Neutral citation number: [2020] EWCA Crim 791

No: 201803992/B4 & 201803993/B4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 3 June 2020

B e f o r e:

THE VICE PRESIDENT OF THE CACD
LORD JUSTICE FULFORD

MRS JUSTICE McGOWAN DBE

MR JUSTICE LINDEN

R E G I N A
v
PARVIZ YOUSEFI

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr M Skelley and Miss G Reed appeared on behalf of the **Appellant**
Mr R D'Cruz and Mr S Requena (via video link) appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

THE VICE PRESIDENT:

Background

1. The appellant stood trial between 19 June and 17 August 2018 in the Crown Court at Isleworth before Judge McDowall and a jury and was convicted of three identity document offences and five dishonesty offences. They were: one offence of possession of an improperly obtained identity document with intent, contrary to section 25(1)(b) of the Identity Cards Act 2006 (count 1), two offences of possession of an identity document with improper intention, contrary to section 4(1) and (2) of the Identity Documents Act 2010 (counts 3 and 4) and five counts of fraud under section 1 of the Fraud Act 2006 (counts 5 to 9). He was sentenced on 21 August 2018 to concurrent terms of 18 months' imprisonment on counts 1, 3 and 4, to a consecutive term of three years' imprisonment on count 5, a further consecutive term of four years' imprisonment on count 6 and concurrent terms of four years' imprisonment on counts 7 to 9. The total sentence therefore was 11 years and six months' imprisonment. He appeals against his convictions by leave of the single judge.

The facts

2. Over a period of 10 years between 2000 and 2017, fraudulent claims for various types of state benefit were made under five different identities. As a result of the fraudulent claims, a total of £714,364.24 were defrauded from the public purse and paid into various personal bank accounts.

3. The appellant, who is aged 64, was an Iranian national living in the United Kingdom. On his return to this country from a trip to Turkey in May 2017 he was arrested at Heathrow Airport. He was using a passport in the name of Parviz Behbahani (count 4). He was in possession of an iPhone which contained images and messages relating to other identities. When his home was searched, further documents were found relating to identities other than his own.

4. In interview the appellant initially answered some questions, but early on he stated that he was tired and ill and needed medication. Thereafter, he remained silent for the rest of the interview.

5. It was the prosecution case that the appellant improperly obtained identity documents in different names and then assumed those false identities in order to make fraudulent benefit claims. The appellant had applied for and obtained passports in the names Parviz Rahbar (counts 1 and 3) and Parviz Behbahani (count 4). He had made fraudulent benefit claims under his own name, Parviz Yousefi (count 5), Parviz Rahbar (count 6), Ali Habibpour (count 7), Hadi Atashsokhan (count 8) and Jvad Hoshvar (count 9).

6. The prosecution relied on extensive documentary evidence relating to the various identity documents the appellant obtained, applications for benefits and deed pole name change applications made by the appellant, along with banking documentation showing benefit payments into various accounts linked to the appellant.

7. David Sisley-Collet from Her Majesty's Passport Office produced evidence of passport applications and passports issued to the appellant, showing details linked to, and photographs said to be of, the appellant. Catherine Warner and Carole Whitlock from the Home Office gave evidence of the appellant's immigration status and various applications and documents he submitted to the authorities regarding the different identities. Analysis of his telephone revealed images, emails and messages relating to various different identities he had used. A facial mapping expert, Mr Blythe analysed the images on the identity documents and applications and stated that there was "strong support" for the conclusion that they all showed the appellant. There were agreed facts that were reduced to writing and distributed to the jury.

8. The prosecution relied on adverse inferences from the appellant's failure to answer questions in interview and evidence of his bad character. The latter concerned, *inter alia*, his previous convictions from 1992 ("the Teesside convictions") and other material. The evidence of bad character was introduced to correct a false impression created by the appellant during his evidence.

9. The appellant admitted he had changed his name several times and had obtained documents in these identities. His case was that he had used several of these different identities in order to travel in and out of Iran due to his dissident political activities in that country. He accepted, therefore, that he had travelled using different names including Parviz Behbahani, Javd Hoshvar and Hadi Atashsokhan. Indeed, having been stopped entering the United Kingdom in 2010, he had pleaded guilty to three offences of possessing improperly obtained identity documents, a UK and an Iranian passport in the name of Jvad Hoshvar and an Iranian passport in the name of Hadi Atashsokhan. He denied using his true identity or any other identities fraudulently to claim benefits.

10. Additionally, he accepted he had applied for both the Parviz Behbahani passports (counts 2 and 4) believing that he was entitled to do so having changed his name from Yousefi by deed pole. He denied ever using the Parviz Rahbar identity and denied applying for either of the Parviz Rahbar passports (counts 1 and 3). He accepted applying for benefits in the name of Parviz Yousefi and maintained that this was not dishonest (count 5). He had received some £62,300 but he gave evidence that these claims were not fraudulent as he was a UK citizen and was genuinely ill, and therefore he was entitled to make these claims. He denied being responsible for any of the other benefit applications in the names of Rahbar, Habibpour, Atashsokhan and Hoshvar (counts 6 to 9). He suggested that other people may have hijacked his identity.

11. The appellant gave evidence over three days between 27 July and 31 July 2018.

12. The central issues for the jury were whether it was the appellant who had improperly obtained the Parviz Rahbar passports, whether the Parviz Behbahani passport was improperly obtained, whether the Yousefi benefit claims were made dishonestly and whether it was the appellant who had made dishonest applications for benefits using the other identities.

The grounds of appeal

13. Although the appellant originally relied on a ground of appeal relating to the judge's decision to admit the evidence of bad character, this has not been pursued. The sole surviving ground of appeal relates to suggested flaws in the summing-up which are analysed in detail hereafter.

14. The respondent candidly accepts there were deficiencies in the summing-up in terms of its brevity, lack of structure, mistakes in terms of the directions of law and the general lack of detail. However, it is argued that the remedial steps that were taken addressed the key deficiencies; the jury were conscientious and diligent; and in all the circumstances the convictions are safe. It is argued that given the jury had clearly focused carefully on the evidence during the case, as demonstrated by the many questions they asked, there was sufficient protection for the appellant that they had appropriately approached the facts and any factual element of the various directions in law.

Discussion

Introduction

15. We regret that the judge's summing-up in this case was beset with multiple failings. By way of an initial summary, the majority of the directions in law were in error, in some instances seriously so. The judge failed even to attempt to sum up the evidence or the issues in the case and he engaged in what is best described as a series of homilies on various subjects by giving examples or images that were unrelated to the facts or the circumstances of the trial and which would, in consequence, have been materially distracting for the jury. Once the judge had indicated that the summing-up was nearly at a close, Mr D'Cruz (for the prosecution), entirely appropriately, pointed out in restrained but clear terms, in the absence of the jury, that the judge had not summed up the evidence or provided any analysis of the contested issues. He suggested that the summing-up, which had lasted about 40 minutes, contained many "inadequacies" and that the judge needed to start the summation again. He highlighted apparent errors with the direction on the failure to mention facts in interview and the direction on dishonesty and the wholesale lack of any direction on the nine counts in the indictment (which the prosecution successfully at this late stage applied to amend) along with other problems.

16. Although after an overnight adjournment the judge adopted and read out written directions on the charges as drafted by prosecuting counsel, and he made some corrections on the direction as to the inferences that may be drawn from the failure to mention facts in interview, he did not take any other steps to recast the summing-up.

17. We stress that this summing-up was delivered in the month before the judge's retirement and we are conscious that the trial came at the end of a long career on the Circuit Bench. We have sought to exercise restraint in describing our criticisms of the judge's summation, but the deficiencies were pervasive and profound. We would wish to emphasise that what happened in this case was an exceptional event and does not in any way reflect the usual impressively high standard of summings-up, which are in the vast

majority of cases the result of the painstaking hard work and professionalism that characterises the work of the Circuit Bench.

The facts

18. At the commencement of the summing-up, the judge said that he was not intending to take the jury through "all the vast amount of documents" because they had been "paying close attention". Instead, he invited them to send a note if they were unable to agree as to what a witness had said. He made similar remarks at the end of his observations and instead of summing-up the facts in any way, he simply said:

> "Now, as far as other matters are concerned, you have had, as I say, access to all these documents and you have been taken through them with a degree of care ... with thoroughness if I can say and I have said already that I do not think it would be helpful for you if I was to follow the exercise through all over again."

19. He did not remind the jury of the evidence of any of the 23 witnesses, save in the most general sense as regards the appellant and the expert evidence as regards facial recognition and he did not refer the jury to a single document from the extensive jury bundle to which there had been frequent and detailed reference during the trial. There was no attempted rehearsal of any of the detailed issues in the case, even after counsel asked him to take this step. We have in mind of course that counsel had each addressed the jury at length and no doubt with clarity.

20. The judge's approach in this regard was in breach of his clear duty to sum up the facts in order to assist the jury and to ensure a fair trial. It was equally incumbent on the judge to define the issues and to remind the jury of the evidence they had heard which related to those issues (see *Brower* [1995] Crim L R 746). The failure by the judge to sum up without a review of the facts or the issues was, particularly in the context of this lengthy case, a clear and serious procedural irregularity (see *Amado-Taylor* [2000] 2 Cr App R 189). In *Amado-Taylor* the court stressed that counsels' speeches were no substitute for a judicial and impartial review of the facts from the trial judge who was responsible for ensuring that the defendant had a fair trial. Furthermore, the judge needs to arrange the evidence issue by issue - a task which could not be passed on to the jurors, even if they were taking notes. Judges, therefore, have long been exhorted to assist the jury by analysing the evidence and relating it to the various issues raised during the course of the trial. It is self-evident that this does not involve rehearsing all of the evidence that has been given, but it is necessary for the judge to identify the major issues and the principal evidence relevant to those issues, whether in dispute or not. This can be achieved in a focused and selective manner, but the judge's summary must be clear and the main elements of the cases for the prosecution and the defence need to be explained and the principal evidence germane to their respective cases and any other significant issues that have been raised must be identified.

21. We adopt the summary provided by Simon LJ in *R v Reynolds* [2019] EWCA Crim 2145;

[2020] 1 Cr App R 20 when dealing with the form and style of a summing up:

> "54. What is helpful will depend on the case. A recitation of all the evidence and all the points made on each side is unlikely to be helpful; and brevity and a close focus on the issues is to be regarded as a virtue and not a vice, see Rose LJ in *Farr* (The Times, December 10, 1998) cited in *Amado-Taylor* at 192A. Since a summing-up of the evidence is by its nature a summary, it is bound to be selective; and providing the salient points are covered and a proper balance is kept between the case for the prosecution and the defence, this Court will not be lightly drawn into criticisms on points of detail.
>
> 55. Secondly, a succinct and concise summing-up is particularly important in a long and complex trial, so as to assist the jury in a rational consideration of the evidence, see *D, Heppenstall & Potter* [2007] EWCA Crim 2485; [2008] Lloyd's Rep F C 68:
>
> > "33. One principle is, however, of cardinal importance in assessing the fairness of the trial process. A summing-up must accurately direct the jury as to the issues of fact which it must determine (see *R v Lawrence* [1982] AC 510 at 519). The summing-up must:
> >
> > > "fairly state and analyse the case for both sides. Justice moreover requires that [the judge] assists the jury to reach a logical and reasoned conclusion on the evidence. (See per Simon Brown LJ in *R v Nelson"* [1997] Crim.L.R. 234) […]"
> >
> > The directions given by the judge to the jury should provide the jury with the basis for reaching a rational conclusion. The longer the case the more important is a short and careful analysis of the issues. […]"

22. It has sometimes been observed, particularly in older reports, that this requirement may not necessarily apply to very short and straightforward cases (see for instance *Stoddart* (1909) 2 Cr.App.R 217 at 313), but we observe that even with single count, single witness trials the judge will still need, however shortly, to describe what the issue or issues are and to do this effectively, he or she will usually need to summarise the evidence relevant to those issues. It may be possible to do this in a relatively few sentences. Whether a failure to undertake this exercise renders the verdict unsafe is a matter to be determined on the basis of the circumstances of the individual case.

The direction as to speculation

23. The judge, having directed the jury to try the case on the evidence and not to speculate as to what absent witnesses might have said and most particularly from those individuals

whose identities and names had featured in the case, thereafter directed the jury that there is "no property in the witness" and that the prosecution and the defence are entitled to take statements from known potential witnesses and that the written statements of witnesses who are unavailable can be introduced without calling the particular individual. He indicated that the appellant's family might have been in a position to confirm "things that were going on". The judge appeared to direct the jury that they could bear in mind a crucial or fatal error in not introducing evidence if it would have provided an answer to an issue in the case. However, he gave no assistance as to how such a failure to call evidence could be used and instead adopted the formula "it is a matter for you". Furthermore, these comments were made in the context of the judge reminding the jury that the appellant had not called various friends of his who had helped him fill in some of the forms.

24. The relevant passage in this regard, which is markedly difficult to follow, is as follows:

> "In this particular case, again, there were suggestions sometimes that forms had been completed not by Mr Yousefi himself, but friends who were helping him out so it would not necessarily have been helpful and again, rightly or wrongly, that was not done. If it is something that seems to you a crucial or fatal error of saying, "If it had been done, we might have had a definite answer to something," again, that is a matter for you; it is a matter of lawyers' comment. If you agree with any argument put forward that there would not have been much point, it would have been unlikely to have produced anything in any sense conclusive, that again is a matter for you. You say in an ideal world, you might have had it, but in this less than ideal world, it was not asked for. It was not felt that it was going to be a worthwhile exercise."

25. To the extent that this and other passages appear to suggest that the jury could draw inferences from the failure by the appellant to call witnesses, such a direction was not in accordance with the law. Mr D'Cruz accepts that the judge appeared to direct the jury that they could draw inferences against the appellant from his failure to call witnesses, albeit he suggested in the instance just cited that it may not have involved a material error. In our judgment, the judge should have made clear that the jury should not draw any adverse inference from the absence of a witness and they should simply decide the case on the evidence they had heard, without speculating about the evidence a witness might or might not have given. In *Forsyth* [1997] 2 Cr.App.R 299, this court criticised the judge for having suggested to the jury that there was no "property in a witness" in a case in which a note had been sent by the jury asking about the absence of a witness. In *Wright* [2000] Crim.L.R 510, this court underlined that comments on the failure to call a particular witness may amount to a reversal of the burden of proof. As the Vice President of the Queen's Bench Division, Kennedy LJ, observed:

> "14. For as long as any one of us can remember, everyone involved in criminal trials has recognised, or should have

> recognised, the dangers of a judge commenting on the defence failure to call a particular witness. It can so easily detract from what has been said about the burden of proof."

26. In this summing-up the judge fatally undermined his direction that the jury should not speculate on the absence of witnesses by dwelling on the ways in which their evidence might have been introduced and by directing the jury that it was a matter for them to determine the significance of the fact that a witness had not been called. This was an issue on which the judge should have given the jury short, clear and accurate directions in just a few sentences. He entirely failed to do so.

The direction as to names

27. We indicated earlier that the judge engaged in what is best described as homilies on certain issues by providing examples or images that were wholly unrelated to the facts or circumstances of the present case and which would have been highly distracting for the jury. One important example related to names. The prosecution case was that the appellant improperly obtained identity documents in different names and then assumed these false identities to make fraudulent benefit claims. The defence case was that the appellant had changed his name several times and had obtained documents in some of these identities. He admitted using several aliases in order to travel in and out of Iran due to his dissident political activities in that country, but he denied using his true identity or any other identity fraudulently to claim benefits. He accepted that he had applied for both of the Parviz Behbahani passports, believing that he was entitled to do so having changed his name from Yousefi by deed poll. He denied ever using the Parviz Rahbar identity and denied applying for either of the Parviz Rahbar passports. He denied being responsible for any of the other benefit applications in the names of Rahbar, Habibpour, Atashsokhan and Hoshvar.

28. The judge's observations on the use of names were as follows, and as the opening sentence indicates this was delivered as one of the directions on the law:

> "Now, as far as names are concerned, you have to understand that the law has got a number of things to say about the names that people have or the names that people use. Some things, none of us have any choice about. The names that feature on our birth certificates. In some religions, I will just mention this, I think it is not in dispute, that Catholics signing up to be a member of the church can, if they want to, add another name to the ones they were given from birth and again, that is something that does happen. I would not claim to know whether it happens in any other religions, but that is an example where someone can add a name.
>
> People can change their names and as far as that goes, there can be informality or formality. If you take it into your heads that as from now, you do not want to be known by your given names, you want

to be known by different names, you can certainly tell your friends and relations that, 'As from now, I want you to call me,' whatever your choice of name is. Sometimes, it might be something like that, when people have got a number of given names, they might not be happy that you have been known by hitherto. You might say, 'I'd prefer it if you called me Jane rather than Mary or Edward rather than Robert,' or anything like that. It is a matter, again with your friends and relations, you can do what you like. Whether they respect your wishes is, of course, a family matter.

But, of course, it can be rather different if you are dealing with, what I will call, bureaucracy because bureaucracy may want, by way of formality, to say, 'Well, you're on the system, we need to know, there needs to be a measure of formality,' and here is the case where you have had the example given of changing name, changing identity by deed poll and that you have got in your paperwork. You know that there were a number of deed polls made by Mr Yousefi, changing his name, changing his name back and again, it is something that any person is entitled to do. There is no limit to say you can only do it once or twice or something like that. You can do it as many times as seem good to you for any reason that seems good to you, but of course, there may be a price to pay in the sense that the authorities may start thinking, 'This is a bit odd, a bit weird. What is going on here?'

As you know, there were queries being raised and sometimes, it is in relation to names or identities saying you filled in a form saying, using another identity, 'Can we have something to back that up?' Again, the defendant, as you know, did produce measures of paperwork that seems in some instances at least, to have satisfied the authorities.

It is something, again, in terms of one's motivation, however maybe it made reference to the defendant saying because he had his connections in Iran, things that he would like to change about the way things were run in that country, he did not want to attract attention to himself. One thing again in terms of negative, and you may think quite obviously, we have not heard any evidence called from the authorities in Iran, whether secret service police or anything else, to say that Mr Yousefi under any identity is on the radar. You, again, I think, are unsurprised by that, but again, it is something that is an explanation why you would not have it.

Having different paperwork, of course, is not a guarantee that it will keep you out of trouble because there are, when entering or leaving the country, [inaudible] what you might call [inaudible]

> checked and some people who work in these areas are particularly good about recognising faces and again, I am not sure if it has ever happened to you, but you might have been stopped at a border control because someone thinks that you look like someone which may or may not be, and it may [inaudible] but as I say, having different paperwork does not guarantee that you avoid trouble. If you have the bad luck to run into someone in any capacity who recognises you, knows you and starts saying, 'Let's see your identity,' and perhaps having phone enquiries made, but that again is comment and it is a matter for you what you make of it.
>
> The prosecution case is, of course, that whatever his defence position with regards to the authorities in Iran, that the real reason he was having a number of identities was because he had the intention of using different identities for criminal purposes, obviously the most obvious one being claiming benefits and as I am sure you will appreciate, if you are going in for that kind of thing, it is not necessarily that you have actually done it, if, for example, you have taken steps towards getting another identity because you think you might want to use it to further muddy the waters or anything else, but as I say, that is going into territory [inaudible] as to what Mr Yousefi was doing and why and as to what he was doing, as you know, there are measures in dispute relating to whether it is him at all doing these things and in cases where he acknowledges that he was doing certain things and obtaining passports and all these identities, his reasons, his motives for doing that and that again is a matter of comment, a matter for your decision making."

29. The first three paragraphs, as with essentially the rest of this quotation, did not contain any relevant directions in law (save in one very limited respect) and consisted almost entirely of observations by the judge that would have failed to provide the jury with any assistance on the issues in the present case. The judicial comments about practices within the Catholic church and within familial or friendly settings as to the use of names were not in any meaningful sense germane to the issues on either the prosecution or defence cases. Indeed, it is agreed by Mr D'Cruz that this section was unhelpful.

30. The same applies to the judge's observations about the likely reaction of those in positions of responsibility to the number of times an individual might change his name by deed pole, save perhaps as regards the simple point that there is no legal bar to the number of times that you are allowed to change your name. That direction in law could have been given in a single short sentence.

31. The fourth paragraph referred briefly to an aspect of the evidence which the jury had heard as regards further information that was sought because, for instance, of an erroneous date of birth. In the fifth paragraph the judge seemingly returned to the issue of missing evidence and although it is by no means entirely clear, he seemed to suggest that there may be an explanation for the lack of evidence from the Iranian authorities or the security services as to the appellant being a person of interest ("his identity is on the radar"). The sixth paragraph contains comments about the kinds of problems that are sometimes experienced by travellers when their documents are challenged - observations that have no apparent relevance to this case. In the seventh paragraph the judge summarised the bare outline of the prosecution case and reminded the jury that there was a matter of dispute as to why the appellant had different identities.

32. These directions in nearly every respect would not have been of any substantive assistance to the jury, save faintly at the end by reminding them of the outline of the prosecution case and of the fact that the law permits you to change your name any number of times. Otherwise, they did not include any directions on the law. They involved discursive and almost entirely irrelevant comment, and it was extremely difficult to understand the point or points that the judge was trying to communicate that were of relevance to the case. On nearly every issue, these remarks should not have been made and we have quoted the passage in full because it is paradigmatic of the content of this summing-up.

The direction on the appellant's previous convictions

33. The judge's direction on the appellant's bad character was substantially deficient. During his evidence in the present trial, the appellant stated that he had never used the Habibpour identity. He suggested that he had been in business with Habibpour, supplying pizza ingredients, thereby suggesting that Habibpour was a real person. He also, in summary, claimed that he had lived a life of high-minded political struggle against oppression and that his career had been characterised by notable educational goals and hard work. As a result the prosecution were permitted by the judge to introduce the appellant's nine previous convictions for obtaining a pecuniary advantage or property by deception and one conviction for an attempt to obtain a pecuniary advantage by deception at the Teeside Crown Court on 10 February 1992 and for which he was imprisoned for 18 months. These offences related to the use of cheques in an identity other than his own.

34. The prosecution were also permitted to introduce other evidence, which had not led to a conviction, concerning the suggested use of the Habibpour identity by the appellant when he carried out certain transactions, and in particular the occasion when the appellant had presented a cheque by Habibpour to pay for food stuffs.

35. The convictions and the other material had been introduced, therefore, to correct particular false impressions created by the appellant during the course of his evidence. The judge's direction as to the significance of the convictions was as follows:

> "Something that you have to understand very plainly is not in any sense that is conclusive and you say, 'Well, that's it. He's

> obviously guilty of everything.' That does not apply at all. The most it can do is to add some weight to the prosecution case, whether it is any weight at all or whether it is much weight, is a matter for you, but as I say, it is there. He certainly has got these convictions for dishonesty. He certainly has these convictions relating to false passport offences and that is something that again can play a part in your deliberations.
>
> You should understand, of course, that again, it varies from case to case, there are times when something is so similar, if you like, that the evidence may come in front of you - if you say it points automatically - but if you are saying this is a clear pointer to the exact way in which you are committing offences. I think I will go to a work of fiction to make a point that the Scarlet Pimpernel, I think, left behind his trademark whenever he had done his business to [inaudible] and you might say this is, if you like, a trademark about him. There is no suggestion that these offences are dramatically similar to what the defendant is accused of on this occasion. It goes, if you like, to the fact that he has committed offences, but at least he has been, say the defence, he has been upfront about it. It is obviously better if someone has not been in trouble at all because then, they can say, I have reached the age I have without getting into any kind of trouble with the law, and then, of course, they are entitled to have a direction about good character, but the defendant can certainly say, 'All right, I've got to the age I have, 63 now, and it's better if I didn't have this on my record, but it's not as though almost every other year, I've been in trouble with the law.'
>
> It is again a matter you hear from him and that again may be, in your view, something that either counterbalances to an extent or eliminates the helpfulness of the elements about bad character."

36. The judge failed to explain to the jury why the evidence of bad character had been introduced and the ways in which they could properly use this material. He correctly suggested that the appellant should not be convicted simply because of his convictions for dishonesty and that they may add "some weight" to the prosecution case. However, the reason why the judge had permitted this material to be introduced was very specific in that it related to particular evidence that the appellant had given as set out above. Although the use to which the evidence may be put at the end of a case is not necessarily limited by reference to the gateway through which it was admitted, nonetheless the judge needs to give clear assistance to the jury as to the matters to which it is logically relevant. Having indicated to them that this material had not been admitted because it revealed strikingly similar criminality, the judge merely added:

> "It goes, if you like, to the fact that he has committed offences ... "

37. The judge had clearly failed to decide whether or not the impact of this evidence was limited to section 101(1)(a) of the Criminal Justice Act 2003 (correcting a false impression) and he similarly omitted to direct the jury, as we have just highlighted, as to the uses to which it could properly be put. These issues were discussed in *R v Highton* [2005] EWCA Crim. 1985, [2006] 1 Cr App R 7 by this court:

> "10. We therefore conclude that a distinction must be drawn between the admissibility of evidence of bad character, which depends upon it getting through one of the gateways, and the use to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted. It is true that the reasoning that leads to the admission of evidence under gateway (d) may also determine the matters to which the evidence is relevant or primarily relevant once admitted. That is not true, however, of all the gateways. In the case of gateway (g), for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant is charged.
>
> 11. This approach underlines the importance of the guidance that was given in the case of *Hanson and others* as to the care that the judge must exercise to give the jury appropriate warnings when summing up. (We refer in particular to para 18 of that judgment and para 3 of the judgment of *Edwards* and its commendation of the summing up of Judge Mort in the case of *Chohan*). In *Edwards* The Vice-President, Lord Justice Rose said:
>
> > 'What the summing up must contain is a clear warning to the jury against placing undue reliance on previous convictions, which cannot, by themselves, prove guilt. It should be explained why the jury has heard the evidence and the ways in which it is relevant to and may help their decision. Bearing in mind that relevance will depend primarily, though not always exclusively, on the gateway in s.101(1) of the Criminal Justice Act 2003, through which the evidence has been admitted. For example, some evidence admitted through gateway (g), because of an attack on another person's character, may be relevant or irrelevant to propensity, so as to require a direction on this aspect.' (para 3) […]."

38. The care that the judge must exercise in giving the jury appropriate directions as to why

the evidence of bad character had been led and the particular ways in which it was potentially relevant was wholly lacking in this summing-up. Mr D'Cruz submits that the direction was sufficient, particularly given the convictions were germane on the issue of propensity. Whether or not this material was relevant on that basis, what was lacking here was any clear direction as to why the bad character material had been introduced and the proper use or uses it may have for the jury.

The direction as to the appellant's failure to answer questions in interview

39. The direction the judge gave as to silence in interview was as follows:

> "The defendant, as you know, had an interview and in that, you have got a record of it, he began by having the advantage of a lawyer who gets a briefing, he has a discussion with his lawyer. He does not have to answer questions at all, but if he starts answering questions - sorry, before he starts answering questions, he has to be given the warning so he has the right not to answer, but if you do not, it may count against you, and I do stress the words, 'may count against you.' [Inaudible] and there are some cases where a lawyer may say and it is helpful if they say it on record, 'I'm advising my client not to say anything or not to say anything at this stage because the evidence isn't clear enough yet or we haven't seen the paperwork,' whatever it might be and again, it is something that you know, you have got the record, what the defendant was saying. At times, he was feeling that he was being - not perhaps quite the right phrase, but hard done by, saying, 'You're trying to get at me. I'm feeling tired. I need my medication,' and saying in various ways that he did not feel he could do himself justice.
>
> There came a point, as you know, before the interview started as to whether he was fit to be interviewed, breaks during the interview to see if he was fit to carry on or needed, perhaps, to be taken to hospital for mental treatment or recovery and as you know, although he was said to be in the opinion of the examiner okay to carry on, he stopped answering questions and again, this is a matter which is going into your territory because you know the questions that he was not answering. You have got the list of topics that were being taken up and the prosecution place some reliance on this saying, 'This counts against you.'
>
> The answer is again, in terms of the law, not that it must count against him, but that it may count against him. It is a matter where you, the jury, know [inaudible] of the interview. You know the difficulties that Mr Yousefi had and again his reasons for not answering these questions, effectively saying he was not in any fit state to do so. You know not just what he says about it, but from

> the evidence itself that it is not as though he was perceived by everyone as being bright eyed and bushy tailed. He did have some problems. He was on some medication. He did have a track record and needed an examination and of course, it is an area that as you have rightly been told by counsel, it is up to you whether it is a failure at all, to let it count against him and in deciding that, you look at all the circumstances and you would have to say, 'We think he may have had problems but he did not answer questions and we are sure to the requisite standard that the reason that you were not answering was either that you did not have an answer to give at all, or an answer that would stand up to questioning,' but as I say, it is important and I keep on stressing this, that not answering questions from the point he started not answering is not something that must count against him, only may count against him if the jury think that it is fair to do it, that the questions he was being asked were about things that matter in the context of this case and that the reason behind not answering was not tiredness or illness but simply that there was not an answer to give or one that would stand up to questioning.
>
> Again, it is something rather like, I've said, [inaudible] the witness. There was no question of renewing the interview and you can see that it would have been possible for some attempt to have been made by the prosecution to say, 'Okay, we want a more extended break. We might be carrying on with this on another day,' or the defendant or his legal representative could have said, 'Look, it's not that he doesn't want to answer or hasn't got an answer to give, but could we continue this discussion, these questions another day?'
>
> That did not happen on either side and again, it may be that you will say well, it might have been better if it had because then we would have known or might have known about what he would have said in answer to these questions and answered at the time the interview broke off. Again, it did not happen and you have to work with the evidence that you have got. There cannot be anything else."

40. In nearly every respect the judge failed to give the directions that are necessary in this context. The one partial exception is that the judge reminded the jury that the appellant was cautioned before the interview and was told he did not have to say anything and that it might harm his defence if he did not mention something when questioned. However, even in this regard the judge failed to direct the jury on the crucial issue that this warning related only to items which he later relied on in court. There was therefore, even in this regard, an incomplete direction, given the appellant needed to have been informed that conclusions might be drawn against him if he failed to mention facts when interviewed (direction given) which he later relied on as part of his defence (direction not given).

Otherwise, the judge omitted to identify the facts the defendant failed to mention but which were relied on in his defence and the reasons, if any, he gave for failing to mention those facts. The judge equally omitted to direct the jury (i) that they may only draw an adverse inference if, apart from the defendant's failure to mention the facts later relied on in his defence, the prosecution case, as it appeared at the time of the interview, was such that it clearly called for an answer, and (ii) taking into account any explanation given by the appellant there was no sensible explanation for his failure other than that he had no answer at that time or none that would stand up to scrutiny. Furthermore, he did not give the central direction that if they thought it was fair and proper to draw such a conclusion, they must not convict the appellant wholly or mainly on the strength of his failure to mention one or more facts.

41. The following day, at counsel's prompting, the judge gave the following direction:

> "One matter that I apologise if I did not cover it before, about the possible significance of the defendant stopping giving answers when he was being interviewed and you have got the list of questions he was asked when he was silent.
>
> I mentioned that there is a triple test, that it will not count against him at all unless the jury think it is fair to hold it against him, but the question about things which matter in the context of the case and that his reason for not answering was that he did not have an answer to give, or nothing to stand up to questioning.
>
> A reminder, of course, that he is saying that he was stopping because he was tired, feeling ill, needed his medication and so on, so it may be that you come to the conclusion that there is no significance in stopping answering questions during the interview, but what I am asked to make clear and I gladly do, is this, that even if you do decide it can count against him, it can only count to a very limited extent. You cannot take it as a main part of the prosecution case or even a significant part of the prosecution case. At best, it would add some weight to what the prosecution's case is against the defendant and as I say, the question may not arise at all, but do not get carried away, even if you think that the triple test has been passed."

42. Although this direction addressed some of the previous day's omissions, it was not clearly expressed and the judge failed to (i) address the requirement that the facts the appellant failed to mention were facts he relied on at trial, (ii) identify which facts came within this category and (iii) set out the requirement that before drawing an inference the jury needed to have found that the prosecution case at interview was such that it called for an answer. It follows that even following prompting by counsel and an overnight adjournment, the judge failed to give an adequate direction on this issue. In the event, the jury were given two different directions on this issue, neither of which were in writing, and both of which

failed to address all of the matters which the jury needed to resolve before reaching a conclusion on the issue.

43. **The direction on the defence case**

The judge summed up the defence case on the counts in the indictment by asking Mr Skelley (the appellant's counsel) during the summing up to explain to the jury what was suggested by the appellant on each count. There is no avoiding the expression of our deep concern that the judge did not attempt to provide the jury with even a thumbnail sketch of the defence case on the charges he faced. The relevant passage is as follows:

> "The prosecution say that an awful lot of money was obtained and they have got the schedule which is not in dispute saying that under the various identities, an awful lot of money was obtained, but the issue you are looking at is to say is it the defendant who is behind these claims. If it is, in your view, is the case or it might reasonably be the case that yes, there have been false claims made but it is nothing to do with me, and that is what the defendant has said - I am checking with Mr Skelley to make sure I have got it right, about what he says about the different counts, then again, it is very interesting that there was this benefit fraud going on, that some people found a way of making these claims and getting loads of money, but the fact that you disapprove of that kind of thing as honest taxpayers who pay your tax and national insurance and so on, does not intend to say that because it is a bad thing to do, therefore, we are sure that this defendant did it. You have got to look at the evidence against him as to whether he is responsible.
>
> Mr Skelley, if you do not mind, I just want to make sure I am not getting things wrong about putting what I might call the headlines about the different counts that the jury are considering.
>
> MR SKELLEY: Yes.
>
> JUDGE MCDOWALL: In fact, it might be simplest if perhaps you just -
>
> MR SKELLEY: Well, your Honour, count 5 -
>
> JUDGE MCDOWALL: Perhaps do it in indictment through. It is easiest for the jury to look at and then they can see.
>
> MR SKELLEY: Count 5, the allegation of fraud against him, the dishonest representation that he used the identity Parviz Yousefi. He accepts he made those disability living allowance claims. He said not dishonest, entitled to that benefit. That is count 5. The remaining counts, count 6 to 9, I have accepted, the jury may well

> conclude that they were fraudulent. The issue is, on his case, not him. Not him who made those claims, who was responsible for those claims, so that is the distinction between count 5 where he accepts he made the claim in his own name as against counts 6 to 9 where he denies being responsible for the claims.
>
> JUDGE MCDOWALL: And the earlier counts? He is simply saying, 'It's not me.'
>
> MR SKELLEY: Yes, count 4, the [inaudible] case, passport, he said, 'Entitled to make that claim.' He says he changed his name back. He said in evidence he did not have the deed poll for that. That is his position that he was entitled to use that identity following on from the 2007 passport in count 2, so that is count 4. Accepted it is him, but not improper. Counts 1 and 3, denial that he made the application. Denies possession of Raba passports."

44. The judge was under the long-established duty to summarise the defence case, at the very least by identifying the central elements of the appellant's defence and the main evidence and arguments that supported it in order to ensure the jury receives a coherent rehearsal of the case advanced by the accused. In *Curtin* [1996] Crim L R 831, Rose LJ stated:

> "... it is a judge's duty, in summing-up, to give directions on the law, to refer to the salient pieces of evidence, to identify and focus attention upon the issues and in each of those respects to do so as succinctly as the case permits. It follows that as part of this duty a judge must identify the defence. The way in which he does so will necessarily depend on all the circumstances of the particular case. Where a defendant has given evidence, it will usually be desirable though it may not always be necessary to summarise his evidence."

45. We observe that these requirements, all of which were necessary at the conclusion of this eight-week trial, were entirely absent.

46. It follows that this critical task could have been undertaken in a focused and succinct manner, but the judge did not embark upon the exercise.

The directions on the counts in the indictment

47. In the original directions to the jury, the extent of the judge's directions on the counts in the indictment were as follows:

> "... as far as the different counts are concerned, they relate to allegations about getting hold of or having documentation or getting them improperly or having them with the intention of making improper use of them or in the case of some of the benefit frauds actually making improper use of. Again, I think it is fairly

> clear that the language is archaic English. It goes into the fact about [inaudible] being the only documents in the claim and you have got the methodology by which the prosecution say it has been done."

48. In addition, on the issue of dishonesty, the judge wholly erroneously stated:

> "The word dishonesty does feature in some of these counts and it is important for you to understand that there are some areas where the defendant is saying, 'I did something and I might not be doing it by the book, but I didn't perceive there was anything wrong. I thought I was acting perfectly honestly,' and that might arise in connection, for example, with his account about getting separate identification so that he could more easily get into and more importantly, out of Iran.
>
> That is something where he is saying, 'I thought there was nothing wrong in what I was doing,' and that is something where you have to be looking at firstly, whether in your view, he did or may reasonably have been taken to have had that belief. It is not the be all or end all whether you think that belief, if it was or might have been held, was a reasonable one. The question is whether it is genuinely held and of course, you take a view sometimes, in all the circumstances of the evidence, that you apply, standards saying, in effect, 'I cannot believe that anyone would have held that view honestly because none of us would have done,' but remember the test is not whether none of you would have done that, but whether the defendant himself appreciated that he was acting dishonestly and that again is something that is going into your factual territory and no one else's."

49. The judge was persuaded to give fresh directions following the overnight adjournment, about which there is no substantive complaint. They were provided in writing and were read out to the jury before they retired.

50. The appellant criticises the amendment permitted towards the end of the summing-up as to the wording of counts 5 to 9. Although this was a markedly late alteration to the indictment, as Mr D'Cruz points out, the amendment was to delete the word "false" in each of the fraud counts and to add after the word "representation" the following rubric: "which was and which he knew was or might be untrue or misleading." The effect of this was to change the wording of the count to reflect the wording of the statute. It clarified the requirements for a finding of guilt and although it does not affect our decision on the outcome of this appeal, we do not consider that this step caused unfairness or undermined the safety of the conviction in that it did not substantively change the case the appellant had to meet.

Conclusion

51. The cumulative effect of the deficiencies in the summing-up, as set out above, save as regards the directions on the counts in the indictment which were rectified, lead us unhesitatingly to conclude that the convictions are unsafe. Indeed, a number of the deficiencies standing alone undermined the safety of these convictions. It follows that the appeal is allowed, and the convictions are quashed.

Post-Appeal events

52. The court directed a re-trial. The appellant pleaded guilty on Monday 21 September 2020 and he was sentenced to a term of imprisonment of just under seven years the following day.

53. The order postponing publication of this judgment until the conclusion of the re-trial has therefore come to an end and this judgment may now be published.