Neutral Citation Number: [2021] EWCA Crim 377

Case No: 202003069 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
MRS JUSTICE WHIPPLE
T20190245 & T20190246

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2021

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MRS JUSTICE MCGOWAN DBE
and
MR JUSTICE BOURNE

- -

Solicitor General's Reference

(Simon James FINCH)

- -
- -

Mr M Ellis QC MP & Mr Mark Heywood QC instructed by **the Attorney General's Office** for **the Solicitor General**
Mr Stuart Trimmer QC & Mr Ian Ibrahim (instructed by **Devonald Griffiths John Solicitors**)

Hearing dates: 2nd March 2021

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Approved Judgment

Lord Justice Fulford V.P.:

Introduction

1. This is a reference by the Solicitor General pursuant to section 36 Criminal Justice Act 1988. The offender, Simon Finch, is now aged 50. For convenience, we refer to him as the defendant in this judgment.

2. On 6 November 2019 the defendant appeared at a plea and trial preparation hearing on an indictment then containing two counts. He pleaded not guilty to both. On 8 June 2020 the indictment was amended with the leave of the court to add count 1. The defendant again pleaded not guilty. The case was adjourned for trial. The counts were:

    1. Count 1: recording information for a purpose prejudicial to the safety or interests of the State, contrary to section 1(1)(c) Official Secrets Act 1911;
    2. Count 2: making a damaging disclosure relating to defence, contrary to section 2(1) of the Official Secrets Act 1989; and
    3. Count 3: failing to comply with a disclosure notice, contrary to section 53(1) of the Regulation of Investigatory Powers Act 2000.

    By a defence statement dated 20 February 2020 the defendant denied the Official Secrets Act 1989 offence (count 2) and indicated that he would plead guilty to the Regulation of Investigatory Powers Act 2000 offence (count 3).

2. On 26 October 2020 his trial commenced at the Central Criminal Court. On 9 November 2020, at the completion of the evidence in the case and after a ruling from the trial judge, Whipple J, that the defendant had raised no defence, he asked to be re-arraigned and pleaded guilty to the three counts. At the judge's direction, the jury then returned guilty verdicts accordingly.

3. On 10 November 2020 the defendant was sentenced to 3 years' imprisonment on count 1 (14 years' imprisonment maximum). On count 2 he was sentenced to 12 months' imprisonment (2 years' imprisonment maximum), to be served concurrently. On count 3 he was sentenced to 18 months' imprisonment (5 years' imprisonment maximum, given this is a national security case), to be served consecutively, making a total of 4 ½ years' imprisonment. The court imposed a serious crime prevention order which imposed restrictions on the

use by the defendant of electronic devices for a period of five years. There was also a deprivation order relating to the devices he had used and an order relating to surcharge.

The Facts

4. This summary is based to a significant extent on the written Reference, the contents of which have been agreed by the defendant. We are grateful for the careful work that clearly has gone into the preparation of this document.

5. For over 20 years the defendant was employed on sensitive programmes for the Ministry of Defence. In the 1990s he worked for the Defence Evaluation and Research Agency ("DERA"). Between March 1999 and July 2000, he was employed as an Analytical Engineer in the Operational Analysis department of BAe Systems (Operations) Ltd. From 2001 to at least October 2006, he was employed at Qinetiq (the commercial successor to DERA) in a similar role. Between October 2009 and February 2018, he was again employed by BAe, as a lead software engineer, specifically in the development of software tools in the design of military aircraft.

6. The defendant had been vetted for access to sensitive, defence-related information to 'SC' or Security Checked/Security Cleared level. Additionally, among other projects, from July 2002 he was inducted into and afforded access to a Codeword Access programme (later known as a Special Access Programme ("SAP")), in order that he could undertake work on the development and evaluation of a specific missile weapon system.

7. A Codeword Access programme or SAP is a closed or compartmented information handling programme, owned by one of the military commands and headed by a serving officer of at least the rank of Brigadier (or equivalent) in relation to which access to highly sensitive information regarding a specific project or matter is afforded only to a limited group of people, on a strictly "*need to know*" basis, all of whom are identified on an access list and each of whom is inducted and supervised by a Compartment Administrator.

8. The defendant's clearance and work therefore afforded him access to the most sensitive information relating to the defence systems on which he worked, including SECRET, TOP SECRET and Codeword Access material. He was

subject to strict duties of confidentiality arising from the terms of his employment, the terms of non-disclosure agreements he entered into and, in particular, a written notice that was provided to him (the receipt of which and the duties therein he acknowledged in writing). These stipulated that the information to which he had access was protected against disclosure by the provisions of the Official Secrets Acts. On both the commencement and on the termination of his employment with BAe and with QinetiQ, the defendant signed a declaration which contained the following terms:

> "*I have been informed that information, documents, or other articles protected against disclosure by the provisions of the Official Secrets Act 1989 relating to security or intelligence, defence or international relations will come into my possession as a result of my employment with [BAE Systems] as a contractor or consultant thereof on terms requiring it to be held in confidence.*
>
> *I understand that, knowing such information, documents or other articles are so protected against disclosure, I may be prosecuted for an offence under the Official Secrets Acts 1911 to 1989 should I disclose without lawful authority any or any part of such information, documents or other articles.*
>
> *On termination of my employment...I understand that the above declaration continues to apply*."

9. In 2013 the defendant's personal circumstances began to deteriorate. He later said that this was the result of two incidents in April and May 2013. In the first, he was punched by a woman who was a stranger in a bar in Southport on a Saturday night. He reported the assault to bar staff and, the next morning, to the Merseyside police, who took statements and investigated the matter, but were unable to identify the assailant or those with her. In the second, he was abused by a group of youths in Ormskirk and, having responded to them, he took shelter in a bar. The youths and others assembled outside and shouted abuse and threats. The defendant telephoned the Lancashire police. No officer attended. The incident ended when the bar owner and three others chased the youths away.

10. The defendant has since stated that, although his sexual orientation is heterosexual, these events were motivated by homophobic attitudes, because his attackers thought he was gay. After these incidents, he went out less frequently and sought the help of his occupational health department at work. He told the counsellor that he intended to carry a weapon (nunchucks or rice flails). When she dismissed the idea in September 2015, he wrote to his line manager at BAe indicating that he would carry a knife and that women would respect him more if he was prepared to use violence. The police were

alerted and on 4 September 2015 he was visited by police officers at his home and given words of advice about carrying weapons.

11. In January 2016 the defendant went out for the evening in Southport where he lived. He took with him a hammer and a large kitchen knife which, when seen by members of the public, provoked calls to the police who sent mobile units in an attempt to find him. In due course police officers went to his home address. They found the weapons and arrested the defendant, and he was taken to the police station at Bootle. The next day he was assessed by a psychiatrist and detained for 28 days for further assessment of his mental state at the Hesketh Centre in Southport, under section 2 of the Mental Health Act 1983. He remained there for a further period on a voluntary basis.

12. A voluntary police interview was conducted in April 2016 when he had sufficiently recovered. He appeared before Sefton Magistrates' Court on 11 May 2016 when he pleaded guilty to charges of possessing an offensive weapon and possessing a bladed article. On 7 June 2016 he was sentenced to 16 weeks' imprisonment, suspended for 12 months, with a rehabilitation activity requirement.

13. Despite this conviction (which, in breach of the terms of his employment, he did not himself disclose to his employer or to the UK Vetting Service) he continued to be employed by BAe. He returned to work full time from August 2016.

14. During the period October 2017 to January 2018, the defendant commenced and pursued, formal complaint processes with or against Lancashire Police, Merseyside Police, the Independent Office of Police Conduct, Mersey Care NHS Trust, the Parliamentary and Health Service Ombudsman, his trade union Unite and his Member of Parliament. In correspondence in late November, he said that he intended to resign from work and to change his life by February or March 2018. At the end of January 2018, he gave notice of resignation from his employment, which came to an end on 15 February 2018. In April 2018 he moved from Southport to Swansea in South Wales.

15. Thereafter, according to the evidence he gave at trial, he put into effect a plan he had first contemplated in January or February 2018 to recall and record, as accurately as he could, details of the secret missile programme on which he had been employed under the SAP arrangements. Using his then unencrypted computers, he went on three days each week to the civic library in Swansea and there worked on and recorded the information that he later disclosed. On other days he engaged in leisure activities. In June he travelled in France and elsewhere on the continent before returning to the UK to

continue recording sensitive information in the same manner until September. In doing so he relied on commercial cloud computing services that were not secure. Later in the same period, he encrypted his computers and hard drive with Vera Crypt, a highly effective, publicly-available encryption software. In mid-July he renewed his passport. In September he travelled first to Paris, then Bordeaux and then back to Paris. From there, on Tuesday 16 October he travelled to Frankfurt in Germany, staying until Friday 2 November 2018.

16. Over four days from Thursday 25 October to Sunday 28 October 2018 he created new, clean Word documents on his encrypted computer, in preparation for an act of unlawful disclosure, populating those files with the work he had undertaken in raw text form earlier in the year.

17. On Sunday 28 October 2018, at 4.35pm, from his hotel room, the defendant sent an email and attachments to eight addresses, copied to a ninth (another of his own addresses). The message had 32 attachments, 29 of which were copies of communications relating to his complaints processes and three were documents he himself had written.

18. In the lengthy email message, he complained of mistreatment which he said amounted to torture at the hands of Merseyside police (a reference to his 2016 arrest). He said that he had attempted to pursue various avenues of redress for failures to protect him from hate crime, without success, and had decided, in those circumstances, to release classified and protected information relating to the defence systems to which he had had access in the course of his employment. He in fact did so in both the email itself, and in an attached document entitled, "*Systems.doc*", which he had written. He described this as "*a sample (and proof)*" of the kind of information he had already delivered to hostile foreign states by post during his time in Europe. His motivations, he said, included that he had been repeatedly failed by the UK state, including the police, his employer, the IPCC/IOPC, his local NHS Mental Health Trust, his trade union and his Member of Parliament. He had been let down additionally by others, including specialist law firms from whom he had sought advice. He suggested that his lack of redress and the refusal of justice he had experienced led him the conclusion that he had no obligation to care for national security if the nation had no care for his security.

19. The "*Systems.doc*" file was a closely typed six-page document that contained very detailed information about his work on an identified missile system development programme. The weapon system and its software are currently in operational use with the UK armed forces and therefore the technical detail in the document was (and continues to be) classified as Secret or Top Secret

and compartmented within a SAP. The information included much detail about the operational performance of the system.

20. A full damage assessment report has been prepared describing the detail, accuracy and effect of the information disclosed. Expert evaluation of the impact of this disclosure concluded that release of the information to a hostile adversary would provide an understanding of the functioning of the system and would allow them to develop methods of countering the system, significantly affecting its capability, and consequentially creating risk to UK and foreign partners and putting lives at risk. At trial, because of the need to prove the necessary elements of counts 1 and 2, the reporting witness (Witness A) was called to give detailed evidence as to the level of classification of the information disclosed and the actual and potential damage to national security that resulted, while the court sat in private.

21. Seven of the eight addressees of the message and its attachments were accounts relating to individuals from two firms of solicitors, two employees of the charitable organisation the LGBT Foundation, the office of the defendant's Member of Parliament, an employee of the Unite union and a general address for the legal department of the charity Mind. Investigators traced these seven of the eight recipient addresses, and took such steps as were possible to remove traces of the emails and information from those recipients and their systems. By then the material had, in some cases, been forwarded to other addresses and stored on related servers. The eighth addressee was not specifically referred to in evidence during the trial, for security reasons, but was identified in the written evidence of witness "L" in the redacted served case. The user of that email address is believed to be resident abroad (in a foreign country considered to be an ally to the UK). No step of retrieval or containment has been possible in that instance.

22. The message and its attachments were sent in unencrypted form over the open internet to non-specialised email addresses, including overseas. There was agreed expert evidence given in the trial of the extent to which such services are not secure, are hosted abroad, result in storage at various points in the system, do not involve direct end-to-end transmission and therefore pose a risk of interception and disclosure. In addition, destination addresses may result in information being held in multiple places and being accessible over a long period of time to a number of individuals. There was evidence that the content of the message had in fact come to the attention of others than addressees.

23. In the email disclosure, the defendant stated as follows:

> "Since the UK has refused me any justice, compensation, or even treatment for these appalling crimes then it has no right to expect my loyalty. For over twenty years I have worked in the UK defence industry as a systems engineer. Initially I was a civil servant and even represented the UK overseas. It is particularly foolish to do this to someone who works upon classified systems, particularly if they are somewhat autistic and have a near-photographic memory. Therefore it gives me very great pleasure to say that I have spent the last ten months documenting SECRET, TOP SECRET and CODEWORD information on the wide range of military systems I have worked upon. This information has been sent (freely) to a number of hostile foreign governments. I've provided a sample (and proof) of the level of information which has been sent in Systems.doc. If the nation does not care for my security then why should I care for national security?"

24. Similar expressions were contained in a second document written by the defendant, entitled "*Detail.doc*". A third attached document, written by the defendant ("*Timeline.doc*") and set out as a chronology, contained an entry to the effect that he had posted further classified information on other sensitive projects on which he had been employed to a number of foreign embassies during the period in which he had been travelling in Europe in September and October 2018.

25. When he was arrested on 27 March 2019, the defendant, on request, directed the officers to various digital devices in his flat. Three of those devices – an Iomega mass storage device, a Dell laptop computer and an HP laptop computer – belonged to him and were password controlled, as the defendant confirmed. He refused to supply the PIN code/password for each device when asked. He said to the officers:

> "Have you read my police complaint about being subjected to crimes and being totally ignored by Merseyside Police? And my complaint that they dragged me around the floor naked? Because that's what all this is to do with. I'm so fucking angry about this complaint, so you're not going to get any kind of co-operation out of me. I'm just fucking angry with the British state and what the police did to me."

26. Later that day, the defendant was given a formal advisory note in relation to the provision of PIN/password security information for the devices. When seen and assessed in detention by a custody nurse he told her that he had acted as he did to make "*an attempt to be noticed*" and he reported having sourced international contacts and media outlets to share his views on the corruption he had faced. He told the nurse that he had shared top secret

information regarding the technical aspects of the weapons he had helped to design.

27. When interviewed under caution on 27 March 2019 for the most part the defendant made no comment to the questions asked of him. However, he confirmed his security clearance level and said it would have been updated in 2019 had he still been in work. He added:

> "Merseyside Police convicted me over a victimless first offence...er...any serious offence means you can never get a clearance under the Official Secrets Act again. I've had my career of 25 years taken from me for a victimless first offence, how's that for punitive justice. The UK stinks."

28. He later explained that he resigned from BAe Systems and did so a year after his conviction in 2016 without informing them or the Vetting Unit of his conviction. He went on to observe, without admitting that he was the author of the disclosure message, that hypothetically it would be stupid for the State to torture and refuse access to someone who had access to highly sensitive information. He said of the message that he could not confirm that it was his. He also said this:

> "...perhaps I feel that...my interests will be best served discussing this in a court environment rather than just a police interview environment. You know this is very, if this is my document and this is all to do with me, maybe I think it's too important to just be shoved away in a corner."

29. He added that he did care about the lives that could be harmed by the disclosure.

30. On 17 September 2019, the defendant was charged. He was also served with a written notice under section 49 of the Regulation of Investigatory Powers Act 2000. The notice, granted by a judge of the Central Criminal Court, required the defendant to disclose "*a key or any supporting information*" to make his two laptops and the mass data storage device intelligible by midday on 1 October 2019.

31. On the same day the defendant again spoke to the custody nurse during assessment, saying that he was pleased that the Metropolitan Police were unable to access his computer, as he "*had encrypted it well*". He said he would not divulge the passwords and that he would "*rather do the extra five years*".

32. The digital key information has not been provided at any stage to date. All attempts by the investigators to overcome the password controls and encryption we are told have so far failed.

33. On 2 October 2019 the defendant was further interviewed under caution. He accepted that he had not complied with the terms of the notice. He said that he would provide the encryption key to all devices "*once the Independent Office for Police Complaints conducts a fair and thorough investigation into the allegations of perverting the course of justice, discrimination and torture*" which he made against Merseyside Police. He said that he had set out his position more fully in a letter addressed to police. In it he had laid down the same pre-condition. That letter, in almost identical terms, was received by police the following day.

34. During the trial, the defendant in cross-examination admitted each element of the three offences against him. He agreed that he had given instructions, as set out in his defence statement, that he would plead guilty to the RIPA 2000 offence but when it came to it he could not bring himself to do so and he had hoped that he would have a sympathetic jury. He said that he had had in his mind in February 2018, when he signed the OSA declaration on leaving his employment with BAe, that he would take the disclosure action if he did not get justice as he perceived it. He accepted that his recording exercise had taken place over 10 months and that it was carefully planned. He also accepted that the information he had recorded and sent was, and was intended and calculated by him to be, of a kind that was useful to an enemy. For the first time whilst giving evidence, and only when specifically asked about it in cross-examination, he said that he had not in fact, contrary to his assertions in his documents, sent any other information to hostile foreign governments or embassies; he claimed to the jury he had said that as a lie to gain attention. He accepted that he had last maintained that he had sent information of this kind days before trial began, when interviewed by Dr Lock on 23 October 2020 (see [41] below).

35. When asked in evidence in chief why he had sent the email, the defendant said:

> "I really couldn't walk away from what has happened. I have a civic duty to stand up and say 'this is happening'. Why I have chosen this crime? I had to do something to generate national exposure, it had to be quite serious, something which would gather national attention. I wanted to choose something non-violent, and I think it had to be something that would cause quite a lot of financial damage, because I had to show the nation that having a proper complaint system is cheaper.
>
> It is not Merseyside Police that my problem is with, but it is with the IOPC for refusing to investigate the complaint.
>
> I refused to provide details or accessing my devices. Initially I wanted this case to come to one of the highest courts in the land, and here we're at the CCC, this is a place where it will generate publicity.
>
> I may have put a condition on the provision of the access codes, and I am not allowed to do that, but I still stand by it.
>
> If someone had said to me, before I pressed 'send' that they were going to investigate properly, of course I would not have sent the email.
>
> [...]
>
> The fact I have not got anywhere with the police complaint is really why the dissemination occurred."

The Sentencing Exercise

36. In sentencing, Whipple J observed that the disclosure which was the subject matter of Count 2 was damaging to national security. With regard to Count 1, she set out that the defendant had recorded confidential information on his personal devices. She indicated:

> "Some of that confidential information was included in systems.doc. We cannot know whether you recorded classified information beyond that contained in systems.doc because your own account on that matter has been inconsistent to date, and because you have refused to

> provide the police with access to your electronic devices. The recording of information such as that recorded in systems.doc is unlawful [...] Importantly, and what makes count 1 the more serious offence, is that your purpose in recording this information was to prejudice the interests of the United Kingdom. You planned and intended the recording and subsequent disclosure of this information which you knew would be information of use to an enemy of the United Kingdom."

37. As regards culpability, the judge recognised that the defendant was not under any pressure, fear or sense of compulsion at the time of his commission of the counts 1 and 2 offences. She said:

> "You were living in Swansea, not working, enjoying free time to do your own thing interspersed with trips to Swansea library where you drafted your cover email and the documents which would accompany it. You went on two holidays to Europe that year, taking your laptop with you and continuing to work on these documents. You sent the email from a hotel in Frankfurt on a Sunday afternoon. These were carefully planned, and deliberate offences, committed at times and in ways of your choosing.
>
> Count 3 was also deliberate and planned. You had every chance to comply with the RIPA notice. You have chosen not to. This is an ongoing state of affairs because you still have not disclosed the digital keys to your devices. It is now over a year since you were asked; and still you refuse. The culpability is high because without knowing what is on your electronic devices, the police and other arms of the state are not able to determine the extent of your offending or to calibrate with any precision the mitigation which might be required to counteract it."

38. The trial judge identified that the defendant's motive had been to gain attention for his causes, believing that "*a high-profile trial at the Old Bailey would draw attention to your complaints and get the outcome you wanted. Your motives were completely misconceived. You have no justification, moral or legal, for what you did*."

39. Whipple J concluded that the defendant's culpability was "*high*". In assessing harm, the judge stated that there was no evidence to show that the email or its classified attachment had fallen into enemy or hostile hands. However, that was not to say that there was no evident harm, as the judge observed:

> "So far as harm is concerned, the jury heard evidence from Witness A in private session. He went through systems.doc and picked out the passages in that document which breached the Official Secrets Acts; he explained why the individual breaches damaged the national interest, he explained why the disclosure of that document caused harm. That harm can be summarised in general terms as follows. There is the potential compromise of the missile system itself. If classified details about the workings of the missile fall into enemy hands, that might diminish the operational effectiveness of the missile system. That puts in jeopardy those United Kingdom servicemen and women who may be engaged in combat operations relying on the missile system. It puts in jeopardy members of the public whom the United Kingdom seeks to protect by its military operations. There is a wider harm to the reputation of the United Kingdom because there has been an unauthorised disclosure of classified information which potentially damages the trust of foreign partner states in the UK's ability to retain confidentiality in secret material. There is harm in the form of the response to your crimes which has been to implement various mitigating measures. This comes at some significant public cost and takes time. Anyway, mitigation is not a complete remedy; there are still risks remaining.
>
> Count 3 harms the national interest in a different way. Without the digital keys to the electronic devices, it is not possible for the police or agencies to investigate the extent of classified material recorded or the possibility of other disclosures. The harm is, in truth, unascertainable."

40. The trial judge indicated that she did not consider there to be any specific aggravating factors applicable to his offending which had not already been taken into account in her assessment of the seriousness of the offending.

41. There was before the court a report dated 29 November 2019 by Dr Owen Davies, a consultant forensic psychiatrist, instructed on behalf of the defendant, with an addendum dated 2 September 2020. There was also a report by Dr Martin Lock, a consultant forensic psychiatrist instructed by the Crown, dated 25 October 2020. The experts met during the trial and produced a joint report. In summary, they agreed that the defendant demonstrated clear evidence of some features of an autistic spectrum disorder but without a formal diagnosis being possible. There was insufficient evidence to conclude that the defendant fulfilled the criteria for a psychotic or delusional disorder. There was no evidence that the defendant was unable to form intent, "... *indeed, he has given lengthy accounts of the planning he undertook and decisions he weighed up*". They both were of the view that his Autism/Asperger's condition

would be inextricably linked to the actions the defendant took, given he clearly holds his beliefs with conviction, and they appear unshakable. Furthermore, he has clearly described being in a state of desperation as, in his view, his grievances had not been taken seriously or even acknowledged. However, the diagnosis of Autism or Asperger's were insufficient and they failed to provide a full explanation for his criminal actions. Indeed, the defendant had given clear accounts of his rationale for committing these crimes, with the implications being carefully weighed up.

42. The trial judge found some mitigation. First, the guilty pleas on day nine of the trial were "*a small factor*" in his favour. Second, the loss of the defendant's career in the defence industry, in which he had worked for many years. Third, the lack of previous convictions of a similar nature. But the judge considered the defendant's "*main mitigation*" to be his autistic condition, as follows:

> "You have suggested that you have PTSD, depression, delusional disorder and other psychiatric problems, but there is no evidence before me that you have any of those conditions. There is evidence that you have some features of an autistic spectrum disorder. You are said to have rigid and literal thought patterns and a poor understanding of social norms, amongst other problems. The psychiatrists (Dr Davies for the defence, Dr Lock for the prosecution) agree that the features of autistic spectrum disorder had a significant effect on your thinking and behaviour in committing these offences, although they also agree that this does not fully explain why you committed these offences. Dr Davies has confirmed the agreed position in evidence before me today. I accept that your actions and decision-making were affected by the features of autism which afflict you. I accept that this reduces the culpability of your offending."

The Reference

43. We are reminded that there is no specific Sentencing Council Guideline that applies to the present case.

44. The Crown suggests that the aggravating features are extensive. First, for the offences under the Official Secrets Acts, the information which was recorded and disclosed was extensive and comprehensive. The most highly classified material was held in a SAP or Codeword Access programme, to which the defendant, who was security vetted, had access under strict conditions during his employment. The recorded and disclosed information related to an in-

service missile weapon system and had both the potential and actual capacity to cause very great harm to the safety and interests of the UK in several ways, including putting lives at risk. The actual harm was various and active steps of mitigation have been and remain necessary. The recording and disclosure conduct was long premeditated, was carefully planned and executed and took place over a total period of 10 months. The methods used both to record and to disclose were themselves not secure. The defendant's declared intention in both making records and in disclosure was to cause harm, including very considerable financial harm. The defendant was motivated by personal grievance and so he took no step to mitigate the harm he had caused. It is not possible entirely to mitigate against the harm done or accurately and fully to assess its true extent. Finally, under this heading, the defendant remains in possession of the recorded information.

45. As regards the offences under Regulation of Investigatory Powers Act 2000, the judge observed that the failure to cooperate was calculated and that the keys had been withheld for cynical reasons. The devices continue to hold classified information as well as opportunity for investigation and mitigation. It is noted that the defendant has expressed satisfaction at the course he has followed.

46. Against that background (*viz.* the submissions as regards what are suggested to be the aggravating features of the case), the core contentions advanced by Mr Ellis Q.C. (the Solicitor General) and Mr Heywood Q.C. on behalf of the Solicitor General are that the sentences were unduly lenient in their individual and in their overall effect in that they failed to mark the gravity of the offending, the need to protect the public from harm and to safeguard national security. It is noted there is significant public concern about cases of this kind. It is suggested, the judge erred in that the sentences passed were manifestly of insufficient severity and fell considerably outside the range appropriate for the offending, having regard in particular to the aggravating features identified, the culpability of the defendant and the harm done.

47. In particular, it is submitted that once the judge had found that the defendant's culpability in committing the Official Secrets Acts offences was "*high*" and that both the actual and potential harm caused was considerable and remains, to its full extent, unascertainable, she ought to have identified as

the correct starting point for the 1911 Act offence on count 1, a significant term of years, amounting to a substantial proportion of the maximum term of 14 years for that offence. It is accepted that, if that were so, there would be no need to add a consecutive sentence for count 2, the disclosure offence under the 1989 Act, instead imposing a concurrent sentence.

48. It is argued that offending of this kind should always attract long custodial sentences, both for punitive and for deterrent sentencing purposes. Mr Heywood argues that although a conclusion that the defendant's autistic traits contributed to his offending, in the sense that it led to overvalued ideas (*i.e.* fixed beliefs which were not delusional in character) as to his treatment at the hands of police and others, was in accordance with the evidence, the effect on culpability ought to have been assessed as limited. It is observed that his condition had little or no bearing on the unlawful method he selected, in a planned and premeditated fashion over many months, to press home his grievance and exact retribution on the United Kingdom.

49. It is submitted, additionally, that the culpability for the RIPA offence was high. This was calculated offending the effect of which was maintained at trial and up to today. The harm intended and caused is considerable in that the investigation and the steps of mitigation and containment that might follow have been frustrated, as the defendant hoped. In reality it is argued there is no mitigation, and the appropriate sentence is one near to the top of the range. Furthermore, an appropriate sentence in a case of this kind should have consecutive effect, as here, but, in the circumstances, a significant reduction for totality is not necessary because the offending was intended by the defendant to aggravate the secrets offending and to enable him to give his account at trial.

The Defendant's submissions

50. On behalf of the defendant, Mr Trimmer Q.C. and Mr Ibrahim submit that the criminality with which this case is concerned is relatively minor. It is highlighted that the defendant did not pass information to foreign agents over a number of years and that he cannot be viewed as a conventional spy. It is argued that there is no evidence of actual harm having been caused although the potential for harm is accepted. Count 1 has a maximum term of 14 years' imprisonment, and it is argued this should be reserved for the most serious offences of this type. Furthermore, counts 1 and 2 were inextricably

linked: recording the material was a necessary preliminary step for its disclosure, and it is argued the latter (count 2) reflected the true gravamen of this offending. The maximum term under count 2 is two years imprisonment. It is suggested that this should have a significant limiting effect on the sentence passed in this case.

51. Considerable reliance is placed on the defendant's personal circumstances and the agreed expert opinion of the psychiatrists, and most particularly the strong link between the offending and the diagnosis of Autism/Asperger's. It is submitted that his culpability is to a significant extent, governed by the underlying reasons for his actions. It is contended that powerful mitigation applies to all three offences. In essence, a strong developmental difficulty has brought him to the grave position he now faces.

52. It is argued that although the suggested defence of necessity or duress was insufficiently made out to be left to the jury, nonetheless the factors relied on provided considerable mitigation.

53. We are reminded that the defendant is now a man in his middle years, he has no family, no employment and has entrenched mental health difficulties.

Discussion

54. The powerful need for secrecy to be preserved in circumstances such as the present was described by Lord Bingham in *R v Shayler* [2003] 1 AC 247 at [25] in the context of revelations to national newspapers by a former member of the security services:

> "There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their

identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient: see, for example, *Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 118c, 213-214, 259a, 265f* ; *Attorney General v Blake [2001] 1 AC 268, 287d-f.* In the *Guardian Newspapers Ltd (No 2) case, at p 269e-g* , Lord Griffiths expressed the accepted rule very pithily:

> "The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency."

As already shown, this judicial approach is reflected in the rule laid down, after prolonged consideration and debate, by the legislature."

55. These offences are committed for a potentially wide range of reasons. Some defendants will be tempted by financial reward; strong political allegiance to an ideology or to another country are another not uncommon motivating factor; pressure or some form of blackmail may cause others to commit crimes of this kind; and there have been other instances in which a grievance held by an employee or ex-employee has led to the unlawful handling of official secrets. Lord Griffiths' "*brightline rule*" has the consequence that regardless of the motivation, the high value that is placed on the absolute prohibition against disclosure without proper authorisation is a – indeed, probably the – preeminent consideration.

56. The inherent seriousness of offences of this kind has been reflected in a series of decisions over the last 50 years. Starting with *R v Britten* (1969) 53 Cr. App. R. 111, Davies LJ at page 117 stated:

> "Contraventions of the Official Secrets Act which prejudice the defence of this country and which may thus tend to endanger the lives of members of the community are to a considerable degree in a category

> of their own. The perils they create and thus the sentences that are appropriate in the interests of the community will, of course, vary according to the circumstances of the particular case. But one factor stands out. In recent decades the dangers of mass destruction of life and property at the hands of an opposing power have increased to an outstanding degree, and it follows that as the dangers increase so does the need in protection of society for sentences of deterrent length."

57. The court in *Britten* went on to cite Hilbery J. in *R v Blake* (1961) 45 Cr App R 292; [1962] 2 QB 377 at page 383 as follows:

> "It is of the utmost importance, perhaps particularly at the present time, that such conduct should not only stand condemned, should not only be held in utter abhorrence by all ordinary men and women, but should receive, when brought to justice, the severest possible punishment. This sentence had a threefold purpose. It was intended to be punitive, it was designed and calculated to deter others, and it was meant to be a safeguard to this country."

58. In *R. v. Prime* (1983) 5 Cr. App. R. (S.) 127 Lawton LJ observed:

> "What this applicant had done was to take the Queen's shilling, both as a member of the Royal Air Force and of the Government intelligence service, and then to have sold her, her subjects and allies to a potential enemy. In time of war such conduct would have merited the death penalty. In peacetime the law does not provide for a death penalty. The nearest it provides for is a very long sentence indeed. In our judgment, right-minded members of the public would consider that a very long sentence was appropriate, and that is what the applicant received.
>
> There is also in this class of case the element of deterrence. Anyone, particularly those in the armed services and Government service, who is tempted, whether by money, threats of blackmail or ideology, to communicate sensitive information to a potential enemy, should have in mind what happened to this applicant. This is particularly so nowadays when, because of developments in the gathering and storing of information by electronic means, those in comparatively lowly positions often have access to material which could endanger the security of the state if it got into the wrong hands."

59. In *R. v. (Michael) Smith* [1996] 1 Cr. App. R. (S.) 202, Lord Taylor CJ, when allowing the appeal, made the following general observations at the conclusion of the judgment:

> "We add as a postscript to the judgment that it has to be clearly understood, as has been stated in a number of the cases […], that in sentencing for espionage the court needs to place an important emphasis upon the deterrent factor of the sentence as well as the punitive factor. Anyone who is prepared to betray his country must expect that he will receive a long sentence. It makes no difference that there may be variations in the political situation worldwide, or in the existence or non-existence of the Cold War, or any other possible source of war or threat to the United Kingdom in the future. Treachery is treachery. It must be deterred and it must be punished."

60. In *R v James* [2009] EWCA Crim. 1261, [2010] 1 Cr. App. R. (S.) 57, Lord Judge CJ in agreeing with the extract just cited from Lord Taylor's judgment in *(Michael) Smith* stated:

> "18. We repeat and endorse the observations of Lord Taylor C.J. in relation to any case where a member of the Armed Forces, however junior, serving abroad in a theatre of military operations, chooses to disclose information to anyone which may be of use, directly or indirectly, to an enemy of this country or prejudicial to the interest and safety his colleagues and companions serving in a war zone and at daily risk of death or serious injury. The element of intended betrayal of serving colleagues makes this a very serious offence indeed. Fortunately, cases like these are very rare. When they do occur, there must be no doubt that even if the information disclosed is not proved to have caused any actual damage, and was brought to a halt before any such damage may have occurred, the deterrent element in the sentence is absolutely fundamental. In fact although no individual serving soldier was directly affected by the appellant's activities, they did have a direct impact on the military relationships between NATO forces and the Afghan Government, and this alone might well have made the task of serving soldiers lengthier and more hazardous.
>
> 19. The Court has a duty to those members of the Armed Forces risking life and health and safety through loyal service to the interests of this country to provide such protection as can be provided in the fortunately very rare cases indeed of possible treachery from those

working alongside them and who are treated as trusted colleagues. The sentence imposed after the trial in this case was not manifestly excessive. In our judgment it properly reflected the deterrent element which necessarily must govern every sentencing decision in cases of treachery."

61. In this case the information relevant to counts 1 and 2 was significant in its extent and seriousness. It was of a highly classified kind, relating to an in-service missile weapon system. As the Crown alleges, the defendant's activities had the potential and real capacity to cause truly significant harm to the safety and the interests of the UK, in a variety of ways. This included putting lives at risk. Actual harm has resulted, not least when the defendant transmitted the material by means of insecure forms of communication to people who should not have received it. This activity was long premeditated; the enterprise was carefully planned and executed; and the offending extended to just under a year. At all stages the material was handled in an insecure manner. The defendant, motivated by personal grievance, sought to cause harm to this country.

62. In summary, therefore, although the defendant did not, for instance, hand the information directly to a terrorist group or a hostile foreign power, by handling and distributing the material in the way set out above, he stripped it of the vital cloak of secrecy that had hitherto provided critical protection. His actions may have had led to it being communicated to those who would seek to use it against the interests of this country. In any event, the approach of the relevant authorities to this material henceforth will have to be on the assumption that it has "*fallen into the wrong hands*". This is highly damaging to the interests of the United Kingdom and it has inevitable financial and reputational consequences (*viz.* the loss of confidence internationally in the reliability, effectiveness and competence of this country, particularly amongst our allies), and it exposes service personnel and civilians to the possibility of harm.

63. We consider that the defendant's reliance on a suggested defence of necessity or duress to have been fanciful and there is no mitigation available to him on the basis that he nearly, but not quite, had a defence to the charges. As the judge observed in passing sentence, "*Your motives were completely misconceived. You have no justification, moral or legal, for what you did*." As in *R v Shayler*, the

defendant was "*not within measurable distance*" of a defence of necessity or duress of circumstance (see the judgment at [17]).

64. The defendant continues to refuse to cooperate as regards the offence under the Regulation of Investigatory Powers Act 2000. The judge observed that the failure to cooperate was calculated, and that the keys had been withheld for cynical reasons. The devices continue to hold classified information as well as opportunity for investigation and mitigation. It is noted that the defendant has expressed satisfaction or happiness at the course he has followed.

65. A key issue is the extent to which the expert psychiatric evidence provided mitigation, and particularly the extent to which it may have operated to reduce the defendant's culpability. The psychiatrists are in agreement that the defendant's Autism/Asperger's would have had a very significant effect on his thinking, in the sense that he may well hold beliefs with conviction, indeed on occasion unshakeably. This would have been particularly relevant in the context of his view that his grievances had not been taken seriously or even acknowledged. Overvalued ideas and a style of rigid thinking is not unusual in the context of this diagnosis.

66. However, although the defendant's Autism/Asperger's provides an understanding of his heightened sense of grievance, it does not adequately explain his commission of these extremely serious criminal offences, especially given the clear account he gave for why he acted as he did, carefully weighing the steps to be taken over a long period of time. Indeed, it is clear from the reports that the defendant's considerable anger with the authorities played a very significant role in his motivation. Therefore, although the court should take account of the contribution that Autism/Asperger's provides to an understanding of the defendant's strongly held views, the diagnosis does not provide in any sense a sufficient explanation for the offences he committed. Put otherwise, he was not compelled by Autism/Asperger's to act in the way that he did, and he was not delusional.

67. In the Sentencing Guideline "*Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*" dated 1 October 2020, under

the heading General Approach it is rehearsed that "*the fact that an offender has an impairment or disorder should always be considered by the court but will not necessarily have an impact on sentencing*". When assessing culpability, "*the sentencer should make an initial assessment of culpability in accordance with any relevant offence-specific guideline, and should then consider whether culpability was reduced by reason of the impairment or disorder*" and "*culpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour*". We reiterate that the learned judge concluded at [12] that:

> "Your motive for this offending, so you told the jury, was to gain attention for your causes. You wanted the IOPC to investigate your allegations of misconduct by the Merseyside police dating back to 2016, and you thought a high profile trial at the Old Bailey would draw attention to your complaints and get the outcome you wanted. Your motives were completely misconceived. You have no justification, moral or legal, for what you did. **I assess your culpability as high**." (emphasis added)

68. Mr Heywood has reminded us that the court should having in mind the five purposes of sentencing. Although only in force three weeks after the sentencing exercise, for ease of future reference these are currently set out at section 57 Sentencing Act 2020 (replicating the position under section 142 Criminal Justice Act 2003):

> **"Purposes of sentencing: adults**
> (1) This section applies where—
> (a)a court is dealing with an offender for an offence, and
> (b)the offender is aged 18 or over when convicted.
> (2) The court must have regard to the following purposes of sentencing—
> (a)the punishment of offenders,
> (b)the reduction of crime (including its reduction by deterrence),
> (c)the reform and rehabilitation of offenders,
> (d)the protection of the public, and
> (e)the making of reparation by offenders to persons affected by their offences.
> […]"

69. Furthermore, in assessing seriousness, by section 63 Sentencing Act 2020 (replicating section 143 (1) Criminal Justice Act 2003):

> **"Assessing seriousness**
>
> Where a court is considering the seriousness of any offence, it must consider—
>
> (a) the offender's culpability in committing the offence, and
>
> (b) any harm which the offence—
>
> (i) caused,
>
> (ii) was intended to cause, or
>
> (iii) might foreseeably have caused."

70. It is necessary to consider the relationship between counts 1 and 2. The judge observed in passing sentence:

> "6. The sending of the email is an offence contrary to s 2 of the Official Secrets Act of 1989. That is count 2. By that offence, you made a damaging disclosure of classified information, which information related to the defence capabilities of this country and had come into your possession by virtue of your position as a government contractor. That disclosure was damaging to national security.
>
> 7. You had recorded confidential information on your personal devices. Some of that confidential information was included in systems.doc. We cannot know whether you recorded classified information beyond that contained in systems.doc because your own account on that matter has been inconsistent to date, and because you have refused to provide the police with access to your electronic devices. The recording of information such as that recorded in systems.doc is unlawful; it is an offence contrary to s 1 of the Official Secrets Act 1911. That is count 1. Importantly, and what makes count 1 the more serious offence, is that your purpose in recording this information was to prejudice the interests of the United Kingdom. You planned and intended the recording and subsequent disclosure of this information which you knew would be information of use to an enemy of the United Kingdom."

71. We agree with that approach, without reservation.

72. The judge explained the sentence she passed as follows:

> "26. I turn to the substantive sentence for your offending, the only sentence open to me is one of immediate custody. My starting point after trial, for all offences, would have been in the region of 6 years. I reduce that to take account of your mitigation and totality. I bear in mind that we are in the midst of a pandemic so that imprisonment may be more onerous.
>
> 27. On count 1, I sentence you to 3 years imprisonment. On count 2, I sentence you to 12 months imprisonment concurrent to the sentence on count 1. On count 3, I sentence you to 18 months imprisonment which will run consecutively to the sentence on count 1.
>
> 28. This is a total sentence of 4 ½ years imprisonment."

73. With great respect to the highly experienced judge, we consider it would have been useful if she had, in accordance with the guideline, made an initial assessment of culpability and thereafter considered whether this should be reduced by reason of defendant's Autism/Asperger's. Adopting that approach, this was, in our judgment, extremely serious offending, for all the reasons rehearsed at length above. The motivation for the offence, albeit a factor, is to a very significant extent outweighed by the assessment of the potential adverse impact of the criminality. As already rehearsed at [55], the damage to the national interest will be the same regardless of whether the individual was motivated by financial reward, political creed, nationalistic considerations, pressure or grievance. There is a strong need to deter those who might be tempted to endanger the safety of the United Kingdom by committing offences of this kind, whatever their personal motivation. Indeed, it is not unusual for those who behave in this way to consider that "*right*" is on their side and that they are morally justified in their actions. Such considerations are unlikely to mitigate the necessary sentence, save

exceptionally, given the seriousness of their actions and the need to deter others.

74. Viewed together, counts 1 and 2 following a trial should have attracted a sentence of no less than 10 years' imprisonment. Although the defendant's Autism/Asperger's has some impact as regards culpability in the sense that it helps explain his sense of grievance, focusing on the clear indications that he acted out of anger and in a very deliberate and calculated way, we consider that his impairment has only a relatively slight impact on his overall responsibility for these offences. His guilty plea following the ruling by the judge, at the end of an essentially hopeless attempt to contest the charges, should attract only the slightest reduction. Bearing in mind these two factors, along with the other matters referred to by the judge, we consider that substitute sentences of 6 ½ years' imprisonment on count 1 and a consecutive sentence of 18 months' imprisonment on count 2 should be imposed.

75. Furthermore, the defendant's culpability for the offence under count 3 was high. As the Solicitor General submits, this was calculated offending, the effect of which was maintained at trial and is continuing. The harm that the defendant intended and has caused is considerable, in that he has thwarted the investigation and the steps of mitigation and containment that would have been possible if access to the devices had been facilitated. Save for the credit discussed above as regards the defendant's late guilty plea and his impairment there is no mitigation.

76. The sentence on count 3 should not have been less than 3 years' imprisonment following a trial, which we propose to reduce to 2 ½ years' imprisonment bearing in mind the matters to which we have just referred. However, given the offending on the three counts was significantly interrelated and, more particularly, bearing in mind the principle of totality, it would be appropriate in this case for the sentence on count 3 to be served concurrently to the other sentences. However, we would stress that in many cases it will be necessary for this additional and often serious aspect of the overall offending to be met with a consecutive sentence.

77. We grant the application. As indicated above, we consider that the overall sentence of 4 ½ years' imprisonment was unduly lenient. We quash the sentences on counts 1, 2 and 3 and substitute a sentence of 6 ½ years' imprisonment on count 1, a consecutive sentence of 18 months' imprisonment on count 2 and a concurrent sentence of 2 ½ years' imprisonment on count 3. The total sentence therefore is 8 years' imprisonment. The other orders made by the judge are unaltered and remain in place (*viz.* the serious crime prevention order which imposed restrictions on the use by the defendant of electronic devices for a period of five years, the deprivation order relating to the devices he had used and the order relating to surcharge). There will be credit for time served on remand.