Neutral Citation Number: [2023] EWCA Crim 79

Case No: 201504337 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
HIS HONOUR JUDGE CARR
T20139007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2023

Before :

LORD JUSTICE FULFORD (sitting in retirement)
MR JUSTICE SWEENEY
and
MR JUSTICE BOURNE

- -

Between :

SHOKUT ZUMAN	**Applicant**
- and -	
REGINA	**Respondent**

- -

Brendan Kelly KC for the **Appellant**
Tom Little KC for the **Respondent**

Hearing date: Wednesday 8 June 2022

- -

Approved Judgment

This judgment was handed down remotely at 10am on Monday 6 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Honourable Mr Justice Sweeney:

Introduction

1. On 25 August 2015, at the conclusion of a retrial before HHJ Carr and a jury in the Crown Court at Birmingham, Shokut Zuman (who was then in his early 40s, and was without previous conviction) was convicted by a majority of 10:2 of conspiracy to defraud, which involved 21 mortgage or loan applications that had been made in the period from 2003 to 2010 (Count 1). There were four co-accused, namely Arshid Khan (who was convicted on Count 1); Shahalam Khan (who was convicted on Count 1 and of making false statements with intent to cheat the public revenue (Count 5)); Samiah Hanna (who was convicted on Count 1); and Mohammed Mughal (who was convicted on Count 1, and of three offences of fraud (Counts 2-4)). Zuman (Count 6) and Hanna (Count 7) were each acquitted of making a false statement with intent to defraud the public revenue.

2. On 22 October 2015, in the same Court, the judge imposed the following sentences: Arshid Khan - 5 years' imprisonment; Shahalam Khan - a total of 5 years' imprisonment; Zuman - 4 ½ years' imprisonment; Hanna - 24 months' imprisonment suspended for 24 months; Mughal - a total of 4 ½ years' imprisonment.

3. Arshid Khan, Shahalam Khan, Zuman and Mughal all applied for leave to appeal conviction and sentence. Hanna applied for leave to appeal conviction. The various grounds of appeal against conviction included common themes in their criticism of a ruling made by the judge refusing an abuse of process application, of his alleged failure to review that ruling at the end of the prosecution case, and of the delay between closing speeches and the retirement of the jury, which was caused by a juror's holiday commitment. The Single Judge granted permission for Shahalam Khan to appeal sentence, but refused all the other applications, which were renewed. Thereafter Zuman (who had by then parted company with his trial counsel, Mr Mark Graffius) made additional written submissions and sought to advance supplementary Grounds. Further, as he was then serving his sentence, he applied to attend the hearing of the renewed applications in person and to make oral submissions. Both of those applications were refused by Treacy LJ, who had been assigned to preside at the hearing of the renewed applications and Shahalam Khan's appeal against sentence.

4. The hearing took place before the Full Court, comprising Treacy LJ, Singh J (as he then was) and Her Honour Judge Molyneux MBE, on 30 November 2016. Arshid Khan, Shahalam Khan and Hanna were each represented by their trial counsel. Against the background of the refusal of his application to attend and to address the Court, Zuman was neither present nor represented. Nor was Mughal. Leading counsel for the Respondent attended in order to deal with Shahalam Khan's appeal against sentence, which involved psychiatric evidence on both sides. However, due to a diary mix-up, the Respondent's psychiatrist failed to attend, and so the appeal against sentence was adjourned to another date, and the court thereafter proceeded to hear submissions in relation to the renewed applications. First, as to conviction, from Mr Michael Wolkind QC for Arshid Khan, then from Mr Roderick Johnson QC for Shahalam Khan, then from Mr Gilbert on behalf of Hanna. The Court then invited and received submissions in relation to conviction from Mr Andrew Smith QC on behalf of the Respondent. Mr Johnson replied briefly, after which the Court heard

submissions in relation to sentence from Mr Wolkind and (again at the Court's invitation) Mr Smith. In the result, for the reasons set out in detail in the judgment (see [2016] EWCA Crim 1925 and para 31 below) the Court refused all the renewed applications, rejecting Zuman's additional submissions and supplementary Grounds in the process.

5. Zuman (hereafter "the applicant") now applies, long after the event, to reopen the determination of his renewed application for leave to appeal conviction on Count 1, pursuant to Part 36.15 of the Criminal Procedure Rules which, following the decisions of this Court (differently constituted) in *R v Yasain* [2016] QB 146, and *R v Gohil* [2018] 1 WLR 3697, came into force on 2 April 2018, and provides (in so far as material) that:

> "*(1) This Rule applies where –*
>
> *(a) a party wants the court to reopen a decision which determines an appeal or reference to which this Part applies (including a decision on an application for permission to appeal or refer);*
>
> *(b) the Registrar refers such a decision to the court for the court to consider reopening it.*
>
> *(2) Such a party must –*
>
> *(a) apply in writing for permission to reopen that decision as soon as practicable after becoming aware of the grounds for doing so; and*
>
> *(b) serve the application on the Registrar.*
>
> *(3) The application must –*
>
> *(a) specify the decision that the applicant wants the court to reopen; and*
>
> *(b) explain –*
>
> *(i) why it is necessary for the court to reopen the decision in order to avoid real injustice;*
>
> *(ii) how the circumstances are exceptional and make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality.*
>
> *(iii) why there is no alternative effective remedy among any potentially available. And*
>
> *(iv) any delay in making the application.*

...

(6) The Court must not reopen a decision to which this rule applies unless each other party has had an opportunity to make representations.

[Note. The Court of Appeal has power only in exceptional circumstances to reopen a decision to which this rule applies]"

6. In the revised written application made on behalf of the applicant in March 2022, Mr Brendan Kelly KC submits, in summary, that neither the applicant nor anyone on his behalf was permitted to make oral submissions in support of his renewed application for leave to appeal, whereas the Respondent was represented. There was no rule that prohibited an applicant for leave from being represented or representing themselves before the Court, either in person or via video- link. The applicant's original grounds were not made clear and were not advanced, or not properly argued, by counsel and, as a result, the Court reached conclusions that were improperly considered and wrong. By not being able to make representations, the applicant, who was effectively denied the opportunity to take part, was prejudiced by a procedural irregularity, whereas the Respondent's counsel was able to put his case without contest, even though he was the subject, in part, of one of the applicant's complaints. In addition, the ruling contained errors which the applicant would have cured in the course of argument. In the result, the applicant's absence amounted to a procedural irregularity which gave rise to an unfairness. Circumstances where an individual had been prevented from making additional oral representations in support of a renewed application for leave were exceptional, and in its actual form there was no difference between the renewed application and the initial application by the applicant's then counsel, which had failed. The matter was a procedural error which had rendered the dismissal a nullity, the remedy for which was for the Court to resolve.

7. The application is opposed by the Respondent, on whose behalf Mr Tom Little KC, in his skeleton argument, submits, in summary, that the decision of the Court on 30 November 2016 could not be characterised as a nullity, and that the facts fall well short of the case being such an exceptional one that it is necessary to reopen the application in order to avoid real injustice and where there is no alternative remedy. Both the Single Judge and the full Court considered the detailed written arguments on behalf of, and from, the applicant, and there were no procedural errors or defects that require the renewed application to be reopened. The applicant's original grounds of appeal were the same as those of some of the other applicants who were represented by counsel before the full Court and it is difficult to understand what arguments it is now contended that the applicant could have made which were not set out in writing, and which the applicable statutory provisions prevented him from placing before the Court. The applicant had no right to attend the hearing, and there was no reason for the Court to grant him leave to attend as he had set out in writing all that could be said in support of his application. Thus, the decision of Treacy LJ to refuse the applicant's attendance cannot be regarded as one that he was not entitled to make, given that it was a matter of judicial discretion and judgement. Counsel for the Respondent was only there because of Shahalam Khan's appeal against sentence, and made only limited submissions in relation to the renewed applications. Thus, any argument as to equality of arms is untenable and any argument that the procedure was demonstrably unfair is fatally flawed. Further, given the limited role played by the Respondent's

counsel at the hearing, there was no breach of para 39A.6 of Criminal Practice Direction IX Appeal.

8. We propose to examine matters under the following headings:

(1) Outline factual background.

(2) Legal Framework.

(3) Submissions.

(4) Discussion.

(5) Conclusion.

Outline factual background

9. As touched on above, the prosecution's case at trial was that the conspiracy to defraud lasted from 2003 to 2010 and involved some 21 mortgage or loan applications made, between them, by Arshid Khan, Shahalam Khan, the applicant and Hanna. Each of the applications was said to contain false representations about the income of the applicant, and many were said to have been supported by false documents. Mughal was said to have acted as an intermediary in a number of the applications, to have supported two further applications, and to have made three false applications in relation to his own properties. The prosecution asserted that there were common features shared by many of the applications which reinforced the conclusion that they stemmed from a single conspiracy. It was a notable feature that the alleged conspiracy had not resulted in any actual loss to any of the lenders, but that was no bar in law to the charge of conspiracy to defraud, which was based on the risk of loss.

10. By October 2010 West Midlands Police were investigating the applicant and his family in relation to money laundering offences. On 4 July 2011, on foot of a witness statement dated 1 July 2011, DC Dyas obtained an ex-parte Restraint Order in relation to the applicant. It transpired that the witness statement contained a significant number of misstatements and, in the result, on 20 September 2011, the Order was discharged by agreement.

11. In the meanwhile, the investigation into the instant offences had begun, during the course of which the applicant was interviewed under caution on two occasions – in August 2011 (in relation to HMRC issues, when he produced a prepared statement in which he asserted that any mortgages that he had obtained had been entirely arranged by an independent financial broker, who he did not name at that stage, and that he had left matters entirely to that broker) and in December 2012 (in relation to the relevant false applications etc, when, in the combination of a further prepared statement and his answers to questions, he had named Mohammed Yasin, who had died on October 20011, Ansar Miah and Mughal as being the brokers who he had used).

12. The prosecution relied on the combination of a number of matters to prove the alleged conspiracy, including the following:

(1) A comparison between the relevant defendants' incomes declared to HMRC and those in the mortgage applications.

(2) False documents submitted with the applications.

(3) The transfer of properties between the defendants.

(4) Mortgage and redemption payments made from bank accounts linked to the defendants (often different from the one on the original application documents).

(5) The defendants being listed as landlords on various agreements for many of the properties.

(6) The fact that witnesses described Arshid Khan as being knowledgeable as to how mortgages worked.

(7) The fact that Mughal had acted as the mortgage broker on a substantial number of the agreements, and had certified copies of many of the false documents.

(8) The fact that purchases were partially funded from other properties that had been purchased during the conspiracy.

(9) Duplication of detail on the mortgage applications.

(10) The fact that the defendants trusted each other with obviously fraudulent material.

(11) False and amended documents recovered from the home of Shahalam Khan.

(12) The fact that there was no apparent involvement of Mohammed Yasin in the various mortgage applications.

13. The applicant accepted that the income stated in the relevant mortgage applications was false, and that false documents had been used in support of the applications. His case was that he had sought to build a portfolio of buy to let properties and had engaged the services of Mohammed Yasin as a financial adviser and that Yasin had been assisted by others including by a man called Ansar Miah and by Mughal. The applicant's case was that, at the material times, he had had difficulty in reading, and had relied on others to collate the material for the relevant applications. Acting on the advice of Yasin he had involved his brother, and some of the co-accused, to hold property in trust for him. Yasin had been responsible for obtaining the mortgages through his own contacts. The applicant relied on a handwriting expert in support of his case, and asserted that Yasin and others had been responsible for the false income statements and false documents used for each application, and had done so in order to obtain their fees.

14. In general terms, the defence of each of the other defendants was to deny that they had been party to any criminal agreement, or involved in the provision of false

documents to mortgage lenders. They too suggested that the fraudulent acts had been committed by mortgage brokers – in particular by Mohammed Yasin.

15. The first trial began on 7 October 2014, but was aborted on 22 December 2014, when Shahalam Khan dispensed with the services of his counsel and the judge ultimately concluded that the trial could not go on with him being unrepresented.

16. In a Skeleton Argument dated 26 February 2015 Mr Graffius, on the applicant's behalf, submitted that:

> "1. Following the first aborted trial in this matter and from the on-going disclosure that occurred throughout the Crown's case, the Defence for Shokut Zuman contends that the officers responsible for the investigation of this case, namely DC Pye and DC Dyas:
>
> - Have not properly investigated Mohammed Yasin or Ansar Miah.
> - Have not properly investigated the brokers who arranged the mortgages in this case.
> - Have deliberately concealed relevant evidence that would assist the defence.
>
> 2. It is axiomatic that officers investigating a case should do so independently and without malice.
>
> 3. Where officers have deliberately not investigated reasonable lines of enquiry that point away from the suspect (in breach of CPIA 1996 Code of Practice para 3.5) and deliberately concealed evidence that would significantly support a defence set out in interview, the integrity of the Prosecution's case is so undermined that the proceedings should be stayed.
>
> 4. This is not a case where the trial process is equipped to deal with the matters complained of. The prejudice to the defendant, by a lack of proper investigation and the deliberate withholding of evidence that would assist the defence, cannot be regulated by the admissibility of evidence or by direction from the court."

17. In the Skeleton Argument, Mr Graffius went on to particularise, amongst other things:

(1) The misstatements in DC Dyas's witness statement dated 1 July 2011.

(2) The consequent complaints made by the applicant, and the refusal of the police to investigate them as the matter was sub judice.

(3) The alleged shortcomings in relation to the investigation of Yasin and Miah.

(4) The alleged concealment from the defence of Miah's direct involvement, in that his address was the source of eight utility bills used in the fraud – although it was specifically accepted that Leading Counsel for the Prosecution had been unaware

of that fact when, in Opening, he had linked that address to the applicant, Shahalam Khan and Hanna.

18. The Skeleton Argument concluded as follows:

> "64. The Defence contends that from the point of discharge of the Restraint Application against Mr Zuman, and his complaint against the officers in this case, the investigation has proceeded with bad faith against Mr Zuman.
>
> 65. The bad faith is epitomised in the deliberate withholding of the evidence from the defence of Ansar Miah's involvement with the eight forged documents used to obtain mortgages.
>
> 66. That bad faith continues with a clear reluctance to pursue reasonable lines of enquiry that would support the defence case of innocent involvement.
>
> 67. That bad faith must, we submit, wholly undermine the probity of the Crown's case.
>
> 68. Once the very integrity of the investigation is compromised the trial process cannot cure it. The court cannot regulate the unfairness to the defendant by refusing to admit evidence or with directions to the jury.
>
> 69. It is for the above reason that the defence submit that these proceedings should be stayed."

19. These arguments were pursued at a contested hearing, during which the judge heard evidence from the relevant officers. In the result, the judge ruled against the application, handing down his reasons after the conclusion of the prosecution case at the retrial, which commenced on 18 May 2015. In short, the judge concluded that there had been failings by the officers, in some part amounting to ineptitude but falling short of bad faith or a deliberate desire to mislead, and that the trial process could deal fairly with the matters that had emerged by reason of disclosure made, both in relation to Yasin and Miah. In addition, the defence could call Miah if they wished to, and prosecution witnesses could be asked questions about Yasin. The points in relation to the officers could be ventilated before the jury, and he could not identify any prejudice that would be caused to the defendants.

20. The applicant did not give evidence at the retrial.

21. A juror had notified a holiday date at the start of the trial. At that stage it was believed that by that date the trial would be over. However, for various reasons, the trial took longer than anticipated and it became clear that the holiday was going to commence just after the conclusion of speeches. The judge refused a defence application that the juror should be discharged, saying that there was no good reason for such a course. After a break of a little over a week, the judge gave a detailed summing up (the only Ground of Appeal in relation to which was pursued on behalf of Hanna, but was ultimately abandoned).

22. As we have indicated, the applicant and four others were convicted. In passing sentence the judge remarked that the applicant had played a leading role, in that he, Arshid Khan and Shahalam Khan had been at the heart of the fraudulent activity. The applicant's previous good character and other mitigating factors were taken into account in relation to his sentence. POCA proceedings were commenced, also before HHJ Carr.

23. On the applicant's behalf, it is underlined that in 2014 / 2015 there were a total of 9 emails from the applicant and other defendants to their respective counsel instructing them to make an application to the judge to recuse himself, but that no such application was made.

24. In September 2015 Mr Graffius settled Grounds of Appeal against conviction and sentence on the applicant's behalf. As to conviction, it was asserted that:

    (1) The judge erred in failing to stay the proceedings as an Abuse of Process. In particular he failed to:

        a. Properly consider evidence that officers had deliberately concealed evidence that would assist the defence.

        b. Properly consider the lack of investigation in respect of Mohammed Yasin and Ansar Miah and other brokers who arranged mortgages and bridging loans in this case.

    It was further submitted that the jury was not the tribunal to determine whether or not the officers' actions threatened the integrity of the criminal justice system.

    (2) The judge erred in not reconsidering the issue at the close of the prosecution case after further failings in the disclosure process had been identified.

    (3) The judge erred in allowing an adjournment of one week for a juror to attend a pre-booked holiday following a ten week trial and defence speeches. It is submitted that a fourteen day delay between defence speeches and the jury retiring was too long to ensure that the arguments and detailed evidence referred to in those speeches were properly addressed.

25. In October 2015 a Restraint Order was obtained in relation to the applicant in connection with the ongoing POCA proceedings.

26. As indicated in para 3 above, Arshid Khan, Shahalam Khan, and Mughal also applied for leave to appeal conviction and sentence, and Hanna applied for leave to appeal conviction. In late February / early March 2016 the Single Judge gave leave in relation to Shahalam Khan's sentence application, but refused all the other applications, which were renewed to the Full Court.

27. On 4 July 2016 the applicant wrote to the Registrar stating that his counsel had withdrawn, that he wished to represent himself and that he wished to rely on the existing and further Grounds of Appeal. Thereafter the applicant wrote to the

Registrar on a number of occasions to confirm that he wished to represent himself, and requesting that he be able to attend the hearing of the renewed application. On 8 November 2016 he lodged Grounds of Appeal of his own composition, to the following effect:

(1) He had acted honourably throughout, whereas a number of the investigating officers (Dyas, Bannister and Pye) had conspired together with prosecuting counsel (Mr Smith and his junior) against the applicant. The Court should consider all the correspondence sent by the applicant, which had hitherto been ignored.

(2) Particular complaint was made in relation to the following factors:

(a) DC Dyas had fabricated evidence in the application to obtain a Restraint Order and in an attempt to mislead the Court.

(b) The failure of Chief Constable Simms to investigate the applicant's complaints about the unlawful actions of the officers over which he held a supervisory role.

(c) The fact that, motivated by jealousy and racism, the investigating officers had fabricated evidence, thereby committing criminal offences – in particular misconduct in public office and obtaining property by deception, – and were motivated by financial gain. They had acted in bad faith, their actions tended to undermine public confidence and they should be investigated.

(d) The fact that submissions about his property portfolio, his contribution to society and his finances were not drawn to the attention of the jury.

(e) The size of the legal fees obtained by counsel and solicitors acting for the applicant and his co-accused.

(f) The fact that prosecuting counsel had acted contrary to their duty in failing to disclose material that would have assisted the applicant and misled the judge.

(g) Mortgage fraud committed by the banking institutions, dishonesty and mis-selling by mortgage brokers, and the level of profits made by the finance industry were not drawn to the attention of the jury.

(h) The officers had acted unlawfully by interfering in the valid contractual agreements between the applicant and the lenders.

(i) DC Pye and DC Dyas had failed in their duty to investigate the mortgage brokers whose actions were fundamental to the deception – and they had fabricated evidence and (together with prosecution counsel) had failed to disclose significant evidence.

(j) The judge had erred in rejecting the submissions on abuse of process, and the applicant's counsel had failed to challenge the judge over errors in his written judgment.

(k) The judge had failed to act in accordance with his judicial oath.

28. The prosecution lodged a detailed Respondent's Notice.

29. On about 22 November 2016 Treacy LJ refused the applicant's request to attend the hearing, and thereafter the Registrar notified the applicant of that decision. There is no record of the reasons.

30. In paragraph 4 above we have recorded the fact that the hearing of the renewed applications took place on 30 November 2016, the constitution of the Court, details of counsel who appeared, and the order of the submissions that were made. The transcript of the proceedings shows, in summary, that:

(1) After the sentence appeal of Shahalam Khan had been adjourned, Mr Wolkind (on behalf of Arshid Khan) reminded the Court that the applicant was neither represented nor present, but had made submissions to the Court in writing, and stated that, at trial, counsel then instructed for the applicant had led the submissions in relation to abuse and that he had "rather followed"; that his own detailed submissions in support of the abuse ground were before the Court in writing and were relied on by him; but that he had to acknowledge that appeals in relation to abuse of process rulings of the type involved in the instant case rarely succeeded, and interference with a judge's assessment of the situation were even rarer. He continued that, even if the judge had been right in his initial ruling in relation to abuse, matters had become apparent during the prosecution evidence (e.g. forgery in relation to one of the brokers) such that the ruling should have been changed. Mr Wolkind further submitted that the delay after speeches was too long, and relied on his written submissions in that regard as well.

(2) Mr Johnson (on behalf of Shahalam Khan) also relied on his written submissions in relation to the abuse Ground. In addition he emphasised that, at one point in the ruling, the judge had said that the prosecution would not have called the relevant officers had Leading Counsel for the Crown not formed the view that they were witnesses of truth, and that the judge had been too much influenced by that, which had been a telling factor in his assessment of the witnesses' credibility, along with his perception of the views of the CPS and of the officers' supervising officers.

(3) Mr Gilbert (on behalf of Hanna) adopted the general arguments in relation to the abuse of process and delay after speeches Grounds. When starting to deal with a Ground that was discrete to Hanna he referred to the fact that Mr Smith (Leading Counsel for the Respondent) "happens to be in Court".

(4) Treacy LJ then addressed Mr Smith, saying: "…..we will just hear from you on conviction matters, just take them as they have been gone through. Abuse?". Mr Smith confirmed that the Court had the Respondent's Notice,

and then submitted "in short form" that the judge's approach to both the receipt of oral evidence and argument, and his subsequent analysis, had been accurate and sustained the conclusion that he had carefully reached in writing, having applied the familiar legal tests. When asked to deal with the submission that the judge should have revisited the issue, Mr Smith pointed out that he had dealt with that in writing, to the extent that he had observed that there had been no renewal of the application by any of the accused. He further pointed out that the judge had delivered his abuse judgment late in the trial, and submitted that, absent any renewal of the application, there was no derogation from a fair trial. When asked by the Court whether there had been any submissions of no case during the trial, Mr Smith indicated that there had been submissions on behalf of the applicant and Hanna [on Counts 6 & 7]. When asked by the Court, Mr Smith indicated that DC Pye (the Officer in the Case) had given evidence measured in hours during the abuse hearing, and evidence measured in days during the trial itself. Mr Smith then moved on to the delay after speeches Ground, pointing out that he had dealt with it in writing and that the Prosecution's headline position was that, given the format adopted by the judge, and the content of the summing up, there was no resultant prejudice. At the Court's invitation, Mr Smith then dealt briefly with other grounds not relating to the applicant. It is, in our view, clear that Mr Smith's submissions did not, in any significant way, go beyond the content of the Respondent's Notice in relation to the applicant.

(5) During the course of his submissions in relation to sentence, Mr Wolkind asserted that Arshid Khan had not been cast as a ringleader, and had been dwarfed by the presence of the applicant.

(6) The Court invited any observations of principle from Mr Smith in relation to sentence and he indicated that the judge had not accepted the prosecution's suggested approach to the issue of risk of loss. Further, when asked by the Court, Mr Smith said that the prosecution did not agree with the assertion that Arshid Khan had been "dwarfed" by the applicant, albeit that there was a distinction in some of the factual evidence that underlay their respective involvements.

31. As indicated above, the judgment of the Court, which was given by Treacy LJ, can be found at [2016] EWCA Crim 1925. In short, after introducing the case, Treacy LJ :

(1) Summarised the respective cases at trial (paras 6-15).

(2) Summarised the judge's ruling on abuse of process and the criticisms made of it (paras 16-25).

(3) Concluded (at paras 26 & 27) that:

"*In our judgment this was a careful analysis of the abuse issue. An asserted error in approach was identified by the applicants in the suggestion that the judge relied on the views of prosecuting counsel and/or of the Crown Prosecution Service on the issue of the integrity of the police. Having read the whole of the judge's reasoning, we are clear that, whilst he referred to*

those matters, he in fact formed his own independent view. In our judgment, that criticism is not made out. The judge examined the evidence and the history of the matter to see whether he could detect prejudice to the defence of a nature which could not be addressed during the trial process, and he had considered the issue of whether the trial should be stopped for executive misconduct.

We can find no flaw in his reasoning. In essence the matters raised with us, particularly as to the judge's view of the inept police officer or the extent of enquiries carried out, fell well within the margin of appreciation with which this court will not interfere."

(4) Considered the revisiting issue, and concluded (at para 29):

"*In the circumstances, we are unpersuaded that the further point as to failure to revisit adds anything to the challenge to the judge's initial decision. In relation to that decision, we are of the view that there is no arguable ground. The ruling made is not sensibly open to criticism."*

(5) Summarised (at paras 30 & 31) the issues in relation to the juror with a pre-booked holiday and concluded (at para 32):

"*Notwithstanding the submissions made to us, we are unpersuaded that there is anything in them. This was quintessentially a case management decision. There were good grounds for the course that the judge took. Once the trial resumed the judge was able to remind the jury of the evidence and the issues in the course of the detailed summing up. This point is not arguable."*

(6) Concluded, as to the further matters advanced by the applicant himself (at paras 42 & 43):

"Finally, in relation to Zuman, who is not before the court today represented by counsel, he has submitted various substantial self-created grounds in addition to written grounds put forward by his counsel. We have considered all of the documentation in his case. Those put forward by Zuman personally raise wide-ranging allegations of malpractice by the police at various levels and also by prosecuting counsel. Those documents range over matters which do no more than raise irrelevancies, such as the fees paid to counsel (both prosecuting and defending). Or which cover matters which are much better dealt with in Zuman's counsel's own written submissions. In addition, Zuman's contributions go over matters which were, or which might have been, raised at trial.
We have considered the documents submitted by Mr Zuman personally during the appeal process as well as those submitted by counsel. We do not find them to be of any assistance. There is no basis for granting leave in the light of their contents".

(7) Analysed and dismissed all the applications in relation to sentence (at paras 46-61).

32. In the meanwhile, various procedural steps had taken place in the POCA proceedings. In January / February 2016 the applicant had produced a section 18 Statement of Information, and made a further statement in which he disputed his conviction and the existence of any basis for POCA proceedings. The Prosecution section 16 statement had been made in February 2016, and was responded to by the applicant in March 2016 – though largely by way of attempting to revisit matters relevant to the trial, and by making unsubstantiated allegations of incompetence and bad faith in relation to most, if not all, of those involved in the investigation and prosecution. In June 2016 the applicant, who had by then dispensed with his lawyers, had served a "Notice of Discharge", in which he again made very serious unsubstantiated allegations against a number of people involved in the prosecution of the trial and the POCA proceedings.

33. In January 2017 the Prosecution served an Opening Note in the POCA proceedings, and in May 2017 the applicant served a document entitled "Opening note for Conspirators Hearing" – the "conspirators" being those who had brought the defendants to justice.

34. In the summer of 2017 there was a three day POCA hearing before HHJ Carr in relation to the applicant and Arshid Khan (who was also unrepresented). Thereafter, in September 2017, the Prosecution served its closing submissions in writing. The following month, the applicant responded in a document entitled "Notice of Request to Cease Harassment, Persecution and Abuse of Process with Malicious Intent in Order to Avoid a Serious Injustice". The judge gave judgment on 4 January 2018. In the result, he made a Confiscation Order against Arshid Khan in the sum of £8,010, 811.05, with three months to pay, and a default term of 10 years; and a Confiscation Order against the applicant in the sum of £4,058, 852.02, with three months to pay, and a default term of 9 years. The following month, the applicant submitted grounds of appeal against the POCA findings.

35. By April 2018 the prosecution had commenced an application before HHJ Carr for a Serious Crime Prevention Order to be made against the applicant who, by then, was represented (as now) by Mr Kelly. On 30 April 2018 an application was served on behalf of the applicant inviting the judge to recuse himself – based on matters relating to the trial; the obtaining of the Restraining Order in October 2015; the POCA proceedings; and the terms of the conclusion of the POCA judgment. At that stage, the judge declined to recuse himself.

36. In June 2018 the Single Judge refused permission to appeal in relation to the Confiscation Orders made against the applicant and Arshid Khan.

37. In May 2019 HHJ Carr recused himself in relation to the application for a Serious Crime Prevention Order. However, he gave no reason(s) for doing so.

38. In February 2020 the applicant (again represented by Mr Kelly) and Arshid Khan (now represented by Mr Farrell QC) renewed their applications for leave to appeal against the Confiscation Orders to the Full Court (differently constituted), which adjourned the applications in order for perfected Grounds to be submitted, which was duly done. Zuman's Ground 1 (which was similar to Arshid Khan's Ground 1) was to the effect that the hearing was defective procedurally, and thus unfair. The

applicant's Grounds 2-4 asserted that the reasoning behind his Confiscation Order was flawed in various respects.

39. The renewed applications came before the Full Court (differently constituted) at the end of September 2020. Arshid Khan was given permission to appeal limited to two Grounds, namely an alleged failure to deduct costs of sale, and an alleged error in the treatment of the properties that had been re-mortgaged during the indictment period (Grounds 2 & 6). The applicant was refused permission on all his own Grounds, but was granted permission to amend his Grounds to include a Ground similar to Arshid Khan's Ground 2.

40. At another hearing before the Full Court (differently constituted) in December 2020, directions were given for Arshid Khan and the applicant to finalise and lodge the submissions that they wished to make, and for the Prosecution to respond. In the result, on behalf of the applicant, Mr Kelly submitted that he wished to revisit the decision of the Full Court to refuse permission on Ground 1 – i.e. that the POCA hearing had been procedurally unfair and should be set aside.

41. The hearing took place (before Stuart-Smith LJ, McGowan J and Sir Alan Wilkie) in February 2021. Judgment was handed down on 19 March 2021 – see [2021] EWCA Crim 399. In short, the Court observed that Arshid Khan and the applicant both considered that confiscation of their property was unfair in circumstances where the lenders had raised no complaint and had suffered no loss, even after being informed of the unlawful obtaining of the tainted mortgage advances, and that that perception had coloured their attitude and approach markedly and greatly to their disadvantage. The Court then analysed the principles in relation to reopening appeals (which we address below) and the particular facts in relation to the POCA hearings at first instance, and stated (at para 79) that:

> "…. *What is exceptional about this case, in our judgment, is that the judge ultimately recused himself. As he did not give reasons for his decisions we do not know what they were. What we do know is that the application had been made on four Grounds of which one was the judge's conduct of the POCA hearing."*

42. At paras 100 & 101, the Court continued:

> "…. *While we rely upon our assessment of the materials we have had to consider, we are significantly influenced in our assessment that this case is exceptional by the prosecution's (entirely proper) concession that, if we were to be satisfied that there was evidence that the available means were significantly less than the calculated benefit (which we are), we should remit the case to the Crown Court.*
> *In our judgment the Crown's concession justifies the conclusion that this is an exceptional case, which in turn justifies reopening the earlier determination of this issue. We do not consider that it is open to us to settle on the identified assets, as suggested by Mr Evans QC. Rather, we consider that it is necessary to remit the case to the Court below on this ground also."*

43. Thus, the Court quashed the Confiscation Orders made against Arshid Khan and the applicant and remitted the case to the Crown Court for a hearing de novo before a different judge.

44. On 6 April 2021 an application was made on behalf of the applicant to reopen the determination of the Full Court on 30 November 2016, when his renewed application for leave to appeal conviction was refused.

45. Shortly thereafter the application was reviewed by the Criminal Appeal Office, and Directions were given as to the need to perfect the application, in particular in relation to the reason(s) for the long delay. However, through no fault of the applicant, that was not brought to his attention until February / March 2022. A revised application was lodged promptly thereafter.

46. On 11 April 2022 Fulford LJVP directed that the application should be the subject of an oral hearing, with the Respondent attending.

Legal framework

47. Section 22 of the Criminal Appeal Act 1968 provides, in so far as material, that:

> "*(1) Except as provided by this section, an appellant shall be entitled to be present, if he wishes it, on the hearing of his appeal, although he may be in custody.*
>
> *(2) A person in custody shall not be entitled to be present –*
>
> *(a) where his appeal is on some ground involving a question of law alone; or*
>
> *(b) on an application by him for leave to appeal; or*
>
> *(c) on any proceedings preliminary or incidental to an appeal; or*
>
> *(d) where he is in custody in consequence of a verdict of not guilty by reason of insanity, or of a finding of disability;*
>
> *unless the Court of Appeal give him leave to be present."*

48. Part 39.11 of the Criminal Procedure Rules provides that:

> *"A party who is in custody has a right to attend a hearing in public unless–*
>
> *(a) it is a hearing preliminary or incidental to an appeal, including the hearing of an application for permission to appeal;*
>
> *(b) it is the hearing of an appeal, and the court directs that –*
>
> *(i) the appeal involves a question of law alone; and*

(ii) for that reason the appellant has no leave to attend; or

(c) that party is in custody in consequence of –

(i) a verdict of not guilty by reason of insanity; or

(ii) a finding of disability."

49. Section 31 of the Criminal Appeal Act 1968 provides, in so far as material, that:

"*(1) There may be exercised by a single judge in the same manner as by the Court of Appeal, and subject to the same provisions –*

(a) the powers of the Court of Appeal under this part of this Act specified in subsection (2) below;

…

(2) The powers mentioned in subsection (1)(a) above are the following–

...

(c) to allow an appellant to be present at any proceedings …"

["*appellant*" includes a person who has given notice of an application for leave to appeal – see section 51 (1) of the Act].

50. Criminal Practice Direction IX Appeal 39A: Appeals Against Conviction and Sentence – the Provision of Notice to the Prosecution (as amended) provides, in para 39A.1, that when an appeal notice is served, the Registrar will notify the relevant prosecution authority. Para 39A.2 deals with Respondents' Notices. The Practice Direction continues:

"*39A.3 The Registrar of Criminal Appeals will notify the relevant prosecution authority in the event that:*

(a) leave to appeal against conviction or sentence is granted by the single judge; or

(b) the single judge or the Registrar refers an application for leave to appeal against conviction or sentence to the Full Court for determination; or

(c) there is to be a renewed application for leave to appeal against sentence only.

If the prosecution authority has not yet been served with the appeal notice and transcript the registrar will serve these with the notification, and if leave is granted the registrar will also serve the authority with the comments of the single judge.

> *39A.4 The prosecution should notify the registrar without delay if they wish to be represented at the hearing. The prosecution should note that the registrar will not delay listing to await a response from the prosecution as to whether they wish to attend. Prosecutors should note that occasionally, for example, where the single judge fixes a hearing date at short notice, the case may be listed very quickly.*
>
> *39A.5 If the prosecution wishes to be represented at any hearing, the notification should include details of counsel instructed and a time estimate. An application by the prosecution to remove the case from the list for counsel's convenience, or to allow further preparation time, will rarely be granted.*
>
> *39A.6 There may be occasions where the Court of Appeal Criminal Division will grant leave to appeal to an unrepresented applicant, and proceed forthwith with the appeal in the absence of the appellant and counsel. The prosecution should not attend any hearing at which the appellant is unrepresented (Nasteska v The former Yugoslav Republic of Macedonia (Application No.23152/05)). As a court of review, the Court of Appeal Criminal Division would expect the prosecution to have raised any matters of relevance with the sentencing judge in the first instance.*
>
> [Para 39A.7 is concerned with renewed applications for leave to appeal against a sentence imposed for an offence involving a fatality].

51. *Nasteska* (above) involved a series of four trials and appeals. In each of the first three trials the applicant was convicted of abuse of power, and in each instance the Court of Appeal remitted the case for re-hearing. The applicant was convicted again at the fourth trial and sentenced to a suspended prison sentence. In person and through her lawyer, she appealed again on a number of grounds, and requested permission to attend the Court of Appeal. Thereafter, in the absence of the applicant and her lawyer, but in the presence of the public prosecutor, the Court of Appeal dismissed the appeal – referring to the prosecutor's written and oral submissions requesting that the appeal be dismissed. Further, the Court of Appeal stated that the presence of the applicant or her lawyer would not have contributed to establishing the facts. The European Court of Human Rights observed that the principle of equality of arms implies that each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* his or her opponent, and that the principle does not depend on further quantifiable unfairness flowing from a procedural inequality. The Court observed the public prosecutor had attended all four appeals, whereas the applicant had only been summoned to the Court of Appeal once, and had not been summoned to the final session. In the result, the Court concluded that, even if the public prosecutor had not been permitted to make any comments, her presence at the Court of Appeal's private sitting afforded her, if only to outward appearances, an additional opportunity to bolster her opinion in private, without fear of contradiction by the applicant. Thus, the Court concluded, the principle of equality of arms had not been respected, and there had therefore been a breach of Article 6.1 of the Convention.

52. The applicant drew our attention to the decision of this Court (presided over by Lord Lane CJ) in *R v Pinfold* [1988] 2 WLR 635. The offender was convicted of murder and his appeal against conviction was dismissed. Thereafter, he applied for leave to appeal out of time against conviction, on the ground that a fresh point was to be raised. The Court refused the application upon the basis that the Criminal Appeal Act 1968 provided for only one appeal against conviction, and therefore the Court had no jurisdiction to entertain the application. However, the Court acknowledged two possible exceptions - namely, if the appeal had been abandoned and (in exceptional circumstances) the Court treated the abandonment as a nullity; and if the first appeal involved some procedural irregularity which led to injustice to the appellant, such that the Court treated the dismissal as a nullity. We would add that it has since been made clear that a purely technical or administrative slip, whose rectification does not involve reconsideration of the justice of the case, requires no re-hearing and may be remedied by the Court on the papers. Otherwise, subject to its exceptional jurisdiction to reopen a determination of an appeal, the Court is *functus officio* – see *R v Shoker, Lennox and Kuchhadia* [2015] EWCA Crim 1939.

53. The principal authorities in relation to the exceptional jurisdiction to reopen an appeal include *R v Daniel* [1977] QB 364; *R v Yasain* [2016] QB 146; *R v Gohil* [2018] 1 WLR 3697; *R v Rostami* [2018] EWCA Crim 1383; *R v Cunningham and Di Stefano* [2020] 1 WLR 1203; *R v Court* [2021 EWCA Crim 242; *R v Zuman* [2021] EWCA Crim 399 (the application to reopen the applicant's renewed application for leave to appeal the Confiscation Order – see also paras 41-43 above); and *R v Field* [2022] 1 WLR 3495. It suffices to quote in detail from the two most recent cases.

54. In *Zuman* Stuart-Smith LJ, giving the judgment of the Court, said this:

> "*70. For present purposes it is sufficient to cite the comprehensive summary provided by the Court in Gohil at [129] which was cited with approval by the Lord Chief Justice in Cunningham and Di Stefano at [31]:*
>
> *'We venture to pull the threads together as follows:*
>
> *(i) The CACD has jurisdiction to reopen concluded proceedings in two situations. First, in cases of nullity, strictly so-called and distinguished from mere irregularities. Secondly, where the principles of Taylor v Lawrence [2003] QB 528 as adopted in R v Yasain [2016] QB 146 are applicable; thus where the necessary conditions are satisfied. For ease of reference, though not to be interpreted as a statute, the necessary conditions are: the necessity to avoid real injustice; exceptional circumstances which make it appropriate to reopen the appeal; and the absence of any alternative effective remedy. It is to be emphasised that these are almost invariably cumulative requirements, though not necessarily sufficient for the exercise of the discretion, in that the court retains a residual discretion to decline to reopen concluded proceedings even where the necessary conditions are satisfied;*

(ii) Though the principles of Taylor v Lawrence apply in both the Court of Appeal (Civil Division) and the CACD, as underlined in R v Yasain the jurisdiction need not necessarily be exercised in the same way, bearing in mind both the triangulation of interests in criminal proceedings (the state, the defendant and the complainant / victim) and the general availability of the CCRC to remedy the injustice of wrongful convictions;

(iii) In exercising the jurisdiction to reopen concluded proceedings. The test applied by the CACD will be the same, regardless of whether the application is made by the Crown or on behalf of the defendant;

(iv) We respectfully agree with the observation of the court in R v Yasain that the jurisdiction of the CACD to reopen concluded proceedings is probably best confined to "procedural errors". Indeed, at least generally, we see the R v Yasain jurisdiction as directed towards exceptional circumstances involving (as submitted by the Amicus) the correction of clear and undisputed errors "where it is simpler and more expedient for the court itself to reopen the appeal and correct a manifest injustice without the need for further litigation". Such an approach is healthy as it does not altogether exclude room for pragmatism in practice, while confining its scope to appropriately very limited circumstances, where, even if recourse to the CCRC were otherwise available, it would be a wholly unnecessary exercise. As it seems to us, fashioning the jurisdiction in this manner accords with authority, principle, practicality, and policy – not least the great importance of finality in criminal proceedings.

71. The reference to confining the exercise of the jurisdiction to "procedural errors" is not an absolute prohibition on exercising it in other circumstances. We are mindful of the overarching obligation upon the Court to further the Overriding Objective of dealing with criminal cases "justly". However, that does not give any encouragement to re-open the determination of an appeal simply because a later court takes a view of the merits of an appeal that differs from the view taken by the Court that determined it. Without attempting an exhaustive catalogue, "procedural errors" will typically encompass circumstances such as a failure to notify a party of a hearing, or where it can be shown that the determining Court did not have all the information that it should have had when reaching its decision. Beyond such cases we bear in mind the observation of the Lord Chief Justice in Cunningham and Di Stefano at [32]:

> *'We entirely agree with the approach of this court in Yasain and Gohil that, save for decisions that are a nullity, the usual exercise of this jurisdiction is to be confined to correcting "procedural errors" that are clear and undisputed and where*

there is no alternative effective remedy (albeit we do not wish to close the door entirely on exceptional circumstances, when the lack of an alternative effective remedy, or some other reason, may lead the court to reopen a decision in order to avoid a manifest injustice). As Gross LJ observed in Gohil, although the jurisdiction to reopen concluded proceedings has not been removed by the availability of the CCRC, that will almost invariably be the proper route."

72. We highlight the passage in brackets to emphasise that (a) the jurisdiction is not rigorously confined to cases involving procedural errors but (b) it is likely to be confined to exceptional circumstances when the lack of an alternative effective remedy (or some other reason would or might otherwise lead to injustice."

55. In *Field* (above) Dame Victoria Sharp P., giving the judgment of the Court, cited the terms of Part 36.15 of the Criminal Procedure Rules, and continued:

"*38. The underpinning rationale for this rule is, of course, the avoidance of injustice. But that has to be set in the context of the need for finality in judicial decision-making. A legal system would be unworkable if a party, having no further right of appeal under the Rules, could simply seek to open up a final decision, after a hearing where the respective arguments have been presented and debated, on the ground that that party considers the reasoning and outcome wrong and unjust. Moreover, the interests of the losing party are not the only interests to be considered. The wider public interest in the good administration of justice and its finality and the interests of the victim and the victim's family also have to be taken into account: as reflected in the language of the rule.*

39. It is essentially for these reasons that an application to open up a final decision is regarded as an exceptional step. In the context of criminal appeals the position has been discussed in a number of cases. Some antedate Crim PR 36.15; but all authoritatively set out, in consistent terms, the approach required to be adopted and stress that such applications can succeed only in exceptional circumstances.

40. Some instances where a final decision may be reopened involve cases where there has been a fundamental defect in procedure giving rise to real injustice, or where a decision can be treated as equivalent to a nullity: for example, where an applicant has stated a wish to renew an application for leave to appeal against sentence through counsel, but by error counsel is not notified of the hearing date: R v Daniel [1977] QB 364. The position is discussed further in R v Yasain [2016] QB 146.

41. In Gohil [2018] 1 WLR 3697 the position was fully reviewed. It was held, at para 110, that the Court of Appeal (Criminal Division) will not reopen a final determination of an appeal unless (i) it is necessary

to do so in order to avoid real injustice; (ii) the circumstances are exceptional and make it appropriate to reopen the appeal; and (iii) there is no alternative effective remedy. (These criteria, of course, were subsequently reflected in Crim PR r 36.15 [see above]). *The Court went on to hold that there were what might be described as "necessary conditions" for the exercise of the jurisdiction and that, almost invariably, they had to be cumulatively satisfied. The Court further went on to suggest (at para 129) that the jurisdiction was "probably best confined to 'procedural errors' – the court contemplating that such errors were to be "clear and undisputed".*

42. *The courts' reluctance to reopen final determinations is further illustrated by the view taken in R v Hockey [2018] 1 WLR 343. An application, some years after the original decision, to reopen a confiscation order was made on the footing that subsequent appellate authority had showed that the original confiscation order had been made on a misinterpretation of the proper application of the Proceeds of Crime Act 2002. The court refused the application. It emphasised the "very limited" nature of the jurisdiction. It went on to say (at para 14) that the jurisdiction was "absolutely not available" where it was said that the proper construction of the relevant legislation had been misunderstood.*

43. *Finally, it should be added that the exceptional jurisdiction to reopen a final appellate determination perhaps may not necessarily be confined to cases of nullity or of procedural errors, as (with qualification) had been suggested in Gohil. Thus in R v Cunningham (Christopher) [2020] 1 WLR 1203, the court, whilst endorsing the decision in Gohil, stated (at para 32): "we do not wish to close the door entirely on exceptional circumstances, when the lack of an alternative effective remedy, or some other reason, may lead the court to reopen a decision to avoid a manifest injustice…"*

…

48. *It is essential to re-emphasise one point (reflected in the authorities) at the outset. The point is fundamental to the availability and application of Crim PR r 36.15 procedure. That is that the procedure cannot properly be invoked simply as a means of having a second go. Were it otherwise, it would wholly subvert the finality of judicial decisions: hence the need for exceptional circumstances if such an application is to be entertained.*

49. *To assert "real injustice" simply as a result of an adverse outcome on appeal therefore is nothing to the point. Many unsuccessful defendants whose appeals are rejected may say, and some may sincerely believe, that their lack of success is a grave injustice. Likewise, some advocates may choose to think that because their arguments have failed, it must be that they had not been properly understood. But parties and their advocates, with respect, are not*

> *independent or objective, and cannot, as it were, self-certify in that way. And for this purpose it adds nothing, save for the insertion of a few pejorative epithets, to describe a final decision not just as "wrong" or "misconceived" but as "utterly" or "wholly" or "demonstrably" wrong or misconceived.*
>
> ...
>
> *75. We would add, for the future, some more general observations. Parties and practitioners must clearly understand that the jurisdiction conferred by Crim PR r 36.15 is extremely limited and that the jurisdiction can indeed only be exercised in exceptional circumstances. Parties may disagree, even profoundly disagree, with the reasoning and conclusion of an appellate decision. But such disagreement gives no basis whatsoever for an application under this rule. It is inappropriate and wrong to make such an application with the ultimate aim of getting another constitution of the court to reconsider the merits of the appeal, by means of claims of procedural unfairness or of bias which have no sustainable basis. To do so will be an abuse of process. The court will be vigilant to ensure that applications under the rule will be confined to those narrow and exceptional circumstances where the rule is properly to be invoked."*

56. Given the delay in making the instant application, we observe that in *R v AW* [2017] EWCA Crim 819 this Court underlined that where there is unjustified delay in making an application to reopen a decision, the strong public interest in finality may prevail. Finally, in *R v Gohil* (above) it was held that the Court must "*keep in mind the 'end game': what, if any, bearing does the application have on the safety of the conviction*?"

57. We were also referred to *R v James* [2018] EWCA Crim 285 in which (to use Stuart-Smith LJ's words at para 73 of the judgment in *R v Zuman* (above)) "……*the Court gave trenchant advice on the circumstances in which it is appropriate to allow an appellant to advance fresh grounds of appeal before the Full Court: see [14]-[37] and the summary of general principles at [38]."* However, detailed recitation of the principles is not necessary at this stage, as consideration of them will only become necessary if the instant application is successful, and another hearing is therefore required.

Submissions

58. We have summarised the applicant's written application in para 6 above. The factual errors made by the Court in its judgment on 30 November 2016 which, it is asserted, would have been corrected by the applicant if he had been present, are said to concern the following:

    (1) Mr Zuman was not asked about the broker Yasin during the course of his voluntary interview which took place on 16 August 2011. To endorse HHJ Carr's finding against the applicant, that the applicant had failed to mention Yasin's name until a time after his death was ill founded. That first and

voluntary interview was unconnected to the issue of mortgages. The applicant was not asked for the name of any broker nor was any such inquiry made of him. [We have dealt with the interview of the applicant on 16 August 2011 in para 11 above, and observe that this issue was dealt with in the judgment at para 7 (when summarising the Crown's case) and at paras 23 & 24 (when dealing with the judge's abuse ruling)].

(2) Treacy LJ erred in observing that there were a lot of victims. The crime as alleged did not bear that characteristic. The 'victims' as described had shown little interest in pursuing the prosecution any further and sustained no loss. Their successors in title of the various mortgaged properties, another 'subprime' lender, were content for all unlawfully obtained mortgages to continue as the payments were being met without fail. [We observe that this issue was dealt with in the judgment at para 8 (as to absence of loss and it being relied on for the purpose of sentence) and in e.g. paras 46, 47, & 56 (as to sentence)].

(3) Treacy LJ erred in finding as he did as to the effect of the absent CCTV footage of the search of 27 Station Road, Kings Heath on 24 May 2011 upon the safety of the conviction. [We observe that there is, in terms, no such finding in the judgment].

(4) Treacy LJ relied upon the absence of any application to the trial judge that he recuse himself from hearing the matter as support for his finding that the Learned Judge had ensured a fair trial. There were 9 emails (in total in the aborted trial and the re-trial) in 2014 / 2015 which had been provided to various instructing solicitors and barristers from Mr Zuman and his co-accused requesting they apply to HHJ Carr to recuse himself. That issue is now clear, the applicant obtained new representation, the application was made, and it has been granted without any or proper investigation. At the very least, the learned judge, the subject of consistent complaint, conducted himself in a way that gave rise to an appearance of bias. [We have dealt with the 9 emails in para 23 above. We observe that recusal was not a Ground of Appeal, and that recusal (as opposed to revisiting the abuse ruling - see paras 28 & 29) did not feature in the judgment].

59. In his oral submissions, Mr Kelly underlined, amongst other things that:

(1) As made clear in *Nasteska* (see para 51 above) the principle of equality of arms does not depend on further unquantifiable unfairness. Thus, without more, breach of the principle established injustice.

(2) No reason had been given by Treacy LJ for his refusal to permit the applicant to attend the hearing, and he should have suggested to the applicant that someone might appear on his behalf pro bono – particularly against the background that what the applicant had submitted was found to be of no value. In any event, he could have allowed attendance via video link.

(3) Alleged errors or omissions were made by Mr Wolkind during the appeal hearing, and Arshid Khan had made a formal complaint against Mr Wolkind.

(4) The applicant and Mr Graffius had parted ways following an unexpected costs order, and the applicant had enquired about other counsel, but without success.

(5) There were issues, beyond those reflected in the papers that had been submitted, which the applicant wished to raise at the hearing, at which (against the background of alleged mental health difficulties) he was desperate to be heard in relation to an issue which involved years of events.

(6) Mr Wolkind made a (failed) attempt, in relation to sentence, to aggrandise the applicant's role.

(7) Mr Smith should not have been there and (albeit reluctantly and in accordance with the Respondent's Notice) he made submissions.

(8) The heart of the applicant's case was the inequality of arms, the summary nature of the application made by counsel, the appearance of what happened at the hearing, the references to the applicant in a slighting way, and the lack of proper submissions made on behalf of, or by, the applicant.

61. In his oral submissions, Mr Little argued, amongst other things that:

(1) The instant application was to reopen conviction, not sentence.

(2) It was wholly unobjectionable for Mr Smith to be present at the hearing given that he was dealing with Shahalam Khan's appeal against sentence, which involved disputed expert psychiatric evidence.

(3) Equality of arms is a highly fact-sensitive issue, involving two aspects: presence and submissions. *Nateska* was a very different case from the applicant's. The relevant hearing had been held in private (not in public) and the Prosecutor had had the last written and the only oral word (to which the appellant had not been able to respond) – see paras 27 & 28 of the judgment.

(3) Whilst it would have been preferable if Treacy LJ had given reasons for refusing the applicant permission to attend, it was not feasible for Mr Smith to confine his comments to those who were present and represented. However, nothing that he had said went beyond the confines of the Respondent's Notice (which was the Prosecution's last written word on the issues). The last written words in the case were the applicant's voluminous submissions, which Mr Smith did not address. Thus the applicant had not been placed at a significant disadvantage.

Discussion

62. We have summarised the applicant's submissions at paras 6, 58 and 59 above. In essence, the central complaint is that the applicant was not present at the hearing when his renewed application to appeal was considered by the Full Court on 30 November 2016. It is suggested this amounted to a procedural irregularity, on the basis that the court reached wrong and ill-considered conclusions, in part because the

applicant had been denied the opportunity to advance oral submissions. Furthermore, it is contended there was an additional procedural irregularity, in that the prosecuting counsel was present at the hearing and advanced submissions relevant to the applicant's case, thereby undermining the principle of equality of arms. As a result, it is argued that the decision of 30 November 2016 was a nullity.

63. The starting point in considering these submissions is the undoubted absence of any entitlement on the part of an applicant in custody to attend at the hearing of a renewed application for leave to appeal. The domestic statutory provisions provide that the right to be present relates to an appeal and not to an application for leave to appeal (see paras 47-49 above, setting out, *inter alia*, sections 22 and 31 of the Criminal Appeal Act 1968), albeit the court has a discretion to allow this to occur. This statutory regime has been considered by the European Court of Human Rights in *Monell and Morris* v UK (1988) 10 E.H.R.R. 205, in which case the court observed:

> "57. On an application for leave to appeal, the Court of Appeal does not re-hear the case on the facts, and no witnesses are called, even though the grounds of appeal involve questions of fact as opposed to questions of law alone. The issue for decision in such proceedings is whether the applicant has demonstrated the existence of arguable grounds which would justify hearing an appeal. If the grounds pleaded are in law legitimate grounds for appeal and if they merit further argument or consideration, leave will be given; if one or other of these conditions is lacking, leave will be refused.
>
> 58. As the Court held in its *Delcourt* judgment of 12 February 1985, albeit in a different context, as a general principle paragraph 1 of Article 6 requires that a person charged with a criminal offence be entitled to take part in the trial hearing. […] The limited nature of the subsequent issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal appearance of the [applicants] before the Court of Appeal."

64. The obligation, therefore, on applicants acting in person who are in custody is to ensure that in the written materials before the court they have demonstrated the existence of arguable grounds which would justify hearing an appeal. Exceptionally, the single judge or the Full Court may permit the applicant to be present, but that is a matter for the discretion of the court. In virtually every case involving a renewed application for leave to appeal either conviction or sentence before the Full Court (of which there are a significant number), applicants in custody are not present at the hearing, either in person or via a video link.

65. It was self-evidently convenient for the Full Court to deal with the applications for leave to appeal conviction and sentence by Arshid Khan, Shahalam Khan, Mughal and the applicant, and with Hanna's application for leave to appeal conviction, along with the appeal by Shahalam Khan against sentence, in the course of the same hearing, given that they were co-defendants in the same trial. Counsel for the Crown was necessarily present, representing the respondent on Shahalam Khan's sentence appeal, (not least because, as we have already indicated, psychiatric evidence was to be introduced for Shahalam Khan and the Crown). Arshid Khan, Shahalam Khan and Hanna were represented in their applications for leave to appeal against conviction and accordingly it was entirely correct for the respondent to advance submissions in

their cases, at the invitation of the court, as to whether leave should be granted. Put otherwise, there was no arguable infringement of the principle of equality of arms (as described in *Nasteska*) vis-à-vis the position of the three represented applicants.

66. Mr Smith's response to the conviction submissions by the three represented applicants was notably brief. He made it clear to the court that he relied on his written submissions, and he focussed almost entirely on the grounds of appeal advanced by the three represented applicants jointly in their grounds of appeal against conviction (which were, in the three respects that we have identified, shared with the present applicant). He briefly addressed a propensity issue concerning Shahalam Khan and he referred to Hanna's abandonment of one ground of appeal. He did not address any of the materials supplied by the present applicant and he did not touch on the various arguments advanced by the applicant through his counsel or personally.

67. The Criminal Practice Direction in this regard must be applied with appropriate common sense and realism. In the present case, the respondent's counsel was required to be present, and the court was entitled – as it did – to invite Mr Smith to respond to the oral submissions of Mr Wolkind, Mr Johnson and Mr Gilbert on their renewed applications for leave to appeal conviction. Mr Smith did not substantively depart from the written Respondent's Notice, and he focussed on the oral submissions advanced by the three represented applicants. The injunction in the Practice direction at 39A.6 ("*The prosecution should not attend any hearing at which the appellant is unrepresented* […]") should not be interpreted as preventing the prosecution from responding to applications advanced by represented applicants when there is a mix of represented and unrepresented applicants. Care will need to be taken by prosecuting counsel in those circumstances not to stray into issues that are particular to an unrepresented applicant. In the present case that did not happen.

68. It follows that there was no breach of the principle of equality of arms. The applicant was not at a substantial disadvantage vis-à-vis the respondent in the presentation of his case. There was, on analysis, no procedural inequality. It follows that it is not necessary to reopen this final determination in order to avoid a real injustice. Furthermore, these circumstances are not exceptional such as to make it appropriate to reopen the appeal, given that it is by no means unusual for the Court of Appeal (Criminal Division) to deal simultaneously with applications for leave to appeal by former co-defendants, some of whom are represented and some unrepresented on their renewed applications before the Full Court. As we have indicated, in these circumstances the prosecution must be careful to respect the decision in *Nasteska* and the Practice Direction at 39A.6.

69. Finally, we would also observe that, given that the claims made by the applicant against prosecuting counsel were wholly unsubstantiated, it was plainly within the proper exercise of the Court's discretion not to require Mr Smith to withdraw; that there is no arguable merit in the alleged factual errors relied upon; that the delay in bringing this application to reopen has been considerable and that no good reason has been advanced for it; that the court has not been provided with a satisfactory explanation as to why the alternative effective remedy of approaching the Criminal Cases Review Commission has not been relied on (this issue was simply not addressed in Mr Kelly's "Application to re-open oral application for Leave to Appeal

Against Conviction"); and that the application bears the hallmarks of inappropriately trying to have a "second go".

Conclusion

70. The decision of this court on 30 November 2016 was not a nullity and it was not procedurally unfair. The applicant has failed to demonstrate that his case comes within the extremely limited jurisdiction conferred by Criminal Procedure Rule 36.15. We have no hesitation in refusing this application to re-open.