Neutral Citation Number: [2020] EWCA Crim 597

Case Nos: 201804971 B1 and 201902387B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HIS HONOUR JUDGE BATE
INDICTMENT NO: T20160104

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2020

Before:

Lord Justice Lindblom
Mr Justice Hilliard
and
His Honour Judge Flewitt Q.C.

- - - - - - - - - - - - - - - - - - - -

Between:

	201804971B1
Mehemet Mustafa	**Appellant**
- and -	
	201902387B1
Finbar Breslin	**Applicant**
- and -	
The Environment Agency	**Respondent**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Mr Andrew Thomas Q.C. and Ms Samantha Riggs (instructed by **Clyde & Co.**) for the **Appellant**
Ms Samantha Riggs (instructed by **the Registrar of Criminal Appeals**) for the **Applicant**
Mr Austin Stoton (instructed by **the Environment Agency**) for the **Respondent**

Hearing date: 27 February 2020

- - - - - - - - - - - - - - - - - - - -

Judgment Approved by the court for handing down

Lord Justice Lindblom:

Introduction

1. On 9 December 2015 in the Crown Court at Basildon, H.H.J. Lodge dismissed two charges against the appellant Mehemet Mustafa, the applicant Finbar Breslin and their co-accused Adrian Hennessy in proceedings brought by the Environment Agency under the Environmental Permitting (England and Wales) Regulations 2010. The offence charged in count 1 on the indictment was the contravention of regulation 41(1)(b) "by neglecting in the commission of an offence by a body corporate". The offence charged in count 2 was the contravention of regulation 41(1)(a) "by consenting or conniving in the commission of an offence by a body corporate".

2. The 2010 regulations were revoked and replaced, in substantially the same form, by the Environmental Permitting (England and Wales) Regulations 2016, with effect from 1 January 2017. We shall, however, refer to them throughout this judgment as if they were still in force.

3. On 14 March 2016, Spencer J. granted leave to prefer a voluntary bill of indictment against all three accused, with a single consolidated count, in which the offence was stated to be:

   > "CONTRAVENTION OF REGULATION 12 OF [THE 2010 REGULATIONS], contrary to regulations 38(1)(a) and 12(1)(a) of [the 2010 regulations]."

   The particulars of that offence were stated to be:

   > "Between the 3rd day of September 2013 and the 6th day of December 2013 PRIME BIOMASS LIMITED ("the company") by reason of the operation of a Regulated Facility[,] namely … a waste operation at Dover's Corner Industrial Estate, Rainham, Essex otherwise than under and to the extent authorised by an Environmental Permit, contravened Regulation 12(1)(a) of [the 2010 regulations] thereby committing the offence under Regulation 38(1)(a) and this offence was committed with the consent or connivance of, or attributable to neglect on the part of, ADRIAN HENNESSY, FINBAR BRESLIN and MEHEMET MUSTAFA, each a director of the company."

4. On 2 November 2018, after a trial in the Central Criminal Court before H.H.J. Anthony Bate, Mustafa and Breslin were convicted on that single count. Hennessy was acquitted. Sentencing has been adjourned pending the outcome of the proceedings in this court.

5. Mustafa now appeals against conviction by leave of the single judge. Breslin applies for an extension of time, of some five months, in which to apply for leave to appeal against his conviction. Breslin's applications have been referred to the full court by the Registrar.

6. Mustafa's appeal is on two main grounds. The first, for which leave was granted by the single judge, is that the trial judge – following the conclusions of Spencer J., as he was bound to do – erred in directing the jury on the law relating to the offence, and in particular on the question of whether, at the relevant time, the company's operation was an "exempt facility" as defined in the legislation. The second ground, which was not before the single judge and for which leave is therefore required, is that the trial judge erred in failing to give

– or trial counsel was at fault in failing to seek – a good character direction for Mustafa, who, it is said, was entitled to be treated as a man of good character. Breslin adopts Mustafa's first ground.

The facts

7. Prime Biomass Ltd. was incorporated on 21 September 2012. Mustafa, Breslin and Hennessy were all directors of the company at the time of the alleged offence.

8. The company operated a facility for the storage and treatment of waste wood on premises at the Dover's Corner Industrial Estate. At the relevant time it had a contract with a Swedish energy company called Vattenfall. To fulfil the requirements of that contract it had to transfer waste wood to the port at Harwich and ship it to Sweden to be used as fuel. The wood was supplied to the site at Rainham, where it was treated, and then moved to another site before being exported. Two shipments of waste wood were made to Sweden in late 2013 and early 2014: a shipment of 2,389 tonnes on 18 December 2013, and a shipment of 2,381 tonnes on 9 January 2014.

9. There is no dispute that the company's operation at Rainham fell with the ambit of the 2010 regulations. Under regulation 8 it had to be either a "regulated facility", which required an environmental permit, or an "exempt facility". No environmental permit was ever granted or applied for.

10. On 21 January 2013, the company registered the operation at the site as an "exempt facility". The exemption, referred to as a "T6 exemption", allowed up to 500 tonnes of waste wood to be stored or treated at the site over any seven-day period. Treatment included chipping, shredding, cutting or pulverising. The T6 exemption ran until 12 March 2014.

11. As a result of the introduction of the regulatory position statement, (RPS) 131 version 1, in January 2013, regulatory requirements were put in place for the storage of waste wood on the dockside at Harwich. Consent to export 30,000 tonnes from the port was granted on 13 November 2013 by a trans-frontier shipment of waste authorization.

12. On 28 March 2013, two officers of the Environment Agency, Mr Ijaz Sawar and Ms Cathryn Jones, went to the site to discuss with those present the operation the company intended to undertake. There seems to be no dispute that the T6 exemption was being complied with at that stage.

13. Later, however, on a number of visits to the site between 3 September and 6 December 2013, officers found that the waste wood on the site exceeded 500 tonnes.

14. Mr Sawar visited the site on 4 September 2013. He met Breslin, and told him that the waste stored on the site was more than the 500-tonne limit allowed by the T6 exemption. Breslin accepted that this was so, and admitted that some 1,200 tonnes of waste wood was on the site. The officer told Breslin that it must be reduced to 500 tonnes by 17 September 2013. On 5 September 2013 the company was provided with a Compliance Assessment Report (Exemption) ("CAR-E") form, which stated on the back, under the heading "Enforcement Action", that "[any] non-compliance of [sic] an exemption or of the objectives is an offence, and renders the exemption invalid". The company was advised to act urgently to reduce the amount of waste wood on the site.

15. Mr Sawar visited the site again on 6 and 19 September 2013. Further CAR-E forms were completed for these visits, on 10 and 24 September 2013 respectively, warning that if the company failed to reduce the amount of waste wood to comply with the T6 exemption, enforcement would follow. The deadline for compliance was extended to 25 September 2013.

16. On 24 September 2013, Breslin sent an email to the Environment Agency, agreeing to reduce the height of the waste stored on the site, and stating that 200 tonnes a week would be removed.

17. On 30 October 2013, Mr Sawar visited the site once again, and found that the amount of waste wood had been reduced to between 500 and 600 tonnes. He told Mustafa, who was there, that the company should continue to reduce the waste wood until it came within the 500-tonne limit. Another CAR-E form was provided to the company, on 31 October 2013.

18. Mr Sawar made further visits to the site on 8 and 15 November 2013. It appeared that the amount of waste wood had not been reduced since the previous visit; that, on the first of these occasions, more waste wood had been received; and that, on the second, the quantity appeared to have increased. On 8 November 2013, Breslin was told that more waste should not be received. On 15 November 2013, another representative of the company, Mr Paul, was told that the quantity of waste must be reduced. Further CAR-E forms were issued, on 8 and 20 November 2013.

19. Between those two occasions, on 13 November 2013, Ms Jones went to the site and estimated that there were about 3,176 tonnes of waste wood on it.

20. On 5 December 2013, Mr Sawara and Ms Jones visited the site to undertake a formal survey. All three accused were there. The officers determined that there were about 4,180 tonnes of waste wood on the site, informed the accused that this was so, and told them that the import of waste must be stopped. Another CAR-E form was provided, on 13 December 2013.

21. Between 9 December 2013 and 8 January 2014, the company sent the Environment Agency details of waste movements to and from the site, which showed that this activity had continued.

22. By a letter dated 10 February 2014, Mr David Jennings, the Environment Agency's Environment Management Team Leader, required the company to "stop receiving waste and to bring [the] site into compliance" with the T6 exemption by 21 March 2014. The letter went on to say that the site would be "monitored", and that "should any waste be received without an appropriate environmental permit or relevant exemption [the company] will be committing a criminal offence under [regulations] 12 and 38 of [the 2010 regulations]".

23. In the course of February 2014, arrangements were made for the removal of waste wood from the site.

24. On 24 February 2014, the Environment Agency received a letter from the company, confirming its commitment to removing waste wood from the site, and indicating that it was going into liquidation by the end the following month.

25. On 6 March 2014, Mr Jennings wrote to the company again, saying that the company's operation had "ceased to be an exempt waste operation" and that "an environmental permit is required to store more than 500 tonnes of wood at any one time", and confirming that "[the] initial deposit and ongoing storage of this material is an offence under Regulation 38(1)(a) …".

26. On 12 March 2014, Mr Jennings and Mr Sawar went to the site, and saw a large amount of waste wood, deposited in piles.

27. On 24 March 2014, Mr Jennings sent a letter to the company, informing it that the T6 exemption had been removed from the public register on 12 March 2014, and stating that the continuing storage of material at the site was an offence under regulation 38(1)(a) of the 2010 regulations.

28. The company went into voluntary liquidation on 24 March 2014.

29. By then, the Environment Agency had received complaints from several neighbouring business owners about nuisance caused by emissions of wood dust from the site.

30. All three accused were interviewed under caution. Both Mustafa and Hennessy suggested that Breslin was mainly in control of the site. Breslin said that Mustafa managed it. Hennessy said he had been made a director of the company by its parent company, Prime Energy Power Ltd..

31. The prosecution case was that between the dates in question the company was not complying with the registered T6 exemption, because on visits made by officers during that period the waste wood found at the site exceeded 500 tonnes. It was also alleged that dust escaping from the site was such as to endanger human life or to harm the environment. It was contended that because the registered exemption was not complied with, the company's operation became a "regulated facility" and required an environmental permit. By continuing to operate without an environmental permit, the company was in breach of regulation 12, so that an offence under regulation 38 had been committed, and in the circumstances the directors were personally liable.

32. The defence case for all three accused was that there was no consent, connivance or neglect on their part so as to make them criminally liable for the acts or omissions of the company, and that the company's operation was compliant with the exemption during at least some of the visits made by the officers.

33. On 13 October 2015 H.H.J. Lodge heard the defence application to dismiss both counts on the original indictment. The defence contended that under the legislative scheme, which expressly provides for the removal of an exemption, the T6 exemption registered by the company had remained in place until it was removed. The application was opposed by the Environment Agency, on the basis that if the terms of an exemption are breached, the exemption ceases to be effective; that, in the absence of an exemption, the operation would be a "regulated facility"; that an environmental permit would then be required; and that if an environmental permit was not obtained an offence would be committed. In his ruling dated 3 November 2015, granting the application to dismiss, H.H.J. Lodge accepted the argument the defence had put forward. On 9 December 2015 he quashed the indictment.

34. The Environment Agency challenged that ruling by its application for consent to prefer a voluntary bill of indictment, contending that H.H.J. Lodge's interpretation of the 2010

regulations was wrong in law. In his judgment, Spencer J. concluded that the charges against the accused had been wrongly dismissed, and that there was no reason why they should not be allowed to continue to trial.

35. When the trial eventually proceeded in October 2018, the Environment Agency relied on the evidence of the officers who had visited the site in the relevant period; on the officers' communications with the accused, which demonstrated their knowledge of the breach of the conditions of the exemption; on the complaints that had been made about dust escaping from the site; on the interviews of Mustafa and Breslin under caution, in which they had sought to fix blame on each other; and on the failure of the accused to give evidence.

36. Mustafa's defence at trial, foreshadowed in interview and set out in his defence case statement, was that his role in the company was limited to administration, including invoicing and debt collection, that he did not exercise any control over the site, and that Breslin was responsible for the operation there. He had acknowledged in his interview that a delay in obtaining the trans-frontier shipment of waste authorization for the shipments to Sweden may have led to excess wood being stored on the site. Breslin's defence, indicated in his interview, was that he had done his best to comply with the exemption. He relied on his previous good character. Hennessy maintained that he had never been at the site, and that Breslin and Mustafa were in charge of the operation. None of the accused gave evidence.

37. In his summing-up, H.H.J. Bate directed the jury on the law relating to the offence. His directions reflected the conclusions of Spencer J.. He told the jury that the prosecution had to make them sure that at least one of two circumstances had occurred: first, that the total quantity of waste stored at the site over any seven-day period within the indictment exceeded 500 tonnes; and second, that the type and quantity of waste, and method of disposal or recovery at any time within the indictment was, through the escape of dust from the site, inconsistent with the objectives of the Waste Framework Directive (Directive 2008/98/EC) – because it endangered human health or harmed the environment. If they were sure of one or both of those things, the breach rendered the "T6 exemption" invalid; the company required an environmental permit to operate on the site; and its continued operation without a permit was unlawful, in contravention of regulation 12.

38. The judge gave a good character direction for Breslin and Hennessy, but not for Mustafa.

The 2010 regulations

39. Under the 2010 regulations, establishments or undertakings that carry on certain waste disposal or recovery operations are, as we have said, either "regulated" or "exempt". The operation of a "regulated facility" requires an environmental permit, granted under regulation 13. The operation of an "exempt facility" does not. Regulation 8(2)(a) provides that an "exempt facility" is not a "regulated facility". It follows that if an operation is not an "exempt facility" it must be a "regulated facility". The two are mutually exclusive. Regulation 12(1) provides, so far as is relevant here, that "[a] person must not, except under and to the extent authorised by an environmental permit … (a) operate a regulated facility". Under regulation 38(1)(a) it is an offence for a person to contravene regulation 12(1). If an operator does not hold an environmental permit for a "regulated facility", there is a breach of regulation 12(1)(a) and an offence is committed. Regulation 41(1) provides that if an offence committed by a corporate body is proved either "(a) to have been committed with

the consent or connivance of an officer" or "(b) to be attributable to any neglect on the part of an officer", the "officer as well as the body corporate is guilty of an offence …".

40. An "exempt facility" is defined in regulation 5(1)(a):

> "In these Regulations –
> "exempt facility" means –
> (a) an exempt waste operation …".

41. An "exempt waste operation" is also defined in regulation 5 and, so far as relevant here, means a waste operation:

> "… that meets the requirements of paragraph 3(1) of Schedule 2 …".

42. Paragraph 3(1) of Schedule 2 provides:

> "3(1) For the purposes of the definition of "exempt waste operation", the requirements are –
> (a) that a waste operation –
> (i) falls within a description in Part 1 of Schedule 3, and
> (ii) satisfies the general and specific conditions specified in Part 1 of that Schedule in relation to the description;
> (b) subject to sub-paragraph (2) and paragraph 9(10) of this Schedule –
> (i) that the waste operation is registered, and
> (ii) an establishment or undertaking is registered in relation to it; and
> (c) that the type and quantity of waste submitted to the waste operation, and the method of disposal or recovery, are consistent with the need to attain the objectives mentioned in Article 13 of the Waste Framework Directive
> …".

The objectives of article 13 of the Waste Framework Directive are, essentially, to avoid pollution and harm to human health.

43. As to (a), the "general conditions", as set out in chapter 2, section 1, paragraph 3 of Schedule 3 are that:

> "(a) the operation is for the purposes of recovering or reusing the waste, unless otherwise stated in the specific conditions;
> (b) the waste used is suitable for the purposes of the operation;
> (c) no more waste is used than is necessary to carry on the operation."

The "specific conditions" for the treatment of waste wood and waste plant matter by chipping, shredding, cutting or pulverising (T6) are set out in chapter 3, section 2, paragraph 6(3) of Schedule 3:

> "For the purposes of this paragraph, the specific conditions are that –
> (a) the total quantity of waste treated or stored over any 7-day period does not exceed 500 tonnes; and
> (b) no waste is stored for longer than 3 months after treatment."

44. The registration provisions are in paragraphs 6 to 14 of Schedule 2. Under paragraph 6, an establishment or undertaking "seeking to be registered" must notify the relevant authority

of specified particulars relating to the waste operation. The application can be made online, but must be in the form specified by the relevant authority. Under paragraph 7(1) an exemption registration authority must establish and maintain a register of exempt facilities. After an entry is made, it must, within five working days, ensure that the register contains the relevant particulars. Within five working days of being notified of any change, it must ensure that the register is brought up to date. The register must be open to inspection by the public.

45. A fee is payable for an environmental permit, but not for the registration of a waste operation as an "exempt facility".

46. The duty to remove entries from the register is provided in paragraph 8, which states:

> "8(1) The duty to maintain a register in paragraph 7(1) includes a duty to remove an entry from the register if –
> (a) the exemption registration authority becomes aware that the exempt facility is no longer in operation at the place stated in the particulars;
> (b) the facility ceases to be an exempt facility …
> …
>
> (2) If the exemption registration authority removes an entry from the register under sub-paragraph (1), it must notify without delay the occupier, operator or other person registered in relation to the exempt facility …".

47. In a guidance document published in March 2010 by the Department for Environment, Food and Rural Affairs, "Environmental Permitting Guidance [on] Exempt Waste Operations", paragraph 6.40, under the heading "Duty to remove entries from the register", describes the circumstances in which a duty arises to remove an entry from the register. These include the waste operation being "no longer an exempt waste operation (for example, an establishment or undertaking that fails to renew its registration will no longer be exempt or an operation that is operating outside the exempt waste operation conditions and requires an environmental permit) …".

H.H.J. Lodge's ruling

48. On the submissions made to him, H.H.J. Lodge reached these conclusions:

> "5.5 The Crown submit that the requirements in Paragraph 3 [of Schedule 2] operate in such a way that if the specific conditions are not met, the premises ceases to be an exempt facility. Once the premises cease to be an exempt facility, they need a permit. If they have no permit, an offence is committed. The Crown say that those duties set out in paragraphs 6-8 dealing with registration and the maintenance of a Register are administrative regulations that do not affect the core proposition that once the terms of the exemption are breached, the facility ceases to be an exempt operation.
>
> 5.6 I reject that submission. Looking at paragraphs 6 to 8, they create the mechanism for Registration and maintaining a Register which determines whether a facility is exempt or not. I was initially concerned by paragraph 8(1)(b). Paragraph 8(1) reads "The duty to maintain a register … includes a duty to remove an entry from the register if […] (b) the facility ceases to be an exempt facility. This might suggest

that the duty to remove [is] consequent upon the premises having become an exempt facility, rather than being the act which [causes] them to be an exempt facility.

5.7 However in my judgment such an interpretation is incorrect. It would make the management of the Regulations uncertain and impractical. One only needs to look at the facts of this case to see the difficulties the Crown's interpretation would cause. On each visit the wood waste exceeded the 500 tonnes. Had on each of those visits that fact caused the premises to have ceased to be an exempt facility, the Agency would have a duty to remove the Company from the Register. The company would then be required to make a further application to go back onto the Register under paragraph 6. On further visits that cycle would be repeated.

5.8 In my judgment, there is, as the defence argue, the need for certainty as to the state of the facility. The agency police the situation. They give warnings. They take action and they have the eventual sanction of deregistration. If one looks at the letter at exhibit DIJ/1 … , this is precisely what the Agency sought to do. They indicate that the Company is no longer operating an exempt facility, and the failure to bring the waste within the required limits would cause the Agency to exercise its duty to deregister.

5.9 … [It] is common ground that the premises were either a Regulated Facility or an Exempt Facility. It is only if the premises are regulated that a permit is required. It is only if the premises are operated otherwise than in accordance with the permit that an offence is committed. In my judgment for the indictment period, the premises remained an Exempt Facility. As such no permit was required and so no offence was committed. In those circumstances, the application to dismiss is granted.

5.10 I am fortified in my decision by the concession properly made by the defence in respect of the potential offences under s.33 of the Environmental Protection Act 1990. This case has a background of problems caused to adjoining premises and the people thereon by reason of the treatment of excess amounts of waste. There are in addition to the regulatory offences, offences which are capable of covering the allegation of treating waste in a manner which is likely to be harmful to others. The regulatory offences are not the only options which were available to the Agency.

5.11 The application to dismiss succeeds. …".

Spencer J.'s judgment

49. Spencer J. disagreed with H.H.J. Lodge's interpretation of the 2010 regulations. He rejected a submission made on behalf of Hennessy that practical difficulties would flow from any other construction; that it was easy to envisage a situation in which the quantity of wood fluctuated above and below the permitted 500 tonnes; that it could not be right that an operation would fall in and out of being an "exempt facility", leaving the operator at risk of prosecution; and that, in accordance with the principle of "legal certainty", the register should be capable of being relied upon as an accurate record of the status of the registration. The answer to that submission, in Spencer J.'s view, was that "this position is no different from that of the holder of an environmental permit for a regulated facility, where the conditions of the permit will typically state the maximum volume of material

which is to be stored or processed". It was "true that the status of the operator as a permit holder would not be affected, and the operation would remain a regulated facility, but the liability to prosecution would depend on just the same factual question, i.e. whether from day to day the condition has been breached" (paragraph 27 of the judgment).

50. A further argument put to Spencer J. was that a different construction from that favoured by H.H.J. Lodge would produce difficulties for third parties dealing with such a waste operation, who could be criminally liable for breach of the "duty of care", imposed by section 34 of the 1990 Act, to prevent any contravention of the legislation. The third party, it was submitted, might deliver a further quantity of wood to the operator when the quantity of waste permitted by the T6 exemption had already been exceeded, though on inspection of the register he had seen it was still an "exempt facility". Spencer J. observed that the duty of care under section 34 was only to "take all such measures as are reasonable in the circumstances", and that "[matters] of the kind raised would be relevant to reasonableness and evaluated on their merits" (paragraph 28).

51. Spencer J.'s main conclusions were these (in paragraphs 32 to 34 of his judgment):

> "32. The nub of the matter, for the judge, was whether the words of paragraph 8(1)(b) of schedule 2, imposing a duty to remove an entry to the register if "the facility ceases to be an exempt facility", mean that it is the act of removing the entry which causes the facility to cease to be an exempt facility, or whether the removal is merely confirmation that the facility has already ceased to be an exempt facility.
>
> 33. The crucial part of the judge's ruling, at paragraph 5.6, … is his conclusion:
>
> > "Looking at paragraphs 6-8, they create the mechanism for registration and maintaining a Register which determines whether the facility is exempt or not."
>
> Thus the judge must have concluded that it is only if and when the entry is removed from the Register that the facility ceases to be exempt. That, with respect, is to ignore the plain words of Regulation 5, for it is that provision which defines and determines whether a facility is exempt or not. Regulation 5 states unequivocally that a waste operation can only be an "exempt waste operation", and thus an "exempt facility", if it meets the requirements of paragraph 3(1) of Schedule 2. If it does not meet those requirements it cannot be an "exempt facility". Registration is only one of the three requirements. A waste operation cannot be an "exempt facility" unless it is registered, but if one or other of the two remaining requirements is not met, the fact of registration cannot make it exempt when Regulation 5 says in terms that it cannot be exempt.
>
> 34. In rejecting the prosecution's argument the judge must have concluded that the wording of paragraph 8(1)(b), imposing a duty to remove an entry from the register if "the facility ceases to be an exempt facility", can be construed as making the act of removal from the register the event which causes the facility to cease to be an "exempt facility". I can see no justification for that conclusion. The duty to remove an entry cannot arise unless the facility has already ceased to be an "exempt facility". The words are not capable of bearing the interpretation that it is the act of removal itself which causes the facility to cease to be an "exempt facility". Regulation 5, and Regulation 5 alone, determines whether at any given time the operation is or is not an "exempt facility"."

52. Rejecting a submission that there was a material distinction between the use of the terms "exempt waste operation" and "exempt facility" in regulation 5 and the registration provisions in Schedule 2, and that this lent support to H.H.J. Lodge's conclusion, Spencer J. said (in paragraph 35) "[the] structure and interrelation of the definitions is quite clear", and that "an "exempt waste operation" is simply one species of "exempt facility", along with an "exempt water discharge activity" or an "exempt ground water activity"". Regulation 5(1), in his view "could not be clearer in this regard".

53. As for the misgivings expressed by H.H.J. Lodge about the practical consequences of the interpretation contended for by the Environment Agency, Spencer J. said (in paragraphs 36 to 38):

> "36. The judge was understandably concerned about the practicalities of registration and de-registration in the event of an operation ceasing to be an "exempt facility": see paragraph 5.7 of his ruling. He could not accept that on each inspection visit, if it was found that the 500 tonne limit was exceeded, there would be a duty to remove the company from the Register, only for the company to make a further application to go back onto the register, with the prospect of the cycle being repeated endlessly. Although I need not decide the point, it may be that there is some discretion on the part of the Agency in deciding at what stage to fulfil its duty to remove an entry from the register. Paragraph 8(1) does not, for example, impose a duty "forthwith" to remove an entry if any of the events in sub-paragraphs (a), (b) or (c) occurs (including the facility ceasing to be an "exempt facility"). This is to be contrasted with paragraph 8(2) which imposes a duty on the Agency to notify the registered person "without delay" if it removes an entry from the register. This broader discretion may provide the answer to the practical anomaly, as the judge saw it, of repeated de-registering and re-registering.
>
> 37. What is critical, however, is that the scheme of de-registering, and its practical working, cannot compel an interpretation of paragraph 8(1)(b) ("the facility ceases to be an exempt facility") which makes the act of removal from the register the touchstone for determining whether the operation meets the requirements of paragraph 3(1) so as to remain an "exempt facility", as defined in Regulation 5.
>
> 38. Furthermore, although paragraph 15 of Schedule 2 imposes a duty on the Agency to carry out "appropriate periodic inspections", the frequency of inspections will be governed to a degree by resources and budgetary constraints. It must follow that, after registration, there could well be a period of several weeks or months between inspections. If during such an intervening period the 500 tonne limit has been flagrantly exceeded, and that can be clearly demonstrated, it would be strange indeed if no regulatory offence had been committed simply because the company remained on the register. If such an interpretation were correct, it would mean that activity which Regulation 5 (via Regulations 12 and 38) clearly proscribes as criminal would be exempt from prosecution for as long as the Agency remained ignorant of the true state of affairs and thus could have taken no steps to de-register the company."

54. In support of the proposition that an offence will be committed unless all three requirements are met – registration of an exemption, compliance with conditions of the exemption, and consistency with the objectives of the Waste Framework Directive – counsel for the Environment Agency had relied on two authorities concerning the previous

legislative scheme, and in particular the provisions of section 33(1)(a) and (b) of the 1990 Act, which prohibited the deposit, storing and disposal of controlled waste except in accordance with a waste management licence, and regulation 17(1) of the Waste Management Licensing Regulations 1994. The two authorities – neither of which appears to have been cited to H.H.J. Lodge – were the decision of the Court of Appeal in *O'Grady Plant and Haulage Ltd. v London Borough of Tower Hamlets Council* [2011] EWCA Crim 1339 and the decision of the Divisional Court in *Environment Agency v Stanford* [1999] Env. L.R. 286. Having acknowledged that neither of those cases was of direct relevance to the issue he had to decide, Spencer J. nevertheless found in them "broad support for the proposition that it has always been the scheme of the relevant legislation that the fact of registration of an exemption will not afford protection from prosecution for a regulatory offence unless the requirements of the exemption are also complied with" (paragraph 44 of the judgment).

55. Spencer J. saw no force in the argument that there were several other offences for which the company might have been prosecuted instead of an offence under regulation 12, including an offence under section 33(1)(c) of the 1990 Act – to which H.H.J. Lodge had referred in paragraph 5.10 of his ruling. The fact that those other remedies exist could not affect the proper construction of the 2010 regulations (paragraph 49).

56. In Spencer J.'s view, therefore, the error made by H.H.J. Lodge was to think that the mechanism for registration and maintaining a register is what determines whether a facility is exempt or not, rather than "to concentrate on the all important words of Regulation 5 and paragraph 3 of Schedule 2 which make it crystal clear that unless all the requirements of paragraph 3 are met, the operation cannot be an "exempt waste operation" and thus cannot be an "exempt facility". It was, as he put it, "a fundamental error of law … to conclude that the operation remained an "exempt facility" throughout the period of registration, even if the other requirements of paragraph 3 of Schedule 2 were not met" (paragraph 53).

57. The suggestion that the Environment Agency had "in some way condoned the offending" was, in Spencer J.'s view, unfounded. As he said, "the reality … is that [it] repeatedly attempted to bring the company into compliance, which is the standard method of enforcement", and that "[when] that failed, there was no reason … why the alleged breaches of the conditions of the exemption should not have been prosecuted in the usual way" (paragraph 64).

Was the company's operation an "exempt facility"?

58. Both Mustafa and Breslin contend that they were wrongly convicted as a consequence of a misdirection by H.H.J. Bate on the law relating to the offence. Both contend, in effect, that the judge, constrained as he was by the reasoning of Spencer J. in his judgment, misled the jury on the question of whether the company's operation at the site was an "exempt facility". The submissions made to us on behalf of Mustafa by Mr Andrew Thomas Q.C., who did not appear in the court below, reflected the argument that succeeded before H.H.J. Lodge but failed before Spencer J.. They were adopted Ms Samantha Riggs for Breslin, who did appear below.

59. Mr Thomas pointed to the company's co-operation with the Environment Agency both before and during the indictment period. After Mr Sawar's visits to the site in early September 2013, the site was brought back into compliance with the exemption. In his evidence at trial Mr Sawar acknowledged that he had encouraged the continued shredding

of waste to ensure that the amount of it on the site was brought within the 500 tonnes limit. Thus, Mr Thomas submitted, the Environment Agency was at that stage continuing to treat the operation as an "exempt facility". Although the CAR-E forms recorded a breach of the T6 exemption, they did not indicate that the exemption had ceased to have effect. The company had complied with the request to shred, and by the time of Mr Sawar's visit on 30 October 2013 the operation complied with the exemption. When Mr Sawar went to the site again on 5 December 2013, though he considered the amount of waste wood to be significantly in excess of the 500-tonne limit, he did not instruct the company to cease its operation but again encouraged it to continue treating the wood. Not until 10 February 2014 did the Environment Agency send the company a letter stating that it no longer considered the company was operating an "exempt facility", and warning that its failure to reduce the waste on the site to less than 500 tonnes would lead to de-registration. On 24 February 2014, the company told the Environment Agency that it would be going into liquidation. And it was only after the Environment Agency sent its letter of 6 March 2014, that the de-registration process ensued.

60. Mr Thomas also took us to some of the communications between officers of the Environment Agency in March 2014 when de-registration was being considered. In an email sent to Mr Jennings and Ms Sawar on 13 March 2014, Ms Nnamdi Ekebuisi, a Customer Service Advisor in the Waste Exemptions team at the National Customers Contact Centre, said that she had "actioned [their] request to de-register EPR/JH0516AA at [Dover's] Corner Industrial Estate", and that "[as] of today exemptions under this reference at this site are no longer effective". Later on the same day, Mr Jennings sent an email to officers in the Environmental Crime Team requesting that the site be added to "the Illegal Waste Sites Register", and stating that "[the] T6 exemption for this site has been de-registered and the ca 4,000 tonnes of wood left [on] the site is deposited illegally".

61. That history and correspondence, Mr Thomas suggested, was consistent with the conclusion that before de-registration the operation was not illegal, and that the company could lawfully operate under the "T6 exemption" as an "exempt facility".

62. Mr Thomas's main submission, however, is quite simple. Under the legislative scheme, he argued, an exemption does not cease to be effective until it is removed from the public register. Throughout the period of the registration, and despite any failure to meet the other requirements imposed by paragraph 3 of Schedule 2 to the 2010 regulations, the operation remained an "exempt waste operation" and thus an "exempt facility". Until de-registration, this would continue to be its status, and an environmental permit would not be required. This understanding of the legislative provisions, Mr Thomas submitted, is consistent with the principle of legal certainty. It cannot be right that the Environment Agency could write to the company in February 2014 asserting that the storage of waste wood on the site at various times in 2013 was unlawful, having in the meantime sanctioned the processing of that waste to bring the operation back into compliance with the "T6 exemption", and then proceed to prosecute under regulations 12 and 38.

63. If Spencer J.'s construction of the legislative provisions was right, Mr Thomas submitted, the practical difficulties highlighted by H.H.J Lodge would arise. An operation might then fall in and out of being an "exempt facility" – as was so in this case – and the risk of prosecution would arise intermittently as the quantity of the waste on the site fluctuated, particularly if that was in dispute. This was inimical to "legal certainty", which is an important protection not only for the operator but also for third parties, and the public. The register should be capable of being relied upon as an accurate record of the status of the operation (see the decision of this court in *R. v Walker & Sons (Hauliers) Ltd.* [2014]

EWCA Crim 100). The process as a whole would be undermined if the public register showed illegal waste sites as "exempt [facilities]".

64. The answer to this point was not, submitted Mr Thomas, the one given by Spencer J. in paragraph 27 of his judgment, which ignores the distinction between a permitted waste operation and an exempt waste operation. If a condition on an environmental permit is breached, the operator can be charged with an offence under regulation 38(2) – failing to comply with or contravening an environmental permit condition. In those circumstances the environmental permit still subsists. There is no equivalent offence of failing to comply with an exemption condition or limit. The mere fact that the operator is in breach of an exemption does not mean that the operation ceases to be an "exempt facility" and becomes an illegal site. It remains an "exempt facility", albeit out of compliance. The Environment Agency can then take steps to bring it into compliance – such as by serving a notice under section 59 of the 1990 Act requiring excess waste to be removed from the site. The exempt waste operation does not itself automatically become illegal. It only becomes illegal once the exemption has been de-registered and it is thus no longer an "exempt facility". Until then, the exemption survives. And unless the positive step of de-registration is taken, it will continue to survive. This "purposive construction" of the provisions, said Mr Thomas, is consistent with "legal certainty".

65. In this case, Mr Thomas contended, during the period in the indictment the Environment Agency could have brought a charge under section 33(1)(c) – treating, keeping or disposing of controlled waste in a manner likely to cause pollution of the environment or harm to human health; or it could have served a notice under section 59; or it could have served a restriction notice under section 109A of the Environment Act 1995, preventing the further reception of waste. After de-registration, a charge could have been brought under section 33(1)(b) – keeping controlled waste without a permit, or under regulations 12 and 38 – operating a regulated facility without a permit.

66. Mr Thomas also criticized Spencer J.'s conclusion on the "duty of care" in paragraph 28 of his judgment. By contrast with the "due diligence" provision in section 33(7) of the 1990 Act, there is no corresponding defence under the 2010 regulations for a person charged with an offence of knowingly causing or knowingly permitting a contravention of regulation 12. The offence is one of strict liability.

67. The authorities relied on by the Environment Agency – *O'Grady*, *Stanford* and also *Environment Agency v R. Newcomb & Sons Ltd. and another* [2002] EWHC 2095 (Admin) – were all, said Mr Thomas, distinguishable from this case. They dealt with a different legislative scheme. And in all of them, the activity in question was not capable of complying with the relevant regime. Here it was.

68. We cannot accept Mr Thomas's and Miss Riggs's argument. The central proposition in it, that an "exempt facility" does not cease to be exempt until de-registration, is in our view mistaken. Spencer J.'s reasoning was, we think, sound and his conclusions correct. His interpretation of the 2010 regulations was accurate. As Mr Austin Stoton submitted for the Environment Agency, on the true construction of the relevant provisions, the consequence of any breach of the three requirements of the T6 exemption was that the company's operation was no longer an "exempt waste operation", and ceased, upon that breach, to be an "exempt facility". At that point it could only be a "regulated facility", for which no environmental permit had been granted.

69. In this case, to make good the charge in the indictment, the Environment Agency had to prove that, in the relevant period, the company was operating a "regulated facility" rather than an "exempt facility". If at any time during that period, the operation was not an "exempt facility" the company committed the alleged offence.

70. On a straightforward interpretation of the legislative provisions, in our view, a waste operation will only be an "exempt facility" if it fully meets the requirements of paragraph 3(1) of Schedule 2. If it does not meet those requirements in full, it cannot be an "exempt facility", and it must be a "regulated facility"; there is no other status it can then have. And if, as a "regulated facility", it is operated without an environmental permit, there is a breach of regulation 12, and an offence under regulation 38 has been committed. That, it seems to us, is this case.

71. The "requirements" that have to be met for an operation to be an "exempt waste operation", and thus an "exempt facility", are clearly set out in paragraph 3(1) of Schedule 2. There are three of them: first, that the operation satisfies "the general and specific conditions" specified in Part 1 of Schedule 3 for the relevant description of the operation (paragraph 3(1)(a); and chapter 2, section 1, paragraph 3 and paragraph 6(3) of Schedule 3); second, that it is registered (paragraph 3(1)(b) of Schedule 2); and third, that the type and quantity of waste, and method of disposal or recovery, are consistent with the relevant objectives of the Waste Framework Directive – that it does not endanger human health or harm the environment (paragraph 3(1)(c) of Schedule 2).

72. Those three requirements are mandatory, and cumulative. None of them is said to be optional or discretionary. None of them is said to override or displace the other two. They must all be satisfied. If any of them is not met, or ceases to be met, the operation cannot be an "exempt waste operation", and thus cannot be an "exempt facility" (regulation 5), but can only be a "regulated facility" (regulation 8).

73. The provisions of paragraphs 6 and 7 of Schedule 2 for the registration of a facility as an "exempt facility", and of paragraph 8 for the de-registration of a facility when it "ceases to be an exempt facility", do not indicate a different understanding of the threefold requirements of paragraph 3(1) of Schedule 2 and the effect of regulation 5, which requires those three requirements to be met if a facility is to be an "exempt facility". On the contrary, they reinforce that understanding.

74. Registration of a facility under paragraphs 6 and 7 does not mean that the operation has been approved by the Environment Agency or that it will be regarded as an "exempt facility" while the entry remains on the register, regardless of its compliance with the requirements in paragraph 3(1) of Schedule 2.

75. De-registration under paragraph 8 would of course in itself have the effect of rendering the facility no longer an "exempt facility", because it would then not satisfy the second requirement in paragraph 3(1) – the requirement of registration (paragraph 3(1)(b)). But that is not the only circumstance in which a facility "ceases to be an exempt facility". It can also cease to be an "exempt facility" by failing to comply with one or both of the other two requirements, in paragraph 3(1)(a) and (c). The fact that an entry for the facility remains on the register does not, on its own, signify that it remains an "exempt facility" even though the operation is, in fact, in default on either of the other two requirements. Registration does not, of itself, confer continued status as an "exempt facility", nor does it bestow immunity from the consequences of its ceasing to be an "exempt facility". It does not afford protection from prosecution, unless the other requirements of the exemption are complied

with. That is not what the provisions state, or imply. And we see no justification for reading into the legislative scheme provisions that are not there.

76. Crucially in our view, as Spencer J. observed (in paragraph 33 of his judgment), it is regulation 5 that "defines and determines whether a facility is exempt or not". Spencer J. was also right to say (in paragraph 34) that the duty in paragraph 8(1)(b) to remove an entry from the register cannot itself arise unless the facility has already ceased to be an "exempt facility" (paragraph 8(1)(b)). That provision cannot mean that it is the act of removal from the register itself that causes the facility to cease to be an "exempt facility". Rather, it plainly means that the operation "ceases to be" an "exempt facility" before, not after, the duty to de-register arises. As Spencer J. went on to say (ibid.) "[regulation] 5, and [regulation] 5 alone, determines whether at any given time the operation is or is not an "exempt facility"". We agree.

77. This understanding of the meaning and effect of the provisions of paragraph 3 of Schedule 2 to the 2010 regulations seems to align well with the analogous case law on the previous legislative regime, under section 33 of the 1990 Act and regulation 17(1) of the 1994 regulations. The legislative purpose is essentially the same. And the relevant conclusions are, we think, strongly persuasive here (see the judgment of the court, given by Pitchford L.J., in *O'Grady*, at paragraphs 23 to 28; the judgment of Lord Bingham C.J. in *Stanford*, on pp.288 to 290; and the judgment of Newman J. in *Newcomb*, at paragraphs 10 to 18). In *Stanford* Lord Bingham C.J. said this (on p.292):

> "It is however plain that an exemption, even if registered, does not provide protection from prosecution if the activity carried on is not within the terms of the exemption and does not comply with its terms."

78. We are not dissuaded from our interpretation of the legislative provisions by the various submissions made by Mr Thomas and Ms Riggs on the general theme of "legal certainty", on the asserted practical difficulties that might be generated if de-registration was not the sole determinant of an operation's continued status as an "exempt facility", and on the existence of other powers such as those in section 33 of the 1990 Act. Those submissions cannot alter the terms in which the legislature framed the relevant provisions of 2010 regulations. They do not disturb Spencer J.'s analysis, which we endorse.

79. As Mr Stoton submitted, the concept of "legal certainty" here is enshrined in the express requirements that have to be met if an operation is to be an "exempt waste operation", and thus an "exempt facility". Whether an operation is an "exempt facility" depends on the operator having registered the exemption and operating within its constraints. It is a matter of fact whether those requirements are satisfied at any given time. If they are not met, then for the duration of their not being met the operation has ceased to be, and is not, an "exempt facility".

80. The position here is similar to that of the holder of an environmental permit for a "regulated facility", the conditions of which state the maximum volume of material to be stored or processed on the site. Alleged breaches of such conditions may be intermittent, or fluctuating; and they may be contentious. If proved, they do not deprive the operator of his status as the holder of an environmental permit, or the operation of its status as a "regulated facility". But liability to prosecution, as in the case of an offence under regulation 38(1), will depend on the particular facts. Where a long-standing or persistent breach of an exemption limit has occurred, the Environment Agency is not obliged by any provision of the legislative scheme to refrain from enforcement or from launching a prosecution if and

when it judges that to be appropriate. It does not have to wait until the exemption has been removed from the register. Otherwise, as Mr Stoton submitted, an operator could offend with impunity until de-registration had taken place. Whether and how the Environment Agency proceeds in a particular case is a matter of discretion.

81. In this case, the prosecution was well founded. It was not vitiated by any misconception or misapplication of the legislative provisions. The jury were properly directed on the law relating to the offence. The essential facts are not, now at least, materially in dispute. As for the first requirement in paragraph 3(1) of Schedule 2 – that the operation satisfies "the general and specific conditions" – the Environment Agency's case was this was not so, because during the relevant period, it was discovered that quantities of waste wood well in excess of 500 tonnes were present on the site throughout the majority of the indictment period. The second of the three requirements – that the waste operation must be registered – was satisfied, because the company's operation was duly registered as exempt on 21 January 2013, and it remained registered throughout the period to which the indictment related. As for the third requirement, it was the Environment Agency's case that the company's operation was not conducted in a way that was consistent with the need to achieve the objectives mentioned in article 13 of the Waste Framework Directive. In particular, the operation excited complaints from neighbouring occupiers on the Dover's Corner Industrial Estate about nuisance caused by wood dust emanating from the site.

82. On this ground, therefore, the appeals must fail.

Did the judge err in not giving a good character direction for Mustafa?

83. Permission to add a fresh ground of appeal in Mustafa's case, which was not put before the single judge, was sought by a notice dated 9 December 2019. It is submitted by Mr Thomas that H.H.J. Bate erred in law in his summing-up by not giving a good character direction for Mustafa, who, it is said, was entitled to be treated as a man of good character. In the alternative, it is submitted that trial counsel failed to ensure that the judge gave such a direction. Either way, it is submitted that Mustafa did not receive the benefit of a direction to which he was entitled and that his conviction is unsafe as a result.

84. Mustafa had two findings of guilt for burglary in 1974, when he would have been 13 or 14 years old, and one conviction for possessing an offensive weapon in 1981, when he would have been 20.

85. Those acting for him at trial asked for confirmation that he had no previous warnings from the Environment Agency. A response to that request was sent by email on the 22 October 2019 with two attachments, one of which was a witness statement of Gary Yardley, an Environmental Crime Officer employed by the Environment Agency, dated 11 February 2014. He explained that on 31 January 2014 he had gone to Michelins Farm, Rayleigh, to assess compliance with a court order that required Roger Phipps to remove all waste from the farm by midday on the 30 January 2014. There were quantities of waste over most of the site. The other attachment was a warning letter dated 22 November 2013 from the Environment Agency to TLM Management Ltd. "(c/o Company Director and/or Company Secretary)", which referred to a suspected offence by TLM Management Ltd. on or before 13 November 2013, namely the burning of waste without an environmental permit or exemption at Michelins Farm, Rayleigh, contrary to regulations 12 and 38(1)(b) of the 2010 regulations. Mustafa was the sole director and company secretary of TLM Management Ltd. at the time. And there is no dispute that he was aware of the contents of that letter.

The owner and operator of the site was an independent operator. As a result of an earlier prosecution by the Environment Agency, TLM Management Ltd. was one of several companies engaged to remove waste from the site.

86. It is common ground that a warning letter of this kind does not itself constitute any finding or admission of guilt and could not therefore impugn the character of Mustafa – any more than could the penalty notice for disorder in *R. v Hamer* [2010] EWCA Crim 2053 or the harassment warning letter in *R. v Dalby* [2012] EWCA Crim 701.

87. Privilege was waived by Mustafa when the application to vary the grounds was made. Trial counsel, Mr Rupert Wheeler, was invited to comment on the new ground, which he did on 8 January 2020.

88. In an email dated 27 September 2019 Mr Wheeler had explained that before speeches, he invited the judge to indicate whether, in light of the findings of guilt in 1974 and the conviction in 1981 and the warning letter of 22 November 2013, he would be able to give a modified good character direction. Mr Wheeler said in this email that the judge's ruling was that he could not give such a direction where Mustafa and his company had a "criminal [or] regulatory history". As will be seen, it is now accepted that this overstates the position. Mr Wheeler continued:

> "[Mustafa] and I had to decide whether to adduce the bad character ourselves and seek a modified direction or simply leave these matters out of evidence and not seek any direction on character either way. We took the view that it would be better to say nothing. Though inevitably the Judge would have to omit [Mustafa] from the [character] direction given in respect of the other defendants, on balance we felt that this would be better than drawing attention to potentially adverse evidence of bad character."

89. In a further email, dated 2 October 2019, Mr Wheeler said:

> "During the exchange, the Judge was apprised of the nature of the letter and of the previous convictions. My recollection is that the Judge took the view that both the letter and the convictions undermined his ability to give a good character direction. There were no submissions on piercing the corporate veil, though my recollection is that the Court did not raise this as a potential impediment to the letter going in. Neither the prosecution nor defence sought to adduce the letter and so the matter did not arise… [Mustafa] and I took the tactical decision not to put the letter in. There was an obvious danger that had we sought a ruling on whether the veil could be pierced, the Judge might have ruled that it could. That would have given the prosecution leave to seek to adduce it as bad character evidence. They may well have been successful in that application on the law. We took the view that it would be better to leave it alone rather than risk it going in through this route. The letter was addressed to the Company Director of TLM, not simply TLM itself. I accept that there is a distinction between the company committing the offence and the individual director doing so. However, in a company the size of TLM with [the Appellant] at its head, the Court could well have concluded that the reality of the circumstances [was] such that the veil could be lawfully pierced. Furthermore, the obvious inference was that he would have had at least some knowledge of what TLM were doing. Tactically, the risk posed by it going in weighed heavier in the balance than the omission of a modified good character direction (which the Judge had by no means agreed to give). My recollection is that I gave advice in line with

the above. We spoke of the advantages and disadvantages of seeking to push the issue, and took a tactical decision that it would be better not to risk it going in."

90. Full transcripts of the proceedings from the close of the prosecution case to the start of speeches have been obtained. They do not reveal such an exchange with the judge. In an email dated 5 December 2019, Mr Wheeler said:

> "My clear recollection is that it was, as I remember, the Judge saying that he would be troubled about giving a modified good character direction, given [Mustafa's] old previous for burglary and the letter. It was a short exchange and would have been made around the time the letter was served."

91. On 8 January 2020 Mr Wheeler wrote to the Registrar of Criminal Appeals, stating:

> "My recollection is as follows: [Mustafa] had two previous convictions from 1975 and one from 1981, with other offences taken into consideration. Following a review as to whether any defendant had any Environment Agency warnings against their name, the prosecution disclosed that TLM Management had been warned on the 22nd November 2013 about a suspected offence of burning waste at a site on or before 13th November 2013. The 13th November 2013 was within the indictment period. Mr Mustafa was sole director and company secretary of TLM Management at that time. The Warning Letter had been addressed to the company director and the company secretary.
>
> At some stage prior to speeches I sought an indication from the Learned Judge as to whether he would be willing to give a modified good character direction in the circumstances. I recall the Judge stating that he would be troubled by doing this. This was not a request for a formal ruling. I am not clear precisely when this short exchange took place, but I remain certain that it did.
>
> The prosecution did not seek to adduce any evidence of bad character against Mr Mustafa at that stage. However, they opposed the request for a good character direction on the basis that the Warning Letter was relevant bad character evidence against him.
>
> After discussing the matter with Mr Mustafa, we came to the conclusion that a good character direction should not be formally sought. This was for the following reasons:
>
> In order to seek the good character direction formally, it would have been necessary for the Learned Judge to have ruled on the probative value of the Warning Letter. If the judge ruled that it was relevant evidence of bad character, then clearly no good character direction would have been available. Had he ruled that it was not, then I accept that I could have proceeded to seek the modified good character direction.
>
> In considering whether to seek the ruling, it was my view that there were risks to each route. If the Learned Judge accepted the prosecution's submission that the Warning Letter was relevant bad character evidence against Mr Mustafa, then it would have been open to them to apply to put the letter in as bad character evidence. If it had ultimately been adduced in that way, then the negative effect on the defence would have been severe.

On the other hand, if I did not take the first step of seeking a formal ruling on the status of the Warning Letter, then I would be restricted from ultimately requesting the good character direction. This meant the jury would hear nothing about Mr Mustafa's character, in contrast to his co-defendants.

I therefore weighed the two options and, with the agreement of Mr Mustafa, took a tactical decision to take the application no further. It was my view at the time that the danger of obtaining an adverse ruling on the status of the letter (effectively opening the door for the prosecution to seek to adduce it), outweighed the risk created by omitting any reference to Mr Mustafa's character in the summing up. My view remains that if the letter had been adduced as bad character evidence, it would have been far more detrimental than the omission of any reference to his character in the summing up.

I acknowledge the force of the Appellant's submission [now] that, had the ruling been sought, the correct decision would have been for the Learned Judge to conclude that it was not relevant bad character evidence. However, I also note that the prosecution continues to submit that the letter does have probative force. This, in my view, highlights that it was far from obvious as to what the Learned Judge would have done had I sought the ruling. I was also guided by the informal indication made by the judge in the short exchange. It was a difficult tactical decision in which, following discussion with Mr Mustafa, we decided to be conservative rather than take a risk that could have caused significant detriment to his defence."

92. We do not know on what basis Mr Wheeler said that "the prosecution continues to submit that the letter [of 22 November 2013] does have probative force". But in any event, as we have said, the agreed position now is that it does not.

93. Mr Thomas – who, as we have said, did not appear at trial – maintained that the judge was asked to indicate provisionally whether or not he would give a modified good character direction. No one has suggested, however, that the matter was ever put before the judge for a final ruling.

94. Mr Stoton, who did appear at trial, said in the addendum respondent's notice that he indicated to Mr Wheeler that the prosecution was "neutral" on the question of a "*Vye* direction". He told us that Mr Wheeler asked the judge for guidance. Mr Wheeler made the judge aware that there were previous convictions but not what they were, and mentioned to him the existence of the warning letter. It was a very short exchange, lasting only a minute or so. The facts underlying the warning letter were not looked at. In the addendum respondent's notice, Mr Stoton said that the judge indicated he would not be likely to give a modified direction. If the matter had been pursued further by the defence, the prosecution might have wanted to explore the underlying facts.

95. We are satisfied that the matter was never considered before the judge in sufficient detail for anyone to think he had given a definitive ruling. No evidence was put before the jury about Mustafa's character that required any direction from the judge. We must therefore approach the issue on the basis of the decision made by Mustafa in the light of discussion with his counsel.

96. We are satisfied that the decision not to pursue the question of Mustafa's character further has the hallmarks of a tactical decision, and that it would not be right for us to go behind it

at this distance in time. It is rarely easy, and here it certainly is not, to identify all the considerations that would have had a bearing on the decision made by the accused. Mustafa was in the best position to know what lay behind the warning letter that was sent to him, and how damaging, or not, any exploration of the underlying facts might be for him. What does seem clear, however, is that he made a tactical decision that nothing should be done to generate more detailed consideration of the position. He was entitled to take that view. In the event, he was convicted, but this does not mean that the decision he took was improperly taken or that he should now be allowed to re-visit it.

97. In the circumstances, in our view, it cannot properly be contended that the absence of a good character direction for Mustafa had any effect on the safety of his conviction.

98. We have been given an explanation for the delay in advancing this ground of appeal. Issues such as this inevitably become much harder to investigate after lengthy delays. Some of the delay that has occurred here is unsatisfactory. But if we had seen any merit in the argument put forward, we might have been able to overlook that. In this case, however, we do not think there is an arguable ground of appeal. We therefore refuse the application for an extension of time in which to apply for leave to advance this ground.

Conclusion

99. For the reasons we have given, we dismiss Mustafa’s appeal and refuse Breslin’s applications.