Neutral Citation Number: [2019] EWHC 1385 (Admin)

Case No: CO/2028/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2019

Before:

LORD JUSTICE HOLROYDE
and
MR JUSTICE DOVE

- -

Between:

The Queen on the application of Ali Bahbahani	**Claimant**
- and –	
Ealing Magistrates' Court	**Defendant**
London Borough of Ealing	**Interested Party**

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Louis Mably QC and Benjamin Waidhofer (instructed by **Lawrence & Co CDS LLP**) for the **Claimant**
No appearance or representation for the **Defendant**
Ellis Sareen (instructed by **London Borough of Ealing**) for the **Interested Party**

Hearing dates: 14th February 2019

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Approved Judgment

Lord Justice Holroyde and Mr Justice Dove :

Introduction

1. The facts of this case are extraordinary, and we think it almost inconceivable that they will ever be replicated. The Claimant Mr Bahbahani applies for judicial review of his convictions following a summary trial as long ago as 26th August 2014. It now appears that the man who attended that trial (and earlier court appearances) and identified himself as the Claimant, and who gave evidence in the Claimant's name, was not in fact the Claimant but rather his trusted agent Saad Maki Abdul-Jalil, to whom he had granted power of attorney. In essence, the Claimant contends that the proceedings as a whole were unlawful because he had been impersonated. This is the judgment of the court, to which we have both contributed.

2. We summarise the relevant facts so far as practicable in chronological order.

3. On the 26th January 2004 the Claimant appointed Mr Abdul-Jalil to be his attorney for the purposes of the Powers of Attorney Act 1971.

4. On 7th December 2005 Mr Abdul-Jalil was convicted of offences of conspiracy to defraud and money laundering. He was remanded in custody until 20th January 2006, when he was sentenced to 6 years' imprisonment. Confiscation proceedings under the Proceeds of Crime Act 2002 (hereafter, "POCA") were heard at a later date, and on 11th December 2006 Mr Abdul-Jalil was made subject to a confiscation order in the sum of £598,000, with two years' imprisonment in default of payment.

5. On 22nd October 2007, for an offence of conspiracy to handle stolen goods to which he had pleaded guilty, Mr Abdul-Jalil was sentenced to a further two years' imprisonment.

6. On the 27th May 2008 (whilst Mr Abdul-Jalil was still in custody serving his sentences) the Claimant became the owner of a residential dwelling house at 1 Waldegrave Road, Ealing, London. That property had been the subject of investigation by the London Borough of Ealing (the Interested Party in these proceedings) for breaches of planning control. The Interested Party served an enforcement notice dated the 16th December 2008. On the 5th May 2009 it appears that Mr Abdul-Jalil, impersonating and pretending that he was the Claimant, attended the offices of the Interested Party and complained that he had not had any knowledge of the enforcement notice. He provided a new address for the Claimant, and the Interested Party decided to serve a fresh notice. A further enforcement notice dated the 8th May 2009 was served. The enforcement notice alleged a material change of use of a detached and ancillary domestic outbuilding arising from its use as a self-contained residential unit.

7. An enforcement notice appeal was lodged bearing (or purporting to bear) the signature of the Claimant. A public inquiry was held in relation to the appeal on the 12th January 2010. At the inquiry a copy of the Claimant's passport and also the power of attorney dated the 26th January 2004 (see [3] above) were submitted by Mr Abdul-Jalil, who gave evidence in support of the appeal in his own name on behalf of the Claimant. In the course of her decision dismissing the appeal the Inspector noted that she had not been provided with "any evidence whatsoever relating to accounts or

income from the property except for the rent book". She further noted that the rent book did not cover the period of the whole term of the tenancy, and that no explanation had been provided in relation to that discrepancy. The notice having been upheld, it came into effect. The Claimant did not comply with it.

8. On 29th May 2012 the Claimant granted Mr Abdul-Jalil another wide-ranging General Power of Attorney to act on his behalf. Amongst other things, this authorised Mr Abdul-Jalil –

> "… to sign and negotiate all documentation and any other ancillary documents, including bank documentation on my behalf, as well appearing in court for me and accepting any thing for me and on my behalf in respect of any legal proceedings."

9. The Interested Party's investigation in relation to breach of planning control at 1 Waldegrave Road continued. Ultimately a further enforcement notice was served dated the 24th October 2012. This enforcement notice related to a breach of planning control caused by the use of the first floor flat as two self-contained residential units, together with operational development in the form of rear extensions and the creation of roof terraces along with the sub-division of the rear garden. No appeal was lodged in respect of that enforcement notice and therefore it came into effect. The time for compliance expired on 12th June 2013. Again, the Claimant did not comply with it.

10. On the 7th May 2013 Mr Abdul-Jalil commenced serving a sentence in default of payment of the December 2006 confiscation order (see [4] above).

The proceedings in the Ealing Magistrates' Court

11. On the 18th December 2013 an information was laid before the Ealing Magistrates' Court (the Defendant in these proceedings) by the Interested Party's solicitor, alleging failure by the Claimant to comply with the enforcement notices. The first hearing date was adjourned following a request by Mr Abdul-Jalil, in the guise of the Claimant. The memorandum entered in the Defendant's register records that on the 15th May 2014 a plea of not guilty was entered in respect of both charges. It is an agreed fact that the not guilty pleas were entered not by the Claimant, but by Mr Abdul-Jalil impersonating him and pretending that he was the Claimant. It is again an agreed fact that Mr Abdul-Jalil impersonated the Claimant, and gave evidence as the Claimant, at his trial on the 26th August 2014, which ended with findings of guilt in relation to both charges. Pursuant to section 70 of POCA, the Claimant was committed for sentence to the Crown Court at Isleworth so that a confiscation order could be considered.

The proceedings in the Crown Court

12. The proceedings in the Crown Court began on the 26th September 2014, when Mr Abdul-Jalil impersonated the Claimant at a mention hearing. As part of the usual procedure followed on that occasion, he admitted the convictions and the committal for sentence. On the 10th October 2014 a statement pursuant to section 18 of POCA was signed, admittedly by the Claimant, after it had been prepared by Mr Abdul-Jalil. It was not however served, and as a result the Interested Party applied for the case to be listed for mention.

13. By the time of that further mention hearing, on 28th November 2014, the Interested Party's investigations had led (understandably, in view of the events to date) to suspicion that the Claimant was using the name Abdul-Jalil. When Mr Abdul-Jalil attended the hearing, in the guise of the Claimant, he was therefore asked if he had previously served a sentence in the name of Abdul-Jalil. He said that he had. He did not however say that he was not the Claimant.

14. On 20th February 2015 the Interested Party served a statement alleging that the Claimant and Mr Abdul-Jalil were one and the same person.

15. The next significant milestone in the proceedings was a mention on the 29th April 2015 when, for the first time, the Claimant attended the criminal proceedings at the Crown Court with Mr Abdul-Jalil. The judge ordered that the Claimant produce his passport and that the issue of identity be tried as a preliminary issue. On the 8th May 2015 the Interested Party wrote to the Claimant accepting that the passport he had provided was genuine and therefore accepting that he was not the man who had, up until that point, participated under the Claimant's name as the defendant in the prosecution brought by the Interested Party. It was accordingly no longer necessary for the preliminary issue to be tried. At a further mention hearing on 29th May 2015 a revised timetable was set for the confiscation hearing.

16. On 16th June 2015 an application was made by the Claimant (without notice to the Interested Party) for leave to appeal to the Crown Court against his convictions on 26th August 2014. The application was long out of time and made no reference to the Claimant having been impersonated by Mr Abdul-Jalil in the criminal proceedings. On the 29th June 2015 the application was dismissed by HHJ Edmunds QC on the basis that it was totally without merit, in that it raised no new issues and provided no reasonable excuse for the delay in making the application. On the 6th August 2015 there was a further application to the Crown Court for leave to appeal against conviction out of time. It was made on a different basis, namely an alleged failure in disclosure by the Interested Party, but again made no reference to impersonation of the Claimant. On the contrary, the application drafted by counsel on the Claimant's behalf, and no doubt on his instructions, stated that the Claimant was served with the first enforcement notice; said that he had unsuccessfully appealed that notice; referred to a "preparation for effective trial form" in which the applicant had indicated that he had not been served with the second enforcement notice; and submitted that disclosure of the relevant document "would have had a profound effect upon the [Claimant's] ability to comply" with the enforcement notice. On 10th September 2015 this further application was also refused.

17. On the 14th December 2015 the Claimant issued an application for permission to apply for judicial review of the Crown Court's decision on 10th September 2015. Once again, no reference was made to his having been impersonated: instead, judicial review was claimed on the ground that there had been a breach of natural justice in denying the Claimant an opportunity to pursue his appeal against conviction, when the delay in his lodging that appeal was "squarely due to the actions of the prosecution" in not disclosing a relevant document. The grounds of claim, large parts of which appear to have been copied and pasted from the application made to the Crown Court in August 2015, stated amongst other things that the Claimant stood trial in the magistrates' court and was convicted, and that he, acting as a litigant in person, had lodged grounds to appeal out of time to the Crown Court. In its acknowledgment

of service the Interested Party raised the question of the impersonation of the Claimant by Mr Abdul-Jalil, and expressed suspicion that the judicial review proceedings may have been commenced by Mr Abdul-Jalil impersonating the Claimant. Ultimately, permission to make this application for judicial review was refused on the 7th October 2016 by Collins J, who considered the application to be totally without merit.

18. Following the grant of a restraint order under Section 41 of POCA on the 11th February 2016, and following a further application by the Claimant for an adjournment, the confiscation hearing against the Claimant began on the 31st March 2016, before Mr Recorder Philip Shepherd QC in the Crown Court at Isleworth. On the second day of the confiscation hearing, an application for an adjournment was made by the Claimant (who was of course the defendant in the confiscation proceedings) on the basis that he needed time to amend his judicial review claim (see [17] above). That application was refused and the confiscation hearing proceeded. It continued over eight days, during which time the court heard evidence both from the Claimant and also from Mr Abdul-Jalil, and concluded on 18th July 2016. There were then written closing submissions from the prosecution and defence, after which a further hearing was to be listed for judgment to be handed down and for sentencing to take place.

19. On 19th July 2016 there was a hearing before the Defendant magistrates' court of an application which the Claimant had made a week earlier under section 142(2) of the Magistrates' Courts Act 1980. By this application, the Claimant sought to reopen his convictions in August 2014, on the basis that he had been impersonated in the proceedings by Mr Abdul-Jalil. That application was dismissed.

20. There then followed a lengthy period after the prosecution had lodged its closing submissions in the confiscation proceedings, during the course of which the Claimant terminated his instructions to counsel who had represented him at the confiscation hearing, and instructed fresh counsel to prepare the written submissions in response.

The application to the Crown Court for a stay

21. On the 6th January 2017 written submissions were made on behalf of the Claimant contending that the confiscation proceedings were an abuse of process, and applying on that ground for the proceedings in the Crown Court to be stayed. One of the grounds upon which the application was made was the contention that in all of the preliminary hearings and communications which led up to the trial on the 26th August 2014 in the Defendant magistrates' court someone other than the Claimant had appeared purporting to be him. The prosecuting authority, namely the Interested Party, responded by contending that the certificate of conviction was conclusive and that all other remedies available to the Claimant had been exhausted. It was accepted by the Interested Party that there was no evidence that the Claimant had actual knowledge of the enforcement notices, and no evidence that the Claimant had actual knowledge of the commencement of the prosecution. By this stage it was also, of course, common ground that it was not the Claimant but Mr Abdul-Jalil who had appeared and given evidence at the trial.

22. Submissions were made at an oral hearing on the 1st March 2017, and on 13th March 2017 the Recorder delivered his judgment. For convenience, he referred to the

Claimant as "AB" and to Mr Abdul-Jalil as "SMAJ". He concluded that this was not a case in which a defendant had been impersonated by an antagonistic third party whose actions he had disowned: on the contrary, the Claimant had confirmed during his evidence that Mr Abdul-Jalil was his trusted agent. The Recorder's findings in relation to the impersonation of the Defendant and its consequences, and in relation to the allegation of abuse of process, included the following:

> "It was submitted by reference to what was described as a fundamental principle of criminal liability that this could only attach to the actual individual specified in the charge sheet on the indictment. No authority is cited to me on this very broad proposition, but, that said, here the actual individual specified was the owner of the land, namely, the defendant. Section 179(2) of TCPA makes the owner criminally responsible for non-compliance. This is not a case of someone other than the person who the law makes criminally responsible for non-compliance with an enforcement notice has been found guilty of the offence in question, such as SMAJ. In addition to being the actual individual who was correctly specified in the summons, here the defendant was convicted, as the certificate of conviction proves. Magistrates' Courts are inferior courts, not of record. Their decisions are recorded pursuant to Part 5 of the Criminal Procedure Rules in a register book. The defendant was convicted on 26th August 2014, and the extract from the register of the Ealing Magistrates' Court, which was annexed to the further prosecution submissions, in my judgment proves this beyond challenge.
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> …
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> In my judgment, the defendant has not in the circumstances of this case established that the integrity of the criminal justice system requires protection by staying these proceedings. To the contrary, having delegated the conduct of his affairs in relation to the properties that he owned to SMAJ he has no real cause for complaint. Here, what occurred was that SMAJ pretended in the Ealing Magistrates' Court that he was the defendant unbeknown to the prosecution. Far from complaining about this at the earliest opportunity, or distancing himself from SMAJ, the defendant appears to have adopted until now what was done in his name, but, more than this, having failed to appeal in time or obtain permission to appeal out of time, and that he failed in judicial review, to my mind allowing this application would be a collateral attack on those decisions. It could be seen as attacking the integrity of the criminal justice system. I find myself unable to say continuation of these proceedings demands the imposition of a stay for abuse of process. Indeed, I do not find that there has been an abuse of process at all."

In those circumstances, the Recorder dismissed the Claimant's application for a stay.

The judgment in the confiscation proceedings

23. After yet further submissions on behalf of the Claimant seeking to set the proceedings in the lower court aside, the confiscation proceedings were concluded on the 15th September 2017, when the Recorder gave a detailed judgment rejecting the various grounds of challenge. In the course of that judgment the Recorder rejected submissions which had been made on the 5th June 2017 contending that the committal of the case was "bad on its face" and/or that in the interests of justice the court should set aside the Claimant's conviction and remit the case pursuant to section 142 of the 1980 Act. At paragraphs 41 and 42 of his judgment the Recorder ruled upon those submissions as follows:

> "41. I do not consider that in the light of the foregoing and having regard to the chronology … that it is in the interests of justice to accede to this application. To the contrary, in my view this would subvert justice because not only has this come about in circumstances where AB was willing to invest SMAJ with the widest powers to act on his behalf and continued this even after he knew that SMAJ was sentenced to 6 years imprisonment for fraud in January 2006 and a further sentence of 2 years for conspiracy to handle stolen goods in October 2007, AB affirmed his willingness by executing a further General Power of Attorney on 29th May 2012. At no time has AB terminated the wide powers he chose to invest in [SMAJ]. As the chronology shows AB has made past applications for permission to appeal out of time in June 2015 and again in August 2015 by which time AB has retained solicitors and counsel. Judicial review has also been attempted but failed and on July 2016 an application made under s142(2) MCA to re-open the conviction which was dismissed on 19 July 2016.
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> 42. In my judgment it would be quite wrong to permit a different outcome at this stage. Accordingly I dismiss that application."

24. During the course of his judgment in relation to the confiscation proceedings, the Recorder made a number of findings which are pertinent to the present proceedings. First, when dealing with the Interested Party's contention that the Claimant was "simply a front for a money laundering operation" and that therefore the assumptions within section 10 of POCA arose, such that other real property apart from 1 Waldegrave Road and the monies passing through a number of other bank accounts should be brought within the scope of the confiscation proceedings, the Recorder observed at paragraph 71-72 of his judgment as follows:

> "71. From my assessment of AB in the witness box over many days it was striking how little he knew about the 7 properties and how totally he delegated almost everything to SMAJ and continued to do so in the face of overwhelming evidence that SMAJ was treating the properties as his own as well as the bank accounts and impersonating him in court proceedings about which he failed to inform AB. The prosecution say that

> standing back everything is consistent with AB acting as a front with SMAJ and possibly others being the real people behind an elaborate money laundering operation. In the case of SMAJ who was called as a witness for AB he was in my view a wholly unconvincing witness who gave me the overwhelming impression that he was prepared to say anything to suit the case being advanced. SMAJ is a convicted fraudster who has an outstanding confiscation order against him. This says the Prosecution is precisely the context in which it becomes unsurprising that the use of AB to act as a front can be expected. It also puts they say into its proper context the purported explanations put forward by AB. I examine later in this judgment the credibility of the Defence witnesses.
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> 72. The fact that AB chose on his version of events to entrust his affairs to SMAJ calls for explanation to say the least. When it is also the case that bank accounts in the name of AB were routinely being operated by SMAJ the conclusion that AB's true role was simply to act as a front becomes all the more compelling. But as the Prosecution rightly submit this does not result in the conclusion that AB is to be treated as having minimal benefit for the purposes of confiscation."

25. In respect of the magistrates' court proceedings the Recorder noted that Mr Abdul-Jalil had attended the trial on 26th August 2014 in the guise of the Claimant, and observed as follows:

> "101. AB contends that he knew nothing of these proceedings. The problem for AB is that this is consistent with SMAJ being the true beneficial owner of 1 WR and AB being simply a front to conceal that fact."

26. In respect of the credibility of the Claimant and of Mr Abdul-Jalil, and in respect of the relationship between them, the Recorder found as follows:

> "102. In the case of AB who gave evidence over a protracted period as I have already pointed out he is a man of good character but I have to say at the outset that I found him to be a witness whose testimony was replete with improbabilities and contradictions. For example:
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> (i) Even though AB attended this Court on 29th April 2015 he made no attempt to disclose that SMAJ had impersonated him either in the EMC or at prior hearings. His professed ignorance of the nature of the proceedings and why he was there was simply not credible.
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> (ii) His profession of continued ignorance of the nature of the proceedings is belied by his signature on a list of his assets made for the purpose of complying with section 18 POCA- the document is headed in the Isleworth Crown Court.

(iii) On 21st April 2009 AB attended the British consulate in Beirut and signed a witness statement in High Court proceedings verified by a Statement of Truth in which he claimed ownership of Convent [one of the relevant properties] but significantly told an outright deliberate lie- that he had never had any relationship, social or business or otherwise, with the Defendants – which included SMAJ. In fact as AB positively avers he had a close business relationship with SMAJ for at least 6 years before signing that statement. I have to ask myself why AB should be willing in a witness statement that he knew was being used in Court to tell such an egregious lie and what it says about his credibility having taken the trouble to travel all the way to Beirut for that purpose. In the witness box AB had no satisfactory answer for this.

(iv) AB account about how instantly he was apparently able to start business and export profits rather than invest in what was a start up I found incredible. On his account no sooner had he started the business that he was able to send significant sums to the UK.

On this basis I do not think I can place reliance on the testimony of this witness unless it is corroborated by other reliable evidence.

103. Suffice it to say for the purpose of this judgment that I agree with the prosecution submission that SMAJ is fundamentally dishonest and not a person on whose testimony any reliance can be placed without reliable evidence to support it. His willingness to impersonate AB on a repeated basis in the EMC and in this court knowing full well what he was doing and giving evidence as AB eliminates his credibility. His willingness to be involved in the obtaining of the witness statement from AB that contained such an outright lie about his relationship with SMAJ does the same. And this is before one considers his criminal record and his demeanour in the witness box which was evasive and wholly unconvincing.

…

107. I find it wholly implausible that an intelligent business man would not only retain SMAJ but maintain that relationship with someone who had the track record of SMAJ when there were so many other ways of managing the properties. Just a few examples will suffice:

(i) No rent was collected for the period October 2006 - April 2008 while SMAJ was in prison in closed conditions- it is incredible that AB would be willing to permit this over such an extended period.

(ii) The fact that SMAJ was convicted and sent to prison for fraud is ample reason to terminate this agency and yet on AB's account he never did so. Not only was he not available for a very extended period but he was convicted of serious dishonesty. This factor alone is powerful enough.

(iii) It allegedly took 2 years for SMAJ to repay over £350,000 for a failed transaction relating to 26 Wesley Court without it raising any protest from AB

(iv) Even after his supposed trusted agent SMAJ failed to take the elementary precaution of insuring 1 WR so that when there was a fire AB sustained a loss of just over £206,000 this brought forth no protest let alone termination of this supposed agency.

(v) And yet AB not only gave SMAJ a Power of Attorney he even extended this to giving SMAJ the power to represent him in court.

(vi) SMAJ impersonated him in court and failed to tell AB about the Notices let alone do anything to act on them thereby failing in his basic duty to protect his principal's interests. And yet AB's alleged faith in him remained undiminished.

(vii) Add to this how little AB knew about his properties and what little interest he took in them.

(viii) I also note the significant cash withdrawals made by SMAJ which suggest that he was treating the money in those accounts as his own.

(ix) AB appeared to know very little about debits from what were supposedly his accounts for all manner of reasons in addition to property acquisitions including over £10,000 for spreadbetting, an investment company called Parkwheel Limited about which AB knew nothing to name just some examples.

(x) No less than £189,632.74 represented returned cheques for which AB had virtually no explanation.

(xi) The striking absence of documents relating to the supposed letting of the properties or expenditure connected with them.

Suffice to say that I do not accept this account that SMAJ was acting as his agent- it is just too implausible. The overwhelming impression I had was the SMAJ operated these accounts and dealing with the properties as if they were his own because they were. In my judgment AB was a willing participant in acting as a front for SMAJ."

27. In those circumstances the Recorder fined the Claimant £2,000, made an order as to costs and made a confiscation order under POCA in the sum of £4,310,311. He imposed a sentence of eight years' imprisonment in default of payment of the confiscation order and a similar term in default of payment of the fine.

The appeal to the Court of Appeal, Criminal Division

28. On the 13th October 2017 the Claimant applied to the Court of Appeal, Criminal Division for leave to appeal in relation to the confiscation order. His application was referred by the Registrar to the full court. The grounds of appeal were first, that the proceedings in the magistrates' court had been a nullity because the Claimant had been impersonated, and that a writ of *venire de novo* should therefore be granted; secondly, that the sentencing proceedings in the Crown Court had been an abuse of the process once it became known that the Claimant had been impersonated; and thirdly, that the confiscation order was in any event wrong in principle.

29. The judgment of the court was handed down on 5th February 2018. It is published under neutral citation [2018] EWCA Crim 95. Each of the grounds of appeal was rejected, and the appeal succeeded only to the extent of correcting a technical error as to the default term in relation to non-payment of the fine, which was reduced to one of 40 days' imprisonment. The default term in respect of the confiscation order remained unchanged.

30. The first ground of appeal was rejected on the basis that there was no power for the court to grant the order sought, the writ of venire de novo being concerned only with trials on indictment. The court observed that there were varied ways in which a conviction in a magistrates' court can be challenged, and said at [19]:

> "The [Claimant] may yet seek to challenge head on the convictions in the Magistrates' Court and committal for sentence. The issues which arise, were such a challenge made, may not be entirely straightforward, in particular whether questions of discretion arise in connection with delay and relief. It is part of the [Claimant's] argument that when a conviction is properly to be regarded as a nullity, there is no basis upon which either delay or the broad discretion that surrounds the grant of relief in judicial review proceedings could stand in the way of quashing the proceedings. But those are arguments for the court with jurisdiction to consider them."

31. As to the second ground of appeal, by which it was contended that in circumstances where the Claimant was not present and could not be proved to have been aware of the criminal proceedings in the magistrates' court prior to his conviction (and where it was apparent that a third party had impersonated him) the proceedings should have been stayed as an abuse, the Court of Appeal's conclusions were as follows:

> "24. From these facts the recorder concluded:
>
> "All of the foregoing leads me to conclude that the prosecution is right to observe that this was not a case where the defendant (applicant) was impersonated by or faced with the actions of

> antagonistic third parties whose actions he disowned. To the contrary, (Mr Abdul-Jalil) was a trusted agent, as he confirmed when he gave evidence during the hearing."
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> 25. In the course of his ruling the Recorder correctly addressed his mind to the test to be applied in an application to stay criminal proceedings on the grounds of abuse of process, namely by the second limb to protect the integrity of the criminal justice system. He observed, as was not in dispute, that neither the court nor the prosecution had contributed to any conduct that undermined the integrity of the criminal justice system. The difficulties, the recorder concluded, were of the applicant's own making. In his ruling he stated:
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> "(Mr Abdul-Jalil) pretended in the Ealing Magistrates Court that he was (the applicant), unbeknown to the prosecution. Far from complaining about this at the earliest opportunity, or distancing himself from (Mr Abdul-Jalil), (the applicant) appears to have adopted until now what was done in his name. but more than this, having failed to appeal in time or obtain permission to appeal out of time (to the Crown Court against the convictions), and that he failed in judicial review, to my mind this application would be a collateral attack on those decisions. It could be seen as attacking the integrity of the judicial system… I do not find there has been an abuse of process at all".
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> 26. We agree with the recorder and his reasons for rejecting the abuse of process application. There is no merit in the applicant's criticism of the refusal to stay the proceedings as an abuse of process. He was himself the cause of the very matters of which he complained. To the extent that the process was abused, it was by Mr Abdul-Jalil in a way which was initially endorsed by the applicant for his own advantage."

32. As to the submission that the committal for sentence to the Crown Court was defective, thereby rendering the sentence and confiscation proceedings a nullity, the court noted that the fact that the Claimant had not been present at the time of the committal for sentence was of course not apparent from any document emanating from the magistrates' court. The Recorder had been correct to reject the submission that the committal was "bad on its face": the Claimant had been seeking an inquiry which would be appropriate in judicial review proceedings but not in the Crown Court. The court observed that the correct approach had recently been restated in *Westminster City Council v Owadally* [2017] EWHC 1092 (Admin), [2017] 1 WLR 4350 (to which we return later in this judgment).

33. It is unnecessary for present purposes to say more about the third ground of appeal. It suffices to record that the court found the order to have been correctly calculated and not disproportionate.

34. Before coming to the present proceedings we should note that on 27th September 2017 Mr Abdul-Jalil was arrested and charged with doing acts tending and intended to pervert the course of public justice. The charge alleged that between 25th August 2014 and 9th July 2016, at Ealing Magistrates' Court, with intent to pervert the course of public justice he did a series of acts, namely purported to be someone else in civil proceedings and lied on oath, which had a tendency to pervert the course of public justice. We are told that that prosecution was subsequently discontinued, for reasons which are not known to the parties.

The claim for judicial review

35. We can now turn to the present claim for judicial review, issued on 23rd May 2018, which challenges the convictions of 26th August 2014. Permission to apply was granted by Supperstone J, but was limited to three grounds, to which we will come shortly.

36. In support of his claim, the Claimant filed a witness statement dated 4th May 2018. We are bound to say that this raises more questions than it answers. The Claimant stated that he is an American national and has never lived in the UK for any extended period of time; that he first met Mr Abdul-Jalil in 2002; that he understood him to have "an excellent reputation for managing property efficiently and productively"; that around March 2008 Mr Abdul-Jalil was speaking to him about business opportunities in the UK; and that throughout the time the Claimant was out of this country Mr Abdul-Jalil regularly kept him updated about matters in the UK. He did not explain how those statements could be reconciled with the fact that between 2006 and 2009 Mr Abdul-Jalil was in prison serving his sentence for serious offences of dishonesty. The Claimant went on to state that at all material times he had entrusted his affairs to Mr Abdul-Jalil and he had no knowledge of the enforcement notices, the appeal against the first notice, the issuing of the information, the proceedings in the magistrates' court or the initial proceedings in the Crown Court. He did not explain how those assertions could be reconciled with the application made on his behalf in August 2015 (which shows that his instructions at that stage must have been to the effect that he was served with at least the first enforcement notice and was aware of, and participated in, the proceedings in the magistrates' court) or with the terms of his application for judicial review in December 2015 (see [17] above). He also stated that he did not know at the time that Mr Abdul-Jalil had been imprisoned both for offences of dishonesty and for non-payment of his confiscation order, but he did not explain when or how that substantial total period of incarceration came to his attention. As to how he eventually came to participate in the Crown Court proceedings, the Claimant's statement merely said that in April 2015 Mr Abdul-Jalil asked him to come to the UK "to clarify an issue relating to identity". He stated that it was only when the confiscation proceedings began in 2016 that he began to understand what had happened and realised he had been misled and manipulated by Mr Abdul-Jalil.

37. The Claimant has waived legal professional privilege in relation to the conduct of the confiscation proceedings by counsel whom he instructed at that stage (but not earlier). The court therefore has the benefit of information provided by counsel. It is apparent that although the Claimant said he had been impersonated by Mr Abdul-Jalil, he would not disassociate himself from Mr Abdul-Jalil, who indeed accompanied the Claimant to conferences with counsel. Initially counsel was instructed that they were not pursuing the impersonation issue: his instructions in that regard only altered at a

time when it was clear that the confiscation proceedings were not going well. In response to a specific enquiry, counsel expressed his opinion in these terms:

> "AB's reluctance to follow my persistent advice that he need to distance himself from Mr Jalil and work to revisit the criminal proceedings, if the impersonation point was genuine, always indicated to me that I was not being told the truth about the extent of his knowledge. From all my experience with the two of them I formed the view that AB did know of the proceedings but no one thought they would lead to the confiscation proceedings and the possible loss of all the other properties so it was treated as seriously as I should have. [sic] As such Mr Jalil was allowed to do what he did and AB knew of it."

The grounds of claim

38. The first of the three grounds of claim contends that as a result of breaches of section 17A and section 20 of the 1980 Act there was simply no jurisdiction vested in the magistrates' court to try or to convict the Claimant. In consequence the whole of the proceedings flowing from the breaches of those statutory requirements are a nullity and should be quashed. Ground 2 contends that as a result of the Claimant not being present in court, the trial and convictions, together with the subsequent proceedings based on the convictions, are invalid and a nullity. Ground 3 contends that the Claimant's convictions arose as a breach of the requirements of fairness owing to the fact that he was impersonated at the trial and therefore did not participate in the proceedings.

39. All of these grounds are resisted by the Interested Party, on whose behalf Mr Sareen also submits that no extension of time should be granted to the Claimant to bring this claim.

The statutory provisions

40. Sections 17A-21 of the Magistrates' Courts Act 1980 provide for the procedures to determine first an accused's plea, and secondly the mode of trial, when a person is charged with one or more either-way offences (that is, offences which may be tried either in the Crown Court or in a magistrates' court). We must quote sections 17A and 20:

> "17A.— Initial procedure: accused to indicate intention as to plea.
>
> (1) This section shall have effect where a person who has attained the age of 18 years appears or is brought before a magistrates' court on an information charging him with an offence triable either way.
>
> (2) Everything that the court is required to do under the following provisions of this section must be done with the accused present in court.

(3) The court shall cause the charge to be written down, if this has not already been done, and to be read to the accused.

(4) The court shall then explain to the accused in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty—

(a) the court must proceed as mentioned in subsection (6) below; and

(b) he may (unless section 17D(2) below were to apply) be committed for sentence to the Crown Court under section 3 or (if applicable) 3A of the Powers of Criminal Courts (Sentencing) Act 2000 if the court is of such opinion as is mentioned in subsection (2) of the applicable section.

(5) The court shall then ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.

(6) If the accused indicates that he would plead guilty the court shall proceed as if—

(a) the proceedings constituted from the beginning the summary trial of the information; and

(b) section 9(1) above was complied with and he pleaded guilty under it.

(7) If the accused indicates that he would plead not guilty section 18(1) below shall apply.

(8) If the accused in fact fails to indicate how he would plead, for the purposes of this section and section 18(1) below he shall be taken to indicate that he would plead not guilty.

…

20. Procedure where summary trial appears more suitable

(1) If the court decides under section 19 above that the offence appears to it more suitable for summary trial, the following provisions of this section shall apply (unless they are excluded by section 23 below).

(2) The court shall explain to the accused in ordinary language—

(a) that it appears to the court more suitable for him to be tried summarily for the offence;

(b) that he can either consent to be so tried or, if he wishes, be tried on indictment; and

(c) that if he is tried summarily and is convicted by the court, he may be committed for sentence to the Crown Court under section 3 or (if applicable) section 3A of the Powers of Criminal Courts (Sentencing) Act 2000 if the court is of such opinion as is mentioned in subsection (2) of the applicable section.

(3) The accused may then request an indication ("an indication of sentence") of whether a custodial sentence or non-custodial sentence would be more likely to be imposed if he were to be tried summarily for the offence and to plead guilty.

(4) If the accused requests an indication of sentence, the court may, but need not, give such an indication.

(5) If the accused requests and the court gives an indication of sentence, the court shall ask the accused whether he wishes, on the basis of the indication, to reconsider the indication of plea which was given, or is taken to have been given, under section 17A or 17B above.

(6) If the accused indicates that he wishes to reconsider the indication under section 17A or 17B above, the court shall ask the accused whether (if the offence were to proceed to trial) he would plead guilty or not guilty.

(7) If the accused indicates that he would plead guilty the court shall proceed as if—

(a) the proceedings constituted from that time the summary trial of the information; and

(b) section 9(1) above were complied with and he pleaded guilty under it.

(8) Subsection (9) below applies where—

(a) the court does not give an indication of sentence (whether because the accused does not request one or because the court does not agree to give one);

(b) the accused either—

(i) does not indicate, in accordance with subsection (5) above, that he wishes; or

(ii) indicates, in accordance with subsection (5) above, that he does not wish,

> to reconsider the indication of plea under section 17A or 17B above; or
>
> (c) the accused does not indicate, in accordance with subsection (6) above, that he would plead guilty.
>
> (9) The court shall ask the accused whether he consents to be tried summarily or wishes to be tried on indictment and—
>
> (a) if he consents to be tried summarily, shall proceed to the summary trial of the information; and
>
> (b) if he does not so consent, shall proceed in relation to the offence in accordance with section 51(1) of the Crime and Disorder Act 1998."

For convenience, we will refer to the combined requirements of those two sections as "the sections 17A/20 procedure".

The submissions: ground 1

41. We are grateful to counsel for their written and oral submissions.

42. On behalf of the Claimant, Mr Louis Mably QC draws particular attention to section 17A(2) which requires all of the steps needed to comply with the legislation to be done with the accused present in court. He couples this with the subsequent obligations under section 17A to explain the nature and potential consequences of the accused's choices, in ordinary language, before those choices are made. In a similar vein he submits that it is clear that the requirements of section 20, together with the procedural safeguard which that section contains, can only be discharged if the accused is present in court.

43. Mr Mably draws attention to the fact that there is a line of authority supporting the contention that a failure to discharge the procedural requirements of section 17A and section 20 deprives a magistrates' court of jurisdiction leading to the proceedings being a nullity. In the case of *R v Cockshott* [1898] 1 QB 582 a Divisional Court held that the failure to inform an accused of his right to be tried by a jury, when he was entitled to make that choice pursuant to section 17 of the Summary Jurisdiction Act 1879, was the breach of an absolute rule that the accused should be provided with that option, and was not a requirement which could be waived. In *R (Rahmdezfouli) v Wood Green Crown Court* [2013] EWHC 2998 (Admin); [2014] 1 WLR 1793 a Divisional Court applied the decision in *Cockshott* to the requirements of section 17A of the 1980 Act in circumstances where a magistrates' court clerk had failed to ask the statutory questions mandated by section 17A of the 1980 Act at the outset of the proceedings. Giving judgment in the Divisional Court Mackay J (with whom Moses LJ agreed) observed that "the legislature in enacting section 17A must have intended in my judgment, acting in line with then existing authority, that where a magistrate's court declined or failed to follow the requirements of the section it was acting without jurisdiction every bit as much as if, for instance, it had purported to try a defendant on a charge of homicide".

44. We would add that *Cockshott* was also followed in *R v Kent Justice, ex parte Machin* [1952] 2 QB 355, in which the court found that magistrates had failed to follow the strict requirements of section 24 of the Criminal Justice Act 1925 and accordingly quashed the convictions. Lord Goddard CJ noted, at p360;

> "It follows, therefore, that this man has never technically been in peril and he could now be tried over again."

45. The most recent example relied upon by Mr Mably was *Owadally*. In that case it was ultimately accepted as a fact that whilst the accused in the case were present at the hearing when pleas were taken and were represented by counsel, it was clear that guilty pleas had been indicated by counsel rather than articulated by the accused themselves. The defendants' case was that the indication of guilty pleas entered on their behalf by counsel was an incurable error, fatal to the subsequent proceedings, because pursuant to section 17A they, and only they, could indicate pleas of guilty. In giving the leading judgment in the Divisional Court Gross LJ (with whom Ouseley J agreed) concluded that whilst the case had originally been brought by way of case stated, it should be considered as an application for judicial review. Having reviewed the authorities Gross LJ offered the following observations in relation to the approach to breaches of section 17A of the 1980 Act:

> "45. Pulling the threads together:
>
> …
>
> (v) It is, as it seems to me, beyond sensible argument to the contrary that s.17A, MCA requires the defendant to enter a guilty plea personally and that a failure to do so involves non-compliance with the provisions of the section. This is so whatever the position may be in respect of other provisions of the MCA. Thus, for example, s.122 provides that an absent party represented by a legal representative is not deemed to be absent. But even there it may be doubtful whether a legal representative can enter a binding guilty plea in the absence of the accused: see, *Blackstone* (2017), at D22.5.
>
> (vi) In general, the law has moved away from the "mandatory"/ "directory" dichotomy and now asks instead whether the legislature intended that the consequences of a procedural failure should entail the invalidity of the proceedings which follow. In doing so and as has been seen, the law distinguishes broadly between "mere" procedural failure and proceeding without jurisdiction. Informed acquiescence, or waiver, on the part of the accused may be of the first importance to the former but, as recounted in *Ashton*, waiver cannot operate to confer jurisdiction. *Clarke* serves as an authoritative reminder that there are instances where, however technical or lamentable it may be, a procedural requirement may be jurisdictional, so that non-compliance results in the invalidity of the proceedings which ensue, upon the appropriate application being brought in time or within any extended time. As it seems to me, the

> observations in *Ex p. Machin* [1952] 2 QB 355 and *Williams* [1978] QB 373 epitomise this approach.
>
> (vii) For completeness, it is a part of the confiscation context (*Sekhon* [2003] 1 WLR 1655 and *Soneji* [2006] 1 AC 340) that the Court is under a statutory duty to make a confiscation order where the requisite conditions are satisfied. The conclusion that non-compliance with a statutory requirement is there treated as a "mere" procedural failure fits readily within this context.
>
> (viii) The requirements of s.17A (or its predecessors) have been consistently treated in the authorities as jurisdictional: see *Cockshott* and *Rahmdezfouli's* case [2014] 1 WLR 1793. In this regard although it is relevant that only the claimant was represented in *Rahmdezfouli's* case, the Court's decision was plainly based on a careful consideration of the authorities, so that its persuasive authority is not materially reduced.
>
> ix) Here, as elsewhere, decisions of courts cannot be ignored and will stand unless or until successfully challenged by an appropriate application made within time or any extension of time."

He went on to express his conclusions in relation to the judicial review application in the following terms:

> "51. Once the procedural difficulties have been put to one side (as they have in the peculiar circumstances of this matter), the insuperable difficulty is that – as established by authority – the jurisdiction of the magistrates' court to deal with these either way offences is conditional on strict compliance with the s.17A, MCA requirements. A failure so to comply, here constituted by not taking the indication of pleas from the Respondents personally, meant that the magistrates' court was acting without jurisdiction. It follows that the committal for sentence was invalid, thus fatally undermining the Crown Court proceedings: see, for instance, the observations in *Ex p. Machin* [1952] 2 QB 355 and *Williams*. The defect, once found, could not be cured or overcome by waiver, ratification, acquiescence or the like; none of these, as expressed in *Ashton* [2007] 1 WLR 181, could operate to confer jurisdiction. It will be recollected that in *Clarke* [2008] 1 WLR 338 the absence of an indictment meant that there could be no valid trial on indictment and the signing of the indictment at a late stage could not validate the invalid proceedings already conducted – as here, without objection. Here too, as interpreted by authority, Parliament's intention must be understood as meaning that non-compliance with the s.17A, MCA requirements results in the invalidity of any proceedings which follow - so reflecting the fundamental importance of guilty pleas being entered personally; and that such invalidity, once found, was incurable

> by the Respondent's participation in the proceedings which followed. Accordingly, I am, most reluctantly, driven to the conclusion that the Respondents' submission is correct in law. Put another way, any other conclusion would run strongly and unacceptably counter to the tenor of authority, to which reference has been made.
>
> 52. I reiterate that the approach followed in this case is based on the following considerations: the case is where it is because of the procedural errors made on all sides, so that, in effect, each party required our indulgence; the need for a pragmatic response at the stage this case has reached; the problems of deciding whether to grant permission when the case is already before us, and the facts have been found. This approach is no guide at all as to how a court should approach judicial review applications of this nature in the future. It is to be hoped that the court is not put in this position again."

46. It will be noted that the court in reaching that decision focused on the requirements of section 17A of the Magistrates' Courts Act 1980. We also note that in each of the three cases on which the Claimant relies, the accused was present in court at the time when the sections 17A/20 procedure was undertaken, but the manner in which the procedure was conducted was deficient. In none of the cases was the accused personally at fault in any way: in *Cockshott*, the accused entered a guilty plea, but without having first been informed of his right to elect jury trial; in *Rahmdezfouli* the accused intended to plead guilty, but his intended plea was communicated to the court by his counsel and not entered by him personally; and in *Owadally* also the accused indicated their guilty pleas through counsel and did not enter those pleas personally. No case was cited to us in which the correct accused was absent and the sections 17A/20 procedure procedure was undertaken (correctly) in relation to another person, who was impersonating the accused. That is not surprising: as we have said, the circumstances of the present case are extraordinary.

47. Relying on that case law, Mr Mably submits that it is well-established that the sections 17A/20 procedure goes to the jurisdiction of the court, that it was clearly not complied with in this case, and that compliance with the requirements cannot be waived. He submits that that is sufficient to determine this application: the procedures undertaken in the magistrates' court, and the subsequent proceedings to which they gave rise (including the confiscation proceedings, notwithstanding that the Claimant was at that stage present and participating) were invalid and a nullity, and should be quashed. Mr Mably points out that the Recorder in his detailed judgment did not make any positive finding that the Claimant was aware of the magistrates' court proceedings, and that both the recorder and the Court of Appeal found the Claimant to have been the author of his own misfortune because he had effectively handed over control of his affairs to Mr Abdul-Jalil. But, he contends, the position would be the same even if an accused had deliberately colluded in putting an impersonator before the court, so that the court's jurisdiction was removed by deliberate fraud. Deliberate conduct of that sort could result in the accused being prosecuted for doing acts tending and intended to pervert the course of justice, but

does not alter the jurisdictional need for compliance with the sections 17A/20 procedure.

48. Mr Mably also relies on a concession made in the Interested Party's Summary Grounds of Resistance in the following terms:

> "… it is conceded that, had the Ealing Magistrates' Court known that the person before the court was not the Claimant but Mr Abdul-Jalil, to proceed to trial and judgment as it did would have been unlawful and would have rendered any resulting conviction liable to be quashed. It makes little difference whether the analysis is framed as a breach of natural justice, or denial of a fair trial, or non-compliance with the statutory requirements in s17 MCA 1980: to knowingly try an impersonator in the stead of a defendant would be obviously unlawful"

Mr Mably agrees, but argues that the validity of the proceedings depends on compliance with the procedures which would give the court jurisdiction, and not on whether the court was ignorant of the true facts at the time.

49. On behalf of the Interested Party, Mr Sareen submits that the proper approach to the issues in this case does not involve consideration of whether the proceedings in the magistrates' court should be labelled a nullity: the court should instead apply two straightforward principles, namely that a person who has been an innocent victim of a deception of the court, or manipulation of the court process, should have a remedy, but that a person who shares in the responsibility for such deception or manipulation should not. The Claimant, he contends, is firmly in the latter category, as is confirmed by the findings of the Recorder in the confiscation proceedings (see [22-26] above) and by the comments of the Claimant's former counsel (see [37] above). Mr Sareen particularly relies on the Recorder's conclusion that the Claimant willingly acted as a front for Mr Abdul-Jalil, putting his name to properties and bank accounts which were in reality Mr Abdul-Jalil's. He accepts that there is no evidence which could prove for sure that the Claimant had actual knowledge of the enforcement notices or of the prosecution in the magistrates' court, or knew of the proceedings before he signed his section 18 POCA statement on 10th October 2014 (see [12] above). He contends however that by leaving the conduct of his business interests to Mr Abdul-Jalil, and granting him the very wide power of attorney, the Claimant in his role (as the Recorder found) as a front for Mr Abdul-Jalil's money laundering created the situation in which the sections 17A/20 procedure could not apply because the man charged was not before the court. Mr Sareen submits that the absence of proof that the Claimant knew of the magistrates' court proceedings does not assist the Claimant, because if it were the case that he had no knowledge of what Mr Abdul-Jalil was doing in his name, that would merely demonstrate that the two men were so closely linked that the one was willing to give the other a general authority to do what he wanted.

50. Mr Sareen acknowledges the case law relied on by the Claimant under ground 1, but seeks to distinguish it in two ways: first, on the basis that none of the cases cited is authority for the proposition that any form of non-compliance with the sections 17A/20 procedure will necessarily be fatal to the validity of the proceedings; and

secondly, on the basis that the cases cited involved a patent error of law – a failure to follow the sections 17A/20 procedure in a way which could have been observed at the time by anyone in court. In the present case, he submits, the magistrates' court made no error of law: it made an error of fact as to the identity of the person before the court, because it had deliberately been misled. Having made that understandable error, the court correctly applied the law and followed the sections 17A/20 procedure: there was therefore no error of law for this court to correct.

The submissions: ground 2

51. Building on his submissions in relation to ground 1, Mr Mably submits that the invalidity of the summary trial proceedings necessarily follows from the fact that the court, by reason of non-compliance with the sections 17A/20 procedure, acted without jurisdiction. But, he submits, there is a separate ground on which the magistrates' court lacked jurisdiction: he argues that a trial, in which the person who appears as and claims to be the accused is not in fact the accused, is in any event a nullity. The court in such a trial would not be trying the true accused, and it cannot be said that the true accused had a lawful trial. The provisions of section 11 of the 1980 Act (which in certain circumstances permit a trial in the absence of the accused) cannot be relied upon in such a case, because the court – mistakenly believing that the accused is present – will not have complied with the requirements of that section.

52. Mr Mably again contends that the position would be the same, and the court would be deprived of jurisdiction, even if the accused were deliberately attempting to pervert the course of justice.

53. Mr Sareen accepts that if the sections 17A/20 procedure in the magistrates' court was a nullity, it would no doubt follow that the trial was also a nullity. He relies, however, on his submission under ground 1 that the sections 17A/20 procedure was not a nullity. As to Mr Mably's discrete ground, he accepts that it would obviously be unlawful for a court to proceed with a trial in the knowledge that the person appearing as the accused was an impostor, but submits that to categorise this as a jurisdictional issue is to beg the question. He submits that the Defendant court here acted properly, because it did not know that it was being deceived by a man who was not the true accused.

54. In this regard, Mr Sareen submits strongly that the approach for which the Claimant contends would lead to absurd results. He invites the court to consider a case in which an accused deliberately sent an impostor to take his place at trial, intending that he would remain silent about the deception if the outcome of the trial was favourable but would seek to have "his" conviction quashed if it was unfavourable. To allow an accused to profit in that way from his own deception of the court would be contrary to the interests of justice. Thus, argues Mr Sareen, it cannot be correct (as Mr Mably contends) that a conviction must inevitably be treated as a nullity if it later transpires that someone other than the true accused was before the court.

55. **The submissions: ground 3**

56. In a further development of his principal argument under ground 1, Mr Mably submits that the purported trial of the Claimant was fundamentally unfair, and a breach of the principles of natural justice, because the Claimant was impersonated by Mr Abdul-

Jalil. He acknowledges the decisions of the Crown Court and the Court of Appeal to the effect that the Claimant was the author of his own misfortune (see [31] above), but points out that the Interested Party does not seriously dispute the Claimant's assertion that he was ignorant of the proceedings in the magistrates' court. He therefore argues that this was not a case of voluntary non-attendance by an accused who thereby waived his right to be present at his trial. As a result of the impersonation, he submits, the Claimant did not enter his own pleas, had no opportunity to elect trial by jury, had no opportunity to seek an indication as to sentence and did not give evidence. In the result he stands convicted, and has a confiscation order and default sentence against him, after a trial in which he did not participate and at which he was impersonated.

57. Mr Mably drew our attention to a line of authority ending most recently with the case of *R (on the application of Harrison) v Birmingham Magistrates' Court and others* [2011] EWCA Civ 332. That case concerned an application for judicial review in relation to a forfeiture order made under section 298 of POCA. The Claimant argued that the order should be quashed as a result of her contention that she had received no notice of the hearing at which the forfeiture order was made. She contended that she had told the relevant police officer over the telephone that she had moved from her previous address and provided him with details of her new address. The court accepted that if she had had notice of the hearing, she would have contested it and had an evidential basis for doing so. In agreement with the other members of the Court of Appeal that the application should be allowed, Munby LJ provided the following reasons for that conclusion:

> "60. I have to say that I find this a very plain and obvious case. *If* the appellant is right when she says that she knew nothing of the crucial hearing, then the simple fact is that the State has confiscated what she says is her property in circumstances which can now be seen to have denied her the due process of the law in breach of the most elementary principle of natural justice, the right to be heard. The principle of *audi alteram partem*, that no man or woman is to be condemned unheard, is one of the oldest rules of our administrative law. It goes back at least four centuries, for it is to be found in *Boswel's Case* (1606) 6 Co Rep 48b and *Bagg's Case* (1615) 11 Co Rep 93b. *If* the appellant is right in her denial of knowledge of the hearing, then she has been the victim of a miscarriage of justice, a miscarriage of justice which we would merely be compounding if we did not intervene. As I commented in *ex parte Marsh* at [50]:
>
> "Mr Marsh was denied a fair trial. Justice was not done. It is the historic and vital function of [the Administrative] court when exercising its supervisory jurisdiction over Justices to ensure, if not that justice is done, at the very least that demonstrated injustice is not allowed to continue uncorrected."
>
> The case-law which I analysed in *ex parte Marsh*, in particular the judgment of Watkins LJ in *R v Bolton Justices ex p Scally* [1991] QB 537 and the speech of Lord Slynn of Hadley in *R v*

> *Criminal Injuries Compensation Board ex p A* [1999] 2 AC 330, demonstrates that the jurisdiction which is here invoked is exercisable even if the tribunal has behaved with complete propriety and even if there has been no misconduct or misbehaviour on the part of the prosecutor or complainant. As Lord Slynn said in *ex p A* at 345:
>
> "It does not seem to me to be necessary to find that anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness."
>
> So the question is whether the appellant makes good the factual premise on which her case is based. As to that I agree with my Lord's analysis. Her denial of knowledge of the hearing is not merely supported by significant corroborative material; it has not, hitherto, ever been put specifically in issue by the police. Mr Baran does not assert that he has any material on which to cross-examine the appellant. Why, in these circumstances, should we remit the case to the Administrative Court to enable Mr Baran to go on a fishing expedition in the hope, Micawber like, that something may turn up? I can think of no good reason. The order should be quashed."

58. Mr Sareen accepts that a fundamental unfairness or breach of natural justice should result in the convictions being quashed, but submits that not every unfairness will have that result and that it will only be exceptionally that a conviction will be quashed if the court has acted without error. He further submits that the alleged unfairness must be assessed in all the circumstances of the case, and not viewed in isolation. In this regard, he relies on the robust approach taken by the House of Lords in *Al-Mehdawi v SSHD* [1990] 1 AC 876.

59. In that case, a deportation order was made against the Claimant in circumstances where his solicitors had negligently sent to the wrong address letters informing him of the date of a hearing, and the time limit for appealing against the decision made in his absence. The consequence of the negligence was that the Claimant was neither present nor represented when his appeal against the deportation order was heard and dismissed, and that he missed the relevant time limit and was unable to mount any further appeal. It was accepted that there had been no personal fault on the Claimant's part. He contended, successfully before the High Court and the Court of Appeal, that there had been a breach of the principle of *audi alteram partem* and that the decision dismissing his appeal should be quashed. An appeal by the Secretary of State to the House of Lords was allowed. Lord Bridge of Harwich delivered the only speech, with which the other members of the panel agreed. At p898 he said:

> "It has traditionally been thought that a tribunal which denies natural justice to one of the parties before it deprives itself of jurisdiction. Whether this view is correct or not, a breach of the rules of natural justice is certainly a sufficiently grave matter to entitle a party who complains of it to a remedy ex debito justitiae. But there are many familiar situations where one party to litigation will effectively lose the opportunity to have his

> case heard through the failure of his own legal advisers, but will be left with no remedy at all except against those legal advisers. I need only instance judgments signed in default, actions dismissed for want of prosecution and claims which are not made within a fixed time limit which the tribunal has no power to extend. In each of these situations a litigant who wishes his case to be heard and who has fully instructed his solicitor to take the necessary steps may never in fact be heard because of his solicitor's neglect and though no fault of his own. But in any of these cases, it would surely be fanciful to say that there had been a breach of the audi alteram partem rule. … These considerations lead me to the conclusion that a party to a dispute who has lost the opportunity to have his case heard through the default of his own advisers to whom he has entrusted the conduct of the dispute on his behalf cannot complain that he has been the victim of a procedural impropriety or that natural justice has been denied to him, at all events when the subject matter of the dispute raises issues of private law between citizens. Is there any principle which can be invoked to lead to a different conclusion where the issue is one of public law and where the decision taken is of an administrative character rather than the resolution of a lis inter partes? I cannot discover any such principle and none has been suggested in the course of argument."

60. The effect of that decision, submits Mr Sareen, is that this court must consider not only whether the Claimant was deprived of the opportunity to participate in the proceedings before the magistrates' court, but also why that was so. The reason, he contends, is clear: the Claimant was involved in a money-laundering arrangement with Mr Abdul-Jalil. Mr Sareen argues that the Claimant must have known that his role in that arrangement might somehow expose him to some form of legal liability, but he nonetheless continued to leave matters in the hands of a convicted fraudster and thereby willingly took the risk.

The submissions: grant or refusal of relief

61. After the hearing, counsel put in helpful written submissions as to whether, if the Claimant's submissions were successful, the court should nonetheless refuse relief, either on the ground that section 31(2A) of the Senior Courts Act 1981 mandated such a refusal, or in the exercise of the court's discretion. As will be seen, there is an important measure of agreement between the parties, and we can therefore summarise the submissions briefly.

62. It is convenient before doing so to set out the material provisions of section 31 of the Senior Courts Act 1981 as amended:

> "(2A) The High Court –
>
> (a) must refuse to grant an application for judicial review, and

> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements on subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> …
>
> (6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant –
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.
>
> (8) In this section "the conduct complained of", in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief."

63. Mr Mably accepts there has been delay in bringing this claim, but submits that it has been explained following the Claimant's waiver of privilege and that in any event permission to apply for judicial review has been granted. He submits that where a criminal conviction is quashed as a nullity, the requirements of section 31(2A) cannot be satisfied. He refers to *Rahmdezfouli*, *Owadally* and *Ford* [2018] EWCA Crim 1751 as showing that where the High Court has found criminal proceedings in a magistrates' court to have been a nullity, it has gone on to grant relief and set aside the conviction. That approach, he submits, is consistent with the practice of the Court of Appeal, Criminal Division in issuing a writ of venire de novo where a conviction was a nullity: see, eg, *Turk* [2017] EWCA Crim 391, [2017] 1 WLR 2919. He argues that an invalid conviction must always be regarded as fundamentally different from a valid conviction. If that broad proposition is not accepted, Mr Mably submits that in any event the requirements of section 31(2A) are not satisfied in this case. It is not inevitable that the Claimant would be convicted if he participated in a valid trial, and to suggest otherwise is an exercise in speculation. In any event, the "outcome" in criminal proceedings is not simply the eventual verdict but includes the procedural

steps prior to that verdict. Here, in contrast to what actually happened when Mr Abdul-Jalil was impersonating the Claimant, the Claimant might (for example) have obtained legal representation; elected jury trial; challenged the prosecution case; given evidence; advanced the defence available to him under section 179(3) of the Town and Country Planning Act 1990 ("did everything he could be expected to do to secure compliance with the notice"); and made submissions.

64. Mr Sareen, whilst not agreeing with every aspect of the Claimant's approach to this issue, agrees that the "outcome" in criminal proceedings includes the trial process as well as the verdict at the end of that process, and therefore accepts that section 31(2A) should not of itself bar relief. He contends however that the court should refuse relief in the exercise of its general discretion to do so in judicial review proceedings. He invites the court to draw the conclusion that the Claimant was content to adopt the actions of Mr Abdul-Jalil until it became apparent that they would lead to a very substantial confiscation order, and relies on the following matters. First, the long delay in issuing this claim, which cannot all be blamed on differing legal advice which he received and which continued even after the confiscation order had been made. Secondly, the prejudice caused to the Interested Party in contesting the varied and protracted proceedings in which the Claimant engaged during the long period when he was conspicuously not advancing the argument on which he now relies. Thirdly, the near certainty of conviction if the Claimant is tried again: the offences with which the Claimant was charged are offences of strict liability, subject only to the statutory defence of which, Mr Sareen submits, the Claimant has no realistic prospect of availing himself in the circumstances of his relationship with Mr Abdul-Jalil. No speculation is involved in predicting the result of a retrial in the particular circumstances of this case. Mr Sareen submits that this court should consider, in accordance with *Harrison*, whether fairness demands that these convictions be quashed, and should answer that question in the negative.

65. As to the relevance or otherwise of legal advice, Mr Sareen relies on *R (Gerber) v Wiltshire Council* [2016] EWCA Civ 84, [2016] 1 WLR 2593. The court was there considering an appeal in a case in which the High Court had granted an extension of time to, and had granted the claim for judicial review by, a person who had made a late challenge to a grant of planning permission in respect of nearby land. The interested parties, to whom the planning permission had been granted, had commenced building works before the claim was issued. One of the matters on which the claimant relied was that he had received incomplete advice from his solicitors as to whether he could make an application for judicial review out of time. At [53] Sales LJ (as he then was), with whom Lord Dyson MR and Tomlinson LJ agreed, said in relation to the extension of time –

> "The fact that a person acts (or omits to act) on the basis of legal advice does not make him less responsible in law for his actions (or omissions to act). Legal advice helps him to decide what to do, but in most contexts it is still his decision and his actions (or omissions) which determine how his rights and liabilities in relation to another person should be adjusted."

66. Sales LJ went on to consider section 31(6) of the 1981 Act and noted that, even when there might be substantial hardship or prejudice to a person other than the claimant or

detriment to good order, the court has a discretion whether to refuse relief. He continued, at [59] –

> "This requires the court to make an overall evaluative assessment having regard to what, depending on the circumstances, may be a range of relevant considerations, including the extent of the substantial hardship or prejudice likely to be suffered by such other person … if relief is granted as compared with the hardship or prejudice to rights which would be suffered by the claimant … if relief is refused and the extent of the detriment to good administration if relief is granted as compared with the detriment to public administration through letting public law wrongs go without redress if relief is refused."

Discussion

67. After this necessarily lengthy summary of the relevant facts and of the submissions, we can express our views comparatively briefly.

68. It is important to emphasise at the outset that, just as the facts of this case are extraordinary, so too is the procedural history which has preceded the hearing of this claim in the High Court. In this claim for judicial review, the Claimant advances for the first time a direct challenge to the jurisdiction of the Defendant magistrates' court to embark upon a summary trial and to convict the Claimant and commit him for sentence to the Crown Court. It is not, therefore, a collateral attack on the decisions of the Defendant, of the Crown Court or of the Court of Appeal, Criminal Division.

69. We also emphasise at the outset that the Interested Party has fairly and properly accepted that there is no evidence capable of proving for sure that the Claimant in fact knew of the enforcement notices, or of the prosecution in the magistrates' court, at any time before he signed a statement dated 10th October 2014 in the confiscation proceedings. We see the force of the points made by the Interested Party to the effect that the Claimant, far from disassociating himself from Mr Abdul-Jalil's actions in his name, maintained a close relationship with him and effectively approbated his actions until it became clear how the confiscation proceedings were likely to end. We also have well in mind the submissions of Mr Sareen, and the findings of the Recorder on which those submissions are based, as to the lack of credibility of the explanations given by the Claimant and by Mr Abdul-Jalil. Nevertheless, the Interested Party – again, fairly and properly – did not invite the court to draw an inference of actual knowledge on the part of the Claimant as to the enforcement notices and the proceedings in the magistrates' court. We therefore must and do reach our decision on the basis that the Claimant may not have known of Mr Abdul-Jalil's actions until after the convictions in the Defendant magistrates' court on 26th August 2014. It seems to us that we must also reach our decision on the basis that in the period after 10th October 2014 the Claimant may have been to some extent under the influence and control of Mr Abdul-Jalil and not an equal partner with him in their joint actions.

70. In our judgment, the line of authorities from *Cockshott* to *Owadally*, on which the Claimant relies, establish beyond argument that Parliament must be taken to have intended that compliance with the sections 17A/20 procedure is a precondition of a

magistrates' court having jurisdiction to try an either-way offence, at least in the absence of clear evidence that the accused was himself a party to deliberate misleading of the court as to the identity of the person appearing before it. The flaw in Mr Sareen's argument, that the only error made by the Defendant was a factual error as to the identity of the man appearing before the court as the accused, is that it is inconsistent with those decisions as to the jurisdictional importance of following the correct process, and therefore following the sections 17A/20 procedure with the true accused rather than with an impostor. As to whether deliberate fraud on the part of the accused provides an exception to that clear line of authorities, Mr Sareen's approach, summarised at [49] above, is superficially attractive; but in our view it breaks down upon closer analysis. The fact that an accused was himself responsible for manipulation or deception of the court may indeed be a powerful reason why, as Mr Sareen's skeleton argument put it, that accused "should not profit from this wrongdoing". But it does not follow that considerations of whether an accused should profit from his wrongdoing can determine whether or not the court has jurisdiction.

71. We see greater force in the logic of Mr Mably's argument, that the principle for which he contends applies even in a case where the accused himself has deliberately misled the court, and that accordingly the fraudulent conduct of an accused may in such a situation deprive a magistrates' court of jurisdiction to try him. It seems to us that in such a case Mr Mably is correct to say that the fraudulent conduct of the accused cannot confer jurisdiction where none would otherwise exist, and that failure to follow the sections 17A/20 procedure is fatal to the jurisdiction of the court whatever the circumstances in which the court is misled or manipulated. We think he is also correct to say that the sanction for such conduct would lie in a prosecution of the accused for a separate offence of doing acts tending and intended to pervert the course of justice, and perhaps (depending on the circumstances) for offences of conspiracy to do acts tending and intended to pervert the course of justice and/or perjury.

72. However, as we have indicated at [69] above, this is not a case in which the Claimant has been shown to have shared in responsibility for the misleading of the magistrates' court as to the identity of the man before it at trial. Even if Mr Sareen's argument were correct in principle, it would therefore fail on the facts in this case. We well understand why in the Crown Court and the Court of Appeal the finding that the Claimant was the author of his own misfortune was both relevant and sufficient to determine the issues which arose before those courts; but it does not follow that the facts which gave rise to that finding can also be relied upon to determine, in favour of the Interested Party, the issue of jurisdiction which this claim raises for the first time.

73. As we have noted at [46] above, the previous cases on which Mr Mably relies in support of ground 1 were cases in which the true accused was present in court but the wrong procedure was followed, whereas this is a case in which the correct procedure was followed but with the wrong person present in court. We have considered carefully the points forcefully made by Mr Sareen (with specific reference to ground 2, but also relevant in relation to ground 1) as to the potential scope for abuse by an accused who was prepared to introduce an impostor in his place and to take the risk of detection and prosecution for more serious offences against the administration of justice. We are nonetheless satisfied, for the reason we have indicated, that in this case the sections 17A/20 procedure was not properly complied with in respect of the man charged in the informations, namely the Claimant, and that in consequence the

Defendant had no jurisdiction to embark upon a summary trial or to convict the Claimant or to commit him for sentence. Ground 1 accordingly succeeds.

74. As to ground 2 (see [38] above), we accept Mr Mably's submission that it follows from our finding on ground 1 that the trial and the convictions, and the subsequent proceedings and sentence based upon the convictions, were a nullity. That is sufficient to determine ground 2 in the Claimant's favour. It is therefore unnecessary for us to consider the much wider proposition for which Mr Mably goes on to argue under ground 2, and we do not think it appropriate to do so when the submissions of the parties were appropriately focused on this case and did not purport to consider every possible circumstance in which a trial might take place in which the person who appears as and claims to be the accused is not in fact the true accused.

75. Ground 3 makes it necessary to consider two stark features of the case. On the one hand, there are obvious and compelling grounds for criticising many aspects of the Claimant's conduct, and obvious and compelling grounds for being deeply suspicious about the true extent of his knowledge of and involvement in Mr Abdul-Jalil's actions. On the other hand, in circumstances where actual knowledge of Mr Abdul-Jalil's actions has not been established against the Claimant, he stands convicted and sentenced after a trial of which he may not have known and in which he did not participate. The issue of whether the Claimant had a fair trial cannot be determined by reference to the precise consequences which followed his conviction. The importance of that issue is however highlighted by the fact that the Claimant faces a confiscation order of more than £4.3 million, and a default sentence of 8 years' imprisonment.

76. Mr Sareen mounts a powerful argument (summarised at [60] above) to the effect that the Claimant, for dishonest reasons, willingly took the risk that Mr Abdul-Jalil would expose him to a risk of prosecution, and cannot now complain that the proceedings against him were unfair. The decision in *Al-Mehdawi* (see [58-60] above) can of course be distinguished from the facts and circumstances of the present case, but its importance to Mr Sareen's argument lies in the recognition that the mere statement that a person has been denied a hearing will not necessarily lead to a conclusion that the relevant decision must be set aside on the ground of a breach of natural justice. If that is so where a claimant is personally blameless, it may be thought the principle applies with stronger force, even in the criminal context, where a claimant has lost his right to be present at his trial by his own misconduct.

77. Persuasively presented though this argument was, it immediately brings one back to the important point which has already been mentioned more than once: it has not been shown and cannot be shown that the Claimant, at the time of the sections 17A/20 procedure and the trial, was actually aware of what Mr Abdul-Jalil was doing in his name. The fact that the Claimant granted power of attorney to Mr Abdul-Jalil cannot assist the Interested Party on this issue: although the Claimant by the second power of attorney (see [8] above) authorised Mr Abdul-Jalil to appear <u>for</u> him, it did not authorise Mr Abdul-Jalil to appear <u>as</u> him. In those circumstances, we accept Mr Mably's submission that the case cannot be treated as one of voluntary absence from trial, giving rise to issues of waiver. It must instead be regarded as one in which it is at least possible that the Claimant was unwittingly deprived of his right to be present at his trial, to contest the case against him and to give evidence. In our judgment, the court is bound in those circumstances to say that the requirements of a fair trial <u>of the</u>

Claimant were not met. There is much that can be said against the Claimant, but we do not think it can fairly be said that he should suffer the consequences of a trial in which he was undoubtedly impersonated and of which he may not even have known. Ground 3 accordingly succeeds having regard to the particular circumstances of this case. It is not necessary to decide, and we do not think it appropriate to decide, whether Mr Sareen's submission could succeed in a case in which the claimant himself could be shown to have shared in responsibility for the court being deliberately misled at the stage of the sections 17A/20 procedure.

78. We consider finally whether, notwithstanding our conclusion that the grounds of appeal succeed, we should refuse to grant the Claimant the relief which he seeks. We reject Mr Mably's broader argument to the effect that section 31(2A) of the 1981 Act has no application to claims for judicial review in criminal cases: we see no warrant in the statutory language for setting it aside in judicial review proceedings relating to a criminal matter. It may well be difficult in many cases to answer the question posed in section 31(2A) affirmatively, but the question still needs to be considered. We do however agree with counsel that section 31(2A) of the 1981 Act does not, in the circumstances of this case, lead to the conclusion that relief should be withheld. We take that view for two reasons: first, because in the context of a challenge to the lawfulness of criminal proceedings, the "outcome" is not limited to the eventual verdict; and secondly, because in all the circumstances of the case, and bearing in mind all the contingencies set out in Mr Mably's submissions (see [63] above), we are not persuaded that it is "highly likely that the outcome for [the Claimant] would not have been substantially different". Relief is therefore not barred by that section, and we must consider whether relief should be refused in the exercise of the court's discretion.

79. In this regard, we repeat what we have said at [75] above. There is no doubt that the Claimant delayed the issuing of this claim for a very long time, and in the meantime pursued a variety of applications and appeals on a different factual basis. *Gerber* shows that even if the Claimant received conflicting legal advice at different stages, that would only be one factor in the evaluative assessment which the court must make; and in this case, it can be said against the Claimant that – whatever the precise terms of any advice may have been – his own instructions plainly did not raise the grounds on which he now relies until a very late stage. In addition, it can be said that the case against the Claimant in the criminal proceedings was and remains a very strong one. All those are reasons why the court has given careful thought to whether relief should be refused. But once again, the proper concession that the Claimant cannot be shown to have known of the enforcement notices and criminal proceedings in the magistrates' court is of central importance: the Claimant was convicted in circumstances where the wrong man was before the court, and it cannot be said that it was the Claimant who put him there. Although we have considerable sympathy for the Interested Party's position, and have anxiously considered whether the grant of relief would confer an unmerited benefit on the Claimant, we are in the end satisfied that the court should not exercise its discretion to refuse relief. The Claimant has been convicted, sentenced and made the subject of a confiscation order in respect of a very substantial sum of money, with a lengthy term of imprisonment in default, when the court had no jurisdiction to make those decisions and impose those sanctions. Notwithstanding the delays on this case, we see nothing in section 31(6) of the 1981 Act which would justify the withholding of relief in this case, where the consequences

for the Claimant of the proceedings taken without jurisdiction are undoubtedly of substantial weight.

80. In this regard, we also note that *Baker v Police Appeals Tribunal* [2013] EWHC 718 (Admin) provides support for the view that an order made in excess of jurisdiction should generally be quashed, because refusal of relief will mean that an unlawful decision would have the same effect as a lawful decision. We would add, however, that we leave open the question whether there would be grounds for exercising the court's discretion to withhold relief in judicial review proceedings arising from a case in which the claimant himself had shared in the responsibility for the deliberate misleading of the court by fraudulent conduct.

Conclusion

81. For those reasons, we will grant the claim for judicial review and quash the decisions of the Defendant in convicting the Claimant and committing him for sentence and the decisions of the Crown Court in sentencing the Claimant for the offences of which he had been convicted and in making the confiscation order.

Consequential matters

82. When the draft of this judgment was provided to counsel, they were invited to agree an appropriate form of order. It was not possible for the parties to reach agreement on all matters. Written submissions were therefore made in respect of three matters which remained in dispute. We are grateful for the care with which those submissions were drafted. We are able to make our decision upon them without a further hearing.

Further proceedings in the Magistrates' Court

83. Although we have concluded that the decisions of the Defendant in convicting the Claimant and committing him for sentence, and the subsequent decisions of the Crown Court, must be quashed, there has been no challenge to the lawfulness of the proceedings against the Claimant up to the date when the sections 17A/20 procedure was conducted. The summonses issued against the Claimant therefore remain valid. Mr Sareen confirmed in his written submissions that the Interested Party intends to continue the prosecution, and sought a direction that the case against the Claimant be relisted before the Defendant magistrates' court for the sections 17A/20 procedure to be conducted in the presence of the Claimant. Mr Mably opposed that application, on the grounds that it is neither necessary nor appropriate. He acknowledges that it is a matter for the Interested Party to decide whether it wishes to continue the prosecution.

84. We see no reason to doubt the expressed intention of the Interested Party. That being so, it is in our judgment a necessary consequence of the decisions we have made that the case be relisted before the Defendant magistrates' court. That should be done as soon as practicable. We will give a direction to that effect.

The decisions of the Crown Court

85. Mr Sareen pointed out in his written submissions that the Crown Court has not been a party to these proceedings. He therefore questioned whether it was right for this court to make an order explicitly quashing the decisions of the Crown Court, though he

acknowledged that the quashing of the Defendant's decisions would render the Crown Court's decisions of no effect. Mr Mably in response submitted that an order quashing the decisions of the Crown Court would be correct in law and would reflect our judgment in relation to the Defendant's decisions. In the alternative, he submitted that this court could and should treat these proceedings as including a claim for judicial review of the decisions of the Crown Court.

86. If the Crown Court had been joined as a defendant to this claim for judicial review, we are confident that it would (in the usual way) have taken no active part in the proceedings. The course of the hearing, the submissions and our decision would have been the same. The quashing of the Crown Court's decisions is a necessary consequence of our quashing of the Defendant's decisions, and it would be unsatisfactory to leave matters on the basis of an informal understanding that the Crown Court's decisions had been rendered of no effect. It would also be unsatisfactory to require the Claimant to issue a fresh claim against the Crown Court, the outcome of which would be inevitable in the light of this judgment. In those circumstances we think it right to dispense with all procedural requirements, to treat the claim as including a claim for judicial review of the decisions of the Crown Court and to quash those decisions.

Costs

87. The Claimant seeks an order for his costs of this claim for judicial review, primarily against the Interested Party pursuant to section 51 of the Senior Courts Act 1981 or alternatively (and, from his point of view, much less satisfactorily) from central funds pursuant to section 16 of the Prosecution of Offences Act 1985. The Interested Party resists any order being made against it and submits that any award of costs should be pursuant to the 1985 Act.

88. It is - rightly - common ground between the parties that these are "proceedings in a criminal cause or matter" and that accordingly this court has the power, pursuant to section 16 of the 1985 Act, to make a defendant's costs order in favour of the Claimant. Such an order would be for such amount as the court considers reasonably sufficient to compensate the Claimant for any expenses incurred by him in the proceedings. However, the effect of section 16A of the 1985 Act is that such an order would be limited to the Claimant's out of pocket expenses and could not include any amount in respect of his legal costs.

89. It is also - and again rightly - common ground between the parties that the existence of the power to make a defendant's costs order under the 1985 Act does not displace the power of the court to make an order for costs inter partes pursuant to section 51 of the 1981 Act.

90. For convenience, we shall refer to an order pursuant to the 1985 Act as "the criminal costs scheme" and an order pursuant to the 1981 Act as "the civil costs scheme". There is an issue between the parties as to which of those schemes should be applied in the circumstances of this case.

91. In *Murphy v Media Protection Services Ltd* [2013] 1 Costs LR 16 a Divisional Court (Stanley Burton LJ and Barling J) considered which of the schemes to apply in the context of an appeal by way of case stated against a criminal conviction which was

ultimately quashed after a reference to the European Court. Application was made by the successful appellant for the payment of her costs both in the High Court proceedings and in the criminal proceedings in the magistrates' court and (on appeal) in the Crown Court. The court referred to the absence of any guidance as to the criteria to be applied when considering whether to make an order under the criminal or the civil costs schemes. At [15] the court said:

> "Clearly, save in exceptional cases, prosecutions and appeals in criminal cases should be and will be subject to the criminal costs regime. However, the present case was unusual."

The court went on to identify a number of reasons why the case was exceptional, and made an order under the civil costs scheme in respect of the appellant's legal costs at all stages of the proceedings.

92. The approach adopted in *Murphy*, and the test of exceptionality identified in that decision, was followed by a Divisional Court (Foskett and Carr JJ) in *Hull and Holderness Magistrates' Court v Darroch* [2014] EWHC 4184 (Admin), where the court concluded that there was nothing exceptional about the case (an appeal by way of cases stated) and the criminal costs scheme should accordingly apply.

93. The unsuccessful applicant in that case appealed against the refusal of his application for a non-party costs order in relation to the proceedings in the magistrates' court: see *Darroch v Football Association Premier League Ltd* [2016] EWCA Civ 1220, to which we shall refer for convenience as "*Darroch CA*". The court identified an issue as to whether it had jurisdiction to hear the appeal, given that appeals from the High Court in a criminal cause or matter lie to the Supreme Court and not to the Court of Appeal. The court concluded that it did not have jurisdiction. Burnett LJ (as he then was), with whom Hallett LJ and Sir Brian Leveson P agreed, said at [14]:

> "There is no doubt that the appeal against conviction by way of cases stated was a criminal cause or matter. The fact that the appeal was converted into judicial review proceedings to enable the convictions to be quashed for a reason not encompassed within the cases stated in my judgment could not deprive them of their colour for the purposes of section 18 of the 1981 Act. The proceedings themselves, although civil, were a criminal cause or matter for that purpose."

94. At [18] Burnett LJ noted the anomaly which would arise if proceedings properly characterised as a criminal cause or matter for the purposes of an appeal were differently categorised for the purposes of an issue as to costs:

> "The determination of an application for costs by either party at the end of an appeal by way of cases stated or a claim for judicial review is an inherent part of the exercise of the jurisdiction. There would be a startling consequence if the appellants' submission were correct. Many appeals by way of case stated or claims for judicial review which are criminal causes or matters result not only in an order determining the substance of the matter but also an order in relation to costs.

> There could not sensibly be different appeal routes for those two aspects of the same order of the High Court."

95. Burnett LJ went on, in a part of his judgment which he recognised as being obiter but which nonetheless had a practical importance, to say this about the decision in *Murphy*:

> "25. Having accepted that there was a power to make the order sought, the Lord Justice formulated a test of exceptionality which governed its exercise. I have come to the conclusion, in respectful disagreement with Stanley Burton LJ, that the Divisional Court has no power under section 51 of the 1981 Act to make the order for which the appellants contended in that case in respect of the costs below.
>
> 26. In my judgment section 51 of the 1981 Act does not empower the High Court, on an appeal by way of case stated, or a claim for judicial review that seeks to quash convictions, to make a civil costs order in respect of costs incurred in the underlying criminal proceedings in the Crown Court of the magistrates' court. …"

96. That decision of the Court of Appeal in *Darroch CA* does not appear to have been cited to the Divisional Court in *Lord Howard of Lympne v DPP* [2018] EWHC 100 (Admin). The court in that case, again in the context of an appeal by way of case stated, adopted the *Murphy* approach. At [28] Whipple J (with whom Simon LJ agreed) noted that the guidance given in *Murphy* had been followed in *Darroch*, and that although those decisions were not strictly binding on the court, it had not been suggested that either was wrongly decided and there was no reason to depart from that approach. Whipple J went on to say, at [29] that the appeal before the court was self-evidently a criminal matter and accordingly the criminal costs scheme must apply unless the case was exceptional. At [35], she concluded that it was not.

97. Mr Mably submits that the test of exceptionality formulated in *Murphy* should not be applied to this case, for three reasons: the application in *Murphy* extended to the costs incurred in the courts below, which this Claimant does not seek; the passage which we have cited from *Murphy* refers to "prosecutions and appeals in criminal cases", whereas claims for judicial review are civil proceedings; and the decision in *Darroch CA* found that "the whole basis of *Murphy* was wrongly decided" and did not endorse any principle of exceptionality. He therefore seeks an award of costs against the Interested Party under the civil costs scheme, taking as his starting point the general rule under CPR 44.2(2)(a) that the unsuccessful party will be ordered to pay the costs of the successful party, and setting out a number of additional arguments in support of such an order in the circumstances of this case.

98. Mr Sareen submits that the error which the court made in *Murphy*, as to costs incurred in the courts below, had no logical impact on its decision that the criminal costs scheme should apply save in exceptional circumstances. The decision in *Darroch CA* therefore does not undermine the principle of exceptionality, which rightly reflects the clear decision of Parliament to enact very different schemes for costs in civil and criminal proceedings. He puts forward a number of arguments as to why the criminal

costs scheme should apply to this case, which began as a prosecution brought by the Interested Party substantially in the public interest and which led to a judicial review claim which the Interested Party could not responsibly have failed to resist.

99. We do not think it necessary to add to this already lengthy judgment by setting out the detailed submissions, but we make clear that we have considered them all. Our conclusions on the issue of costs are as follows.

100. The approach laid down in *Murphy* has been followed by the Divisional Court on at least two occasions. The decision of the Court of Appeal in *Darroch CA* is of course binding on us, and we would not follow the previous decisions of the Divisional Court if the decision in *Darroch* CA required a different approach. However, the judgments of the Court of Appeal in *Darroch CA* did not include any explicit disapproval of the principle that the criminal costs scheme should be applied (within its proper limits) unless there are exceptional circumstances making it appropriate for the High Court to make an award under the civil costs scheme. Nor, in our view, is any disapproval of that principle to be inferred from the reasons given by the Court of Appeal for its decision on the issue of jurisdiction. Moreover, the decision in *Darroch CA* makes it clear that in this context, there is no necessary distinction to be drawn between an appeal by way of cases stated and a claim for judicial review which seeks the quashing of a criminal conviction. We are not persuaded by Mr Mably's submissions that the principle set out in *Murphy* is wrong or that we should not follow it. This is a claim for judicial review in a criminal cause or matter, and the criminal costs scheme should apply unless there are exceptional reasons to take a different course.

101. There are no such exceptional reasons. The Interested Party had brought the prosecution pursuant to the statutory power of local authorities under section 222 of the Local Government Act 1972 to prosecute where they consider it "expedient for the promotion or protection of the interests of the inhabitants of their area", and was therefore acting in the public interest in commencing and pursuing the prosecution. This claim for judicial review was brought because the Claimant had exhausted his rights of appeal in the underlying criminal proceedings by pursuing different, and unmeritorious, arguments. The purpose of the claim for judicial review, successfully achieved as a result of our decision, was to quash the criminal convictions and the consequent criminal penalties and orders. The character of the proceedings has therefore been criminal throughout, and the only exceptional circumstances are the factual features arising from the impersonation of the Claimant by Mr Abdul-Jalil. In those circumstances, we have no doubt that the criminal costs scheme should apply.

102. Under that scheme, we have the power to make a defendant's costs order. We decline to exercise that power in the Claimant's favour. As is apparent from this judgment, there are strong grounds for criticising many aspects of the Claimant's conduct, and many respects in which he can be said to have been the author of his own misfortune, in particular by endorsing and adopting the actions of Mr Abdul-Jalil when it suited him to do so. The present proceedings were commenced very late, and were supported by a witness statement which, as we have said at [36], raised more questions than it answered. For the reasons we have given, the Claimant was entitled to succeed in his claim for judicial review; but we are wholly unpersuaded that any award of costs from central funds should be made in his favour in relation to that claim.

103. We would add that, if we had been persuaded that the civil costs scheme should be applied, we would similarly have refused to make any order for costs against the Interested Party.

104. The application for costs is therefore refused.