IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202000236/B5

[2021] EWCA Crim 819

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 7 May 2021

LORD JUSTICE POPPLEWELL
MRS JUSTICE TIPPLES DBE
THE RECORDER OF CROYDON
HER HONOUR JUDGE ALICE ROBINSON
(Sitting as a Judge of the CACD)

REGINA
V
OTHMAN LOUANJLI

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MR JOEL BENNATHAN QC appeared on behalf of the Applicant

J U D G M E N T

1. THE RECORDER: The applicant renews his application for leave to appeal against his conviction on 18 September 2019 at Southwark Crown Court of fraud by false representation, contrary to section 1 of the Fraud Act 2006 (count 1) and being concerned in a money laundering arrangement, contrary to section 328 of the Proceeds of Crime Act 2002 (count 2).
2. Leave to appeal was initially sought on three grounds:

1. The judge was wrong to exclude evidence that a solicitor involved in preparing the case had attempted to bribe the police.
2. The judge was wrong to refuse to exclude evidence of messages between the applicant and others in circumstances where the investigators had been unable to examine the source material so as to ensure fairness and proper disclosure.
3. A number of facts and matters leave a general sense of unease that the conviction is unsafe.

3. The renewed grounds no longer pursue ground 3 and instead raise a different argument, namely that the judge was wrong to conclude that he had no jurisdiction to allow the applicant to give evidence via video link. Although this was not the order in which the grounds were dealt with by counsel, we refer to this as the new ground 3.
4. Although the factual background is complicated, the allegations against the applicant fall within a relatively narrow compass and relate to events in November 2011. In essence, it was alleged that the applicant, who was employed by a bank (Liechtensteinische Landesbank, "LLB") dishonestly made false representations to a firm of solicitors and accountants, Notable Services LLP, in relation to €100m which had recently been transferred to one of Notable's client accounts with Barclays Bank in the name of a man named Luis Nobre. It was also alleged that the applicant was concerned in a money laundering arrangement relating to those funds.
5. The €100m belonged to a Swiss company called Allseas Group SA owned by Edward Hereema whose general counsel was Cornelius Kooger. The company was looking for short-term investment opportunities to finance a super vessel capable of transporting complete oil and gas rigs. During 2011, Allseas' directors met with a series of individuals, Paul Sultana and Marek Rejniak to discuss high return investment schemes. Sultana suggested the trading should take place in Malta. A company was set up there, Allseas Group Ltd, of which Hereema and Kooger were directors. Allseas Group Ltd opened an account with the bank of Valetta in Malta and transferred the €100m there.
6. Rejniak also set up a Maltese company, Allied Investment Corporation ("AIC") which was controlled by him. In October 2011 a loan agreement was created between Allseas Group Ltd and AIC, the ostensible purpose of which was that Rejniak would then be able to access the funds quickly when an investment opportunity arose. The €100m was transferred from the Allseas account to AIC's account with the Bank of Valetta which was solely controlled by Rejniak. However the Bank of Valetta was not able to facilitate trading in the sum of €100m. It was therefore necessary for an alternative bank to be found in which the €100m could be traded. Around the same time, Rejniak mentioned a man named Luis Nobre to Kooger as a "Tier 1 trader" which Kooger understood to mean that he had access to key trading platforms. Nobre was a client of Notable and had a client account with them.
7. From mid-2011 the applicant had worked for LLB as a relationship manager in Abu Dhabi. It was common ground that no one from Allseas had met or knew of the

applicant. On 26 May 2011, Nobre had attempted to open a bank account in the name of Larn Limited (a company associated with Nobre) with LLB through their Abu Dhabi branch, but because no funds were credited the account lapsed within a few months. As a result, no KYC (know your customer) checks had been done.

8. On 17 October 2011 the Bank of Valetta sent the €100m in AIC's account to the (defunct) Larn account at LLB who sent the money straight back. On 25 October 2011, the money was sent to another bank and bank in Andorra, who again sent the money straight back. It was common ground that the applicant had known of these two failed a transactions.
9. On 2 November 2011, the €100m was sent by the Bank of Valetta on behalf of AIC to Nobre's account with Notable held at Barclays Bank. In consequence of the money arriving, Notable began due diligence checks. These included a telephone conversation on 3 November 2011 between officers of Notable and the applicant. It was during this conversation that the Crown alleged the applicant made the false representations that:

    He had known Nobre for a long time/that they had a long relationship;
    LLB had successfully completed KYC checks on the source of the €100m;
    LLB was aware that the funds had been sent from themselves to the Bank of Valetta.

10. The Crown's case was that the first two representations were simply untrue and that the third was misleading. The €100m had barely touched the sides at LLB who had immediately rejected it. An affidavit based on that conversation was prepared by Notable and sent to the applicant via email, informing him that he could make alterations. The affidavit was not signed by the applicant but he did send an email on 14 November which stated:

    > "I would like to confirm that Mr Luis Nobre is well-known to the bank and did satisfy to the KYC and due diligence that we did run during his account opening process."

11. Following the due diligence checks, Notable allowed Nobre to give instructions for the release of the monies and some €15m did leave the account. Some of it was used to pay Nobre's debts. €1m was transferred to a company called Renaissance Ltd. This company was owned by a Barclays Capital investment banker, Sebastian Elbied. Renaissance paid €562,000 to the applicant's company Bridge Limited. The Crown's case was that this was the applicant's payment for his services. In support of its case, the Crown relied upon messages and telephone calls between Nobre, the applicant and Elbied obtained from Elbied's employer Barclays.
12. In due course Barclays Bank investigated Nobre and Larn and on 21 November 2011 it made a Suspicious Activity Report and the remaining funds (€84 million) were held in a suspense account. As a result, the Serious Organised Crime Agency made an application to freeze the assets.
13. For a short time after that, Mike Stubbs at solicitors Mishcon de Reya represented both Nobre and Allseas in an attempt to release the money. At that stage Allseas did not believe there had been any fraud. However, on 22 December 2011 the police made an application for a restraint order to the Central Criminal Court. The evidence in support of the application included a table which showed the disbursements that had been made from the Notable account. Hereema's evidence was that at this moment he realised that a

fraud had taken place. Mishcon de Reya ceased to act for Nobre and continued to act for Allseas.

14. In due course Nobre was arrested and charged with a number of money laundering offences relating to Allseas and others. In 2016, Nobre was convicted of acquiring criminal property (the proceeds of the fraud on Allseas) when the sum of €100m was accepted into the Notable Barclays Bank account, and he was convicted of using criminal property in the transfer of €15m transferred from the €100m in the account at Notable. Sultana was also convicted in a separate private prosecution of conspiracy to defraud in relation to his role in the fraud on Allseas.
15. The applicant was interviewed under caution on several occasions in 2014, 2015 and 2016. The applicant did not attend his trial. He was living in Dubai and was too ill to travel to the United Kingdom. However, he was represented at trial by leading and junior counsel. Some consideration was given at trial to whether or not the applicant would give evidence by video link. In the event the judge ruled that he had no jurisdiction to make a video link direction, having regard to the decision of the Court of Appeal in R v Ukpabio [2008] 1 WLR 728. The applicant expressly agreed to the trial proceeding in his absence, signing a two-page document "Informed Consent for Trial in My Absence" setting out his reasons.
16. The Crown's case was that a number of individuals had falsely represented their status to the Allseas Group directors to persuade them to release their €100m on the agreement that the money would be traded to yield a large cumulative return. The applicant had entered into an arrangement which he knew or suspected would facilitate the acquisition of criminal property. He had made false representations to Notable during their KYC compliance in order to assist Nobre to get control of the money. The applicant had received some of these funds via his company (Bridge) from Elbied's company (Renaissance).
17. The applicant's case was that he did not make the representations alleged in the phone call on 3 November. It was not seriously disputed that, if he had made them, they were false. He also maintained that the €100m was not criminal property until it was stolen by Nobre withdrawing some of it from Notable's account, something which the applicant had nothing to do with. Until that moment, he said Allseas and its directors had been complicit in the movement of funds for their own purposes.

Ground 1: Evidence of a bribe

18. On behalf of the applicant, Mr Joel Bennathan QC submitted that Mishcon de Reya and Stubbs were involved in the investigation into the fraudulent activity associated with the €100m and therefore had the ability to influence it. We make clear that any allegations made arise out of unused material in the trial and, as we understand it, they have not been the subject of any prosecution or any disciplinary finding. Initially Mishcon de Reya acted for Nobre and Allseas in attempting to persuade Notable and Barclays to continue allowing access to the funds. When Allseas realised what Nobre had done, Mishcon de Reya continued to act for Allseas alone. Mishcon de Reya acted for the claimant in the civil action against Notable to recover the lost money, they acted for liquidators in an action against Nobre's company and they acted as prosecuting solicitor in the private prosecution against Sultana. Stubbs was involved both before and during these cases. He was responsible for gathering material for all this litigation and also for preparing the

witnesses Hereema and Kooger to make statements to the police investigating these matters. Stubbs had met the applicant in December 2011 when he was still acting for Nobre and told the applicant that everything would be fine.

19. Mishcon de Reya met police officers from the Metropolitan Police Service responsible for investigating the fraud and money laundering allegations in this case on a number of occasions. At one meeting it is said that Stubbs asked the police to lie to Nobre and return his passport in the hope that doing so would lead him to recover other funds from abroad, which funds appeared, to the police at least, as being criminal property in any event and in return offered to make a donation to a police charity. It was also claimed that a man called Gow with CIA contacts could arrange for £1m of those monies to be transferred to the Serious Organised Crime Agency, then the Metropolitan Police Service pension fund. It was submitted that the clients for whom Stubbs acted would have an obvious benefit were Nobre and the applicant convicted; the guilt of Nobre has an obvious link to Notable's potential liability for damages and the allegations against the applicant founded an action against LLB.
20. An application to adduce evidence of the attempted bribe was made at the trial and refused by the judge on the grounds that it was too remote from the issues before the jury. Mr Bennathan submitted that the evidence could and should have been adduced because it was misconduct in the investigation of the offence for the purposes of section 98 of the Criminal Justice Act 2003 and that there was no power to exclude it under section 78 of the Police and Criminal Evidence Act 1984 because it was not prosecution evidence. He submitted that the judge did not describe the legal test he was applying and wrongly took into account what he saw as the risk of satellite litigation.
21. He submitted that the evidence was relevant. Once the jury in the applicant's trial knew that Stubbs was prepared to bribe police to lie to a suspect and bring about an elaborate ruse to seek to recover funds, they would be entitled to view all other aspects of his involvement in the case in a different light. Mr Bennathan gave examples of how he said the bribe evidence could affect the issues before the jury. He submitted that the judge had effectively sought to substitute his own view of the effect which the evidence might have when that was a matter for the jury.
22. On behalf of the Crown in the Respondent's Notice, Mr David Durose QC submitted that the contention that Stubbs was able to influence the evidence to his detriment is without substance or foundation. The key evidence against the applicant came from the witnesses to the telephone conversation on 3 November 2011 when he was said to have made the false representations which had nothing to do with Allseas. Hereema and Kooger had given a detailed account to the police that was supported by hundreds of contemporaneous documents. The only material produced by any witness in the prosecution of the applicant which came from Mishcon de Reya were agreed emails. While Mishcon de Reya had copies on Notable's files, these were not the source of documents used at trial which came directly from Barclays and from Notable. Mr Durose pointed out that the judge had given the defence an opportunity to identify any area of evidence that could have been influenced by the conduct of Stubbs that was not reflected in the contemporaneous documents. No such area was identified.
23. Mr Durose submitted that there was and remains no clear basis as to how the bribe evidence was relevant to any issue in the case. The judge refused to admit the bribe evidence simply because it was irrelevant and therefore inadmissible.

24. We accept the submissions of Mr Durose in the Respondent's Notice. In relation to the evidence of Hereema and Kooger, during argument the judge asked defence counsel to consider overnight,

> "... with a view to identifying material in the evidence of Messrs Kooger and Hereema which goes beyond the many contemporary emails between them and others that have survived and formed part of the paper exhibits in the case. The significance of the contemporary email suggesting that the inner circle of Allseas directors were, in fact, intent on investing this money is that those emails were created way before Mike Stubbs started to advise Mr Kooger and Mr Hereema in December 2011."

25. The next day counsel for the defence was unable to do so, submitting instead that the emails were admittedly incomplete and therefore there may be other emails which point away from an intention to invest.
26. Mr Bennathan's argument would involve inviting the jury to conclude that because Stubbs attempted to bribe police officers into allowing one client (Nobre) to leave the country, that supports an argument that the dishonesty may have caused Stubbs to coach another client (Allseas' witnesses) into giving an inaccurate account where those witnesses gave evidence at the trial and were questioned by reference to contemporaneous documents which did not support that suggestion on the basis that there might be other contemporaneous material which did support the suggestion. In our judgment, that is the worst sort of invitation to the jury to speculate about the existence and contents of other material not before them. As the judge said in his ruling refusing to admit the evidence:

> "It is a measure of pure speculation that other emails had been lost and that those emails may have told a different story".

27. Further, there is no evidence that Stubbs was able to influence any of the written material put before the jury. The Crown obtained the documents about Notable from that firm and their bankers, Barclays, not Mishcon de Reya. Further, as is common ground, the existence and content of the messages supplied by Mishcon de Reya are not in dispute.
28. The basis of the judge's refusal to admit the bribe evidence was that it was not relevant. That is plainly the correct test. The fact that such a judgment to some extent involves evaluating the evidence is inevitable and is not an indication that the judge was usurping the function of the jury. The judge rightly held that there was no evidence that anything said or done by Stubbs had a material impact on the way in which the Allseas witnesses presented their evidence.
29. As to the judge's reference to satellite issues, there is no basis to conclude that the judge thought the bribe evidence was relevant but excluded it because of concern about satellite litigation. Rather, the fact that the bribe evidence was not material was supported by the fact that for the jury to understand it would require the admission of other evidence which had even less relevance.
30. The judge's final conclusion was that the evidence "is far too remote to have any material bearing on an issue in this trial". That was a conclusion which the judge was fully

entitled to reach and this ground of appeal is not arguable.

Ground 2: The Elbied messages

31. Mr Bennathan submitted that a significant part of the case against the applicant was derived from the messages obtained from Elbied's phone which were supplied by Barclays. The phone was taken by Barclays in the context of employment litigation between them and Elbied. The first tranche of 96 messages were supplied to the Crown in response to a production order in 2015. Barclays stated that the phone itself had been returned to factory settings when Elbied's employment with them ceased. Subsequently, further messages were obtained in 2018 pursuant to an International Letter of Request ("ILOR"). These largely duplicated the earlier messages but included some further ones.
32. At trial the defence objected to the admission of the messages pursuant to section 78 of the Police and Criminal Evidence Act 1984. It was common ground that the messages were not complete and Barclays had withheld material on the grounds of legal professional privilege. Mr Bennathan submitted that Barclays had an interest in the employment litigation in messages that would incriminate Elbied. The messages were portrayed by the Crown as sinister because they were taking place around the time Nobre was engaged with Notable, whereas examination of other messages in similar terms might put the messages placed before the jury in a different light. Although the judge told the jury the messages were incomplete, they had also been told not to speculate and so in reality they could not adjust the significance of the messages. The fact that the police could not have access to the device and Barclays' data storage facility deprived the applicant of the safeguards of unused material set out in the Criminal Procedure and Investigations Act 1996.
33. Mr Bennathan emphasised the importance of a rigorous approach to disclosure as required by R v H [2004] 2 AC 134. He also relied upon R (on the application of AL) v SFO [2018] 2 Cr.App.R 13, where the Divisional Court stressed the requirement for prosecuting authorities to fulfil their disclosure obligations. He submitted that the judge should have deployed a mechanism short of staying the proceedings, namely to exclude the evidence.
34. In the Respondent's Notice, Mr Durose submitted that the production order sought all messages between Elbied and a phone number attributed to the applicant. The Crown understood the messages supplied to represent all of those requested. As part of the ILOR process, email traffic held by Barclays was examined for identified key words. The additional messages included many already supplied and many of the remainder were false positives, e.g. they included the word "Dubai" but were irrelevant in their content. He submitted that there is no basis for the suggestion that Barclays were partisan in their selection of the messages supplied to the police and therefore no evidence that they were unreliably obtained.
35. In relation to the argument that the messages were incomplete, Mr Durose submitted that there were many other messages and phone records obtained from Nobre's devices about which no complaint was made and cross-referencing assisted in supporting some of the Elbied material. He also submitted that the applicant would have had access to messages to and from him, that many of them were put to him in interview and it was not suggested that any relevant messages had not been identified. The jury was aware that the dataset was incomplete.

36. In our judgment, for the reasons given in the Respondent's Notice, there is no evidence to support the suggestion of any irregularity by Barclays in the provision of information in response to the production order and ILOR. The messages sought by the production order were provided and there was transparency in the selection of messages provided in response to the ILOR. There is nothing sinister about the failure to provide the device itself, it was a phone belonging to Barclays, supplied to an employee and retained and re-used when Elbied left their employment. The position is a complete contrast to that in AL where the Divisional Court noted that "nothing has been placed before this court to suggest that there is any practical difficulty at all in obtaining the interview records provided there is a will to obtain them, using judicial compulsion if needs be", para 123. Here the Crown had obtained all that it could using judicial compulsion.
37. In his written reasons, the judge addressed the defence submission that it would be unfair to admit the messages. He said that although the messages added to the Crown's case they were far from being the only evidence in the case. As an example, the judge cited the following message sent by Nobre to the applicant on 7 November 2011 (after the 3 November phone call but before the applicant's email on 14 November) obtained from one of Nobre's own phones which stated:

> "Dear Othman, tks for your help. Whatever solution you have from me, need to be made today before 5pm pls!! ... very important on your solution to add: Origins of funds, from trading of bonds from tier 1 banks; fix income, oil; gas and real estate products and services/investments. Tks in advance, Louis."

38. The implication of that message is that Nobre was coaching the applicant to provide evidence of a legitimate source of the funds.
39. In his written reasons for refusing to exclude the messages, the judge concluded:

> "This was a case that was litigated very much on the availability of contemporary records that had the potential to shed light on the motivation of witnesses and suspects at the time when the events could no longer be fresh in their respective memories. This disputed evidence comprised a small, though not unimportant, part of a much wider picture. Admitting it was not in my view going to have such an adverse effect on the fairness of the proceedings that it ought not have been excluded."

40. In our judgment that was a conclusion that cannot be faulted.
41. Further, the jury were specifically told by the judge in summing-up not only that the messages were incomplete but also that "the question is whether there is enough here for you to see the overall picture or if it just too inconclusive or it may be". In other words, the jury were specifically invited by the judge to consider whether the messages were, for that reason, too inconclusive to place any weight on them. That is not at odds with the standard direction not to speculate.
42. There was no unfairness to the applicant in admitting the messages and this provides no basis for arguing that his conviction is unsafe.

43. New ground 3: Evidence by video link
44. Mr Bennathan submitted that on a proper reading of the legislation and the authorities, this court can revisit its decision in Ukpabio that the court had no jurisdiction to direct that the defendant could give evidence by video link. He submitted that in R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, Baroness Hale cast doubt on the correctness of an earlier decision that a defendant could not give evidence via video link: R(S) v Waltham Forest Youth Court [2004] EWHC 715 (Admin). In Ukpabio the court declined to depart from the conclusion in the Waltham Forest case that the statutory scheme precluded any common law power to make live link orders in respect of a defendant's evidence.
45. Mr Bennathan submitted that a close reading of the Camberwell Green case should have led the court in Ukpabio to conclude that the court does have power to order a defendant to give evidence via video link where justice requires it. In support of that submission he prayed in aid Article 6 of the European Convention on Human Rights. The fact that the applicant had agreed to the trial proceeding in his absence does not detract from the fact that his conviction is unsafe in all the circumstances. He was acting on legal advice that the judge would regard himself as bound by Ukpabio and the applicant was placed in an impossible position. Either he agreed to trial in his absence, a violation of Article 6, or he applied for an adjournment of a trial which, by the time it took place, would have involved such a long delay as to be a breach of the right in Article 6 to a hearing within a reasonable time.
46. He submitted that the court was not precluded from revisiting Ukpabio by the decision in Young v Bristol Aeroplane Co [1944] KB 718. The examples given in that case of decisions given *per incuriam* are not closed as Lord Greene MR recognised when he said at page 729:

> "We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts."

47. In the Respondent's Notice, Mr Durose submitted that the Court of Appeal is bound to follow its previous decisions subject to the following exceptions: (1) Where there are two conflicting decisions, one of which the court is bound to decide to follow; (2) Where a previous decision, although not overruled, cannot stand with a subsequent decision of the House of Lords or Supreme Court; (3) Where a previous decision was given *per incuriam*: Young v Bristol Aeroplane Co. This is not a case where there is a subsequent decision of a higher court so exception 2 cannot apply. Nor does this case fall within any of the examples given in Young v Bristol Aeroplane of decisions which are *per incuriam* (the court has acted in ignorance of a statute, a previous decision of its own, or a decision of a higher court).
48. Mr Durose submitted that the court in Ukpabio plainly took into account the Camberwell Green case. In paragraph 13 Latham LJ said in relation to it that:

> "It should be said that the decision under appeal in that case did not raise the issue with which we are concerned, and none of their Lordships with whom Baroness Hale sat adverted to this issue."

49. He submitted that this was plainly correct and the Court of Appeal in Ukpabio was entitled to decline to decide the case in accordance with the brief and carefully nuanced observations made by Baroness Hale in the Camberwell Green case.
50. He went on to refer to the relevant statutory provisions relating to defendants giving evidence via video link and submitted that, in any event, the decision in Ukpabio was correct as to the proper interpretation of the legislation. Further, he submitted that Article 6 did not require that a defendant be permitted to give evidence by any particular means and pointed to the conclusion in the Camberwell Green case that Article 6 was not violated by the "imbalance" in the legislative scheme so far as defendants and witnesses giving evidence by video link is concerned. Further, the applicant participated in the trial by providing instructions to his legal team who he remained in contact with throughout and his account given in several interviews was before the jury.
51. Finally, Mr Durose submitted that the applicant had made an informed choice that the trial should proceed in his absence. He did not apply for an adjournment, nor did he explore any other means by which evidence could be given. On the contrary, his "Informed Consent for Trial in My Absence" document said in terms that the trial should continue even if he is unable to give evidence and he was signing the document in the full knowledge and understanding of what it entails.
52. For reasons which will become apparent, we do not consider that it is necessary to set out the relevant statutory provisions in order to deal with this ground. They would only be material if there were arguable grounds for submitting that Ukpabio was decided *per incuriam*. In our view there are not.
53. The grounds of appeal in Ukpabio were that the judge was wrong to conclude that he had no power to allow the defendant to give evidence via video link and no power to allow the defendant to participate in the trial via video link, paragraph 9. The appeal was dismissed. Therefore, the ratio of the case (on that first ground of appeal) is that the Crown Court have no power to give a direction allowing a defendant to give evidence at trial by video link. That is precisely the issue raised in this application for leave to appeal.
54. The principle in Young v Bristol Aeroplane is important and longstanding. Unless one of the exceptions applies, this court is bound to follow the decision in Ukpabio. There can be no question of the court in Ukpabio having taken the decision in ignorance of the relevant statutory provisions, or a previous decision of its own, or a decision of the House of Lords; indeed that is not the applicant's case. Instead, Mr Bennathan submits that the categories of case which fall within the *per incuriam* principle are not closed. In order to succeed in that submission, the applicant must show that this case is, as described by Lord Greene, one of "the rarest occurrence" which must be dealt with "in accordance with [its] special facts ".
55. In Ukpabio, after identifying the two issues in the case which we have already set out, Latham LJ referred to the Waltham Forest case and the legislation. In particular, he drew attention to the amendments in the Youth Justice and Criminal Evidence Act 1999 made

by the Police and Justice Act 2006 which allow video link directions to be made in respect of child defendants and defendants suffering from a mental disorder. He continued:

> "13. Mr Fleming on behalf of the appellant submits that the decision of the Divisional Court in the *Waltham Forest* case [2004] 2 Cr.App.R 335 is one which we should not follow, bearing in mind in particular that the decision was expressly doubted by Baroness Hale in *R(D) v Camberwell Green Youth Court* [2005] 2 Cr.App.R 1. It should be said that the decision under appeal in that case did not raise the issue with which we are concerned, and none of their Lordships with whom Baroness Hale sat adverted to this issue.
>
> 14. Having considered those submissions we can see no justification for concluding that the special measures provisions in the 1999 Act do not provide the complete statutory scheme by which evidence can be given by video link and which, apart from those statutory provisions, cannot be given by video link. In other words, the provisions are based on the premise that otherwise evidence to a court should be given by a witness present in court subject to such protective measures short of video link which the court considers to be appropriate to provide such protection as is necessary in order to ensure that the witness is able to give evidence properly and fully and in particular without fear. The amendments to the 1999 Act are a recognition of this principle. They would not have been necessary otherwise."

56. In our judgment, two things follow from these passages. First, the Court of Appeal in Ukpabio had well in mind the provisions of the 1999 Act and the amendments to it which enable a video link direction to be given in respect of defendants in certain circumstances. In so far as the legislative landscape had changed, the court concluded that it supported the argument that the legislation provides a complete statutory scheme by which evidence can and cannot be given by video link. Second, its decision was based on the court's view of the proper interpretation of the legislation not on the grounds that it was bound by the Waltham Forest case.
57. So far as the Camberwell Green case is concerned, when developing his submissions orally, Mr Bennathan submitted that the passages from the speeches of Lord Rodger and Baroness Hale at paragraphs 17 and 63 respectively were part of the reasons for the decision that it was not unfair for witnesses to give evidence via video link because of the circumstances in which defendants could also give evidence by video link. However, the issue in that case was whether a decision to refuse a video link direction for a child witness on the grounds that a similar direction could not be made for the child defendants was lawful. That is not the same issue that arose in Ukpabio. Further, Baroness Hale was very careful to say in paragraph 63 that:

> "The point does not arise for decision in this case, and so it would be unwise to express an opinion upon it...
>
> I would therefore prefer to reserve my position on whether the Waltham Forest case was correctly decided. It cannot in any event affect the result of this case."

58. Accordingly, it is important to bear in mind that the Camberwell Green case (1) raised a different issue and the observations of Baroness Hale and Lord Rodger are obiter dicta, (2) Baroness Hale expressly declined to decide the point at issue in this case, and (3) all the dicta were expressed in the context of child defendants. In those circumstances, we do not consider that there is any basis for the submission that the decision in Ukpabio falls within those 'rarest' of cases that are *per incuriam*.
59. As to the residual argument that the failure to allow the applicant to give evidence by video link in this case is a breach of Article 6, in our judgment the applicant's "Informed Consent for Trial in My Absence" document is a complete answer. In this the applicant states:

1. He has discussed the implications of the trial proceeding in his absence at considerable length and in great detail.
2. His legal team is fully instructed in relation to all issues that the applicant regards as important and they consider to be determinative of the outcome.
3. All the points the applicant would wish to canvass may be adequately addressed in cross-examination of prosecution witnesses.
4. The applicant's lawyers have available a mass of material upon which to establish the important points.
5. The applicant wishes the trial to continue in his absence, notwithstanding that it remains uncertain as to when, if at all, he will be able to attend.
6. The applicant is aware that once the trial starts it will proceed to its natural conclusion, whether he attends or not.
7. That will remain the position even if he is unable to give evidence.
8. The applicant has been advised by experienced lawyers and is signing the document in the full knowledge and understanding of what it entails.

60. In those circumstances it is not open to the applicant now to complain that for him to be tried in his absence was unfair. Mr Bennathan has given no example of how the applicant was prejudiced by his failure to attend, other than that he could not give evidence as to what was said in the 3 November 2011 telephone call. However, as the judge said in his written reasons for admitting the Elbied messages, the case was litigated very much on the basis of contemporary records which had the potential to shed light on the motivation of witnesses and suspects at a time when events could no longer be fresh in their memories. Further, in relation to the telephone call of 3 November 2011, apart from denying that the applicant had made the representations alleged, at trial his counsel was unable to put forward any positive alternative case in cross-examination of the witnesses as to what was said in the telephone call. Thus, there is no evidence that the defendant was materially prejudiced by his failure to attend and give evidence at the trial, or that it was unfair for him to be tried in his absence.
61. For all these reasons the renewed application for leave to appeal is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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