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**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT MANCHESTER**  
**HHJ Leeming QC**  
**T20157290**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/06/2019

**Before :**

**THE PRESIDENT OF THE QUEEN'S BENCH DIVISION**  
**(SIR BRIAN LEVESON)**  
**MR JUSTICE WILLIAM DAVIS**  
and  
**SIR PETER OPENSHAW**

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**Between :**

**Basil Assaf**  
**James Roden**  
**Elliot Hyams**  
**Jaikishen Patel**  
**- and -**  
**The Queen**

**Appellant**

**Respondent**

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**Leonard Smith QC for Basil Assaf**  
**Jeremy Dein QC for James Roden**  
**James Pickup QC for Elliot Hyams**  
**Jim Sturman QC for Jaikishen Patel**  
**Alex Langhorn for the Crown**

Hearing date : 6 June 2019  
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# **Approved Judgment**

## **Mr Justice William Davis :**

### **Introduction**

1. This judgment relates to sentences imposed on four young men who, at the time of their offending, were students at Manchester University. The offences were committed between May 2011 and October 2013. In May 2015 they were sent for trial to the Crown Court at Manchester. The first appearance at the Crown Court was on 12 June 2015. In due course a 14 count indictment was preferred against Basil Assaf, Elliot Hyams, Jaikishen Patel and James Roden together with another man, Joshua Morgan. Counts 1, 2 and 3 charged conspiracies to evade the prohibition on the importation of a controlled drug. Counts 1 and 2 involved MDMA and 2CB respectively, both being Class A drugs. 2CB is a drug similar to MDMA but with hallucinogenic effects when taken in sufficient quantity. The conspiracy charged in Count 3 related to Ketamine, then a Class C drug. Counts 4 and 5 charged conspiracies to evade the prohibition on exportation of Class A controlled drugs, namely the same Class A controlled drugs to which Counts 1 and 2 related. Counts 6, 7, 8 and 10 charged conspiracies to supply Ketamine, MDMA, 2CB and LSD (also a Class A drug), the agreement in each case being to supply to persons in England and Wales. All four young men with whom we are concerned were charged with those conspiracies which were alleged to have run from 31 May 2011 to 3 October 2013. Assaf, Hyams and Roden were also charged on Count 9 with possession of LSD with intent to supply, the period specified in the Count being 1 February 2013 to 3 October 2013. Joshua Morgan, with whose case we are not concerned directly, also appeared on the counts of conspiracy. In due course a count of assisting offences of supplying controlled drugs contrary to Section 46 of the Serious Crime Act 2007 was added to the indictment in his case.
2. Initially the case was listed for trial in September 2016. That date could not be met because of applications made on behalf of Assaf and Hyams to exclude evidence obtained by the prosecution from the United States. The trial then was listed on 24 April 2017, that date being fixed at some point prior to September 2016. After two hearings in December 2016 and January 2017 which occupied 5 working days, the judge on 13 February 2017 ruled that the evidence from the United States was admissible. Arraignment took place on 28 February 2017. On that date Hyams pleaded guilty to Counts 1 to 10, namely all counts on which he was charged. Roden pleaded guilty to Counts 1 to 8 and not guilty to Counts 9 and 10. The other defendants pleaded not guilty to all Counts. On 29 March 2017 the cases of Assaf and Patel were re-listed for plea. Assaf pleaded guilty to Counts 1 to 10. Patel pleaded guilty to Counts 1 to 8 and Count 10, Patel not being charged on Count 9. On 12 April 2017 Roden's case was re-listed for plea at which point he pleaded guilty to Count 9. In due course his plea of not guilty to Count 10 was left on the file on the usual terms. Morgan pleaded guilty to the count of assisting offences in May 2017, namely a matter of days before his trial was due to commence. In his case the counts of conspiracy were left on the file on the usual terms.
3. Assaf's pleas of guilty were tendered on a basis which was not acceptable to the prosecution. The point at issue was whether he was (as the prosecution alleged) the prime mover in the conspiracies. The court concluded that a Newton hearing was required. This was listed for a date in July 2017 with the sentence of all defendants to take place on 5 September 2017. In the event the Newton hearing (which involved the calling of evidence from an FBI witness based in the United States) was postponed to

the date in September 2017. It occupied three working days with evidence being called on both sides. The issue was resolved in favour of the prosecution. Sentence eventually was imposed on 21 March 2018.

4. The sentences were as follows:

**Assaf**

Counts 1, 2, 4, 5, 7 and 8 – 15 years 2 months imprisonment

Counts 3, 6 and 10 – 10 years 2 months imprisonment

All sentences to run concurrently – total sentence 15 years 3 months imprisonment

**Roden**

Counts 1, 2, 4, 5, 7 and 8 – 12 years imprisonment

Counts 3, 6 and 9 – 9 years seven months imprisonment

All sentences to run concurrently – total sentence 12 years imprisonment

**Hyams**

Counts 1, 2, 4, 5, 7 and 8 – 11 years three months imprisonment

Counts 3, 6, 9 and 10 – 9 years imprisonment

All sentences to run concurrently – total sentence 11 years 3 months imprisonment

**Patel**

Counts 1, 2, 4, 5, 7 and 8 – 11 years 2 months imprisonment

Counts 3 and 6 – 9 years 7 months imprisonment

All sentences to run concurrently – total sentence 11 years 2 months imprisonment

Morgan was sentenced to 7 years 2 months imprisonment for assisting offences. He applied for leave to appeal against that sentence. Leave was refused by the single judge. His application for leave has not been renewed.

5. Patel appeals against his sentence with the leave of the single judge. Roden and Hyams renew their applications for leave to appeal against sentence after refusal by the single judge. Assaf renews his application for an extension of time of 6 days in which to apply for leave to appeal against sentence. Assaf's application for leave to appeal was out of time because his solicitors sent the form NG to the Court of Appeal Criminal Division rather than, as was then required, to the Crown Court. We shall grant the extension of time. We shall grant leave to all those who renew their applications for leave. Hereafter we shall refer to all as the appellants.

### **The facts**

6. It was from October 2010 that the appellants were students at Manchester University. Assaf and Hyams had known each other at school. Assaf and Patel met because they were following the same course. Patel and Roden lived in the same student accommodation during their first year. As a result, all four became friends. They used illicit drugs, in particular cannabis. They began to sell drugs to other students at the University. This retail activity grew in scale until the end of May 2011. It was then that the conspiracies with which we are concerned commenced. Assaf, Hyams and Patel were party to the conspiracies from the outset. Roden joined the conspiracies in August or September 2011. Patel deliberately left Manchester in June 2012 at which point he ceased to be part of the conspiracies. Hyams played no further part in the conspiracies from March 2013 in circumstances to which we shall return. Thereafter the conspiracies continued until the arrest of Assaf and Roden on 2 October 2013.
7. The dealing in drugs reflected by the different conspiracies was carried out principally – though not exclusively – via the Silk Road website. This website had opened in February 2011. It was a market place for drugs and other illegal goods. Users of the website had to have a user account. As a result a digital record was kept of the transactions conducted by any account holder. The website was not available on the normal internet. It was on the dark web accessible using special software known by the acronym TOR. All traffic on the website was encrypted so that the identity of any user was concealed. Anyone conducting transactions on the Silk Road website was required to pay using Bitcoin or some similar cryptocurrency. This further concealed and anonymised those transactions. In 2013 United States federal government intervention closed down the Silk Road website. On 9 September 2013 the back up server was seized from a data centre in Philadelphia. This enabled the US authorities to identify the location of the Silk Road marketplace and linked Bitcoin servers in Iceland. They were seized on 2 October 2013. By that point those using the Silk Road had been identified. As a result Assaf and Roden were arrested on 2 October 2013 at the flat they shared in Manchester. What was found at the flat demonstrated their activity at that point and led to detailed forensic analysis of laptop computers recovered from the flat.
8. In March 2011 Assaf had created a user account on the Silk Road website in the name CheezyDave. From the end of May 2011 until the arrest of Assaf and Roden this account was used to purchase drugs from abroad which then were imported into this country. MDMA was imported from the Netherlands and Canada. 2CB came from Pakistan and China. Ketamine was imported from Pakistan, Germany and Belgium. Over the course of the conspiracies to import drugs 181 purchases were made using the CheezyDave account. Total expenditure was in excess of \$85,000. The addresses used to receive the drugs from abroad included the addresses in Manchester of Assaf, Roden and Hyams. The appellants also used the name of a fellow student whose driving

licence was found at the flat of Assaf and Roden on their arrest and a mailbox rented solely for the purpose of receiving delivery of drugs.

9. The appellants not only purchased drugs for onward sale from abroad via the Silk Road. Drugs also were purchased directly from wholesale dealers in this country. For obvious reasons the extent of this trade could not be identified as precisely as the purchases made online. Text messages between the appellants referred to four different named suppliers of MDMA with the quantities apparently supplied varying between 1 ounce and 100 grams of MDMA in its crystal or powder form. On an occasion in 2012 Hyams travelled from Manchester to London with £12,000 in cash to purchase drugs though in the event he was robbed before completing the deal.
10. In April 2011 Assaf created a separate user account on the Silk Road website in the name Ivory. For the period of the conspiracies this account was used to export and to supply drugs. 6,305 separate supplies (whether by export or within this country) were made up to 2 October 2013. Over 4,800 transactions involved the supply of MDMA. There were over 700 supplies of 2CB and over 300 supplies of Ketamine. There were 19 identifiable supplies of LSD. The total quantity of MDMA supplied was 16.7 kilograms in its crystal form. There was a dispute between the prosecution and the defence as to what this represented as MDMA in tablet form. However, even the lowest estimate put forward on behalf of the defence was 80,000 tablets. Estimates ranged up to 240,000 tablets. Of the transactions involving the supply of MDMA the majority were for quantities of 2 grams or less of the drug in its crystal form. However, there were nearly 400 transactions for amounts in excess of 10 grams. The total value of sales of MDMA recorded on the website was over \$975,000. The total value of sales for all drugs was recorded as \$1.14 million.
11. Just as not all of the drugs obtained by the appellants came via the Silk Road website so not all of the drugs were supplied online. The appellants also supplied drugs in person. The monies received for those drugs were not recorded. In addition, the appellants were able on occasion to bypass the Silk Road payment system which they would do in order to avoid paying the commission charged by the website. The value of the unrecorded sales was difficult to assess. That they occurred was apparent from messages sent by Assaf to customers e.g. "you come to Manchester to get...100g ket for £1250".
12. In January 2013 a further user account on the Silk Road website was created with the name Sapphire. This was intended to be used for the supply of LSD by Assaf and Roden. From September 2012 LSD was supplied via the Ivory user account in liquid form. On 13 occasions a vial containing 10 ml of liquid LSD was supplied for a unit price of \$633. Each vial contained sufficient LSD for around 80 individual doses. The Sapphire account would have been used to supply 71 vials of liquid LSD (the equivalent of 5,000 or more individual doses) which were found at the flat shared by Assaf and Roden after their arrest. This was the LSD to which Count 9 on the indictment related.
13. Save for the drugs supplied personally by the appellants to those who visited them in Manchester the drugs were sent by post in envelopes or jiffy bags (depending on the size of the consignment). The packages of drugs were vacuum sealed in order to prevent any smell. Two heat sealing devices were found at the flat shared by Assaf and Roden. Also at the flat were: a label printer, label printing software being loaded onto Roden's laptop computer; 4 sets of digital scales, each bearing traces of MDMA and

ketamine; face masks and white oversuits; chemicals suitable for making a reagent capable of testing for the presence of controlled drugs. As at October 2013 this flat was the base for dividing, preparing and packaging drugs for onward supply. A total of £5,500 in cash was found at the flat.

14. Both Assaf and Roden had a laptop computer at their shared flat. Both computers were used to operate the main user accounts, CheezyDave and Ivory, and to access various online money transfer services. The TOR software was on a USB stick found at the flat. This enabled the software to be run on any computer and was designed to prevent evidence of its use being apparent on the computer itself.
15. In consequence of the income generated by the supply of MDMA and other drugs, the appellants enjoyed a lifestyle very different to that of ordinary students. In 2011 they went on holiday to Jamaica. Holidays in Prague and the Bahamas followed in 2012. They bought luxury consumer goods. Assaf bought a flat in the centre of Manchester.

### **The role of each appellant**

16. As we already have noted, ASSAF was the subject of a Newton hearing in respect of his role. Having heard evidence and submissions over 3 days the judge concluded that he was the prime mover and the guiding mind of the conspiracies. He had set up the Silk Road user accounts. He was involved in the purchasing and onward supply of drugs throughout the period of the conspiracies. He ran the Silk Road user accounts. He engaged in all aspects of the drug dealing both via the Silk Road website and direct contact with suppliers and purchasers. He directed others within the conspiracy to undertake particular tasks. When Patel left Manchester in 2012 he changed the passwords to the user accounts to prevent Patel from accessing the accounts. When he and Hyams fell out in early 2013 he was the one who decided that Hyams no longer should be part of the enterprise. He had overall control of the monies generated by the conspiracies.
17. RODEN joined the conspiracies when they already were in existence. However, they had only been running for two or three months at the time he joined. Thereafter, he played a full role in all aspects of the enterprise. He accessed the Silk Road user accounts. He had some access to cryptocurrency accounts. He directed the activity of Morgan. After March 2013 he and Assaf were the only participants in the conspiracies and he played a full part in them.
18. HYAMS was party to the conspiracies from the outset. He had access to the user accounts on the Silk Road website. He engaged in all aspects of the enterprise: buying and supplying drugs via the website; direct contact with suppliers and customers; some access to cryptocurrency. He left the conspiracies in March 2013. As the judge found this was because he fell out with Assaf who no longer wanted him to be part of the enterprise. In effect Assaf gave him the sack.
19. PATEL was also party to the conspiracies from the outset. He was involved in all aspects of the enterprise. He received drugs imported by post and kept a stock of drugs. He sold drugs directly to customers. He packaged orders being sent out by post. He had access to the Ivory user account. He was involved in banking transactions. His departure from the conspiracies was voluntary. In June 2012 he left Manchester and had nothing further to do with the enterprise.

## **The personal circumstances of each appellant**

20. None of those with whom we are concerned can be regarded as an archetypal international drug dealer. Each appellant went to Manchester University in the autumn of 2010 with nothing more in mind other than to live the life of an ordinary student. Each comes from an entirely respectable family. Members of each family were at the hearing of the appeal. No doubt they also attended some if not all of the various hearings in the court below. The devastation that this offending has caused to those families is apparent from the statements and letters provided to the judge which we have seen and read. It is a tragedy both that these young men have caused such devastation and that they have thrown away the opportunity that they had to make full and decent lives for themselves. However, as we said at the hearing, this factor has to be set beside the effects of major drug trafficking and the involvement of the appellants in very serious crime.
21. In May 2011 when the conspiracies were put into effect Assaf, Patel and Hyams were 19. Roden joined the conspiracies shortly after his 19<sup>th</sup> birthday. It follows that the appellants were relatively young throughout the period of the conspiracies. Patel was 20 when he left Manchester and ceased to be part of the criminal enterprise. The other appellants were 21 when their involvement in the conspiracies came to an end. None of them had any criminal history before they joined the conspiracies.
22. Assaf graduated from Manchester in 2014. He then moved to London where he worked as a business intelligence analyst until 2017. His involvement with drugs did not wholly cease. In 2017 he was fined for possession of Ketamine (by then a Class B drug). A psychiatric assessment in June 2017 concluded that he was then in the throes of a major depressive disorder for which he had required treatment from community mental health services and which possibly had involved some psychotic symptoms. The psychiatrist considered that he would be vulnerable in prison.
23. Roden left Manchester University before graduating. He returned to London to live with his parents and obtained employment with a start up company as a data analyst. His employers provided the sentencing judge with a supportive reference. A psychiatric assessment in his case was carried out in February 2017. It disclosed that he suffered from Asperger's Syndrome coupled with anxiety disorder. The psychiatrist expressed concerns over how Roden would cope in prison with the risk of his problems being exacerbated.
24. Hyams continued with his degree course and graduated in the summer of 2014. Initially he worked for a metal trading company moving in 2016 to a small company supplying plastic packaging. Both companies provided supportive references. The pre-sentence report in his case offered the view that he would be vulnerable in prison.
25. Patel left Manchester in order to commence a different course of study at Portsmouth University. He eventually obtained a degree in pharmacology from Kingston University and then took up employment with a health care company. He lived at home with his parents and extended family in East London.

## **The sentencing remarks**



26. The judge's sentencing remarks were comprehensive. They occupy something over 30 pages of closely typed transcript. The essence of the general remarks can be summarised as follows:
- The conspiracies were sophisticated and well-planned using the dark web to conceal the activity of those involved.
  - Large quantities of Class A drugs were trafficked, such drugs being blights on society and causing misery to users of the drugs and to wider society.
  - Sentencing in a case such as this needed to fulfil the aims of protecting the public, punishing the offenders and deterring others who might be tempted to use the dark web to supply drugs.
  - The motivation of the appellants was solely financial gain to provide themselves with a rich lifestyle.
  - Delay from September 2017 (which was the point at which the court could have sentenced) was to be taken into account in the appellants' favour.
27. The judge had regard to the Sentencing Council definitive guideline for drugs offences. He applied the principles in *Khan and others* [2013] EWCA Crim 800 i.e. the guideline applies to offences of conspiracy and it is appropriate in such cases to look at the aggregate quantity of the drug involved. He declined to accept the proposition that dealing in drugs online was less serious or less harmful than face to face dealing. He did not accept that MDMA was to be treated as a less serious form of Class A drug than (for instance) cocaine.
28. In relation to Assaf the judge determined that, prior to the trial of issue, credit for plea would have been 20%, full credit not being available because there had been challenge by Assaf to admissibility of the United States evidence and because his pleas were not tendered until relatively shortly prior to the trial date. Because there had been a trial of issue, credit was reduced to 15%. The judge found that, after a trial and taking into account aggravating and mitigating factors, the appropriate sentence would have been 18 years' imprisonment in relation to the offences concerning Class A drugs. This was on the basis that those offences fell outside the sentencing range indicated for Category 1 offences committed by a person taking a leading role. Thus, he arrived at the sentence after discount for plea of 15 years 3 months imprisonment.
29. In relation to Roden the judge said that he was "in the upper branches of this conspiracy, but lower down than Assaf in the scale of criminality and slightly above Hyams". He said that Roden's involvement had "characteristics of a leading role". The judge identified those characteristics as substantial links to and influence on others in the chain, closeness to the original source of the drugs, expectation of substantial financial gain and an awareness of the full scale of the operation. Credit for plea in his case was set at 20% for the same reasons as those given in the case of Assaf. The judge concluded that, subject to one matter, sentence after trial in Roden's case would have been 16 years' imprisonment. However, he reduced that sentence by 12 months to take account of Roden's mental health, namely his Asperger's Syndrome. Thus, the 20% discount was applied to a sentence after trial of 15 years' imprisonment and the sentence after discount was 12 years' imprisonment.

30. The judge said that Hyams was “slightly below Roden...but not by much”. As we have already indicated, the judge found that Hyams did not leave the conspiracies voluntarily. He assessed Hyams as having “characteristics of a leading role” on the same basis as Roden. Credit for plea in his case was set at 25% because he was the first of the appellants to tender pleas of guilty. Applying the reduction to a sentence after trial of 15 years’ imprisonment led to an overall sentence of 11 years 3 months imprisonment.
31. Patel was assessed by the judge as being below the other three appellants in the hierarchy. The judge described his role as “between leading and significant”. He accepted that Patel’s voluntary departure from the enterprise was an important mitigating factor. The judge concluded that the proper sentence after trial in Patel’s case would have been 14 years’ imprisonment. Applying a discount of 20% for his pleas of guilty, the overall sentence was 11 years two months imprisonment.

### **The grounds of appeal**

32. Each appellant has arguments to raise particular to his case. However, there are grounds common to each appellant which we shall consider at the outset. First, it is argued that the appellants were young at the time they offended and that the judge gave no or no sufficient weight to this factor. Reliance is placed on *R v Clarke and others* [2018] EWCA Crim 185, in particular paragraph 5 of the judgment of the Lord Chief Justice:

“Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in [R v Peters \[2005\] EWCA Crim 605, \[2005\] 2 Cr App R\(S\) 101](#) is an example of its application: See paras [10]-[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. *The Age of Adolescence*: [thelancet.com/child-adolescent](http://thelancet.com/child-adolescent); 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday.”

That proposition is of general application and we have no hesitation in endorsing it. However, the force of the proposition is greater in cases where the criminality involves relatively short-lived episodes even if the episodes are repeated. Here the appellants engaged in well-planned and sophisticated conspiracies which involved a course of conduct over many months. Their behaviour did not suggest youthful immaturity; rather the reverse. It is also of significance that these appellants were well-educated young men from stable backgrounds. In any event the judge did give some effect to the ages of the appellants. We take Assaf as the benchmark. The judge identified his sentence after trial as 18 years’ imprisonment. Had Assaf been an adult, a higher sentence after trial would have been appropriate. In relation to smuggling and supplying offences, the Sentencing Council guideline states that “sentences of 20 years and above may be appropriate, depending on the role of the offender” where the quantity of drugs is significantly higher than the indicative quantity provided for in

Category 1. In this case the equivalent of at least 80,000 tablets of MDMA was supplied. This is 8 times the indicative quantity in Category 1.

33. Second, reliance is placed on the evidence of Professor Aldridge whose report was available to the judge. Professor Aldridge is a Professor of Criminology at the University of Manchester. She has a research interest in online drug dealing. Two arguments are put on the basis of Professor Aldridge's report. First, there is less transactional violence if drugs are sold via a website and sent out in the post than if the drugs are sold on the street or in some other face to face context. Second, the Sentencing Council guidelines were not devised with online selling in mind and application thereof to online dealing is likely to result in unfairness and disproportionate sentences.
34. As to the first argument, there will be a reduced potential for violence if the transaction is conducted at arm's length via the internet. But online transactions were not the sole means by which the appellants carried on their business. There were face to face sales. It is of note that there was a baseball bat close to the entrance of the flat occupied by Assaf and Roden at the time of their arrest. There is an obvious inference to be drawn as to the purpose of this being kept easily to hand. More to the point, the Sentencing Council guideline is not concerned at Step One with whether the supply of drugs is linked to violence. The relevant factors are the culpability of the offender and the indicative quantity of the drugs involved. The most serious cases of importation of drugs will be those where the offenders are responsible for bringing in tonnes of Class A drugs into the country, the consignment(s) being passed on within the wholesale market. Transactional violence in those circumstances is unlikely. Yet the sentence imposed will be very long indeed. The presence of a weapon or evidence of community impact – factors which can reflect transactional violence – are aggravating factors to be considered at Step Two.
35. The second argument is wholly without merit. It is apparently based on this passage from the report of Professor Aldridge:

“When constructing cases against dealers apprehended in offline drug markets, evidence (i.e. drugs seized) is likely to represent only a fraction of the actual supply activities for drug dealers over the course of their selling careers. In contrast, a cryptomarket vendor's entire selling history becomes available as evidence in building cases for prosecution. This may result in heavier penalties handed down to cryptomarket sellers...”

It is entirely true that, if there is evidence that an offender has supplied a large quantity of drugs, the offender is likely to receive a longer sentence than someone in respect of whom there is no evidence of large-scale supply of drugs. If the prosecution cannot prove that an offender has supplied drugs in large quantities, he will not be sentenced as if he had. On the other hand, if the prosecution can prove large scale supply, he will be sentenced on that basis. There cannot conceivably be anything wrong with that. The Sentencing Council was not concerned with how an offender might be proved to have dealt in a particular quantity of drugs. Rather, it set guidelines depending on what could be proved. In any event, the premise of Professor Aldridge's proposition is false i.e. that offline dealers will be prosecuted on the basis of the drugs seized from them. That may be true in small scale prosecutions of minor dealers. The prosecution of large scale

dealers will be based on text traffic, telephone contact, surveillance evidence, monitoring evidence and other means by which a compelling circumstantial case will be assembled. It is commonplace for such offenders to be sentenced on the basis of inferences to be drawn as to the nature and extent of their dealing, those inferences being based on very much more than the drugs seized.

36. Third, it is said that the judge slavishly followed the guideline and failed to take the approach as required by *Healey and others* [2012] EWCA Crim 1005 i.e. to adopt a flexible approach both when assessing the role of an offender and when considering harm by reference to indicative quantity of the drug concerned. Whilst there may be legitimate criticism to be made of the sentence arrived at by the judge in relation to individual appellants, we do not consider that he slavishly followed the guideline. The sentence he imposed on Assaf was predicated on going beyond the guideline. The sentences he imposed on the other appellants were nuanced. Whether they were nuanced sufficiently is an issue to which we will turn shortly.
37. Fourth, the judge said that the sentences should reflect the delay from September 2017 to the date of sentence. All of the appellants save Assaf argue that this did not take sufficient account of delay. Each of them had been ready for sentence from early April 2017. Moreover, although much of the delay between the first appearance in the Crown Court in June 2015 and arraignment in early 2017 was due to the applications to exclude evidence, there were some delays caused by the court not being able to accommodate hearings on the dates originally fixed. Coupled with the issue of delay, it is said that the judge did not give sufficient weight to the fact the men in their mid-twenties who fell to be sentenced by him were very different to the young men who had begun to deal in drugs in 2011 still in their late teens. We agree that, with the exception of Assaf, the delay for which account should have been given should have been from early April 2017. We also agree that the judge should have indicated how much weight he gave to the changes in the appellants since the end of the conspiracies. He made no reference at all to this factor. It is not possible to engage in an arithmetical exercise in respect of these matters. However, our consideration of each appellant's case will take them into account.
38. We turn then to the case of each appellant. The principal submission on behalf of Assaf is that the judge should not have identified a sentence after trial which was outside the category range for a Category 1 offence. It is not suggested that the judge was wrong to find that Assaf played a leading role. Given that the judge conducted a 3 day Newton hearing in respect of that issue, this is an entirely proper concession. It is also accepted that, for a defendant who only pleaded guilty within a few weeks of the date fixed for trial and who thereafter unsuccessfully contested a Newton hearing, 15% was an appropriate discount for the pleas of guilty. Indeed, in the context of this case it could be argued that a discount of 15% was generous. Why was the judge wrong to take a sentence after trial outside the category range? First, it is argued that the enterprise was not as sophisticated as the judge concluded. The factors relied on are that the authorities were onto the appellants quickly and there was no concealment of evidence. This argument is without substance. The judge was quite entitled to conclude that the enterprise was sophisticated given the use of the dark web and cryptocurrencies. The authorities only identified the appellants as the result of an FBI operation more than two years after the establishment of the enterprise. The use of the encrypted dark web was a model of concealment. Second, it is said that the appellant was young, of good

character (at the time of the offending) and remorseful. These mitigating factors should have prevented the sentence after trial being outside the category range. For the reasons we already have given, this proposition is unsustainable. Without the mitigating factors, Assaf's sentence before trial would have been 20 years or more. It was his youth and the other mitigating factors which brought it down.

39. We have given leave in Assaf's case in part because his sentence set the tariff for the other appellants. In the event we are satisfied that the sentence in respect of all counts involving Class A drugs was neither manifestly excessive nor wrong in principle. His overall sentence will remain unchanged. However, although it will make no difference to the sentence to be served by Assaf, we do adjust the sentence imposed in respect of Counts 3 and 6. Those counts related to the importation and supply of Ketamine, a Class C drug. By the time of sentence Ketamine had been reclassified so that it is now a Class B drug. It may be that the judge in error sentenced by reference to its classification at the time of sentence. The sentence imposed on Counts 3 and 6 represented a sentence after trial of 12 years' imprisonment. The category range for a Category 1 offence in respect of a Class C drug is 4 to 8 years. The maximum sentence is 14 years' imprisonment. The indicative quantity of Ketamine for Category 1 is identified as 1.46 kilograms. The extent to which the appellants dealt in Ketamine is not clear. It is certainly not possible to say that the quantity involved was many times the indicative quantity for Category 1. In all of those circumstances the sentence on Counts 3 and 6 cannot be sustained and it will be quashed. The sentence after trial would not have exceeded the upper end of the category range i.e. 8 years' imprisonment. Applying the discount of 15% to that figure we substitute concurrent sentences of 6 years 8 months for the sentences of 10 years 2 months on Counts 3 and 6. To that limited and academic extent Assaf's appeal is allowed.
40. On behalf of Roden the first point to be made is that the judge set a discount for plea of 20% on a mistaken basis. The judge understood Roden to have pleaded guilty on the same occasion as Assaf. This was not the case. Save for his late plea in respect of the intended supply of LSD, Roden pleaded guilty on the same day as Hyams. It is argued on his behalf that he was entitled to similar credit as that afforded to Hyams i.e. 25%. We agree with that argument. Had the judge appreciated the true position, he would have extended the additional credit in relation to the pleas tendered on the same day as Hyams. The sentence imposed on the count to which he did not plead guilty at that point was significantly less than the sentence imposed on the principal counts so reduced credit on that count was of no practical effect. Thus, the withholding of credit was significant. It is unfortunate to say the least that no-one pointed out the error at the conclusion of the sentencing process. Had this been the only basis for interfering with Roden's sentence, this failure would have been costly. We do note that counsel who represented Roden before us did not appear in the court below.
41. In the event we consider that there is a wider basis for interfering with the sentence. The judge decided that the ringleader of the conspiracies – the man who had set up the enterprise and who had been in charge from start to finish – would have been sentenced to 18 years' imprisonment had he had a trial. We have concluded that this was an appropriate sentence after trial for Assaf. But Roden did not set up the enterprise. He only joined it when it had been operating for a few months. He was described by the judge as being in the upper branches of the conspiracy and as having characteristics of a leading role. This language on its own was imprecise. The characteristics to which

the judge referred to justify his description mirrored the language of the guideline. However, the judge did not explain by any detailed reference to the evidence how it was that Roden came near to fulfilling a role in the enterprise closely aligned to that played by Assaf. Given that the proper sentence after trial was said to be 16 years' imprisonment before allowance was made for Asperger's Syndrome, the judge put Roden very close to Assaf in terms of culpability.

42. We are satisfied that this was not justified. The prosecution accepted throughout that Assaf was the prime mover and organiser of the enterprise. The evidence demonstrated that Assaf maintained control over much of the finances of the operation. Whilst it often will be the case that different participants in a conspiracy each take a leading role, here there was no doubt that Assaf was in charge. We are persuaded that there was insufficient distinction drawn between Assaf, the organiser of the conspiracies, and Roden, an enthusiastic participant. The judge's assessment of the appropriate sentence after trial in Roden's case was manifestly excessive. In our view the proper figure would have been 13 ½ years' imprisonment to reflect his lesser role in comparison to Assaf and to reflect his age. From that figure we deduct the same period – 12 months - as the judge did to reflect Roden's disability i.e. Asperger's Syndrome. We see no reason to interfere with this aspect of the judge's sentencing decision. Thus, the sentence before credit for plea on the counts involving Class A drugs should have been 12 ½ years' imprisonment. Allowing 25% discount for the pleas of guilty that results in a sentence of 9 years 4 months in relation to all counts relating to Class A drugs i.e. Counts 1, 2, 4, 5, 7, 8 and 9. We quash the sentences imposed by the judge on those counts and substitute for them concurrent sentences of 9 years 4 months imprisonment. In relation to Counts 3 and 6, we take a similar approach to that which have adopted in the case of Assaf. Without engaging in a mathematical exercise we quash the sentences imposed on those counts of 9 years 7 months and substitute concurrent sentences of 5 years 6 months imprisonment.
43. Hyams complains that the judge erred in finding that he did not leave the conspiracies voluntarily. Hyams lodged a basis of plea which made the assertion that his departure was voluntary. The prosecution did not challenge that assertion. Indeed, their written response to the basis of plea accepted it. It is argued that this should have been determinative of the issue. Had the judge said nothing and then sentenced otherwise than in accordance with the basis of plea, we would have agreed with this argument. That was not the position. The judge had heard evidence about this point in the course of the Newton hearing conducted in relation to Assaf. He formed the view that Hyams did not leave voluntarily. This was one reason why he concluded that Assaf was the prime mover. Assaf's position in the enterprise was such that, when he decided that a co-conspirator was not pulling his weight, Assaf sacked the co-conspirator. Because Hyams had not been present at or participated in the Newton hearing the judge concluded that he should give Hyams the opportunity of giving evidence to rebut the view the judge had formed. This was the appropriate course to take. Hyams declined this opportunity. That was his choice. Having given this opportunity to Hyams, the judge then was entitled to maintain the view he had formed on the evidence he already had heard.
44. In fact, the judge's conclusion tends to support the more fundamental argument put on behalf of Hyams, an argument very much the same as that maintained by Roden. The judge used similar language in Hyams's case as he had in relation to Roden in order to

establish Hyams's role. For the reasons we have given in relation to Roden, we conclude that the judge's reasoning cannot be sustained. In respect of Hyams the starting point after a trial was set at 15 years i.e. only 3 years less than that applicable in the case of Assaf. Yet Hyams had not participated in the enterprise for the last six months of the operation, a factor of importance irrespective of why he had left the conspiracies. Moreover, Hyams clearly was relatively subordinate as evidenced by the manner in which Assaf dealt with his departure. Finally, the difference between the sentences after trial takes insufficient account of the delay which affected Hyams and which was due to the stance taken by Assaf. Taking all matters into account we conclude that the sentence after trial in his case in relation to the counts concerning Class A drugs should have been 13 years.

45. It is said on behalf of Hyams that he should have been given a discount in excess of 25%. The argument put on his behalf is that his pleas were the first to be entered – though Roden's came later on the same day – and that he was entitled to mount the application to exclude evidence from the United States before tendering his pleas. As to the latter point, it is said that exclusion of the evidence from the United States would have reduced the scale of the conspiracy. That may be so. Hyams still would have been guilty of the offences irrespective of the admission of this evidence yet no pleas were tendered until very shortly before trial. The judge did not fall into error in relation to the discount afforded to Hyams. The discount afforded to him was appropriate. Thus, on the counts in respect of which Hyams was sentenced to a period of 11 years 3 months imprisonment, those sentences will be quashed and substituted by concurrent sentences of 9 years 9 months imprisonment. The sentences of 9 years' imprisonment in relation to Counts 3 and 6 will be quashed for the same reasons as given in the cases of Assaf and Roden. Again we abjure a mathematical exercise and we substitute concurrent sentences of 5 years 6 months imprisonment. We leave unchanged the sentences on Counts 9 and 10.
46. Patel was in a different position to the other appellants. He ceased any involvement in the conspiracies in the middle of 2012. He did so voluntarily. He chose to leave his course at Manchester and to move to Portsmouth to distance himself from the other appellants. This factor affects his culpability in two ways. First, it demonstrates that he thought better of the criminality in which he had engaged many months before the conspiracies came to an end. Second, it means that he was a participant in the enterprise for just under half its total duration. It is not possible to calculate exactly the proportion of the overall supply of drugs which occurred when he was party to the enterprise but, since the level of supplies increased over time, he was involved in rather less than half of the total amount of drugs supplied. The judge concluded that the appropriate sentence after trial in Patel's case would have been 14 years' imprisonment i.e. only a year less than Hyams who remained in the conspiracies for nearly a year after Patel's departure. We are persuaded on that ground alone that Patel's sentence was manifestly excessive.
47. Further, the judge said that Patel's role fell between a leading role and a significant role. He concluded that Patel fell below the other three appellants in the hierarchy. The judge did not explain the basis for reaching that conclusion. Insofar as he rehearsed factors applicable to Patel, they mirrored precisely those he had set out in relation to Roden and Hyams. Our conclusion is that Patel, whilst he was party to the conspiracies, was not in a very different position to Roden and Hyams. Since we have concluded that the

sentence after trial in relation to those appellants should have been significantly lower than the figure identified by the judge, the same must apply in Patel's case. The appropriate sentence in his case must bear a proper relation to the sentences appropriate in the cases of Roden and Hyams.

48. Taking those two factors together we conclude that the appropriate sentence after trial in Patel's case was 10 years' imprisonment. It is argued that he should have been afforded a greater discount than 20% on the basis that his pleas were tendered only a month after the point at which Roden and Hyams pleaded guilty. We reject that argument. There was nothing to prevent Patel from tendering his pleas when he first was arraigned. For approximately a month the prosecution and the court were left to assume that a trial would be required in his case. A reduction of the discount in his case from 25% to 20% was wholly appropriate.
49. It follows that we quash the sentences of 11 years 2 months imposed on Counts 1, 2, 4, 5, 7 and 8 and substitute for them concurrent sentences of 8 years' imprisonment. We quash the sentence of 9 years 7 months imprisonment imposed on Count 10, conspiracy to supply LSD, and substitute a concurrent sentence of 8 years' imprisonment. The sentences of 9 years 7 months imprisonment imposed in relation to the counts relating to Ketamine will be quashed for the same reasons as we have given in relation to the other appellants. In relation to Counts 3 and 6 we substitute concurrent sentences of 5 years' imprisonment.
50. It follows that we allow the appeals. In the case of Assaf the variation of the sentence is of academic effect only. In relation to the other appellants the total sentences are reduced for the reasons we have set out above. Although we have concluded that the judge fell into error in his assessment of the role played by three of the appellants, this was a difficult and complicated exercise carried out with considerable care. The adjustments we have made to the sentences do not detract from the overall approach taken by the judge.