Neutral Citation Number: [2023] EWCA Crim 1018

Case No: 202301370 B1

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 September 2023

Before:

LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE CHAMBERLAIN
and
LORD JUSTICE FULFORD
(Sitting in Retirement)

- -

Between:

AINE DAVIS	**Applicant**
- and -	
THE KING	**Respondent**

- -
- -

Mark Summers KC and Edward Craven (assigned by **The Registrar of Criminal Appeals**) for the **Applicant**
Mr Duncan Penny KC and Ms Kate Wilkinson (instructed by **Counter Terrorism Unit**) for the **The Respondent**

Hearing dates: 13 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 8 September 2023 by circulation to the parties or their representatives by e-mail.

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Lord Justice Fulford:

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

Introduction

1. The applicant was born in February 1984 and raised in London. It is the Crown's case that, on 28 July 2013, having earlier converted to Islam, he started a journey via Amsterdam and Turkey to take part in the violent conflict which had, in the period 2013 – 2014, engulfed large parts of Syria. Material found on various electronic devices, which apparently belonged to the applicant and which were recovered from the address of his *de facto* wife (Amal El-Wahabi), contained speeches and writings indicating his support for martyrdom and violent Islamic jihad.

2. The prosecution maintains that, within this context, the applicant instigated an attempt to smuggle €20,000 into Turkey for the purposes of terrorism. It is suggested that an analysis of the relevant telephone communications and CCTV records demonstrates that the applicant, his wife and one of her friends, Nawal Msaad, arranged for the latter to travel to Turkey with €20,000. On Thursday 16 January 2014, she was arrested at Heathrow airport en route to Istanbul carrying this concealed sum of money. Along with Amal El-Wahabi, she was later charged under section 17 of the Terrorism Act 2000 ("TA 2000"). The two women stood trial at the Central Criminal Court. On 13 August 2014, Amal El-Wahabi was convicted and Nawal Msaad was acquitted.

3. Following the conclusion of their trial, on 16 August 2014, the Sunday Telegraph published an article entitled "British Jihadist at the heart of terrorist network in Syria and Iraq". It was accompanied by two photographs which had been exhibited at the trial of the two women and which depicted the applicant, in one holding a gun whilst in the company of other men (all of whom, save for the applicant, had their faces obscured and many of whom were holding firearms) and, in the other, with another man who was similarly armed. The article suggested that the applicant was a "jihadist at the heart of [a] terrorist network in Syria and Iraq" and that the €20,000 was intended by him to be used for terrorist purposes.

4. On 13 January 2015, in the Westminster Magistrates' Court, a warrant was issued for the applicant's arrest; this was followed, on 6 March 2015, by an Interpol Red Notice which was issued in respect of the applicant. On 12 November 2015, the applicant was arrested at an address in Istanbul, along with five other individuals. He was questioned and remanded in custody.

5. On 12 March 2016, the six men were charged by the Turkish prosecuting authorities with a single offence, namely membership of an armed terrorist organisation on 12 November 2015, contrary to the Turkish Criminal Code No. 5237, Article 314 and the Anti-Terrorism Law 3713, Article 5. The applicant was tried at the High Criminal Court in Silivri and convicted on 9 May 2017. He was sentenced to 7 ½ years' imprisonment. On 14 July 2017, the Istanbul Court of Appeals upheld his conviction. He was held in "judicial" custody in Turkey for approximately six years and eight months. On 10 August 2022, the applicant was deported from Turkey to the United Kingdom, and he was arrested by the prosecuting authorities of England and Wales on his arrival.

6. The applicant presently faces an indictment containing three counts which are to be tried at the Central Criminal Court. Given their significance to the present application, it is necessary to set these out in full:

   i) Count 1 alleges that, between 28 July 2013 and 16 January 2014 and contrary to section 57 of TA 2000, he possessed an article, namely a firearm, in circumstances which give rise to a reasonable suspicion that his possession was for a purpose connected with the commission, preparation, or instigation of acts of terrorism.

   ii) Count 2 alleges funding contrary to section 15 of the TA 2000. The particulars are that, over a period starting on or before 13 January 2014 and ending on 16 January 2014, he invited one or more others to provide money and intended that it should be used, or had reasonable cause to suspect that it would or may be used, for the purposes of terrorism.

   iii) Count 3 alleges funding arrangements, contrary to section 17 of the TA 2000. The particulars are that, between 13 January 2014 and 16 January 2014, he entered into or became concerned in an arrangement with Amal El-Wahabi and others as a result of which money was made available, or was to be made available, to another and he knew or had reasonable cause to suspect that it would or may be used for the purposes of terrorism.

The issues raised at the Pre-Trial Preparatory Hearing

7. On 9 December 2022, Mr Mark Summers KC, on behalf of the applicant, advanced submissions to the Recorder of London, His Honour Judge Lucraft KC, on various preliminary issues prior to a jury being empanelled, within the ambit of a pre-trial Preparatory Hearing (see section 29(1B) of the Criminal Procedure and Investigations Act 1996).

Abuse of Process

8. The applicant argued that the prosecution should be stayed on the basis that it constitutes an abuse of process. Various grounds were advanced in support of this contention which we have treated as separate grounds of appeal:

   (i) *Abuse of Process: Issue 1*

   The applicant contended that the prosecution infringes the double jeopardy principle on the basis that he is being prosecuted for alleged offences which arise from the same or substantially the same facts as were the subject of his previous prosecution, conviction and imprisonment in Turkey.

   (ii) *Abuse of Process: Issue 2*

   It was submitted there are no "special circumstances" which justify the applicant being prosecuted a second time in respect of the same facts.

   (iii) *Abuse of Process: Issue 3*

Four principal allegations were advanced under this heading: a) the United Kingdom authorities "procured, colluded or connived in" the applicant's deportation from Turkey to the United Kingdom, thereby avoiding extradition proceedings, with the objective of facilitating his prosecution in this country; b) the Home Secretary "actively cajoled" the United States to prosecute a United Kingdom national in a manner that was "obviously and seriously illegal"; c) statements which were deliberately false were made, and undue pressure was applied, to undermine the applicant's exercise of his legal rights to challenge his removal from Turkey; and d) United Kingdom consular officials "colluded" in his "illegal" deportation by the Turkish authorities, which occurred whilst an appeal against his deportation and an application for asylum in Turkey were outstanding.

Count 3

9. The applicant additionally contends that Count 3 should be quashed (or stayed as an abuse of process) on the basis that the Crown's case against him is "bad in law". Given he is alleged to have been concerned in or entered into an arrangement to make funds available to "*another*", it is argued the charge must fail because the other could not have been himself. Furthermore, it is submitted that the Crown impermissibly departed from the way in which the allegation concerning this count had earlier been formulated.

The judge's decision and the application for permission to appeal

10. The judge decided against the applicant on each of the matters raised, as set out in two written rulings: on 10 March 2023 (as regards Issues 1, 2 and 3) and on 18 April 2023 (as regards Count 3). On 18 April 2023, the judge refused permission to appeal. On 18 May 2023 the Registrar of Criminal Appeals referred the applicant's application for permission to appeal to the full court.

Jurisdiction

11. The first question we need to address concerns jurisdiction, which was raised by the Registrar of Criminal Appeals on 28 April 2023 ("(d)oes the Court have jurisdiction to deal with a ruling on abuse of process as an interlocutory application?"). The parties have each filed written submissions and addressed us briefly in oral argument on it. The question of jurisdiction with respect to the appeal against the ruling on abuse of process was not raised by the prosecution. We will turn to the statutory provisions but note immediately that appeals from rulings in preparatory hearings are in respect of "questions of law". The resolution of questions of law commonly involves making findings of fact or require the judge to make evaluative assessments. For the reasons which follow, our conclusion is that an appeal lies to the Court of Appeal from a ruling in a preparatory hearing on the question of abuse of process.

The Criminal Procedure and Investigations Act 1996

12. Section 6A(1) of the Criminal Procedure and Investigations Act 1996 ("CPIA 1996"), as amended, provides that a defence statement is a written statement which does certain specified things, including "(d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose".

13. Section 29 empowers a judge of the Crown Court to hold a preparatory hearing where it appears to him or her that an indictment raises a case of such complexity, a case of such seriousness, or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing (a) before the time the jury is sworn and (b) for any of the purposes mentioned in section 29(2). Those purposes are: (a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial; (b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them; (c) determining an application to which section 45 of the Criminal Justice Act 2003 applies; (d) assisting the judge's management of the trial; and (e) considering questions as to the severance or joinder of charges.

14. In certain cases, a preparatory hearing is mandatory. Among these are cases, such as the present, where at least one of the offences charged by the indictment against at least one of the persons charged is a terrorism offence: see section 29(1B), read together with section 29(6).

15. Section 31(1) provides that, at the preparatory hearing, the judge may exercise any of the powers specified in section 31. These include, in section 31(3), making a ruling as to:

> "(a) any question as to the admissibility of evidence;
>
> (b) any other question of law relating to the case;
>
> (c) any question as to the severance or joinder of charges."

16. The remainder of section 31 confers specific case management powers. Section 35(1) provides that an appeal shall lie to the Court of Appeal from any ruling of a judge under section 31(3), but only with the leave of the judge or the Court of Appeal. Section 35(3) empowers the Court of Appeal to confirm, reverse or vary the decision appealed against.

The Criminal Justice Act 1987

17. With the exception of the provisions that make a preparatory hearing mandatory in certain cases, sections 29 and 31 CPIA 1996 were modelled on and closely resemble sections 7 and 9 of the Criminal Justice Act 1987 ("CJA 1987"). Section 9 CJA 1987 empowers the judge to "determine", rather than "make a ruling as to" certain matters, but this court has already noted that this difference is not material (see *R v AUH* [2023] 1 WLR 1399, [67]). The matters which the court is empowered by section 9 CJA 1987 to determine are not identical to those on which it is empowered by section 31(3) CPIA 1996 to make a ruling, but they both include "any other question of law".

18. The question which arises here is whether a ruling on an application for a stay for abuse of process is a ruling on "any other question of law relating to the case". There is a great deal of authority which bears on that question, both in the context of the CJA 1987 and in the context of the CPIA 1996. We have sought to identify the key principles.

R v Aujla

19. In *R v Aujla* [1998] 2 Cr App R 16, this court heard and determined an appeal from the ruling of the trial judge, in a preparatory hearing under the CPIA 1996, that it was not an abuse of process to use material obtained by foreign telephone tapping. The question of jurisdiction was not considered. However, it is of some interest that the Crown did not argue that the ruling was not on a "question of law relating to the case".

R v Alps

20. In *R v Alps* [2001] EWCA Crim 218, this court heard and determined an appeal from the ruling of the trial judge, in a preparatory hearing under the CPIA 1996, rejecting his application for a stay on the ground of abuse of process, because he had immunity from prosecution under the Geneva Convention and because he was charged under the wrong statutory provision. Again, the question of jurisdiction was not considered.

R v H

21. In *R v H* [2007] UKHL 7, [2007] 2 AC 270, the House of Lords considered whether section 9(11) CJA 1987 conferred jurisdiction on the Court of Appeal to hear an appeal from a ruling on disclosure made in the course of a preparatory hearing. The Appellate Committee was divided on the question whether the powers that may be exercised at a preparatory hearing were confined to those in section 9 CJA 1987. But, as Lord Hope explained at [18], that question did not matter. What mattered was whether a ruling which determines an application for disclosure, given by a judge while he is conducting a preparatory hearing, can be the subject of an appeal.

22. As to that, the ratio of the case is to be found in the majority judgments. Before going to those, however, it is pertinent to point out Lord Scott's clear disapproval, at [32], of previous case law to the effect that determining an abuse of process submission fell outside the purposes for which a preparatory hearing under the CJA 1987 could be held. In this respect, he was agreeing with Lord Rodger (at [50] and [53]) and Lord Mance (at [91]) that the permitted purposes should be broadly construed.

23. Lord Hope emphasised that a preparatory hearing is a part of the trial, albeit a part which takes place before the jury is empanelled. The judge had power under section 8(2) CPIA 1996 to deal with disclosure applications and did not require the powers in section 9 CJA 1987 to do so. Such applications should normally be dealt with before the preparatory hearing. Moreover, an application for disclosure would not in itself raise a question of law "relating to the case": see generally at [19]-[26].

24. Lord Rodger explained that sections 7 and 9 CJA 1987 were intended to confer powers which it may be beneficial for the judge to exercise in advance but which, under the law as it had stood previously, could only be exercised at the trial proper. But an application for disclosure is not a "question of law", even if it required the judge to identify the scope of his powers and duties, so could not be "question of law relating to the case": [59]. This view was bolstered by considering the report of the Roskill Committee, upon which the CJA 1987 was based. That committee had intended that preparatory hearings would be used to determine "points of law which go to the root of the case or any point of law relating to the admissibility of evidence as disclosed on the papers": [60]. It was important that preparatory hearings were intended to take place

after the essential work of preparation for the trial had been completed and so, "the judge would determine questions of law relating to the case, as fully prepared for trial, not questions of law relating to the essential preparations for the trial of the case": [62]. The absence of any mention of disclosure in section 9(3) was not a lacuna but reflected a legislative intention that applications for disclosure should not take place at, but preferably before, the preparatory hearing: [65].

25. Lord Mance also referred to the Roskill Committee's phrase "points of law which go to the root of the case" and said that Parliament had in section 9(5)(b)(iii) conferred a power to require the defendant to inform the court and the prosecution of "any point of law (including a point as to the admissibility of evidence) which he wishes to take", noting that the power given by section 9(3)(c) would enable them to be determined: see at [96]. The reasons why disclosure applications did not fall within section 9(3)(c) "as such and without more" included that they did not go to the root of the case, the Roskill Committee thought they would be dealt with before the preparatory hearing, they do not come within the ordinary meaning of "points of law relating to the case" and the CPIA 1996 made no reference in the context of disclosure to the preparatory hearing procedure: [110].

Warren v Attorney General

26. In *Warren v Attorney General* [2009] JLR 248, the Jersey Court of Appeal considered whether there was a right of appeal under Article 86(3) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 against a ruling on an application for a stay on abuse of process grounds, because the prosecutorial authorities had acted "in contravention of the rule of law". That paragraph provided for an appeal against a ruling at a preparatory hearing on "any question as to the admissibility of evidence and any other question of law relating to the case".

27. At [17], the court said the determination of an application for a stay on the ground of abuse of process was within the discretion of the first instance judge. However, the focus of the jurisdictional provision was "not on the nature of the ruling but on the nature of the issue to be determined" (applying *R v H*). At [19], they noted that, as observed in *R v Latif* [1996] 1 WLR 104, there was "considerable overlap" between the principles applicable to the court's jurisdiction to stay criminal proceedings and the power to exclude evidence. They continued: "If the question of the admissibility of evidence is to be regarded as one of law, as the statute expressly provides, in our judgment, it falls within the intention of the legislature that an application to stay proceedings as an abuse of process should be regarded also as a question of law." At [20] they noted that an application to stay on the ground of abuse of process "goes to the root of the prosecution".

R v VJA

28. In *R v VJA* [2010] EWCA Crim 2742, this court determined whether it had jurisdiction to consider an appeal from an abuse of process ruling given at a preparatory hearing under the CJA 1987. At [37], the following principles were derived from *R v H*:

> "First, the purposes set out in section 7(1), for which a preparatory hearing may be ordered, should be interpreted broadly and generously […]. Secondly, the orders that a judge may make 'as part

> of' a preparatory hearing proper are limited to the specific matters set out in section 9 […]. Thirdly, the judge should make an order under section 9(3) only if he reasonably considers that to make such a ruling would also serve a useful trial purpose within one of the purposes set out in section 7(1) […]. Fourthly, the scope of what falls within section 9(3)(c) i.e. 'any other question of law relating to the case', is restricted. Whether a ruling falls within that provision depends on the nature of the issue which the order or ruling decides […]. Fifthly, section 9(3)(c) does not cover rulings on disclosure 'as such and without more' […]. The words in quotes are from Lord Mance's speech. The 'question of law relating to the case' must relate to something more specific than the question of whether the judge misdirected himself and so vitiated his decision… The questions of law have to go 'to the root of the case' of which Lord Mance gave some examples […]. Lastly, the Court of Appeal's jurisdiction to give leave to appeal under section 9(11) in respect of a determination made by the judge under section 9(3)(c) is limited to the types of question of law that fall within section 9(3)(c)."

29. At [41], the court decided that the ruling appealed in that case was not the determination of a point of law relating to the case. Its reasons were these:

> "First, it is not argued that there is some independent issue of law that has to be determined prior to deciding the overall question of whether there should be a stay because the proceedings are an abuse of the process of the court. Secondly, it is not argued that the judge erred in law in applying the well-known principles that he had to consider in deciding that overall issue. Thirdly, there is no explicit argument in the proposed Grounds of Appeal that the decision of the judge was so unreasonable that no reasonable judge, properly directing himself, could have come to that conclusion. To the extent that it is implicit in them, in our view, in the context of this case and the issue decided by the judge, such an argument does not constitute 'any other question of law relating to the case' under within section 9(3)(c) as interpreted in *Regina v H*, as Lord Scott of Foscote specifically stated at [41]."

R v AUH

30. Very recently, in *R v AUH* [2023] EWCA Crim 6, [2023] 1 WLR 1399, this court considered whether it had jurisdiction to entertain an appeal from an abuse of process ruling made under the CPIA 1996. It held that the ruling did determine a question of law because it involved the question whether someone was an "exempt person" for the purposes of paragraph 2(4) of Schedule 3 to the Legal Services Act 2007 and ancillary questions of law relating to nullity and abuse: see at [65]-[67]. The broader question whether, without more, there is jurisdiction in respect of appeals against rulings relating to abuse of process was not considered.

Submissions for the applicant

31. For the applicant, Mr Summers notes that the question posed by the Registrar to the parties in this case *("(d)oes the court have jurisdiction to deal with a ruling on abuse of process as an interlocutory application?")* was also posed in *R v AUH*. He submits that the answer in that case determines the answer here. That answer is also consistent with prior authority.

32. The CPIA 1996 itself proceeds on the basis that "any point […] as to an abuse of process" is a point of law: see sections 6A(1)(d) and 11(6)(b) and Mr Summers submits that the Jersey Court of Appeal was correct in *Warren* to focus on the nature of the issue (abuse of process), rather than the particular ruling under appeal.

33. *R v H* concerned disclosure, a question which went to "essential preparations for the trial of the case", rather than "questions of law relating to the case, as fully prepared for trial" (Lord Rodger, [62]). An application to stay on the ground of abuse of process goes "to the root of the case" (Lord Rodger, [60]; Lord Mance, [96]).

34. *R v VJA* can be distinguished because in that case it was not argued that there was any independent issue of law that had to be determined prior to deciding the overall question of abuse of process, nor that the judge had erred in applying the legal test, nor that the conclusion was so unreasonable that no judge, properly directing himself, could have come to it. Here, by contrast, both misdirection and perversity are alleged.

Submissions for the Crown

35. For the Crown, Mr Duncan Penny KC submits that the approach to be applied in deciding whether the rulings appealed from were rulings as to "any […] question of law relating to the case" is that in *R v VJA*. Here, both the principal arguments advanced on behalf of the applicant inviting the judge to stay the proceedings as an abuse of process required the judge to make factual determinations against a background "largely of agreement as to the relevant principles". His rulings "principally involved his assessment of factual matters".

36. Although the applicant's grounds have been cast in terms of legal error, and it is suggested that there is an error of approach, the analysis is debatable. The Crown does accept, however, that insofar as the ruling concerns the correct approach to the question of double jeopardy in respect of foreign proceedings, "it may properly be regarded as a question of law, although the [applicant's] grounds are in substance connected with the judge's conclusions about the facts of the cases before him".

37. Moreover, an appeal under the interlocutory procedure provided for by the CPIA 1996 is not an opportunity to bring a claim for judicial review of a matter relating to a trial on indictment, which is precluded by section 29(3) of the Senior Courts Act 1981.

Discussion

38. In our view, it is important to distinguish two stages of the analysis, both of which may be termed "jurisdictional", but in different senses. The first asks whether, in principle, an appeal lies under section 35(1) from a ruling made in a preparatory hearing on an application to stay proceedings on the ground of abuse of process. That question turns

on whether the ruling appealed from is a ruling "on any […] point of law relating to the case" within the meaning of section 31(3) CPIA 1996. If the answer is "No", the court should not embark on the task of considering the substance of the appeal. If, however, the answer is "Yes", a second stage of analysis arises: how should the appellate jurisdiction in section 35(3) be exercised? In particular, in what circumstances can and should this court intervene to reverse or vary the judge's ruling?

39. The majority in *R v H* considered that the answer to the first question (in the statutory context of the CJA 1987) turned on the nature of the issue being determined. One factor regarded as important was whether the issue goes to the root of the case. Another was whether the issue relates to the case, as fully prepared for trial, rather than to preparations for the trial. Where the ruling is on a disclosure application, neither question can be answered affirmatively. Where it is on an application to stay for abuse of process, both can.

40. Lord Mance at [96] noted that, on his reading, section 9(3)(c) CJA 1987 enabled the judge to deal with points of which the statute envisaged the defendant being required to give notice under section 9(5)(b)(iii) ("any point of law (including as to the admissibility of evidence) which he wishes to take"). We note that, in section 6A(1)(d) CPIA 1996, the defence statement is required to include "any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take" (emphasis added). This seems to us to be a further indication that "any other question of law" is wide enough to encompass a ruling on an application to stay for abuse of process. We also see force in the conclusion of the Jersey Court of Appeal in *Warren* that a statutory scheme which permits appeals on the admissibility of evidence ought in principle to permit appeals on applications for stays on the ground of abuse of process, given the overlap between the two.

41. We can readily understand why, in *VJA*, this court was reluctant to accept that it has jurisdiction in a case where it was not contended that the judge had misdirected himself in law or acted irrationally or beyond the limit of his discretion. But in our view, these questions arise at the second stage of the analysis. At the first stage, the focus should be on the nature of the issue being determined in the judge's ruling, not on the errors or alleged errors it contains. Otherwise, the court would not know whether an appeal lies without investigating the extent to which the ruling turned on questions of law. In the present case, Mr Penny submits that ruling was made "against a background largely of agreement as to the relevant principles" and "principally involved his assessment of factual matters" (Notice of Grounds of Objection, paragraph 3); whereas Mr Summers identifies a series of misdirections and alleges perversity (Applicant's Submissions on Jurisdiction, at [17]). If the question of principle whether an appeal lies depended on which of these submissions was correct, it would become impossible to determine it without determining the substance of the appeal.

42. In this case, the application to stay for abuse of process was made on three bases which, we consider, were "points of law relating to the case" within the meaning of section 31(3) CPIA 1996. If successful, they would have barred the prosecution from proceeding. They were applications made on the (written) evidence as prepared for trial, not with a view to preparing the case for trial. They had been raised by the defence in writing. They were suitable for determination at a preparatory hearing. We conclude that, in principle, an appeal from the judge's ruling lies to this court.

43. The concerns of the court in *VJA* can and should, however, inform the analysis at the second stage, when considering whether the appellate jurisdiction should be exercised. A conclusion that, in principle, an appeal lies does not mean that it will be appropriate for this court to exercise its appellate jurisdiction by substituting its judgment for that of the first instance judge. It is important to reiterate that a ruling on abuse of process typically involves findings of fact and a multi-factorial balancing exercise, leading to a judgment about "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": see *R v Latif* [1996] 1 WLR 104, 112 (Lord Steyn). It is not the function of this court, whether on an interlocutory appeal or on an appeal from conviction, to remake the judge's findings of fact or to perform the balancing exercise afresh, unless the judge has erred in law or approach, taken into account something irrelevant or failed to consider something relevant or reached a decision that no reasonable judge could reach.

44. We emphasise that a judge is not obliged to deal in a ruling with every piece of evidence adduced or every submission advanced. Submissions that a judge has left out of account a material consideration should be made sparingly and only where the transcript and ruling, read as whole, justify it.

Abuse of Process

Summary of the relevant evidence, the submissions and the judge's ruling relating to Issues 1 and 2 ("double jeopardy" and "special circumstances" see [8] above)

45. The Turkish indictment, to which the judge referred, is critical in this regard. The six men were charged with membership of an armed terrorist organisation on a specific day, namely 12 November 2015 (the date of their detention). The "events" to which this charge related – put otherwise, the facts founding or underpinning it – commenced on 6 October 2015 when the applicant contacted someone called Ilhami Bali, a border chief for ISIS in Syria, to enlist his help in order to enter Turkey for the purpose of attending an important meeting. Thereafter it was alleged that the applicant, who was in contact with regional "conflict" organisations (principally ISIS), had arrived in Istanbul by land on 7 November 2015, calls having been made by the Telegram messaging service to an unidentified man in Istanbul. This latter individual had been "participating in organisational development and activities" and was suspected of "provocative and sensational actions" in Istanbul. A search warrant was accordingly issued which resulted in the arrests described above. It is to be emphasised, therefore, that the Turkish case vis-à-vis the applicant centrally concerned his role as a significant member of ISIS who had arrived in Istanbul for a meeting with someone who was suspected of planning future terrorist incidents in that city. It was on the basis of these core facts that the applicant was charged, in Turkey, with being a member of ISIS on 12 November 2015. The indictment additionally included a short history of ISIS, with particular focus on the organisation's activities in Turkey.

46. The categories of evidence relied on against the six accused to prove the charge were summarised in the Turkish indictment and included events going back to, at least, 2012. Reliance was placed on documents, memory cards, laptops, mobile telephones, telephone records (particularly as regards contact between some of the defendants), details of certain motor vehicles, passports (including forgeries), numerous photographs of various of the defendants and others with weapons, ISIS emblems and criminal records. Focusing on the applicant, it was rehearsed that he had been banned

from entering Turkey since 7 March 2012 (he had a M-99 restriction code and an "identification record"). In the context of describing his role in ISIS, it was emphasised that, as set out above, he used the codename Abu Ayyub al-Britani. The prosecuting authorities relied on the applicant's admission in interview that he had attended conflict zones controlled by ISIS, that he had entered Turkey illegally and he had used a false passport. Additionally, there was reference to the Sunday Telegraph article and its title ("British Jihadist at the Heart of Terrorist Network in Syria and Iraq") in the context of an accompanying photograph, showing the applicant with an armed and masked individual; there was also mention of further photographs from conflict regions of individuals with covered faces holding guns. We note in passing that the Turkish court rejected the applicant's suggestion that the photographs had an innocent provenance, along with the claim that they had not been taken in conflict regions controlled by ISIS. Similarly, the court declined to accept the applicant's contention that he had visited the region to aid the victims of war, the applicant having volunteered, during his evidence, that he had taken €10,000 with him and had anticipated receiving €20,000. The applicant gave evidence concerning the arrest of Nawal Msaad and the court referred to the applicant's wife having been arrested for "carrying financial aid to ISIS". The prosecution noted the Red Notice without elaborating on its contents and there was a link provided to the Sunday Telegraph website. Reliance was placed on the applicant's digital and electronic records which included pictures of "emblems" used by ISIS, together with, as just described, pictures of individuals with guns and masks.

47. It is self-evident that the prosecution of the applicant in this country involves three charges which are substantively different to the single count on which the applicant was convicted in Turkey. The Draft Opening Note prepared for the applicant's trial in England (dated 20 February 2023, and updated on 28 February 2023) rehearses vis-à-vis count 1 that at the end of November 2013, he sent Amal El-Wahabi the photograph of himself in the company of another person who is holding a firearm, along with the photograph of himself holding a firearm, along with 14 other individuals who, in the main, were similarly armed. Counts 2 and 3 relate to Nawal Msaad's arrest at Heathrow on 16 January 2014 when the €20,000 was seized. These were the facts or the events on which counts 1, 2 and 3 were founded.

48. Turning to the evidence to be called in support of the three counts, the Crown, *inter alia*, rely on: i) the applicant's regular contact with Nawal Msaad and the Turkish and Syrian telephone numbers he provided to her; ii) the material which suggests that he envisaged personal martyrdom (this latter material was unavailable in the prosecution in Turkey); iii) the fact that by 2013 he had resolved to live in "Muslim lands" and that at the time of the attempted smuggling of money into Turkey for terrorism, he was "taking part in the violent conflict that had engulfed large parts of Syria in the period 2013 – 2014" (as discussed below, the respective timespans for the two sets of proceedings are relevant in this context); iv) his use of the name "Hamza", and that in 2007 he spent time, firstly, in Saudi Arabia and, secondly, with Amal El-Wahabi in the UAE (it is averred that he was with her in 2008 in the Yemen, which he visited again in 2009); v) his travels to Egypt in 2009 and 2011, and to Turkey in 2012; vi) a detailed and extensive examination of the telephone/messaging contact by Amal El-Wahabi in January 2014 with the applicant and Nawal Msaad (these did not feature in the Turkish prosecution), along with other events in that month; and vii) the discovery of extensive and diverse jihadist material at various addresses, which could, in the main, be attributed to the applicant. In this context, we have taken into account Mr Summers'

submission that the court should distinguish between the facts on which the prosecutions are based and the evidence adduced to establish those facts (see [55] of the "Grounds of and Submissions on Interlocutory Appeal against Rulings at a Preparatory Hearing").

49. The judge set out extensively the principal materials relied on in the two prosecutions (*viz*. in Turkey and in the United Kingdom), along with differences between them. He indicated that he had read in detail everything provided to him. He concluded that the 3 counts in the proceedings before him were not founded on the same or substantially the same facts as those that had underpinned the applicant's prosecution in Turkey. He emphasised that the proceedings in this country are dependent on evidence recorded on the devices seized in the United Kingdom at the time of the arrest of Amal El-Wahabi and Nawal Msaad. He stressed that the CCTV footage and the circumstances of Nawal Msaad's arrest helped establish the conduct of others recruited by the applicant in this country. He was satisfied that the allegations faced by the applicant are "legally distinct" from that which he faced in Turkey. Counts 2 and 3, in his judgment, involved allegations which "stand apart" from the Turkish proceedings and, overall, the offences that are to be tried in the United Kingdom have a "very different focus" to the Turkish charge. Finally, the reference to the €20,000 and the photographs in the Turkish proceedings did not lead to the conclusion that the present indictment should be stayed.

50. As to special circumstances, the judge again noted that counts 2 and 3 "stand apart" from the proceedings in Turkey. These offences involved the applicant as the organiser or architect of a terrorist funding arrangement in the United Kingdom, which was only prevented by the intervention of domestic law enforcement agencies. Furthermore, the offences charged in this country have a "very different focus" to the charge preferred in Turkey.

51. Mr Summers submits that the judge's reasons were impermissibly brief and that on a significant number of issues he failed to engage, sufficiently or at all, with the evidence and the submissions relied on by the applicant. It is suggested that the judge's decision on double jeopardy amounted to a "striking departure" from existing case law and that his conclusions were inconsistent with the facts and the principles established in the jurisprudence. Mr Summers highlights that his conviction in Turkey was based on the totality of his conduct as summarised in the indictment. It is argued that the judge erroneously conflated the facts on which the two prosecutions were or are based with the evidence relied on in each set of proceedings. The applicant stresses that the same photographs and the same cash transfer arrangement featured in the two sets of proceedings. It is emphasised that whether the charges are legally distinct as between the two prosecutions is irrelevant when assessing if they are based on the same or substantially the same facts (see *R v Phipps* [2005] EWCA Crim 33 at [20] and [21]).

52. The applicant's case as regards special circumstances is that the judge wrongly focussed on whether the prosecution in this country was founded on the same or substantially the same facts as the prosecution in Turkey and, furthermore, the "reasons" set out by the judge were not capable as a matter of law of amounting to special circumstances. It is contended that the category of special circumstances is very narrow. The applicant has listed certain circumstances which the courts have determined cannot amount to "special" in this context.

53. Mr Penny supports the reasoning and the conclusions of the judge.

Discussion and conclusions on Issues 1 and 2

54. It is unnecessary for this court, once again, to rehearse the caselaw analysing the circumstances which offend the principle of double jeopardy. These have been summarised in earlier decisions of this court, such as *R v Wangige* [2020] EWCA Crim 1319; [2021] 4 WLR 23, [40] – [56]. Put shortly, the first main circumstance is when there is a proposed prosecution following an acquittal or conviction and in both sets of proceedings the offence is the same in fact and law (*autrefois acquit* or *convict*): see *Connelly v DPP* [1964] AC 1254, per Lord Morris of Borth-y-Gest at pages 1305 – 1306 and Lord Devlin at pages 1339 and 1340: "For the doctrine to apply it must be the same offence both in fact and in law". Similarly, a man cannot be tried for a crime which is in effect the same, or is substantially the same, as a crime of which he has previously been acquitted or convicted (or could have been convicted by way of an alternative): see *Connelly* per Lord Morris of Borth-y-Gest at pages 1310 – 1328. There is a linked principle that ordinarily there should be no sequential trials for offences on an ascending scale of gravity. The second circumstance is when there is a proposed prosecution following a trial for any offence which is founded on "the same or substantially the same facts" (*abuse of process*): see *R v Beedie* [1998] QB 356 at page 366E: "A stay should have been ordered because the manslaughter allegation was based on substantially the same facts as the earlier summary prosecutions, and gave rise to a prosecution for an offence of greater gravity, no new facts having occurred […]". In this latter situation, the court would normally consider it right to stay the proceedings unless the prosecution can demonstrate "special circumstances" justifying another trial.

55. In *R v Z* [2000] 2 AC 483, a case involving different charges advanced in two sets of proceedings, Lord Hutton (speaking for their Lordships) considered the various speeches in *Connelly* and observed:

> "In my opinion the speeches in the House recognised that as a general rule the circumstances in which a prosecution should be stopped by the court are where *on the facts* the first offence of which the defendant had been convicted or acquitted was **founded on the same incident** as that on which the alleged second offence is founded" (page 497 C – D) (our emphasis). (See also *R v Phipps* [2005] EWCA Crim 33 per Clarke LJ at [21]: **"arising out of the same incident"**.)

56. The first main issue in the present context, therefore, is whether the two prosecutions, on different charges and in different jurisdictions, are founded on "the same or substantially the same facts" or are founded on or arise out of "the same incident". The answer to that question can be relatively shortly stated. First, however, it is helpful to consider in outline the nature of the exercise which needs to be undertaken.

57. There are two Administrative Court decisions in the context of extradition proceedings which are of assistance in understanding the approach that should be adopted. In *Fofana and another v Deputy Prosecutor Thubin Tribunal De Grande Instance De Meaux, France* [2006] EWHC 744 (Admin), the main issue was whether the appellants' extradition was barred on the ground of double jeopardy, by virtue of criminal proceedings on indictment commenced shortly before the European Arrest Warrant had been issued and completed a few weeks before the extradition proceedings were heard and determined. It was contended that the indictment was based on the same conduct,

including the same alleged false documentation, as relied upon by French authorities. However, the indictment related only to a single transaction whereas the description of the alleged criminality in the European Arrest Warrant was of a much wider and longer course of fraud perpetrated against a number of French companies.

58. The approach adopted by the Administrative Court in *Fofana* was to consider the extent of the contrast or similarities between the prosecutions as regards the extent and seriousness of the criminality alleged in the two sets of proceedings, and the court evaluated the facts relied on in each case to determine whether any differences were insignificant or "not so great" (see [27]). In that case, Auld LJ concluded at [29] and Sullivan J agreed that:

> "[…] although the extradition offence specified in the Warrant is not based on exactly, or only partly, on the same facts as those charged in the Southwark indictment, there would be such a significant overlap between them as to have required the District Judge to stay the extradition proceedings as an abuse of process."

59. It is important to have in mind additionally that, if the prosecutions are not founded on the same or substantially the same facts and are not founded on and do not arise out of "the same incident", it is usually unobjectionable for admissible evidence common to both sets of proceedings to be relied on in each of the prosecutions, for instance due to common issues arising in both cases. In *Boudhiba v Central Examining Court No 5 of the National Court of Justice, Madrid, Spain* [2006] EWHC 167 (Admin), the appellant was arrested in the United Kingdom on the authority of a European Arrest Warrant issued by a Spanish judicial authority seeking his extradition in respect of serious offences, including document forgery. The court accepted that the Spanish authorities could properly prosecute the appellant for wide-ranging offences concerning the forgery of passports, despite his conviction in the United Kingdom for an offence of using a single forged passport. It was not considered to be an abuse of process that the offences it was proposed should be prosecuted in Spain were of a more serious nature. As Smith LJ observed at [32]:

> "[…] The Spanish authorities have not sought extradition in respect of the personal use by this appellant of any particular passport. They want to try him in respect of forgery and trafficking of administrative documents which, it appears from the conduct alleged, will comprise or include passports. The fact that this appellant used a forged passport to enter England in 2003 might well be used as evidence in support of the allegation of forgery and trafficking. [The appellant's counsel] accepted, rightly in my view, that there is no reason why the evidence relating to the passport found in Wood Green should not be used against the appellant, so long as he is not convicted again of the offence of using it."

60. The court, therefore, accepted that it would be appropriate for the evidence supporting the conviction in this country to be relied on in Spain in support of a prosecution for wider forgery offences, so long as he was not convicted a second time for using that particular passport. The decisions in *Fofana* and *Boudhiba* are not binding on this court, but they are persuasive.

61. In summary, the authorities establish that, in circumstances such as the present, the court should determine, as regards the two sets of proceedings, whether they are **founded on/arise out of the same incident** or are **founded on the same or substantially the same facts**. This exercise may include having regard to such matters as the extent and seriousness of the criminality alleged in the respective cases and whether there is any significant difference between the facts founding the charges (*viz.* the extent of any overlap). Furthermore, contrary to Mr Summers' submission, the court may need to consider the detail of the charges, which can be a critical aspect of assessing whether the prosecution in question constitutes an abuse of process. As set out above, this was a relevant consideration in both *Fofana* and *Boudhiba*. The charges provide the context in which an assessment of the extent of any factual overlap is to be made; indeed, the charges may contain factual assertions which are relevant to this decision. Self-evidently, the charges standing alone may not be determinative of whether the proceedings are founded on/arise out of the same incident or are founded on the same or substantially the same facts because, as Clarke LJ indicated in *Phipps,* "that is always true in this type of case" given the court will be considering different charges (see [27]). However, as indicated by Davis LJ in *Wangige* at [64], rather than focusing narrowly on the ingredients of the respective charges, there should be a more "holistic" approach, by reference to all the circumstances when assessing whether the charges arose out of the same incident. That exercise, in our judgment, will include taking into account the ambit and wording of the charges. Finally, evidence common to both sets of proceedings may be admissible in each of the prosecutions, for instance due to issues in common arising.

62. Turning to the circumstances of the present application, the two sets of proceedings were not founded on and do not arise out of the same incident and they were not founded on the same or substantially the same facts. The charges are entirely dissimilar in terms of the offences alleged and their dates (for the Turkish proceedings, membership of ISIS on 12 November 2015; for the United Kingdom proceedings, terrorist-related possession of a firearm and funding/funding arrangements, in 2013/2014). The focus of the Turkish prosecution – and the facts with which it was concerned – were substantively different from that in the United Kingdom. The Turkish case, as summarised above, was directed at the applicant's role as a significant member of ISIS when he arrived in Istanbul for a meeting with someone who was suspected of planning future terrorist incidents in that city in November 2015. The prosecution in this country is focussed, within a terrorist context, on his possession of a firearm and his involvement in funding/funding arrangements in 2013/2014. The photographs of armed men and the evidence concerning the €20,000 and the arrest of Nawal Msaad were not part of the facts on which the Turkish prosecution was based and, instead, they seemingly formed a small part of the historical evidence supporting the Turkish charges.

63. It is of note in passing that there are marked differences between the evidence relied on in support of the two cases. This is described in [46] and [48] above. In the Turkish prosecution – in addition to the evidence referred to in the preceding paragraph – it was averred that the applicant had been banned from entering Turkey since 7 March 2012 (he had a M-99 restriction code and an "identification record"). Focussing on his role in ISIS, there was reliance on his use of the codename Abu Ayyub al-Britani, along with his admission in interview that he had attended conflict zones controlled by ISIS, entered Turkey illegally and used a false passport. The prosecution authorities in the

proceedings before the Central Criminal Court intend to establish the applicant's regular contact with Nawal Msaad, as well as the Turkish and Syrian telephone numbers he provided to her. Material that was unavailable in the prosecution in Turkey reveals, first, that he envisaged personal martyrdom and, second, the extent of the contact by Amal El-Wahabi with the applicant and Nawal Msaad in January 2014. The prosecution will also call evidence to establish the two central facts on which the prosecution in this country is founded: first, that at the end of November 2013 the applicant sent Amal El-Wahabi the two relevant photographs of the applicant with an armed man or with other armed men and, second, the arrest of Nawal Msaad and the discovery of the €20,000 on 16 January 2014, both within a terrorist context.

64. In summary, the extent and seriousness of the criminality alleged in the two sets of proceedings was markedly different, the facts founding the proceedings in the two countries were significantly dissimilar and they did not relate to the same incident. Furthermore, the extent of any factual overlap is slight. There is, additionally, considerable divergence in the evidence that has been or is relied on to prove those facts.

65. Although the judge addressed "special circumstances", in light of our decision as to the factual dissimilarity between the prosecutions in the United Kingdom and Turkey, this issue does not arise for consideration. We refuse leave on issue 2. Additionally, given our conclusions on the facts (which are determinative of the double jeopardy limb of the abuse of process submissions) it is unnecessary to address the potential limitation on the decision in *R v Beedie* – for the reasons set out in *R v Cheong* [2006] EWCA Crim 524 at [14] & [15] – when there is or has been a prosecution abroad (see also *R v Treacy* [1971] AC 537, 562 D (per Lord Diplock); *R v Thomas* [1985] QB 604, 610 *et seq* (per MacPherson J)).

66. Finally, it is necessary to observe that we reject the criticism of the judge that he failed to engage with significant arguments advanced by the applicant and important aspects of the evidence. On the contrary, his summary of the evidence was comprehensive and he addressed the main issues raised by the applicant which merited detailed attention. The conclusions the judge reached were properly open to him.

67. A detailed consideration of the circumstances surrounding the Turkish prosecution demonstrates, therefore, that there is nothing in this point. It is unarguable and we refuse leave to appeal.

Summary of the evidence, the submissions and the ruling relating to Issue 3

68. Mr Summers' submissions under this heading are dependent on four principal allegations of serious wrongdoing by the Home Secretary and United Kingdom officials, which we have treated as separate grounds of appeal. In outline, these are that:

First Allegation

i) the United Kingdom authorities "procured, colluded or connived in" the applicant's deportation from Turkey to the United Kingdom, thereby avoiding extradition proceedings, with the objective of facilitating his prosecution in this country;

Second Allegation

ii) the Home Secretary "actively cajoled" the United States to prosecute a United Kingdom national in a manner that was "obviously and seriously illegal"; she sought to "broker" the extradition of the applicant to the United States; and it is averred that she personally petitioned and lobbied the United States Deputy Attorney General to extradite and prosecute the applicant;

Third Allegation

iii) United Kingdom consular officials sought to persuade/pressure the applicant into waiving the immigration rights and protections available to him in Turkey; they are alleged to have made false statements that the applicant had no alternative but to accept deportation from Turkey, and that if he agreed to return voluntarily to the United Kingdom, he would be permitted "to get on with his life"; it is suggested pressure was similarly applied to the applicant's family to persuade him to agree to return to the United Kingdom voluntarily (officials purportedly threatened him with unwelcome media attention on his arrival); and

Fourth Allegation

iv) United Kingdom officials "colluded" in the applicant's "unlawful" deportation removal from Turkey to the UK on 10 August 2022, in "deliberate disregard" of an appeal against the order for the applicant's deportation and his asylum application, both of which were pending.

69. Turning to the detail as regards these contentions, the Home Secretary considered the choice of either requesting the applicant's extradition from Turkey or awaiting a decision by the Turkish authorities on deportation. She received a draft extradition request (dated 27 May 2021) with a supporting submission. The latter set out the advantages and disadvantages of extradition as opposed to deportation. The suggested advantages of extradition were that it guaranteed the applicant's return to the UK and it gave control over his travel. The disadvantages were that the applicant could only be tried in the United Kingdom for the offences set out in the extradition request and permission from Turkey would be needed to add charges; approval by the Turkish government would be needed to effect onward extradition, for instance, if a request was made by the United States of America; and it was assessed that the request for extradition was "likely" to be refused. As to the alternative, awaiting possible deportation, the advantages were that it was expected, although it was not guaranteed, that the Turkish authorities would deport the applicant upon his release. Awaiting deportation would avoid submitting an extradition request that was "highly likely" to be refused "based on UK refusals of extradition requests submitted by Turkey". With deportation there would be no bar to onward extradition from the United Kingdom. Although a concern of the Crown Prosecution Service was rehearsed, namely that Turkey may allow deportation to a country other than the United Kingdom, the Home Secretary was advised that if Turkey proceeded with deportation, the applicant would be supplied with a travel document that only allowed return to this country (the applicant's passport had expired in May 2021). As to disadvantages, the "UK was not

able to make a request to Turkey to deport [the applicant], as to do so could lead to a future abuse of process challenge in a UK prosecution on the basis that there should have been a formal extradition request". In all the circumstances, the Home Secretary on 8 July 2021 elected to await the outcome of the applicant's parole hearing in Turkey and any subsequent decision on deportation.

70. It is alleged that the British Government sought to secure the prosecution of the applicant in this country with the fewest possible restrictions on the charges that could be preferred, as well as facilitating his possible extradition from the United Kingdom to the United States of America. There were communications between British and American officials concerning the options of prosecuting the applicant in the United States and the United Kingdom (these included a telephone call between the Home Secretary and the United States Deputy Attorney General, Lisa Monaco, on 19 July 2022 during which the applicant's case was discussed). At one stage it is suggested the British Government appears to have favoured the United States of America as the venue for further criminal proceedings against the applicant for his activities in Turkey/Syria and it is averred that the Americans were encouraged to prosecute the applicant.

71. The applicant submits that British officials would inevitably have been aware that the criminal law of the United States does not offer protection to an accused equivalent to the "double jeopardy" rule. It is submitted, therefore, that the intention was to avoid a procedural bar to a proposed prosecution of the applicant in this country. It is noted that extradition from Turkey to the United States of America was impossible.

72. Mr Summers argues that the Home Secretary "actively cajoled" the United States to prosecute a United Kingdom national. This was "obviously and seriously illegal" and the Home Secretary's actions were "manifestly incompatible with her statutory role and functions" which include, vis-à-vis her role under the Extradition Act 2003, "the duty to act as a fair, objective and impartial decision maker".

73. Prior to the end of the applicant's sentence in Turkey, British officials were involved in the arrangements for the applicant's return to the United Kingdom if he was to be deported, for instance by chartering a private flight which had the advantage, amongst other things, of reduced risk of media attention. On 27 June 2022, the Foreign, Commonwealth and Development Office indicated their understanding of the position in an email to the Home Office, namely i) that if he was released on 9 July 2022, the applicant would be held at a Migration Detention Centre until the Security Department approved his deportation; ii) once the Turkish authorities officially confirmed their intention to deport the applicant, the United Kingdom would have ten working days to put this into effect; iii) the flight would need to be safeguarded, and the possibility of an escort was raised, along with the general procedure to be followed; and iv) the Turkish government had been asked for more information as to the likely timeframe.

74. A British consular official visited the applicant in Ankara prison on 4 July 2022. The official and the applicant both appeared to be aware that he was to be deported. The applicant stated his preference was to remain in Turkey "but understood he would be deported to the UK and had no objections to going to the UK". He was encouraged to maintain good behaviour, including during the process of deportation. He was informed that he would be moved to a deportation centre if he was conditionally released (this was confirmed to the consular official by the prison manager).

75. As anticipated, on 9 July 2022, the applicant was released from prison and was transported to a deportation centre. On 11 July 2022, the order for his deportation was issued by the Turkish government. The applicant suggests he was not told of this by the Turkish authorities and the Crown accept "there is no record of (the applicant) being informed by the Turkish authorities that it had been issued". Equally, there is no evidence that the consular officials were aware that the applicant had not been informed of the deportation order until a later date. On the documentation this does not appear to have been an issue raised by the applicant or his lawyer with the consular officials once he became aware of the order.

76. On 13 July 2022, the applicant refused to apply for an Emergency Travel Document on the basis that he did not wish to return to the United Kingdom but instead wanted to travel to another but unspecified country. Consideration was thereafter given to the process of applying for an emergency passport which did not require the applicant's consent.

77. On 20 July 2022, the Turkish authorities relayed the information that the applicant had asked to see a lawyer and that this was "likely to delay the removal process". It was noted by British officials that the applicant's "ability to utilise legal challenge to delay/disrupt the process will depend on the circumstances in which deportation to the UK can be challenged under Turkish law; […] Ankara is currently exploring this in further detail and […] further information (will be provided) on this point once received". The Turkish officials indicated that a deportation notice would not be issued until the "legal angle" is resolved and accordingly it was decided to postpone booking a charter flight.

78. On 26 July 2022, the consular officials received a letter from the staff at the deportation centre requesting a travel document and confirming "that his deportation and administrative detention decision was taken within the scope of Turkish law". A further letter dated 29 July 2022 from the deportation staff, provided the date of the deportation decision (11 July 2022).

79. On 28 July 2022 the applicant met with a Turkish lawyer at the detention centre and completed a power of attorney. United Kingdom Government officials were advised by officials at the detention centre that in addition to appealing the deportation order there was an alternative route of challenge which could delay the proposed deportation by weeks or longer by requesting a review of the decision. However, the applicant told consular officials that he had not instructed his lawyer to pursue this option and instead he sought legal advice as to removal to a country other than the United Kingdom.

80. The next visit by consular officials occurred on 29 July 2022. The applicant was asked several times if he had instructed a lawyer to lodge an application with the courts against his deportation. The applicant replied that he had not done so but indicated, as set out above, that he had provided his lawyer with a power of attorney. The official repeated that the applicant's sole option "was to go to the UK", and that his choices were limited to whether this was to be "low profile" by way of a United Kingdom Government charter flight, or by the Turkish authorities on a commercial flight with the risk of full media attention. The official asked several times if the applicant would take up the British government's offer of returning him to this country in a safe and low-profile manner. The applicant indicated he wished to speak with his family (he wanted them to avoid a media storm), but when an attempted telephone call failed, the official

reiterated that his only option was to return to the United Kingdom by one of the two routes set out above. The applicant explained that he wished to discuss with a lawyer whether a different destination was possible, to which the official said "this would not happen" because the only United Kingdom travel document that could be issued would be for a single journey to this country. The applicant understood that, given his background, he was likely to be detained on his arrival in the United Kingdom. The applicant asked for a further day to decide if he would cooperate in his return to the United Kingdom and stated that he would inform the official immediately as to his decision. It was arranged with the detention centre staff that the applicant should have a longer telephone call than usual on the following day and that he would ring the consular official with his decision. The applicant thanked the consular officials for the visit, which had clearly been positive. As they departed, the applicant repeated he would make a decision after speaking with his family and a provisional plan was made for the officials to return the following Monday to assist in the request for an emergency travel document should the applicant agree to return to the United Kingdom.

81. On 30 July 2022, on the advice of his Turkish lawyer, the applicant filed a hand-written claim for asylum with the detention centre. It is of importance to note that the Crown holds no material relating to any asylum claim and Mr Penny, on behalf of the Crown, submits in unequivocal terms that the consular officials had no knowledge of it at any relevant stage (*e.g.* see [75] of the Skeleton Argument on behalf of the Crown dated 20 February 2023 "[t]he Crown is unaware of an extant asylum claim in Turkey and no record is held which indicates that the Crown was at any stage aware of an asylum claim in Turkey"). There is no evidence to contradict this clear assertion and, given the detail of the consular records that have been disclosed, it is untenable to suggest that notification of this event would have been deliberately left out of, or excised from, the documentation.

82. On 1 August 2022, the deportation centre informed United Kingdom officials in Ankara that the applicant, having spoken to his family, had decided not to cooperate with his deportation to the United Kingdom. As rehearsed in an email on 1 August 2022, consular officials arranged to meet the applicant on 2 August 2022 to ensure he understood his lack of options, and to underscore the message that the likely result of a failure to comply with an HMG-managed return was deportation by the Turkish authorities on a commercial flight, with the heightened risk of the media attention that he wished to avoid. In this regard, it is important to have in mind that a letter was later provided to the consular officials on 2 August 2022 stating that the applicant had not appealed his deportation order within seven days. There was no suggestion of other routes of challenge to the deportation.

83. It is suggested by Mr Summers that the following section of the email of 1 August 2022 (see the preceding paragraph) indicates that the consular officials lied to the applicant to persuade him to agree to his deportation:

> "There remains uncertainty as to whether there are legal avenues available to [the applicant] to delay and/or disrupt his deportation should be continue to seek to do so. The deportation centre has indicated to [consular officials] that [the applicant] may still be able to apply to the Courts to request a review of the decision to deport him. [United Kingdom officials are] urgently seeking formal clarification on this point – if [the applicant]

> remains non-compliant [the United Kingdom] is unable to issue travel documentation until all potential avenues of appeal have been exhausted."

84. The suggested lie is said to have featured in a conversation between a consular official and the applicant's sister on 1 August 2022 when the former indicated his "concerns are for [the applicant] to return to the UK in a safe and low profile way [and] that [the applicant] has only one option to return to the UK (he cannot stay in Turkey or travel to another country…)". The applicant's sister informed consular officials that the applicant was concerned as to what would happen to him on return to the United Kingdom.

85. On 2 August 2022 officials at the deportation centre again requested a travel document for the applicant and confirmed that his deportation and decision notification had been taken within the scope of Turkish law, and that the deadline for appealing the deportation decision had expired on 18 July 2022. It is suggested that the wrong provision and the wrong time period seems to have cited and that the applicant had 15 days in which to appeal under Turkish law.

86. Mr Summers contends that the next visit to the applicant on 2 August 2022 by a consular official was "to try to pressure him to agree to voluntary return". The applicant again indicated he did not want to go to the United Kingdom and that he was considering other options. The official rejoined that his only option was deportation to the United Kingdom. The possibility of a low-profile return was again explained, which it was suggested was in his best interests and that the United Kingdom government was prepared to organise his safe return, avoiding media attention. He was told his sister agreed this course was in his best interests.

87. An official at the Home Office indicated in an email on 2 August 2022 that the applicant did not trust the British government and that he was looking at options other than removal to the United Kingdom and that he would "take any consequences" of his decision not to cooperate. The Home Office official understood that the Turkish authorities wanted to deport the applicant within a short timeframe, following the applicant's failure to appeal his deportation order within the seven-day deadline. It was understood that the deportation could take place within the next week. A travel document was needed for his return to this country.

88. On 4 August 2022 the applicant's Turkish lawyer filed applications challenging the deportation order. This was outside the seven-day timeframe (the order having been made on 11 July 2022), although it is the applicant's case that he did not learn of its existence until 29 July 2022 when, as set out above, he was asked by consular officials if he had instructed his lawyer to lodge an application with the courts against his deportation.

89. It is alleged that on or about 7 August 2022 the applicant was falsely informed by guards at the deportation centre that the telephone system was not functioning. On or about 8 August 2022 a consular official visited the applicant, who indicated his disinclination to return to the United Kingdom. The official indicated "we want you back". On the same day, at the request of the manager of the deportation centre, the applicant rewrote his asylum application.

90. On 10 August 2022 the applicant was deported to the United Kingdom on a commercial flight.

91. The judge set out the evidence and the arguments relating to these four allegations in considerable detail. This included a review of the evidence relied on by the applicant and the respondent. The judge considered and described the submissions of Mr Summers and Mr Penny in very considerable detail. In the event, he accepted – essentially in its entirety – the analysis of Mr Penny and he concluded that the materials did not support the contention that the United Kingdom connived in or procured the unlawful deportation of the applicant from Turkey. We would note that the judge could not describe at any great length a decision which is based, in the main, on the failure by one of the parties to identify relevant supporting evidence.

Discussion

92. These submissions by the applicant are directed at the secondary category of abuse, the purpose of which is to protect the integrity of the legal system, thereby maintaining the rule of law (see *R v Maxwell* [2011] 1 WLR 1837 per Lord Dyson JSC at [13]). The threshold for this category of abuse is very high. The question for the court is whether the court's sense of justice and propriety or public confidence in the justice system will be offended if the proceedings are not stayed in the particular circumstances of the case. In reaching this decision, the gravity of the misconduct and the degree of culpability of the wrongdoers will be highly relevant, as will be the connection between the abuse of executive power and the proceedings which are said to be an abuse of process (see *Secretary of State for the Home Department v CC & CF* [2013] 1 WLR 2171, per Lloyd Jones LJ at [92] – [97]). The applicant bears the burden of establishing that this very high threshold has been crossed. The role of this court is to consider whether the judge reached a conclusion that he was entitled to reach. Put another way, was the decision properly open to the judge, as an exercise of discretion?

93. For the reasons set out below, we agree with the judge that there is a wholesale lack of evidence of misconduct on the part of the then Home Secretary and the relevant United Kingdom officials. Various interpretations have been placed by the applicant on the events summarised above, which the judge was not only entitled to conclude were unsustainable but which have no foundation in reality.

First Allegation

94. There was and is no evidence to support the suggestion that United Kingdom officials "procured or connived" in the applicant's deportation from Turkey to the United Kingdom for the "ulterior purpose" of putting him on trial in this country, thereby improperly avoiding extradition proceedings. The opposite is the case. As rehearsed above, a submission was prepared for the Home Secretary outlining the two options for her to consider. She was advised that it was "likely" or "highly likely" that an extradition request from the United Kingdom would be refused by the Turkish authorities, whereas it was expected, although not guaranteed, that the Turkish authorities would deport the applicant when released from his custodial sentence. In these circumstances it is not arguable that the Home Secretary improperly avoided extradition proceedings. On the contrary: it was entirely proper for her to decide not to make an application for extradition which was expected to fail and instead to await the

anticipated decision by the Turkish government to deport the applicant to the United Kingdom.

95. The evidence does not support the alleged "procuring or conniving" in the applicant's deportation. It is striking that consular officials, as expressly recorded in the documentation (see [69] above), were careful not to request the applicant's deportation, not least because they anticipated that this could lead to an application such as the present. There is no evidence to the contrary. It is clear by the end of June 2022 the United Kingdom government was aware of the course to be followed by the Turkish authorities, leading to the consular visit, five days before he was due to be released, to inform him of the planned deportation. Indeed, as early as 30 December 2021, a consular official warned the applicant that he may face deportation on his release from custody in Turkey.

96. We stress, therefore, that there is a lack of any evidence, either direct or inferential, to suggest that the British officials had attempted to influence the Turkish government in issuing the order to deport the applicant. Given the serious crime of which he had been convicted, the decision to remove the applicant from Turkey is unsurprising. Furthermore, since his passport had expired, the limited-validity travel document provided to him meant that deportation to a country other than the United Kingdom would have been infeasible. The applicant does not suggest there was a viable alternative.

97. We refuse leave to appeal on this ground.

Second Allegation

98. Under this heading, it alleged the Home Secretary sought to "broker" the extradition of the applicant to the United States; it is averred that she personally "petitioned and lobbied" the United States Deputy Attorney General to extradite and prosecute the applicant. It is suggested this was "obviously and seriously illegal".

99. It is clear from the history set out above, that the British government discussed with officials from the United States the options as to whether or when criminal proceedings might be brought against the applicant in the United States and the United Kingdom. It is accepted, therefore, that communications between the two countries concerned the possibility of prosecution in the respective criminal jurisdictions. But the assertion that the Home Secretary impermissibly sought to circumvent the double jeopardy rule in this country is unfounded. Her presumed awareness of that rule does not constitute evidence that, by her intentions and actions when liaising with United States, she sought to behave, or behaved, in a way that offends this court's sense of justice and propriety or public confidence in the justice system. It was not wrong or unprincipled for the Home Secretary over the period of a few days in July 2022 to explore the possibility of a prosecution of the applicant in the United States, a possibility which, after brief consideration, was not pursued. The Home Secretary was entitled, enthusiastically or otherwise, to consider such a move, and to understand the stance of the American government. Given the nature of the conviction of the applicant in Turkey, it would have been wholly understandable if the United States had wished to prosecute the applicant.

100. This alleged abuse of executive power (*viz.* the liaison with the United States) in any event did not lead to any adverse result as regards the applicant. As the jurisprudence makes clear, this is a highly relevant consideration. The short-lived and discounted proposal of prosecuting the applicant in the United States is essentially irrelevant to the alleged unlawful deportation of the applicant from Turkey. It is untenable to suggest, in these circumstances, that the court's sense of justice and propriety or public confidence in the justice system will be offended if the proceedings are not stayed. These discussions with representatives of the United States constitute, in reality, no more than a footnote in the history of the return of the applicant to the United Kingdom.

101. We refuse leave to appeal on this ground.

Third Allegation

102. It is alleged United Kingdom consular officials sought to pressure the applicant into waiving the immigration rights and protections available to him in Turkey by, *inter alia*, falsely suggesting he had no alternative but to accept deportation from Turkey, and that if he agreed to return voluntarily to the United Kingdom, he would be permitted "to get on with his life".

103. The timing of events is critical in this regard. Until 30 July 2022, the applicant had neither appealed the deportation decision nor made an application for asylum. The challenge to the deportation decision was made on 4 August 2022, following the asylum application on 30 July 2022. It is incorrect to suggest that the consular officials were maintaining he had no alternative but to accept he was to be deported to the United Kingdom given, for instance, that the officials asked him repeatedly on 29 July 2020 whether he had appealed the deportation decision. Furthermore, at no point in this history is it suggested that the consular officials maintained he did not have appellate rights or the opportunity to apply for asylum. As late as 28 and 29 July 2020, the applicant told consular officials, having seen his lawyer, that he had not given instructions to appeal the deportation decision, and that he was still considering cooperating in the procedure of deportation to the United Kingdom. It was entirely accurate that, in the absence of an appeal by him against deportation or an application for asylum, there was "no option" to avoid deportation to the United Kingdom, given the decision of the Turkish authorities to deport and the limited-validity travel document. The "no option" statement was correct.

104. The consular officials learnt of the applicant's decision not to cooperate with the process of deportation on 1 August 2022. We repeat, as set out at [81] above, that the Crown holds no material relating to any asylum claim and Mr Penny has submitted in unequivocal terms that the consular officials had no knowledge of this application at any relevant stage. It was not until 4 August 2022 that the applicant's Turkish lawyer filed applications challenging the deportation order. As far as the consular officials were concerned the applicant's options had not changed, given the information they had received that the challenge to deportation was time-barred (see [110] below).

105. Furthermore, the references in the final relevant conversations with the applicant and his sister on 1 and 2 August 2002 to there being "one option" need to be put in the context of the content of the discussions between the consular officials and the applicant, and the principal issue on which the latter was focussing. As we have already highlighted, it would have been nonsensical for the consular officials to maintain that

the applicant had no potential legal recourse in Turkey given the officials had recently pressed him as to whether he had appealed the deportation decision. Instead, in his conversations with the officials, the applicant had repeatedly indicated he wanted to explore the option of being deported to countries other than the United Kingdom, and his sister on 1 August 2022 suggested he was worried about what would happen in the United Kingdom on his return. The note of the meeting with the applicant on 2 August 2022 includes the following, "[the applicant] stated he does not want to go to the UK and that he was looking at other options (I informed [the applicant] his only option was to be deported to the UK and HMG was prepared to facilitate this in a safe way, with a low profile as not to attract media attention, by way of a charter flight)" and there are two further references to "other options" and looking at "options" in this note which appear to bear same meaning, in that the applicant was discussing removal to another country. For this additional reason, in the context of "the options" which were being considered in the discussions with the officials and which the applicant was repeatedly stressing he was exploring, the reference to "one option" was entirely accurate, for the reasons set out above (*viz.* if deported from Turkey with a limited-validity travel document, the United Kingdom was the sole option). As Mr Penny for the Crown submitted to the judge, the applicant is a British citizen and has no other nationality. On analysis, therefore, the evidence does not provide any credible support for the inferences for which the applicant argues and which underpin this allegation.

106. The sole suggested reference in an early meeting with one consular official to getting on with his life in the UK is superseded by all of the subsequent conversations in which the applicant understood the proposal was that he was to be deported to the United Kingdom and detained. Furthermore, the applicant was not threatened with adverse media attention; indeed, the opposite is true: the consular officials offered to organise a charter flight as opposed to a commercial flight organised by the Turkish government, with the latter carrying a greater risk of media attention.

107. We refuse leave to appeal on this ground.

Fourth Allegation

108. It is alleged that United Kingdom officials "colluded" in the applicant's "unlawful" deportation removal from Turkey to the UK on 10 August 2022, in "deliberate disregard" of the appeal against the order for his deportation and the application by the defendant for asylum, both of which were pending.

109. These grave assertions have been advanced without evidential foundation. There is no substance to the suggestion that the consular officials had any involvement in the date of enforcement of the applicant's deportation, which was prior to the determination of the deportation appeal and the asylum application. The applicant had refused the assistance of the consular officials, most particularly that he should travel by way of a flight chartered by the United Kingdom authorities. In the event, the applicant was flown to this country by the Turkish government on a commercial flight. On the evidence, therefore, the only role of the consular authorities in his deportation was to provide a limited-validity travel document.

110. Although there is a suggestion that the wrong provision and time period provided for in the legislation had been cited (the true period may have been 15 rather than 7 days),

in the absence of indications to the contrary, the consular officials were wholly entitled to act on the information they had received in writing from the Turkish authorities.

111. It follows that the judge was entitled to conclude that there is no support for the contention that the British authorities assisted in the deportation of the applicant with knowledge either that he had made an asylum claim or that he had an outstanding appeal against deportation which was not time-barred. Indeed, it is not suggested that the applicant or his Turkish legal representatives raised either of these issues with the consular authorities prior to his departure and including at the meeting with a consular official on or about 8 August 2022. The theory advanced by the applicant is either unsupported or contradicted by the evidence.

112. We refuse leave to appeal on this ground.

Count 3

113. The applicant principally contends that Count 3 should be quashed (or stayed as an abuse of process) on the basis that the Crown's case against the applicant is "bad in law". Given he is alleged to have been concerned in or entered into an arrangement to make funds available to "*another*", it is argued the charge must fail because the other could not have been himself. Furthermore, it is submitted that the Crown impermissibly departed from the way in which the allegation concerning this count had earlier been formulated. We can take this proposed ground of appeal shortly.

Summary of the submissions and the judge's ruling relating to Count 3 and discussion

114. Mr Summers submits that, as a matter of ordinary English, the word "another" means someone else. In the context of the present charge, it is argued that the words "to another" in section 17 can only refer to someone other than the person who is alleged to have committed the offence. It is suggested that the Crown's case at the trial of Amal El-Wahabi and Nawal Msaad was that the applicant was the intended end-recipient of the €20,000 (it was to be delivered to him in Turkey). We immediately note, however, that the prosecution in that case referred to the money being destined to support the jihadist cause and that it would be used for the purposes of terrorism.

115. The applicant submits that it is impermissible and abusive for the Crown to seek to circumvent the effect of the suggested "another person requirement", as provided by Parliament, by "artificially" characterising the "arrangement" as a series of separate sub-arrangements, thereby excising the ultimate intended end-recipient of the funds (*i.e.* the applicant) from the scope of the "arrangement" which he is alleged to have entered or become concerned in.

116. We have already emphasised that the evidence demonstrates the consular officials were unaware at the relevant time that an asylum claim had been made. On 2 August 2022 the consular officials received a letter from the Turkish Deportation Centre confirming that the deportation decision and the decision notification had been taken by the Ankara Governorship Provincial Directorate of Immigration on 11 July 2022 within the scope of Turkish law, namely Article 54 of the Foreigners and International Protection Law No. 6458. It was set out that the deadline for appealing against the deportation decision had expired on 18 July 2022 in accordance with paragraph 2 of Article 54 of the same law, which indicates that a foreigner, legal representative or lawyer may appeal against

the removal decision to the administrative court within seven days of the date of notification. The appeal against the deportation order was made two days after receipt of this letter, on 4 August 2022.

117. The judge accepted the analysis of Mr Penny, as set out in his updated skeleton argument dated 17 April 2023, as follows:

> "11. Here, in point of fact, the defendant was involved in (and indeed it is very clear that he was the architect of) an arrangement in which the money was in sequence to be made available to a number of others in sequence (*sic*) (first by the 'brothers' to El Wahabi, then by El Wahabi to Msaad, then by Msaad to an unidentified other or others who were to receive the money in Turkey/Syria). In due course, that unidentified other (or one of them) may, or may not, at some stage have included the defendant himself. It matters not.
>
> 12. The gravamen of the offence is the defendant's involvement in (by entering into or becoming concerned in) the arrangements for the onward supply of money from A to B (and here from B to C, and C to D, etc.) for the purposes of terrorism. There is certainly no legal principle which prevents the Crown from framing its case in this fashion, and in any event here the evidence of the arrangements for the passage of the funds which took place, from 'the brothers' (A) to El-Wahabi (B) , and from El-Wahabi (B) to Msaad (C) (all at the behest of the defendant), suffices for the commission of the offence. In fact, the Crown's case is that these arrangements went further and were intended to involve others overseas. For the purposes of the submission before the court, however, the above analysis disposes of the argument being advanced."

118. Mr Penny accepted, we consider correctly, that the applicant for the purposes of section 17 could not have been the "another person". Paraphrasing Mr Penny's submission, he also correctly submitted that the involvement of the applicant was immaterial if he was simply one of the links in a chain of recipients. We agree.

119. Finally, we do not accept that the Crown changed its case. In the opening note for the 2014 trial, it was simply alleged that the money was to be passed "to another person"/handed to "the correct person", and as set out above it was clear that the money was, in due course, to be dispersed for the purposes of terrorism and to support jihadist causes. It is wholly untenable to suggest that the sole recipient was to be the applicant (who, standing alone, could not have been the "another person"). Even allowing for an element of uncertainty as to how the events were to unfold, he would have been no more than one of an unknowable number of other individuals in receipt of some or all of this money.

120. In our view, the judge's conclusions were properly open to him. This ground of appeal is unarguable and we refuse leave.

Conclusion

121. We refuse leave to appeal on all of the grounds advanced on behalf of the applicant and dismiss the application.

122. All of the issues considered in this judgment were fully argued and given the jurisdiction issue in particular is one of importance, we give permission for this judgment to be cited notwithstanding this was an application for permission.