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Case No: 201105502 B5
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**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM Manchester Crown Court**
**Mr Justice Henriques**
**T20107579**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/09/2013

**Before :**

**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**
**LORD JUSTICE TREACY**
and
**MRS JUSTICE SHARP**

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**Between :**

**Regina**
**- and -**
**Munir Ahmed Farooqi**
**Matthew Newton**
**Israr Hussain Malik**

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**Mr Bott QC & C Henley** (instructed by **Stephen Lickrish & Associates**) for **Munir Ahmed Farooqi**
**Ms M McGowan QC & I McMeekin** (instructed by **Registrar of Criminal Appeals**) for **Matthew Newton**
**Mr Bennathan QC & P Wilcock QC** (instructed by **Registrar of Criminal Appeals**) for **Israr Hussain Malik**
**Mr A Edis QC & S Baker** (instructed by **Crown Prosecution Service**) for the **Respondent**
**Mr J Ryder QC** for the **Bar Council**

Hearing dates : 17th - 18th July 2013

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# Approved Judgment

**Lord Judge, Lord Chief Justice of England and Wales :**

1. We have all contributed to the writing of this judgment of the Court, which arises in melancholy circumstances as a result of flagrant misconduct and alleged professional incompetence by one of the advocates at trial, Mr Lawrence McNulty, leading counsel for Munir Farooqi (Farooqi).

2. Between 16th May 2011 and 9th September 2011 Farooqi, Matthew Newton, Israr Malik and Harris Farooqi (Farooqi's son) were tried before Henriques J and a jury at the Crown Court sitting in Manchester. The indictment contained 10 counts.

3. Farooqi, Newton and Malik were convicted of all the counts that they faced, and Harris Farooqi was acquitted of involvement in the single count which affected him, Count 1.

4. Farooqi was convicted on five counts: one count of engaging in conduct in preparation for acts of terrorism contrary to section 5(1) of the Terrorism Act 2006 (the Act) (Count 1), three counts of soliciting to murder contrary to section 4 of the Offences Against the Persons Act 1861 (Counts 3, 6 and 7) and one count of dissemination of terrorist publications contrary to section 2(1) (a) and (2) (b) of the Act (Count 4). He was sentenced to imprisonment for life with a specified minimum term of nine years on Count 1, to imprisonment for life with a specified minimum term of seven years on Counts 3. 6 and 7 and to a term of four years' imprisonment on Count 4. The sentences were concurrent.

5. Newton was convicted of one count of engaging in conduct in preparation for acts of terrorism contrary to section 5(1) of the Act (Count 1) and of two counts of dissemination of terrorist publications contrary to section 2(1) (a) and (2) (b) of the Act (Counts 2 and 5). He was sentenced to six years' imprisonment on Count 1, three years' imprisonment on Count 2 and four years' imprisonment on Count 5. The sentences were concurrent.

6. Malik was convicted of one count of engaging in conduct in preparation for acts of terrorism contrary to section 5 (1) of the Act (Count 8) and two counts of soliciting to murder contrary to section 4 of the Offences Against the Persons Act 1861 (Counts 9 and 10). He was sentenced to imprisonment for public protection (IPP) with a minimum specified term of five years on Counts 9 and 10, concurrent, with no separate penalty on Count 8.

7. Farooqi, Newton and Malik were given appropriate credit for time spent on remand in custody. They were also made subject to the notification requirements of the Counter Terrorism Act 2008 (Farooqi for a period of thirty years, Newton for a period of

fifteen years and Malik for a period of thirty years). Various other forfeiture orders were made.

8. Harris Farooqi was alleged to have assisted his father in the recruitment and radicalisation process. As we have said he was acquitted. In this judgment we shall refer to him by his full name to distinguish him from his father, and shall only do so when this is a required feature of the narrative.

*The Appeals*

9. Farooqi, Newton and Malik seek leave to appeal against their convictions. Farooqi and Malik also seek leave to appeal against sentence. Malik's and Newton's applications have been referred to the full court by the single judge. Farooqi's applications, which are some 8 months out of time, have been referred to the full court by the Registrar. In the circumstances we granted each appellant leave to appeal against convictions on the single issue of the consequences of Mr McNulty's misconduct and his alleged incompetence.

*Representation*

10. The representation at trial was as follows. Andrew Edis QC and Stuart Baker appeared for the Crown. Farooqi was represented by Mr McNulty and Hossein Zahir instructed by Tuckers. The solicitor at Tuckers with the day to day conduct of the case was Vajahat Sharif. Matthew Newton was represented by Maura McGowan QC and Ian McMeekin. Malik was represented by Joel Bennathan QC and Peter Wilcock also instructed by Tuckers. Harris Farooqi was represented by Charles Bott QC and Christopher Henley, instructed by Stephen Lickrish and Associates.

11. The representation before this court is the same as that at trial, with one exception. Farooqi is now represented by those who represented Harris Farooqi at trial – that is, by Mr Bott and Mr Henley instructed by Stephen Lickrish and Associates.

12. In view of the criticisms made of his trial counsel in Farooqi's Grounds of Appeal, Farooqi was invited to and did waive privilege. Letters of response to Farooqi's Grounds of Appeal were received from Mr Zahir on 17th July 2012, from Mr Jim Meyer of Tuckers on 18th July 2012 and from Mr McNulty on 31st July 2012.

13. On 22nd November 2012 directions were made by a different constitution of this court in relation to the hearing of these applications, one of which was that the Crown should consider making a request for a witness statement directly to counsel who appeared for Farooqi at trial.

14. On 24th June 2013, despite the waiver of privilege, Mr McNulty declined a request from the Crown Prosecution Service to provide a witness statement in respect of the instructions by and advice given to Farooqi. Mr McNulty also declined to provide any further assistance in relation to the issue of the advice given to Farooqi not to give evidence, which he had been asked to give in the light of the Crown's submissions in its skeleton argument for Farooqi's appeal. Beyond stating that his lack of comment on the skeleton did not imply either approval or disagreement with it, he offered no response to the opportunity to provide a witness statement to counter or address the direct personal criticisms contained in it. Mr Zahir however provided further responses in relation to the matters with which he was asked to deal for the purposes of these applications, including in a statement dated 8th May 2013 to which we refer below. Later in the judgment we shall return to emphasise that we were not given, and were not asked by Farooqi to seek assistance from the potential witnesses to these issues.

15. Mr John Ryder QC appears for the Bar Council at the invitation of the Registrar, to assist the court on matters of professional conduct raised by these applications.

*Grounds of appeal against conviction*

16. In the unusual circumstances of these appeals, we shall begin by describing the grounds of appeal and, having so to speak, explained the context, we shall then address the factual issues in lengthy, but unfortunately necessary detail.

*Farooqi*

17. Mr Bott submits Farooqi's conviction is unsafe for a number of related reasons. He says Farooqi was not competently represented at trial with the result that his defence was not presented to the jury coherently or at all. Instead, Mr McNulty relied upon a series of legal arguments and submissions that were misconceived in law and untenable. He also consistently defied rulings of the court and behaved in a manner that was unprofessional and provocative. These (cumulative) failings were so fundamental that in the exceptional circumstances of this case, Farooqi was denied a fair trial. The jury's perception of his case must have been influenced by the judge's repeated attempts to correct or control his counsel's behaviour and the extensive directions in the summing up that were required as a result. These suggested that the conduct of Farooqi's case had been misguided and improper, that the jury should disregard arguments raised by Mr McNulty in his closing speech and treat lengthy and aggressive cross-examination conducted on Farooqi's behalf as irrelevant. Mr McNulty's strategies were both inept and provocative: they took no account of the law or the basic rules of criminal procedure. They required a strong judicial response. What distinguishes this case from the norm is that Mr McNulty persisted in his approach despite that response. He was defiant throughout both in his attitude to the court, and in his disobedience to the judge's rulings. The jury saw the persistent conflict between the judge and counsel and then heard a summing up which set out

Mr McNulty's failings at length. This was bound to influence their view of Farooqi's case and perhaps, that of the other appellants.

18. Mr Bott further contends that the issue of the fairness of Farooqi's trial does not depend on a consideration of the quality of Farooqi's defence, which was that he lacked the requisite intent to commit any of the offences of which he was convicted. His instructions were wholly obscured by the way in which his case was conducted; and so, it is said, he certainly did not give any meaningful or informed consent to the conduct of his case so as to be responsible for it. Mr Bott makes no criticism of Mr Meyer, who he says, played no active part in the conduct of the case or of Mr Zahir, who he says was hardly consulted by Mr McNulty at all.

*Newton*

19. In relation to Mr McNulty's conduct and its consequences, Ms McGowan for Newton adopts the arguments advanced for Farooqi. She says the history of this case is complex and unusual. Farooqi and Newton were closely linked in fact and on the Crown's case. As a consequence of the way Farooqi's case was conducted the judge had little or no option but to take on the role of prosecutor to redress it. The summing up was flawed in consequence, as it contained a series of observations on the facts which favoured the Crown. To consider the case against Newton the jury was required to give fair and objective interpretation to his explanation given in evidence for words said or acts done. But in circumstances where the judge had to "redress the balance" the effect was to prejudice the case of Newton. The directions that the jury should ignore any views which the judge expressed or appeared to express about the facts were inevitably compromised by the need to correct Mr McNulty's submissions. As a result, Newton did not receive a fair trial. The jury in his case alone should have been discharged. The combination of the conduct of the trial and the content of the summing up must, as the judge feared, have had such an impact on Newton's case as to create a real risk of unfairness. If his case had been conducted in the manner in which Farooqi's case was, he would, subject to consent or collusion, have an arguable ground of appeal. The position is that much stronger when he had no control over the conduct of which complaint is now made.

*Malik*

20. Mr Bennathan QC for Malik puts his grounds of appeal somewhat differently to those advanced for Farooqi and Newton.

21. He submits, first, that the unusual circumstances surrounding the conduct of the defence of Farooqi at trial were such that Farooqi's defence was not properly or adequately put before the jury. Given the powerful links between Farooqi and Malik, that is sufficient to cast doubt on the safety of Malik's conviction. A central plank of Malik's defence (that his lack of criminal intent was shown by the fact that he never initiated any conversations about jihad with the undercover officers) was "swamped" by the judge's repeated and powerful directions that such initiation was irrelevant to

the jury's deliberations insofar as it went to entrapment. The judge effectively withdrew the issue whether the police had acted unlawfully or unfairly from the jury; this was intended as a direction to exclude entrapment from the jury's consideration, but in a case where there were allegations and counter allegations of lying between a police officer and Malik, it rendered his conviction unsafe. The summing up was flawed because it contained a variety of observations on the facts of the case which favoured the Crown, aggravated by the fact that the judge compromised the warning about putting aside his own views by correcting comments made by Mr McNulty. In the peculiar circumstances of the trial, what is described as the Watson direction (see *R v Watson* [1998] QB 690) combined with the chronology of the verdicts, raises concerns about the way in which the jury approached their deliberations and returned their verdicts.

*The Crown's response*

22. Mr Edis accepts that the conduct of Farooqi's defence was deserving of substantial criticism. However although the court may wish to take the opportunity to indicate its views of the proper bounds of defence conduct, the question for decision is not one of professional discipline, but whether the trial was marred by any unfairness to one or more of the appellants which renders any of the convictions unsafe.

23. The case against Farooqi was overwhelming and the issue extremely simple. The case against the defendant was what he said to undercover police officers. There was no dispute about what he had said. Did he mean what he said? The simple issue was properly before the jury, who could hardly have failed to grasp it.

24. As to the circumstances in which Farooqi elected not to give evidence, according to Mr Edis, he would have had an impossible time in the witness box. That explains his decision. Although there is no evidence that Farooqi was informed of the approach which Mr McNulty intended to take in his closing speech, neither is there any evidential basis for the conclusion that Farooqi's decision not to give evidence was not an informed decision and this is underlined by his striking silence before this court, and the absence of any witness statement on this topic from him.

25. Mr Edis further submitted that the evidence given by Newton and Malik presented an additional burden to both of them and to Farooqi. Their appeals are predicated on the basis that if Farooqi was not guilty then neither were they. But the reverse is also true: if they were guilty, so was he. If any defendant was convicted, it is highly likely that the other defendants would also be convicted, not least because of the striking similarity in the things which they said to the investigating police officers. The inference that they were working together was obvious. By contrast Harris Farooqi said nothing to the undercover officers at any stage. Mr Edis reminded us that in view of the nexus between the defendants and because of their concerns about the approach of Mr McNulty, counsel for the three appellants (including Mr Bott for Harris Farooqi) were permitted to make submissions to the jury which argued for Farooqi's acquittal. This provides a clear indication of the way in which the cases were linked.

26. Mr Edis emphasises that it is not submitted by the appellants that any of the judge's rulings on the legal submissions made by Mr McNulty or his corrections of Mr McNulty's conduct are open to any criticism. Therefore, however unfortunate the circumstances which required them to be made they have no relevance to the eventual outcome. The basis for examining the safety of the convictions should be confined to what happened before the jury.

27. This has two aspects: first, the cross-examination of the undercover officers by Mr McNulty and, second, the contents of the summing up. As to the first, the judge showed great restraint during the cross-examination. There was a legitimate point to the cross-examination of the undercover officers by Mr McNulty, which was designed to demonstrate that they, rather than Farooqi, were responsible for the initiation of discussion about jihad, potentially a relevant consideration to the issue of Farooqi's intent. That question was ventilated at enormous length, and was at the forefront of the evidence before the jury. The other purposes of cross-examination (with suggestions that the officers were "professional liars" and "tricksters"), although remote from the issues in the trial, provoked little judicial intervention.

28. Provided that the decision not to give evidence was freely taken by Farooqi, as clearly it was, the summing up must be studied as a whole. Examined in this way, the necessary corrections did not assume undue prominence, and would not have been misunderstood by the jury. The corrections section was a relatively small part of an otherwise conventional and helpful summing up which made the issues clear to the jury. There is no substance in the criticisms in the summing up advanced on Malik's behalf.

29. Mr Edis submits that the judge, having spent considerable time on the crafting of the summing up, performed an extremely difficult task in an exemplary fashion, thus remedying the problems caused to the trial, the Crown, the remaining defendants and Farooqi by Mr McNulty without compromising the essential fairness of the trial. Accordingly the convictions are safe.

30. These are the issues which arise in these appeals and to which our analysis of the evidence is directed.

*The Crown's case at trial*

31. The case for the Crown was that each the four defendants engaged in conduct designed to radicalise individuals to commit violent jihad in Afghanistan and Pakistan.

32. Farooqi was the eldest of the defendants, a highly intelligent man with good knowledge of English. It was the Crown's case that he was the charismatic leader of a small group of Islamic extremists intent on identifying, converting and radicalising vulnerable young men for the cause of Jihad. Farooqi ran a Da'wah stall in

Manchester promoting Islamic material. He was the principal target of a covert surveillance operation conducted between November 2008 and November 2009. Two undercover police officers, "Ray" and "Simon" were given an identity as vulnerable and isolated individuals. They were deployed with instructions to approach Farooqi's Da'wah stall and express an interest in Islam. The expectation was that, in consequence, Farooqi would befriend them, enabling evidence to be gathered as the relationship developed. Ray and Simon were permitted to show the necessary enthusiasm for their task and to raise a series of topics of conversation to assist their investigation into the radicalisation process.

33. The many conversations and meetings which took place during the ensuing 11 months were covertly recorded and the transcripts of these recordings became the central evidence in the case against the appellants.

34. Very briefly, the process employed by the undercover officers, who worked separately, was that after completing each deployment with any of the defendants, and as soon as possible thereafter, they wrote up their recollections in their evidence books. Subsequently the recordings were downloaded and much later they were transcribed and the transcript prepared by others was checked and corrected. When writing their recollections the undercover officers did not know what had been successfully recorded and what had failed to be recorded by the equipment. Their evidence books were checked against the transcripts for the purpose of disclosure and then for the evidence to be given at trial. It is said by Mr Edis, and has not been disputed, that there was a very high level of accuracy, that these methods worked and that the jury therefore knew that the undercover officers had been meticulous and accurate across the whole investigation. With the exception of one phrase arising in relation to Malik, the accuracy of precisely what each appellant had actually said was effectively undisputed.

35. A key part of the Crown's case related to the position of Malik. The Crown alleged that there was compelling evidence that he was a young man radicalised to a dangerous extent by Farooqi, and this gave the lie to any suggestion that Ray and Simon had manipulated Farooqi to create an artificial relationship. The Crown relied on Farooqi's possession of "under the counter DVDs" which were played, for example, to Malik and his relationship with Shaykh Farooqi (no relation) to whom he directed Ray to discuss his desire to fight jihad. The Crown argued that the "circle of trust" i.e. those with whom Ray and Simon were told they could talk openly about jihad, including Newton and Malik - and the use of codewords – "getting married" for martyred, going on "holiday" for jihad and "the weather" for local conditions in the Swat valley – indicated that this was a real rather than a fantasy conspiracy.

36. This evidence revealed a deliberate process of grooming Ray and Simon for violent jihad abroad, directed by Farooqi assisted by co-defendants. The initial phase was alleged to be conversion to Islam, followed by a programme of increasing radicalisation as the converts were prepared mentally to engage in violent jihad. The Crown relied on the topics discussed and views expressed by Farooqi during the course of Ray and Simon's deployment. On many occasions he talked to them about

his time in Afghanistan in 2001 when he had travelled to fight with the Taliban shortly after the 9/11 attacks. Farooqi played extremist DVDs to the officers, watched footage on YouTube with them, and supplied them with various lectures by Anwar Al-Awlaki. When Ray and Simon said that their ultimate purpose was to participate in violent jihad, they were clearly and unequivocally encouraged in their declared endeavours.

37. In circumstances to which we shall come in detail later, and as we have already indicated, Farooqi did not give evidence. There was however no challenge to the accuracy of the transcripts. As Mr Edis submitted, and Mr Bott did not dispute, on the basis of what he said the case against him was a strong one. In accordance with the defence case statement served on 21st March 2011 Farooqi's defence was "that he lacked the requisite intent to commit any of the offences of which he was convicted and had allowed himself to respond to a suggestive agenda in a way that was at odds with anything he could possibly achieve." His defence, Mr Bott says, depended almost entirely upon the meaning of the words spoken by him and the reliability of any conclusions which could be reached by the jury about his intention when speaking those words. Mr Edis encapsulated the issue for the jury in submissions to the judge in this way: "if the jury are sure that the words were uttered, what did they mean and with what intent were they spoken?"

38. Newton, a convert to Islam, gave evidence at trial. He worked on Farooqi's stall having been recruited by him. He was alleged to be Farooqi's trusted accomplice who supplied offensive "terrorist" material to Ray and Simon, and encouraged them in their pursuit of violent jihad. Newton served a detailed defence case statement and his evidence accorded with it. Again, there was no dispute about what he said, as recorded in the transcripts, or what he did. [1] The issue at trial concerned his intent in saying what he did or in doing what he was said to have done. It was the Crown's case that the view to be taken of Newton and his motives was to be judged against his relationship with Farooqi. Newton said he genuinely wanted to promote the religious aspects of his faith, but had no intention of encouraging violence or terrorism. He accepted that his conduct was open to sinister interpretation, and he also accepted that he had handed over material which was capable of amounting to terrorist publications to the officers, but he denied any involvement in terrorism or any intention to become so involved.

39. Malik was alleged to have been recruited and radicalised by Farooqi before he went to prison (for an unrelated matter) in January 2009. Whilst in prison, he radicalised others with the assistance of materials provided to him by Farooqi. He emerged from prison on 15th June 2009 as a fully committed jihadi. Thereafter he engaged in radicalising and encouraging Simon to engage in violent jihad overseas. On 24th September 2009 and again on 29th October 2009 he solicited or encouraged Simon to murder another person or persons unknown. The Crown also relied on the similarity

[1] For example he accepted giving Simon various electronic books ("Battle of The Hearts & Minds", "Milestones" and "The Dust Will Never Settle Down") and audio recordings ("The Battle of The Hearts and Minds, "Allah is Preparing us for Victory I", Allah is Preparing us for Victory 2", "The Dust Will Never Settle Down", "The Constants of Jihad Part 1", "The Constants of Jihad Part 2", "The Constants of Jihad Part 3", "The Constants of Jihad Part 4", "The Constants of Jihad Part 5" and "The Constants of Jihad Part 6").

in language between that used by Farooqi when radicalising a recruit for jihad and the language used by Malik. It was said, in short, that he had learned it all from Farooqi. Albeit the context of the particular conversations was important (in particular as the jury were to find, that Farooqi, a very influential man in Malik's life, was indeed recruiting Simon for terrorism) reliance was placed, as for the other appellants, on the transcripts and, on a limited number of occasions where recordings were incomplete, on the statements made by the undercover officers in their evidence books about the relevant conversations. In the written grounds of appeal the accuracy of three words in the transcripts by Malik at trial ("I wanna die" [2]) was disputed, but the overwhelming bulk of what he was recorded as having said was not in dispute.

40. Malik gave evidence. His position was wholly supportive of Farooqi. His defence, as presented at trial, was that there was no "grand conspiracy" between the four defendants, as alleged. The conversations relied on by the prosecution did not demonstrate the necessary intent either for solicitation to murder or to engage in conduct in preparation for acts of terrorism. His lack of criminal intent was shown by the fact that he never initiated any conversations about jihad with the undercover officers. He never intended Simon to go and fight abroad unless and until the second coming. This meant he was not guilty on all the counts affecting him, and (in relation to counts 9 and 10), he did nothing beyond showing friendship to Simon and supporting him in his declared intention to become a good Muslim.

*The contentious parts of the trial and the issues raised in the appeals*

41. As we have said, it is submitted that the trial was unfair to the appellants for various reasons, arising principally from Mr McNulty's conduct of Farooqi's defence, and the consequences which flowed from that. These submissions have focused largely but not exclusively on Mr McNulty's cross-examination of Ray and Simon, on a number of legal submissions he made during the trial and his closing address to the jury, Farooqi's decision not to give evidence, and the way in which the judge dealt with all these matters in his summing up. We turn therefore to these parts of the trial in the order in which they arose, and the criticisms made by the appellants.

*The cross-examination of Ray and Simon*

42. Although the accuracy of the transcripts was agreed, Mr McNulty cross-examined Ray and Simon over a period of 14 days. Mr Bott says that the cross-examination was prolix, extensive and irrelevant, and, on occasions, offensive, and that for some time its underlying purpose was not clear. At a later stage in the trial the judge said that he allowed the cross-examination to continue because he thought it would be counter productive for him to interrupt it, and because he could not foresee that in the end it would be largely irrelevant. At one level Mr Bott submits, Mr McNulty was laying the foundation for the suggestion that the undercover officers "controlled the agenda" and Farooqi's contributions to the conversations had to be judged in that light. However this could have been done in a fraction of the time and with proper focus. It was

[2] Words spoken by Malik to Farooqi on 31st July 2009.

moreover hard to foresee that this represented an attempt to set up a submission to stay the indictment or exclude the evidence *ex post facto* because there was no proper legal or procedural foundation for such an approach. However he says with hindsight, the cross-examination foreshadowed this strategy.

43. By way of example, Mr Bott draws attention to the following passages from Mr McNulty's cross-examination of Ray, (a) near the beginning, (b) the middle (c) the end of the process and (d) to similar passages from the cross-examination of Simon, with the particular parts of what was said that are relied on highlighted in bold :

(a) "Q. Well, what I suggest to you is this: that from at least mid January 2009, that that was your style? That you were trying to take advantage of Munir Farooqi's good nature**, so that you could do him harm by attempting to trick him into committing an offence.** Is that right?

A. No, sir, it's completely incorrect. I was playing the part of a role that I had been asked to do so, that had been authorised by a senior officer, and one of my objectives was to play the part of a vulnerable person with low social ties, and I did that throughout the course of the operation.
Q. And I suggest that in pursuit of conviction, while you have been in that witness box, **it has been your purpose to deceive the jury by painting a false picture of your relationship with Mr. Farooqi. You have lied in short, is that correct?**
A. It's certainly not the case. I have sworn an oath. I am a professional undercover law enforcement operative, and in doing so, I have answered every question which I believe to be correct, which I have signed a statement to that effect.
Q. You are a professional law enforcement undercover officer?
A. I am a police officer. I am a professional police officer, yes.
Q. Yes, you are a professional liar, putting it bluntly?
A. I use tactics as such as an undercover law enforcement operative to carry out my role. Yes, I do lie in the role of an undercover law enforcement operative, but on this occasion I have sworn the oath and I have answered every question which I believe to be correct.

Q. **So you deny both propositions I have been putting to you, that you have been attempting to trick him and that you have been lying on oath, so therefore I had better prove those propositions**"

(b) "Q. And over the next eight months you were going to encourage him at every opportunity to talk about his experience in Afghanistan, were you not?
A. No, sir, and I didn't.

Q. And you and Simon were going to play word games with a man who was ignorant of the fact that he was in peril, in order **to trick him to giving you some encouragement by way of document, advice or assistance**?

A. I can only answer for myself, sir. I can't answer for another undercover law enforcement operative, but in answer to your question, that's no.

Q. And the purpose of that was to enable you to arrest him*?"*

(c) "Q: Now earlier on in my cross-examination of you, I drew your attention to the fact that some people feign difficulties, so that they can assault, rob or rape people who come to their assistance. What I am suggesting to you is **you feigned inadequacy, in order that you could steal from Mr. Farooqi, in order that you could steal his liberty**. Is that not right?

A. No, it isn't, sir"

(d) "Q. And what I am suggesting to you is whether or not he was sending people or engineering for people to go abroad to participate in violent conflict, was a matter of no interest to you in late January of 2009. In late January of 2009 **you were hell bent on tricking this man into committing an offence?..**

Q. What, and we can trust you, can we?
A. Er, yes, fully.
Q. A professional liar?
A. Erm, I am not a professional liar.

…

Q. Right. Now I think we agree that you do tell lies professionally when you are engaged as an undercover officer?

…

Q. You were cynically exploiting the death of that man, in order to excite either hostile feelings or hostile words against the police, were you not?
A. No.
Q. So **that it might be deployed later in evidence**?
A. No.
Q. And it is as an example of many examples of how poisonous and devious you can be, seeking out your aims*?*

44. The judge intervened during the cross examination on a number of occasions. Mr Bott refers to one example, during the cross examination of Simon on the 13 July 2011, which we set out in its context:

"Q: Well, you say to respect people's human rights, but you never had any right to enter his premises, did you?
A. Er, yes, I did.
Q. How so?
A. He invited me in.
Q. He never invited you in?
A. I think you will find the first time I ever met Munir on the 4th of January, he invited me to come to his house for something to eat. He wrote his address down, he give me his telephone number.
Q. No, no, no, no, he never invited you?
A. He did.
Q. He invited the person you were pretending to be?
A. Which is me.

Q. He invited the person that was interested in Islam in.
J: Mr. McNulty.
LM: He invited the person who had a history of alcohol abuse in?
J: Mr. McNulty.
LM: My Lord. He never invited you in?
A. Erm, I was portraying to be a normal member of the public. If it wasn't me that Munir had invited in and radicalised and encouraged to go and fight Jihad, it would have been another vulnerable member of the public from Manchester, so in respect of me attending his address, I feel that my main hope is that I have stopped a vulnerable individual from Manchester being radicalised by Munir and others.
Q. But you never believed for one second that if he knew who you really were you would be invited to his premises, did you?
A. Of course not.
Q. No?
A. If I told him I was a police officer, he definitely wouldn't have invited me.
AE QC: My Lord.
J: Yes.
AE QC: My learned friend is misleading the jury about the law again.
J: Yes.
AE QC: Because what he is implying from his position as Counsel in his question is that the fact that the officer was going under an assumed alias, means that the invitation which was extended to him did not create a right to enter, and that is, I am afraid, not the law.
J: Of course. It ---
AE QC: I am sorry about that, but it is just not.
J: Mr. McNulty, more than one member of the jury was actually shaking his or her head whilst you took this point.
LM: Well, let us see.
J: Mr. McNulty, I am not going to permit it. It is a complete waste of time. It is ill conceived in law, and please move on. He was perfectly entitled to enter those premises. Any suggestion that he was not is wrong in law.
LM: Well, then I suggest as a matter of fact you were no different to the man that pretends to come to read the gas meter, who is really there to steal the old lady's pension?
J: No, Mr. McNulty. Mr. McNulty, that is exactly the same proposition put in a different way. He was entitled to enter those premises, and that is the end of the matter.

*Legal Submissions: (i) The application to exclude the evidence of the undercover officers and/or for a stay*

45. On the evening of 28th July 2011, just before the close of the Crown's case, the Crown was served with a skeleton argument which bore the names of Mr McNulty and Mr Zahir. It was headed "Skeleton argument on behalf of Munir Farooqi in support of application to exclude evidence of UCO's [sic] [undercover officers] under section 78 and to stay the indictment." This was the first intimation that any such submission might be made. A skeleton argument also making submissions about entrapment had been served on behalf of Malik earlier that day.

46. The first paragraph of the Farooqi skeleton argument was entitled" Statement of Purpose". It read:

"In light of the fact that the Defendant denies he has committed any criminal offence this is an application under section 78 of the Police and Criminal Evidence Act to exclude the evidence of the undercover officers and to stay the indictment in respect of counts 1, 3, 9 and 10 on the grounds of entrapment or attempted entrapment…"

47. The second paragraph was headed "Issue". It said:

"Have UCO's Ray and Simon lured or attempted to lure its (sic) Munir Farooqi into committing acts forbidden by the law?"

48. The skeleton went on to suggest that the conduct of the undercover officers went beyond offering the appellant an unexceptionable opportunity to commit an offence. A section headed: "The Law" said:

"The law as to the applicable principles relating to entrapment can be distilled from the speeches in R v Loosely (2001) UKHL 53."

49. It was then argued that this case was a prolonged and suggestive undercover operation in which the undercover officers persistently set the tone of the conversations so as to lure the appellant in doing or saying things he would not otherwise have done. Thus the skeleton said:

"It is submitted that if the Crown seek to assert that it was consistent with the ordinary process of terrorist radicalisation it is incumbent upon them to place before the court evidence of the terrorist radicalisation of vulnerable men, such as to demonstrate there exists a common pattern…

"Further there is no evidence that persons approached for radicalisation either all succumb or those who do not are unwilling to come forward to the police…

"…it was the clear intention of the UCO's to lure Munir Farooqi into committing a crime and as such their evidence ought to be excluded and Crowns stayed on all but count 4…"

50. The application evoked a strong response from the Crown. Amongst other things Mr Edis complained:

i) The arrests in the case took place in November 2009, and dismissal applications were made to Henriques J and rejected in December 2010. The case was managed by the court before trial. No such submission had been intimated by either Malik or Farooqi before then.

ii) The evidence in the case was agreed. There was no dispute about what Ray and Simon had said to Malik or Farooqi, and none about what Malik or Farooqi had said to them. Further, the trial date had been postponed so that both men (who were in custody) could listen to every word of the recordings before trial with their lawyers.

iii) If the submissions were well-founded and the proceedings an abuse then hundreds of thousands of pounds would have been wasted, the resources of the court and the jury would have been needlessly expended, and two men who ought never to have been prosecuted would have spent two years needlessly in custody.

iv) The timing of the applications was a matter of grave concern not merely because of the breach of the practice direction relating to abuse applications and the Criminal Procedure Rules, (1.2, 3.2 and 3.3) but because each defendant was in serious breach of section 6A(1)(d) of the Criminal Procedure and Investigations Act 1996, a matter of counsel's professional duty: see *R v Rochford* [2011] 1 Cr App R 11.

v) The Crown had to respond to the legal submissions with less than 24 hours notice. Ordinarily such a matter would be considered at length and the disclosure process would be fully reviewed. Entrapment is not a defence, but in the context of an application to stay the Crown would have to consider what evidence, inadmissible before the jury, might be required to address the applications. The timing was particularly unsatisfactory because the judge had already made clear during the cross-examination of the undercover officers that they had behaved lawfully and no submission to the contrary had been made. The court had received the evidence without objection, and without being informed properly about the real issues relating to it now about to arise. On an abuse application the Crown may choose to call different evidence from that which is relevant to the issue which the jury have to decide once the evidence is admitted. It was inappropriate to make applications of this kind at this time because the Crown had limited itself to evidence probative of guilt rather than evidence which refuted allegations of abuse of process or unfairness. The Crown had been deprived of the opportunity to deal with the matter evidentially and that was unfair.

51. These points, which were accepted in due course by the judge, are reiterated before us by Mr Bott, who says that the exchanges which took place between the judge and Mr McNulty at this stage marked the beginning of a serious deterioration in the relationship between them which characterised and dominated the rest of the trial.

52. It is clear from those exchanges that the judge was, as he said, gravely concerned about the timing of the submission and about what now appeared to have been the purpose of Mr McNulty's cross-examination of the undercover officers. The judge said: "It was in this mistaken belief that I restricted my interventions, which would have been continuous and indeed would have brought the whole process to a halt had I known what was afoot." He ruled that entrapment was not a defence.

53. At one point during these exchanges Mr McNulty said: "it was never my intention to address the jury on entrapment without permission." The judge warned him in unequivocal terms if he argued entrapment before the jury it would treated as a contempt of court.

54. Mr McNulty then submitted the indictment should be stayed on the grounds that the conduct of the officers was so improper as to bring the administration of justice into disrepute, saying that the grounds for making the submission have arisen only because of the course of cross-examination and the answers given by the officers. The judge did not accept that argument. He said:

> "J: Did that thought occur to you when you first read the papers in the case?
> LM: My Lord, no. No, it did not
> J: Did it occur to you at the committal proceedings?
> LM: My Lord, no. It did not.
> J: At the dismissal hearing?
> LM: My Lord , no..
> J: No
> LM: My Lord, much of this has been, much of this is evidence related..
>
> "J:..there should have been an application in advance of the trial.
> LM: My Lord, the evidence to establish that emerged during the trial as a by product..
> J: No, I am not having that at all….You have transcripts of every word the officer spoke to your client.. Nothing was conceded or admitted by them which was in any way improper."

55. Mr McNulty did not then argue before the judge, as he did a few days later, that *Loosely* was no longer good law and that entrapment could be run as a defence to the jury.

*Legal submissions: (ii) The submission of no case to answer/self defence*

56. Later that day, after a submission of no case had been made on behalf of Harris Farooqi, Mr McNulty advanced a brief and separate argument. This was that there was no case for Farooqi to answer because the Crown had failed to negative self defence. This argument, advanced on the basis that Farooqi had advocated only "defensive jihad" – that is, that Muslims should only use violence for the purposes of self defence, and the jury could not therefore conclude that he was encouraging Ray or Simon to act unlawfully or other than in necessary self defence, was not referred to in Farooqi's defence case statement. Indeed it had not been mentioned at all (as Mr Edis was later to observe) until the evening of the 27th July 2011.

*The judge's ruling on legal submissions (i) and (ii)*

57. On 1st August 2011, the judge gave a detailed ruling, in which he dismissed the applications made on behalf of Farooqi and Malik. (He also dismissed the submission of no case made on behalf of Harris Farooqi).

58. The application made on behalf of Farooqi of no case to answer/self defence was dealt with briefly. In respect of the stay applications, the judge said this amongst other things:

> "Both applications saw the light of day on 28th July 2011…Nothing whatsoever has occurred during the currency of this trial to trigger the applications **…**The matter is further aggravated in Munir Farooqi's case by prolonged cross examination of both undercover officers in which unfairness was persistently being canvassed in the presence of the jury when it is clear from the authorities that the only remedy for entrapment is an application for a stay for abuse of process or a section 78 application, both of which must be determined by judge alone…The Crown has been deprived of the opportunity to deal with the matter evidentially…there has been a flagrant breach of the Practice Direction**…**It is my responsibility to ensure a trial which is fair to the Crown and defence and I have no hesitation in concluding that the conduct of the defence thus far has precluded that obligation as far as the Crown entitlement is concerned….much of the cross examination involved criticising indeed on occasions abusing the officers for doing exactly what Parliament permits…I have no hesitation in dismissing Munir Farooqi's applications. They are a long way short of the mark**.**..I will not permit in the presence of the jury any assertion that the conduct of the undercover officers was unlawful**…"**

59. After the judge had given his ruling, Mr McNulty asked whether the issue of self defence would be left to the jury. The judge said he was not minded to close out self defence altogether but would decide at the conclusion of the evidence whether there was any evidence of self defence.

*Farooqi's failure to give evidence*

60. When the Crown had finished adducing evidence against Farooqi, the judge asked Mr McNulty if his client would be giving evidence. The response was "My Lord I am as sure as I can be that he will not be giving evidence", but he indicated that he would need "a little time" during the lunch break to speak to his client. The records show that there was a very brief visit to Farooqi over the lunch break on that day in which counsel were accompanied by Mr Sharif, the solicitor who had been in daily attendance at the trial.

61. After that visit, the necessary formalities under section 35 of the Criminal Justice and Public Order Act 1994 were transacted in open court in the presence of the jury, and it

was confirmed that Farooqi would not be giving evidence. Thereafter, some short further evidence was called on his behalf.

*Legal submission (iii): The submission that entrapment is a defence*

62. On 3rd August 2011, Mr McNulty submitted a document to the court, which bore his name and that of Mr Zahir.

63. It was entitled "Note on the Defence of Entrapment". It asserted that "there is a defence of entrapment available at English law and the jury ought to be directed accordingly." It continued

"..insofar as Loosely states that there is no defence of entrapment, it no longer represents good law since the case of Mushtaq (2005) UKHL 25."

64. Mr Bott describes this further submission as "quite untenable" and Mr McNulty's approach as wholly suspect. He says that an argument to the effect that, in spite of *Loosely,* entrapment could be regarded as a jury issue was so bold that a responsible advocate would have raised it at the beginning of the case, not after 14 days of cross-examination.

65. We mention at this stage that in a letter sent by him to the Bar Standards Board in relation to disciplinary proceedings against him arising from his conduct during the trial (see paragraph 98 below), Mr McNulty has said this argument was suggested to him by Mr Zahir. Mr Zahir, who points out that in *Mushtaq* Mr McNulty appeared for the appellant, says that this was not the case. We are not in a position to resolve this conflict on the papers. However even if Mr Zahir had suggested the argument, it was Mr McNulty who was the leading counsel acting on the behalf of Farooqi, and he chose to advance it before the judge.

*The judge's ruling on legal submission (iii)*

66. The judge rejected the submission in emphatic terms. In his ruling (given on the 11th August 2011) the judge said:

"(Mr McNulty's argument)..has thus far evaded the attention of the learned editors of Archbold, Blackstone and Smith & Hogan. It is to be noted in *Mushtaq* that neither the case of *Loosely* nor the defence of entrapment were mentioned…Lord Hoffman in *Loosely* specifically stated that the exercise of the power to stay proceedings was sufficient to satisfy the right to a fair trial under Article 6 of the Convention. Distinguished counsel had submitted that the principles on which the power to order a stay was exercised in England did not satisfy the Convention. This argument failed…I can only assume that this very belated submission has been made, with a view to raising the point elsewhere, or to justify the quite exceptional conduct of the defence

case in allowing the jury to hear all the evidence before submitting that it could be excluded, and/or that the proceedings be stayed**..** Had there been any merit in either contention, two and half months of court time would have been needlessly wasted. This was a submission that could have been made on the papers pre-trial as every relevant word in Munir Farooqi's case was recorded."

*Legal submission (iv): Self defence and combatant immunity*

67. On 11th August 2011 there was further discussion of issues of law, before speeches and summing up. During the course of these discussions, the Crown suggested that they might comment on Mr McNulty's failure to mention self defence in his defence statement, which they did not know was going to run "until 21.43 on the 27th of July"

68. Later that day, the Court gave further consideration to the issue of self defence. The Crown had proposed a direction to the effect that Farooqi was entitled to be acquitted if the jury concluded that he had encouraged the use of force "exclusively" for defensive purposes. Mr McNulty objected to the use of the word exclusively. It appears from his submissions that he considered it to be a complete answer to the indictment to say that any force Farooqi may have encouraged the undercover officers to use was intended to oust an unjust invader (the Americans/allies) and was therefore no more than the use of force in lawful self defence.

*The judge's ruling on legal submission (iv)*

69. On Friday 12th August 2011, the judge gave a further ruling. He said:

" I have deemed it necessary to make a permanent record of the unsatisfactory state of affairs that now prevails in this trial in relation to the defence of Munir Farooqi, and his case alone. There is no mention of any defence of self-defence in the defence statement. In a skeleton argument in support of a submission of no case to answer, undated but submitted prior to 25th of July, there was no mention of the defence. In an amended skeleton submitted on the 27th of July 2011, for the first time Counsel indicated that he intended to rely upon the defence. Neither the court nor the Crown had any earlier intimation."

70. He went on to say:

"I repudiate in advance any assertion that failure to give evidence was in reliance upon my indication that I would leave self defence to the jury. It was obvious to me that a decision not to give evidence had been taken some time in advance and irrespective of any indication by me as to what defences I would leave. The Crown are now about to address the jury. There can be no doubt that as they now contend they have been ambushed… For the second time in this trial, the Crown and accordingly the Court have been ambushed. As presently informed I am minded to direct the jury that in limited circumstances, self defence may arise. I have the advantage of very recent overnight researches into the law [by Mr Edis]. The

complexity of the law in this field is instantly to be observed from the speech of Lord Bingham of Cornhill in Jones and Others…It is to be noted that over 130 cases were cited in argument in that case. I am confronted by a fait accompli, a situation which must never be repeated. I have given urgent thought as to whether it is necessary to discharge this jury so the Crown could call evidence which they would have wished to call as to the state of affairs as it prevailed in Pakistan at the time. That is simply not possible. There is no application to discharge the jury. I do not propose to do so. I am confident Crown Counsel can overcome the predicament in which he has been placed. It is, however, to be noticed that overnight, when he would wish to have been refining his address to the jury, he was necessarily researching the law on treason and self-defence. I am minded that the safest available course is to leave self-defence…"

71. Thereafter Mr Edis addressed the jury. On 15th August 2011, before Mr Edis concluded his address, Mr McNulty complained that its effect was to invite him to say how he would argue self defence to the jury. The judge then invited him to say how and on what basis he intended to submit to the jury that self defence could run, so Crown counsel could have an opportunity to deal with the submission. Mr McNulty said he expected the judge to explain to the jury the circumstances in which Farooqi would be acting lawfully. He said: "Nothing is what I propose to say about the law on self defence… If I do not appear to be co-operative it is because it appears to me that what is being done here is an improper attempt to have sight of the closing speech…"

*Mr McNulty's closing speech*

72. Mr McNulty made his closing speech to the jury over the course of three days, the 16th, 18th and 19th August 2011. Mr Bott describes it as a defiant and provocative speech which went well beyond anything that was professionally acceptable. A number of specific matters illustrate the submission.

73. The speech began with what is described as a "thinly veiled" suggestion that the judge was biased in which Mr McNulty encouraged the jury to regard the judge as a salesman of worthless goods:

"After all when you meet with a salesman , he does not start off his sales patter by insulting you but…that does not mean what he is selling you is worth anything."

74. Secondly, from the outset Mr McNulty attacked the motives of the Crown and others concerned with the case and encouraged the view that the Crown was a politically motivated witch hunt. The judge and the Crown were depicted as the agents of a repressive state: the purpose of the Crown was to stifle Farooqi's right to free speech. Other parties who did not agree with his approach, and their counsel were accused of sucking up to the Crown and the court.

75. Thirdly, Mr McNulty misrepresented the evidence on a number of occasions. He repeatedly gave evidence himself on behalf of Farooqi, which was later summarised by the trial judge, and to which we refer later in this judgment. He made significant allegations that should have been but were not put to witnesses in cross-examination, in particular that the evidence against Malik had been contrived because the police had no evidence that Farooqi had influenced anyone except the undercover officers. This led to a number of interventions from the judge on the first afternoon, (at the end of which Mr Edis raised the propriety of Mr McNulty's suggestion of judicial bias) and then again on 18th August when the judge said; "You are giving evidence that could have been given by your client and it must stop". "This cannot continue."

76. Mr McNulty said he was addressing the issue of Farooqi's intention, to which the judge said: "The way he tells us what his intention is by going into the witness box."

77. At the end of Mr McNulty's speech, Crown counsel gave notice that they were considering making an application to discharge the jury. The judge responded that he was not surprised, and that he had been considering the possibility of doing so of his own motion. The court then adjourned whilst the Crown considered its position.

*Whether the jury should be discharged*

78. On 22nd August 2011, the judge heard submissions about whether, in the light of Mr McNulty's closing speech, it was now possible for the case to continue or whether the jury should be discharged and a retrial ordered. The question was whether the problems which already existed, aggravated by Mr McNulty's closing speech, were so acute that the continuation of the trial would no longer be viable; and which he also said, highlighting the point for the consideration of the co-defendants, "in setting out these problems in clear terms it is hoped that MF [Farooqi] and other defendants will themselves understand fully the present situation and give informed instructions to their counsel as to how they wish to proceed. This particularly affects MF since the trial process can only proceed on the basis that he has given informed instructions for all that has been done in his name, and that he decided not to give evidence after receiving proper advice. The Crown has no confidence in any assertion made as these matters made by LM, but takes comfort from the fact that MF is represented by competent and experienced junior counsel and solicitors who continue to act."

79. The judge had earlier observed in the course of exchanges with Mr Edis:

"Now what can I do? I order a retrial, a retrial to start in front of another Judge at Woolwich next January. What can I do to prevent exactly the same thing happening again? They do not give us red cards…"

80. The Crown did not apply to the judge for the discharge of the jury, provided the judge was content that a summing up could be delivered that was fair to all parties and which was not undermined by the thinly veiled allegation of judicial bias, the trial could continue.

81. Ms McGowan however applied to discharge the jury and for Newton's case to be severed. She adopted Mr Edis's criticisms of Mr McNulty's speech. She said in summary, that the errors in the speech could not be adequately corrected by the summing up without adversely affecting the fairness of Newton's trial, in circumstances where the allegation was one of joint enterprise, and if Farooqi were to be convicted the chances of Newton being convicted necessarily would be considerably greater. Mr Bott (who at that stage will be remembered was acting for Farooqi's son), expressed serious concerns about the trial continuing. He referred to submissions by Mr McNulty in his closing speech which suggested that other defence counsel had, for their own reasons, associated themselves with a conspiracy by the Crown and the court. He referred to another passage from Mr McNulty's speech as a travesty of the evidence, and a submission that no responsible counsel ought to have made. He said the risk of injustice was considerable, but he had no instructions to make an application to discharge. On behalf of Malik, Mr Wilcock said he had discussed the position with Mr Bennathan and he did not make an application to discharge. He said the court was entitled to take the view that it had a conscientious jury who would listen attentively to the firm directions the judge may feel it necessary to give.

82. The judge ruled that the trial would continue. He said :

> "At the conclusion of Mr. McNulty's closing speech last week on behalf of Munir Farooqi, Crown Counsel indicated that they may wish to apply to discharge this jury, on the grounds that Mr. McNulty's speech contained so many falsehoods that could not adequately be corrected in a summing up, or if fully corrected, the summing up would appear unbalanced. They have since taken instructions at a high level, and they essentially remain neutral, appreciating that this must, whatever submission the Crown may make, this must remain a matter for me."

83. He went on to say:

> "I am not at all surprised by any of the indications that have been made last week, nor the submission made today. Indeed, for the greater part of the speech, lasting for some nine hours, I was considering whether I should myself take the responsibility for such a course, extreme as it may be, indeed wholly exceptional and a course of last resort."

84. The judge described Mr McNulty's submissions as "hopeless". He had no understanding of the law, the rules of procedure or his own professional obligations, and that he had defied the court's order not to canvass entrapment before the jury:

> "I regret to say that having forbidden Mr. McNulty from canvassing the non-existent defence, in my judgment he did just that, referring to secret police, a conspiracy between two undercover officers to entrap Israr Malik and Munir Farooqi, and an element of improper conduct which was never previously canvassed, namely that senior officers had been out to get Israr Malik, and that they needed to have a radicalised man and to make him a defendant."

85. The judge said that Mr McNulty had given evidence for Farooqi on at least four important subjects. He had tried to neutralise the summing up by describing the judge as biased. In these remarks Mr McNulty was, submits Mr Bott, depicted as a thoroughly unscrupulous advocate prepared to use every trick and device to mislead the court.

86. In conclusion the judge said:

"As Mr. Edis has so recently said, the court has been placed in a very difficult position. I have the task of attempting to craft a summing up which will correct these several matters, and yet disadvantage no defendant, nor the Crown. I propose to do my best to do so. Should I shirk that responsibility, literally millions of pounds will have been expended to no good purpose. If at the conclusion of my summing up I conclude that I have not been able to achieve what I set out so to do, then of course I will have no option other than to discharge the jury. If I think I have succeeded and have in fact failed, then it may well be that the Court of Appeal can put matters right.

No Judge should ever be put in this position, and I trust that it will never reoccur. I propose to deal with the wider implications of what has transpired at the end of the case."

*The summing up*

87. Unsurprisingly in light of the unexpected way in which the course of the trial had unfolded, the judge said that he would take a few days to craft, or in reality to re-craft, his summing up. This began on Tuesday 30th August 2011. It concluded on the following Monday afternoon, the 5th September 2011, when the jury retired to consider their verdicts.

88. The judge began his summing up by providing the jury with a written Route to Verdict about which no complaint is made. It included the list of the topics which the summing up was going to cover, including one entitled "corrections". Specific importance was focused on the issue of intent as it applied to each count and the defence of each defendant to that count.

89. Confining ourselves to the issues raised in the appeal, the judge directed the jury that he and they were together engaged in a process of trying each defendant fairly. He directed them that the facts were for them in conventional terms and tailored his directions to the facts. He said amongst other things: "The major issue, the overriding issue, is whether the purpose [of the Da'wah stall] was solely and exclusively to attract individuals to the faith of Islam, or whether there was, in addition, a criminal purpose, namely to attract individuals, vulnerable individuals, offer them friendship, radicalise them, and then recruit them to fight in Afghanistan or Pakistan, when the time was right and when the call came…Every defendant says "I have not committed any crime. I did not try to persuade anybody to fight in Pakistan or Afghanistan. I did not knowingly and intentionally disseminate terrorist publications, and I did not incite

anybody to murder." He focused on the relevance to the verdict of the level of intention required before the relevant defendant could be convicted. Each defendant denied the intention attributed to them by the prosecution. When dealing with self defence the judge said: "The defence is simple. No recruitment was taking place." The judge said of counts three, six and seven: "The defence say here he was not at all inciting Ray in the first count and Simon in the second to commit murder. Nor indeed was he inciting him to go and fight abroad."

90. After lunch the judge gave the "corrections" section of his summing up, in which he dealt with Mr McNulty's closing speech. This part of the summing up lasted 1 hour and 10 minutes. It was wholly self-contained, separated both by time, and by the judge's remarks, from the legal directions which preceded it and the exposition of the evidence which then went on to occupy the remainder of the summing up.

91. The judge introduced the corrections section by saying:

"I now come to part of my summing up which I would rather not have to deliver. I must correct a number of matters that Mr McNulty dealt with in his closing speech…

In a criminal trial, I have a number of tasks. As you know, informing you as to the law is one of them, and that includes that you are not misled as to the law or the facts by anyone. A further task, and it is a task that we both share, the ten of you and myself, is that all four defendants and the Crown have a fair trial…
There are a number of matters I must deal with. It is important that you have in mind that there is absolutely no evidence nor reason to believe or even suspect that Munir Farooqi himself was the author of anything said by Mr McNulty which I must correct, or that he authorised it, and you must certainly not use any of these matters as evidence of any criminality on his part. At the same time, you must have regard and full regard to what I tell you when you come to your deliberations, and you must allow me to correct the several errors that have occurred."

92. The judge went on to deal with the matters in Mr McNulty's closing speech which required correction. These included allegations of judicial bias, the giving of evidence in the closing speech, allegations made and not put to witnesses, the canvassing of the non-existent defence of entrapment by reference amongst other matters to secret police and conspiracies, and the allegedly improper motivation for the Crown.

93. In view of their importance to the appellants' case, we set out some examples of the corrections made by the judge, using his language for this purpose:

a) "The first matter I have to correct is the warning that Mr. McNulty issued as to the possibility of undue influence or judicial bias. As to the latter, he said this: "There is a tendency to assume that just because a Judge does not represent the Crown or the defence, that he is not biased in one way or the other .... I am sure that is the position and I am sure that will be the position here, but, Members of the Jury, history has taught us that that is not always the case, and no jury should ever assume it is so.

b) Now if Mr. McNulty is sure that there will be no bias in this case, there can be no purpose in making this observation. If he thinks I am biased, then he can apply to me to disqualify myself, and if I refuse and he had any evidence of bias, he could go to the Court of Appeal and the Court of Appeal could order a retrial between another Judge and another jury, but he has already told you that he is sure I will not be biased, and so why raise the issue? He should not have done so….

c) My role or the role of the judiciary in general, I know not which, was likened to that of a salesman, who may be friendly, "But that does not mean", said Mr. McNulty, "that what he is selling is worth anything, does it?" Now that is a form of courtroom anarchy…

d) Mr. McNulty in due course said that the only thing between Munir Farooqi and an improper conviction "is me and a fair minded jury." Well, this could be said, taken literally, to be an invitation to you to find the defendant not guilty, because a conviction would be improper. It plainly misleads you as to my role. One of my functions is to protect defendants from improper verdicts, an important judicial role. It is also the Crown's role to protect defendants from improper verdicts. A flawed verdict which will be set aside is no good to the Crown. We have a Court of Appeal to protect defendants from improper verdicts, and beyond that a Criminal Cases Review Commission. Your function is to decide the case according to the evidence, and so please ignore any exhortation which misstates our respective roles…

e) It was submitted in his speech to you by Mr. McNulty, that there was a conspiracy to entrap both Israr Malik and Munir Farooqi, and it was contended by Mr. McNulty that by reference to the date of arrest, that Israr Malik has been manufactured as a victim/perpetrator to shore up a false case. They have put him in the dock alongside Munir Farooqi. The operation was not complete until they put Israr Malik in the dock.

f) Now that is a considerable accusation to make, and one which if it was to be made, should have been put to Detective Chief Inspector Richardson, the senior investigating officer when he was in the witness box, so that he could deal with it. He has had no opportunity of dealing with what is a very grave allegation… Counsel simply cannot wait until his closing speech to make such an allegation because the Crown have no way of answering it or dealing with it.

g) What I can tell you is this: that there is simply no evidence of any such improper motive, and as I have told you, you must assume that this was a lawful operation. As I have told you, there is no defence of entrapment…the defence here is not that the defendant was entrapped. It is that he committed no criminal act…

h) Mr. McNulty went on to submit that this case was all about freedom of speech, the implication being that the Crown were motivated by malice and a desire to stop free speech. If the defence had wished to assert that this operation was undertaken to prevent Islam being preached or advanced from Da'wah stalls in the city of Manchester, then it was Counsel's duty to give the officers responsible for the Crown an opportunity to answer the allegation when Detective Chief Inspector Richardson was in the witness box…

i) Mr. McNulty went on to assert that there was an unpleasant smell of racism about the Crown, and that the Crown had alleged that Munir Farooqi was motivated by racism. The only possible assertion touching upon race was the allegation that white persons were being targeted as potential reverts, and thus potential recruits.

j) I regret to say that by raising judicial bias, undue influence, a false racist allegation, a desire to prevent freedom of speech, secret police and a conspiracy involving senior officers, a series of false allegations have been made which should not have been made, and they are compounded by an exhortation made to you as to the way you reach a verdict…

k) It is legitimate in a closing speech for Counsel, even when his client has not given evidence, to make submissions about what inferences may be drawn from the evidence as to his client's motives and intentions. What is not legitimate is for Counsel to make positive assertions on his client's behalf which could have been made in the witness box....

l) The next matter about which a positive assertion was made by Counsel and in respect of which no evidence was given by Munir Farooqi, namely counts six and seven, is where Mr McNulty made this positive assertion which was a repeated assertion, "We are now going to turn to the last two counts, which relate to the 15th and 16th October. These conversations are very different, and as I have said to you previously, in effect they are part of a single ongoing conversation which begins on the 13th October, when Munir Farooqi is clearly talking about jihad and the end of the world…

**m)** Now of course I sounded partial in that passage, because I had to correct what had taken place. Had this assertion been made during the evidence, or had Mr. Munir Farooqi gone into the witness box and said "I was talking about the end of the world on the 15th and 16th of October", everything I have just said to you would, I have no doubt, been said to you by Mr. Edis. I do not appreciate being put in this position of having to make all these corrections, because it makes me sound partial, but if these points are not made to you, then a jury paying less attention than you might say "Oh well, maybe he was talking about the end of the world.…

n) The only person who could say the three brothers were a fiction was Munir Farooqi from the witness box saying he lied about them. Again you may think this was an attempt to write out those three men from the script, and to cause you to question whether or not they existed, and when there is plain evidence that they did exist, uncontradicted from any source, you are entitled to assume that they did...

o) The only person who could evidence that these stories were designed to deter jihad rather than encourage jihad was Munir Farooqi because that was what was in his mind, if it was…Munir Farooqi would have been asked to his face was he encouraging or was he discouraging jihad. That is why these matters have to be raised by defendants and not by their Counsel, so they can be asked about them…

p) Towards the end of his speech, Mr. McNulty devoted a substantial passage to asserting that passages of [what] Munir Farooqi [said] were abstract and part were concrete. Again, the only person who could say whether he was speaking in the abstract or the concrete was Munir Farooqi.

q) It is very simple. You must decide his case on the evidence that you have heard. Nothing that Mr. McNulty said in his closing speech was evidence. Whilst he can invite you to give the natural ordinary meaning to everything in the transcripts, Counsel cannot give an explanation which requires evidence to take you outside or beyond the ordinary natural meaning of the words in the transcripts. Without any evidence from Munir Farooqi, you decide the case on the Crown evidence, together with the evidence of the witnesses that he has called."

94. These corrections were interspersed with a number of passages in which the judge emphasised that the jury were the sole judges of fact and that his corrections should not impinge upon the case of any of the defendants:

a) "In dealing with the law as I am doing now, you must accept what I say about our respective functions and disregard what Mr. McNulty has said. The position could not be simpler. You must follow my legal directions absolutely and without qualification, but so far as the facts are concerned, you are the sole judges of fact. I am not here to decide the facts for you, nor am I here to influence you, merely to assist you so that you can judge the facts, but I am not here in a purely passive role. The law is this: a Judge may comment on the facts, and may do so in confident terms. A Judge has experience of marshalling facts and identifying issues, and it is therefore right that you should have a Judge's assistance on the facts and you will have mine, but the ultimate decision on the facts must be yours. If I express a view of the facts, only adopt it if it accords with your own...

b) Ensure, please, that the matters I have thus far dealt with do not impinge upon any one of the defendants. None of them have advanced these matters before you. Nor allow it to impinge upon the Crown. They are entitled to a fair trial; not to have to counter matters such as this….

c) It remains, however, your task to decide firstly whether terrorists were being recruited, and then to consider the case of each defendant separately, deciding whether he knew what was going on, if you decide it was, and whether he participated with the necessary intent. As a matter of law, it is most certainly open to you to conclude that one or more persons were engaged in recruiting terrorists and one or more were not. You may also conclude that all were involved or that none were. That is because the facts are entirely for you…

d) Now it was said by Mr. McNulty that the 13th October involved a significant conversation about the end of the world. Now because the facts are for you, you will want to consider whether indeed there was a significant conversation about the end of the world or whether there was just about a page and a half before many other matters were dealt with, and so tab 38 will need your very close and careful attention. If you disagree with the way I present the facts to you, then you are perfectly entitled to do so, but you then have to go on and say whether or not there is a basis at all for concluding that the 15th and 16th are some sort of continuation. You will wish to consider whether page five and pages 20 and 21 can be considered a significant conversation about the end of the world, and whether at tab 39 on the 15th of October, and tab 40, the 16th of October, it can properly be said that those were a continuation of the 13th of October."

Coming to the end of the corrections section, the judge concluded:

e) "Now I am conscious that was a lengthy session, lasting for one hour and ten minutes of corrections. It is vital that you do not hold it against Munir Farooqi himself. It is equally vital that no other defendant finds himself adversely damaged. Nor indeed must the Crown by thoughts having been planted in your mind, that could only have been there had they come from the witness box, and most important too, that you do not think that the Judge is completely biased because of what I have had to deal with. I do hope you understand. I am as committed as you are to seeing that the four defendants and the Crown receive a fair trial. That is why I have had to correct all these several matters. Tomorrow we are going to move on to the case against Munir Farooqi, and so far as these matters are concerned, it is just a question of putting away and outside as really not having existed, because these were matters that should not have been canvassed before you. I hope you do understand."

95. In the remainder of his summing up, lasting for a further four days, the judge gave what Mr Edis describes as a meticulous and comprehensive exposition of the evidence. Further he set out in detail, separately for each defendant, the respective Crown and defence cases, which included the evidence given by Newton and Malik. The judge had invited each counsel to prepare a summary in "nutshell" form of the case for each defendant, and in relation to Newton and Malik, the summing up then included a "nutshell" of the case for the defendant closely based on these summaries. The judge concluded with these words:

"And that concludes my review of what is said against each defendant and what is said by way of response, and I remind you that you are the sole judges of fact. I trust my summing up has been of assistance. You must accept that what I told you about the law is correct, and where I am in conflict with Mr. McNulty, my legal directions must prevail. You must not assume that Mr. McNulty spoke as he did at the behest of or with the approval of Munir Farooqi. Defence Counsel may not and need not tell their lay clients what they propose to say. You must decide his case on the…evidence, …The several corrections I have made must not adversely affect the fairness of this trial, either in relation to the trial of any defendant, nor the Crown."

96. We must return to an earlier stage in the summing up when, during the "corrections" section the judge gave the jury a "*Watson direction*", quoting Lord Lane CJ's exact words. This is a source of complaint by Mr Bennathan. The passage occurred during the course of the summing up directed to the judge's expression of regret at reference to judicial bias, undue influence, a false racist allegation, a desire to prevent freedom of speech, secret police and a conspiracy involving senior officers, when the judge added:

"I regret to say that, by reference to these matters (Mr McNulty telling you that the jury system is not about compromise, resisting any temptation to make compromises and not going with the flow or with who shouts the loudest, but there was no mention of your collective responsibility in the concept of give and take) you may think that what you were told was a blueprint for a disagreement, and what I tell you now is a

direction formulated by a former Lord Chief Justice. It is the law, and Mr McNulty's exhortation is not, and I quote the former Lord Chief Justice in terms."

The judge then said:

"Each of you has taken an oath to return a true verdict according to the evidence. No one must be forced to that oath but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If unhappily you cannot reach agreement you must say so."

97. On 8th September 2011 the jury returned unanimous guilty verdicts on all counts against Farooqi and Newton and returned their verdict of not guilty on the one count faced by Harris Farooqi. The following morning, the 9th September 2011, after retiring for an hour, the jury returned a unanimous verdict of guilty against Malik on Count 8. The judge then gave the jury the majority direction, and one hour later the jury returned unanimous verdicts of guilty against Malik on the remaining counts he faced, that is Counts 9 and 10. The judge passed sentence on the appellants later that same day.

98. By way of footnote we should add that, following the trial, the Attorney General to whom the matter had been referred by the judge (after initial complaints to the Bar Standards Board by the Crown Prosecution Service) concluded there was sufficient evidence to bring proceedings for contempt against Mr McNulty in relation to his conduct at the trial, but that the public interest was best served by the Bar Standards Board formally investigating the allegations of professional misconduct against him. On 31st January 2012, the Attorney General made a formal complaint to the Bar Standards Board of professional misconduct against Mr McNulty. We understand this complaint awaits resolution.

99. We are now in a position to address the grounds of appeal.

*The fairness of the trial*

100. In this jurisdiction it is axiomatic that every defendant has an absolute entitlement to a fair trial.

101. We must begin by emphasising that the conduct of the trial by the judge was impeccable. He remained patient under considerable provocation, and in the public interest he sought to salvage an important lengthy trial from shipwreck. In his directions to the jury, in fairness both to the prosecution and to ensure that justice

would be done according to the law the danger that the jury would be misled had to be avoided. We cannot detect any basis for criticising the judge for lack of fairness or balance in his approach to his responsibilities. The essential criticism is that notwithstanding the fairness with which the judge sought to discharge them, the misconduct of counsel and his deliberate and repeated challenges to the judge's authority could not be addressed and dealt with without compromising the fairness of the trial. The only answer to the problem created by Mr McNulty was the discharge of the jury, and the only answer to the resulting unfairness of the continuing of the trial is to quash the convictions.

102. We are not here contemplating with the wisdom of hindsight the possible alternative ways in which, following conviction, the defence might have been differently conducted. A variety of different formulations can be found in the authorities, and the catalogue of discouraging adjectives which may apply in the formulation of any relevant test for such cases is probably not yet closed. For present purposes we have asked the question in relation to each defendant whether the misconduct and the alleged incompetence of Mr McNulty could sensibly be addressed by judicial directions in the summing up, and if they could, were they in fact addressed in such a way that the integrity of the trial process was maintained.

103. When issues like this arise, the starting point however, and this requires emphasis, is that the overwhelming likelihood is that the appropriate response is for the trial to continue to its conclusion. The derailment of a trial, whether on the basis of deliberate or inadvertent misconduct by counsel, must remain the exception. The judge is vested not only with authority over the conduct of the trial, but with the means, through careful and unequivocal directions to ensure that the jury, with its own interest in the fairness of the trial process, understands the criticisms properly made by the judge for which counsel is responsible, and does not, unless directed to do so, visit them on either his client, or any of the remaining defendants.

104. It is a matter of regret that there are ample grounds for criticising the conduct of Mr McNulty at the trial. These have been fully addressed by Mr Bott at the hearing of the appeal, and, as we have narrated, he, in accordance with the rules which require counsel to act fearlessly on behalf of his client, has not minced the language of criticism.

105. We must therefore return to the basic question. The starting point is that the record of what Farooqi said in conversations with the undercover police officers was not and could not be disputed. The jury knew exactly what was said to and by him. What he said formed the basis for a very powerful case that he was guilty of the offences with which he was charged. He defence was that whatever he may have said, the necessary intention to prove guilt was absent.

106. The difficulty which faced Farooqi's legal advisors is obvious. Although some fairly peripheral points of possible relevance to intent could be made on the basis of isolated passages from the recorded conversations, the defence was fixed with what was

revealed by the conversations as a whole. It appears to us that faced with this problem, and without any justified basis for doing so, Mr McNulty embarked on the forensic strategy of an all-out attack on every aspect of the prosecution case, sometimes at a very late stage in the process, in circumstances which can be described as "ambush" and of confrontation with and disobedience to the judge. The objective of this strategy would have been to seek to distract the attention of the jury from the simple question which they were required to address: what conclusions should properly be drawn from the incontrovertible evidence of these conversations? The only person who could give evidence about his intentions was Farooqi himself, but if he did so and disclaimed the apparent intention revealed by the conversations, the potential for devastating cross-examination was obvious.

107. The question was raised whether Mr McNulty discussed his proposed forensic strategy with his client. However, whether he did or not, and even assuming that his client agreed or encouraged it, the client's "instructions" were irrelevant. The client does not conduct the case: that is the responsibility of the trial advocate. The client's instructions which bind the advocate and which form the basis for the defence case at trial, are his account of the relevant facts: in short, the instructions are what the client says happened and what he asserts the truth to be. These bind the advocate: he does not invent or suggest a different account of the facts which may provide the client with a better defence.

108. Something of a myth about the meaning of the client's "instructions" has developed. As we have said, the client does not conduct the case. The advocate is not the client's mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor "instructs" him. In short, the advocate is bound to advance the defendant's case on the basis that what his client tells him is the truth, but save for well-established principles, like the personal responsibility of the defendant to enter his own plea, and to make his own decision whether to give evidence, and perhaps whether a witness who appears to be able to give relevant admissible evidence favourable to the defendant should or should not be called, the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with twin responsibilities, both to the client and to the court.

109. In the trial process the advocate is subject to some elementary rules. They apply whether the advocate in question is a barrister or solicitor, and to the extent that the rules of professional conduct of either profession are not consistent, they should be made so. In the forensic process the decision and judgment of this court bind the professions, and if there is a difference, the rules must conform with the decisions of the court. By way of emphasis, in the course of any trial, like everyone else, the advocate is ultimately bound to abide by the rulings of the court. If a remedy is needed, the rulings are open to criticism in this court, and if they are wrong, their impact on the trial and the safety of any conviction can be fully examined. Although the judge is ultimately responsible for the conduct of the proceedings, the judge personally, and the administration of justice as a whole, are advantaged by the presence, assistance and professionalism of high quality advocates on both sides.

Neither the judge nor the administration of justice is advantaged if the advocates are pusillanimous. Professional integrity, if nothing else, sometimes requires submissions to be made to the judge that he is mistaken, or even, as sometimes occurs, that he is departing from contemporary standards of fairness. When difficult submissions of this kind have to be made, the advocate is simultaneously performing his responsibilities to his client and to the administration of justice. The judge, too, must respect the reality that a very wide discretion is vested in the judgment of the advocate about how best to conduct the trial, recognising that different advocates will conduct their cases in different ways, and that the advocate will be party to confidential instructions from his client from which the judge must be excluded. In general terms, the administration of criminal justice is best served when the relationship between the judge and the advocates on all sides is marked by mutual respect, each of them fully attuned to their respective responsibilities. This indeed is at the heart of our forensic processes.

110. For the purposes of these appeals we shall highlight some of the further rules which appear to have been significantly infringed.

111. The advocate cannot give evidence or, in the guise of a submission to the jury, make assertions about facts which had not been adduced in evidence. That is inconsistent with the proper function of an advocate. The importance of the rule is particularly stark whenever the defendant elects not to give evidence in his own defence. Farooqi failed to do so, and we shall shortly address the complaint against Mr McNulty's competence arising from this decision. Whatever the circumstances, the advocate cannot supply the evidence that the defendant has chosen to withhold from the jury. Self-evidently his function is entirely distinct from that of a witness. When the advocate confines himself to commenting on or inviting the jury to draw inferences from aspects of the evidence which has been given, this principle is not infringed. But as we have demonstrated in the narrative of the facts, Mr McNulty went much further.

112. Mr McNulty's critical comments about prosecution witnesses were advanced without the witness (or the prosecution) having been given a fair opportunity to address and answer the criticism. The fairness principle operates both ways. The defendant must have a fair trial. It is however equally unfair to an individual witness to postpone criticism of his conduct until closing submissions are made to the jury, not least because if given the opportunity, the witness whose behaviour is impugned may have a complete or partial answer to the criticism. All this is elementary.

113. We do not suggest that the principle of fairness to the witness requires the somewhat dated formulaic use of the word "put" as integral to the process. Assuming that there is material to justify the allegation, "Were you driving at 120 mph?" is more effective than, "I put it you, that you were driving at 120 mph?" What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination. This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate. We withhold criticism of Mr McNulty on this particular aspect of his cross-examination because he was following a developing habit of

practice which even the most experienced judges are beginning to tolerate, perhaps because to interfere might create difficulties for the advocate who has been nurtured in this way of cross-examination. Nevertheless we deprecate the increasing habit of comment or assertion whether in examination in chief, but more particularly in cross-examination. The place for comment or assertion, provided a proper foundation has been laid or fairly arises from the evidence, is during closing submissions to the jury.

114. One further aspect of the principle that the trial process is not a game is that the advocate must abide and ensure that his professional and lay clients understand that he must abide by procedural requirements and practice directions and court orders. The objective is to reduce delay and inefficiency and enhance the prospect that justice will be done. Ambush defence or arguments are prohibited.

115. In his closing submissions to the jury Mr McNulty made a personal attack on the judge, and the prosecution, and indeed some of his colleagues acting for other defendants which was quite astonishing, and far beyond the experience of any member of this court. The comparison drawn between the judge and a dishonest seller of worthless goods was intolerable. The suggestion that some of the counsel for the co-defendants whose approach to the trial was different to his own should be regarded as "sucking-up" to the judge was reprehensible. It is quite clear from a study of the transcripts available to us that each of the other counsel was acting within and in accordance with the rules of professional conduct which govern the exercise by each advocate of his or her professional responsibilities. For completeness, we simply add that the attack on the prosecution was equally unjustified. This was not fearless advocacy, with the advocate necessarily standing firm in the interests of his client in the best traditions of the Bar. Advocacy of the kind employed by Mr McNulty would rapidly destroy a system for the administration of justice which depends on a sensible, as we have emphasised, respectful working relationship between the judge and independent minded advocates responsibly fulfilling their complex professional obligations. It is difficult to avoid reflecting that this behaviour, particularly during the later stages of the trial, had as its ultimate purpose the derailment of the trial by the creation of pressure on the judge to discharge the jury before they retired to consider their verdicts or to procure favourable verdicts by illegitimate means.

116. It gives us no satisfaction to provide this brief indication of the areas of serious concern about the professional conduct of Mr McNulty. We therefore return to the question: how was the judge to address the consequent problems? As the judge recognised it was open to him to discharge the jury and order a new trial, a decision involving huge inconvenience to everyone else involved in the case, and substantial public expense, and in which it is worth noting, as the judge did, it would have been open to Farooqi to require that Mr McNulty should continue to act for him. It was also open to the judge to discharge the jury from giving verdicts on one or more of the defendants, but in practical terms, quite apart from wasted time and expenditure, these allegations, and the evidence to sustain them postulated a joint trial of all the defendants. The better alternative, notwithstanding the problems created by Mr McNulty was to continue the trial. Provided the judge was satisfied that the issues and evidence could be summed up to the jury in a way which would correct the errors for which Mr McNulty was responsible, while simultaneously ensuring that the trial of

the defendants would not be prejudiced, the trial could sensibly continue to its normal conclusion. That is what the judge decided, leaving open the further safeguard that if, at the end of his newly refashioned summing up he was not satisfied of the wisdom of his decision to continue the trial, it remained open to him to discharge the jury.

117. This judgment was made towards the very end of a length trial by one of our most respected judges, an acknowledged master of the criminal justice process. Far from criticising it, we have no doubt that his judgment was right. Even if (deliberately or otherwise) the trial had been exposed to the risk of derailment, its integrity was far from irremediably tarnished. As a matter of what is sometimes described as his discretion, but in reality is his judgment, the judge was entitled to conclude that the remedy for what had gone wrong could be provided by the summing up.

118. We have, of course, closely studied the summing up. As we indicated earlier, after providing the written Route to Verdict, the judge directed the jury accurately about the relevant legal principles and explained with utmost clarity the basis of defence of each defendant to each count he faced. The jury can have been in no doubt about the nature of the defence and the requirement, that before any convictions could be returned, the Crown should satisfy the jury so that they were sure that the necessary intent was proved. There then came a natural break. After lunch he addressed the necessary corrections. He expressly exonerated Farooqi from his criticisms of the conduct of his counsel, and repeated that neither the criticisms nor the need for them had any bearing on the trial of any of the other defendants, and that they were irrelevant to the verdicts in each of their individual cases. The "corrections" section of the summing up was detailed, but proportionate to the length of the summing up as a whole and the level of corrections required. It was also carefully ring-fenced. It was limited in its ambit and scope to the issues improperly created by Mr McNulty's conduct. The judge directed the jury about legal principles in accordance with his duty. He made clear that his observations had no bearing on the factual decisions which were for the jury. Having concluded the "corrections" section of his judgment, he turned to the factual issues which were then addressed in meticulous detail over the next four days without the risk of distortion of the essential issues.

119. In our judgment the issues were fully and fairly explained to the jury and left for their decision, and the necessary process of correction was handled so as to ensure that the normal processes by which the jury addressed the evidence and reached their eventual conclusion were not undermined. Notwithstanding many unfortunate features of this trial the convictions of three of the defendants, and the acquittal of the fourth defendant, followed a fair trial.

120. This is a convenient point at which to address Mr Bennathan's submission that the summing up was flawed. He suggests that the effect of the corrections, even if appropriate, was to "swamp" his client's defence and, although again, the judge rightly addressed the "entrapment" defence, the impact so far as his client was concerned was to bolster the credibility of the police and to undermine the relevance to the contention that his client had never "initiated" any conversations about violent "jihad". We have studied Mr Bennathan's very detailed written submissions advanced

in support of these proposed grounds of appeal, together with the equally detailed response from the Crown. Reading the summing up as a whole Mr Bennathan's contentions are unsustained. We would have refused leave to appeal on this ground. On detailed analysis, although it may be that different parts of the summing of the facts could have been expressed more attractively from Mr Bennathan's point of view, in our judgment Malik's case was fairly put before the jury. Similarly, on the basis that Mr Bennathan submits that Farooqi's defence was not properly left to the jury and this had a consequent damaging effect on his client's position, because the two cases were inextricably mixed up, we are satisfied that Farooqi's defence, notwithstanding the misconduct of his leading counsel, was fairly before, but unsurprisingly rejected by the jury.

*Farooqi's Failure to Give Evidence*

121. We turn to Mr Bott's submission that the appellant's convictions are unsafe on the basis that the failure of the appellant to give evidence was itself consequent on Mr McNulty's incompetence.

122. In essence he submits that Mr McNulty had his own individual views about the way the case should be conducted, and that he did not enable his client to make an informed decision about whether or not to give evidence. We have been shown a schedule of visits by Farooqi's legal advisers to him whilst in custody. It cannot be said that his legal team visited him with any great regularity during the trial.

123. Farooqi signed a document on 1st August 2011, witnessed by Mr Sharif and Mr McNulty. It recorded the fact that his counsel did not think that it was in his best interests to give evidence. It acknowledged that the judge might give an adverse inference direction to the jury, and that by not giving evidence, there was no guarantee of being found not guilty or avoiding a prison sentence if convicted. The document concludes:

> "Finally I understand that the decision whether I give evidence or not is entirely mine and should I wish to reject my counsel's advice, Mr McNulty is happy to call me and to permit me to give evidence on my own behalf. Having considered all of the above I have decided of my own free will that I did not wish to give evidence."

124. Mr Bott submits that given the nature of the case against Farooqi, he should have been told that he needed to go into the witness box. He also points out that Mr Zahir, junior counsel, was not present on 1st August, although the document refers to advice given by him as well as Mr McNulty.

125. On the morning of 1st August Mr McNulty was able to give an immediate answer to the judge's enquiry about whether his client would be giving evidence. This clearly suggests that the matter had been discussed before then and a decision made, subject

to final confirmation. The document dated 1st August signed in the very short consultation over the lunch break of 1st August, appears to us to represent no more than the final confirmation witnessed in writing of an issue which had already been discussed and was the subject of advice given on previous occasions. Farooqi has waived his legal professional privilege in this case, thus enabling some consideration to be given to what advice he was given. However, we have received scant materials in support of the assertion now put before the court.

126. Most surprisingly there is no witness statement of any sort provided by Farooqi himself. When an appellant wishes to assert that he has not been given appropriate advice in a particular respect, or has not been able to make an informed decision about a matter of materiality in the trial, he must provide the court with a statement setting out the relevant history. There is no such material from Farooqi.

127. Next we turn to Mr Zahir.. We would describe the material provided by him as sparse in content and quality. He has also provided notes which he took of consultations on 6th and 19th July 2011, the latter of which is an occasion when the question of giving evidence was under consideration. He says he was not present on 1st August and has no other detailed recollection.

128. Farooqi's case was extensively prepared by Mr Sharif, a solicitor, who, like Mr McNulty and Mr Zahir, has considerable experience of representing defendants over a number of years in terrorist cases. Despite a request to do so, and notwithstanding the fact that he was involved at the heart of Farooqi's defence from the outset and during the trial, he failed to provide any material whatsoever on issues germane to this appeal, including the decision not to give evidence.

129. Farooqi has not sought to rely on any material from Mr McNulty, Mr Zahir or Mr Sharif, nor has he sought an order requiring the attendance of any of them.

130. The dearth of material from the primary actors in the decision as to whether or not to give evidence represents a very unpromising basis for a submission that the court should conclude that Farooqi did not make an informed decision, or was inappropriately advised, about whether he should give evidence or not, or indeed the circumstances in which he decided that he would not do so.

131. Some documentary material sheds light on these matters. In the spring of 2011 a defence statement was submitted on Farooqi's behalf. As we have already indicated, the line was to the effect that he acknowledged that the words recorded on the probe evidence were in fact spoken by him but that they did not accurately reflect his intention. It also makes the point that the undercover officers had steered the conversation with Farooqi towards discussion of Jihad. Consequently, Farooqi's recorded observations were said to be no more than an explanation of the principles of Jihad and a reaction to the conversational promptings of the undercover officers. What he said was not, and was incapable of being, an invitation or solicitation to any form of criminal conduct. Moreover, he did not intend anyone to travel to Pakistan or

Afghanistan in order to participate in terrorism and he did nothing with the intention of soliciting murder.

132. The probe evidence covered a period of a year and involved a huge number of conversations, totalling a vast amount of time. Farooqi, who is an intelligent man, had insisted on personally reviewing the DVDs of those probes. After a great deal of time had been expended by him reviewing the probe evidence, he admitted that the transcriptions of the probes were indeed accurate. This too was confirmed in his defence statement. This meant that the defence would turn on an interpretation of that agreed material. As we have already commented, the defence put forward by Farooqi was consistent with that being advanced by the co-accused.

133. The record of visits in custody shows that quite apart from many visits by Mr Sharif prior to the creation of the defence statement, there had also been visits by Mr McNulty.

134. Thus, by the spring of 2011 when the defence statement was produced, Mr Farooqi had given his lawyers his instructions about the charges that he faced.

135. As we have seen, Mr McNulty's strategy in cross-examination was to emphasise the reactive role of his client to approaches by the undercover officers and the context in which he had provided his responses to them.

136. In those circumstances the need for very regular contact with the client during the trial was diminished. This appears to us to be the most likely explanation for the relatively limited degree of contact between Farooqi and his legal advisers during the trial.

137. Two further pieces of material are important. Firstly, there is the note Mr Zahir made of the consultation on 19th July 2011. On that day the records show that Farooqi was seen by Mr Sharif and Mr Zahir for nearly two hours in the morning, with Mr McNulty being present for about twenty-five minutes of that time. Mr Zahir's note records discussion in the presence of both counsel and the solicitor to the effect that the need was to keep the focus of the case on the police rather than to allow it to move, as the prosecution would wish, to focussing on whether Farooqi was radicalising others including members of his family. At that stage, of course, his son, Harris Farooqi, was a co-defendant.

138. Mr McNulty is recorded as saying "I am still of the view it is not in your interest to give evidence." That clearly indicates that he had expressed that view before. Farooqi is recorded as confirming that Mr Zahir had explained the material and commented "you say everything I can say is on transcript and I can't think of much else to add." It is then recorded that Farooqi said that he took the view that there was no real purpose to giving evidence and that the account in the transcripts was clear. This was followed by Mr McNulty advising that it would be difficult to give evidence and that there were disadvantages, but that the decision was his. By leaving things as they were they

could focus on the police; but if he wanted to, Farooqi could give evidence. The basis underlying this discussion was that the case would go to the jury, and indeed reference was made to the jury's likely attitude if they thought the judge was biased. There was also discussion of the wisdom of calling Farooqi's daughter and son-in-law as defence witnesses, each of whom could be the subject of hostile and possibly productive cross-examination for the Crown.

139. Prior to 1st August 2011 when Mr McNulty announced that Farooqi would not be giving evidence, there is logged a two hour conference on 28th July with Mr Sharif, the solicitor, during the morning and a forty minute conference involving him and Mr McNulty in the afternoon. A weekend intervened between that date and 1st August, but it seems to us that given the timetable, the fair inference to be drawn, as the Crown's case was drawing to its close, was that the further discussion must have addressed the merits of giving evidence and it was this which enabled Mr McNulty to give his prompt answer to the judge's question on Monday 1st August 2011.

140. We therefore stand back to assess the position. There is an absence of evidence from the quarter from which we would most expect to find some assistance if this appellant were able to amount a credible attack on the advice tendered to him, namely Farooqi himself. There has been a lamentable failure by Mr Sharif to provide any sort of assistance. Mr Zahir's position appears to be one of limiting his involvement in matters, although he has provided his record of the consultation of 19th July. There is no other contemporaneous record of any sort provided by Mr McNulty, Mr Sharif or Mr Zahir.

141. By contrast such material as there is in the form of visit logs, the defence statement and the documents of 19th July and 1st August leads us to the firm conclusion that the lines of Farooqi's defence were clear; and that prior to 19th July Mr McNulty had indicated that he did not advise his client to give evidence. On 19th July the topic was revisited and clearly considered in some depth, and the view of the legal advisers was maintained. It is also clear that Farooqi himself understood the position and its potential consequences. He acknowledged that the decision was entirely his own, and he personally decided not to give evidence. The log for 28th July, coupled with the events of 1st August, suggest a further conversation on that topic enabling a swift signing of the formal document on 1st August.

142. There is no credible material to support the proposition that Farooqi did not make an informed decision or that he was improperly advised. The submission that he should have been told in terms that he needed to go into the witness box has the disadvantage of being made in hindsight and from a different tactical viewpoint. It also fails to acknowledge the devastating nature of the cross-examination to which Farooqi would have been exposed, and its possible damaging impact on the remaining defendants including Farooqi's son. It is clear to us that there was significant discussion of the pros and cons of giving and/or calling evidence; it is clear that Farooqi was aware that he had a free hand in the matter; and the overwhelming inference is that he understood the general approach of the defence, which was not to challenge the

primary evidence given, but to seek to set it in a context favourable to him. There is nothing in this point.

143. There is therefore no material to suggest that the fairness of Farooqi's trial was undermined by the circumstances in which he came to decide that he would not give evidence, and on this issue we are not satisfied that Mr McNulty's conduct of the defence fell below the appropriate level of professional competence.

144. We have received a letter from Mr Meyer, who was the solicitor with overall responsibility for the conduct of Farooqi's case. It is clear that he fulfilled some form of overarching supervisory role involving managing the VHCC contract with the Legal Services Commission and ensuring that others prepared Farooqi's case properly. We recognise that he has never met Mr Farooqi and that he does not have a detailed knowledge of the evidence in the case. He describes how a team of four within his firm headed by Mr Sharif, all of whom had prior experience in working in a number of terrorism cases, carried out the necessary groundwork. The content of his letter indicates that he has made some enquires of his team in the light of the grounds of appeal prepared by Mr Bott.

145. What Mr Meyer appears to have gleaned from members of his team is that the decision not to give evidence was uncontroversial, and that Farooqi understood the implications of not going into the witness box. The reality was that Farooqi did not want to give evidence and had made it clear that he was not prepared to give names and details of individuals referred to in the transcripts or in a diary recovered. He was acutely aware that in one important respect his explanation would conflict with that of his son. He had not coped well with testing questions put to him in conference, and there were concerns that the jury would find him evasive or unable to give an innocent account. These were reasons underlying the view of the legal advisers as to why Farooqi would not benefit from giving evidence, and this advice was communicated to him. According to Mr Meyer, Farooqi agreed with the advice.

146. It is unsatisfactory that we should receive this information from someone who had not been at the trial and did not have day to day involvement in the necessary decisions. However, Mr Meyer must have received his information from some source within his firm closely connected with the trial, and it is, if anything, unfavourable to the case now advanced by Farooqi; it certainly cannot advance his case in any way and serves to confirm the view we have taken.

147. By way of footnote we record that Mr Bott was critical of the fact that the visits log shows that on and after 22nd August when the judge had to consider whether it was feasible to continue with the trial, there were no visits to Farooqi by any members of his legal team until 31st August. Whatever this may suggest about a failure to observe reasonable standards of client care, this cannot impact on the decision not to give evidence which, as we find, had been taken before the end of July and was ratified on 1st August. As we have observed, that decision was taken in the expectation that the case would go to the jury. Accordingly, the developments in mid-August after Mr

McNulty's speech do not affect that position. The events of 22nd August onwards represent the judge stripping out the offending aspects of Mr McNulty's closing speech so that they were no longer before the jury, and leaving those aspects of Farooqi's case which were properly for consideration to the jury.

148. Moreover, as, again, we have noted, Farooqi is an intelligent man with a good command of English who had enjoyed a lengthy working relationship with his legal team over many months. He was in court on 22nd August and would have heard and understood the discussions. Had he wished to confer with his legal team, he needed only to ask them to come and see him. Had he wished to complain that he had in some way not made a free and informed decision as to whether to give evidence, there was ample opportunity for him to have done so. The complaint based on Farooqi's failure to give evidence is not sustained.

*The Watson Direction*

149. On behalf of Malik, Mr Bennathan, criticises the use of the *Watson* direction. He does so on two bases. The first submission is that the *Watson* direction should never have been given at all. The second is, that it adversely affects the way in which the jury returned their verdicts.

150. As to the first point, Mr Bennathan did not accept that there was anything objectionable in what Mr McNulty said about the approach that jurors should take. He reinforces this by pointing out that the Crown did not raise objection to this passage during the trial, although they had raised objections to other passages in Mr McNulty's speech. For the reasons we have given, we disagree. The judge was entitled to take the view that Mr McNulty's speech created a danger that the jury would not fully comprehend their responsibility, if possible in accordance with their consciences, to achieve a collective decision. We give much weight to the judge's feel of the case and his concerns that Mr McNulty's address was calculated wrongly to divert the jury.

151. Care must be taken in relation with a *Watson* direction. There are particular dangers in departing from the wording approved by Lord Lane CJ, and difficulties arise if the direction is given in circumstances which appear to put pressure on a jury to agree when they may genuinely be unable to do so in accordance with their oaths. The cases illustrate that problems may arise if the direction is given prior to majority direction, but after the jury has indicated some difficulty in reaching a verdict (see *R v Atlan [2004] EWCA Crim 1798*). It is also well understood that the direction should not normally by given at the same time as a majority direction (see *R v Buono [1992] 95 Cr App R 338*). In this case the judge did not deviate from the approved wording, nor, since it was given on the first day of a summing-up which ran over five days, could it be thought that his direction was associated with some difficulty the jury were expressing in reaching unanimous verdicts.

152. In the circumstances we are wholly unpersuaded that the judge was wrong to give a *Watson* direction. To have ignored his concern that the jury had been invited to take an inappropriate approach to their deliberation would have been a dereliction of his duties. The advice given in the *Watson* direction was precisely apt to cover the situation. In the unusual circumstances of this case, the *Watson* direction was an appropriate way of ensuring that the jury approached their responsibilities on a correct basis.

153. The second limb of Mr Bennathan's submissions is that the use of the *Watson* direction adversely affected Malik's case in relation to the reception of verdicts. Mr Bennathan had submitted to the judge prior to summing-up that Count 8 added nothing to Counts 9 and 10. The judge rejected that submission on the basis that Count 8 could be committed by someone who did not solicit murder. The two types of offence have different ingredients, and guilt of Count 8 might encompass activity falling short of that required for Counts 9 and 10. We agree with the judge's analysis and the way he left the matter to the jury. Counts 9 and 10 alleged soliciting to murder by encouraging the undercover officer to murder another person whilst engaged in Jihad abroad.

154. The *Watson* direction was given on 30th August 2011. The jury retired on the afternoon of 5th September. We have already outlined the sequence of events after the jury's retirement at paragraph 97 above, but we repeat it here. On the afternoon of 8th September the jury indicated that they had reached some verdicts. They convicted the appellants Farooqi and Newton, and acquitted Harris Farooqi. They had not reached unanimous verdicts in Malik's case. The judge sent the jury home for the day and indicated to counsel that he would give a majority verdict direction the following morning.

155. On 9th September, after an hour's deliberation, the jury was brought into court with a view to being given a majority direction. At that time they returned a unanimous verdict against Malik on Count 8. They were given a majority direction on Counts 9 and 10. An hour later they returned and convicted Malik on Counts 9 and 10 unanimously.

156. Mr Bennathan sought to argue that the *Watson* direction may have infected the jury's approach, since at the time of returning a unanimous verdict on Count 8 the jury clearly had not been unanimous in relation to Counts 9 and 10. We reject this argument. First, there was a very substantial time gap between the giving of the *Watson* direction on the first day of the summing-up and the returning of verdicts on Counts 9 and 10, some nine days later. The notion that a necessary corrective direction at the outset of the summing-up as to the general approach a jury should adopt in its deliberations could have improperly affected the result many days later is unsustainable.

157. Moreover, there was, as the judge ruled, a clear difference between Count 8 and Counts 9 and 10, and separate consideration was required in relation to each count.

There is no reason at all why the jury should not have considered and reached verdicts on Count 8 before moving onto the later counts. The order in which the jury considers counts is a matter for it to determine. We can perceive no properly arguable basis for complaint in relation to this second limb of the *Watson* argument.

158. There is no merit in these arguments and we reject them.

*Applications regarding sentence*

159. These applications are made by Farooqi, who was sentenced to a term of life imprisonment with a minimum term of nine years, and by Malik, who was sentenced to imprisonment for public protection with a minimum term of five years.

160. Farooqi seeks to argue that a life sentence was wrong in principle and that the minimum term was manifestly excessive in that the judge should have attached more weight to the fact that there was no evidence that any person radicalised by Farooqi had travelled abroad to fight Jihad. It was also urged that there was no certainty that Farooqi had the means to send anyone abroad to fight.

161. Any offence committed in a terrorist context requires a careful consideration of the danger posed by the offender. Farooqi was an unrepentant offender whom the judge had had an ample opportunity to assess over the course of a lengthy trial. He concluded that Farooqi was a very dangerous extremist who believed that murder of allied troops was an obligation, which he wholeheartedly incited.

162. He had attended terrorist training camps in the past and was familiar with weapons such as rocket launchers and Kalashnikovs. He had travelled to Afghanistan to fight alongside the Taliban in 2001. He was a dedicated recruiter of others, doing all he could to recruit men to fight the Taliban and kill allied troops at a time when he owed allegiance to this country. He had numerous contacts in the terrorist world. He was determined and sophisticated in what he did, and devoted his whole energies to the task of recruiting.

163. These were findings with which we agree and to which the judge was fully entitled to come. A sentence of life imprisonment is appropriate where the culpability of an offender is particularly high, or where the offences are particularly grave, and by their very nature arouse public abhorrence. See *R v Kehoe [2009] 1 Cr App R (S) 9* and *Attorney General's Reference No (43 of 2009) [2010] 1 Cr App R (S) 100.*

164. We are satisfied that Farooqi's offending qualifies for a sentence of life imprisonment. Given the nature of his activities, their aims, and the dedication with which they were pursued we consider that the minimum term was appropriate. Although the judge recognised that Farooqi could claim some mitigatory effect on the basis that nobody had actually gone abroad to fight as a result of his activities and also

that he had no relevant previous convictions, those factors were clearly taken into account by the judge and do not result in any impeachable sentence.

165. Farooqi is substantially out of time in making this application. In view of the lack of merit in it we refuse an extension of time, but in any event this application fails on its merits and is dismissed.

166. Malik complains about the imposition of an IPP and the minimum term of five years imposed. It is argued that that sentence was manifestly excessive given Malik's age (20 at the time of relevant events) and the fact that he was a victim of Count 1 in the sense that he had been radicalised by Farooqi. Moreover, insofar as he had solicited others to murder, that had been carried out under the guidance of Farooqi, who was an older and highly influential person.

167. The judge accepted that Malik had been the victim of Farooqi's radicalisation and that as a result his life had been changed for the worse. The judge noted that whilst serving a period in custody during the currency of the conspiracy, Malik had tried to radicalise others using materials provided by Farooqi. It was clear that after release from that term he was prepared to go and fight abroad in pursuit of Jihad, to die if necessary in so doing, and to encourage others to do so.

168. The effect of radicalisation was that Malik had become a dangerous offender within the meaning of the 2003 Act and was at significant risk of further such offending and causing serious harm to others. The judge was thus obliged to consider steps for public protection. The fact that Malik had become dangerous as a result of Farooqi's activities did not change that stark reality. By the time of sentence it was clear that Malik was still in thrall to Farooqi. The judge correctly considered in the light of *R v C [2009] 1 WLR 2158* whether some less draconian measure than an IPP could be adopted, but in the circumstances felt that only an IPP was appropriate. The judge carefully analysed the position. In our view he was right to conclude that Malik was dangerous and justified in his conclusion that only a sentence of IPP would meet that danger.

169. The minimum term imposed is less than that imposed on Farooqi and properly reflects the judge's view that Malik's culpability was significantly less than that of Farooqi. We see no basis upon which it could properly be argued that either the IPP or the minimum term were manifestly excessive.

170. Having considered the merits and determined that there are none, we dismiss this application. Insofar as any extension of time was required in Malik's case, that too is refused.

171. Accordingly, both applications relating to sentence fail.

*Conclusion*

172. These appeals and applications are accordingly dismissed or refused.