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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURTS AT
CROYDON CROWN COURT (HHJ STOW QC & HHJ BAUCHER)
NEWCASTLE CROWN COURT (HHJ GOSS QC)
BIRMINGHAM CROWN COURT (MR RECORDER FEEST)
HULL CROWN COURT (HHJ BURY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 27th February 2014

Before :

LADY JUSTICE HALLETT VICE PRESIDENT OF THE CACD
MR JUSTICE SILBER
and
MR JUSTICE GREEN

- -

Between :

Regina	**Respondent**
-and-	
Charles Okedare	**Appellant**
Regina	**Respondent**
-and-	
Mohammed Ashraf	**Appellant**
Regina	**Respondent**
-and-	
Tuan Anh Kao	**Appellant**
Regina	**Respondent**
-and-	
Zameer Ejaz Hussain, Majed Iqbal, Yasar Hussain	**Appellants**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Geoffrey Payne for **Charles Okedare**
Michael Greenhalgh for **Mohammed Ashraf**
Clare Wade and Taimour Lay for Tuan Kao
Edward Renvoize for **Zammer Hussain**
Simon Csoka QC for **Majed Iqbal and**
Abdul Iqbal for **Yasar Hussain**
Tom Little for **The Crown**

Judgment
As Approved by the Court

Lady Justice Hallett DBE, Vice-President of the Court of Appeal Criminal Division :

This is the judgment of the Court.

General background

1. The Court has before it six applications for leave to appeal against conviction and or sentence from four separate trials. In each case an applicant has either deliberately absconded or disappeared. Notwithstanding the absence of a lay client, their lawyers wish to argue a variety of grounds. The first issue for the Court, therefore, is whether or not it is prepared to entertain applications for leave to appeal and appeals from people whose whereabouts are unknown; and if so in what circumstances. In recent years, there has been some confusion over the appropriate procedure to be adopted and a degree of inconsistency in practice.

2. The position was once straightforward. In *Flower* [1966] 50 Cr App R at page 34 Widgery J giving the judgment of the Court declared that the practice of the Court where an appellant escapes is either "to adjourn the appeal or dismiss it according to the justice of the case."

3. In *Jones No 1* (1971) 55 Cr. App. R. 321 the Court went further. It found (at pages 327-329) that a decision whether or not to appeal against conviction "cannot rationally be taken before the verdict is known". It concluded that in all "save the most exceptional cases" the proper time for a defendant to take advice as to the prospects of an appeal and to give instructions to initiate appeal proceedings is after conviction and sentence. Where a defendant had absconded during a trial and "put it out of his power to give instructions at the proper time" the Court, as a general rule, would take the view that his solicitors did not have authority to initiate appeal proceedings and any notice of appeal was a nullity. This was so even if the defendant had given express instructions to appeal conviction (should it occur) post a failed submission of no case.

4. Accordingly, it became the general policy of the Registrar of Criminal Appeals to treat any application for leave to appeal lodged by the solicitors for an applicant who had absconded, on the basis that that the solicitors were "without proper instructions".

5. Yet, in *Gooch* [1998] 2 Cr App R 130, in what it described as an "exceptional case", the Court found no difficulty in proceeding to hear an appeal where leave to appeal conviction and sentence had been given and the appellant absconded before the appeal against sentence could be determined. At the invitation of the Crown (who wanted the appeal resolved so that it could enforce a confiscation order), the Court declined to follow the "normal course" and adjourn the appeal of an absconder. The Court declared there is no rule of law that an appeal cannot be heard in the absence of the appellant. Buxton LJ, giving the judgment of the Court, explained at page 134 F that in civil proceedings where a "*fundamental* (our emphasis) matter with regard to an order is being complained of, the Court will not necessarily treat the fact the order has been disobeyed as a reason for not hearing the person who complains of it. We think these considerations must apply strongly in a case where the issue is a

matter of criminal punishment…." However, the Court cautioned that a person who absents himself "is in the mercy of the Court and there may be circumstances where the only sensible or proper course is to dismiss the appeal without proper consideration of the merits" (see page 133A) .

6. The practice as laid down by *Jones* changed after the enactment of the Human Rights Act 1998 and the decision in *R. v. Charles and Tucker* [2001] 2 Cr. App. R. 15. The applicant Charles absconded on the day he was convicted shortly before the summing up. He was arrested over a year later and sentenced. He gave instructions to his solicitors to advance and renew his applications for leave to appeal conviction and the necessary extension of time. The applicant Tucker absconded two days before he was convicted and remained unlawfully at large at the time of the hearing before the Court of Appeal Criminal Division ("CACD"). His solicitors submitted grounds of appeal against conviction and maintained that they were still in touch with him and had his authority to proceed.

7. Their applications were listed before the then Vice President of the CACD, Hooper and Goldring JJ. The Court heard submissions from the parties and from an amicus. Hooper J gave the judgment of the court. We extract three passages relevant to our deliberations from his paragraphs 52 to 54:

> "(i) there could well be a breach of Article 6(1) if an applicant who has absconded could not succeed with an application for leave to appeal solely because it is treated as ineffective by the Registrar or dismissed for the reason in *Jones*…" .
>
> "(ii) there seems to us a good policy reason for not taking such an inflexible approach. If an applicant, for example, has been sentenced to an unlawful sentence then the sooner it is so declared the better".
>
> "(iii) Having considered the matter carefully, we do not share the view expressed in *Jones (No.1)* that where a defendant has, by absconding, put it out of his power to give instructions, his solicitors have not been duly authorised to prosecute appeal proceedings on his behalf. We derive some comfort from the case of Gooch in reaching this conclusion. Whilst accepting the remote risk that the absconder does not want to appeal, we take the view that a single Judge or the Full Court is entitled (but not bound), to conclude that the legal representatives submitting the application for permission have the actual or implied authority so to do. The applicant might have wished grounds to be advanced further to those which his legal representative decides to advance. That must be a risk which he takes. Nor do we think that it is appropriate for the Registrar in future to treat an application in these circumstances as ineffective. Applications should be put before the single Judge. We direct that Tucker's application should now be submitted to a single Judge. Should the single Judge refuse leave, then notices of that refusal (as in the Charles case) should be sent in accordance with regulations

> 12 and 21(c). Any application for renewal will be put before the Full Court in the usual way."

8. The Court went on to give Charles leave to appeal against conviction on grounds which criticised the trial Judge's approach to the Code of Practice governing identification procedures introduced by the Police and Criminal Evidence Act 1984.

9. Since *Charles and Tucker* was decided there have been a number of important developments in the Criminal Law and in particular the introduction of the Criminal Procedure Rules in April 2005.

10. Part 1.1 of the Criminal Procedure Rules ["Crim PR"] is in the following terms:

> "(1) The overriding objective of this new code is that criminal cases be dealt with justly. "
>
> (2) Dealing with a criminal case justly includes—
>
> acquitting the innocent and convicting the guilty;
>
> dealing with the prosecution and the defence fairly;
>
> recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
>
> respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
>
> dealing with the case efficiently and expeditiously;
>
> ensuring that appropriate information is available to the court when bail and sentence are considered; and
>
> dealing with the case in ways that take into account—
>
> (i) the gravity of the offence alleged,
>
> (ii) the complexity of what is in issue,
>
> (iii) the severity of the consequences for the defendant and others affected, and
>
> (iv) the needs of other cases."

11. Part 2.1(1)(b) makes clear that the overriding objective applies to proceedings in the CACD.

12. Further, the Court has considered the issue of whether to entertain an application in the absence of appellants on a number of occasions. We give a few examples.

13. In *McGing* [2005] EWCA Crim 1651, the Court, proceeding on the basis the appellant's counsel "had her instructions", heard and determined an application to

appeal sentence from a man who had absconded. It quashed an order "for return to prison" made in error and in ignorance of an administrative recall to prison for the same period.

14. In *Macguire* [2006] EWCA Crim 1239, the Criminal Cases Review Commission ("CCRC") referred an appeal against sentence of an absconder who had been sentenced in error on the basis of his brother's antecedents. The CCRC do not need the authority of an appellant to make a referral. The Court decided to remove a stay on the appeal imposed when the appellant absconded, hear the appeal and reduce the sentence.

15. In *Kumar* [2007] EWCA Crim 3461, the full Court allowed an appeal against sentence on the grounds it was excessive despite the fact the appellant had absconded from prison whilst serving his sentence.

16. In *KC* [2010] EWCA Crim 1845, the issue was whether the Court should entertain an application from lawyers acting for a man who had absconded during his trial on the basis his sentence was excessive. The argument focused on the fact the offences were historic and committed at a time a different sentencing regime was in force. The legal representatives were described as "without instructions". The Court, in the exercise of its discretion, agreed to hear the appeal and reduced his sentence.

17. In *Salloum* [2010] EWCA Crim 3120, the Court was faced with an application from an accused who failed to appear on the first day of his trial but continued to give his lawyers instructions from afar up to and including an appeal. Thus his lawyers had express authority to advance an appeal. He was given leave by the single Judge. Nevertheless, relying on principles it derived from Gooch, the Court refused to hear the appeal (it not being an "exceptional case") and adjourned to give the appellant one last chance to attend.

18. In *Riley and others* [2012] EWCA Crim 2507, the court considered the impact of the decision in *Charles and Tucker* on a renewed application for leave to appeal. Two of the applicants had absconded. One of them Bradley absconded during his first trial, and was convicted in his absence at a re- trial. He sought to persuade the Court that grounds of appeal lodged on his behalf by counsel and solicitors who continued to act for him even after his disappearance were a nullity having been lodged without authority. The Court held that the grounds were lodged "within the scope of their implied or deemed instructions in accordance with the decision in *R v Charles and Tucker*….." and then ratified by the applicant on his return to the United Kingdom.

Applications for leave

19. The focus of the Court in such cases is usually on the question of authority because the right to apply for leave to appeal is personal to the convicted defendant. Applying for leave on grounds that are totally without merit may have adverse consequences for him or her, for example, a loss of time order or a costs order. In normal circumstances the offender should be warned by their lawyer as to those possible consequences. The form NG which must be completed either by the appellant or on his behalf makes this clear:

> "**Appellants in Custody Only**

> I understand that if the single Judge and/or the Court is of the opinion that the application for permission to appeal is plainly without merit, an order may be made that time spent in custody as an appellant shall not count towards sentence.
>
> **All Appellants**
>
> I understand that if the court dismisses my appeal or application it may make an order for payment of costs against me, including the cost of any transcript obtained.
>
> [This form should be signed by the appellant but may be signed by his/her legal representative provided the WARNINGS set out above have been explained to him/her. NB if signed by a legal representative, the appellant will be given the opportunity to request a copy of the form.]"

20. However, the single Judge, who acts as a filter for most applications for leave to appeal, rarely (if ever) exercises the powers referred to above on a simple application for leave. We are unaware of any recent instance where the single Judge has done more than give an indication (by ticking a box) that the application is totally without merit, for the consideration of the full Court, if the application is renewed. Thus, there may be little in practice to deter a defendant from pursuing an appeal, if advised it is arguable, at least to the single Judge stage. For those who have not been remanded in custody, there may be little in practice to deter a defendant from pursuing an application further.

21. Nevertheless, the lawyer whose duty is to act in the best interests of their client should not generally advance an appeal on a client's behalf without authority. When he signs a form NG on the applicant's behalf he represents he has authority to appeal (unless he indicates clearly to the contrary).

22. A lawyer either has authority or he does not, but it does not have to be express. Authority may be inferred from all the circumstances (see the example of the applicant Bradley in *Riley and others* where instructions to represent the applicant at trial and subsequent ratification of the application for leave to appeal were considered sufficient to give authority). However, the longer the period between instructions, absconding, conviction and application, the harder it may become to persuade a court that instructions to appeal exist. Any disengagement by the defendant from the trial and appeal process may also tend to negative an inference of authority.

23. Mr Little for the Crown acted more as an amicus than prosecuting counsel. In his extremely helpful submissions, he acknowledged the force of these observations but invited the court to be willing to infer instructions to appeal, in most cases, at least as far as the single Judge stage. He provided a number of reasons, pragmatic and principled.

24. First, although it does not necessarily follow from that the fact that the applicants have little to lose from providing instructions to appeal that there is an implied instruction to appeal, in most criminal appeals the applicant plays a limited role. The

appeal is commonly determined on questions of law or evidence or sentencing practice. In the event of a conviction and sentence it might be safely assumed that an applicant would wish to appeal if they were informed that the application was properly arguable at least as far as the single Judge stage.

25. Second, there is a clear public interest in litigation (at first instance and appellate level) being resolved expeditiously if, at all, possible. A practice, which effectively amounts to staying applications by an absconder for leave to appeal pending their apprehension, is inconsistent with the need to deal with appeals expeditiously and with respecting the interests of witnesses and victims who deserve finality.

26. Third, albeit any system should be one in which there should be no encouragement to abscond, the penalty for absconding is the imposition of a sentence rather than any restriction in rights to appeal. Arguably, a restriction on the ability of an applicant to appeal solely because he had absconded could be described as disproportionate.

27. Fourth, there are bound to be circumstances in which the Court would wish to intervene in the interests of justice, for example the Court would not wish to countenance the possibility of an unlawful sentence being allowed to stand simply because an offender has absconded. The court should not deny itself the power to correct a glaring error.

28. We see considerable force in the approach advocated by Mr Little. It accords with the law, with reality and with the general (if not universal) practice of the Court in recent years. It is consistent with the principles of the Criminal Procedure Rules for the Court to dispose of cases where it can and it is consistent with a defendant's right to a fair trial to allow his lawyers to apply for leave to appeal, even in his absence. By absconding, a convicted defendant risks additional punishment and loses the opportunity to participate fully in an appeal, but, as the decision in *Charles and Tucker* makes clear, he does not give up his right to apply for leave to appeal and authorize his lawyers to do so. If there is little to lose, most defendants would wish to enforce that right. We endorse Hooper J's observations at paragraph 54 of *Charles and Tucker* to the effect that "a single judge or the full Court is entitled (but not bound) to conclude that the legal representatives submitting an application for permission have actual or implied authority to do so".

29. Further, we consider that even where the position is clear that an application is launched without instructions, the Court has the power to intervene in the interests of justice. In this judgment we do not seek to determine in any definitive way the limits of this power. Its most obvious application will be where the court below has imposed an unlawful sentence or lacked jurisdiction. In such cases the appeal court will be enforcing the intention of Parliament by holding the lower court to its statutory powers. However, we do not think that this defines the limits of the Courts power, given the broad duty of the Court imposed by part 1.1 of the Criminal Procedure Rules to perform justice and acquit the innocent and which expressly incorporates considerations based upon Article 6.

30. There can be no clear dividing line between applications/renewed applications the court would be prepared to entertain, notwithstanding the absence of authority and those it would not; save to say that applications based on the exercise of discretion are more likely to fall the wrong side of the line (even if described as a "point of

law") whereas applications based on a fundamental error (eg *McGing* and *MacGuire*), want of jurisdiction or an unlawful sentence would fall the other.

31. Thus, we are satisfied that the practice should be: applications from absconders should not be treated as ineffective per se. If there are grounds for believing an absconder has given authority to appeal, expressly or impliedly, or the case is one where the Court might wish to intervene in the interests of justice, the Court should proceed as normal. The application should be put before the single Judge. The single Judge may adjourn the application for more information, grant/refuse leave or refer the application to the full Court as usual.

32. If the single Judge is satisfied there is no authority to pursue an application for leave and the application is not one the Court would wish to entertain, she or he has the power to treat the application as ineffective and time will continue to run. However, we would expect orders declaring an application ineffective and orders staying applications brought on behalf of absconders to be the exception rather than the norm at this stage.

33. However, it remains the professional responsibility of the lawyer to highlight the fact their client has absconded for the benefit of the Criminal Appeal Office and the single Judge. He must provide a full account of the circumstances of the absconding (with updates if necessary) coupled with an explanation for the basis for the assertion of authority and/or any reason why the Court would wish to entertain the application.

34. We see no reason to differentiate between applications for leave to appeal against conviction and sentence. It was suggested during argument that there may be problems where a successful appeal against conviction results in an order for a re-trial, especially in multi handed cases. The order of the Court in such cases (pursuant to Section 8(1) of the Criminal Appeal Act 1968) requires re-arraignment of an appellant within two months. If the appellant is not here he cannot be arraigned. However, if a defendant can be tried in his absence, he can be re-tried in his absence. Those acting for him will be notified of the order for a re-trial and if the appellant is still absent at the time of his re-arraignment then he will be deemed to have waived his right to be re-arraigned and a not guilty plea entered. Any additional complications which arise from the fact the applicant is one of a number of co-accused seeking to appeal against conviction must be addressed on a case by case basis. It may be advisable, however, to adjudicate upon the applications of co-accused, where possible, before finally disposing of an application of an absconder.

35. Where the single judge has given leave, it remains for the full Court to decide whether it is prepared to hear the appeal on the merits. If it is not so satisfied, the appeal can be stayed.

Renewals

36. The question then arises what happens if the single Judge refuses the application or declines to refer it. It becomes much harder to infer authority where there is a real risk of adverse consequences to the convicted person, for example one who has been remanded in custody. The full Court may well exercise the powers referred to in form NG, where a wholly unmeritorious application is pursued to the full Court and precious time and resources (better devoted to meritorious applications) are wasted.

This might mean an order for costs or that time served pending the determination of his appeal shall not count towards a sentence.

37. Thus, the lawyer has a duty to his client to advise him of possible rather than theoretical consequences of pursuing an application. For this reason, it became common ground during the course of argument that a lawyer should consider his duties to the client and to the court very carefully before advancing a renewed application that might have adverse consequences for the client, absent clear instructions from them. In these circumstances, the court may be unwilling to infer authority to renew from the mere fact of their having been instructed to represent the client at trial. However, again, the interests of justice may prevail and there may be cases where the Court is prepared to entertain a renewal application notwithstanding any issue over authority.

38. If the applicant has nothing to lose by renewing an application, as may well be the case, it may be easier to persuade the Court that authority should be inferred from all the circumstances, but, we emphasise, it remains a decision for the Court.

39. Thus, unless the interests of justice demand a hearing of the merits (for example in the case of an unlawful sentence), the full Court may well treat an application to renew made without instructions as ineffective. Time will continue to run in respect of it.

40. If the application to appeal/renew is out of time then the fact that it is being made by a person who has absconded is a matter which the Court can properly take in to account (amongst other factors including the reason for its delay and its merits) when deciding whether to extend time to the applicant or not. Such an approach is not disproportionate.

41. If the number of absconders increases and the problem becomes a significant one for the Criminal Appeal Office, consideration might be given to re-drafting form NG or drafting a form which applies solely to absconders.

42. We turn to the individual applications

Charles Okedare

43. Charles Okedare was charged with an offence of conspiring to defraud the Secretary of State for the Work and Pensions of benefit money. Having previously been granted bail, he was due to appear at the Croydon Crown Court on 21 January 2011 when the case was listed for a Plea and Case Management Hearing. He failed to appear and a warrant was issued for his arrest and he also failed to attend at a subsequent directions hearing on 3 March 2011.

44. On 24 June 2011, a ruling was made at Croydon Crown Court that the continuing absence of the applicant from the proceedings should be deemed as a waiver of his rights to be arraigned as no explanation had been provided for his absence. Similar rulings were made in respect of the applicant's co-accused, Akinwumiju and Akande.

45. Between 13 March 2012 and 19 April 2012 the applicant, together with Akinwumiju and Akande were tried in their absence together with three defendants who attended their trial.

46. On 19 April 2012 the applicant was convicted in his absence of one count of conspiracy to defraud. Following his conviction on 4 May 2012, he was sentenced again in his absence to 2 years imprisonment, with the warrant for his arrest remaining outstanding.

47. On 4 May 2012, a timetable was set for confiscation proceedings pursuant to the Proceeds of Crime Act 2002 ("POCA") in relation to all the defendants. Counsel for the applicant and the other absent co-accused raised the issue of jurisdiction. A hearing was set to determine the issue for which skeleton arguments were provided by the prosecution and on behalf of the applicant.

48. The prosecution considered that they were entitled to proceed with confiscation proceedings against the defendants who had absconded under section 28 of POCA. The applicants submitted that sections 27 and 28 did not apply with the consequence that legislation did not provide for the commencement of confiscation proceedings against a defendant who had absconded before trial and was subsequently convicted in his absence.

49. HHJ Stow QC considered the provisions of sections 6, 27 and 28 of POCA. The Judge determined that neither sections 27 nor 28 applied, but that section 6 did. On 13 June 2012, a confiscation order was imposed in the applicant's absence in the sum of £29,050.62 to be paid within 6 months. A term of 14 months imprisonment was ordered to be served consecutively to the 2 year sentence in the event of default in payment.

50. An application has been made on behalf of the applicant for leave to appeal HHJ Stow QC's ruling on the basis that section 6 does not apply and the Court had no jurisdiction. Counsel for the respondent contends that the Judge was right to permit the matter to proceed but that he erred in relying on section 6 rather than section 28.

51. The application for leave to appeal has been referred to the Full Court by the Registrar. It is not disputed that the applicant's solicitors did not have express authority but it is clear (and the respondents agree) that the application raises an important issue on statutory construction relating to the jurisdiction of the Court to hear the confiscation proceedings. We give leave to the applicant to pursue the application.

Mohammed Ashraf

52. Mohammed Ashraf and Mohammed Adrees were charged with the offence of arson with intent to endanger life in the Crown Court at Newcastle upon Tyne. The issue of his fitness to plead was to be tried as a preliminary issue but before this took place, the applicant deliberately left the United Kingdom to attempt to avoid being tried. The Recorder of Newcastle found that the applicant had feigned illness and had disengaged from the trial process. The trial proceeded in his absence. His counsel applied for the jury to be discharged because of the admission of some allegedly

prejudicial material. The Judge refused the application stating that any potential prejudice could be removed by an appropriate direction.

53. On 12 April 2013 the applicant was convicted of the offence of arson and on the same day, he was sentenced to 7 years imprisonment. His lawyers sought leave to appeal conviction, on the basis that the Judge ought to have discharged the jury, and sentence, on the grounds of disparity and excessive length.

54. Leave to appeal conviction was refused by the single Judge who explained that the trial Judge had directed himself correctly and he was entitled to reach the conclusions he did. The application for leave to appeal against sentence was also refused because the arson was planned, committed at night and involved the use of an accelerant on a house which was likely to contain sleeping adults and children. There was no objectionable disparity between accused because the Judge was entitled to find that the applicant was the driving force and the organiser of the offence.

55. The applicant's lawyers seek to renew the applications. His counsel accepted, correctly in our view, that they have no authority. He did not attempt to persuade us that these are applications the Court would wish to entertain and that the interests of justice test (however loosely defined) is met. In those circumstances, we would be entitled to treat them as ineffective. However, the application having come this far, we decided it would not be in the interests of justice to allow the applicant to benefit from his absence. We considered the renewal applications on their merits and agreed wholeheartedly with the single judge for the reasons he gave. The renewed applications are refused.

Zameer Hussain, Yasar Hussain and Majed Iqbal

56. The three applicants renew their applications for leave to appeal against conviction and sentence.

57. The first applicant Yasar Hussain absconded after the fifth day of his trial. He was convicted in his absence of 12 counts of converting criminal property, contrary to section 327(1)(c) Proceeds of Crime Act 2002 (counts 2-14) and conspiracy to pervert the course of justice (count 15). He was sentenced to 4 years imprisonment on each count concurrent on counts 2-14 and 42 months imprisonment consecutive on count 15 giving a total sentence of 7 years and 6 months.

58. His solicitors have sought to apply for permission to appeal but confirmed to the Registrar of Criminal Appeals by letter dated 25 January 2013 that they do not have instructions to submit the application to renew. In the course of oral submissions it was explained to us that solicitors received a letter purporting to come from Yasar Hussain which was dated on a day unspecified in January 2013 but received by the solicitors in February 2013. The letter intimated that Yasar Hussain gave instructions to appeal. However, Counsel quite fairly and in our view correctly, did not submit to us that we should treat this letter as genuine. He accepted, therefore, that he did not have authority to make the application to renew the application for leave. He also accepted that the grounds upon which he relies do not go to unlawfulness or want of jurisdiction and do not obviously fall within the "interests of

justice" category. They do, however, substantially overlap with those of the other co-defendants.

59. In those circumstances, we decided to consider the applications of his co-accused before reaching our final conclusions on the disposal of his application, thereby avoiding the difficulty that may have arisen had we seen merit in the grounds of appeal common to all accused.

60. The second applicant, Zameer Hussain, was convicted of one count of conspiracy to pervert the course of justice (count 15). He was sentenced to 18 months imprisonment. The third applicant, Majed Iqbal, was also convicted of count 15. He was sentenced to 5 years imprisonment.

61. Count 1 concerned a conspiracy to defraud, amounting to what is termed an 'advance fee fraud.' It was contended that Yasar Hussain and others made false representations about the trademark 'Duracell' in order to induce certain foreign companies to make payments for goods which were never supplied. False representations were made to five companies in order to induce payment: Golden Arch & Sing'z Food in Dubai, Pars Piricas in Iran, Sonia Foods in Hong Kong, and, Pimp Juice in Hungary. The prosecution alleged what they called a closed conspiracy and accordingly the Judge directed the jury that they could only convict if they found more than one accused guilty.

62. Counts 2-14 concerned the conversion of criminal property. The Applicant Yasar Hussain was charged with 13 counts relating to the deposit in and withdrawal from the bank of monies paid over by the five defrauded companies.

63. Count 15 concerned an allegation of conspiracy to pervert the course of justice. It concerned all three of the applicants. Majed Iqbal was the solicitor from a Bradford firm who was instructed by Yasar Hussain in the fraud trial.

64. The prosecution alleged that all three applicants had sought to persuade witnesses from the five defrauded companies not to attend the original trial (which had been due to start on 11th June 2012) and to retract their allegations. The three applicants travelled abroad to meet witnesses or their associates with a view to paying money to them in return for a written promise not to attend court and a retraction of allegations. Meetings were recorded by the alleged conspirators.

65. They intensified their efforts after a pre-trial ruling by the Judge on the admissibility of a written statement from the Hong Kong company. The applicants and their representatives withdrew money and flew (from 3 different airports) to Dubai to meet a representative from Sonia Foods with a view to "settling the case".

66. On their arrival back at Manchester on Monday 28th May the applicants, Yasar Hussain and Majed Iqbal, together with a Mahmoon Ul-Rashid, were arrested. Zameer Hussain travelled to Heathrow.

67. Mahmoon Ul-Rashid was found to be in possession of items belonging to both applicants. These included Iqbal's laptop in which was a disc containing documents relating to the fraud case. They also found money exchange slips. In his pocket, Yasar Hussain had a bank withdrawal slip showing Zameer's withdrawal of £30,000,

and two SIM cards. The Applicant Majed Iqbal claimed that his bags contained legally privileged material but they were nonetheless seized, together with his I-phone and two other phones. The police also recovered two memory sticks from Iqbal's hand luggage containing the recordings of meetings in the Dubai hotel room and showed Iqbal handing over money

68. Copies of the retraction statements were found on the memory stick. He was also in possession of an original document signed by a Hong Kong witness promising not to attend Court. This stated: "A civil settlement has been agreed…. We no longer wish to support any action against individuals in the UK. We wish to withdraw our statement. We confirm we will not be attending Court in the UK." A memory stick contained electronic copies of similar statements from other witnesses.

69. The police also found four more written agreements from the other four fraud victims, making a full set of agreements not to attend Court. Iqbal also had a note of all the witnesses' phone numbers. It appeared that £133,500 had been paid to four of the companies' witnesses; it is not known how much the Hungarian company received.

70. All three applicants had been in Dubai for the meetings. Iqbal had applied for legal aid funding to pay for one of the trips, purportedly to take a statement in relation to the fraud case and to travel to Iran "to ascertain the full background to the matter". Yet, he did not go to Iran and when he met the Iranian representative, no attempt was made to gather any evidence.

71. The police also investigated telephone calls and found that the applicants or their associates had regularly contacted the witnesses' phone numbers. They called themselves Tony and Joseph, and used three mobile numbers which they thought could not be traced to them. However, Iqbal used one of these so called "dirty" phones to make a work-related call to the Duty Solicitor centre when he was at Heathrow, waiting to go to Dubai.

72. The applicants were arrested and interviewed. Yasar Hussain made no comment, although the Court was later told that the £30,000 was to settle invoices, relating mainly to home improvements at the family home. Majed Iqbal made no comment but handed in prepared statements, denying any involvement with paying off witnesses and saying that he was concerned about confidentiality. He was in Dubai on holiday, and it was a coincidence that Yasar Hussain was there at same time. Zameer Hussain said that he had withdrawn £30,000 to buy fixtures and fittings for a new club he was opening in Preston. He had gone to Dubai to a party. Iqbal and Zameer Hussain gave evidence along similar lines.

73. The case put on Yasar Hussain's behalf in his absence was that there may well have been false representations to Proctor & Gamble, but it was not an advance fee fraud. It was a failed business venture. In relation to the conspiracy to pervert the course of justice, there was no direct evidence that he had attended the meetings. In any event the representatives of the defrauded companies had exercised independent business judgment not to attend court and as businessmen were only concerned to settle the case on commercial terms. This, it was said, was not an offence.

Applications

74. Various applications were made and were ruled upon by the Judge. First, an application to stay proceedings on the grounds of abuse of process was based on the fact the police seized and inspected various material subject to legal privilege. Following a three day voir dire the Judge rejected the application. In a detailed ruling which set out the relevant law he ruled that the police had engaged in "misconduct" of a kind in obtaining the disc, then printing and retaining a document obviously subject to legal professional privilege. But, he concluded that this was an honest mistake. He further found that he had been given dishonest explanatory evidence during the voire dire. This he attributed to the officers seeking to cover their tracks through embarrassment at their earlier errors rather than a deliberate attempt to conceal dishonest conduct. He could see no material impact or prejudice resulting from this to the defence. Any misconduct was not such as to require a stay to protect the integrity of the criminal justice system.

75. Second, the Judge ruled on an application to allow statements to be read in the absence of the maker. He permitted the prosecution to read the witness statements from the representatives of Golden Arch UAE, Singz Foods UAE, Pars Piricas Iran, Sonia Foods Hong Kong and Pimpjuice, Hungary, but not the witness statement of Phuman Singh Ghuman (Singz Foods UAE). In Mr Ghuman's case alone, he considered there was material casting doubt upon his reliability and it was not in the interests of justice to admit it. The Judge later reviewed his decision in the light of the applicants' evidence. He concluded that the defence had not been hampered by the admission of the evidence.

76. Third, Majed Iqbal claimed he could not have a fair trial in the light of despite Yasar Hussain's refusal to waive privilege before he absconded. The Judge disagreed. Despite the number of areas where privilege attached, he was satisfied Iqbal could indicate his defence sufficiently. The trial process and stern warnings to the jury would provide sufficient safeguards to ensure that he had a fair trial.

Grounds of appeal against Conviction

a) Abuse of process

77. It was argued on behalf of all of the applicants that the Judge erred in failing to stay the proceedings for abuse of process arising out of the conduct of the police officers in relation to the privileged material. Mr Renvoize, for Zameer Hussain, raised a separate argument about privilege. He contended that because the police had included the privileged document in a list of unused material it was an abuse not to have provided it to the other defendants i.e. to persons other than the owner of the privileged document.

78. In our judgment, there is nothing remotely arguable in the abuse of process argument or the disclosure of privileged material arguments and the single Judge was correct to conclude that they were unarguable.

79. The Judge carefully considered the issue. He directed himself fully and properly on the law. He made a considered assessment of the credibility and motives of the police officers in issue and concluded it did not reflect bad faith at the time of the wrongful seizure of the privileged material. This was a view of the evidence open to him. He also made an assessment of prejudice. The Prosecution had not had sight of

the document so that there was no inequality of arms. No-one suggested there was any or any material prejudice to the defendants from the seizure.

80. These facts are, as he found, far removed from the cases where an argument of abuse has been sustained and where there is real prejudice or an affront to justice. This is quintessentially the sort of case where an appeal court should be slow to interfere. We decline to do so.

81. Mr Renvoize's argument as to disclosure of privileged material is fatally flawed and, with respect, betrays a failure to understand the principles behind legal professional privilege. If the privileged material was wrongly seized then the duty of the police was to return that material forthwith. It was not to compound the error and treat it as discloseable to other co-defendants. If the position were otherwise this would be to place other parties in a better position than they would have been had the unlawful seizure not occurred.

b) Unreliability of the jury

82. It is also suggested that because the jury was confused, in the face of a clear direction from the Judge, as to the components of conspiracy, they must have been confused generally and this makes the convictions unsafe. The single Judge rightly rejected this ground also. Even if the jury was confused on one point it does not follow, that they were confused on other points where the law and the evidence were different.

83. In our view the fact that the jury deliberated at great length and gave mixed verdicts suggests that they were quite able to differentiate between different points of law and different strands in the evidence. There is no suggestion that the jury were in any way confused as to their other deliberations. We suspect the fact of a verdict being returned on only one accused probably has more to do with the timing and manner of taking of the verdicts than any confusion on their part.

c) Privilege

84. It is argued on behalf of Majeed Iqbal alone that his duty to maintain legal privilege prevented him from having a fair trial and being able to refer to potentially exculpatory material.

85. There is an air of unreality about this argument. From our reading of the transcripts, Iqbal frequently used the cloak of privilege to protect himself. He would avoid difficult questions by saying that he was prevented from responding because he would have to divulge privileged material; so much so, his counsel invited the Judge to direct the jury that this was not the case. The Judge, in our view generously, erred on the side of caution and gave the direction to the jury in strong terms favourable to Iqbal.

86. Despite a valiant attempt by Mr Csoka QC for Iqbal we are not persuaded that there was any prejudice in Iqbal's inability to refer to privileged material. He was unable to provide even the most general description of the kind of material that he claimed was lost to his defence. There was nothing which prevented him from giving an honest explanation of his presence and possession of the documents. This he did. He

provided a considerable amount of detail to explain his trips and apparent involvement. Further, there was nothing which prevented his explaining why he used false names and misrepresented his occupation during the meetings and why his firm insisted he was not acting in the capacity of a solicitor at all.

87. Accordingly, we are satisfied his inability to refer to privileged material – such as it was – did not remotely mean that he was denied a fair trial.

Supplemental grounds

88. Various arguments were advanced on paper that the Judge wrongfully admitted certain statements to be read as admissible hearsay. These were matters for the Judge's discretion having heard the argument and being in full knowledge of the evidence. They are unarguable.

89. Majed Iqbal advanced (from prison) additional extra grounds out of time under cover of a letter dated 12th July 2013. These are: (i) that the Judge erred in admitting hearsay evidence from the complainants; and (ii) that the Judge erred in not allowing defence counsel to see a jury note. We note his counsel felt unable to argue these grounds before us. He was right. They are totally without merit.

Grounds of Appeal against Sentence

90. Majed Iqbal alone argues that his sentence was manifestly excessive and was "substantially more onerous" than the appropriate sentence for the substantive offence. What this ground ignores is that Iqbal was a practicing a solicitor who was heavily involved from start to finish in the conspiracy to pervert. This was a determined and cynical breach of his own professional duties and it was no isolated incident.

91. He knew that the evidence against Yasar Hussain on a very serious charge was overwhelming. Nevertheless, he agreed first with Yasar and then with Zameer to pay off witnesses abroad. He had access to Hussain family money and made five trips abroad (three trips to Dubai, one to Budapest and one to Hong Kong) to bribe witnesses to prevent them giving evidence. His offending was further aggravated by his attempts to thwart the Judge's adverse ruling on the admissibility of the Hong Kong statement and by the fact he made a fraudulent application for public funding for the first and third Dubai trips. His efforts were successful since none of the witnesses whom he had paid came forward for the trial.

92. The applicant already had relevant previous convictions. In 2000 he had pleaded guilty to five offences of dishonesty and received a community service order. In 2001, he had pleaded guilty to actual bodily harm and been conditionally discharged.

93. We have no doubt the seriousness of the offence justified a substantial prison sentence. This was necessary to uphold public confidence in the justice system and the professionals working within the system and to deter others. The Judge was perfectly entitled to arrive at the conclusion that he did and his reasoning cannot be faulted.

94. Accordingly, we see no merits in any of the grounds advanced before us for any of the applicants. We see no reason, in the interests of justice to leave the applicant Hussain in a better position than his co-accused by treating his application as ineffective and thereby leaving the door ajar to a possible renewed application in the future. We dismiss the applications of all three applicants.

Tuan Anh Kao

95. Finally we consider the rather different application of Tuan Anh Kao. On 16 June 2012 a police helicopter identified an unusual heat source coming from an address in Birmingham. As police approached the property, the applicant fled from the rear of the house and hid in a tree. He was arrested along with a Lithuanian male, Silvas. The house was identified as a cannabis factory containing approximately 500 cannabis plants with a hydroponic system installed in the bathroom.

96. On arrest, the applicant explained to the police that he was 16 years old and he was treated as a juvenile. When he was interviewed in the presence of a solicitor about the offence he gave a "no comment" response to all questions. Silvas was also interviewed and he denied the offence but he was subsequently convicted after trial.

97. The applicant appeared in the Youth Court on 28 February 2012, at which time the court treated him as being over 16 years. He was committed for trial at the Birmingham Crown Court. On 28 April 2012 he pleaded guilty to one count of producing a controlled drug of class B, namely cannabis plants. The Recorder held that he could not be satisfied that applicant was over 18 years of age and sentenced him to a 12 months Detention and Training Order.

98. The applicant disappeared during the probationary period of that order and remains at large. It is possible that he has been "re-trafficked" or that he has simply absconded. On his behalf application is made for an extension of time of about 17 months in which to apply for leave to appeal against conviction notwithstanding the plea of guilty.

99. Ms Phillipa Southwell, who is a solicitor employed by Messers Birds, has stated in a witness statement made on 13 January 2014 that her firm was instructed on 17 September 2012 by the applicant who wanted to appeal his conviction for drug cultivation. She explained that she wrote to the applicant on 18 September 2012 explaining that if he wished to appeal, he would have to sign and return to her the relevant forms. This he did on 20 September 2012, but was reported missing on 23 December 2012.

100. His solicitors have relied on his initial communication and the fact that he signed the authority and funding form to argue that they have authority to pursue this appeal. We agree. Their client indicated his wish to appeal and his consent to his solicitors taking the necessary steps. There is nothing to suggest he wished or wishes to withdraw the application. The fact that the applicant has absconded/disappeared in these circumstances does not preclude the court from considering this appeal. In any event there remains the possibility that his disappearance is not his fault.

Grounds of Appeal

101. The issues raised on this appeal are first whether the applicant was trafficked, and, if so, whether he has been compelled to commit a criminal offence as a consequence of being trafficked. This entails consideration of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197) ("the Convention"), which has been ratified by the United Kingdom.

102. The case for the applicant is that his case engaged Article 4 of the European Convention on Human Rights and Article 26 of the Anti Trafficking Convention. Article 26 of the Convention explains how those compelled to commit offences as a result of trafficking should be treated and it provides that:- "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so"

103. Article 26 has been supplemented by EU Directive 2011/36 on Preventing and Combatting Trafficking in Human Beings which came into force and Article 8 of it provides that:-

> "Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2"

Article 2 of the Directive provides an extensive definition of what constitutes trafficking.

104. The applicant, as a Vietnamese youth under the age of 18 at the time of arrest and found acting as a "gardener" in an organized industrial sized scale cannabis factory was, therefore, subject to a National Referral scheme to consider and determine whether he was a victim of trafficking. The Home Office made an interim finding on 23 November 2012 that there are reasonable grounds to believe that the applicant is a victim of trafficking.

105. The applicant was then entitled to a period of 45 days of reflection which would run from the date of his release from detention after which he would be entitled to a conclusive decision. A conclusive decision has not been reached because the evaluation cannot be completed while the applicant remains missing.

106. All this Miss Wade submits amounts to a compelling case the applicant is the victim of trafficking and should never have been prosecuted. There is a positive duty on the part of the prosecuting authority to investigate whether or not the applicant was a victim of trafficking and whether a prosecution is in the public interest. Yet no investigation was conducted. The Crown Prosecution Service failed to follow its own guidelines. He should have been referred for investigation. The conclusion, she insists, was bound to be that he was the victim of traffickers.

107. It is important to bear in mind that even if it is clearly established that an offender has been trafficked it does not provide him with immunity from prosecution for a

criminal offence. In the cases of *L, HVN and others v R* [2013] EWCA Crim 991, Lord Judge CJ explained that:-

> "13…it has not, however, and could not have been argued that if and when victims of trafficking participate or become involved in criminal activities, a trafficked individual should be given some kind of immunity from prosecution, just because he or she was or has been trafficked, nor for that reason alone, that a substantive defence to a criminal charge is available to a victim of trafficking".

108. Other than the provisional finding of the Home Office, inferences drawn by the United Kingdom Border Agency and the NSPCC, from his nationality and youth, that he may well have been trafficked and assertions made by Ms Wade we have no admissible material as to whether or not the applicant was in fact trafficked, and we have no material at all on whether he was compelled to commit the offence. Further, we have no evidence on why he pleaded guilty. Such evidence would have to come from the applicant.

109. Thus, important issues cannot yet be resolved. In those circumstances, we consider that it would be premature to give permission at this stage. If the court were to proceed to determine the application on the material presently before it, there is always the possibility that the decision would be adverse to the applicant. Given the possibility he may have been trafficked and re-trafficked that would be unfair on him.

110. Given the exceptional nature of the application, we consider that we have no option but to stay this application for permission to appeal unless and until the applicant is able to address and satisfy the requirements above.