IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1687

CASE NO 201903008/B5, 201903010/B5, 202002337/B5 &

202002733/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 21 October 2021

MR JUSTICE SPENCER

THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE MENARY QC
(Sitting as a Judge of the CACD)

REGINA
V
EL MEHDI ZEROUAL

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MR ZEROUAL appeared in person

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J U D G M E N T

1. MR JUSTICE SPENCER: There are four renewed applications before the court following refusal by the single judge.

Overview

2. The applicant Mr El Mehdi Zeroual, now aged 58, appears in person. Although these matters are listed before us as non-counsel applications, we have permitted Mr Zeroual to address us briefly as he had requested. We are grateful for his assistance.
3. The renewed applications all arise from the applicant's conviction for offences of fraud in a prosecution brought by the London Borough of Hammersmith and Fulham ("the council"). The applicant seeks to appeal against conviction and sentence and against the subsequent confiscation order which was made. He also seeks to appeal against the order that he pay a substantial proportion of the prosecution costs of all the proceedings.
4. For the conviction and sentence appeals, he requires very lengthy extensions of time, 209 days in respect of conviction; 173 days in respect of sentence. The single judge refused those extensions, as well as refusing leave. For the confiscation and costs appeals, the single judge granted short extensions of time but refused leave.
5. We have read all the papers in the case, including the applicant's very full and thorough grounds of appeal and his extensive observations on every aspect of the case. We understand his strength of feeling. As the trial judge observed in deciding to suspend the inevitable sentence of imprisonment, the applicant has lost everything as a result of these convictions: his job in the civil service, the prospect of a full civil service pension, his home, a good and continuing relationship with his young children. His mental health has suffered badly; he has been homeless.
6. We have considered the voluminous papers in the case very carefully. We are satisfied that with one exception there is no arguable ground of appeal in relation to conviction, sentence, confiscation or costs.
7. The exception relates to one ground of appeal against conviction which we think raises a properly arguable point of law arising from the judge's directions to the jury. To put that ground of appeal in context, we need to set out briefly the factual background.
8. On 18 December 2018 in the Crown Court at Isleworth the applicant was convicted by the jury of two offences of fraud by failure to disclose information, contrary to section 3 of the Fraud Act 2006. He was acquitted on a third count.
9. On 23 January 2019 he was sentenced by the trial judge, His Honour Judge Denniss to a term of 18 months' imprisonment suspended for a period of 18 months, with a 30-day rehabilitation activity requirement.
10. Following the hearing of the confiscation proceedings on 6 July 2020 before His Honour Judge Denniss, the applicant was ordered to pay a confiscation order in the sum of £89,074 of which £17,500 was to be paid as compensation to the council. The order was to be paid within two months with 12 months' imprisonment in default. The applicant was also ordered to pay £54,584 towards the costs of the prosecution, representing four-fifths of their total costs of all the proceedings. The judge's decisions on confiscation and costs were set out in a reserved written judgment perfected on 14 July 2020.
11. On 7 September 2020 there was a "slip rule" hearing at which an agreed correction was made to the "available amount" under the confiscation order. However, that had no effect on the amount of the confiscation order to be paid which was substantially less than the "available amount".

12. Throughout the criminal proceedings, including the confiscation proceedings, the applicant was represented by solicitors and counsel. One of his complaints is that he was not properly or competently represented. Following waiver of privilege, we have the benefit of the observations of his trial counsel.

The issues at trial

13. The prosecution arose from the applicant's conduct in relation to his tenancy of a flat owned by the council, 7 Elgar Court, Blythe Road, London W14. It was a one-bedroomed flat with separate living room, kitchen and bathroom. The applicant took the tenancy in 1996. The terms of the tenancy included a prohibition on sub-letting of part of the premises without obtaining the council's permission. That prohibition mirrored the statutory term of any secure tenancy, pursuant to section 93 of the Housing Act 1985. There was no prohibition on having lodgers, but a requirement in the tenancy agreement to inform the council when lodgers were taken in.
14. The precise terms of these conditions of his tenancy changed over the years. The latest version introduced in March 2013 provided:

> "2.5 Residence
>
> To occupy the dwelling as his/her principal home ...
>
> ...
>
> 2.7 Sub-letting
>
> To obtain the council's permission before sub-letting or parting with possession of part of the premises.
>
> ...
>
> 2.8 Lodgers
>
> To inform the council in writing when lodgers are taken in."

15. The rationale behind these standard terms of the tenancy, as explained in the prosecution's opening note for the trial, is that if the tenant stops living in the property as their only or principal home they have to tell the council so that the property can be re-allocated to someone else on the council's waiting list. Likewise, if the tenant wishes to sub-let a council property by renting it to someone else, they are under a duty to tell the council and gain their permission. Council tenants are not allowed to sub-let their properties completely, for the obvious reason that council properties are there for those in genuine need of housing, not for people to make money out of by sub-letting to others.

Count 1

16. Count 1 of the indictment alleged that the applicant between 31 May 2014 and 29 April 2016 dishonestly and intending to make a gain for himself or another, failed to disclose to the council information that he was under a legal duty to disclose in relation to his tenancy, "namely that he had sub-let part of the premises at 7 Elgar Court." We note that

the prosecution chose to allege "sub-let" rather than "part with possession of".

17. The prosecution case was that the applicant was well aware of the prohibitions against sub-letting without permission. The prosecution alleged that the difference between sub-letting and having a lodger, as the appellant well knew, is that to have a lodger the tenant has to actually to be living in the property. The prosecution opening note stated that it was common ground that if the applicant did in fact sub-let part of 7 Elgar Court he was under a duty to disclose that to the council, and common ground that no such disclosure was ever made. The issue in count 1, it was said, was whether the prosecution could prove that the applicant did in fact sub-let part of Elgar Court during that two year period, 2014 to 2016.
18. To prove sub-letting the prosecution relied on various strands of evidence.
19. First, between those dates the applicant placed nine adverts on the Gumtree website for the rental of 7 Elgar Court, targeted at overseas visitors. Six different email addresses were used to post the adverts. The adverts provided contact mobile phone numbers which belonged in some cases to the applicant himself and in other cases to his ex-wife. The prosecution case was that the applicant targeted these adverts at overseas visitors and students because they would be less familiar with the rules on letting council properties, and because it would make it much harder for the council to discover what the applicant was doing and trace the sub-tenants. His use of six different email addresses, it was alleged, was an attempt to avoid him being traced. Between October 2014 and February 2016, the applicant posted a further nine adverts relating to 7 Elgar Court on a different website, spareroom.co.uk. The prosecution case was that the scale and content of the advertising suggested that this was sub-letting on a commercial basis. One of the adverts specifically showed a student living in the small bedroom at 7 Elgar Court indicating that the living room was available for separate rental. Each advert was for the rental of the main room in the flat, the living room.
20. Second, the prosecution relied on evidence from or relating to four sub-tenants or lodgers (those terms being used, it seems, interchangeably during the trial) who were living at the flat during this period. One such sub-tenant Mr Xue stayed at 7 Elgar Court from 31 May 2014 and paid the applicant £1,500. Whilst Mr Xue was staying in the flat, a Korean student was living there in the other room. The applicant did not live there. Another sub-tenant Mr Thalmeier stayed at 7 Elgar Court from 27 April to 21 May 2015. The applicant let the property to him for £1,800. There was another person living at the flat when Mr Thalmeier arrived and during the first week he was there.
21. Officers of the council visited 7 Elgar Court on 27 April 2016 and found another sub-tenant living there, Mr Tariq. He said he had been living there for five to six months and paid £750 per month in cash to the applicant. Living in the other room at the flat was another sub-tenant Mr Ahmed who said he had moved in recently and paid £750 in cash to the applicant. Both these sub-tenants confirmed that the applicant did not live at the property. Whilst the council officers were at the flat, Mr Tariq telephoned the applicant in panic. The applicant was overheard to say "Why did you let them in? Tell them you are a lodger."
22. When the council officers returned to the flat later that day the applicant was there himself. He did not allow them in at first. There was a shopping trolley and a dustpan and brush outside. The applicant was agitated and sweating. He said he was tidying up. The prosecution said this was an attempt by the applicant to cover up what he had been

doing and that it provided compelling evidence against him.

23. Third, there was banking evidence which showed that the applicant regularly deposited large amounts of cash, consistent with sub-letting 7 Elgar Court. The applicant at the time was employed as a civil servant in the Department of Communities and Local Government. His salary was paid directly into his bank account. The prosecution case was that the banking evidence provided compelling evidence that the applicant had been sub-letting parts of 7 Elgar Court extensively. An Equifax report obtained by the prosecution traced any debt footprint that had arisen from the occupation of 7 Elgar Court. The report contained many names of people living at the address, mostly Japanese, but Mr Tariq's name also appeared on the list.
24. The defence case on count 1 was that the applicant was living at 7 Elgar Court at all times and was not sub-letting the property. His explanation for the adverts and for the payments of cash into his account was that he was assisting a friend with her rental of a property in Shepherd's Bush. He would pay her £1,000 per month and rent out her flat for her, taking any profit he made from the rental. He said that he used the details of 7 Elgar Court in the internet adverts merely to attract tenants for her flat in Shepherd's Bush. One difficulty with this line of defence was that he had failed to mention this explanation in his interview. He told the jury this was because the interview had lasted a long time and he was exhausted.
25. In the course of his evidence to the jury the applicant asserted that he had always lived at Elgar Court himself. He said Mr Tariq and Mr Ahmed were sharing the bedroom, whilst he himself was living at the flat. He was away from the flat when the council officers visited only because he had been staying elsewhere overnight with a girlfriend. When the officers returned later in the day he was, he said, merely tidying up the flat, not re-converting the lounge. He showed the jury photographs of his children living at the flat, with date stamps on the images throughout the two year period in question. His explanation for the cash deposits into the bank account was that it was money he was receiving in relation to the rental of his friend's flat in Shepherd's Bush and money from his brother who was purchasing a property from the applicant in Morocco. In support of his case, he exhibited invoices from Amazon which gave 7 Elgar Court regularly as his billing address and his delivery address, and evidence from a boiler maintenance team who visited the flat on several occasions when he was there. He called a number of witnesses who had lived in the same block and also a friend, all of whom regularly saw the applicant at Elgar Court.
26. The witness Mr Thalmeier, one of the alleged sub-tenants, was abroad at the time of the trial and unable to attend. The prosecution applied successfully to adduce his witness statement as hearsay under section 116 of the Criminal Justice Act 2003. The prosecution also successfully applied for the evidence of what Mr Tariq and Mr Mohammed told the council officials to be admitted as hearsay evidence. Mr Tariq and Mr Mohammed were also both out of the country. The judge gave a careful ruling on this application. He was satisfied that all reasonable steps had been taken to secure the attendance of these witnesses and that in principle their evidence was therefore admissible. He acknowledged the disadvantage to the defence in not being able to cross-examine the witnesses but balancing this consideration against the value of their evidence, he was satisfied that it was proper to admit this hearsay evidence. For example, the risk that Mr Tariq and Mr Mohammed had fabricated what they had told the

council officers at the flat before phoning the applicant was remote indeed. The judge in his summing-up gave the appropriate directions and warnings about the hearsay evidence and the disadvantage to the defence.

Count 2

27. Count 2 on the indictment alleged an offence of fraud by failing to disclose relevant circumstances in connection with the exercise by the applicant of his right to buy the flat by failing to declare that it was no longer his only or principal home. We need say little more about this charge because the jury acquitted on count 2. There had been an unsuccessful application to dismiss count 2 in advance of the trial which was well and competently argued by the applicant's counsel. The applicant contends that the acquittal on count 2 supported his case on count 1 that he had not sub-let the flat at any time. We shall return to this point.

Count 3

28. Count 3 alleged that between 23 February 2010 and 2 December 2013 the applicant dishonestly and with intent to make a gain for himself failed to disclose to the council information he was under a legal duty to disclose, namely that there was another adult living at 7 Elgar Court, which meant that he was no longer entitled to claim a single person's discount for council tax.
29. This was a completely separate and discrete allegation relating to the period before the alleged illegal sub-letting. During this earlier period the applicant received the benefit of a single person's discount of 25 per cent on his council tax bill amounting to some £880. The applicant admitted in interview that he had not informed the council that during this period his wife was living with him, so in fact he was no longer eligible for the single person's discount.
30. The defence case on count 3 was that the applicant had in fact told someone from the council that his wife lived with him when he wanted to be upgraded from a one-bedroom property. It was contended that this was sufficient notification. He had not realised that it was necessary for him to inform the council tax department specifically. He was not acting dishonesty.

The grounds of appeal

31. The applicant has advanced numerous grounds of appeal in various documents. The original grounds of appeal were dated 12 August 2019. One of the grounds (paragraph 2.4) was that the jury were not provided with any "case law" in relation to count 1, as opposed to count 2, and were misdirected in law. The applicant has expanded upon this ground in later documents, including further well-structured grounds of appeal submitted after the decision of the single judge to refuse the extension of time and to refuse leave. We shall return to this ground.
32. His other grounds of appeal include a challenge to the judge's decision to admit the hearsay evidence and complaints about inadequate legal representation at trial.
33. Because privilege has been waived, we have the benefit of trial counsel's observations on the applicant's grounds of appeal against conviction, together with a copy of counsel's negative advice on appeal. The applicant has annotated each of those documents with very detailed comments of his own criticising and refuting much of what counsel says.
34. We have considered all that material. We have also considered the oral submissions that the applicant has made this morning in support of those additional matters. For example, he has repeated to us and explained a little more about his case at trial in relation to the rental of the property in Shepherd's Bush belonging to a woman of his acquaintance and

how it was that this explained the adverts that he had placed. He told us that he had wanted her called as a witness. We observe that it is clear from what trial counsel has said in her very detailed response to the grounds of appeal that there was a tactical decision reached between counsel and client that it would not be in the applicant's interests to have her called as a witness, not least because she had said something contradictory in a witness statement she had made to the prosecution. We do not accept therefore that there is any substance in that ground of appeal, however strongly the applicant still feels about it.

35. Similarly, the applicant has enlarged upon his concerns about the way in which he was represented and sometimes the way in which his detailed instructions were not followed; he says there was a lack of consultation and discussion about various tactical decisions. Again, we are unable to accept that there is any arguable merit in that ground. In particular we have noted in the papers before us a contemporaneous document from trial counsel which impressed us greatly, containing a series of very detailed requests from trial counsel to the applicant seeking clarification on aspects of his instructions. The applicant, in equally detailed responses, had dealt with counsel's queries. That it seems to us is the clearest indication of very diligent attention by counsel to the factual aspects of the case. We can well understand that with the background not only of these proceedings but also concurrent civil proceedings raising some overlapping issues, it must have been difficult for those representing the applicant, as it was for the applicant himself, to ensure that all matters were covered. But we cannot see that there is any force in the criticism of the general standard and level of representation he received.
36. We therefore repeat that having considered all the material before us, including the applicant's oral submissions, we are unable to accept that there is any arguable ground of appeal save in one respect. In all other respects we agree with and adopt the reasoning and conclusions of the single judge, without repeating those conclusions in this judgment.

The sole arguable ground of appeal

37. The exception is the adequacy of the judge's directions of law on count 1. The initial grounds were fully addressed in a Respondent's Notice dated 16 September 2019. As to the complaint that the judge's directions of law were inadequate in relation to count 1, the Respondent's Notice simply asserts that the prosecution opening set out the relevant facts and law in relation to what had to be proved to establish that the applicant had sub-let part of the property. The Respondent's Notice points out that the judge's written directions of law were agreed with both counsel and that there is no ground for suggesting that the directions were inadequate.
38. In refusing leave to appeal and the necessary extension of time, the single judge addressed comprehensively the applicant's main grounds of appeal. In relation to the complaint about the judge's legal directions, the single judge said this:

> "The judge, who had provided his legal directions to both counsel in advance, correctly directed the jury about the law which applied to each count. Your counsel, rightly, took no issue with his directions."

39. The single judge's decision was given on 24 March 2020. In response, having renewed the application for leave in time, the applicant submitted a cogently argued document

headed "Grounds of Appeal" dated 8 June 2020. It strikes us as an impressive document. When we read it we apprehended that it was drafted by a lawyer, rather than by the applicant himself. The applicant has explained to us in his oral submissions this morning that in fact it was drafted by a member of the Bar acting *pro bono* who volunteered to assist the applicant when the applicant had cause to resort to a food bank with which that volunteer lawyer was associated. That is impressive in itself.

40. The document submitted headed "Grounds of Appeal 8 June 2020" expands on the argument that the jury were inadequately directed on the law and in particular on the difference between a sub-tenant and a lodger.

41. We note that in the applicant's earlier document dated 24 November 2019 headed "Comments on my trial counsel's observations" the applicant set out himself in some detail why he contends that the judge failed to direct the jury adequately on what the prosecution had to prove to establish that the applicant had "sub-let" part of the premises, which was the precise allegation in count 1. The applicant refers in that document to a number of authorities from the law of landlord and tenant in support of the basic proposition that there cannot be a sub-letting of part of the premises unless the sub-tenant has exclusive possession of the part sub-let.

42. The applicant also cites in that document two other authorities on the meaning and scope of a covenant by the tenant not to part with possession of the premises. We have looked at both of those authorities. In Stening v Abrahams [1931] 1 Ch 470, at page 473, Farwell J said:

> "A lessee cannot be said to part with the possession of any part of the premises unless his agreement with his licensee wholly ousts him from the legal possession of that part. If there is anything in the nature of a right to concurrent user there is no parting with possession."

43. In Lam Kee Ying v Lam Shes Tong [1975] AC 247, at page 256, the Privy Council stated:

> "A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises."

44. We note that section 93 of the Housing Act 1985 provides:

> "(1). It is a term of every secure tenancy that the tenant-
>
> (a) may allow any persons to reside as lodgers in the dwelling-house, but
>
> (b) will not, without the written consent of the landlord, sub-let or part with possession of part of the dwelling house."

45. As we have explained, that wording was incorporated into the applicant's tenancy agreement in the March 2013 revision operative at the material date. The prosecution

elected to allege in count 1 that the applicant had failed to disclose that he had "sub-let" part of the premises rather than "parted with possession of" part of the premises. Whether in the context of this case that is of significance or may simply be no more than a distinction without a difference, forms part of our conclusion that it is at least arguable that the judge's directions of law on count 1 were inadequate.

46. More importantly, the applicant contends that although individuals, including the four alleged sub-tenants on whom the prosecution relied, had been allowed into occupation for money consideration, it cannot be said in law that he had "sub-let" part of the premises to any of them in the sense of granting them exclusive possession. He returned to the property regularly himself.
47. In the summing-up the judge gave the jury no direction or assistance as to the legal meaning of the term "sub-let". At page 5E to F he simply said:

> "The prosecution allege that he repeatedly sub-let part of the premises, whether he used the expression 'lodger' or 'paying guest', during the relevant period...".

48. By contrast, but only in the context of count 2 (on which there was an acquittal) the judge told the jury what they would have to be sure of before they could conclude that the defendant had the intention that 7 Elgar Court was not his "principal or only residence", as alleged in that count. He said:

> "You will have to be satisfied so that you are sure that the defendant was not actually living at the flat and that in practical terms both rooms were being used by sub-tenants or lodgers, and that during the indictment period in 2014 to 2016 there were periods when the defendant had no intention of returning to and treating it as his sole or principal home."

49. By their verdict of acquittal on count 2 it would seem that the jury were not sure of that.
50. We note that trial counsel, in her observations on the grounds of appeal following waiver of privilege, asserts that:

> "The Prosecution's case was factually that the [defendant] had vacated the premises while the sub-tenants lived there and the learned judge directed that the jury would need to be sure that he had vacated the premises during the periods of occupation in order to find him guilty of count 1."

51. The reference there to count 1 is erroneous. In fact, as we have just explained, that direction was given only in relation to count 2.
52. The judge appeared to refer later in his summing-up to "lodgers" and "sub-tenants" interchangeably. At page 9E he said:

> "The prosecution further rely on actual evidence from four of the sub-tenants or lodgers."

53. At page 15D to E the judge said:

> "Insofar as the defendant has stated that these people were lodgers, the prosecution submit that despite what he must have known about his obligation, he never in fact declared of any these lodgers' existence and occupation of the premises. The prosecution again submit that it is evidence of sub-letting or having lodgers on a commercial basis."

54. It seems to us to be properly arguable that counsel and the judge never really got to grips with what had to be proved to establish, as a matter of law, that the applicant had sub-let part of the premises in breach of the terms of his tenancy, which was the allegation in count 1. We accept that the gravamen of count 1 was the failure to disclose to the council that he allowed others into occupation of a flat on a commercial basis but count 1 alleged that he was under a legal duty to disclose that he had "sub-let" part of the premises. It is arguable that in law and on the facts there had been no "sub-letting" in breach of the tenancy, having regard to the requirement that the sub-tenant must be afforded exclusive possession for a sub-letting. Arguably the alternative breach of the tenancy by "parting with possession" of part of the premises to a licensee (which was not how it was pleaded in count 1) would not have been made out in law or on the facts either, unless the jury were sure that the applicant did not himself retain possession in law: see Woodfall, Landlord and Tenant, Volume 1 at paragraph 1.023, and Volume 3 at paragraph 25.091.
55. These may, in the end, be found to be technicalities which do not render the conviction on count 1 unsafe, but we are satisfied that it is arguable that the judge should have directed the jury more fully as to what the prosecution had to prove in order to establish that the applicant had sub-let part of the premises in breach of his tenancy agreement.
56. When this point is fully argued before the full court, with submissions from the prosecution, as well as on behalf of the applicant, it may ultimately be that the way in which the trial was conducted and the issues placed before the jury will be found not to render the conviction on count 1 unsafe. Furthermore, even if the full court is persuaded that the safety of the conviction on count 1 is undermined, there will be the further hurdle for the applicant of the lengthy extension of time required.
57. It is because of the additional factor of the extension of time that we shall not ourselves today grant leave to appeal against conviction. Instead, we shall refer to the full court the application for an extension of time and the application for leave to appeal against conviction. We make it clear that we consider that the sole ground which is arguable and on which (but for the extension of time) we would have granted leave, is the adequacy of the judge's direction of law on count 1, in particular in relation to the meaning of "sub-letting". We would not have granted leave on any of the other grounds.
58. In his document "Grounds of Appeal" dated 8 June 2020 the applicant also seeks to advance a further criticism of the judge's direction on count 1. He suggests that the judge failed to direct the jury as to the need for a causal link between the failure to disclose information and the "gain for himself or another" which was caused thereby. We can see nothing in this ground for the reasons explained in the addendum

Respondent's Notice dated 22 July 2021, but as it is part of the overall criticism of the judge's directions of law, we think the applicant should be entitled at least to argue it before the full court.

The sentence appeal

59. Although we can see no merit whatsoever in the grounds of appeal against sentence, or confiscation or costs, those renewed applications will logically have to be considered by the full court in the light of the outcome of the appeal on the single issue we have identified, should leave and the necessary extension of time be granted by the full court for the appeal against conviction.
60. We observe that there appears to us to be no merit whatsoever in the appeal against sentence. The sentence has in fact now been served in full by the applicant and it seems to us that there could be no criticism of the length of the custodial term that was imposed; indeed, it could be said that it was a lenient and compassionate decision to suspend the sentence. We also note that the sum ordered in the confiscation order has in fact been paid by way of deduction from the monies which are restrained in the applicant's bank account, although the costs order has not yet been paid.

Conclusion and directions

61. To summarise our conclusions, we shall grant the applicant a representation order for counsel only. The applicant must liaise with the Registrar over the choice of counsel. The Criminal Appeal Office lawyer, Mr Robert Pryke is in court and will be able to assist. Appointed counsel should, we suggest, be someone with expertise in the law of landlord and tenant, as well as criminal law.
62. We direct that counsel instructed on behalf of the applicant must file and serve by 4.00 pm on 26 November 2021 perfected grounds of appeal confined to the issue on which, but for the necessary extension of time, we would have granted leave. By the same date, the applicant's counsel must serve a skeleton argument. Prosecuting counsel must serve a skeleton argument in reply by 4.00 pm on 17 December 2021. Counsel must between them agree and provide a core bundle of relevant documents and an agreed bundle of authorities. We leave it to the Registrar to set a timetable.
63. The matter should be listed before the full court as early as possible in 2022 with a provisional time estimate of two-and-a-half hours and with estimated reading time of five hours. If counsel disagree with the time estimate for the hearing they must inform the Registrar at the earliest opportunity.
64. A transcript of this judgment, when approved, will be supplied to counsel and of course to the applicant. We have dealt with matters at greater length in this judgment than would be usual in an application for leave which has succeeded in part and will result in a full hearing on a future occasion. We trust however that our analysis, observations and focus on the sole key issue will be of assistance to counsel in addressing that key issue, and thus to the full court.

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