is enjoined to see if some lesser method of disclosure could be adopted which would adequately protect the public interests referred to as well as the interests of the defence in a fair trial.

50. It is clear to us not only that the judge adopted the staged process envisaged by *H&C*, but also that she gave due consideration to the important test at step 4 in seeing whether some lesser alternative to full disclosure was appropriate. It is clear from the judge's ruling that in the circumstances of this case anything less than full disclosure would have the effect of rendering the trial process unfair to the defendants. The judge expressly stated that the only way in which a fair trial could be achieved would be by making disclosure of the identity of XY. This was the culmination of what appears to us to have been a faithful application of *H&C* and a full discharge of the judge's responsibilities. Once the judge made an order for disclosure for XY's identity, then it was for the CPS to make a separate decision as to whether to go ahead with disclosure or to discontinue the proceedings so as to avoid having to make disclosure. That decision as to whether to proceed or to discontinue is not a matter for the judge. It is a matter for the CPS who, as we have previously stated, have to approach the matter on a wider basis than the judge does.

51. We do not accept the criticisms of the judge's ruling suggesting that she had applied the wrong test in failing to balance the interests of securing a fair trial against those relating to the safety of the claimant. The judge had balanced those interests when following step 4 of *H&C*, but once she had concluded that nothing less than full disclosure would suffice, it was not for her further to balance those interests and to make a decision choosing between discontinuance of the proceedings and disclosure of the claimant's identity.

52. Contrary to Mr Holland's submissions, there is nothing in *WV* which in any way modifies the approach mandated by *H&C*. Thomas LJ at no point suggested that this was the case and indeed cited *H&C*. Nothing that was said in *WV* contradicted the necessity for the court to order disclosure of an informant's identity if that were the sole means by which a trial could be procured. The judge herself referred to *R v Turner* [1995] 1 WLR 264, in addition to *H&C*, where Lord Taylor CJ quoted from *R v Keane* [1994] 1 WLR 746: "If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice then the balance comes down

resoundingly in favour of disclosing it." In *Turner* itself Lord Taylor said at page 267H:

> "Even when the informant has participated, the judge will need to consider whether his role so impinges on an issue of interest to the defence, present or potential, as to make disclosure necessary."

53. We note that Thomas LJ quoted the former passage in *WV*. We are unpersuaded that the observations of Thomas LJ at [33] of *WV*: "The disclosure of the identity of an informant without his consent is for the reasons I have given one of those cases where the Crown prosecutor must apply to the court and the court must carefully consider the issues and reach its own decision taking account of the interests to which we have referred by reference to the facts and issues of the case before the court and balancing the interests and risks" were intended to modify [36] of *H&C* in any way. The passage cited has to be read in the context of the matter in issue in *WV*, namely whether the CPS, in the case of an informant, could decide itself to make disclosure of the informant's identity or whether the matter should be referred to a judge. For these reasons we do not consider that Mr Holland's criticism of the judge's approach is made out. Even if it had been, we do not consider that it would have got round the obstacle posed by section 29(3) since the criticism went to the quality of the judge's decision, as opposed to something which went to the fundamentals on a matter which related to the indictment.

54. We turn next to the matters relating to the claimant's right to be heard. We do not consider that the claimant can bring himself within section 16, and in particular section 16(c). That provision cannot avail the claimant on the facts since we do not consider he had involvement, direct or indirect, in bringing the material to the attention of the prosecution. To conclude that the claimant in this case indirectly brought matters to the attention of the prosecution would be to afford too wide a construction to the provision. We consider that the focus of section 16(c) is on the transmitters of the material to the prosecution. To apply it to persons potentially at risk in PII proceedings by reason of the fact that they were informants would make those proceedings very difficult to work in practice and cannot have been the intention of Parliament.

55. It was not in dispute that the claimant had a right to be heard, but this derived from Part 15 of the Criminal Procedure Rules not from section 16. It seems to us that, having considered *Soneji*, it was not the intention of Parliament that a failure to observe the requirements of rule 15.3 (or indeed section 16) would necessarily render decisions to which those provisions apply null and void if there was non-compliance with them. In the circumstances of this case, and having considered the circumstances and consequences of non-compliance, we are satisfied that such failures as there were of procedure did not invalidate the decision. As to non-service of the application, there was good reason for it and the police contact with the claimant prior to the hearing gave him sufficient information about the circumstances and the issue to be decided so that he could make meaningful representations.

56. The letter which he caused to be sent to the judge clearly demonstrates an understanding of the issues and clearly sets out this claimant's position in relation to disclosure of his identity. The document shows not only understanding on his part but

a clear expression of the position he adopted. It is said that he might have made oral submissions which went to the issue of risk and alternative measures. As to the former, the judge proceeded on the basis that the risks to the claimant could not be higher. Accordingly it is hard to see what the claimant could meaningfully have said in addition had he been granted the opportunity to be heard. As to the question of alternative measures, that does not seem to us to be a matter upon which the claimant would have been properly equipped to make any meaningful submission at all. That was essentially a matter for the judge to resolve in the light of submissions made by representatives of the prosecution and defence.

57. In this context we do not consider that what the judge said on 29th March created any expectation that this claimant would be allowed to give evidence on that occasion. What the judge said went no further than indicating that she would receive submissions on behalf of the claimant on 30th March. That she did, having received a lengthy skeleton argument from counsel then acting for the claimant which we have considered. It is apparent from that skeleton that there are no specific matters going to risk or alternative measures which materially affect the position.

58. At the hearing itself the judge did hear from Miss Smith. The judge specifically enquired about the issue of risk to the claimant. It was confirmed that Miss Smith had told prosecuting counsel everything she wished to on that topic; and indeed she told the court that prosecuting counsel was in a better position than she was to deal with the matter of risk. Prosecuting counsel confirmed to the judge that there was no change in the assessment of risk from that which had existed on 3rd March. It was in those circumstances that the judge said that she had no power to review her earlier decision, but that *in any event* there was nothing to be reviewed since there was no new information as to the level of risk which she had previously taken as being at the very highest.

59. Mr Little for the CPS conceded that it would have been preferable for the judge to have heard from the claimant. It would have avoided much of the difficulty now confronting this court. He further concedes that since by 30th March no disclosure of XY's identity had in fact taken place, he would not have supported reliance on rule 15.6 referred to by the judge as a basis for declining to review the earlier decision. Those concessions do not detract from the core of Mr Little's argument which we accept. We consider that notwithstanding the failure to hear representations from the claimant at the hearing, the judge had before her properly informed written submissions made by the claimant contemporaneously with the hearing of 3rd March which in reality could not have been improved upon by oral evidence from the claimant. Although there was a failure to comply with the rules, sufficient was done in reality to achieve for the claimant what the rules set out to achieve. The failures identified have to be seen in context and do not operate in such a way as to deprive this court of jurisdiction.

60. In *R v Maidstone Crown Court ex parte Harrow LBC* it is noteworthy first of all that in that case the Crown Court judge had simply not been entitled to deal with the defendant under section 5(1) of the Criminal Procedure (Insanity) Act 1964 since no jury had been empanelled. That section expressly provided that a supervision and treatment order could only be made if a special verdict was returned or findings were recorded that the accused was under a disability. There was in that case a fundamental failure of jurisdiction to make the order which the judge did.

Accordingly, the order made by the judge could not be categorised as a matter relating to trial on indictment falling within section 29(3). Having so held, the court went on to say that the question of whether the Crown Court has jurisdiction was not the same as an issue relating to the quality of the decision making or an order which the Crown Court did have jurisdiction to make. Where there is an alternative remedy available, judicial review will not usually be available.

61. In the present case we have already determined that the procedural matters relied on were not of such a fundamental nature as to mean that the Crown Court was not in reality exercising its jurisdiction. The criticisms which have been made appear to us to be qualitative rather than fundamental. We have rejected the point taken as to the test applied by the judge. We have concluded that sufficient was done to enable the case which the claimant could make to the judge to be considered. In addition, the acknowledged ability of this claimant to seek judicial review against the third defendant arising out of the same matters constitutes an alternative remedy available to him. In those circumstances the situation identified in *R v Maidstone Crown Court ex parte Harrow* which led to relief being granted does not apply. The exclusionary provisions of section 29(3) lead this court to decline to entertain the application for judicial review against the first defendant.

62. Insofar as the claimant advanced an Article 6 argument the matter was not fully explored before us, and in particular the extent to which, if at all, the claimant could avail himself of Article 6. Assuming for present purposes that he could, it seems to us that there is on the facts as we have found them to be, no scope for reliance on Article 6. Our conclusion that, notwithstanding the failure to comply with the rules, sufficient was done to secure the claimant's participation and take account of his views leads us to the conclusion that there is no breach. The judge had given consideration as to whether any lesser measure than disclosure of identity was possible and had taken account of the claimant's expressed wish to preserve his anonymity as well as matters pertaining to his wellbeing and safety as best she could within the constraints of the application before her. It is noteworthy that this same judge had some months beforehand on an unrelated PII application specifically refused to make an order divulging the identity of the informant. The hearing which is the subject of this claim therefore has to be seen in that context, and it is clear to us that the decisions made by the judge were taken after she had taken adequate account of the matters set out at rule 15.3(8). For these reasons we consider that this separate ground does not advance the case against the first defendant.

The claimant's case against the third defendant

63. In the recast grounds the claimant pursues three grounds against the third defendant set out at paragraph 24 above.

64. The interested parties support the challenge to the ruling of the third defendant to disclose the name of the claimant and continue with the prosecution of Operation Shelter. The third defendant accepts that where the judge's decision is to order disclosure and the prosecution do not regard the decision as appealable there is an obligation on the prosecutor to conduct a balancing exercise, in particular to consider Articles 2 and 3 and the rights of the informant prior to making a decision to disclose. Such a decision is open to a challenge by way of judicial review. The decision made by an experienced reviewing lawyer employed by the Crown Prosecution Service

(CPS) was carefully considered and followed discussion of the issues on a number of occasions with senior lawyers at the CPS, counsel prosecuting the criminal proceedings and senior police officers of the second defendant. The lawyer also considered the applicable case law, having been informed of the risk assessment performed by the second defendant. It is the third defendant's case that the decision cannot be described as unreasonable or unlawful.

The Law

65. We set out below the applicable Articles of the ECHR:

> "Article 2
>
> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
>
> Article 3
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> …
>
> Article 8
>
> Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> There shall be no interference by a public authority with the exercise of this right except such as it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others."

Authorities

66. We will consider below *In the matter of D v Central Criminal Court, HM Customs and Excise* [2003] EWHC 1212 Admin.

67. This was a claim by a police informant, one of six defendants in a serious drugs trial. The claim was brought following disclosure of the fact that he was an informant. Scott Baker LJ considered the role and duty of a prosecutor in a criminal trial where there is or is likely to be disclosure of the identity of an informant as follows:

> "19. The prosecutor has a continuing duty to keep the future of the prosecution under review. It is possible, albeit, perhaps unlikely, that circumstances could change so that adequate protection could for some reason not be provided. The prosecutor would then have to reconsider the position. The issue in this case has been as to the extent of the prosecutor's obligation to take the risk to the claimant and his family into account …
>
> 20. Both Articles 2 and 3 of the European Convention of Human Rights and Fundamental Freedoms are in play … Both Articles are relevant because the claimant and his family are at risk of death, or of reprisals involving serious injury short of death.
>
> 21. It was common ground that Articles 2 and 3 each placed both positive and negative obligations upon the State. Thus, for example, in a positive obligation case, the citizen need only show that the State has not done all that could reasonably be expected of it to avoid a real and imminent threat to life: *Osman v. United Kingdom* [1999] 29 EHRR 245. But the present case is one in which the State's negative obligations arise as well. By continuing with the prosecution it is said that the claimant will be exposed to a real risk of harm, and it is said that whatever his conduct may have been that gives rise to this risk is irrelevant (see *Chahal*, to which I shall refer in more detail in a moment).
>
> 22. Thus the negative obligation is of a more absolute nature than the positive obligation. But, in my judgment, it is necessary to define accurately the nature of the negative obligation in this case. It is not simply not to prosecute the claimant because of the risk to life et cetera, rather it is not to prosecute unless the prosecutor is satisfied that the risk can be adequately met. Of this, the prosecutor was satisfied …
>
> 25. There are two imponderables about the level of risk in this case: (1) what it is at the moment; and (2) the extent to which it will be increased if the trial proceeds. However, it cannot be doubted that whatever the answer to these imponderables, the claimant and his family will be under very serious risk if the defence statement is disclosed.

26. What is the obligation of the prosecutor? In my judgment, it is to be aware that proceeding with the trial is going to create a significant risk, or increased risk to life or limb of the defendant and his family. E should then ask himself, what measures can be taken to minimise that risk. In this case that involved obtaining the necessary information from NCIS and the Prison Service. That he has done. Once satisfied that an adequate level of protection could be provided, his obligation is met. It is not the prosecutor's duty but the duty of others to implement the appropriate measures. Mr McGill, in my judgment, did what was required of him in the present case.

27. What are the appropriate measures cannot be ascertained until NCIS has been able to conduct a full risk assessment. This involves discussion with, and the cooperation of the claimant in the first place, and then any other members of the family whom it is felt necessary to bring under the umbrella of protection. There are a number of different types of protection that NCIS can be put in place depending on the nature and the gravity of the perceived threat. Some are more extreme than others, ranging from a completely new identity to the authorities simply keeping an alert eye on the situation.

28. The decision-maker in the position of Mr McGill can do no more than rely on information form responsible authorities. In this case, he got it from NCIS and the Prison Service. For the decision to be impugned it would, in my judgment, be necessary to show either that the inquiries he made were inadequate or that there would not be adequate protection. The decision-maker pointed out that the problem in this case was not unfamiliar to those engaged in law enforcement. He will have been aware of the range of available possibilities, such as safe houses and so forth.

29. The issue in the end comes down to whether the decision-maker has acted lawfully. In my judgment, he has because he was aware of the risk and satisfied himself that steps should be taken by others to meet it. Should the appropriate steps not be taken, then those who fail to take them might themselves be open to judicial review; but that is, if ever, for another day …

33. In *R v Director of Public Prosecutions ex parte Kebilene* [1999] 3 WLR 972, at 975, Lord Steyn referred to the undesirability of satellite litigation in the conduct of criminal proceedings. He said that absent dishonesty or exceptional circumstances, a decision of the Director of Public Prosecutions to consent to a prosecution is not amenable to judicial review. I respectfully agree that it is only in the most exceptional circumstances, a decision to prosecute or continue a prosecution should be open to review by the courts. I would certainly not regard it as appropriate to use review of a decision

> of the prosecutor as a device to circumvent the prohibition in section 29(3) of the Supreme Court Act 1981, when the factual issue is effectively the same. I do, however, regard the circumstances prescribed by the present case as exceptional, a least to the point of providing the court with jurisdiction to entertain the application."

68. As stated at [33] of *D v Central Criminal* Court, the Administrative Court will only rarely intervene in relation to a prosecutorial decision that has been made. This has been expressed in a number of different ways: "sparingly exercised", *R v. DPP ex parte C* [1995] 1 Cr App R 136, 140; "highly exceptional remedy" *Sharma v Browne-Antoine* [2007] 1 WLR 780 at 14(5). *In R (Bermingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635 at [63] Laws LJ stated:

> " … In any event there will have been expert assessments of weight and balance which are so conspicuously within the professional judgment of the statutory decision-maker that there will very rarely be legal space for a reviewing court to interfere."

Evidence

69. The claimant has filed no evidence to support his application. The third defendant has filed two detailed witness statements from Diane Spence, a Senior Crown Prosecutor working for the CPS in the North East area Complex Case Work Unit. Ms Spence is the reviewing lawyer on Operation Shelter and has overall responsibility for the prosecution of the Shelter cases. She was the person who made the decision on 4th March 2016 to disclose the identity of XY.

70. In her first statement Ms Spence details the events leading to the disclosure on 22nd February 2016 of the heavily redacted transcripts of the claimant's interviews with the NCA. Ms Spence states that she was well aware of the impact disclosure of XY's identity would or could have upon XY and his family and also of the wider risks and impact upon future operations dependent upon the employment of a CHIS. She considered *WV* and *D v Central Criminal Court*, in particular the need to consider whether the Article 2 and 3 risk to XY could be met. Ms Spence considered the matter with counsel and the second defendant.

71. She contacted a Detective Superintendent of the second defendant by email on 19 February 2016 issuing advice to the police in respect of their dealings with XY as she was concerned that XY did not seem to appreciate the risk he was facing and felt it was important that he understood the implications of his actions leading up to and after the revocation of his status as a CHIS. The content of the email is as follows:

> "I think the important thing from the police viewpoint is that XY be told that the prosecution have/are getting the material from the IPCC that is being assessed for disclosure. He/she needs to be told that it is likely that the material will be revealed to the defence solicitors and that it is likely to be edited.

> Nevertheless, the disclosure may lead to defendants being able to identify who XY is even if his/her name etc is edited out.
>
> He also needs to understand that the Prosecution will apply to the court to conceal XY's identity but that the trial judge may decide that the defence need to be told this. If we are ordered to disclose his identity XY will be told of this.
>
> Once the defence have XY's details they may wish to speak with him/her as a potential witness. Any contact could be arranged through the police to avoid XY being contacted directly but if XY did not co-operate his/her contact details would have to be given directly to the defence solicitors. In the event he/she was identified as a potential witness by the defence, his attendance at court may be required and facilitated by a summons or witness warrant in the event he failed or refused to attend at trial voluntarily."

72. By 22nd February 2003 Diane Spence was aware that XY had been informed by UKPPS that his identity and status may be disclosed to the defence, that he refused to accept any assistance at that stage and stated that he was not afraid. In consultation with leading counsel for the prosecution it was decided that the way in which to provide XY with advance notice of the hearing of 3rd March 2016 and to reinforce the fact that his identity may be revealed was the oral briefing that took place on 1st March 2016 (paragraph 12 above). The notification was done in this way because of concerns regarding XY's ability to keep documentation secure and given his repeated attempts at self disclosure.

73. The issue was also raised at a conference on 26th February 2016 attended by senior police officers, the prosecution QC, Ms Spence and others in the prosecution team. The adjourned PII hearing on 26th February 2016 took place (paragraph 9 above). On 29th February 2016 Ms Spence, the Complex Case Work Unit head, the Chief Crown Prosecutor, and the Assistant Chief Crown Prosecutor met to debate XY's position in advance of the hearing on 3rd March 2016 (paragraph 10 above).

74. The issue of whether XY's name needed to or would be revealed, were the prosecution ordered to do so, was something that had been under discussion since the content of his debriefing interviews were made known. However, the situation was constantly developing and changing as XY was proving highly unpredictable; attempts by the IPCC to engage with him were unsuccessful. Reports of his contact with them and the UKPPS who manage witness protection gave contradictory accounts of what XY had alleged. During this time there were a large number of undocumented conversations between Ms Spence, prosecuting counsel and the Assistant Chief Crown Prosecutor in respect of the impact of XY's disclosures, how they could be managed and the issue of XY's identity. Alternatives to revealing XY's identity were discussed but were regarded as inadequate. The view was taken that Operation Shelter and Emerald was possibly at risk if XY's identity was not revealed.

75. At the PII hearing on 3rd March 2016 the judge gave the prosecution until the next day to make a decision as to whether they would comply with her order for disclosure of the identity of XY. The prosecution sought and were granted an extension of time

to 11th March 2016 to reveal the identity of XY to give the police time to finalise safeguarding arrangements.

76. Ms Spence stated that the judge's decision was one which she had anticipated as a potential outcome. Following the hearing Ms Spence made the decision to reveal the identity of XY. The decision was agreed by her unit head and was authorised by the Chief Crown Prosecutor.

77. Ms Spence stated that her decision to reveal the identity of XY was informed by the identified case law. It followed a careful balancing exercise which took into account the safety of XY, his family and others, the wider public interest of the impact of revealing the identity of a police source on future operations and the impact of the failure to disclose. When Ms Spence made her decision the risk to XY and his family as assessed by those responsible for his protection was low and would remain so whilst they remained in the care of UKPPS. However, she took into account the fact that the risk was assessed as high were XY to leave the care of UKPPS. The balancing exercise also addressed the wider public interest of the seriousness of the criminal allegations in Operation Shelter, the impact upon the complainants in that case and the possibility that others may be put at risk in the future by the failure of the prosecution in Operation Shelter. Whilst conceding that the starting point was one of non-disclosure, Ms Spence sought to balance that against the failure to disclose and the impact that a decision would have on public confidence and on future public safety. She took account of the conclusion of HHJ Moreland that revealing the identity of XY was fundamental to the continuation of the prosecution of the defendants. In addition she took into account the fact that the police had also addressed the risk to XY and his family and that the Acting Chief Constable on behalf of Northumbria police was prepared to authorise the disclosure of XY's identity.

78. Ms Spence concluded that the public interest in proceeding with the prosecution outweighed that of withholding XY's identity. At the time she made her decision Ms Spence was satisfied on the basis of information provided that adequate protection measures would be put in place to reduce the risk to XY. Inevitably there would be a risk to XY despite these measures, however, she was satisfied the public interest in continuing with Operation Shelter and Operation Emerald prosecutions outweighed that risk.

79. Ms Spence accepts that she did not consider any review of the evidential stage following the judge's ruling on 3rd March 2016. However, she has since considered whether the revelation of XY's identity would mean that there would no longer be a realistic prospect of conviction against any of the defendants in the remaining trial and is satisfied that were XY's identity to be revealed there would remain a realistic prospect of conviction against each of the defendants and that the prosecution of each of them would remain in the public interest.

80. As to the claimant's ground that she should independently have consulted with XY before making any decision to reveal his identity it is Ms Spence's unchallenged contention that there is no Guidance or Code of Practice which would have required her to enter into independent consultation with the CHIS before making her decision. Further the prosecution team gave anxious consideration to any alternative measures short of disclosing XY's identity at the time and concluded that there were none. Ms

Spence relies upon the fact that the judge carried out the same exercise and concluded that there were none.

81. Ms Spence states that she has kept the position of disclosure of XY's identity under review on a regular basis since 3rd March 2016. She has been regularly updated by the second defendant in relation to the issue, and has considered the information and up to date risk assessments provided by the second defendant. Having so considered her position, her reasoning remains unchanged.

The case of the claimant and the interested parties

82. Following the order of disclosure made by the judge on 3rd March 2016 it was for the third defendant to exercise an independent judgement as to whether to disclose the identity of XY or discontinue the prosecution. The claimant is said to be a vulnerable individual exhibiting unpredictable behaviour, implicit in this is the assertion that all appropriate steps must be taken to protect the safety of XY.

Ground Seven

83. The nature of the information given by XY to the NCA during the course of his interviews included allegations that the police were targeting only non-white men; at the behest of his handler XY was arranging parties to ensure underage girls were present; he was acting as taxi driver to girls of his own selection in order to ensure they would be present at parties; he would plant drugs at those parties so as to ensure that a later police raid would result in the presence both of the underage girls and the drugs. The claimant is a compellable witness and one who could be cross-examined to effect. Any reluctance on the part of XY to attend court could be overcome by the issue of a witness summons which would be granted given the relevant nature of the allegations which he had made. All these matters have the potential to undermine and affect the prospect of any conviction. Further, the third defendant failed to carry out an assessment as to the likelihood of conviction which was material to any decision made to disclose XY's identity. One interested party took the point that the decision of Ms Spence could not be wholly impartial as she was employed by the organisation responsible for the criminal trial.

Ground Eight

84. The third defendant knew that the claimant had not been served with its original application. XY received some notice of what was intended as set out in the oral statement read to him on 1st March 2016. When he attended court on 3 March 2016 he was not afforded an opportunity to address the Judge. These are facts of which account should have been taken when considering whether an independent consultation with the claimant following the judge's decision was appropriate. Given XY's known mercurial temperament, a consultation would have been appropriate in order to ascertain what his future intentions were as to compliance with the UKPPS and for his views on alternative provision. This is particularly important given the low-risk assessment if XY remains within protection and the escalation to high if XY left.

Ground Nine

85. Before the judge and the third defendant there was no written risk assessment. The judge was given a 'generic risk assessment', presented orally by counsel as to what the position could be. No assessment was made as to the likelihood of XY leaving protection and thus being at high-risk. The third defendant was therefore not in a position to state definitively 'this is the level of risk'. In the absence of a risk assessment dealing with this likelihood, any assessment of risk by the third defendant falls short of being satisfied that an adequate level of protection can be provided. The State is obliged, in selecting individuals, to take account of their characteristics when assessing risk and the State's continuing obligation. This is particularly so given that his own counsel described the claimant as being 'congenitally unsuited to the role of a CHIS'.

The case of the third defendant

86. The decision of the third defendant was independent of that of the judge, it was a separate assessment which required appropriate factors to be balanced. It was a broader and more multi layered decision in that there were more factors in play in relation to the wider remit, in particular that of public interest. The decision was more finely balanced and by reason of that less amenable to a successful judicial review challenge.

Ground Seven

87. Ms Spence accepts that she did not consider any review of the evidential stage in accordance with the Code for Crown Prosecutors if the identity of XY were to be disclosed. She has since done so and is satisfied that following such disclosure there would remain a realistic prospect of conviction against each of the defendants and that the prosecution of each of them would remain in the public interest. Nothing said by XY would impact on the credibility of the complainants.

Ground Eight

88. No requirement for an independent consultation with a person such as XY is identified in the Code for Crown Prosecutors or CPS Guidance. XY is a volatile person, he can change from day to day. Any consultation with him would be of limited effect. As to a suggestion that XY could speak upon the issue of alternative measures, none were possible. The allegations made by the claimant in interview were denied by the second and third defendants. Further, the claimant was not in a position to assist as to provision of alternative measures, this was for persons experienced in the prosecution of criminal trials.

Ground Nine

89. Following *D v Central Criminal Court* it is not for the prosecutor to make its own assessment of risk. Where the prosecutor is informed by those responsible for assessing the risk that it can be adequately managed, the prosecutor is entitled to take account of that information and rely upon it in order to make a decision. The assessment of risk was carried out by the second defendant, it was regularly reviewed, the reviews were made known to the third defendant. The decision on 3rd March 2016 had to be made under pressures of time given the inevitable consequences of XY's interview and it's timing in relation to the Operation Shelter trials.

90. Where the prosecutor is aware that in proceeding with the trial there will be an increase in a significant risk to an informant, the question to be answered is whether there are measures which can be taken to minimise that risk. The prosecutor has to be satisfied that a satisfactory level of adequate protection exists. In this case the level of risk envisaged could be 'high'. Information was available that systems were in place to manage such a risk. The fact that XY could, of his own choice, leave the system did not mean that UKPPS no longer had a duty to protect him and manage the risk. Given the high level of risk which had to be considered any further question as to when this event could occur would not materially affect any assessment which had to include this eventuality. Further, given the volatile nature of the claimant any such assessment of this likelihood would be of limited worth. Mr Payne on behalf of the second defendants stated that Article 3 placed an obligation upon the State to provide an adequate system of protection. Such a system requires the relevant party to engage with it. If that individual decided not to engage, that of itself did not render the system inadequate nor does it mean that the State is in breach of that Article 3 obligation.

Conclusion

91. The decision to be made by the third defendant was multi-faceted and broader than that made by the judge. It is only rarely or in exceptional circumstances that the Administrative Court would interfere with a prosecutor's decision. The decision made by Ms Spence on 3rd March 2016 was a decision which she had the power to make, she was an appropriate person to make it. It was made following a series of consultations and meetings with the police, those responsible for the protection of XY, counsel involved in the prosecution of Operation Shelter and senior colleagues in the CPS. The risk assessment of XY had been carried out by the responsible authorities; it was reviewed and the results were provided orally to Ms Spence. Ms Spence, and others, were aware that disclosing the identity of XY and proceeding with the trial would create a risk or an increased risk to XY's life and that of his family. Ms Spence properly sought information from the police and the UKPPS as to what measures could be taken to minimise that risk. Upon the basis of that information Ms Spence was satisfied that an adequate level of protection could be provided. It was not her duty to implement the appropriate measures to minimise that risk. Ms Spence was entitled to rely on the information from the responsible authorities which is what she did. There is nothing to demonstrate that the enquiries which Ms Spence made were inadequate. On the contrary, frequent meetings were held specifically to deal with the risk which disclosure of the identity of XY would pose. The position has remained under review pending disclosure. The assessment remains unchanged.

92. No independent consultation was sought with XY. It is of note that even in these proceedings XY has chosen to file no evidence as to his own position and any steps taken to protect it now or in the future. XY was not an appropriate person to contribute to the issue of alternative provision. That task was for those with the conduct, in court or out of it, of the criminal trial. What was known was the volatile nature of XY's character. It was known that if he walked away from the protection provided by UKPPS that would increase the risk to his life. In such circumstances the risk was deemed to be high. The absence of an assessment as to when such an event

was likely to occur whether by meeting XY or by some other means would add little to any assessment which had taken account and provided for the level of 'high risk'.

93. It is a fact that with every informant there is a risk that he or she will leave the care of those tasked with protection. The volatility of XY was recognised and account was taken of it. The UKPPS has a duty to protect XY at all times, whether as a registered informant or outside the Scheme. XY's leaving of the Scheme did not end its obligation to him. If XY chose to walk away from the protection that would be his choice. The State's obligation in respect of XY's Article 2 and 3 rights is to create a system to provide adequate protection. In our opinion the evidence before Ms Spence satisfied that requirement. There is no absolute guarantee provided by either Article. If XY chose to abandon the protection provided by the system, that is his right; the exercise of his own autonomy for which the State is not responsible.

94. The questions for this Court are:

i) Did Miss Spence properly identify the risk to XY and his family?

ii) Did Miss Spence satisfy herself that steps could be taken by others to meet the risk?

The responsible authorities provided relevant information to the decision maker which permitted her to properly identify the risk. She was aware of the risk and took steps over a period of time and since to ensure that a system existed whereby the risk could be minimised and/or managed. In our view the steps taken by the prosecutor were appropriate, reliance was placed upon relevant information. A system of adequate protection to cover events from low to high risk existed sufficient to satisfy the Article 2 and 3 obligations of the State.

95. The claimant has provided no evidence to support his claim for the alleged breach of his Article 8 rights which is a qualified right. There was a real public interest in the continuation of these serious criminal trials. The claimant has failed to provide good evidence or argument to make out his challenge pursuant to Article 8 ECHR.

96. As to the claimant's Ground 7, the prospect of conviction is a matter for the assessment of the prosecutor. The court has not been provided with evidence as to such an assessment, but it is not for this Court to substitute its view of the likely success of a prosecution; this is one firmly within the remit of the prosecutor.

Decision

97. For the foregoing reasons, all claims are dismissed.