Neutral Citation Number: [2022] EWCA Crim 1444

Case No: 202202796 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
His Honour Judge Tomlinson
T20207210

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2022

Before:

PRESIDENT OF THE KING'S BENCH DIVISION
MR JUSTICE HILLIARD
and
MRS JUSTICE TIPPLES

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Between:

HANH TUYET NGUYEN **Appellant**
- and -
REX **Respondent**

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Benjamin Douglas-Jones KC and **Emma King** (instructed by **Specialist Fraud Division**) for the **Appellant**
Henry Blaxland KC (instructed by **Stuart Miller Solicitors**) for the **Respondent**

Hearing dates: 11th October 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4th November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Victoria Sharp, P.:

1. On 31 March 2022, in the Crown Court at Southwark, the appellant (then aged 42) was convicted of one count of converting criminal property and two counts of concealing criminal property, contrary to section 327(1) of the Proceeds of Crime Act 2002. She was acquitted of two further counts of converting criminal property.

2. On 5 September 2022, she was sentenced to 2 years' imprisonment for each offence, those sentences to run concurrently. She was disqualified from being a director of a company for 4 years, pursuant to section 2 of the Company Directors Disqualification Act 1986. Confiscation proceedings are pending.

3. She now applies for leave to appeal against sentence, the application having been referred to the Full Court by the Registrar who also granted a representation order for leading counsel, Mr Henry Blaxland KC. An application for leave to appeal against conviction was also lodged but that will be dealt with separately in due course. We grant leave to appeal against sentence.

4. There are three grounds of appeal. The principal ground is a challenge to the lawfulness of the immediate custodial sentence imposed on the appellant in the absence of counsel to represent her in court, in circumstances where counsel had refused to attend court in support of the Criminal Bar Association (CBA) days of action. In addition, it is said that her sentence was manifestly excessive, and that in view of her personal circumstances, the sentence of imprisonment should have been suspended.

The co-accused

5. There were three co-accused. My Ha Do was convicted after a trial of conspiracy to supply cannabis, two offences of converting criminal property, one offence of transferring criminal property and one offence of possessing criminal property. My Ha Do was sentenced to concurrent terms of 3 years' imprisonment on each count. Huyen Phan was convicted of one offence of concealing criminal property. She was sentenced to 18 months' imprisonment. Thi Nguyen was convicted of one offence of transferring criminal property and one offence of possessing criminal property. She was sentenced to concurrent terms of 10 months' imprisonment on each count, suspended for 18 months, with an unpaid work requirement of 100 hours. Another accused, Ly Pham had pleaded guilty at a late stage to her part in the conspiracy to supply cannabis. She was sentenced to 6 and a half years' imprisonment (in the Crown Court at Woolwich). She was dealt with on the basis that she had played a leading role. The appellant's husband was also tried on charges of money laundering but acquitted.

The factual background

6. The prosecution's case was that My Ha Do played a leading role in a conspiracy to grow and supply cannabis on an industrial scale. She sourced suitable accommodation for cannabis growing and demonstrated detailed knowledge of cannabis production. She was involved in arranging the trafficking of Vietnamese people into the United Kingdom to work in cannabis houses. In addition to the supply of cannabis and people trafficking, there was evidence that Do was involved in other forms of criminality, namely the arrangement of sham marriages and the production of false identity documents. She had a leading role in the money laundering. She directed the movement

of funds and gave advice on how to circumvent money laundering controls. She used a number of students for her money laundering activities. The total cash deposited into her accounts between October 2010 and March 2016 was £780,612. The total amount of money laundered by her was £1,062,664.

7. Between February 2014 and February 2017, over £500,000 was deposited in cash or by bank transfer into Huyen Phan's personal accounts and into the bank account of her company, Fullhouse Consultant Services Ltd.

8. Thi Nguyen allowed her bank accounts to be used to deposit cash which was the proceeds of crime and subsequently made transfers out. Cash deposits amounted to just under £187,000.

9. The appellant was a qualified accountant. She had set up a clothing export business which received £671,413 in cash and £495,980 in money transfers between January 2014 and July 2016 from Vietnamese "money service agents". The money the agents paid in had been generated from criminal activity in the United Kingdom. In order not to trigger banks' anti money laundering red flags, the payments were made into many different business and personal accounts of the appellant. The cash was paid in all over the United Kingdom in amounts which did not usually exceed £3,000. The criminal money was used to buy clothing which was then exported to Vietnam. There, the clothing would be bought from the appellant's sister. Buyers paid money to the sister or to her husband. The money would be moved to a contact of the money service agent in Vietnam. The money would then be moved on in Vietnam to pay relatives or contacts of the predicate criminals who had paid the money service agents in the United Kingdom. The appellant's business was integral to the placement and integration of the proceeds of crime in the UK which then found their way into the Vietnamese economy by an Informal Value Transfer System.

10. The appellant used multiple bank accounts and a limited company, Britz Fashion Ltd, to facilitate the money laundering operation. She had close links to My Ha Do and received significant amounts of cash and transfers from her. The appellant had incorporated Britz Fashion Ltd in 2012. The appellant produced business records which detailed the sale of clothing but contained no data at all about the source of payments in the United Kingdom. She used documents bearing identity data of other people.

Events leading to the sentencing hearing

11. After her conviction on 31 March 2022, the date for sentence for all offenders was fixed for 9 June. On 13 April, the prosecution note for sentence was served. On 6 May a note for sentence was served on the appellant's behalf. On 17 May the judge agreed to adjourn the sentence date because further time was needed to obtain a report as to Phan's mental health. Protracted efforts were made to find a date which suited all counsel. The 2 September was identified as the date on which most counsel would be available and on the 8 June, the judge fixed that as the new date. The parties were notified of the new date by an email from the listing officer. On 8 June leading counsel for the appellant emailed the list officer to say that he would be away on the 2 September and asking that the date be moved to the following week. That application was refused. On 21 June at a hearing to vary a condition of bail, junior counsel for the appellant, Mr Rose, invited the judge to move the sentencing date to 5 September or to another date in that week. The judge expressed a willingness in principle to move the

hearing to a slightly later date if it could be agreed between all parties. In the event, no such agreement was forthcoming. The judge was informed about this at a further hearing on 30 June, when the appellant's team accepted that the date should remain as 2 September. Junior counsel said that he would conduct the sentence hearing himself.

12. On 25 August counsel for Phan sent a letter to the court and a written application to adjourn the sentencing hearing for an indefinite period until the Criminal Bar Association days of action had ended. On 26 August, the list officer indicated to the parties that the judge had said that sentencing should proceed on 2 September. On 1 September, junior counsel for the appellant, Mr Rose, sent an email to the judge in which he explained he would not be attending on 2 September because of the CBA's days of action, and confirmed that leading counsel would be on leave. On the same day, Mr Rose sent a further email to the judge in which he drew his attention to section 226(3) of the Sentencing Act 2020. Counsel said: "Further to my email this morning I have been conducting further research on the issue of sentencing in absence and have discovered section 226(3) of the Sentencing Act 2020. Whilst I have no doubt that the court and others will already be aware of this provision, given that these are close to unprecedented times, out of an abundance of caution, I thought I should expressly refer to it in this further email to the court. On my reading of the section, if Ms Nguyen is to be sentenced in absence section 226(3) applies and has direct relevance to your sentence decision."

13. At the sentencing hearing on 2 September, the appellant was unrepresented. Her three co-accused were all represented. The judge said that he considered it to be lawful to proceed to sentence the appellant, including to a sentence of imprisonment, as she had had the assistance of counsel since her conviction and the court had made it clear that it would receive any further submissions in writing. The judge said that the appellant would have the opportunity to address the court directly. Prosecuting counsel submitted that the court should proceed to sentence the three represented defendants but that the sentence of the appellant should be adjourned - in the first instance for 28 days, with a view to there being a further 28-day adjournment after that when sentence could take place if it had not already taken place. Prosecuting counsel did agree that sentencing the appellant would be lawful for the reasons given by the judge. No one dissented. The judge said that all defendants should be sentenced together on 2 September.

14. There was then a short adjournment to allow the parties time to consider how to assist the appellant in presenting her case. The prosecution assisted in copying the appellant's bundle of documents for the court. When he opened the case, prosecuting counsel took the court through written submissions on sentence which had been prepared by counsel for the appellant, her pre-sentence report, a reference provided by her husband and her bundle of documents which concerned the ill health of her eldest child and of her husband. She addressed the court herself for about 30 minutes. The appellant's solicitor had been unable to attend court because of childcare commitments and she had not been able to find a colleague who could attend. Pleas in mitigation for all defendants finished late in the afternoon. The judge adjourned sentence to 5 September at 12 noon. On 4 September leading counsel for the appellant emailed the judge to say that he had returned from his holiday but that he would not be attending on 5 September for the same reasons as junior counsel.

Ground 1

15. The submission for the appellant is that it was unlawful to sentence her when she had the benefit of a legal aid order but did not have any legal representation at court.

16. We have already set out the circumstances in which this came about. We have considerable sympathy with the experienced judge who was faced with a difficult situation. The trial had been a long one, lasting some three months. It had been the subject of considerable delay. So too had the sentencing hearing. By the time of sentence, there had been four post-conviction hearings; and the judge had gone to very considerable efforts to find a date convenient for all parties for the sentencing hearing to take place. Well in advance of sentence, in May 2022, the judge had been provided with a note on sentence from the prosecution, and one from the appellant's counsel, and both notes addressed the position of the appellant in detail. The date for sentence of 2 September was fixed in June, but the court was not told by junior counsel for the appellant that he would not be attending the sentencing hearing until the day before it was due to take place. At that point, there was no end in sight to the disruption caused by the CBA's days of action, and the disruption was about to escalate. Junior counsel for the appellant drew the court's attention to the provisions of section 226 by email. But no-one referred the judge to any authority which may have assisted him in determining the issue he had to resolve. When the judge asked all counsel who did attend the hearing (that is, counsel for the appellant's three co-accused, and prosecuting counsel) whether it was lawful for him to sentence the appellant in the absence of her legal representatives, no-one demurred from the proposition that it was.

17. Nonetheless, the lawfulness of the sentence turns not on the reasonableness or otherwise of the judge's approach on the facts, but on what was required by the relevant statutory provisions. As to that, we have concluded that the sentence passed on the appellant was unlawful.

18. From at least the time of the Poor Prisoners' Act 1903, it was recognised by the legislature that it was in the interests of justice that a poor prisoner's case should be properly presented to the court, and that legal aid should be granted in order that justice may be done in such cases. That has remained the underlying principle relating to the provision of legal aid in criminal cases, notwithstanding the many changes and restrictions to the legal aid system which Parliament has enacted over the years, in the Legal Aid and Advice Act 1949, the Legal Aid Acts 1974, 1979 and 1988, the Access to Justice Act 1999 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). In *R v Kirk (Maurice)* (1983) 76 Cr App R 194, for example, Lord Justice Lawton said that the scheme of the Legal Aid Act 1974, was to put those who could not afford to retain solicitors and counsel into the same position as those who could. As he pointed out in the same case however, Parliament also recognised that it may be necessary to revoke a legal aid order because experience of the operation of legal aid showed that many accused in criminal cases when they received advice that was unpalatable to them, wanted to sack the legal representation assigned to them and "shop around".

19. The relevant legislation is currently to be found in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and in the regulations made thereunder, in particular, the Criminal Legal Aid (Determinations by a Court and Choice of Representatives) Regulations 2013 (CLAR).

20. Section 1(1) of LASPO provides that the Lord Chancellor must secure that legal aid is made available in accordance with Part 1 of LASPO, and by section 1(1)(b), this includes legal aid for representation required to be made available under section 16 of LASPO. Section 16 of LASPO provides in part that: "(1) Representation for the purposes of criminal proceedings is to be available under this Part to an individual if—(a) the individual is a specified individual in relation to the proceedings, and (b) the relevant authority has determined (provisionally or otherwise) that the individual qualifies for such representation in accordance with this Part (and has not withdrawn the determination)…"

21. Section 27 of LASPO provides in part that "(4) An individual who qualifies under this Part for representation for the purposes of criminal proceedings by virtue of a determination under section 16 may select any representative or representatives willing to act for the individual, subject to regulations under subsection (6); (5) Where an individual exercises that right, representation by the selected representative or representatives is to be available under this Part for the purposes of the proceedings."

22. The right under section 27(4) of LASPO is not unqualified. Subsection (1) of section 27, provides for example that the Lord Chancellor's duty under section 1(1) does not include a duty to secure that where services are made available under this Part, they are made available by the means selected by the individual. And Part 3 of CLAR makes provision for the limitation of the section 27(4) right in specified circumstances (limiting for example, the types of provider an individual may select to represent them in criminal proceedings, and providing that they may not change providers once they have selected one, save in specified circumstances; see regulations 12 and 14).

23. Regulation 9 of CLAR provides that a court may withdraw a representation order if (a) the individual declines to accept the determination in the terms which are offered; or (b) the individual requests that the determination is withdrawn; or (c) the provider named in the representation order which recorded the original determination declines to continue to represent the individual.

24. Since 1973 Parliament has provided particular safeguards in respect of the provision of legal representation to offenders who face imprisonment for the first time. Such a provision appeared in section 21 of the Powers of Criminal Courts Act 1973 (the 1973 Act), then in section 83(1) of Powers of Criminal Courts (Sentencing Act) 2000 and is now to be found in Section 226 of the Sentencing Act 2020 (the 2020 Act). The wording of these provisions is not identical, but they are materially similar for present purposes; certainly, it has not been suggested during the course of this appeal that anything turns on such differences in wording as there are.

25. Section 226 is one of a number of provisions within Chapter I of Part 10 of the 2020 Act, (sections 223 to 228) which is headed "General Limits on powers to impose custodial sentences." The section itself is headed "Custodial sentence: restrictions in certain cases where offender not legally represented." Section 226 was engaged in this case because the Crown Court was dealing with the appellant on conviction on indictment and she was 21 or over (see section 226(1)).

26. The material parts of section 226 provide as follows:

> (1) This section applies where—

…

(b)the Crown Court is dealing with an offender—

…

(ii) on conviction on indictment.

…

Offenders aged 21 or over

(3) The court may not pass a sentence of imprisonment unless—

(a) the offender—

(i) is legally represented in that court, or

(ii) has failed, or is ineligible on financial grounds, to benefit from relevant representation (see subsections (7) and (8)), or

(b) the offender has previously been sentenced to imprisonment by a court in any part of the United Kingdom.

…

When a person is legally represented

(6) For the purposes of this section an offender is legally represented in a court if the offender has the assistance of counsel or a solicitor to represent him or her in the proceedings in that court at some time after being found guilty and before being sentenced.

Relevant representation: failure or ineligibility to benefit

(7) For the purposes of subsections (2) and (3), "relevant representation", in relation to proceedings in a court, means representation under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (legal aid) for the purposes of the proceedings.

(8) For those purposes, an offender has failed, or is ineligible on financial grounds, to benefit from relevant representation if—

(a) the offender has refused or failed to apply for relevant representation, having—

(i) been informed of the right to apply for it, and

(ii) had the opportunity to do so,

> (b) the offender's application for relevant representation was refused on financial grounds, or
>
> (c) relevant representation was made available to the offender but withdrawn—
>
> (i) because of the offender's conduct, or
>
> (ii) on financial grounds.
>
> Relevant representation is refused or withdrawn on financial grounds if it appears that the offender's financial resources are such that the offender is not eligible for such representation."

27. In *Re McC (a minor)* [1985] AC 528, HL at 552 B-C Lord Bridge of Harwich described the philosophy underlying section 21(1) of the 1973 Act (and article 15 (1) of the Treatment of Offenders (Northern Ireland) Order 1976, a Northern Ireland provision to the same effect as section 21(1)) as follows:

> "Parliament plainly attached importance to ensuring that none of these custodial sentences should be imposed for the first time on a defendant not legally represented unless the defendant's lack of representation was of his own choice. The philosophy underlying the provision must be that no one should be liable to a first sentence of imprisonment, borstal training or detention, unless he has had the opportunity of having his case in mitigation presented to the court in the best possible light. For an inarticulate defendant, as so many are, such presentation may be crucial to his liberty. It is impossible to say in this or any other case that, if the requirements of article 15(1) had been satisfied, it would have made no difference to the result. For these reasons I am of opinion that the fulfilment of this statutory condition precedent to the imposition of such a sentence as the appellants here passed on the respondent is no less essential to support the justices' jurisdiction to pass such a sentence than, for example, in the case of a sentence of immediate imprisonment a prior conviction of an offence for which a sentence of imprisonment can lawfully be passed."

28. In *R v Linda Wilson* (1995) 16 Cr App R (S) 997 (Lord Taylor CJ, Owen J and the Recorder of London) the defendant pleaded guilty to arson, being reckless whether life would thereby be endangered. She was granted legal aid but dismissed the solicitors who had represented her at the Magistrates' Court, and then dismissed the second firm of solicitors and counsel who had represented her when she pleaded guilty in the Crown Court. At the adjourned sentencing hearing, different counsel attended to appear for her, but the defendant indicated she wished to speak for herself. After addressing the court at length, she asked for a further firm of solicitors to be assigned to her. The judge declined to adjourn sentence and sentenced the defendant to seven years' imprisonment.

29. The provision under consideration in that case, section 21 of the 1973 Act, was in the same terms as section 226(6) of the 2020 Act. The court held it was unlawful to sentence the defendant to imprisonment without first discharging the legal aid order.

30. At 1001, Lord Taylor said this:

> "The grounds of appeal contended that in the circumstances of the present case the appellant had not been legally represented in the terms of the section [section 21]. However, the crucial words in subsection (2) seem to us to be the phrase "at some time after he is found guilty and before he is sentenced".
>
> If the obligation was that the defendant be represented at the sentence hearing to speak in mitigation, the phrase "at some time" would not have been needed to be included. It seems to us that those words would be complied with, if at some time after conviction the appellant received advice from his lawyers, albeit the defendant may reject the advice and sack the lawyer. That was the situation here. However, that does not end the matter. A person who has been granted legal aid is entitled to be represented by solicitors and counsel whom he or she has selected and who are willing to act unless and until the legal aid order is withdrawn (see Regulation 45(1) and (2) of SI 1989 No. 344 [The Legal Aid in Criminal and Care Proceedings (General) Regulations 1989 (S.I. 1989 No.344) (the 1989 Regulations)]; *R v Harris* [1985] Crim LR 244; *R v Kirk* (1983) 76 Cr App R 194; and *R v Dimech* [1991] Crim LR 846).
>
> The judge may withdraw a legal aid order pursuant to Regulation 50(2) which provides as follows … Here the judge did not withdraw the order. Accordingly, the appellant, who still had the benefit of the order, was entitled to be represented within the terms of Regulation 45. To sentence her without such representation was unlawful. The judge's order imposing seven years' imprisonment must therefore be quashed.

Lord Taylor went on to say:

> "…it is important that judges bear in mind the need to withdraw a legal aid order in any case where legal aid has been granted but the defendant is not, in fact, to be represented either because he has sacked his lawyers or because they withdraw for proper reasons and the judge does not consider fresh lawyers should be assigned."

31. In this case, the appellant's lack of representation was not of her own choice or of her own making. Starting with the position under LASPO, she qualified for representation in the criminal proceedings against her, a representation order had been made, and it was still in place at the time of the sentencing hearings on 2 and 5 September 2022. By

the time of the sentencing hearing, nothing had happened that might have limited the appellant's rights under section 27(4) and (5) or led to the withdrawal of her representation order pursuant to Regulation 9 of CLAR. She had not declined to accept the determination in the terms which were offered; or requested that the determination be withdrawn. Though her counsel declined to attend at court on the 2 and 5 September 2022, neither they nor her solicitors had declined to continue to represent her, but remained willing to act on her behalf.

32. Nor had the appellant fallen foul of the provisions in section 226(7) and (8) of the Sentencing Act, which might have led to removal of the restrictions otherwise in place in section 226 on sentencing someone to imprisonment for the first time. She had not refused or failed to apply for relevant representation. Her application had not been refused on financial grounds. The representation made available to her had not been withdrawn because of her conduct, or on financial grounds. In other words, none of the grounds specified in section 226(7) and (8) for disapplying the restrictions on sentence for a person in the position of the appellant, had been triggered.

33. No doubt, if she could have afforded it, the appellant would have been represented by counsel at the sentencing hearing, but she was not represented because her counsel had decided to participate in the CBA action - a matter that was simply not under her control. The efforts made by the judge and prosecuting counsel to assist the appellant at that hearing were praiseworthy, but in the event, as the judge put it in his sentencing remarks, her experience in addressing him in person was "harrowing."

34. The appellant had received the assistance of her legal representatives, solicitors and counsel, at some time after being found guilty and before being sentenced, because her representatives had filed written submissions on sentence on 6 May 2022. Section 226(3)(i)(a) therefore applied for the purposes of the sentencing hearing. This was the approach of the judge. But consistent with the approach in *Wilson,* the application of section 226 was not the end of the matter. The appellant had a representation order and she retained the benefit of it, including the right to be represented by her solicitors and counsel, who remained willing to act for her, even if not willing to attend on the day of the sentencing hearing.

35. In our view, such an outcome is a just one, and is entirely consistent with the purpose of the two statutory schemes that were engaged. The appellant remained entitled to legal aid and had taken no step herself which could have led to the revocation of a representation order under section 226.

36. We would add that though she had been legally represented "at some time after being found guilty and before being sentenced" we do not consider those words were intended by Parliament to deprive someone in the position of the appellant of legal assistance at a critical time. Instead, they were directed to give the court a measure of control in relation to an offender who dispenses with his legal representatives between plea and sentence, and who, but for those words, could impede the administration of justice (the situation referred to in both *Kirk* and in *Wilson*).

37. The respondent submitted that the problems caused by the voluntary absence of counsel in support of the CBA's dispute with the Ministry of Justice, were unprecedented. We agree. It may also be the case as the respondent also submitted, that there was no obvious legislative mechanism to deal with them, and someone in the appellant's

precise position could remain unsentenced for an indeterminate period. Whether that is so or not, the appellant was in no different position to that of someone whose counsel was ill on the day of the hearing or had been delayed by a rail strike; on the facts of her case, it was unlawful to sentence her unless and until, for proper reason, her representation order was revoked or withdrawn.

38. It follows that the appellant's sentence must be quashed. It is nonetheless open to this court to impose any sentence which it was within the powers of the Crown Court to pass on the appellant, provided that taking the case as whole, she is not dealt with more severely than she was dealt with by the court below: see section 11(3) of the Criminal Appeal Act 1968 and the observations of Lord Taylor in *Wilson,* citing *R v McGinlay and Ballantyne* (1976) 62 Cr. App R. 156 and *R v Hollywood* (1990) 12 Cr. App R (S) 325.

39. It is necessary therefore to re-consider the issue of sentence, and we can conveniently do so by reference to the merits of the appellant's submission that her sentence was manifestly excessive and should have been suspended.

Grounds 2 and 3

40. Turning to the basis for the sentence the judge passed, the appellant had no previous convictions. The judge had a pre-sentence report which set out the appellant's personal and family circumstances. There were also hospital letters which confirmed her husband's mobility problems and her eldest daughter's onset of epilepsy in January 2022. The children were aged 10, 8 and 2 and a half. The appellant's husband wrote a letter to the judge in which, amongst other things, he said that the delay between arrest and trial had had a major impact on their life and mental health.

41. When he passed sentence, the judge made reference to the time which had elapsed since the offences were committed. Some of the delay had been the result of efforts which the judge had made to ensure continuity of legal representation. He noted that all the offenders were mothers of young children and referred to *R v Petherick [2012] EWCA Crim 2214* and the principles set out there. He said that even if custody could not be avoided, the effect upon children could afford grounds for mitigating the length of sentence. He concluded that the combination of delay and family circumstances should lead to the sentences for each offender being reduced by half but said that "only one out of four cases can arguably get close to the cusp of the custody threshold so as to justify a [suspended] sentence of imprisonment." The judge referred to other cases in which people had been trafficked for exploitation and cannabis cultivation. He said that the appellant and Huyen Phan were considerably more sophisticated than their co-accused. He observed that it may have been that some of the "uncomfortable truths" he had identified about people trafficking were rarely spoken of by them but said that "if that was indeed so, it was…a quite deliberate omission on the part of those who chose not to speak…they knew all too well about a simple differentiation between the haves and the have-nots from Vietnam." The judge found that all the offenders were aware of the fact that very large sums of money had originated from the supply of cannabis. He said not all of the £1,167,393 in the appellant's case inevitably represented the proceeds of crime. The appellant had formed a company to run her export business, but the judge acknowledged that the company was incorporated before the first date in the indictment. Nonetheless, he found that for the purposes of the money laundering sentencing guidelines, the appellant had a category 3A leading role in group activity,

and the nature of the offending was sophisticated, persistent and sustained. The appellant's conduct demonstrated that she knew she was dealing with the proceeds of crime. The judge identified that high culpability offending with category 3 harm has a starting point of 7 years' custody and a range of 5 to 8 years' custody; and that the starting point is based on a figure for the money laundered of £1 million, with a range of £500,000 to £2 million. He said that the appellant would have received a sentence of 4 years' imprisonment but because of delay and family circumstances, this would be reduced to 2 years' imprisonment. The judge made specific reference to the appellant's three children, to the health problems of the eldest child and to the mental wellbeing of all her family members.

42. It is now argued on the appellant's behalf that the judge wrongly assessed her culpability as high when it was medium. It is said that she did not have a leading role in group activity and that there was nothing sophisticated about what she was doing. It is conceded that her offending could be described as sustained. However, it is argued that she had a limited awareness of the predicate offending and that the scale of the offending fell at the lower end of the category 3 harm bracket. Finally, it is submitted that the judge should have suspended the sentence when account is taken of the sentencing guidelines for the imposition of custodial and community penalties and of the impact of the sentence upon the appellant's children.

43. The money laundering guidelines provide that "the level of culpability is determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out." The judge was of course particularly well-placed to make an assessment of the appellant and her offending because he had conducted her trial and that of her co-accused. The offending involved movement of money from predicate criminals to money service agents like My Ha Do and then to the appellant and/or Britz Fashion Ltd. The criminal money was converted to clothing and shipped to Vietnam. There, the money moved from buyers of clothing to the appellant's sister, then to a contact of the money service agents and then to contacts of UK based criminals. In our judgment, the appellant was properly described as having a leading role in this activity, which was sophisticated in nature, the product of significant planning and conducted over a sustained period of time. The judge was right to categorise the appellant's culpability as high. The judge accepted that it was not necessarily the case that every payment was the proceeds of crime but on the face of it, we are satisfied that the amounts involved put the case squarely into category 3 for harm.

44. But for delay and the appellant's family circumstances, the judge said that the sentence would have been one of 4 years' imprisonment. 4 years' imprisonment was already significantly below the starting point of 7 years' imprisonment for offending of this kind. The only other mitigating factor was the appellant's lack of previous convictions. In our judgment, the appellant could have had no complaint about a sentence in the range of 3 to 4 years' imprisonment. In arriving at a sentence of 2 years' imprisonment, the judge had already given more than full weight to the available mitigation and to the appellant's family circumstances. There is no arguable basis for saying that the same mitigating factors should have been used again to justify suspending the sentence of imprisonment. Nor do we accept, as was submitted, that the judge did not have the relevant Sentencing Council guidelines (on the *Imposition of Community & Custodial Sentences*) in mind, not least because he suspended the sentence he imposed on the

appellant's co-accused, Thi Nguyen. On the facts of the appellant's case, we do not consider a sentence of immediate custody can be described as wrong in principle or manifestly excessive.

Conclusion

45. The appellant is somewhat fortunate that this court can only exercise its power under section 11(3) of the Criminal Appeal Act 1968 so she is not more severely dealt with on appeal than she was in the court below. For the reasons we have given, we quash the sentence imposed by the court below, and pursuant to our powers under section 11(3) we impose a like sentence of 2 years' imprisonment on each count, to run concurrently. The sentence will run from the date when the judge purported to impose it.