

ENGLAND AND WALES / JUDGMENT

# Magro, R v

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Neutral Citation Number: [2010] EWCA Crim 1575 Case No: 2009/05112/D4 (1) 2009/06451/D1 (2) 2009/05038/B3 (3) 2009/03766/C1 (4) IN THE COURT OF APPEAL (CRIMINAL DIVISION) ON APPEAL FROM THE CROWN COURT AT BRADFORD HIS HONOUR JUDGE DURHAM HALL (1) ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM MR RECORDER ASIF QC (2) ON APPEAL FROM THE CROWN COURT AT BRISTOL HIS HONOUR JUDGE TICEHURST (3) ON APPEAL FROM THE CROWN COURT AT ISLEWORTH HIS HONOUR JUDGE KATHUDA (4) Royal Courts of Justice Strand, London, WC2A 2LL Date: 08/07/2010 Before : THE LORD CHIEF JUSTICE OF ENGLAND AND WALES LORD JUSTICE GOLDRING MRS JUSTICE RAFFERTY MR JUSTICE WILKIE and MR JUSTICE KING

- ----- Between : R v Magro (1) R v Brissett (2) R v Smith (3) R v Varma (4)

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- ----- Mr H Southey QC and Mr A Nadim for the Applicant (1) Mr H Southey QC and Mr M Singh for the Applicant (2) Mr H Southey QC and Mr S Wood for the Applicant (3) Mr H Southey QC and Mr R Hallows for the Applicant (4) Mr D Perry QC and W Hays for the Crown Hearing dates : 10th June 2010

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## Judgment

The Lord Chief Justice of England and Wales: 1. 2. 3. 4. These four otherwise unconnected applications for leave to appeal against sentence require extensions of time and raise an identical question about the jurisdiction of the Crown Court to make confiscation orders when the sentencing decision involves an absolute or conditional discharge. Such orders were made in each of the present cases: in essence the basis of the application is that following the decision of this court in R v Clarke [2009] EWCA Crim 1074 they were wrongly made. Until that decision, the power of the Crown Court to make a confiscation order in these circumstances had not been questioned. The issue had however never been addressed in this court. In Clarke the principle was described in unequivocal terms: "...the Crown Court has no power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence". The confiscation orders made in each of the present applications contravened this statement of principle. The applications are opposed. If the principle identified in Clarke is correct, these confiscation orders should not have been made. What however is challenged is the decision in Clarke. It is said by Mr David Perry QC, for the

respondent, to have been made per incuriam. It is not binding, and we should therefore decide that the confiscation orders were properly made and dismiss the applications. Mr Perry further suggested that extensions of time were inappropriate in the context of what are described as “change of law” principles, but this is a separate, and in the present context, insignificant aspect of the argument. The facts of Clarke were very simple. He pleaded guilty to concealing criminal property contrary to section 327 of the Proceeds of Crime Act 2002. He was conditionally discharged for a period of 2 years under section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 (the 2000 Act). On 19<sup>th</sup> July 2007 he was made subject to a confiscation order in the sum of £1055.00 under section 6 of the Proceeds of Crime Act 2002 (the 2002 Act). He was ordered to pay within 3 months or to serve 3 months’ imprisonment in default. He sought leave to appeal against sentence. Leave was granted on 19<sup>th</sup> July 2008 and the court directed that counsel should provide a detailed agreed note of the legislative history relating to orders for absolute discharge and conditional discharge (which for convenience we shall describe hereafter as orders for discharge). A seemingly comprehensive note was prepared in November 2008. Judgment was reserved and handed down on 12<sup>th</sup> June

2009. Clarke’s appeal was allowed. No application was made for the court to certify a point of general public importance, with a view to a possible appeal to the Supreme Court. While Clarke was under consideration in the Court of Appeal, Alope Varma appeared before the Crown Court at Isleworth before His Honour Judge Katkhuda on 27<sup>th</sup> November 2008 and pleaded guilty to 3 counts of fraudulent evasion of excise duty. On 15<sup>th</sup> January 2009 he was made subject to a conditional discharge for 2 years. On 3<sup>rd</sup> April 2009, in confiscation proceedings, he was found by the judge to have benefited from criminal conduct in the sum of £7257.86. The available amount for 5. 6. 7. 8. 9. the purposes of confiscation order was assessed at £1500, to be paid by 31<sup>st</sup> March 2010, with 45 days imprisonment in the event of default. Varma’s criminality can be readily summarised. Between June 2005 and July 2006 he was warned on 5 occasions by Her Majesty’s Customs and Excise that he might be prosecuted if he was caught importing tobacco products illegally. He was caught once in October 2007 and twice in April 2008 smuggling tobacco products on flights from Spain back into this country. The total amount of duty avoided was £5307.86. When the judge passed sentence he decided that because Varma suffered from facial neuralgia and was subject to an underlying psychological condition a merciful course would be appropriate. In effect, therefore, apart from the order for conditional discharge, held over Varma for a 2 year period, the judge decided to deprive him of the available financial profits of his criminal activity. that the orders made by is perhaps worth highlighting It Judge Katkhuda represented what appeared to be a sensible sentencing option. While the conditional discharge provided an appropriate method of ensuring the continuing good behaviour of the defendant, the confiscation order deprived him of the profits of his crimes, to the extent of the amount available for recovery. If Clarke is right that option is not available. In the context of the impact of the decision in Clarke, it was pointed out in R v Wilkinson [2009] EWCA Crim 2733 that if the court is not permitted to make an confiscation order together with an order for conditional discharge, it may then become necessary to impose

a different, more punitive sentence, rather than the order for conditional discharge, because without the order for confiscation, the defendant's criminality would not be sufficiently addressed. We agree, and endorse the proposition that there are cases in which the combination of an order for discharge with a confiscation order represents an appropriate sentencing decision. Indeed, whatever other order may be appropriate, there can be nothing remarkable about the proposition that an individual convicted of acquisitive crime should be deprived of its benefit. In broad general terms, therefore, the principle identified in *Clarke* is, to put it no higher, surprising. The question is whether the legislative structures require it. In view of the conclusion we have reached, it is unnecessary for the facts relating to the remaining applications to be narrated. At the end of the judgment we shall explain why. The judgment in *Clarke* is 78 paragraphs long. It sets out the relevant legislative provisions relating to the powers and duties of the court in relation to confiscation orders from its first creation in the Drug Trafficking Offences Act 1986. It also sets out the long history of the legislative provisions relating to absolute and conditional discharges, beginning in 1847, together with all the relevant decisions of this court which bear on the jurisdiction to attach punitive orders to orders for discharge. The court was not ignorant of any legislative provision or any relevant judicial authorities. Mr Perry sought to suggest that the court might have taken a different view if it had been aware of the international obligations of the United Kingdom. He drew our attention to the Council Framework Decision, 26th June 2001, On Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and Financing of Terrorism, and Article 3 in particular, as well as the Scheme relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth, as amended by law ministers in April 1990, November 2002 and October 2005 and the European Convention on Mutual Assistance in Criminal Matter. In addition he highlighted the observations of the European Court of Justice in the criminal proceedings against Pupino [2006] QB 83 and the decision of the House of Lords in *Dabas v High Court of Justice in Madrid, Spain* [2007] 2 AC 31. He identified the importance of compliance with our Convention and Treaty obligations arising from the Confiscation of the Instrumentalities and Proceeds of Crime, and the Framework Decision that member States should establish value confiscation regimes, at any rate where the value of the proceeds of crime exceeds €4000.

10. Without questioning the importance of complying with these obligations, it seems to us clear that the result of even a cursory examination of the statutory provisions currently in force in this jurisdiction demonstrates the clear recognition of the importance attached to the statutory regime which governs confiscation of the proceeds of crime. This disposes of any suggestion that the confiscation system represents an inadequate response to our international obligations. Reference to them in the course of argument would not have persuaded the court in *Clarke* to the conclusion advanced by Mr Perry. Accordingly these applications cannot be refused on the basis that the decision in *Clarke* should be treated as

per incuriam because the court was not invited to and did not address our international obligations.

11. Mr Perry relied on a variety of submissions to make good the contention that Clarke was wrongly decided, but stripped to essentials the end result of his argument is that the error he was seeking to identify stemmed from an over concentration on the impact and effect of orders for discharge and insufficient attention to the statutory provisions which relate to confiscation orders.
12. The issue identified by the court in Clarke was: “Does the Crown Court have the power to make a confiscation order against a defendant following conviction for an offence if he or she receives an absolute or conditional discharge for that offence”. (para 45) In view of the detailed recital in Clarke of a very wide range of legislative provisions, we shall confine ourselves to the critical provisions which bear directly on this issue.
13. Section 12 of the 2000 Act, as amended, provides: “(1) Where a court by or before which a person is convicted of an offence...is of the opinion, having regard to the circumstances including the nature of the offence and character of the offender, that it is inexpedient to inflict punishment, the court may make an order either –
  - (a) discharging him absolutely; or
  - (b) if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding 3 years from the date of the order, as may be specified in the order...
- (7) Nothing in this section shall be construed as preventing a court, on discharging an offender absolutely or conditionally in respect of any offence, from making an order for costs against the offender or imposing any disqualification on him or from making in respect of the offence an order under section 130, 143 or 148 below (compensation orders, deprivation order and restitution orders)”. 14. At the date when section 12 of the 2002 Act came into force, section 2(6) of the Drug Trafficking Act 1994, repeating section 1(6) of the Drug Trafficking Offences Act 1986, provided: “No enactment restricting the power of a court dealing with an offender in a particular way from dealing with him in also any other way shall by reason only of the making of an order under this section restrict the Crown Court from dealing with an offender in any way the court considers appropriate in respect of a drug trafficking offence.” Similar provision was made, with necessary alterations to the language, to deal with non-drug trafficking offences, by section 72 of the Criminal Justice Act 1988, as amended.
15. Section 6 of the 2002 Act provides: “(1) The Crown Court must proceed under this section if the following two conditions are satisfied
  - (2) The first condition is that a defendant falls within any of the following paragraphs –
    - (a) he is convicted of an offence or offences in proceedings before the Crown Court; ...
  - (3) The second condition is that
    - (a) the prosecutor or the Director asks the court to proceed under this section, or

- (b) The court believes it is appropriate for it to do so.” Section 13 of the 2002 Act provides: “(1) If the court makes a confiscation order it must proceed as mentioned in sub-sections (2) and (4) in respect of the offence or offences concerned.
- (2) The court must take account of the confiscation order before –
  - (a) it imposes a fine on the defendant, or
  - (b) it makes an order falling within sub-section (3)
- (3) These orders fall within this subsection – (a)...(compensation orders);
  - (b) ...(forfeiture orders) ; (c)... (deprivation orders); (d)...(forfeiture orders).
- (4) Subject to subsection (2), the court must leave the confiscation order out of account in deciding the appropriate sentence for the defendant...” Section 14 of the 2002 Act provides: “(1) The court may –
  - (a) proceed under section 6 before it sentences the defendant for the offence...or
  - (b) postpone proceedings under section 6 for a specified period. ...
- (11) A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement
- (12) That subsection (11) does not apply if before it made the confiscation order the court –
  - (a) imposed a fine on the defendant;
  - (b) made an order falling under section 13(3);
  - (c) made an order under section 130 of the Sentencing Act (compensation orders)”. Section 15 of the 2002 Act provides: “(1) If the court postpones proceedings under section (6) it may proceed to sentence the defendant for the offence (or any of the offences) concerned.
- (2) In sentencing the defendant for the offence (or any of the offences) concerned in the postponement period the court must not
  - (a) impose a fine on him
  - (b) make an order falling within section 13(3), or
  - (c) make an order for the payment of compensation under section 130...
- (3) If the court sentences the defendant for the offence (or any of the offences) concerned in the postponement period, after that period ends it may vary the sentence by
  - (a) imposing a fine on him,
  - (b) making an order falling within section 13(3) or

(c) making an order for the payment of compensation under section 130..."

16. Mr Perry suggested that the analysis of the legislative provisions in *Clarke* was distilled by the court into two separate questions. The first arose from the impact of section 14 of the 2002 Act, which he described as the "jurisdiction" question. The second was the effect of section 12 of the 2000 Act, described as the question of "principle". 17. In the context of the jurisdictional question, the court in *Clarke* observed: "It follows from section 14(1)(a) of the 2002 Act that a court may proceed to make a confiscation order before passing sentence. (Counsel for the Crown) submits that this provides a strong argument in support of the proposition that, under the 2002 Act an order of absolute or conditional discharge would not prevent the making of a confiscation order. If it did, then a confiscation order made before sentence was passed would (presumably) have to be quashed if, subsequently, an order of absolute or conditional discharge was made and yet there is no express power to do that". (paragraph 46) The court concluded: "Thus, in our view, there is nothing in section 14 of the 2000 Act which prevents a Crown Court Judge from making both a confiscation order and an absolute or conditional discharge order". (paragraph 70) 18. 19. From Mr Perry's standpoint, therefore, so far, so good. The 2002 Act, and the court's analysis of it, supports his submission. The reasoning presents us with no difficulty, and we agree with it. It is the court's reasoning in relation to the 2000 Act, and the question of "principle", as described by Mr Perry, which shows the route to its eventual decision. No punitive order may be made in conjunction with an absolute or conditional discharge unless (a) it is listed in section 12 (7) of the 2000 Act or (b) the enactment which contains the punitive order expressly or impliedly provides for the making of the punitive order, notwithstanding the provisions in section 12(7) (paragraph 31). Earlier decisions of this court, *R v Savage* [1983] 5 Crim App R(S) 216 and *R v Young* [1991] 12 Crim App R(S) 262, demonstrated that certain punitive orders may not be made in conjunction with a conditional discharge because if punishment is inexpedient, it is inappropriate to couple it with a punitive order. The Crime and Disorder Act 1998 amended section 12 (4) of the 1973 Act, the statutory predecessor to section 12(7) of the 2000 Act, to enable the court imposing an absolute conditional discharge also to impose any disqualification or to make an order for costs, deprivation, compensation or restitution. As no express reference was made to confiscation orders in section 12(4) of the 1973 Act this must have been deliberate because the amendment to section 12(4) was directed at the decisions in *Savage* and *Young*. 20. The provision equivalent to section 12(4) of the 1973 Act is now section 12 (7) of the 2000 Act and the omission of reference to confiscation proceedings in section 12 (7) was "telling" (paragraph 76). Where it was intended that the court should be enabled to make punitive orders in association with a discharge order, the legislation was express. A number of examples were given, of which one is the "exclusion order" made under section 1 of the Licensed Premises (exclusion of certain persons) Act 1980. 21. Accordingly: "...the legislature has had well in mind the need to make provision for the consequences of making orders of absolute and conditional discharge sometimes distinguishing between them. As we have seen, the 2000 Act amended a number of other Acts to make reference to sections 12 and 14 of the 2000 Act ...the fact that the 2002 Act

imposes a mandatory regime is obviously a powerful argument for saying that the court must proceed under section 6 even though the defendant is being absolutely or conditionally discharged. However, in the light of *Savage and Young*, section 12(7) and of the history of section 12(7), we have reached the conclusion that the Crown Court has no power to make a confiscation order against a defendant following conviction for an offence if he or she received an absolute or conditional discharge for that offence. If Parliament had wanted to include confiscation orders within the 1973 predecessor to section 12 ...or in the 2000 Act it could easily have done so. We are mindful of the fact that the orders which have been made in *Savage and Young* were made under legislation which gave the power to make the order but did not require the making of an order, but we do not think that this affects the conclusion which we have reached". (paragraphs 76 and 77) At the very end of the judgment the court added: "Given that a confiscation order can, at least in theory, be made before passing sentence, it would obviously be prudent in those very rare cases where an absolute or conditional discharge is a possibility, to decide upon sentence first. We do not think that offends section 13 of the 2002 Act". (paragraph 78)

22. Mr Perry subjected this reasoning to a careful and detailed critical analysis. He drew attention to the way in which a series of legislative provisions strengthened the confiscation regime, and how by section 1(6) of the Drug Trafficking Offences Act 1986 Act, by section 72 (6) of the Criminal Justice Act 1988, and by section 2(6) of the Drug Trafficking Act 1994, the Crown Court was permitted to impose an order for discharge and make a confiscation order against the same defendant in respect of the same offence. The question is whether Parliament can have intended to alter the position as it existed under earlier confiscation legislation when it chose not to repeat the equivalent provisions in precisely the same language. Mr Perry argued that although section 13 of the 2002 Act was not drafted in precisely the same terms as the earlier provisions its effect was the same. Section 13 (4) makes clear that, subject to exceptions, where a confiscation order has been imposed "the court must leave the confiscation order out of account in deciding the appropriate sentence for the defendant". According to his submission, the reasoning in *Clarke* proceeded on the basis that the coupling of the confiscation order with an order for discharge was inappropriate only because the order for discharge followed from the court's decision that punishment was inexpedient. Nevertheless this conclusion is inconsistent with the express provisions in section 13(4) of the 2002 Act. 23. The submission therefore is that section 13(4) encapsulates the effect of the earlier legislation in the 1986 Act, the 1988 Act, and the 1994 Act, by means of which the combination of orders for discharge with a confiscation order are permissible. Mr Perry drew attention to the Explanatory Notes to the 2002 Act which state that section 13 "reproduces the effect of the existing legislation". This clearly indicates that no change of position in consequence of the enactment of the 2002 Act was intended in relation to confiscation orders.

24. Mr Perry further submitted that the approach of the court in *Clarke* failed sufficiently to address the court's obligations to proceed under section 6 of the 2002 Act when the statutory pre-conditions are met. Once the statutory pre-conditions are met, it may proceed under section 6, make a confiscation order and then pass sentence, or, subject to section 14, postpone proceedings under section 6 for a specified period, proceed instead to sentence, and then, before the end of the specified period, make the confiscation order. 25. 26. 27. These were powerful submissions. Faced with them Mr Hugh Southey QC for the applicants submitted that the decision in *Clarke* was correct, reflective of the legislative processes and structure, which proceeded on the basis if the court believed that punishment was unnecessary or inappropriate, a confiscation order should not follow. He pointed out that notwithstanding the terms of the Bill initially presented to Parliament, the 2002 Act omitted section 14 (7), so that the provision equivalent to section 2(6) of the Drug Trafficking Act 1994 to the effect that "no enactment restricting the power of a court dealing with an offender in a particular way from dealing with him also in any other way shall by reason only of the making of an order under this section restrict the Crown Court from dealing with an offender in any way the court considers appropriate in respect of a drug trafficking offence" was removed. Its absence must have been deliberate, which strongly suggests Parliament's view that the draconian nature of confiscation provisions should be mitigated by the clear recognition that where punishment was inappropriate, the draconian provisions should not apply. He further suggested that nothing in section 13(4) of the Proceeds of Crime Act 2002 provided any reason for departing from *Clarke* or concluding that it was wrongly decided. *Clarke* was correct, essentially on the basis that it reinforced the proposition that a confiscation order should not be considered when a punitive sentence was otherwise properly to be avoided, and an order for discharge depended on that conclusion and had that effect. Our conclusions can be briefly summarised. The power to make an order for discharge depends on section 12 of the 2000 Act. It is appropriate to make such an order when "it is inexpedient to inflict punishment". In general, save for specific purposes, such as breach proceedings, an order for discharge is to be disregarded for the purposes of any enactment or instrument which imposes or authorises or requires the imposition of a disqualification or disability. All that accepted however, the stark fact remains that an order for discharge follows a conviction for a criminal offence. And there is nothing novel about the suggestion that a confiscation order can be made when, although it is "inexpedient" to impose punishment for the offence, an order for discharge is appropriate. This was established in earlier legislation. Until the coming into force of the 2002 Act it is undisputed that the legislation relating to confiscation orders, (in relation to drug trafficking offences, the 1986 Act, and the 1994 Act, and in relation to other offences, the Criminal Justice Act 1988, as amended, which were both in force when the 2000 Act in its turn came into force) permitted such orders to be made. The power of the court to make a confiscation order is now founded on the provisions of the 2002 Act. The purpose of such an order is to deprive the offender of the benefit of his crimes, at any rate to the extent of the amount recoverable for this purpose, and to deprive him of what is not rightfully his. The alternative would be to leave him to enjoy the fruits of the offence of which he was convicted. The order cannot be

made unless or until there has been a conviction, but following conviction, and subject to conditions which were established in the case of each of these applicants, the Crown 28. 29. 30. 31. Court is obliged to proceed to address the question whether to make a confiscation order if, as here, the prosecution asked the court to do so. Section 13 of the 2002 Act makes clear that before imposing a fine, or making an order for compensation, forfeiture, or deprivation, the court “must take account of the confiscation order”; otherwise not. It is expressly required to leave the confiscation order “out of account” in deciding the appropriate sentence, and an order for discharge is a sentence which falls within the ambit of section 13(4). This subsection is in sufficiently clear and unequivocal terms to have made it unnecessary for the provision originally found in section 14(7) of the Bill to be included in the Act. It would have been superfluous. In summary, in our judgment the reasoning which led the court to the conclusion that the issue of “principle” based on its analysis of section 12 of the 2000 Act ousted the court’s “jurisdiction” to make the orders currently under consideration was wrong. This avoids the somewhat surprising outcome that, although the court was vested by the 2002 Act with jurisdiction to make a confiscation order as well as an order for discharge in respect of the same offence, it was nevertheless deprived of the power to do so by the provisions of an earlier enactment, which, when it came into force, did not, because of the provisions of section 72(6) of the 1988 Act, as amended, and section 2(6) of the 1994 Act have that effect. It also avoids the need to deploy the extra legislative process suggested at the end of the judgment in *Clarke*, to the effect that the court should, when contemplating the possibility of a discharge order, either decide on sentence first, or, if the confiscation order has already been made, then remove it in the light of an order for discharge made subsequently. This suggestion does not easily fit with the structure of the legislative provisions in section 6, 14 and 15 of the 2002 Act. For these reasons, if it were not for the decision in *Clarke*, we should have concluded that all four applications for leave to appeal should be rejected. In our judgment however, even if the decision in *Clarke* is wrong, we are bound by it. We fully appreciate the practical value of the approach adopted by this court in *R v Simpson* [2004] QB 118, underlining the discretion available to a five judge constitution of the court, circumspectly exercised, to decide that a previous decision of Court of Appeal Criminal Division should not be treated as a binding decision when it is wrong. The exercise of this discretion is sometimes necessary to address the consequences arising from the heavy burdens of a court which often sits in different constitutions, addressing identical or similar problems without full argument, leaving uncertainty about the true position, even to put it bluntly, on occasions productive of chaos, or where such a group of decisions depends on an original decision which was itself reached per incuriam, or where the question relates to purely procedural or sentencing decisions. What *Simpson* does not establish however, is that a five judge constitution is entitled to disregard or deprive the only previous decision of the three judge constitution of the court of its authority on a distinct and clearly identified point of law, reached after full argument and close analysis of the relevant legislative provisions. This principle applies with particular emphasis when the consequences of doing so would be to the disadvantage of the defendant. The court in *Clarke* was fully appraised of all the relevant legislative provisions. There was no relevant

information available to us which was not made available for consideration in Clarke. It was the first occasion when the question arose for decision in the Court of Appeal Criminal Division. There was no actual or perceived possibility of a conflict of or inconsistencies between the authorities, or a decision or decisions based on a misunderstanding of earlier decisions. Clarke itself followed careful investigation by the court into the historic development of the law relating to discharges. It was a reserved judgment. It is plain from the terms of the judgment 32. itself that it was considered in meticulous detail, and given the closest possible attention. If we were to extend the principle in Simpson to the present situation, we should be going further than the decision itself justified, and it is not open to us to do so. The question whether Clarke is wrongly decided can, if the Supreme Court so wishes, be considered by that court. We shall extend time to appeal in the case of Varma. As the timetable shows, the issue of confiscation proceedings was under consideration at the time when the judgment in Clarke was reserved and awaited. At present there is a binding decision of this court which must lead to the conclusion that Varma's appeal should be allowed. We shall make that order. Simultaneously, we shall, as the Crown invited us, certify that a point of law of general public importance is involved in this decision, and invite the Crown to seek leave to appeal from the Supreme Court. We shall invite written submissions from counsel about the terms of the question to be certified. The remaining three applications will be adjourned pending the decision of the Supreme Court whether to grant leave, and if leave is granted, pending the outcome of the appeal to the court. If the issue is to be decided in the Supreme Court, one case will suffice.

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