Neutral Citation Number: [2018] EWCA Crim 2809

Case No: C4/2017/02410

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
His Honour Judge TOPOLSKI

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2018

Before :

LORD JUSTICE GROSS
MR JUSTICE WILLIAM DAVIS
and
MR JUSTICE GARNHAM

- -

Between :

REGINA	**Respondent**
- and -	
HAROON ALI SYED	**Appellant**

- -
- -

Duncan Penny QC and **Alison Morgan** (instructed by **CPS Counter Terrorism Division**) for the **Appellant**
Mark Summers QC and **Steven Powles** (instructed by **Ahmed & Co**) for the **Respondent**

Hearing date : 21 June 2018

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Approved Judgment

LORD JUSTICE GROSS :

INTRODUCTION

1. This is the judgment of the Court to which we have each contributed.

2. This application concerns alleged entrapment.

3. Entrapment or the use of *agent provocateurs* has a very long history (see Prof. Christopher Andrew, *The Secret World, A History of Intelligence* (2018), at pp. 61-2 and elsewhere), raising acute ethical questions for intelligence and security agencies and police alike of the kind discussed more generally in Sir David Omand and Mark Phythian, *Principled Spying: The Ethics of Secret Intelligence* (2018), *passim*. In the criminal justice system, covert operations give rise to the need to balance competing interests. There is an obvious public interest in protecting society by combating serious crime, such as terrorism, drug trafficking and sexual grooming on the internet – and covert operations are of the first importance in doing so. Realism is essential as to what is entailed in such operations, including a recognition of the means necessary for success. On the other hand, the right to a fair trial, whether under the common law or the European Convention on Human Rights ("ECHR") is of fundamental importance, so that the need for limits on covert operations to protect the rule of law and the integrity of the justice system is equally well-recognised. Ends do not always justify means. Sometimes, the line between legitimate law enforcement operations and abusive conduct is not as easy to draw in practice as it can be articulated in theory. On other occasions, it can readily be seen on which side of the line a particular covert operation falls.

4. On 27 April 2017, at the Central Criminal Court before HHJ Topolski QC, the Applicant, now 20 years' old and hitherto of good character, pleaded guilty to the preparation of terrorist acts contrary to s.5(1) of the *Terrorism Act 2006*.

5. On 3 July 2017, the Applicant was sentenced by HHJ Topolski QC to custody for life; the period of 16 years and 6 months, less 297 days on remand was specified as the minimum term under s.82A *Powers of Criminal Courts (Sentencing) Act 2000.* Various other miscellaneous matters were dealt with; it is unnecessary to recount those here.

6. The Applicant's application for leave to appeal was refused by the Single Judge. His renewed application for leave was adjourned by a constitution of the full Court (of which Gross LJ and Garnham J were members) on 30 January 2018, to a date when the Crown were to be represented. That adjourned hearing has now taken place.

7. The Applicant challenges the Ruling, handed down by HHJ Topolski QC on 12 April 2017 ("the Ruling"), following three days of argument in March 2017. In the Ruling, the Judge rejected both applications advanced on behalf of the Applicant: namely: (1) that evidence of the undercover operation constituting the decisive prosecution evidence in the case against the Applicant should be excluded pursuant to s.78, *Police and Criminal Evidence Act 1984* ("PACE") and/or Art. 6 of the ECHR; and/or (2) that the proceedings should be stayed as an abuse of process.

8. Before us, Mr Summers QC, for the Applicant, concentrated more on the abuse argument, rather than seeking the exclusion of the evidence in question pursuant to s.78 PACE and/or Art. 6 ECHR. He no longer, however, sought to submit that a different outcome could result depending on whether the Applicant's case was viewed as an abuse application or an application to exclude evidence.

9. In summary, Mr Summers QC's carefully constructed submissions proceeded as follows:

   i) The relevant English law on entrapment is found in *R v Looseley* [2001] UKHL 53; [2001] 1 WLR 2060 and is derived from the common law of the Commonwealth, not the ECHR.

   ii) The jurisprudence of the European Court of Human Rights ("the Strasbourg jurisprudence") under Art. 6 now enjoins a fundamentally different approach to "police incitement".

   iii) The Judge applied the common law and predictably declined to stay the proceedings and/or exclude the evidence.

   iv) Had the Judge applied Art. 6, the outcome would or, at the least, arguably could, have been otherwise.

   v) Applying s.2 of the *Human Rights Act 1998* ("the HRA 1998"), the Judge was *prima facie* obliged to apply Art. 6, ECHR.

   vi) However, as the Applicant accepts, *Looseley* remains binding (on this Court) as a matter of domestic law, in accordance with *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465.

   vii) Accordingly, this Court should: (a) grant leave to appeal; (b) dismiss the appeal; (c) certify a point of general public importance, pursuant to s.33(2) of the *Criminal Appeal Act 1968*; (d) grant or refuse leave to appeal to the Supreme Court, which was in a position to consider the "continued correctness" of *Looseley* and, hence, the safety of the conviction.

   viii) The Applicant's guilty plea did not preclude this course being followed.

10. For the Crown ("the Respondent"), Mr Penny QC submitted in outline:

   i) The Applicant pleaded guilty in the face of overwhelming evidence.

   ii) There was no reason to doubt the safety of his conviction.

   iii) There was no proper basis for alleging that entrapment had taken place in this case.

   iv) The approach adopted in *Looseley* was binding, correct and compliant with Art. 6, taken together with the Disclosure regime under the *Criminal Procedure and Investigations Act 1996* ("the CPIA 1996").

v) There was no basis for certifying a question as there was no arguable point of law and the application was without merit.

THE FACTS

11. *(1) Background:* Evidence from West Thames College, the Applicant's college, suggests that in or around September 2014 (when he was 17), the Applicant was a '*quiet…polite…forgetful and…childish*' student.

12. The Applicant's brother was arrested for terrorist offences in November 2014. In the months following, the Applicant's behaviour began to change. He became withdrawn and began paying less attention to schooling, professed to have turned to Islam, dressed and behaved traditionally, and was less social and more angry.

13. Staff had concerns that he was being '*groomed to have radical views'*, could be '*easily brainwashed'*, and that the Islamic views he was expressing were not his own and that he did not have the capacity to form them for himself. His views were religious rather than political, albeit thought by at least one teacher to be '*extremist'*. The Applicant also spoke to another student about a desire to help those '*being killed in Syria'*.

14. *(2) Overview:* Between 13 April 2016 and the Applicant's arrest on 8 September 2016, Security Service officers, posing as "Abu Yusuf", communicated online via social media, on a messaging forum called "Threema", with the Applicant who was using the name "Abu Hudaifah". The Applicant and Abu Yusuf also communicated with "Abu Haleemah", "Abu Isa" and "Abu Hass".

15. The Respondent's case was that during these online conversations, the Applicant was engaged in what he believed to be the purchase of weapons, a bomb and target research for an attack in the United Kingdom ("UK"). The Applicant's intention crystallised into a plot to carry out a pressure bomb attack.

16. The Respondent relied on: (1) a schedule of the online conversations between 13 April 2016 and 6 September 2016, running to some 876 entries; (2) meetings between Abu Yusuf and the Applicant on 29 May 2016 and 1 September 2016, together with a 40 second recording of the 29 May meeting (which lasted 40 minutes) and an audio recording of the September meeting; (3) the Applicant's application for a loan on 9 August 2016, to fund the cost of a bomb; (4) the Applicant's comments to police officers when he was arrested, that the password for his phone was "ISIS. You like that?"

17. The Defence case was that the Applicant had been targeted and groomed online by three named individuals, including Abu Isa. They had actively sought to entice the Applicant into radical Islam and put him in touch with a role player (i.e., Abu Yusuf). The applicant was addicted to violent online video games and he joined in the online conversations because he enjoyed playing a game – but he neither regarded it as a real plan nor had any intention of committing a terrorist act. A psychiatric report was prepared and described the Applicant as suffering from conduct disorder; it concluded that he was an "easy target for recruitment" as he was "a product of a dysfunctional and pathological upbringing which left him vulnerable".

18. *(3) Disclosure:* An application was made on 17 February 2017 under s.8, CPIA 1996 for disclosure in respect of the undercover operation. The Respondent stated that there was nothing further to disclose. The Applicant invited the Judge to superintend the process and, at the Applicant's (not the Respondent's) request, an *ex parte* hearing was held. No further disclosure was ordered. Importantly, the Respondent at no stage sought to rely upon any *ex parte* material in support of its response to the arguments advanced on behalf of the Applicant.

19. *(4) The chronology:* The first conversation with the Applicant upon which the Respondent relied took place on 13 April 2016 (on Threema). Abu Hudaifah, a pseudonym for the Applicant, extended greeting to Abu Yusuf, the Security Service role player, who responds in kind.

20. The Applicant introduced himself to Abu Yusuf saying *'I got your ID from abu isa',* adding a little later "you know why I'm speaking to you". Abu Yusuf says he does. Abu Yusuf says "we must be careful as the kuffar r always on r backs". The Applicant responds "yes…may allah blind the kuffars".

21. Abu Yusuf said 'Abu Isa says you are committed brother who I can help but we must be patient'. The Applicant responded by asking whether they could talk on Threema about what he described as *'the opp'*. The Respondent alleged that, here, the Applicant was describing the plan to commit a terrorist attack. He went on: *'Can you get the gear?* Abu Yusuf said "I am working on it". The Applicant asks *'you will be involved right?'* Abu Yusuf told him that he would. They discussed getting guidance from Abu Isa and then said they would be in contact again soon.

22. The Applicant alleges that it is apparent that there had been previous "chat" regarding "the opp" involving the undercover officer, the Applicant and other third parties such as "Abu Isa", "Abu Jundallah" and "Abu Haleemah". We see nothing in this suggestion so far as it relates to the first contact between Abu Yusuf and Abu Hudaifah; the online chat reads as if this is the first contact between the Applicant and Abu Yusuf; the reference to Abu Isa is first made by the Applicant; the reference to Abu Jundallah does not occur until 12 July; the reference to Abu Haleemah is limited to a suggestion by Abu Yusuf that he is "a brother on the right path".

23. The following day Abu Yusuf gave the impression that he was going to speak to another person about the 'gear'. On 15 April 2016, the Applicant chased him saying *'did you speak about the gear?'*

24. On 17 April 2016, Abu Yusuf responded by saying *'Abu Isa said to ask u about details for gear'*. The Applicant responded *'I don't know anyone who could provide with gear...You know people right?'* Abu Yusuf confirmed that he did know people and asked what *'gear we need akhi (brother)'*.

25. On 18 April 2016, the Applicant chased again, asking Abu Yusuf what had happened about the gear. Abu Yusuf said that he had a long chat with someone with whom they could deal once they knew the details. The Applicant asked *'will it cost?'* Abu Yusuf responded *'It depends on wot we r buying?'* The Applicant then said: *'So if its machine guns it will cost a lot'* and then *'Two things. Number one machine gun and we need someone who can make a vest you know the*

dugma (button) one'. He went on *'So after some damage with machine gun then do itishadi (martyrdom)... that's what im planning to do'*.

26. It appears from these exchanges that the Applicant was seeking to obtain a machine gun to do 'some damage', followed by a 'suicide vest' so that he could kill himself. There is no suggestion anywhere in the evidence that this idea was initiated by Abu Yusuf.

27. Abu Yusuf told him that it would not be easy to source a machine gun, and that it would be costly. The Applicant pressed Abu Yusuf, saying '*it's pointless wasting time akhi and yess we need (patience) but same time we need the ball running and akhi is there no way we get the gear for free'*. Abu Yusuf asked how soon he would like to meet with the brother who might be able to supply the 'gear'. The Applicant replied "*whenever you can bro*" and asked *'is this brother a muslim?...Can't he give it fisabilillah'* (for the sake of Allah or in the cause of Allah).

28. On 19 April 2016, Abu Yusuf told the Applicant he had arranged to meet the brother the next day *'2 talk bout the gear inshaAllah'*. Abu Yusuf contacted the applicant on 20 April and said that the brother was *'v happy n willing 2 continue chats bout helpin'*. The Applicant responded *'did you ask about the gear tho'.* Abu Yusuf told the Applicant that the machine gun was going to cost a lot, but that he would try to get a good deal. He asked the Applicant if he had funds. The Applicant responded *'I'm broke lemme speak to abu isa.. He might he able to help in this'*. Abu Yusuf responded "*don't stress 2 much now but let me no*". The Applicant continued *'You have to find out the price for the machine gun any gun'*. Abu Yusuf said that he would speak to his brother.

29. On 23 April 2016, Abu Yusuf contacted the Applicant. There was discussion about what had happened to Abu Isa. The Applicant told Abu Yusuf *'Abu Isa was struck and injured'*. The Respondent suggests that an inference to be drawn is that the Applicant believed the person he referred to as Abu Isa was in a conflict zone and had been hit and injured. The Applicant turned the conversation back to 'the gear' asking *'Bro anything new?? On the gear...Or can we just make vest'*.

30. On 24 April the Applicant asked Abu Yusuf: '*What happened Akhi..we need to get these...weapons... Otherwise we have to make bombs'*.

31. On 25 April, Abu Yusuf said to the Applicant that he had met a brother to whom he was talking about the gear. Abu Yusuf suggested *'it may help inshaAllah if u were to meet him akhi'*. The Applicant raised costs, and asked *'How are we planning to buy it...He has to give is for free…fisbilillah (For the sake of Allah)'*.

32. The Applicant then asked if the brother was a *'supporter of dawla'* (Islamic State), adding: *'If he is then it will be better'.* The Applicant then said *'if the weapons don't work then we can make a bomb'*. He followed this with specific instructions on the material required, referring to "*hydrogen peroxide*", "*acetone*" and "*hydrochloric acid*", where it might be obtained and at what strength.

33. Abu Yusuf suggested a meeting between their "contact" and the applicant, asking if he was free that weekend. The Applicant said he was but asked if the contact could be trusted: *'we don't know who he is...might be fed'*. The possibility of a meeting over the weekend in London was further discussed.

34. On 28 April, the Applicant pressed Abu Yusuf about the weapons again, asking '*when you spoke to this brother about weapons what did he say*?' He went on "*for now we have to confirm if his willing to give it…otherwise we have to make explosives*".

35. On 29 April, the Applicant indicated that he would not be able to make their meeting, saying: *'I wont be able to come for some reason I have been followed by the police*' and '*My passport has been taken away...Police will have eyes on me if I come...*'

36. On 5 May, the Applicant contacted Abu Yusuf using a new Threema account. He explained that he had had to "*delete my previous account for some reason*".

37. On 10 May the Applicant asked Abu Yusuf *"…if this works out you will be involved right in the attack?"* Abu Yusuf replied *"InshaAllah it will all work wiv Allah swt guidance*".

38. On 20 May the Applicant said "*The gear thing looks long how about making explosives*?" Abu Yusuf responded "*Akhi did Abu Abdullah msg u wid list of all stuff u need?*"

39. On 29 May, the Applicant and Abu Yusuf made arrangements to meet in a café in Slough. A Security Service undercover officer attended pretending to be Abu Yusuf and a surveillance operation was conducted. Officers followed the Applicant to a Costa Coffee in Queensmere Shopping Centre and observed the meeting. The recording and transcript of the meeting was incomplete. The witness playing the role of Abu Yusuf says he recalls that the Applicant told him that '*he wanted to do something like make a bomb*'. They discussed explosives. The Applicant said that he had heard things on the internet about explosives but had not made any; he wanted to find a person who could help him; he said he wanted to obtain a gun for free.

40. After leaving the cafe Abu Yusuf told the Applicant that getting a gun would cost money and it would not be possible to get one for free, and that it would need to be brought to England. As we understand it, referring to making a bomb, the Applicant said that he was going to do this on his own, but he also mentioned trying to get others to do it as well.

41. The transcript records the Applicant saying: '*I can get how to make it. But I can't make it...I was with...bomber last week and he was like, I want to blow them up. He wants us to do something for him*'. He continued '*middle of a crowd and blow it up'* and '*I want someone to make the bombs' and 'when you get home you must tell him to get us the stuff'*.

42. On 12 July 2016 the Applicant discussed on 'Threema' contact he had had with Abu Jundallah. He said that he had "*asked him how to make bombs etc".*

43. On 6 August 2016, the Applicant returned to his requests to get Abu Yusuf to provide a weapon. He asked '*Akhi can please ask the brother if he is able to provide with handgun?...Any gun...cheap gun...Have you got any links from dawla*?' On 8 August 2016 Abu Yusuf replied to say that he could ask, but that it would cost '*bcos he won't give 4 free'*. The Applicant said that he could get 3 or 4 hundred, insisting '*anything cheap...Any cheap handgun with bullets'*. Later that day, following further discussion about obtaining handguns, the Applicant repeated '*Akhi just me any handgun with*

bullets'. He asked how long it will take to obtain and '*Can I meet this brother*?' '*And is he Muslim'*.

44. On 9 August, the Applicant asked if he bought a gun for '*800 how many bullets would he get'* and would the dealer keep the gun until the day of the operation. He said the dealer had to be told *'that I never shot a gun in my life and ask him will it still be easy for me to shoot'*. In addition to the request for the gun, the Applicant said: *'...the brother who said he will make bomb for me can he still make one'*.

45. That same day, the Applicant made loan applications apparently to cover the cost of the bomb. He said that he intended getting a loan for '*like 5000' 'And then I wont pay it back'*. Abu Yusuf said that the bomb maker needs the money before he will make it. The Applicant asked how long it will take and '*is it the timer one'*. He said that if the bank accepted his application for a loan it will be in his bank account the next day.

46. Financial evidence supports the Respondent's case that the Applicant was seeking to obtain funds to pay for materials to be used in an attack. The Defence case was that the Applicant applied for the loan to provide credibility to his role playing and to appear knowledgeable or credible to Abu Yusuf.

47. On 11 August 2016, the Applicant contacted Abu Yusuf, told him his bank loan had been declined and sent him a pdf: Wikipedia-mom-bomb-pdf. He said "*send this to the brother and ask him if he can make that its really simple*". Abu Yusuf reported that the bomb maker had said that he could not make it for free. The Applicant then asked Abu Yusuf to *'speak to the brother tell him about the affairs of the ummah' 'his muslim is well' 'He needs some dawah'*. Abu Yusuf says he told the maker is a '*good Bro but cannot do it for free'*.

48. Between 12 and 16 August the Applicant continued in his efforts to get the bomb made for free or for a smaller amount.

49. During this period, the Applicant accessed a number of graphic and extreme videos and images on his mobile telephone. He conducted searches for 'ISIS' and watched footage of terrorist attacks. On 28 August, the Applicant contacted Abu Yusuf and said *'Akhi this week I will meet you and give you the money '£150' 'I will give you the day in sha allah' 'Akhi the brothers must make this bomb really strong' 'it has to be powerful' 'Akhi can you tell the brother to make it a button one'*. He emphasised the need for it to be a "*with button so I can out it somewhere and just press the button*".

50. On 30 August, the Applicant sent a message saying '*Akhi tell the brother that im going to put bomb somewhere and then im going to go to as side and then press the button so it blows up' 'you understand what im saying it needs to be portable so I can go the side press the button, ill give you an example I might put the bomb in the train and then im going to jump out so the bomb explodes on the train' 'that's the type of button bomb I neee'* (sic)' '*So ask the brother if he can make that type of bomb with button'*. He stressed the importance of these details.

51. On the same date, the Applicant researched possible targets for the attack in crowded places in London. The (Security Service) role player had no connection to, or involvement with these searches. These searches continued on 1 September, when the Applicant again met with a person playing the part of Abu Yusuf.

52. The officer playing Abu Yusuf recalls the Applicant saying that the bomb he needed was going to be strong and that it would be the same as the pdf. The officer told the Applicant that it would be ready in the next week. They discussed arrangements for collecting the bomb. The Applicant said that the bomb could have a button rather than a timer, and that this was better as he could '*go up somewhere in a public place, or on a train, and blow it up*'. He asked for suggestions as to location and indicated that he was considering Piccadilly Circus. The Applicant gave the officer £150.

53. The transcript records the following: '*Oxford Street'; 'I was thinking of Oxford Street. '...if you put those things inside called nails, do you know what that is nails' 'those sharp things lots of them inside'. 'Good man, can't wait Akhi. After its all done and that, yeah it blows up everything, after whatever init. If I go to prison, I go to prison, if I die, I die, you understand. I have got to get to Jannah'*. He says it says in the Qur'an that '*it has been prescribed* (sic) *upon you retaliation'*.

54. On 1 September 2016, the Applicant sent messages to Abu Yusuf saying '*Akhi im thinking of grabbing the bomb the same day I do it'*. He asked '*Is it possible if the brother can put the timer on for me'. 'Just in case I put the timer wrong'. 'And I can tell him what time to put it on for'*. On 2 September 2016 the Applicant sent a message saying '*In sha allah akhi did you tell him to put lots of nails…Inside*'.

55. On 6 September, Abu Yusuf told the Applicant that the bomb making brother has *'all the stuff now he start built it'*. The Applicant responded '*Allahu akbar'*. He asked for pictures once it is made and wanted to be told '*how to set the timer in sha allah'.* At 11pm that evening, the Applicant was told that the bomb would be ready in 2 or 3 days.

56. From 6 September to the early hours of the day of his arrest on 8 September, the Applicant continued making internet searches. Many of the search terms were repeated and related to ISIS and previous terrorist attacks. He returned to searches for a potential target, referring to 'Oxford Street', an Elton John concert on 11 September in Hyde Park, '*packed places in London'*, and videos seeking to justify attacks on Western countries.

57. On 8 September 2016, at approximately 05.30, police officers attended the Applicant's home address and arrested him on suspicion of involvement in terrorist offences. He was cautioned and responded *'Alright'*. He was asked to identify his telephone, which he did, lying on the top bunk of a bed. He was asked if the telephone had a password and (as already mentioned) said '*Yeah...I.S.I.S. you like that?*' He was interviewed over a number of days. He made no comment to the allegations that were put to him.

58. *(5) The Ruling:* As foreshadowed, two applications were advanced before the Judge – to exclude the evidence of the online conversations and/or to stay the proceedings as an abuse of process. It was common ground that without the online chat material there would be insufficient evidence for the Respondent to proceed against the Applicant. In, with respect, his impressive Ruling, the Judge refused both applications.

59. At the heart of the Applicant's submissions was the proposition that in the light of subsequent Strasbourg developments post-dating *Looseley*, a new approach was required. The Applicant's case was that the Strasbourg jurisprudence placed the burden of proof on the Respondent to show that there had been no incitement. The upshot, it

was contended, was that *Looseley* would now be decided differently and, as summarised by the Judge (at [11]):

> "…that the served prosecution case brought against this young and vulnerable man does not disclose any evidence of the four essential requirements established by the Strasbourg jurisprudence. First, evidence showing the basis upon which the role playing operation was conceived; that is to say the 'concrete and objective suspicions that the defendant was at the point of first contact with the role player already involved in planning, or was intending to commit, a terrorist offence'. Secondly, the full extent of the police involvement, which must remain passive throughout. Thirdly, that it was independently authorised and fourthly, that it was independently supervised. All of this they submit must be established by way of evidence presented to and examined in open court."

The Respondent had failed to discharge the burden of proof and the applications should be allowed.

60. The Judge held that *Looseley* remained good law and a binding precedent. The House had given the most careful consideration to whether the power to exclude evidence or order a stay had been modified by Art. 6 and the Strasbourg jurisprudence, and decided it had not. The Applicant's submissions had overlooked or paid insufficient regard to some significant features of English criminal law and practice, namely (at [79]):

> "(i) The fact that here we have trial by judge and jury.
>
> (ii) That there are important differences between justice systems across the current membership of the European Union in terms of practice and procedure.
>
> (iii) That in this jurisdiction the continuing nature of the disclosure regime and, in particular, the continuing nature of the obligations placed upon the prosecutor regarding disclosure, combine to provide a real safeguard that ensures Art. 6 compliance.
>
> (iv) The practice and procedure relating to first the authorisation and then the supervision of under-cover operations themselves."

61. As the application was, in reality, one for a stay, the burden of proof rested on the Applicant to make good the case of abuse. Having regard to the chat line material itself, the Applicant had been "in the driving seat" (at [81]) and was already planning the "opp" when he first made contact with Abu Yusuf. The role players did no more than present him with an "unexceptional opportunity". The Judge (*ibid*) did not find any material in the chat line evidence itself "to even begin to suggest that the defendant is being lured or enticed and thereby entrapped". The Judge had reached that conclusion well aware of the defence complaint that what occurred before 13 April "is and will remain unknown". The Judge went on as follows (at [86]):

> " If the defendant had wished to say, as was submitted on his behalf, that he was lured into, incited and then entrapped into criminality either by the role player, or by anything said or done by anyone else prior to the first contact with the role player on 13th April, or that his vulnerability and his innocence was being taken advantage of, or that the messages sent and received did not in some way reflect the true circumstances, then it was for him to give evidence and cross examine the appropriate witnesses. While I can understand that there might be tactical reasons not to do so, the fact is that there was no evidence from the defendant put before me. I do not find from a careful examination of all the material that I was invited to consider that there is any credible evidence that this was or may have been a case of entrapment or incitement."

62. The requirement of having reasonable grounds of suspicion was an important safeguard in ensuring the propriety of police undercover conduct from the outset. The Applicant's submission that there had to be reasonable grounds for suspicion of the defendant at the point of first contact with the role player put "the bar far too high" (at [89]). That someone was not a target nor even personally suspected was to be taken into account; however, suspicion of a particular person was not always essential and (*ibid*) "the fact they come to attention in the operation may be just a matter of bad luck".

63. That the Respondent's evidence was silent as to the position prior to 13 April was not to the point. As the Judge put it (at [90]):

> "One can think of many examples…where the evidence begins with the defendant being under surveillance of one kind or another, there being no evidence nor explanation placed before the court as to why, or in what circumstances that is the position. In this case the prosecution assert …that there were reasonable grounds to suspect that this defendant was planning a terrorist attack. They do that by proceeding with this prosecution ….founded upon the evidence they have served. That is the position in these courts as a matter of routine…..The fact that the evidence is silent prior to 13th April 2016, is also not….fatal to the fairness of the proceedings nor indicative of any lack of, or doubt about, the existence of reasonable grounds of suspicion in respect of this defendant."

Had there been any material telling against the mounting of a surveillance operation, the Respondent was under a continuing obligation to disclose it.

64. The Judge recorded (at [92]) that no point having been taken, it was (as he understood it) "accepted that there was both authorisation and supervision" of the operation.

65. A breach of Art. 6 did not occur where a state agent afforded someone an opportunity to break the law. If a person freely took advantage of an opportunity to break the law given to him by a state agent, that agent was not to be regarded as inciting or instigating the crime. Here, even if the role player had, on occasion, initiated contact that could not justify a finding of incitement or entrapment. Offences of such gravity warranted

operations of this type. The Applicant (at [96]) had not been lured into this "but [had] volunteered himself and remained resolved and determined". The Applicant had not discharged the burden resting on him of proving that he had been lured into the planning of a terrorist attack.

66. The Judge concluded that there had been nothing objectionable about state agents posing as violent jihadists prepared to carry out terrorist attacks. There was no evidence that the offence was brought about by state agents. Even if the Applicant was vulnerable, he was not lured or persuaded but (at [97]) was "determined and committed and had most probably already engaged in planning an attack". The online material extended over a period of nearly six months and he had been presented with an unexceptional opportunity. Notwithstanding the gaps, in particular regarding the two face to face meetings, there was a reliable record of communications allowing issues to be tested and assessed and thereby safeguarding Art. 6 rights. The applications were refused.

AUTHORITY

67. (1) *Domestic and Commonwealth authority:* A useful starting point is the decision of the Supreme Court of Canada in *R v Mack* [1988] 2 RCS 903 (to which the House of Lords referred in *Looseley*). Giving the judgment of the Court, Lamer J alluded (at p.917) to "a crucial distinction, one which is not easy to draw" between:

> "…the police or their agents – acting on reasonable suspicion or in the course of a *bona fide* inquiry – providing an opportunity to a person to commit a crime, and the state actually creating a crime for the purpose of prosecution…."

68. The rationale for the recognition of the doctrine of entrapment in Canadian law was (at p.938) "…the belief that the integrity of the court must be maintained". This was a "basic principle":

> "…..It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price….."

Accordingly (at p.942), the basis upon which entrapment is recognised "lies in the need to preserve the purity of administration of justice".

69. The importance of the police acting on reasonable suspicion or in the course of a *bona fide* inquiry is underlined at various points in the judgment, to avoid the vice of "random virtue-testing" and to guard against *mala fides*. However (at p.956):

> "Of course, in certain situations the police may not know the identity of specific individuals, but they do know certain other facts, such as a particular location or area where it is reasonably suspected that certain criminal activity is occurring. In those cases it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion. This latter situation, however, is only justified if the police acted in the course of a

> *bona fide* investigation and are not engaged in random virtue-testing. While, in the course of such an operation, affording an opportunity in a random way to persons might unfortunately result in attracting into committing a crime someone who would not otherwise have had any involvement in criminal conduct, it is inevitable if we are to afford our police the means of coping with organised crime such as the drug trade and certain forms of prostitution to name but those two."

70. Summarising (at pp. 964-5), the Court held that there was entrapment when:

> "(a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry;
>
> (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence."

It was neither "useful nor wise" to state in the abstract what elements were necessary to prove entrapment but it was essential to link the elements relied on by a court to the rationale for the doctrine.

71. For policy reasons (at p. 972), the issue of entrapment was to be resolved by the trial Judge – rather than a jury – and the proper remedy was a stay of proceedings. As (at p.975) the guilt or innocence of the accused was not in issue (when determining a question of entrapment), the burden of proof rested on the accused to prove, to the standard of a balance of probabilities, that the conduct of the state was an abuse of process because of entrapment.

72. The relevant considerations in this area were, with respect, helpfully and concisely stated by Lord Steyn in *R v Latif* [1996] 1 WLR 104, at pp. 112-113, a case concerning drug trafficking. Noting that entrapment was not a defence under English law and that the Appellant would probably not have committed the particular offence of which he was convicted but for the conduct (including criminal conduct) of an informant and customs officers, Lord Steyn observed that the approach to the matter posed the "perennial dilemma":

> "If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime."

The weaknesses of both extreme positions left only one principled solution: the matter was one for the Court's discretion, with a requirement to perform a balancing exercise.

Where a fair trial was not possible, a stay would be ordered (a "category 1" stay). In *Latif*, however, a fair trial *was* possible, so that the issue was:

> "…whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system."

In short, the stay in question was what might be termed a "category 2" stay; such a stay is ordered when it is not fair to try the defendant in question (having regard to maintaining the integrity of the criminal justice system), notwithstanding that a fair trial would be possible.

73. In Lord Steyn's view, the law was settled (*ibid*):

> "Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed….The speeches in *Ex parte Bennett* [(1994) 1 AC 42] conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those….charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

74. We come next to the leading domestic authority, *Looseley*; the context was again drug trafficking. Echoes of the thinking in both *Mack* and *Latif* can be discerned in the leading speeches of Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Hutton.

75. Lord Nicholls began by articulating the competing interests and underlining the difficulty of drawing the line between acceptable and unacceptable police conduct. Thus:

> "1. My Lords, every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment….is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences,

> frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen.
>
> 2. These propositions….are not controversial. The difficulty lies in identifying conduct which is caught by such imprecise words as 'lure' or 'incite' or 'entice' or 'instigate'. If police officers acted only as detectives and passive observers, there would be little problem in identifying the boundary between permissible and impermissible police conduct. But that would not be a satisfactory place for the boundary line. Detection and prosecution of consensual crimes committed in private would be extremely difficult. Trafficking in drugs is one instance….
>
> 3. Moreover, and importantly, in some instances a degree of active involvement by the police in the commission of a crime is generally regarded as acceptable. Test purchases fall easily into this category…..
>
> 4. Thus, there are occasions when it is necessary for the police to resort to investigatory techniques in which the police themselves are the reporters and the witnesses of the commission of a crime. Sometimes the particular technique adopted is acceptable. Sometimes it is not. For even when the use of these investigatory techniques is justified, there are limits to what is acceptable….."

Lord Nicholls (at [5]) alluded to the "knotty problem" of defining or identifying the limits of acceptable "pro-active" conduct by the police.

76. As summarised by Lord Nicholls (at [6]), common law countries differed in the nature of the remedy provided in entrapment cases. In the United States of America, entrapment was a substantive defence; the issue was, accordingly, one for the jury. In Canada, as already observed when considering *Mack*, the remedy was by way of a stay of proceedings. In Australia, the trial Judge had a discretion to exclude evidence. In New Zealand, the court had an inherent jurisdiction to exclude evidence to prevent an abuse of process.

77. English law had undergone substantial statutory and common law development in this area, but it remained the case that (at [12]) entrapment did not of itself provide a defence. With regard to s.78, PACE, merely because evidence was obtained by entrapment, a Judge was not required to exclude it – albeit the Judge could take into account all the circumstances in deciding whether or not to exercise his exclusionary discretion. Further and as traced in *Latif*, the common law had developed the remedy of a category 2 stay of proceedings. Of these two remedies (at [16]), the grant of a stay should normally be regarded as the appropriate response. These statutory and common law developments were (at [15]) "reinforced" by the HRA 1998. Entrapment and the use of evidence obtained by entrapment "may deprive a defendant of the right to a fair trial embodied in article 6".

78. As to the limits of acceptable police conduct, Lord Nicholls reiterated (at [19]) that the judicial response to entrapment was based on the need to uphold the rule of law:

> "A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly. Police conduct which brings about, to use the catchphrase, state-created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience, to borrow the language of Lord Steyn in *R v Latif*…..In a very broad sense of the word, such a prosecution would not be fair."

79. Lord Nicholls then considered at some length the meaning of "state-created crime" and concluded (at [23]) that a "useful guide" was to consider:

> "…whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. I emphasise the word 'unexceptional'…."

The investigatory technique of providing an opportunity to commit a crime was intrusive and (at [24]) "should not be applied in a random fashion, and used for wholesale 'virtue-testing', without good reason." Ultimately (at [25]):

> "…the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. Lord Steyn's formulation of a prosecution which would affront the public conscience is substantially to the same effect… "

80. In applying these formulations, the Court (at [25]) would have regard to all the circumstances of the case. Amongst these (at [27]) was the reason for the particular police operation. It went without saying that the police must act in good faith:

> "Having reasonable grounds for suspicion is one way good faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centred on a particular place, such as a particular public house. Sometimes random testing may be the only practicable way of policing a particular trading activity."

81. Lord Nicholls (at [30]) held that neither the discretion conferred by s.78 PACE nor the Court's power to stay proceedings as an abuse had been modified by Art. 6, ECHR. He specifically referred (at [31]) to *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 (see further, below) and concluded that its "statement of principle" was not "divergent from the approach of English law".

82. Lord Hoffmann, agreeing with Lord Nicholls, began (at [36]) with what might be termed a working summary; entrapment occurs:

> "…when an agent of the state – usually a law enforcement officer or a controlled informer – causes someone to commit an offence in order that he should be prosecuted."

Building on Lord Steyn's statement in *Latif* that English law was "now settled", Lord Hoffmann (*ibid*) summarised it as follows:

> "First, entrapment is not a substantive defence in the sense of providing a ground upon which the accused is entitled to an acquittal. Secondly, the court has jurisdiction in a case of entrapment to stay the prosecution on the ground that the integrity of the criminal justice system would be compromised by allowing the state to punish someone whom the state itself has caused to transgress. Thirdly, although the court has a discretion under ….[s.78, PACE]…to exclude evidence on the ground that its admission would have an adverse effect on the fairness of the proceedings, the exclusion of evidence is not an appropriate response to entrapment. The question is not whether the proceedings would be a fair determination of guilt but whether they should have been brought at all…"

83. As is plain (from [45]), the appeals before the House of Lords in *Looseley* raised the question of whether the exercise of the power to stay proceedings was sufficient to satisfy the right to a fair trial under Art. 6, ECHR. That right extended to a right not to be tried at all "in circumstances in which this would amount to an abuse of state power". It was contended that the principles upon which the power to order a category 2 stay did not satisfy the requirements of the ECHR as stated in *Texeira.*

84. "At the highest level of abstraction" (at [47]), the entrapment doctrine in English law concerned an abuse of executive power, such as amounted to an affront to the public conscience, bringing the administration of justice into disrepute. More specifically, the theme running through all discussions of the subject was "that the state should not instigate the commission of criminal offences in order to punish them". The meaning of "instigation" depended upon the particular facts of the individual case; no single factor or formula would always produce the correct answer. Thus (at [49]), only limited assistance could be gained "from distinctions which restate the question rather than provide a criterion for answering it", as Lord Hoffmann immediately went on to illustrate:

> "For example, it has been said that a policeman or paid informer should not act as an *agent provocateur*, an expression used to signify practices employed by foreigners unacquainted with English notions of decency and fair play…."

85. An important but not necessarily decisive question (at [50] *et seq*) was whether the policeman had caused the commission of the offence rather than merely providing an opportunity for the defendant to commit it. As to suspicion (at [56]) it was not "normally" considered a "legitimate use of police power to provide people not suspected of being engaged in any criminal activity with the opportunity to commit crimes". Supervision of police activities (at [60]) was closely linked to the question whether the police were creating or detecting crime. In this jurisdiction, codes of

practice covered undercover operations (a factor, we observe, which has developed since the time of *Looseley*). In the same vein as *Mack* and the speech of Lord Nicholls, Lord Hoffmann emphasised that (at [65]):

> "The requirement of reasonable suspicion does not necessarily mean that there must have been suspicion of the particular person who happens to have committed the offence. The police may, in the course of a bona fide investigation into suspected criminality, provide an opportunity for the commission of an offence which is taken by someone to whom no suspicion previously attached. This can happen when a decoy (human or inanimate) is used in the course of the detection of crime which has been prevalent in a particular place."

86. As to *Teixeira* (at [72] *et seq*), Lord Hoffmann concluded that the principles of English law on which a stay of proceedings may be granted on grounds of entrapment were "entirely consistent" with that decision of the Strasbourg Court. Although the UK's technique for authorising and supervising undercover operations was very different from the judicial supervision in continental countries, the purpose was the same: "to remove the risk of extortion, corruption or abuse of power by policemen operating without proper supervision". While every case depended on its facts, there was nothing in the general principle applied by the Strasbourg Court or the "cluster of factors to which it attached importance" suggesting any difference from the English approach to entrapment. Pertinently, with respect, Lord Hoffmann observed (at [74]) that the contrary submission "depends upon an excessively literal and technical analysis of some of the language used by the court". Thus, when the Strasbourg Court in *Teixeira* spoke of the requirement that the police act in an "essentially passive manner" it did not mean (at [75]) that "even in an authorised undercover operation, the officer must take no active step such as offering to buy an illegal substance".

87. Lord Hutton's speech was to like effect. He too, in terms, concluded (at [109]) that the approach of the English Court was in no way inconsistent with the *ratio* of *Teixeira*. It is only necessary, here, to set out the following earlier and, with respect, very helpful passage from Lord Hutton's speech, in particular as to the need for realism in the approach adopted:

> "101. In balancing the relevant factors the English courts have placed particular emphasis on the need to consider whether a person has been persuaded or pressurised by a law enforcement officer into committing a crime which he would not otherwise have committed, or whether the officer did not go beyond giving the person an opportunity to break the law, when he would have behaved in the same way if some other person had offered him the opportunity to commit a similar crime, and when he freely took advantage of the opportunity presented to him by the officer.
>
> 102. In considering the distinction (broadly stated) between a person being lured by a police officer into committing an offence so that it will be right to stay a prosecution and a person freely taking advantage of an opportunity to commit an offence

> presented to him by the officer, it is necessary to have in mind that a drugs dealer will not voluntarily offer drugs to a stranger, unless the stranger first makes an approach to him, and the stranger may need to persist in his request for drugs before they are supplied. Therefore…..a request for drugs, even if it be persistent, need not be regarded as luring the drugs dealer into committing a crime with the consequence that a prosecution against him should be stayed. If a prosecution were not permitted in such circumstances the combating of the illegal sale of drugs would be severely impeded, and I do not consider that the integrity of the criminal justice system would be impaired by permitting a prosecution to take place…..”

88. We add with regard to *Looseley* that the fact specific nature of the inquiry into entrapment is underlined by the different outcomes in the two individual matters before the House of Lords.

89. The various *Looseley* considerations were most helpfully distilled by Professor David Ormerod, in *Recent Developments in Entrapment* [2006] Covert Policing Review 65, cited in *R v Moore* [2013] EWCA Crim 85, at [52]. Prof. Ormerod identified five factors as of particular relevance:

    i) Reasonable suspicion of criminal activity as a legitimate trigger for the police operation;

    ii) Authorisation and supervision of the operation as a legitimate control mechanism;

    iii) Necessity and proportionality of the means employed to police particular types of offence;

    iv) The concepts of the “unexceptional opportunity” and causation;

    v) Authentication of the evidence.

90. Before leaving domestic law, brief mention should be made of *R v Asiedu* [2015] EWCA Crim 714; [2015] 2 Cr App R 8, at [19] – [24] *per* Lord Hughes, in connection with the Applicant’s guilty plea. The significance of a guilty plea, “a formal admission in open court that….[a defendant]…is guilty of the offence” (at [19]), should not be downplayed; ordinarily, there cannot be an appeal against conviction as (*ibid*) “there is nothing unsafe about a conviction based on the defendant’s own voluntary confession in open court”. A guilty plea, however, is not always a bar to an appeal against conviction. An adverse ruling, declining to exclude evidence, will not normally suffice for a defendant seeking to pursue such an appeal; it will only do so if the ruling compels a guilty plea as a matter of law, not where the ruling merely renders the defence more difficult, even dramatically so. By contrast, where the issue goes to a category 2 stay on the ground of entrapment, a plea of guilty would not prevent an appeal against conviction. In short (at [21]):

> "…if the trial process should never have taken place because it is offensive to justice, a conviction upon a plea of guilty is as unsafe as one following trial."

91. *(2) Strasbourg jurisprudence:* The Strasbourg authorities to which we were referred begin with *Teixeira*. Relying on Art. 6(1), ECHR, the applicant complained that he had been deprived of a fair trial due to the conviction being based mainly on statements of two police officers who had incited the commission of that offence. The Court reiterated that the admissibility of evidence was primarily a matter for national law; the (Strasbourg) Court's task under the ECHR (at [34]) was to ascertain "whether the proceedings as a whole, including the way in which evidence was taken, were fair".

92. The Court held (at [35]) that the use of undercover agents "must be restricted and safeguards put in place" even in drug trafficking cases. While appropriate measures needed to be taken in dealing with organised crime, the right "to a fair administration of justice" was so important "that it cannot be sacrificed for the sake of expedience". On the facts (at [38]), it did not appear that the officers' intervention had taken place as part of an operation ordered and supervised by a judge; that the authorities had good reason for suspecting the applicant of drug-trafficking; or that at the time of his arrest the applicant was in possession of more drugs than the quantity the police officers had requested. Nor was there evidence to support any predisposition to commit offences. In the circumstances (*ibid*):

> "…the necessary inference…is that the two police officers did not confine themselves to investigating Mr Teixeira de Castro's criminal activity in an essentially passive manner, but exercised an influence such as to incite the commission of the offence."

Accordingly (at [39]), the Court concluded that the actions of the two officers:

> "….went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed."

Consequently, there had been a violation of Art. 6(1).

93. *Edwards and Lewis v United Kingdom* (2005) 40 EHRR 24 was another drugs case involving an undercover operation. Both applicants contended that they had been the victims of entrapment. Crucially, the trial Judge – who decided the issue of entrapment – had seen evidence, withheld from the defence but on which the prosecution relied in the course of a Public Interest Immunity ("PII") hearing: see, esp., at [51] – [58]. In those circumstances, the Court ruled (at [59]) that the procedure employed to determine the issues of disclosure and entrapment had neither complied with "the requirements to provide adversarial proceedings and equality of arms" nor "incorporated adequate safeguards to protect the interests of the accused". It followed that there had been a violation of Art. 6(1).

94. Three points may at once be noted. First, the Court accepted (at [53]) that the defendant's entitlement to disclosure was not an absolute right. There may be competing interests which necessitated withholding certain evidence from the defence. Only such measures as were "strictly necessary" were permissible to restrict the rights

of the defence. Any difficulties thus caused to the defence "must be sufficiently counterbalanced by the procedures followed by the judicial authorities". Secondly, *Edwards and Lewis* was dealt with in the domestic Court before the consideration of governing principles and procedural safeguards contained in the decision of the House of Lords in *R v H* [2004] UKHL 3; [2004] 2 AC 134 and applied since. Thirdly and simply, the facts of *Edwards and Lewis*, involving as they did *ex parte* material adduced and relied upon by the prosecution in a PII hearing, differ starkly from those of the present case where (as already summarised) the prosecution did not seek a PII hearing and placed no reliance on any *ex parte* material.

95. *Ramanauskas v Lithuania* (2010) 51 EHRR 11 is an important decision, serving as the foundation for a line of authority which followed. The applicant had been a prosecutor, convicted of accepting a bribe to obtain the acquittal of an accused but only after the offer of the bribe had initially been refused and thereafter reiterated on a number of occasions. He complained that his Art. 6(1) right to a fair trial had been infringed; he had been incited to commit an offence that he would never have committed without the intervention of "*agents provocateurs*". The Court held in his favour that there had been a violation of Art. 6(1).

96. At [49] – [61], the Court dealt with "General Principles". At the outset ([49] – [51]), the Court observed that it was aware of the difficulties "inherent in the police's task of searching for and gathering evidence for the purpose of detecting and investigating offences". The police were increasingly required to make use of undercover agents, informers and covert practices "particularly in tackling organised crime and corruption". Corruption, including "in the judicial sphere", had become a major problem. The use of "special investigative methods", in particular, undercover techniques, could not of themselves infringe the right to a fair trial. However:

> "…on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits."

97. Building on *Teixeira* amongst other authorities, the Court ruled (at [53]) that the use of sources such as anonymous informants by the trial court to found a conviction was acceptable only if "adequate and sufficient safeguards" against abuse were in place. In particular, there needed to be "a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question". The Court acknowledged the rise in organised crime but the right to a fair trial applied to all types of criminal offence "from the most straightforward to the most complex" and could not be sacrificed on grounds of expediency.

98. The Court (at [55]) described police incitement as follows:

> "Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution."

99. Where the disclosed information did not enable the Court to conclude whether the applicant was subjected to police incitement, it was essential (at [61]):

> "…that the Court examine the procedure whereby the plea of incitement was determined in each case in order to ensure that the rights of the defence were adequately protected, in particular the right to adversarial proceedings and to equality of arms."

100. Thereafter (at [62] *et seq*), the Court turned to the application of those principles to the facts of the case. In a paragraph ([70]) to which we shall return, the Court said this as to the burden of proof:

> "It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement. Should they find that there was, they must draw inferences in accordance with the Convention."

101. Given that the applicant maintained throughout the proceedings that there had been incitement, the domestic authorities and courts should have undertaken (at the very least) a thorough examination of whether the prosecution had incited a criminal act. To that end (at [71]):

> "…they should have established in particular the reasons why the operation had been mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. This was especially important having regard to the fact that VS, who had originally introduced AZ [the briber] to the applicant and who appears to have played a significant role in the events leading up to the giving of the bribe, was never called as a witness in the case since he could not be traced. The applicant should have had the opportunity to state his case on each of these points."

102. Subsequent authorities can be taken briefly, as they essentially repeat the principles formulated in *Ramanauskas*.

103. In *Bannikova v Russia* (2010) 18757/06, Nov 4, the Court set out those principles at some length at [33] – [65]. As to whether the investigation was "essentially passive" (*Ramanauskas*, at [55]) the Court would examine the reasons for the covert operation and the conduct of the authorities in carrying it out. The Court would rely (at [38]) on whether "there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence". The authorities needed to be able (at [40]) "to demonstrate at any stage that they had good reasons for mounting the covert operation". A closely linked question (at [43]) was the point at which the authorities had launched the undercover operation, "i.e., whether the undercover agents merely 'joined' the criminal acts or instigated them". The question of pressure to commit the offence would be examined by the Court (at [47]) when

"drawing the line between legitimate infiltration by an undercover agent and instigation of a crime". As to the burden of proof (at [48]), the Court repeated the first sentence only of *Ramanauskas* [70] and linked the question to authorisation and supervision of the undercover operation. The procedure of determining the allegation of incitement was also pertinent, with the Court making a reference to *Edwards and Lewis* and expressing specific concern (at [64]) as to "non-disclosure of information admitted as evidence".

104. In *Veselov v Russia* (2012) 23200/10, Oct 2, the Court's summary of the relevant principles is found at [88] *et seq*. The role of domestic courts when dealing with an allegation of incitement, was, with respect, helpfully set out (at [94]) as follows:

> "Any arguable plea of incitement places the courts under an obligation to examine it in a manner compatible with the right to a fair hearing. The procedure to be followed must be adversarial, thorough, comprehensive and conclusive on the issue of entrapment, with the burden of proof on the prosecution to demonstrate that there was no incitement (*Ramanauskas…[70]*). The scope of the judicial review must include the reasons why the covert operation was mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant was subjected."

Additionally, if by way of something of an amalgam of observations from *Teixeira, Ramanauskas* and *Bannikova*, the Court said this as to the burden of proof (at [109]):

> "The Court reiterates in this connection that the burden of proof is on the authorities to show that there was no incitement, but in practice they may be prevented from discharging this burden by the absence of formal authorisation and supervision of the undercover operation…."

105. In its discussion of principles (at [89] *et seq*), *Lagutin v Russia* (2014) 6228/09 drew on the authorities to which reference has already been made. Particular attention was paid to the withholding of "relevant evidence" from the defence on PII grounds: see, at [97] *et seq*.

106. Finally, in this review, *Furcht v Germany* (2015) 61 EHRR 25, contains a restatement of now familiar principles. When dealing with the facts, it may be noted that the Court (at [55] – [56]) focused, critically, on the time undercover officers first approached the applicant; there was then neither objective suspicion that he was involved in drug trafficking nor any proper basis for concluding that he was predisposed to trade in drugs. The applicant was instead approached because he was a good friend of the suspect (S) and was therefore seen as means to establish contact with S.

107. *(3) Pulling the threads together:* With the possible exception of the burden of proof (see further below), we are quite unable to accept Mr Summers' submission that the Strasbourg jurisprudence now requires a new approach or that *Looseley* would be decided differently. In our judgment and, unsurprisingly given the care taken by the House of Lords in this regard (*Looseley*, at [30] – [31], [72] *et seq*, [109]), *Looseley* remains compliant with the requirements of Art. 6, ECHR. Our reasons follow and

hinge on a proper understanding of the principles underlying both the common law approach embodied in *Looseley* and the Strasbourg jurisprudence, so far as relevant for present purposes.

108. First, the rationale is essentially the same, in both approaches. It involves a concern for the integrity of the criminal justice system. Ends do not necessarily justify means. Criminal proceedings amounting to an affront to the public conscience on account of the improper conduct of state agents may be stayed. Were it otherwise, the administration of justice would be brought into disrepute. In the context of entrapment, the Court must stand between the state and its citizens. Equally however, the Court understands the public interest in combating crime and bringing criminals to justice; it recognises the need for intrusive techniques including undercover operations to do so, especially in the context of serious crime. Therefore, the use of undercover techniques could not of themselves infringe the right to a fair trial. But the right to a fair trial must not be sacrificed on grounds of expediency. Accordingly, as a matter of striking the correct balance between these competing and profoundly important interests, there are limits as to what is acceptable by way of police, intelligence or security work and safeguards must be in place. These propositions are derived interchangeably both from the common law authorities set out above (*Mack, Latif* and *Looseley, passim*) and from the Strasbourg jurisprudence (*Teixeira* and *Ramanauskas, passim*). There is no difference of substance between the two streams of authority.

109. Secondly, working definitions of entrapment are essentially the same in both approaches, as appears from *Mack* (at pp.964-5), *Looseley* (at [36]) and *Ramanauskas* (at [55]), all set out above. Though there may be distinctions between the wording used, these are distinctions without a material difference.

110. Thirdly, efforts to construct differences between the two approaches on the basis of an unduly literal reading of the language of judgments are misplaced and to be discouraged (*Looseley*, at [74]). Instead, when analysing and applying the judgments in both systems (common law and Strasbourg), regard must be had throughout to the purpose or rationale of the doctrine of entrapment. So:

    i) When in *Texeira* (at [38)) and *Ramanauskas* (at [55]) the Strasbourg Court spoke of state agents acting in an "essentially passive" manner, it could not be taken to mean that they were confined to being passive observers only. To hold otherwise would be wholly unrealistic (*Looseley*, at [2], [3], [74] – [75] and [102]) and (taken literally) would exclude even test purchases in the drugs context. It would render empty that Court's recognition of the importance of and need for undercover techniques, especially when combating serious and organised crime: *Teixeira*, at [35]; *Ramanauskas*, at [49] – [51]. Once the authorities are thus understood, the distinction drawn in both systems - between state agents doing no more than presenting a defendant with an unexceptional opportunity to commit a crime and the state punishing an individual for a crime which the state itself has instigated - encapsulates the mischief at which the doctrine of entrapment is aimed and is Art. 6 compliant: *Mack,* at pp. 964-5; *Looseley*, at [23], [36] and [101]; *Teixeira*, at [38] – [39] . It is, necessarily, a fact specific question in any particular case as to which side of the line the conduct of state agents falls (*Mack, ibid; Looseley*, at [47]).

ii) Similar considerations apply to the Strasbourg Court's emphasis on reasonable grounds for suspicion or predisposition to commit the offence on the part of the suspect at the commencement of the undercover operation (*Teixeira*, at [38]; *Bannikova*, at [38], [40] and [43]; *Furcht*, at [55] – [56]). The vice otherwise apprehended was random virtue-testing - together with the need to ensure good faith on the part of state agents (*Mack*, at p.956; *Looseley*, at [24], [27] and [56]). Approached in this fashion, it can readily be understood that having grounds for suspicion of a particular individual is not always necessary (*Mack*, at p.956; *Looseley,* at [27] and [65]); there is no conceivable affront to the public conscience where a *bona fide* law enforcement investigation focuses on a particular locality or activity and a defendant, hitherto unknown, thereby comes to the attention of the authorities. In today's world, a locality must of course include an electronic locality, such as a chatline or website. We are unable, even arguably, to construe the reference to "the applicant" in *Bannikova*, at [38], as intended to render abusive an unexceptionable law enforcement operation of the nature just described.

111. Fourthly, while there are inevitably terminological and other differences of detail between national systems in the treatment of disclosure, at least in the present context there is no material conceptual difference between the requirements for proper disclosure in English law and the Strasbourg jurisprudence. In English law, put starkly, disclosure under the CPIA regime, is viewed as fundamental to the fairness of the proceedings: *R v H* (*supra*), at [14]. Importantly, the prosecutor in English law is under a continuing duty with regard to disclosure: s.7A, CPIA. The Strasbourg jurisprudence emphasises adversarial proceedings, equality of arms and adequate safeguards to protect the interests of the accused: *Edwards and Lewis*, at [59]; *Veselov*, at [94]. Plainly, here too, there is a like concern going to fairness. The Court in *Edwards and Lewis* itself underlined (at [53]) that the defendant's entitlement to disclosure was not absolute and there would be circumstances necessitating the withholding of material from the defence. Again, no meaningful distinction appears as between the two systems. Overall, there is nothing whatever to suggest that the English law disclosure procedures under the CPIA and post-*R v H,* fortified by the prosecutor's continuing duty as to disclosure, are in any way non-compliant with Art. 6. As already explained, the problem in *Edwards and Lewis* related to prosecution *reliance* on material, not disclosed to the defence – an explanation reinforced by the treatment of *Edwards and Lewis* in *Bannikova* (at [64]) and *Lagutin* (at [97] *et seq*).

112. We turn separately to the incidence of the burden of proof, which, as will become clear (see below) is irrelevant on the facts in the present case. So far as concerns a category 2 stay (ordinarily the preferable remedy for entrapment), the burden in English law (and, it would seem, Canadian law, *Mack*, at p.975) rests on the accused to make good the charge of abuse. At first blush, the Strasbourg authorities suggest that – provided there is an arguable allegation of incitement - the burden of proof lies on the state to show that there was no incitement: *Bannikova,* at [48]; *Veselov*, at [94] and [109]. However, as already noted, the citation of *Ramanauskas* in those later authorities is, at best, partial – yet *Ramanauskas* is invariably advanced as the foundation for the proposition. For our part, we do not find the key paragraph (i.e., [70]) in *Ramanauskas* entirely straightforward. Intriguingly, paragraph [70] is contained not in that part of the judgment which is dealing with principles but in the later section concerned with the application of the relevant principles to the facts. Be that as it may, while the first

sentence does indeed deal unequivocally with the burden of proof, with respect, the second sentence is not easy to follow. It appears to suggest that if the state fails to discharge the burden of proof, the failure may not be fatal – as the Court must go on to examine the facts and, we would infer, must be free to reach a conclusion either way as to whether there was incitement. The third sentence talks of drawing inferences in accordance with the Convention, should the examination by the judicial authorities reveal that there was incitement; this too, with respect, is difficult to reconcile with the apparently bald proposition in the first sentence. Further exploration of the burden of proof in the Strasbourg jurisprudence must, however, await a case where it is necessary for the decision; as it is irrelevant to our decision (see below), we take no more time over it here.

DISCUSSION AND CONCLUSIONS

113. We come now to apply the law to the facts and to formulate our conclusions.

114. *(1) The Applicant's guilty plea:* In the light of the authorities, our primary focus is on the application for a category 2 stay, rather than for the exclusion of the online chat material pursuant to s.78, PACE and/or Art. 6, ECHR. As already discussed (*Asiedu, supra*), the Applicant's guilty plea is not a bar to an appeal on the issue of a stay.

115. On this footing, it is unnecessary to say more as to the impact of the Applicant's guilty plea on the s.78/Art. 6 question, save to observe that the plea was in no way compelled by the Judge's Ruling; it remained open to the Applicant to advance his defence (i.e., he was only playing a game and had no intention of committing a criminal act) regardless of the Ruling, had he chosen to do so.

116. *(2) Authorisation and supervision of the undercover operation:* As recorded by the Judge, no point was taken below to the effect that the undercover operation had not been properly authorised or supervised. Before us, Mr Summers sought to argue that the Respondent had failed to show proper authorisation and supervision of the operation. In our judgment, this was too late. If a point was to be taken on authorisation and supervision, it should have been taken below. This is not an issue to be sprung on the Respondent at the appellate stage. We add only that, on the material before us, there is no reason whatever to suppose that the undercover operation was not properly authorised or supervised.

117. *(3) Authentication of materials:* The Judge held in terms that there was a reliable record of the online and other communications, notwithstanding the gaps which he flagged in the Ruling. We did not understand there to be a challenge going to the authenticity or reliability of the materials but if there had been, we would have rejected it for the reasons given in the Ruling.

118. *(4) Reasonable suspicion and timing:* Mr Summers pressed the Applicant's complaint that what had occurred prior to 13 April 2016 was and remained unknown. In our judgment, this is an irrelevancy on the facts of the present case and, for the reasons already given, nothing in the Strasbourg jurisprudence points towards – still less compels – a different conclusion. On the material available to both the Applicant and the Court, on 13 April 2016 the Applicant made contact with someone whom he thought was sympathetic to the idea of terrorist violence. The Applicant's own words convey the irresistible inference that he already had the "opp" in mind. From then onwards

there was, at the very least, reasonable suspicion that the Applicant intended to commit a terrorist offence. Nothing prior to that date is relied upon by the Respondent or was relied upon by the Respondent before the Judge. There is nothing to call into question the good faith of the Respondent or to suggest that this was, in any way, an objectionable instance of random "virtue-testing". If the Applicant wished to say that events prior to 13 April supported his complaint of entrapment, he could have given or adduced evidence to that effect – but chose not to do so.

119. In argument, the Court raised with Mr Summers the familiar instance of the police posting a bogus profile on a dating or chat room website, when they have information that the website is being used by men who wish to have sex with young (under-age) girls. The bogus profile is likely to be of someone purporting to be a girl of, say, 14 or 15. When the man contacts the "girl" and suggests meeting for sexual purposes, the "girl" agrees. When the man attends at the appointed meeting place, he encounters the police rather than a young girl. Mr Summers, as we understood him, accepted that this scenario does not fall foul of the principles in the Strasbourg jurisprudence. Reasonable suspicion would arise when the man first made contact with the "girl". In saying this, Mr Summers was not making any unwarranted concession; a contrary submission would be untenable. In our judgment, however, it necessarily follows – though Mr Summers sought to resist the conclusion – that the same considerations applied here. Reasonable suspicion of the Applicant arose on and from 13 April 2016.

120. We entirely agree with the Judge's observations at [90] of the Ruling. The Respondent's silence as to the position prior to 13 April 2016 was not to the point; indeed, and though we base our conclusion on the facts of this case, the absence of such an explanation is anything but unusual in criminal cases.

121. We are fortified in this conclusion by two considerations, relating to safeguards inherent in our system of criminal justice. First, the Respondent (as already underlined) remained under a continuing duty of disclosure; it follows that had there been material relating to events prior to 13 April 2016 which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case of the Applicant, the Respondent would have been duty bound to disclose it. Secondly, had the Applicant chosen to pursue his defence (rather than plead guilty) it would have been for the jury not the Judge to decide the question of guilt.

122. *(5) Evidence of entrapment:* On the basis that the correct focus is on the material relating to the events of 13 April 2016 and thereafter, we have anxiously reviewed the online chat material. Having done so and for the reasons which follow, we are wholly unable to conclude that there is even an arguable case of entrapment on the facts of this case. We record, lest there be any doubt, that in dealing with the events on and following 13 April 2016, the Court's procedure amply and manifestly satisfied the Strasbourg jurisprudence (*Ramanauskas*, at [71]; *Veselov*, at [94]).

123. Having regard to the authorities (domestic and Strasbourg), the mere fact of an undercover operation does not disclose an abuse infringing Art. 6. The key question is accordingly whether the Security Service role players went beyond offering the Applicant an "unexceptional opportunity" to commit the crime. The online chat material (set out, at length, above) does not begin to suggest that they did. Contact was generally (if not invariably) initiated by the Applicant, not the role players. The role players were careful throughout to remain responsive, in our judgment, essentially

passive. Read sensibly and as a whole, the Applicant pressed and chased the role players, not *vice versa*. After gaps in the communications, the Applicant resumed contact. Without any prompting from the role players, the Applicant made a loan application. It is correct that the 29 May meeting was proposed by "Abu Yusuf" (the role player/s) but that would appear to have been a necessary part of the operation and it would be fanciful to treat it as amounting to incitement.

124. The Judge's conclusion on the online chat material was amply justified. As the Judge aptly put it in the Ruling (at [81]), the Applicant had been in "the driving seat" and – on the disclosed and served material - was already planning the "opp" when he first made contact with Abu Yusuf. The Judge held that the role players did no more than present the Applicant with an "unexceptional opportunity". At [96] – [97], the Judge went on to say that there had been nothing objectionable about state agents posing as violent jihadists prepared to carry out terrorist attacks; offences of such gravity warranted operations of this type. The Applicant had not been lured into the planning of a terrorist attack; he had been determined and committed. With all this, we agree.

125. *(6) Burden of proof:* As earlier foreshadowed, there is or may be a difference between English law and the Strasbourg jurisprudence on the incidence of the burden of proof when a category 2 stay is in issue. As seen from the ruling, the Judge approached the issue on the basis that the Applicant had not discharged the burden of proof resting on him (the correct position in English law) of proving that there had been an abuse of process warranting a category 2 stay. Assuming the burden of proof did rest on the Applicant, there is no basis for quibbling with the Judge's conclusion; it was plainly right. In terms of the Strasbourg jurisprudence, the Judge's approach could be supported on the basis that, as we have held, the Applicant's allegations of entrapment were not arguable, thus, on any view (*Ramanauskas,* at [70]), not giving rise to a burden of proof resting on the Respondent.

126. In any event, whatever concerns there might have been - had matters rested there – can be readily dispelled. On the assumption that, contrary to the Judge's approach, the burden of proof rested on the Respondent, we are entirely satisfied that there is no arguable case for concluding that the role players went beyond providing the Applicant with an unexceptional opportunity for committing the offence and had induced the commission of that offence. That conclusion is inevitable on the online chatline material, together with the other matters relied upon by the Respondent before the Judge (set out above) and us. The argument to the contrary is, with respect, fanciful. It follows that the incidence of the burden of proof matters not, so that if there is indeed any difference of substance between English law and the Strasbourg jurisprudence in this regard, it is immaterial for present purposes.

127. *(7) The s.78/Art. 6 ECHR application to exclude the online chat evidence:* For completeness, on the assumption, favourable to the Applicant, that his guilty plea did not preclude him from pursuing this issue on appeal, the application to exclude the online chat evidence is doomed to fail, for the reasons already given. It is unnecessary to belabour the point.

128. *Overall conclusion and disposal:* By way of a cross-check, we remind ourselves of the five factors of particular relevance highlighted by Prof. Ormerod (cited in *R v Moore* and set out above). As explained, there was reasonable suspicion as the trigger for the undercover operation, on and from 13 April 2016. Authorisation and supervision of

that operation were not in issue before the Judge and cannot be raised now. Given the gravity of the offending, the necessity and proportionality of the means employed in the operation cannot sensibly be questioned. The role players did not go beyond giving the Applicant an unexceptional opportunity of committing the offence. Authentication of the materials was not in issue.

129. For the reasons given, we refuse the application for leave to appeal. In a nutshell, there is no arguable case of entrapment on the facts and, equally, no arguable case that there is any material difference between English law and the Strasbourg jurisprudence such as to cast any doubt on *Looseley* complying with Art. 6, ECHR. Far from the role players conducting themselves abusively and bringing the justice system into disrepute, they are to be commended for an undercover operation conducted with scrupulous care.

130. Accordingly, we decline the Applicant's invitation to grant leave, dismiss the appeal and certify a question of general public importance for the consideration of the Supreme Court. Plainly, this is not an occasion when certification would have been appropriate.

131. Although our decision is to refuse leave to appeal, the matter has been fully considered and this judgment may be cited.