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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Case No. CO/1257/2019

Neutral Citation Number: [2020] EWHC 2029 (Admin)

Royal Courts of Justice

Monday, 6 April 2020

Before:

THE HONOURABLE MR JUSTICE SAINI

B E T W E E N :

THE QUEEN
ON THE APPLICATION
OF ANDRIUS ZALYS

Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

T. Buley QC (instructed by Bindmans) appeared on behalf of the Claimant

J. Anderson (instructed by the Government Legal Department) appeared on behalf of the Defendant

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J U D G M E N T

MR JUSTICE SAINI:

This judgment is divided into 5 parts as follows:

I. Overview – paras. [1-11]
II. Legal Principles – paras. [12-17]
III. The Facts – paras. [18-38]
IV. The Grounds – paras. [39-48]
V. Analysis - paras. [49-52]
VI. Conclusion - paras. [53-64]

I. **Overview**

1 This is an urgent application made on behalf of Mr Andrius Zalys, the claimant, for a mandatory injunction directing the Secretary of State, the defendant, to release him from immigration detention. The hearing was conducted this morning via Skype.

2 The claimant is a Lithuanian national, born on 29 November 1983. He has been in detention since 4 January 2020 under Regulation 32(1) of the Immigration European Area Regulations 2016, and he is currently held at Colnbrook Detention Centre.

3 The main issue raised by the application concerns the legality of the claimant's continued detention in light of the COVID-19 pandemic. The claimant however reserves his rights in relation to the legality of his past detention. In support of this application, he relies, in particular, on the fact that he suffers from a chronic medical condition which puts him at high risk if he contracts the COVID-19 infection. He also relies upon the fact that at present all commercial flights to Lithuania, the place to which he is to be deported, have been suspended.

4 The defendant resists the application and argues that, by reason of the claimant's previous convictions and risk of him absconding, there would be significant public protection concerns, were he to be released.

5 In order to address his health concerns, the defendant has offered the claimant a sole-occupancy room at Colnbrook Detention Centre, which the claimant has declined to take up.

6 The defendant argues that at present it cannot be said that the claimant's removal will not take place within a reasonable time. The defendant says, however, that she will keep the issue of detention under careful review, as the situation develops.

7 The application originally came before me, as the Urgent Applications Judge, last week on Tuesday, 31 March 2020. At that time I made directions for the defendant to serve an acknowledgement of service and summary grounds of defence by Friday, 2 April 2020 and I directed an expedited remote oral hearing by Skype today (that is on Monday, 6 April 2020).

8 In her pleadings, the defendant not only opposes the injunction but also submits that permission to apply for judicial review should be refused. I should record at the outset that I have been substantially assisted by the concise and focused oral submissions of counsel. I am grateful to them and their solicitor teams for the efforts that they must have made to prepare and present this case on such an expedited basis.

9 Turning to the claimant's case, he argues that his continued detention is unlawful on three independent bases. First, under ground one, it is argued that the claimant's detention violates the well-known *Hardial Singh* principles (a reference to R v Governor of Durham Prison, ex parte Hardial Singh [1984] 1 WLR 704); secondly, under ground two, the claimant relies upon a breach of the Adults at Risk (AAR) Policy of the defendant; and, thirdly, under ground three, the claimant asserts a breach of Article 3 of the European Convention on Human Rights.

10 In the oral submissions before me today, this last ground, concerning Article 3 of the European Convention on Human Rights, has not been pursued in support of the application for an interim injunction and I say no more about it.

11 By way of interim relief, the claimant invites me to grant an order for his release today or, as an alternative, to direct an expedited hearing (in a matter of weeks) of the entire claim.

II. Legal Principles

12 The principles governing the grant of relief in judicial review proceedings are those contained in the well-known case American Cyanamid Company v Ethicon Ltd [1975] AC 396, as modified in public law cases. First, the claimant must demonstrate that there is a "serious issue" to be tried. In judicial review claims, the approach to that matter has been modified somewhat to require the claimant to demonstrate there is a "real prospect" of the claim succeeding at the substantive hearing. I refer here to the judgment of Cranston J in R (Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1425 (Admin) and, in particular, to para.6 of that case. See also The Administrative Court Judicial Review Guide 2019 at para.15.6.

13 However, although that may be the normal test in the typical prohibitory injunction scenario (where one seeks to restrain action in public law), the test in the present case has to be a more stringent one. That is because, as is common ground before me, the interim mandatory order being sought will in substance (if not in form) be a form of final relief. The claimant, in those circumstances, needs to show a particularly strong case.

14 There are various ways of describing the more stringent test but one can settle upon something along the following lines: the court must be satisfied to a high level of confidence that the claimant will ultimately prevail. That is more demanding than, say, a mere "serious issue to be tried" or "real prospect" but one has to bear in mind that these proceedings are at an early stage with necessarily limited factual material before the court. The claimant submits in this case that not only can he show a serious issue to be tried, but he can show a very strong *prima facie* case. That may be a way of describing the more stringent test.

15 Secondly, the court considers whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. Of particular relevance to the present case is the observation of Lord Diplock in American Cyanamid at p.408 F to G, which I drew to the attention of the parties during oral argument:

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo."*

16 Before I turn to the facts, it is important to identify what maintaining the *status quo* (referring to Lord Diplock's observation above) would amount to in this case. It would be to maintain the claimant in detention pending a further final oral hearing, which, on the claimant's alternative argument, should be convened as soon as possible and in a matter of weeks.

17 The availability of rapid "rolled-up" hearings in the Administrative Court is an important factor in exercising the discretion to make interim injunctions in the public law jurisdiction; and indeed may point in certain cases to not making injunctions which require potentially irreversible steps (such as release) to be taken by public authorities when a final resolution by way of expedited hearing is available.

III. The Facts

18 The claimant is a national of Lithuania who was born on 29 November 1983. He is an EU national. The claimant was convicted in Lithuania of a rape in or around 2001 and served a sentence of four years and three months' imprisonment. He was also convicted of battery and disorderly behaviour in 2016, for which he received one year and two months' imprisonment, and of theft and destruction of property in 2011. He was convicted of robbery on 20 March 2013, but his sentence of 60 days' imprisonment suggests that this was a lower order of seriousness. On 4 April 2013, the claimant was convicted in France of theft, for which he received four months' imprisonment. He was convicted again of theft in Lithuania on 7 March 2015 and received two years' imprisonment. The claimant clearly has a long history of offending.

19 The claimant's father lives in the UK and has been diagnosed with HIV/AIDS. The claimant entered the UK in January 2018 to be with and care for his father, who is his only living family member. The claimant took action to claim a National Insurance number to enable him to work, as he was entitled to do as an EU national, but his identification documents were, it is said, stolen shortly after his arrival. The claimant and his father then became homeless. During this period of homelessness, the claimant developed tuberculosis.

20 On or around 6 April 2019, he was cautioned for an offence of possession of a Class A controlled drug. That appears to be the last evidence of any criminality on the part of the claimant.

21 The claimant's case was referred for deportation action on 17 April 2019 and, on 18 April 2019, the claimant was assessed as meeting the threshold for deportation on public policy grounds. However, the claimant was not detained at this time. The reasons for this are not clear.

22 From 20 November 2019, the claimant was supported by a charity known as "Saint John of God Hospitaller Services" (which I will refer to as "St John"). That is an organisation which provides support to individuals who are homeless and/or who have complex needs. As a result of this support, the claimant was treated in a rehabilitation centre for his TB and was prescribed with certain medication.

23 It appears that the claimant is no longer contagious with TB and but he currently takes certain medication for his opioid addiction.

24 The next material event, and an event which is central to this case, is that, on 4 January 2020, the claimant was encountered by the police during a routine traffic stop. I am told that he was identified as being "wanted for immigration" and detained. It is not clear to me whether the defendant maintains that the claimant was unlawfully in the UK, as certain of the documents appear to suggest, but, in fact, on the material before me, I find it hard to see why the claimant would have been regarded as being unlawfully in the UK. He is an EU national. That matter is of marginal relevance in this case, but I mention it at this stage by way of background.

25 Following his detention on 4 January, the claimant was held under immigration powers; that is under Regulation 32(1) of the Immigration European Economic Area Regulations 2016) and, subsequently, under para.2(3) of Schedule 3 to the Immigration Act 1971.

26 On 7 January 2020, the claimant underwent an induction interview for immigration detention. During this interview, he informed the defendant's officers that he had been a victim of torture and sexual violence. This led in the normal way to a referral under r.35 of the Detention Centre Rules.

27 On 24 January 2020, an ACDT (Assessment Care in Detention Teamwork) plan was opened by the detention centre healthcare staff as a result of the claimant's history of mental health problems and his current negative thoughts. He told staff that he had previously suffered with hallucinations and suicidal thoughts and that he had tried to commit suicide on several occasions. He presented with multiple scars and explained that he had previously jumped out of a fourth storey window and overdosed on tablets. The claimant said that he had come to the UK hoping to improve his life but now felt very stressed and anxious.

28 On 31 January 2020, the defendant made a deportation decision and a deportation order was served on the claimant. The claimant did not appeal within the permitted time, namely, by 10 February 2020. However, in due course the claimant did appeal, on 17 February 2020, and sought an extension of time.

29 On 21 February 2020, the First Tier Tribunal (FTT) decided to extend time for the appeal, noting that the delay was not serious or substantial and that the claimant would have faced difficulties in appealing from detention, which would have been exacerbated by his poor English and problems in obtaining legal representation. The FTT also observed that there were issues in the appeal which would merit further consideration. Removal directions had at that time been set for the claimant's removal to Lithuania on 7 March 2020, but were cancelled in light of the appeal.

30 On 3 March 2020, St John wrote confirming that the claimant had secured a place on a "TB placement" at Olallo House, where he had been accommodated from 20 November 2019 until his detention on 4 January 2020. St John said that this placement and accommodation remained open to him, but, on the material before me, it looks like that accommodation will remain open to him only while he has treatment at St John and that will end at some point in May 2020. I should record that the support which St John were going to provide to him during this placement included direct observation treatment, health and well-being support, meals, a structured daily routine, keyworker and group support, English classes, employment and resettlement support.

31 The claimant's appeal against deportation was heard on 13 March 2020. A decision is awaited and, on the documents before me, it looks like that decision may be some time, given the COVID-19 crisis and because the FTT is not currently sitting.

32 A r.35 report for the claimant was eventually prepared, with some delay, on 15 March 2020 by a Dr Java. Dr Java referred to the claimant's account of his history of physical and sexual abuse and explained:

> "He has scars on his body which are documented on the body map. He is complaining of nightmares, flashbacks, anxiety and hyperarousal symptoms, suggesting PTSD, so we have referred him to our mental health team on an urgent basis for further assessment. He also has self-harmed whilst in detention and has been on ACDT. Furthermore, he reports two mental health admissions to the hospital in Lithuania. In addition to his mental health, he is currently suffering from TB and is on medication for this, as well as Subutex for his opiate addiction. We note alcohol depending in the past as well. In view of the multiple mental and physical health problems, in our opinion, as a GP, detention is and will be likely to continue to have a negative impact on his physical and mental health."

33 Returning to the chronology, on 16 March 2020, the ACDT was closed and, on 19 March 2020, the claimant's detention was considered by a case progression panel, which recommended that detention be maintained. I should quote from that decision.

> "Reason for balance: the panel recommended to maintain detention and monitor the appeal. The First Tier heard and an outcome is anticipated shortly. The CPP suggested case owner chose r.35 decision as a priority. The CPP reviewed Mr Z's AARL2, agreed, although a recent ACDT vulnerability plan opened on 02/03/2020, no new concern raised via healthcare, well-being appears to be managed well and AARL2 engaged. The CPP noted Mr Z's harm risk, agreed elements of public protection, reasonable grounds to maintain detention. The CPP agreed, as there is a prospect of removal, dependent on the outcome of the appeal and r.35 application. There is a UK letter for travel, CPP agreed removal clear case progression, CPP agreed removal anticipated in a reasonable time scale."

The panel decision was a recommendation to maintain detention.

34 On 27 March 2020, following a pre-action letter, the claimant issued this claim for judicial review and, on 28 March 2020, the claimant's detention was reviewed and maintained. As I have already indicated, on 31 March 2020, I made certain orders as regards expedition and directions for the current interim relief hearing.

35 On 1 April 2020, a form IS.91RA Part C was completed by detention staff notifying the defendant that the claimant is at a high risk of infection, including COVID-19, because of his underlying medical history, which includes respiratory disease.

36 On 1 April 2020, the defendant considered and addressed the r.35 report. The defendant accepted that the claimant fell to be considered at level 3 of AAR policy. The defendant gave detailed consideration to the risk factors and competing immigration factors. The decision is summarised in the Summary Grounds of Defence, as follows:

> "On 1 April 2020, the Defendant considered and addressed the rule 35 report. The Defendant accepted that the Claimant fell to be considered at

Level 3 of the AAR policy. The Defendant gave detailed consideration to the risk factors and the competing immigration factors. The decision letter noted:

> 'You have been assessed at level 3, of the Adults at Risk Detention Policy and the Medical Practitioner has referred you for evaluation regarding your mental distress (to confirm that you have PTSD) to the Mental Health Team as per protocol, as yet no date has been confirmed. Your other associated conditions, TB, opiate and alcohol dependency have been prescribed for and your situation is being monitored and managed.
>
> With regard to your assessment at level 3, the AAR Policy advises that: "Where on the basis of professional and/or official documentary evidence, detention is likely to lead to a risk of harm to the individual if detained for the period identified as necessary to effect removal, they should be considered for detention only if one of the following applies:… the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence"'.

When balancing the factors in regard to your circumstances and specifically your previous convictions, it is clear that you are considered to be a significant public protection concern and any decision to maintain can be seen to be in adherence to the stated policy.

You are removable by EU Letter and once the appeal outcome is promulgated and should it be dismissed, without prejudice, this can be obtained within 5 working days. However, this is balanced against any difficulty in effecting removal at the current time and with current circumstances this is very difficult to predict.

A primary consideration in relation to detention is the imminence of removal, in your case, as mentioned previously, there is an outstanding appeal against Deportation for which you had your First-Tier substantive hearing on 13 March 2020, and we await the Determination which has been reserved. Without prejudice to the outcome of your appeal, it is considered that removal could be achieved, in the event that your appeal is refused, within 12 weeks. But it is acknowledged that this is extremely difficult to establish due to the current restrictions on flights and therefore may in fact take longer.

The presumption to liberty has been considered along with alternatives to detention, however in light of the negative factors outlined above, it is considered that provisions associated with release would be insufficient at present to ensure the protection of the public with the risk factors associated and outlined above."

37 On 1 April 2020, the claimant's solicitors wrote a letter to the defendant seeking clarification as to the review of his detention. That letter asked whether the claimant was one of the 74 persons identified as being at high risk who were to be reviewed as a priority, referred to in the evidence of Frances Hardy of the defendant in the Detention Action litigation. That was a reference to the case R (Detention Action) v Secretary of State for the Home Department [2020] EWHC 732 (Admin). In fact, it appears that the claimant had not been identified as one such individual, but, as I have already noted, he was identified by the defendant as being at increased risk of COVID-19 in Part C of 25 March and 1 April documents, to which I have made reference above.

37 The claimant's detention was then reviewed on 2 April 2020 and there were produced - as I understand it this morning - documents described as the "detention and case progression review". Those documents show that the detention of the claimant was reviewed on 2 or 3 April 2020 by an authorising officer. I will return to that matter in a moment.

38 The Detention Action case was decided by the Divisional Court two weeks ago. There is a certain overlap between the evidence and submissions made in that case and the material before me, but the essential issue in that case was a different one. There the relevant claimant, that is Detention Action, was seeking a form of generic release and other forms of mandatory orders in relation to all people in immigration detention. That case does not assist in relation to the issues before me.

IV The Grounds

39 Turning then to the specific grounds, as I have already indicated, the focus of the argument before me has been on grounds one and two. Ground three has not been pursued orally. Ground one is, essentially, a form of conventional *Hardial Singh* challenge and ground two concerns an allegation that the AAR policy of the defendant has been breached. Counsel for the claimant has correctly submitted that grounds one and two overlap and raise essentially similar matters. I will summarise the arguments below.

40 First, it is argued that the claimant is in an elevated risk category in terms of the consequence of infection with COVID-19 and there is an increased risk to him by reason of his detention. Reference is made to the fact that, in the Detention Action case, the court accepted that "the congregate setting places detainees at higher risk". It is said, on behalf of the claimant, that the consequences to the claimant of an infection with COVID-19 are a very important factor in favour of release.

41 The second point relied upon is that, quite apart from the risk posed by COVID-19, the claimant is a Level 3 risk under the AAR policy by reason of his mental health and other health-related issues, as I have described earlier in this judgment. It is said that there is, accordingly, a strong presumption in favour of release under the AAR policy and that is, likewise, a powerful factor under *Hardial Singh*.

42 Thirdly, it is said that the claimant cannot presently be removed. It is said that there is very considerable uncertainty about the defendant's ability to remove the claimant within any time frame. I was referred to the fact that the defendant's r.35 response itself says that removal is very difficult to predict and that there is speculation that removal could be effected within 12 weeks, if the claimant's appeal fails. I was referred to the fact that the r.35 response says,

> "But it is acknowledged that this is extremely difficult to establish due to the current restrictions on flights and, therefore, may in fact take longer."

43 The claimant submits that the suggestion of 12 weeks is more a hope than an expectation and that the reality is that the defendant does not know and cannot know when removal may be possible. It is said that there is every likelihood that the claimant will not be removed for many, many months. There is certainly no prospect of removal now and, at best, it is said, a highly uncertain prospect of removal over the coming months.

44 The defendant does not accept, either under ground one or ground two, that the claimant has shown even an arguable case. That is why she opposes not only the interim injunction but submits that permission should be refused. I was referred to the fact that, in order for there to be a breach of the third *Hardial Singh* principle, the question is whether it is apparent that removal will not be able to take place within a reasonable time. I was also referred to the case law, which establishes that there is no requirement for the defendant to show that there is a set period of time within which removal will be effected. It was said, by way of reference to the Detention Action case, that the mere fact that it is presently not possible to return someone to another country, because of the situation with COVID-19, does not mean that maintaining detention is necessarily in breach of the *Hardial Singh* principles.

45 In relation to ground one, the defendant has also forcefully put before me the arguments that the claimant is considered to pose a high risk of absconding and that his history of undoubtedly serious previous offending suggests that he poses a high risk of reoffending and harm. I was referred to the fact that his offending history includes rape and robbery and the defendant has said there is no particular evidence of any work being undertaken by the claimant to address his offending behaviour.

46 The defendant also says that she has taken into account the claimant's mental and physical health and those matters are being managed in detention. The defendant refers to the fact that the claimant has been offered, but has not taken up, a single-occupancy room.

47 It was also argued that the time spent in detention thus far is not a particularly lengthy period. In relation to the barriers to removal, although the defendant accepts that she cannot know when it will be possible to remove the claimant to Lithuania, she argues that the case law suggests that there is no onus on the defendant to identify a specific time frame within which removal will take place. The defendant contends that, at the present time, it cannot be said to be apparent that the removal of this claimant will not take place within a period of time that is reasonable in all the circumstances.

48 As regards ground two (the AAR policy), the defendant submits that she has carefully considered the r.35 report produced in relation to the claimant. It is accepted that the claimant is at Level 3 of the AAR policy, but the reasons she has given, for concluding that the balance of immigration factors favour maintaining detention, are not susceptible to challenge on all orthodox public law grounds. Specifically, it is said that the defendant is managing the risk faced by the claimant as a result of his particular physical health and the risk of COVID-19 infection. For these reasons, which I have sought to summarise, the defendant does not accept, under ground two, that there is any arguable public law error.

V Analysis

49 Standing back from the submissions and expressing my interim conclusions at this stage on the question of the legality of detention, in my judgment, the claimant has established a strongly arguable issue to be tried, both under ground one and ground two for the reasons submitted by Counsel for the claimant.

50 Given that the claimant has established a strong *prima facie* case that his detention is unlawful, under grounds one and two, I am satisfied that he should indeed have permission to apply for judicial review under grounds one and two. I will return to that matter in due course.

51 That takes me then to the balance of convenience. By way of summary, the claimant relies upon the same factors which establish the arguable unlawfulness of his continued detention to justify his immediate release under the balance of convenience. If I may summarise the submission of the claimant, it is said that, if there is a strongly-arguable case of unlawful detention, there are very strong countervailing factors required to justify a continued detention. In principle, that is an attractive submission.

52 Against that submission, in relation to the balance of convenience, the defendant relies upon both the risk of absconding and the risk of offending to which I have already made reference. The defendant says, and this is set out in certain of the evidence before me, that there are serious questions in relation to public protection which would arise were the claimant to be released. In particular, as I have already indicated, it is said that the claimant's history of offending creates risks which justify maintaining detention. I accept that one cannot ignore those points.

IV. Conclusion

53 If I step back from these submissions and return to the guidance given by Lord Diplock in American Cyanamid and to which I made reference earlier in this judgment, the balance of convenience in this case comes down in favour of preserving the *status quo*. That is maintaining the claimant in detention for now.

54 But I come to that conclusion only for a very specific reason. That is because this court can address, with finality, the legality of the claimant's detention at an expedited hearing within a matter of weeks.

55 Now, I bear in mind that extending the detention of the claimant for a matter of weeks is no small matter, if, in fact, it turns out that he has been unlawfully detained.

56 I emphasise that, were the court to be in a position where it could not determine, with finality, the legality of the detention within this short period of time, this is a case where I would have been persuaded that considerations of liberty, the medical condition of the claimant, and the substantial uncertainty as to when any return to Lithuania will be possible, would justify immediate release with conditions. As I have already stated, the claimant has established a very strong case on the merits in relation to these matters.

57 My inquiries with the ACO suggest an expedited final court hearing within a short time period (2-3 weeks) will be possible.

58 Accordingly, ultimately, and as a matter of discretion, it seems to me that the right course in this case is to give directions for an expedited hearing of the substantive judicial review at the start of the new court term in April 2020. At that hearing, the judge can consider

whether or not the claimant's detention should be maintained purely as a matter of legality rather than balancing the discretionary considerations as part of the balance of convenience.

59 Those matters - that is the balance of convenience - will fall away at a final hearing, because the court will only need to consider whether, under ground one and ground two, there has been a breach of the *Hardial Singh* principles, or a breach of the AAR policy.

60 Finally, I should record (albeit only by way of a provisional view) that I consider that there is real substance in the claimant's arguments under both of those grounds and one would expect that the defendant, as a responsible public body, will review the claimant's detention, even though there is a further hearing to be fixed soon. I am confident the defendant will review whether in the present circumstances, where it is unlikely that in the near future there will be a return of the claimant to Lithuania, it is appropriate for a person with his medical vulnerabilities to remain in detention. I am obviously making no direction in that regard, but I am sure that the defendant and her advisors will take a fresh look at matters.

61 I will now ask counsel to address me on directions for the hearing at the start of next term. I will not direct a hearing on the very first day of the next term, but I will direct a hearing during that week, with a one-day time estimate.

62 It does seem to me that both the pleadings and evidence for that hearing will require some attention. In particular, it appears to me, based on the arguments that I have heard this morning, the claimant may wish to consider amending his grounds, in relation to both grounds one and two, by including reference to the recent decision of 2 or 3 April 2020, to which I made reference earlier in this judgment. That is, by reference to the documents which were disclosed this morning. That would be appropriate, because it is the most recent and current decision identifying the reasons for the claimant's detention and it (not a historical decision) should be the public law target decision. It also seems to me that the defendant may also wish to consider submitting further evidence, if she maintains the claimant's detention.

63 That concludes my judgment, and I will now turn to the parties for their submissions as to directions.

64 I should make it clear, as I have already indicated, that I am going to grant permission to apply for judicial today in relation to grounds one and two. As regards ground three, the claimant will consider in due course as to whether or not he wishes to pursue that ground. It does not seem to me, as matters presently stand, that it adds substantially to the case. But that is a matter for the claimant.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.