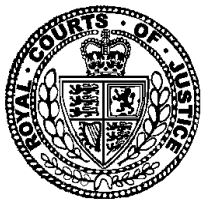

Neutral Citation Number: [2023] EWCA Crim 981

Case No: 202302076 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT ISLEWORTH
His Honour Judge Johnson
01ID1035123

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2023

Before :

LADY JUSTICE THIRLWALL DBE
MR JUSTICE WALL
and
MRS JUSTICE ELLENBOGEN DBE

- -

Between :

ROGELIO AHUMADA Y OTERO	**Appellant**
- and -	
REX	**Respondent**

- -
- -

R Kovalevsky KC and T Harris (instructed by **Cohen & Gresser (UK) LLP**) for the **Appellant**
M Paltenghi (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date : 10 August 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 16/08/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Ellenbogen DBE :

1. This matter was referred to the full court by the Registrar of Criminal Appeals, to determine whether leave to appeal against sentence ought to be granted and, if so, the substantive appeal. At the end of the hearing on Thursday, 10 August, we granted leave and reserved judgment.

2. The facts may be briefly stated. On 7 May 2023, the applicant and his wife were due to fly from London Heathrow to Madrid. The applicant's carry-on luggage was passed through the airport scanner. Inside, within one pocket, was found an automatic pistol and, within another, a magazine loaded with eight cartridges, together with a further five loose cartridges. The gun was in working order and the cartridges were compatible with it. The applicant is a Mexican national who, during the previous week, had travelled from Mexico City to Paris and, from there, by Eurostar, to London. His position throughout has been that the weapon and ammunition lawfully belonged to him but that he had not known that they had been in his suitcase. He was arrested at Heathrow airport and subsequently charged with four offences. He was remanded in custody. On 5 June 2023, he pleaded guilty to possessing a prohibited firearm, contrary to section 5(1)(aba) of the Firearms Act 1968 (count 2) and to possessing ammunition without a firearm certificate, contrary to section 1(1)(b) of the same Act (count 4). The Crown offered no evidence in relation to counts 1 and 3, in relation to which not guilty verdicts were entered, in accordance with section 17 of the Criminal Justice Act 1967.

3. Before us, as below, it was common ground that, pursuant to section 311 of the Sentencing Act 2020, count 2 related to an offence to which (given the applicant's age at the date of conviction) a minimum custodial term of five years applied, unless the court was of the opinion that there were exceptional circumstances, which related to the offence or to the offender, and justified it in not imposing that minimum term.

4. On 15 June 2023, in the Crown Court at Isleworth (HHJ Johnson), the applicant was sentenced to 26 months' imprisonment, on count 2, and to a concurrent custodial sentence of three months, on count 4. Those sentences followed a basis of plea unchallenged by the Crown and a *Newton* hearing, at the instance of the sentencing judge, to determine the applicant's state of knowledge at the material time, following which, as we shall explain, the judge made a finding that there were exceptional circumstances in this case.

The grounds of appeal

5. The applicant seeks permission to advance three grounds of appeal, on the basis of which it is said that his sentence was manifestly excessive:

    i) The judge erred in refusing to be guided by Table 2 within the Sentencing Council's guideline, Firearms — possession of prohibited weapon, in consequence of which he selected an excessive starting point;

    ii) The judge insufficiently discounted the sentences imposed, having regard to the applicant's ignorance of the fact that he had been in possession of the prohibited weapon and ammunition; was of exceptional character; and had complications arising from his medical conditions (metabolic syndrome;

hypothyroidism; cortical atrophy; frontotemporal dementia; severe arthritis of the hands and chronic pain throughout his body) and advanced age (74, at date of conviction); and

iii) The judge erred in concluding that, had he imposed a sentence of or below 24 months' imprisonment on count 2, it would not have been appropriate to suspend it.

The judge's sentencing remarks

6. In his detailed sentencing remarks, the judge stated as follows:

> 'I watched the CCTV of the finding of the gun and the reaction of both you and your wife. I find it very surprising the gun was not detected at either Mexico City or Paris. Having heard your account I concluded that I could not be sure you knew the gun was in that bag; that is not to say that I accept every word of your account. In all, you have given three accounts, one by way of prepared statement to the police; one in a letter to me; and when you gave oral evidence before me. I should add that in your interview, you declined to answer questions, so, no further material came from that source.
>
> You have always maintained that you did not know the gun was in that bag. How that gun came to be in your bag is of some importance. In your prepared statement you said that, in Mexico, you would travel with the same bag to your country house, sometimes referred to as your cabin, and you said this, 'When I got back to Mexico City, I asked my maid if they had seen the same gun. She said I probably left it at the cabin. I assumed this was the case because I searched the bag and could not find it.' In what I will call your mitigation statement to me, you do not go into further details save to say the incident was accidental and happened because of completely innocent carelessness.
>
> When you gave evidence before me earlier this week, you told the court that the gun was stiff and on account of your arthritis, you wanted it oiled and serviced in Mexico City. Accordingly, you put the gun into the same case. On the same day you travelled back to Mexico City. It was normal for the maid to remove your laundry the following day. You then told me that you asked the maid where the gun was and you said that she told you that she had not found it and you must have left it in the cabin. You went on to say that you had presumed that you had left it there.
>
> In my judgement, that account is not credible. I accept that you may have taken the gun to Mexico City in the bag but even with a poor memory, I do not accept you simply accepted a maid's word that the gun was not there. There is a conflict in these two accounts even taking into account words that may have been lost in translation. Incidentally, I accept having heard evidence from …the interpreter that, when you said it was not in working order in your prepared statement, this was an example of a misunderstanding and not a deceit.

> In your prepared statement, you said that you searched the bag for the gun. In evidence you said that you simply accepted her word that it was not there. I do not accept that when speaking of a firearm …you would simply have accepted her word. In my judgement you have brought the gun back and recklessly left it in a bag that you later used for international travel some two to three weeks later. It may be the case that, on the medical evidence, …your memory is poor. That matter aside, I accept your account. I also acknowledge that you are a hugely experienced traveller who would be well aware of security measures at travel hubs such as London Heathrow and this, together with the wealth of character evidence, your age, and your good character, is why I cannot be sure you knew the gun was in that case. I, nevertheless, felt it was important to follow the guidance given in the case of R v Rogers [2016] EWCA Crim. 801…as to the procedure to be followed when exceptional circumstances were being advanced, namely, that the court should hear evidence.'

7. The balance of the judge's sentencing remarks bears reciting in full:

> 'With these facts in mind, I turn to the Sentencing Council Guidelines for this offending. This was a type 1 weapon, it being an automatic pistol. The Crown in its sentencing notes submit that there was no intention to use the weapon, therefore, placing it in Category 3. Accordingly, the range is five to seven years' imprisonment; that categorisation is accepted by your counsel, Mr Kovalevsky, KC. Mr Paltenghi, who appeared for the prosecution, went on to submit originally that there were no aggravating features. I am bound to say that I do not accept that submission as I said during the course of the submissions. First, there was a substantial amount of ammunition with the weapon and, secondly, this offence took place as you were due to board a commercial flight. In the ordinary case, I consider that the starting point would be much closer to seven years' imprisonment than five, with those two seriously aggravating features.
>
> Having said that, I accept that in your case there is considerable mitigation. Not only do you have no previous convictions as you approach your 75th birthday but you are a man of exemplary character. This is evidenced in the large number of references that I have read and which are uploaded on the digital case system. These are documents that go well above what are often seen in this court. Your referees include a Nobel laureate for peace, a former ambassador, and the President of the Mexico City Supreme Court. Clearly, you are also highly regarded by the young who you have taught over a number of years, as well as the mature and distinguished referees who have taken the trouble to write on your behalf. You are, in short, a good man who has contributed to many people, charities, and good causes. I do not underestimate how impressive the character evidence is and nor, indeed, does the prosecution in its sentencing note.
>
> I take into account your age, your remorse, which I accept is genuine, and your poor health. In this regard, I have read the letter from Dr Sinencio Herrera which your wife exhibits in her statement, and I have obviously

heard from your wife, read her statement, and read the statement from your son. I also take into account the state of British prisons and the added hardship that a man of your age and health will suffer. Last but certainly not least, I take into account my finding that you were not aware that you were carrying a prohibited weapon.

Accordingly, I turn to step three which is to address the minimum term and exceptional circumstances. It is accepted that count two attracts the provisions of section 311 of the Sentencing Act 2020; section 311(2) stating, 'The court must impose, here five years, unless the court is of the opinion that there are exceptional circumstances which relate to the offence or the offender and justify it not passing the minimum sentence'. In addressing the topic of exceptional circumstances, therefore, I have to address both the circumstances of the offence and your circumstances as the offender. In doing so I have had the advantage of hearing your evidence and I have already given my factual findings, the most important of which was in your favour.

The approach that I now take – must take — as regards exceptional circumstances is set out not only in the Guideline but in a helpful paragraph in Archbold, a leading text on criminal law, which bears reading out. … 'The court in *R v Nancarrow* [2019] 2 Cr.App.R.(S) 4 reviewed the previous authorities on the issue of exceptional circumstances…noting they established the following principles:

1. The purpose of the mandatory minimum term is to act as a deterrent; the authority for that is *Rehman*.

2. Circumstances are exceptional if to impose five years' imprisonment would amount to an arbitrary and disproportionate sentence.

3. It is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional. In order to justify the disapplication of the five year minimum, the circumstances of the case must be truly exceptional; the authority for that is *R v Dawson* [2017] EWCA Crim. 2244.

4. It is necessary to look at all the circumstances of the case together, taking a holistic approach. It is not appropriate to look at each circumstance separately and conclude that, taken alone, it does not constitute an exceptional circumstance. There can be cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances makes the case exceptional.

5. The court should always have regard, amongst other things, to the four questions set out in the well-known case of Avis, albeit there are now definitive guidelines. Those questions are:

(a) 'What sort of weapon was involved?' Here an automatic pistol; a very serious weapon.

(b) 'What use, if any, was made of it?' None.

(c) 'With what intention did the defender possess it?' The answer to that is without any criminal intention.

(d) 'What is the defendant's record?' I have already said that it is exceptionally rare to see anything as exemplary as yours.

6. The reference in the section to the circumstances of the offender is important. It is relevant that an offender is unfit to serve a five year sentence or that such a sentence may have a significantly adverse effect on his health.

7. Each case is fact specific and the application of the principles depended upon the particular circumstances of each individual case. Limited assistance is to be gained from referring the court to the decisions in cases involving facts that are not materially identical; and, finally,

8. Ultimately, the test is whether the imposition of the minimum sentence would lead to a sentence that is arbitrary or disproportionate.

In his helpful submissions, Mr Kovalevsky addresses the first of these principles. He submits that deterrence is an important factor in cases where a minimum sentence applies. In that he is quite right, but in my judgement deterrence to the possession of firearms is not simply directed at those who may be loosely described as criminals and who may have the inclination to use weapons for unlawful purposes. The case of *R v Burrows* [2004] EWCA Crim. 677 deals with a case where the defendant, an experienced traveller, who was treated as a man of good character, had overlooked the fact that he had used a bag as a hiding place to prevent any accidental use by his young daughter of a gun. As in the instant case, that is your case, this central feature of mitigation was accepted by the Crown and the court.

In *Burrows*, the gun in question was not even classified as a firearm, let alone a prohibited firearm. No minimum sentence applied. In that case the Court of Appeal cited with approval the remarks of the sentencing judge that all air travellers should be concerned with the possibility of boarding an aircraft with such an article, that the oversight was criminal and that the public had to be assured that all possible steps had been taken to ensure that nobody had a weapon such as this — in *Burrows* it was a BB gun — … in their immediate possession when travelling on an aircraft. The court accepted that the offence was one which had arisen out of forgetfulness following a careless, inadequate check of the appellant's luggage. The court went on to say, and I do not consider this to be obiter; it was part of the judgment, 'The importance of the need to ensure security in the air cannot be exaggerated and the travelling public has its own part to play in ensuring that security'. The court went on to state that an immediate custodial sentence for a man of good character was merited. I am not impressed by

the submission that the composition of the Court of Appeal was, by inference, weak nor that this case has not been approved in later judgments. As I said to counsel during the course of submissions, happily guns found at Heathrow Airport are extremely rare occurrences.

Having said all this, taking into account the substantial mitigation in your case, I do find that there are exceptional circumstances which apply. I have had my attention drawn to paragraph 14 under step three of the Guidelines which reads as follows, 'The court may find it useful to refer to the range under culpability A of table two in step two above, namely, the starting point and category range. The court should impose a sentence that is appropriate to the individual case'. During the course of submissions, Mr Kovalevsky pointed out that, immediately before the two tables in the Guidelines there is stated this, 'Table 1 should be used if the offence is subject to the statutory minimum sentencing provisions. Table 2 should be used for all other cases'. He submits, therefore, that I should use Table 2. I consider that this submission is based on a misunderstanding. The offence of the prohibited weapon is subject to the minimum provisions, and, further, later in the guideline step 13 states, 'If there are exceptional circumstances that justify not imposing the statutory minimum sentence, then the court must impose either a shorter custodial sentence or an alternative sentence'. Paragraph 14, which I have already cited, follows.

On the facts of this case and taking into account the aggravating features that I have found to be present and the case of *Burrows*, I do not consider that, in deciding the appropriate sentence, I should follow the suggestion to apply Table 2. Clearly, to move to Table 2 is discretionary. I have to consider what the appropriate sentence is looking at the case and yourself as a whole. Taking a bag onto a scheduled flight with a prohibited weapon and compatible ammunition is clearly a very serious offence. In my judgement, even with all the mitigation that is available here a significant custodial sentence must be passed.

Having found exceptional circumstances, I have to consider the reduction for your guilty pleas. Here I give you the benefit of the doubt, as I have already indicated as to what credit I can give you. Normally, when a not guilty plea is indicated at the lower court this credit is limited to 25%. In view of what I have heard, the fact that your native language is Spanish, and the Crown's concession that is made on this topic, I am prepared to give you full credit. Taking into account my finding that there are exceptional circumstances, I consider that the starting point can be reduced by as much as 50% to three years and four months, and, with the reduction of one third for your guilty plea, the sentence will be one of 26 months' imprisonment…

…

I would finally add this, that, even if I had been able to reduce the sentence to within the range of a suspended sentence and that there would be at least two factors in favour of suspending such a sentence, I would not have done so as I consider that only an immediate custodial term could do justice to this case. The sentence, therefore, is 26 months' imprisonment in total.'

The applicant's submissions

8. In his written submissions in relation to ground one, Mr Kovalevsky KC submitted that the position as agreed below between the Crown and the Defence had been that, in the event of a finding of exceptional circumstances owing to ignorance of the fact of possession of the prohibited items, Table 2 of the sentencing guideline would apply at step two, and that the offence would be categorised as 3B[1] (having a starting point of a medium level community order and a sentencing range of a Band C fine to a high level community order).

9. Whilst, formally, not abandoning that contention, the focus of Mr Kovalevsky's oral submissions in relation to ground one was that paragraphs 13 and 14 of step three of the sentencing guideline reflected the dicta of Lord Woolf LCJ, in *R v Rehman* [2005] EWCA Crim 2056, at paragraphs 12, 14 and 15, to the effect that: (1) the statutory imposition of a minimum sentence is to ensure that, absent exceptional circumstances, the court will always impose deterrent sentences, *'However, it is to be noted that if an offender has no idea that he is doing anything wrong, a deterrent sentence will have no deterrent effect upon him'*; and (2) the statutory reference to the circumstances of the offender is most important; '*We have no doubt that the fact that an offender is unfit to serve a five-year sentence may be relevant, as is the fact that he or she is of very advanced years. This is necessarily to be read into the words used, otherwise a sentence may be inappropriately harsh and even fall within the language of Art 3 of the European Convention.'* Considered in that context and in light of the findings of fact which the judge had made, he submitted that the judge had been wrong not to have had regard to Table 2, at step three of the sentencing guideline. His starting point had been selected from Table 1 and had exceeded all sentencing ranges set out in Table 2, resulting in a manifestly excessive total sentence. Furthermore, the judge had been wrong to find aggravating factors; the parties had been agreed that none had applied and that many of the factors identified in the guideline as reducing seriousness and reflecting personal mitigation had been present. In Mr Kovalevsky's submission, whilst it had been open to the judge to place reliance upon *Burrows*, that case had been decided before *Rehman* and the court had not been referred to *Avis*, to each of which authorities it had been obliged to have regard. Furthermore, the court in *Burrows* had not been dealing with a prohibited firearm which would now fall within section 311(4)(b) of the Sentencing Act 2020, or with Table 1 of the sentencing guideline, and had reduced the sentence from one of 4 months' imprisonment to one of 28 days, allowing for the offender's immediate release. The aggravating factors as found by the judge and said to justify the selection of Table 1 had included an uplift for deterrence which had been inappropriate in light of the judge's finding of the applicant's ignorance.

10. In relation to ground two, Mr Kovalevsky submitted that the judge had been referred to various authorities emphasising the importance of the fact of ignorance and of the rarity of such a finding. In particular, the Defence had relied upon *R v Zhekov* [2013] EWCA Crim 1656 **[17]**:

[1] as corrected in oral submissions

> 'We think however that the very exceptionality of this particular case at least requires one to approach the question of deterrence with some degree of caution. Those hereafter carrying to the United Kingdom such stun guns as disguised weapons will know, if there is publicity of this case or of any other such case, that it is illegal to do so and will know that there is a clear prospect of facing immediate custody if they are detected. But this appellant did not know that. He was to be described as at fault, in that he had not checked.'

In the circumstances of this case, he submitted, the judge's emphasis on *Burrows*, coupled with his characterisation of the applicant's behaviour as 'reckless', might have distracted inappropriately from those factors (ignorance and personal mitigation) which had called for a significant reduction in penalty.

11. As to ground three, Mr Kovalevsky submitted that the penalty which ought to have been imposed would have been capable of suspension, as a matter of principle, and should have been suspended. There had been no suggestion that the applicant had been in possession of the prohibited items in a criminal context and he had been ignorant of their presence in his luggage. None of the factors rendering suspension inappropriate, as set out in the overarching definitive guideline on the imposition of community and custodial sentences, applied in this case. This court should suspend any sentence which it substituted, having regard to the time already served, including on remand since the date of arrest.

12. The court's stated finding that the applicant had been reckless had been made following a *Newton* hearing in which the applicant, his wife and the interpreter had given evidence. In the absence of any issue between the Crown and the Defence, the Crown's cross-examination had been short. The court had asked no questions, nor had it given any indication of any particular concern or issue. Its only stated conclusion, when asked for a formal ruling on the issue the subject of the hearing, had been that it could not be sure that the applicant had known that he had been in possession of the prohibited items. No reasons for that conclusion had been given and neither party had been afforded the opportunity to address the court in relation to any perceived important conflicts between the accounts of events variously given by the applicant. In those circumstances, whilst, as a matter of principle, it is open to a sentencing judge to consider reckless conduct an aggravating factor, the judge had been wrong to sentence the applicant on the basis that he had been reckless.

The Crown's position

13. In relation to ground one, Mr Paltenghi submitted that the focus of Mr Kovalevsky's oral submissions on ground one itself demonstrated that the judge had approached the sentencing exercise correctly. Step 3 of the sentencing guideline reflected the applicable principles, as set out in the Sentencing Act 2020 and in domestic and European jurisprudence. It was clear, from a combined reading of paragraphs 13 and 14 of step 3 of the sentencing guideline, that, where it finds exceptional circumstances which justify not imposing a minimum sentence to exist, the court has a discretion to have regard to Table 2, but is not obliged to do so where it considers that that table does not meet the gravity of the offending in question. The judge had been alive to

that discretion and had decided, on the facts, that it was inappropriate to have regard to Table 2. Contrary to the position advanced by the applicant on appeal, the Crown had made clear that it disagreed with the Defence interpretation of the application of Tables 1 and 2. The Crown's position had been that, *if* the judge considered it appropriate to have regard to Table 2, category 3A in that table would apply.

14. In Mr Paltenghi's submission, whilst the matters raised by grounds 2 and 3 were essentially matters for this court, it was clear, from paragraph 13 of step 3 of the guideline, that, in the event that Table 2 is deemed not to be a useful point of reference, the extent of the adjustment required to the relevant sentencing range in Table 1 is in the judge's discretion. Irrespective of the label properly to be applied to it, the judge had been entitled to have had regard to the conduct on the part of the applicant which he had considered to have been reckless, namely the applicant's failure properly to have checked his luggage before travelling. It had not been incumbent upon the judge to have communicated any provisional conclusions in that respect, whether during the *Newton* hearing, or at sentencing stage. Counsel for the applicant had had suitable opportunity to address the conduct in question in evidence and/or in the course of his submissions.

Discussion and conclusions

Grounds One and Two

15. It is convenient to take grounds one and two together and, in so doing, we must be faithful to the judge's findings that there were exceptional circumstances in this case.

16. The sentencing guideline relating to the possession of a prohibited firearm came into effect on 1 January 2021. At step one, the court is required to determine the offence category, by reference only to the factors identified in the table within that section of the guideline. Culpability is determined by reference to the type of weapon and to the offender's own culpability factors.

17. Step two then provides for determination of the starting point and category range. The guideline states that, *'Table 1 should be used if the offence is subject to statutory minimum sentencing provisions. Table 2 should be used for all other cases. See step 3 for details of the minimum sentencing provisions and the approach to be taken to consideration of exceptional circumstances.'* Table 1 is headed *'Offences subject to the statutory minimum sentence (Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (ag), (ba), (c), section 5(1A)(a))'*. Table 2 is headed *'Offences not subject to the statutory minimum sentence'*. In this case, by reference to the judge's assessment of culpability (which is not subject to challenge), if Table 1 was applicable at step two, as the judge concluded, a category 3B offence had a starting point of five years six months', and a range of five to seven years', imprisonment.

18. In the usual way, the guideline then sets out non-exhaustive lists of aggravating factors and those reducing seriousness or providing personal mitigation, by reference to which the sentencing judge is to decide whether the sentence arrived at thus far should be subject to upward or downward adjustment.

19. Step three is headed *'Minimum term and exceptional circumstances'* and is replicated below, with original emphasis:

> '**Minimum term**
>
> 1. Where the minimum term provisions under section 311 and Schedule 20 of the Sentencing Code apply, a court must impose a sentence of at least five years' custody irrespective of plea **unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so**.
>
> Applicability
>
> 2. The minimum term provisions apply when sentencing an offence under the Firearms Act 1968, section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) or (c) or section 5(1A)(a) committed on or after 22 January 2004 and to an offence under section 5(1)(ag) or (ba) of that Act committed on or after 6 April 2022. Note: the minimum term provisions do not apply to offences charged as conspiracies.
>
> 3. The minimum term applies to all such offences including the first offence. Where it applies the sentence cannot be reduced below the minimum term for a guilty plea (see step 5 – Reduction for guilty pleas).
>
> 4. The minimum term of five years applies to offenders aged 18 or over when the offence was committed. See below for guidance when sentencing offenders aged under 18 when the offence was committed.
>
> 5. Where the minimum term applies, this should be stated expressly.
>
> **Exceptional circumstances**
>
> 6. In considering whether there are exceptional circumstances that would justify not imposing the statutory minimum sentence, the court must have regard to:
>
>   - the particular circumstances of the offence and
>
>   - the particular circumstances of the offender
>
>   either of which may give rise to exceptional circumstances.
>
> 7. Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions 9.3.3 Sentencing.

8. Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

Principles

9. Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.

10. The circumstances must truly be exceptional. It is important that courts do not undermine the intention of Parliament and the deterrent purpose of the minimum term provisions by too readily accepting exceptional circumstances.

11. The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances.

12. The mere presence of one or more of the following should not in itself be regarded as exceptional:

- One or more lower culpability factors
- The type of weapon or ammunition falling under type 2 or 3
- One or more mitigating factors
- A plea of guilty

Where exceptional circumstances are found

13. If there are exceptional circumstances that justify not imposing the statutory minimum sentence then the court **must impose either a shorter custodial sentence than the statutory minimum provides or an alternative sentence.** Note: a guilty plea reduction applies in the normal way if the minimum term is not imposed (see step 5 – Reduction for guilty pleas).

14. The court may find it useful to refer to the range of sentences under culpability A of Table 2 (Offences not subject to the statutory minimum sentence) in step 2 above. The court should impose a sentence that is appropriate to the individual case.'

20. For current purposes, it is not necessary to set out the remaining steps in the guideline.

21. From the framework and drafting of the guideline, it is clear that, at step two, the application of Table 1 or 2 is determined by the nature of the offence itself and that consideration of the existence or otherwise of exceptional circumstances does not arise before step three. That is clear from the explanation provided as to when each table should be used; the heading to each table; and numbered paragraphs 1 to 5 in step three. Thus, in this case, the judge was correct, at step two, to conclude that Table

1 applied, before going on to consider the issue of exceptional circumstances in accordance with numbered paragraphs 6 to 12 of step three, which reflect the earlier caselaw.

22. The judge having found that exceptional circumstances which justified not imposing the statutory minimum sentence did apply, paragraph 13 of step three obliged him to impose either a shorter custodial sentence, or an alternative sentence, to which credit for the applicant's guilty plea would apply (at step five). As paragraph 14 of step three makes clear, the court *'may'* find it useful to refer to the range of sentences under culpability A of Table 2 in such circumstances, but is not obliged to do so. We consider that the statutory duty to give reasons for the sentence imposed encompasses a need to explain any decision not to do so in particular cases, as the judge did in this case. It follows that the judge adopted the approach for which the guideline provides at steps one and two and the real issue raised by ground one is whether, on the facts of this case, he improperly declined, at step three, to refer to the relevant sentencing range in Table 2, including when having regard to the aggravating factors which he had identified.

23. As indicated by his sentencing remarks, the judge declined to refer to Table 2 *'on the facts of this case and taking into account the aggravating features that I have found to be present and the case of Burrows. Taking a bag onto a scheduled flight with a prohibited weapon and compatible ammunition is clearly a very serious offence. In my judgement, even with all the mitigation that is available here a significant custodial sentence must be passed.'* As the structure of the guideline makes clear, the presence of aggravating factors could not itself determine the relevance of either table; aggravating factors increase the seriousness of the offence as categorised and enable the judge to identify the need for any upward adjustment to the sentence arrived at by reference to the relevant table, but do not themselves assist in the identification of the appropriate starting point and category range. Nevertheless, we consider that, read as a whole, the judge's remarks were intended to communicate his view that, having regard to all of the circumstances, the category range for which Table 2 provided (being, under culpability 3A — per paragraph 14 of step 3 — a high level community order to two years' custody) was inadequate to reflect the gravity of the applicant's offending, as the judge viewed it to be. As he put it, *'I have to consider what the appropriate sentence is, looking at the case and yourself as a whole.'* That led him to conclude that, making a suitable adjustment to take account of the aggravating factors which he had identified (being the quantity of ammunition found with the weapon and the fact that the applicant had been about to board a commercial flight), he should move up from the starting point in the guideline at Table 1 (five and a half years' custody; category range five to seven years' custody) to six years and eight months, which term ought then to be reduced by fifty per cent to reflect the exceptional circumstances and mitigating factors, before full credit was given for the applicant's guilty plea.

24. We consider that the judge was entitled to conclude that the matters which he had identified had aggravated the applicant's offending, as, ultimately, Mr Kovalevsky acknowledged, in the course of his oral submissions.

25. Nevertheless, having found that exceptional circumstances applied and, hence, by definition, that the imposition of the minimum term would result in an arbitrary and disproportionate sentence, we consider that the judge erred in his application of the

sentencing guideline, paragraph 13 of step three of which obliged him to impose either a shorter custodial sentence, or an alternative sentence. Once he had concluded that it was not appropriate to refer to Table 2, he could only sentence by reference to Table 1, the starting points and category ranges within which relate to offences to which the statutory minimum sentence applies and do not encompass non-custodial sentencing options. Accordingly, when moving from the starting point applicable to the applicant's category 3B offence to take account of aggravating and mitigating factors and the relevant exceptional circumstances, he had been obliged, first, suitably to reflect the fact that the starting point had been fixed by reference to the minimum term, and so was higher than would be appropriate in light of his finding of exceptional circumstances, such that the aggravating factors which he had identified could properly result in only a modest upward adjustment, if any. Secondly, he had been obliged to make a very substantial downward adjustment to reflect the exceptional circumstances and mitigating factors which he had identified, consistent with the requirement imposed by paragraph 13 of step three and Parliament's rationale for imposing a minimum term, as explained in *Rehman*.

26. In *Rehman*, this court was concerned with section 51A of the Firearms Act 1968, in terms materially the same as those of the successor provision with which we are concerned. At paragraph 4, it defined the term 'deterrent sentences' to mean *'sentences that pay less attention to the personal circumstances of the offender and focus primarily upon the need for the courts to convey a message that an offender can expect to be dealt with more severely so as to deter others than he would be were it only his personal wrongdoing which the court had to consider'*. At paragraph 12, Lord Woolf LCJ said:

> '…So far as we can determine the rationale of Parliament, the policy was to treat the offence as requiring a minimum term unless there were exceptional circumstances, not necessarily because the offender would be a danger in the future, but to send out the deterrent message to which we have already referred. The mere possession of firearms can create dangers to the public. The possession of a firearm may result in that firearm going into circulation. It can then come into possession of someone other than the particular offender for example by theft in whose hands the firearm would be a danger to the public. Parliament has therefore said that usually the consequence of merely being in possession of a firearm will in itself be a sufficiently serious offence to require the imposition of a term of imprisonment of five years, irrespective of the circumstances of the offence or the offender, unless they pass the exceptional threshold to which the section refers. This makes the provision one which could be capable of being arbitrary. This possibility is increased because of the nature of section 5 of the Firearms Act. This is different from most sections creating criminal offences. In the majority of criminal offences there is a requirement that the offender has an intention to commit the offence. However, firearms offences under section 5 are absolute offences. The consequence is that an offender may commit the offence without even realising that he has done so. That is a matter of great significance when considering the possible effect of section 51A creating a minimum sentence.'

At paragraph 16, he went on to state,

> 'It is clear in our judgment that, read in the context to which we have referred, the circumstances are exceptional for the purposes of section 51A(2) if it would mean that to impose five years' imprisonment would result in an arbitrary and disproportionate sentence.'

Apposite, too, are the dicta of this court in *Zhekov* **[17]**, cited at paragraph 10, above.

27. In fact, so far as apparent from his sentencing remarks, the judge moved up from the starting point to reflect the applicable aggravating factors, stating, *'In the ordinary case I consider that the starting point would be much closer to seven years' imprisonment than five with those two seriously aggravating features'*, before reducing the sentence by fifty per cent to reflect the exceptional circumstances and mitigation. This was not an easy sentencing exercise, but, in our judgement, the judge's approach to the aggravating factors was wrong. This was not the ordinary case and we consider that the aggravating factors here warranted an upward adjustment from the starting point for category 3B of Table 1 of six months. It was to the resulting six year custodial term that the fifty per cent reduction reflective of the exceptional circumstances and mitigation as found ought to have been applied. Accordingly, the appropriate sentence on count 2, following a trial, would have been one of three years' imprisonment. After full credit for the applicant's guilty plea, that would have been reduced to two years.

Ground three

28. Whilst stating that he would have imposed an immediate custodial sentence even if the sentence passed had been capable of suspension, the judge did not set out his reasons for that view. On the facts of this case, it is only in circumstances in which appropriate punishment can only be achieved by immediate custody that it would not be appropriate to suspend the applicant's concurrent sentences. Having given the matter very careful consideration, and having regard to the overarching definitive sentencing guideline, we consider that, in the very unusual circumstances here, appropriate punishment can and should be achieved by the imposition of concurrent suspended sentences. It follows that the original sentence was manifestly excessive.

29. We, therefore, allow the appeal. We quash the sentences which the judge imposed on counts 2 and 4. On count 2, we substitute a custodial sentence of two years, suspended for a period of two years. On count 4, we substitute a custodial sentence of three months, also suspended for two years, to run concurrently with the sentence imposed on count 2. Given the time already served by the applicant, we do not impose any requirements.

30. It follows that the applicant can be released.