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IN THE CENTRAL CRIMINAL COURT

No: U20090934

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Old Bailey
LONDON
EC4M 7EH

C

Friday, 13th November 2009

Before:

THE HONOURABLE MR JUSTICE CALVERT-SMITH

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R E G I N A

-v-

U20090934

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MR R WHITTAM QC appeared on behalf of the **PROSECUTION**
MISS S FORSHAW QC appeared on behalf of the **DEFENDANT**

FOR APPLICATION

(9.37 am - 11.00 am)

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Friday, 13 November 2009

FOR APPLICATION

MR WHITTAM: My Lord, I prosecute; Miss Forshaw defends.

Only those who are in court at the moment are myself and Miss Forshaw, my instructing solicitor and her instructing solicitor. Sitting to the side are either senior police officers or officers directly related to matters in the United States of America and the escort. I do have a list of all those in court that we can keep with the court papers.

MR JUSTICE CALVERT-SMITH: That ought to be done. I think we will formally -- since the case has not been called on -- you, Mr Whittam, and you, Miss Forshaw, are satisfied that the person sitting in the dock is the person in these papers.

MISS FORSHAW: I am.

MR WHITTAM: My Lord, we are quite satisfied and the officer who conducted all the interviews is in court and can verify that, as well.

MR JUSTICE CALVERT-SMITH: Thank you.

MR WHITTAM: My Lord, before we proceed with the application --

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: -- there is an application under section 75 of

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the Serious Organised Crime and Police Act. It should be at divider 11 of my Lord's bundle.

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: At that divider, at the very top, the pages are numbered. Once we get past the introduction it is page 46, top left.

MR JUSTICE CALVERT-SMITH: I have it.

MR WHITTAM: My Lord, it is a joint application, if it assists the Court, to exclude members of the public other than those who have been identified and will be on the list available to the Court from --

MR JUSTICE CALVERT-SMITH: The gentleman at the back here?

MR WHITTAM: One of the escorting officers as well, my Lord.

MR JUSTICE CALVERT-SMITH: Thank you.

MR WHITTAM: I can confirm precisely --

MR JUSTICE CALVERT-SMITH: Yes, I saw the escort coming into court.

MR WHITTAM: Thank you.

The Court has the power to make such order as it thinks appropriate to exclude from the proceedings any person who does not fall within subsection 4 and, my Lord, we have the officers, of course, and those representing the defendant, and to give such directions as it thinks appropriate prohibiting the publication of any matter relating to the proceedings, including the

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fact that the reference has been made and it should be made only to the extent that the Court thinks that it necessary to do so to protect the safety of the person and it is in the interests of justice.

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: My Lord knows the nature of the case from the papers that have been provided.

MR JUSTICE CALVERT-SMITH: I do.

MR WHITTAM: And it will be our joint application that plainly for the safety of the individual who is affected by these proceedings and in the interests of justice of any of the proceedings that may follow that are referred to in these papers, the Court should make an order prohibiting the publication of any matter relating to these proceedings, my Lord, until further order and the reason that I indicate that is that there are two scenarios that may occur:

One is should the defendant not comply with the terms of the contract that he has signed, there is the ability to refer the matter back to the Court, and the Court of Appeal in the case of Blackburn indicated that should there be a reference back to the Court, it is unlikely that such hearing would be in private. So that might be one instance where the Court might vary the order.

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The second would be, should the defendant give evidence in a public court in any jurisdiction, it would, in our respectful submission, not put this court in a good light in the areas of transparency and with the press if publicly pronounced in another court was what has taken place in this court.

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MR JUSTICE CALVERT-SMITH: Quite.

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MR WHITTAM: And so we would, subject to any observation my Lord has, suggest that the order is made until further order either of this court or my Lord, or the High Court; whatever my Lord thinks most appropriate. Should evidence be given in another court, it is anticipated that would be during next year, but the timing of which, I am afraid I cannot -- because of the complexity of these matters -- give my Lord any accurate assistance.

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MR JUSTICE CALVERT-SMITH: Yes. It is pretty well inevitable, therefore, that in due course the order would have to be lifted because, as I read the terms of the document you handed in this morning, if he does not give evidence in another court, he is almost certain to be brought back in breach of the agreement, so one way or the other there is going to be publicity and there will have to be publicity at some stage of these proceedings one way or the other.

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MR WHITTAM: My Lord, certainly, and our submission would be that if either of those follow, the reasons for making the order, such as the protection of the safety of the person and the interests of justice are likely to fall away.

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MR JUSTICE CALVERT-SMITH: Quite. Well, I did want to press you a little on his safety should, for instance, by lunchtime -- this morning -- it be public knowledge of what is the procedure. I have not seen anything in my papers. He is in custody at present?

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MR WHITTAM: He is in custody at present.

MR JUSTICE CALVERT-SMITH: Hopefully well-protected, in any event.

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MR WHITTAM: My Lord, he is. He was taken and there should be in my Lord's papers a short statement from Detective Superintendent McKinney.

MR JUSTICE CALVERT-SMITH: Tell me where to find that.

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MR WHITTAM: I shall, if my Lord gives me one moment.

MR JUSTICE CALVERT-SMITH: Is it behind 3?

MR WHITTAM: It should be, my Lord. It is.

MR JUSTICE CALVERT-SMITH: Yes. Well that is what I was referring to.

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MR WHITTAM: He has been --

MR JUSTICE CALVERT-SMITH: Protected custody.

MR WHITTAM: He has been in protected custody and not set

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out in detail in the statement, but Mr McKinney is in court. Should the Court, for example, make an order today that has the effect of making his immediate release, appropriate arrangements are in place for his protection immediately from this court to go to managed premises where there has been a full risk assessment.

MR JUSTICE CALVERT-SMITH: The danger to him, therefore, is what? Hopefully none at all.

MR WHITTAM: Hopefully none at all but, as an example, there was an enquiry made by a member of the press of my chambers yesterday as to what was the nature of a hearing within this building today.

MR JUSTICE CALVERT-SMITH: Really?

MR WHITTAM: That was dealt with appropriately and it may simply be because they were aware that an anonymous number was listed, but there plainly is a risk, managed as best it properly can be.

MR JUSTICE CALVERT-SMITH: I am focusing at the moment on the first of the two criteria, safety of this and at the moment I am finding it hard to see why, with his current whereabouts and his subsequent whereabouts, were he to be released, he would be at risk, physically.

MR WHITTAM: If he was released, albeit staying within the protection of that, he is free to move around. The difficulties with a permanent change of identity is that

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that is not facilitated immediately because, of course, it would have to be repeated once there were appearances in court.

MR JUSTICE CALVERT-SMITH: I think you may be saying, well, if he is released early and that gets out, people will start to smell a rat as to why he has been released early and assume that something like what has happened has happened and therefore try to take action. That I can quite understand.

So far as the interests of justice are concerned, this is, as I understand it, principally those of another country.

MR WHITTAM: My Lord, it is.

MR JUSTICE CALVERT-SMITH: They will clearly want to be able to present their case with the least risk to the integrity of their proceedings.

MR WHITTAM: My Lord, certainly.

MR JUSTICE CALVERT-SMITH: You presumably do not have instructions -- or perhaps you do; I do not know -- as to whether there is any kind of programme, assuming I make the order today, as to when and in what circumstances inevitably what will have to happen, happens.

MR WHITTAM: I can assist my Lord in this way and one of those present in court is from the United States

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Department of Justice who was in consultation with us yesterday and, obviously, slightly depending on whatever order is made here, there will be a further process of some debriefing element because, of course, the debriefing is being done by trained officers here specifically to deal with his giving evidence in the quite specific trials that are referred to, so there will be a further process here, or anticipated to take place here, before he moves to the other jurisdiction.

The first trial is indicated in the report of Mr McAulay. It is in relation to a person whose name begins with T --

MR JUSTICE CALVERT-SMITH: I have seen that.

MR WHITTAM: -- who features largely in the facts due for extradition in the early part of next year and so the precise mechanics will depend upon the nature of the outcome of today's proceedings and the precise mechanics in relation to outstanding matters in the United States of America, but it is --

MR JUSTICE CALVERT-SMITH: You have clear instructions from that jurisdiction that in the interest of their administration of justice --

MR WHITTAM: They are adamant.

MR JUSTICE CALVERT-SMITH: -- this person's identity should be protected until such time as it has to be revealed.

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MR WHITTAM: Precisely. That is what ordinarily happens in their jurisdiction. In similar circumstances -- I say similar, perhaps circumstances precisely like this have not occurred before -- but that is how they would do it and it would assist in their management of the preparation of those trials.

MR JUSTICE CALVERT-SMITH: Miss Forshaw, what do you want to say? Clearly you have instructions from your client which you can pass on, if you wish, to his apprehensions as to his personal safety.

MISS FORSHAW: He is -- undoubtedly was -- highly trusted within the higher echelons of the organisation. Those against whom he proposes to provide assistance and ultimately evidence would know very well if the Court were to provide him with what might be perceived as a lenient sentence. Precisely how well-placed he was and how well-placed he is to give extraordinary information.

MR JUSTICE CALVERT-SMITH: One would have thought that rats would have been smelt from the moment Mr Justice Fulford passed his sentence.

MISS FORSHAW: Possibly, but there is a big difference between the blandness of the sentencing remarks that were appropriate in that situation and which were given and a positive identification of this man and it is

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something that he would be concerned about.

The assistant chief of the --

MR JUSTICE CALVERT-SMITH: But they are your clear instruction from your client.

MISS FORSHAW: They are.

MR JUSTICE CALVERT-SMITH: Thank you. I wanted to know that.

MISS FORSHAW: Also, the assistant chief from the Department of Justice from America is over here and in court today and she was good enough to indicate to me that the United States would be concerned to assure publicity is really not something, at this stage --

MR JUSTICE CALVERT-SMITH: It will be very important, if I make the order sought --

MISS FORSHAW: Yes.

MR JUSTICE CALVERT-SMITH: -- that channels of communication are perfect so that the consequences to the (inaudible) of justice in this country are not prejudiced -- are avoided -- if there is late disclosure here of something that will be available no doubt widely and therefore on the Internet, etcetera, in the US.

MISS FORSHAW: I am quite sure that lady hears your Lordship's words.

MR JUSTICE CALVERT-SMITH: That is all I am saying. Very well.

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Well, Mr Whittam, I am prepared to make the order. I am satisfied, in particular, that the two matters which appear at the end of the document that you served on me this morning in which it is proposed as part of the contract that this person be a witness and the second of those two matters is of such international and overwhelming importance to the administration of justice, not just in this country but worldwide, that if there is any prejudice to those proceedings by the disclosure of these proceedings, in particular, of course, the identity of the gentleman in the dock, but I am also satisfied that there is a significant risk to his own personal safety if the identity was to be disclosed or the nature of these proceedings. So that I will make the order sought until further order with a caveat that I have just expressed to Miss Forshaw, (inaudible) that it is essential that there is coordination on the day in which the revelation has to be made.

MR WHITTAM: My Lord, thank you.

Consequent upon that, bearing in mind the request that was made of my chambers yesterday --

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: -- there has been some concern as to how the police who manage the making of the order in that if,

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for whatever reason, enquiries are made either of them
or their press office or the Crown Prosecution Service's
press office --

MR JUSTICE CALVERT-SMITH: Yes, I understand.

MR WHITTAM: -- that one suggestion that has been made is
simply that in relation to the application with the
number that appears on the court list, if they are
asking any enquiries, Mr Calvert-Smith made the
following orders: "He excluded members of the public not
concerned in or with the proceedings," and it seems to
us to put off any further enquiry, reference would have
to be made to section 752 (a), because otherwise
ordinarily it follows: "Well, what was the jurisdiction?
Was the Court sitting *in camera*? We were not given
notice," and then adding, "He prohibited the publication
of any matter relating to those proceedings."

MR JUSTICE CALVERT-SMITH: You probability ought to put the
word "directly" to comply with subsection 4 (d).

MR WHITTAM: My Lord, certainly. If I may enquire whether
my Lord thinks there should be reference to the Act?

MR JUSTICE CALVERT-SMITH: I was hoping we could get away
without it because it is a bit of a risk area, is it
not?

MR WHITTAM: Those that will be giving the answers will be
happier not to refer to the Act and they can deal with

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the fact that it was a lawful order without having to refer -- and there is no need to give a notice period.

MR JUSTICE CALVERT-SMITH: I would exclude reference to the Act.

MR WHITTAM: My Lord, we will so do.

MR JUSTICE CALVERT-SMITH: And that will have the potential effect of putting the order itself at risk, it seems to me.

MR WHITTAM: Any further information adds to it.

MR JUSTICE CALVERT-SMITH: Very well. Thank you.

Of course, before we get onto the subject matter, there will have to be a record as there is being kept which will obviously have to be stored very safely and we will have to decide, perhaps, at the end of the hearing, what, in due course when the "until further order" moment arrives, will be released.

MR WHITTAM: Perhaps it is convenient to deal with that at this stage in the sense that arrangements have been made in accordance with the judges in Blackburn for there to be a transcript of these proceedings prepared very shortly after them, and when I come to deal with the facts, bearing in mind my Lord was not the original sentencing judge, for good reason --

MR JUSTICE CALVERT-SMITH: Quite.

MR WHITTAM: -- rather than perhaps open them, my Lord has

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the transcript of precisely how it was opened previously to Mr Justice Fulford.

MR JUSTICE CALVERT-SMITH: Which I have read.

MR WHITTAM: And the transcript of his sentencing remarks.

MR JUSTICE CALVERT-SMITH: Both of which I have read.

MR WHITTAM: And it would be convenient and easy to

facilitate the storage of those two documents with the transcript of today and then when today's transcript is published, those two are appended to it.

MR JUSTICE CALVERT-SMITH: Miss Forshaw, are you content that I, as it were, take as read the transcript of Mr Horwell, I think it was, opening at the trial and the sentencing remarks of Mr Justice Fulford.

MISS FORSHAW: Perfectly happy; it seems very sensible.

MR JUSTICE CALVERT-SMITH: It seems a sensible course, as well as saving a good deal of time.

MR WHITTAM: My Lord, in those circumstances -- and I am in the Court's hands -- if I introduce the nature of the application and how it has come about -- my Lord has the note that I prepared -- and very shortly summarise what has occurred both previously and since.

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: I was going to deal with the motivation of the defendant as set out very shortly in Mr McAulay's report and then deal with any other matter that concerns

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my Lord, if my Lord is content with that procedure.

This defendant pleaded guilty to a single count of conspiracy to destroy, damage or endanger the safety of an aircraft contrary to section 1 of the Criminal Law Act 1977 on 28 February 2005.

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: He was sentenced on 22 April 2005 to 13 years' imprisonment. The judge on that occasion was Mr Justice Fulford, sitting at the Central Criminal Court. That sentence has been referred back to this court by a specified prosecutor, the head of the counter-terrorism provision, being a person so designated by the director of public prosecutions under the Serious Organised Crime and Police Act of 2005. I will, if I may, just refer to that as "the Act" at any future point.

MR JUSTICE CALVERT-SMITH: Quite.

MR WHITTAM: The specified prosecutors referred the sentence back to this court because the defendant received a sentence that was not discounted in the strict sense of the Act as under section 74, subsection 10, although he did receive a sentence that was reduced and my Lord knows that material was made available to Mr Justice Fulford.

My Lord, Miss Forshaw knows, and I should indicate

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to my Lord, that Mr Justice Fulford made a number of efforts to see what mechanism could be used so as to not make it obvious that the sentence that was being passed was largely below that which would ordinarily be passed.

MR JUSTICE CALVERT-SMITH: When did the Act come into force, in fact? I meant to look it up but I did not.

MR WHITTAM: My Lord, I am confident --

MR JUSTICE CALVERT-SMITH: It must have been going through Parliament at the time.

MR WHITTAM: It was going through Parliament and there was a debate about what sort of mechanism could be deployed; it was not in force at this time.

MR JUSTICE CALVERT-SMITH: I gather that from the sentencing remarks. Just out of interest to know quite what stage the legislation had reached --

MR WHITTAM: Certainly before the end of the proceedings, I will be able to tell my Lord. I am sorry; I did not have that at my finger tips.

MR JUSTICE CALVERT-SMITH: No, no.

MR WHITTAM: My Lord, I have already indicated that now Mr Justice Fulford is a judge at the International Criminal Court. He is not available and the Court has considered whether, if possible, he could have dealt with it and he is not, which is why my Lord is dealing with it.

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MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: And I perhaps do not need to go through the procedure as set out by the Court of Appeal in the case of Blackburn; I know my Lord will be familiar with that authority and the levels of discount appropriate in the cases.

My Lord, I can indicate that there have been a number of cases listed. I am told that the Serious Organised Crime and Police Act came into force on 1 April 2006; I am grateful to Miss Forshaw for that.

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: Those instructing me have liaised in relation to matters that were heard by the Lord Chief Justice on Wednesday and, in fact, Thursday.

MR JUSTICE CALVERT-SMITH: I have a transcript -- albeit a draft transcript -- of Wednesday, but I have not got Thursday which my spies tell me may have a bearing on this application.

MR WHITTAM: My Lord, if it assists, I was provided late yesterday with a note from a lawyer who detained it that said -- and I think that is in the case of Bevan; does that assist my Lord?

MR JUSTICE CALVERT-SMITH: It does.

MR WHITTAM: Leave to appeal sentence was refused and at the

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start of the hearing, the Lord Chief Justice explained to counsel in today's case that his judgment in his appeals yesterday, he did not think they said anything different than in the case of **R v P** and the **R v Blackburn**.

MR JUSTICE CALVERT-SMITH: The problem that will have to be highlighted, that probably we are going to have to discuss this morning, is the danger of -- not suggesting it is this case at all; in fact quite the contrary -- but the danger of a defendant drip-feeding the system with information and coming back every so often and saying, "Can I have a bit more off my sentence, please?" And I believe, in argument, the hypothetical possibility that he might actually end up in credit at the end of that progress against the next sentence he got.

Clearly, I think the Lord Chief Justice -- what I have heard, although, as I say, I have not seen a transcript -- was anxious to point out to the appellant's counsel and the applicant's counsel in that case that he would not necessarily get the full discount, particularly if there was at least a possibility that further information might come to hand which is, of course, this case, so it does seem to me that it is a matter that --

MR WHITTAM: There is plainly a relevance as to, putting it

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bluntly, double accounting.

MR JUSTICE CALVERT-SMITH: Exactly. Well, thank you for that. Your information coincides with mine. As I say, I have a transcript of the previous case which, in fact, does not impinge, really, on our facts at all.

MR WHITTAM: I do not -- unless my Lord thinks it appropriate -- need to deal with the precise detail of the content of the contract signed under this Act.

MR JUSTICE CALVERT-SMITH: No, I have read that and understood it.

MR WHITTAM: And the content of Mr McAulay's report as to the quantity of contact.

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: Save, perhaps, as just to indicate -- and I raise this with Miss Forshaw and I raise it in case my Lord has any objection -- it would seem to us appropriate simply just to mention the motivation that the defendant has had, because that seems to us to be relevant and that is set out in Mr McAulay's report, tab 2. It is simply paragraphs 38 to 41.

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: And that as my Lord has indicated that, of course, there was from this defendant previous assistance before his first sentence and, therefore, although the level of cooperation has have been variable

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over time, the current level of cooperation is high and the defendant's main motivation is to prove that he has renounced terrorism not purely through words but by actions and he sees himself and others like him as victims manipulated and exploited by the likes of Osama Bin Laden and Khalid Sheikh Mohammed, and that he has firm beliefs that Al-Qaeda has hijacked Islam, misinterpreted the religious creeds for his own ends and thereby manipulated and pressured many Muslims into terrorist-related activities.

My Lord, I could continue --

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MR JUSTICE CALVERT-SMITH: Clearly, some support for what you have read is given by the fact that he has entered into this contract knowing that there is an outstanding indictment against him in the States.

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MR WHITTAM: Purely for quantity and relating only to that which he has given since his sentence, he was, as the phrase is used, interviewed 55 times in scoping interviews; that was some almost 45 hours of interviews. He was assessed of being of potential use in between 12 and 18 future trials and the evidential debrief was some 112 interviews over some 26 days.

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MR JUSTICE CALVERT-SMITH: Yes. He clearly, because of his particular mental abilities, has the ability to be of enormous assistance.

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MR WHITTAM: He is assessed as being highly intelligent and having a particularly good recall of --

MR JUSTICE CALVERT-SMITH: So I see.

MR WHITTAM: -- relevant detail.

MR JUSTICE CALVERT-SMITH: So far it has checked out?

MR WHITTAM: Yes, it has.

MR JUSTICE CALVERT-SMITH: Right.

MR WHITTAM: In essence, the matter for my Lord to determine is the additional discount, if any, that would be appropriate.

MR JUSTICE CALVERT-SMITH: Perhaps I could explore with you to what extent on the authority of Blackburn, which is really the only authority on numbers, so to speak, to the extent to which the Court's hands are tied. If we go straight away to the transcript of Mr Justice Fulford's sentencing remarks at page 7, at F and onwards.

MR WHITTAM: Yes.

MR JUSTICE CALVERT-SMITH: He now refers to what should read "Mars Jones J" -- since I was junior counsel for the Crown in the case I can remember it -- and the sentence of Nezar Hindawi.

Stopping there for a moment, my recollection of the sentencing regime in 1986 was that Hindawi would have served -- and therefore is possibly still serving; I do

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be a sentence of 60 years in Hindawi, as it were.

MR WHITTAM: Precisely.

MR JUSTICE CALVERT-SMITH: Assuming parole was granted. And then he (inaudible) the alternative of an indeterminate sentence accompanied by a substantial tariff which would of course be the time actually served and then released following that tariff period, so that in Mr Justice Fulford's remarks -- and, of course, I am trying to get what was going through his mind --

MR WHITTAM: Of course.

MR JUSTICE CALVERT-SMITH: He was thinking of an actual time to be served of 25 years minimum --

MR WHITTAM: Yes.

MR JUSTICE CALVERT-SMITH: -- following a trial. With that in mind, he then passed a sentence which was just over a quarter of the determinate sentence of 50 years and half the actual.

MR WHITTAM: Yes.

MR JUSTICE CALVERT-SMITH: And the Lord Chief Justice's remarks in Blackburn suggest that three quarters is -- absent exceptional circumstances -- the most discount that should be afforded in cases of this kind, so that on those figures as set out by Mr Justice Fulford, he has just about had the maximum discount, less 6 months, in fact.

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not know -- 30 years.

MR WHITTAM: As I understand it, my Lord, that is right.

MR JUSTICE CALVERT-SMITH: The ability to apply for parole under the next sentencing regime at half time had not come in.

MR WHITTAM: As I understand it, not at the time of that sentence.

MR JUSTICE CALVERT-SMITH: Because in the end, we are looking at actual time to be served, it seems to me, though they might have to compare different sentencing regimes over a different period, Mr Justice Fulford then went on to say that the Court of Appeal rejected Hindawi's appeal and went on to indicate that a determinate sentence of 50 years or more would be appropriate in this defendant's case following a trial and now at the time Mr Justice Fulford said that in April 2005, my understanding was that the ability to apply for parole was in, or was it?

MR WHITTAM: When Mr Justice Fulford passed sentence he would have been able to apply for parole after one half.

MR JUSTICE CALVERT-SMITH: After 25 years of a 50-year sentence.

MR WHITTAM: And the Secretary of State --

MR JUSTICE CALVERT-SMITH: So actually, in order to achieve the actual time served -- even to equal it -- it would

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MR WHITTAM: Yes.

MR JUSTICE CALVERT-SMITH: However, far be it for me to say Mr Justice Fulford fell into error, but I do think actually 60 years was the figure which would have acquainted with the Hindawi sentence and if he was, as he was rightly doing saying that in these turbulent times sentencing levels actually should increase and, of course, since then they have increased substantially, he might have said something more like 70 years or even 80, bearing in mind that Mr Barot, whose name features somewhere in these papers I noticed, received a minimum term of 40 years on a life sentence, I think.

MR WHITTAM: Yes, he did.

MR JUSTICE CALVERT-SMITH: It was reduced, but he pleaded guilty.

MR WHITTAM: Yes.

MR JUSTICE CALVERT-SMITH: And sentences on the London bombers were 40.

MR WHITTAM: I can check; 40.

MR JUSTICE CALVERT-SMITH: Because I am currently trying a case as you well know, Mr Whittam, and Mr Justice Henriques sentenced the principal defendant in the airline case to a minimum of 40 years, which is equivalent to 80, so I think I may be entitled to say that even though it looks as though Mr Justice Fulford

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was attempting to give this person the maximum discount, absent exceptional circumstances, he perhaps did not.

If the mathematics had been done differently and, of course, we are now measuring against a higher sentencing tariff as a result of 21/7, the Barot case and the airline bombers.

MR WHITTAM: Yes.

MR JUSTICE CALVERT-SMITH: Does that accord?

MR WHITTAM: My Lord, it does. There has plainly been an increase and the Court of Appeal has made it plain why and in that context the original case would have to be seen in the light of its timing, less than three months after -- if I can call it -- 9/11 had occurred.

MR JUSTICE CALVERT-SMITH: True.

MR WHITTAM: And therefore the timing of the effect at that time, had this defendant and another succeeded in what they were seeking to do, the combined effects would have justified in putting it within the new regime, if I can put it in those terms.

MR JUSTICE CALVERT-SMITH: It is a similar case that is currently before Woolwich Crown Court, albeit the consequences of that may have been even more so.

That is very helpful. Perhaps I could come back to you.

MR WHITTAM: Unless there is anything else I can assist you

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with.

MR JUSTICE CALVERT-SMITH: Thank you very much.

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Miss Forshaw, you have been listening to what has
being going through my mind --

MISS FORSHAW: Carefully.

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MR JUSTICE CALVERT-SMITH: -- and have you any submissions
to make as to any further discount on the substantial
discount?

MISS FORSHAW: No.

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MR JUSTICE CALVERT-SMITH: It is clear Mr Justice Fulford --

MISS FORSHAW: My Lord, I could repeat, I suppose, word for
word what my Lord has just said, but there is no
point -- I will put it less elegantly -- and, of course,
I agree with that reasoning and it must be right.

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MR JUSTICE CALVERT-SMITH: Yes. I think so and it would
give the Court some --

MISS FORSHAW: Some leeway.

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MR JUSTICE CALVERT-SMITH: -- elbow room, as it were. Yes.

Mr Whittam, is there anything so far as -- and
bearing in mind you are well instructed today --
practical arrangements are concerned? Just suppose, so
far as the prison service was concerned, he would be
free to apply for parole very soon -- as it were, today.
Clearly it would have to go to the Parole Board.

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MR WHITTAM: If it is parole, it would have to be dealt with

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as an application.

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MR JUSTICE CALVERT-SMITH: Yes, and that would be an expedited one.

MR WHITTAM: I assume it could be expedited and I see that the person who has been dealing with the --

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MR JUSTICE CALVERT-SMITH: Are you able to tell me or can you take instructions as to which category prisoner he currently is?

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MR WHITTAM: I can answer that easily: he is currently A because of the nature.

MR JUSTICE CALVERT-SMITH: That might be difficult for parole.

MR WHITTAM: May I take some direct instruction?

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MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: I am very grateful. I have asked Mr (inaudible) to stay close by in case my Lord has any questions.

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MR JUSTICE CALVERT-SMITH: Yes please.

MR WHITTAM: The position is his category has only remained because of the process that he has been going through and once it is resolved at this court, that matter can be changed very swiftly.

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MR JUSTICE CALVERT-SMITH: Yes. I know from sitting in another jurisdiction that it is very difficult for prisoners who have not been re-categorised down to C to

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get parole.

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MR WHITTAM: That is the reason the categorisation has remained.

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Secondly, if there was -- and we would have to consider the mathematics of it -- such a sentence passed that allowed him to be released or the Secretary of State would be obliged to release him but on licence, if he fell in that period between --

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MR JUSTICE CALVERT-SMITH: That would be a very substantial reduction.

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MR WHITTAM: That could be faxed through, but equally, in relation to an application of parole, the probation service at the appropriate level are aware and I am told that that can be substantially expedited and therefore there is the machinery available to alter his categorisation and to expedite any application for parole and I think to allow that to be considered, as I understand it, certainly in a matter of a very few weeks, if not shorter.

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MR JUSTICE CALVERT-SMITH: Yes. One cannot forget Blackburn -- (inaudible) the court not to forget -- that this is a very, very serious criminal offence here despite the fact that there has been a very welcome change of heart and the positive contribution thus far made by this defendant to the administration of justice in the

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United States.

Very well, are there any other matters that either of you wish to raise?

MR WHITTAM: May I just check? No thank you, my Lord.

Unless there are any specific questions, there is nothing we seek to add.

MR JUSTICE CALVERT-SMITH: I will rise for a few moments.

(A short adjournment)

MR JUSTICE CALVERT-SMITH: In the latter months of 2001, this defendant lent himself to a conspiracy to detonate shoe bombs on an aircraft bound for the United States. A co-conspirator of his actually boarded such an aircraft and attempted to detonate a bomb. This defendant, however, who, from his basis of plea, indicated that he had been having second thoughts for some time, eventually, a very few days before he was due to carry out his part of the conspiracy, indicated by email to those who were directing his movements, that he was not prepared now to go through with it.

The result was that he did not board an aeroplane and in fact stored the explosives and the detonator with which he had been supplied to commit the offence at his home, while destroying the shoes which had been adapted for the purpose of getting on board an aeroplane undetected. That remained the position for very nearly

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two years, during which time he disassociated himself completely from those who were minded to carry out acts of terrorism and attended a religious college in Lancashire.

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In November of 2003, he was arrested and immediately confessed to his part in the conspiracy of 2001 and indicated, before the police commenced their search of his home and later the college at which he was studying, where they would find the articles to which I have referred. In due course, he pleaded guilty to conspiracy to endanger the safety of an aircraft and came before Mr Justice Fulford for sentence. Between plea and sentence, he gave a good deal of assistance to the prosecution authorities in this country. However, the report which I have been shown and was before the sentencing judge on that occasion indicated that his cooperation, although extensive, had clearly not been full and there were a number of areas in which he was clearly holding things back.

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However, perfectly properly, the nature of the information he had given, and the importance of it to the investigation of terrorism in this country, was put before Mr Justice Fulford, who had the difficult job of reconciling the gravity of the offence to which he pleaded guilty with the subsequent change of heart and

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positive assistance that had been given.

On 22 April 2005, he passed a sentence of 13 years' imprisonment indicating that had this been the case in which the defendant had pleaded not guilty and been convicted, either a determinate sentence of 50 years or upwards or an indeterminate sentence accompanied by a substantial tariff period to reflect such a determinate sentence would have been passed. He said that the matters that had been put before him, together with the undoubted facts of the plea of guilty and the two-year period during which he had led a blameless life enabled him to reduce the sentence to a sentence of 13 years.

Since then, and in particular this year, I have been provided with material which indicates that the reticence or limit to cooperation provided by this defendant has disappeared and that he has, as it were, cleared the slate so far as his own involvement is concerned, but more importantly for the purposes of these proceedings, has also given information which suggests he would be able to -- and he has expressed a willingness to -- give evidence against some very, very serious offenders currently in the United States.

Accordingly, the new provisions of the Serious Organised Crime and Police Act of 2005 have come

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in to force on 1 April 2006 and an agreement has been reached which he has signed with a specified prosecutor and the specified prosecutor has now referred the sentence back to this court.

Mr Justice Fulford, who would normally have reconsidered the sentence, as I am doing, is presently a judge in the International Criminal Court and therefore unable to sit in his domestic jurisdiction. I have read documents -- which I accept -- which first, together with submissions made by counsel, have caused me to make an order that there be no publication of the fact of this hearing until further order and have caused me to reconsider and adjust the sentence passed to reflect the assistance given and the contract signed by this accused.

The problem has been in computing the extent of any further discount. Although it is not possible to ascertain exactly the way in which Mr Justice Fulford reached the term of 13 years, it seems fairly clear that he was in fact discounting almost three quarters of the sentence that he was considering.

I have been supplied with the judgment of the president, as he then was, Sir Igor Judge in the case of *R v P* and *R v Derek Blackburn*, 2008, 2 Cr.App.R (S) 5. In that case, the president gave general guidance going

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beyond the facts of the instant cases before him as to the extent of discount which should be accorded to defendants under the new regime and he indicated that absent exceptional circumstances, the maximum discount available under these provisions should be three quarters of the total sentence and that the normal discount should be in the order of one half and two thirds of the sentence which would otherwise have been passed.

As I have said, it is too difficult to compute exactly the sentence which was in Mr Justice Fulford's mind, bearing in mind that there would have had to have been the discount for plea and other, no doubt, material of mitigating circumstances which would have had to have been taken into account.

On the basis that I have outlined of a 50 plus year determinate term of a plea of not guilty or a similar tariff period, together with a life sentence or a sentence of imprisonment for public protection and bearing in mind, as I do, that the tariff sentence for this type of offence is, in fact, now much higher than even the figures given by Mr Justice Fulford then, I have been somewhat constrained, it seems to me, in the extent of the further discount I am able to afford this defendant.

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His earliest current parole eligibility date is May 2010 and he is only eligible for automatic release because of the sentencing regime under which this sentence was passed in July 2012 with a licence period extending to August of 2013. I have made enquiries as such are possible and proper as to the parole situation and have been informed that it would be possible for him to be re-categorised in reasonably short order.

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It seems to me that when, as will undoubtedly be the case one day, the public in this country reads the sentence which was eventually passed upon this man, no doubt together with reading of the assistance that he may then have given to the authorities in the United States, they would be appalled if a sentence which was less than the one that I am about to pass had been passed, in spite of the cooperation since. I know -- and it is to his credit -- the defendant has never, in all the marathon interviews to which he has taken part to generate the possibility of his giving evidence in these cases in the United States, sought a reduction himself in his sentence, albeit, of course, he has understood that it may well be a by-product of his cooperation which is due, as Mr Whittam stressed this morning and is accepted by the authorities, to

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a complete change of heart and a desire to expose those who would use one of the world's great religions to commit very serious crimes.

The upshot of the process through which I have gone in attempting to achieve a just answer which would not go against the commonly understood notions of justice in this country is that I am prepared to reduce the sentence to one of 11 years' imprisonment from the current sentence of 13 years. That, I understand, will allow for the defendant to apply for parole from today.

MR WHITTAM: My Lord, can I just deal with some practical matters, if I may. In relation to the reporting restriction, would my Lord allow the officer who has been dealing with this defendant to communicate to the Parole Board that my Lord had passed such a sentence as it was your understanding.

MR JUSTICE CALVERT-SMITH: Yes.

MR WHITTAM: It would allow him to be re-categorised and therefore allow him to apply for parole, because that might assist the process.

MR JUSTICE CALVERT-SMITH: Yes and I would also licence, unless you had any objection, either of you, to that person to inform the Parole Board that the matters which have caused the reduction in sentence are of such moment that if the case could be brought forward, it should be.

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MR WHITTAM: My Lord, I am most grateful for that and that will assist there enormously.

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MR JUSTICE CALVERT-SMITH: I know there is a huge backlog of work for the Parole Board but clearly, albeit you told me the proceedings are unlikely to come into being until some time next year, preparation will need to be made well before then.

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MR WHITTAM: Precisely, my Lord.

As far as the --

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MR JUSTICE CALVERT-SMITH: I would hesitate about anything further than that and I would quite like to see, if you do not mind, to make sure the order is not inadvertently breached and somehow creeps out. If you could let me have it.

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MR WHITTAM: If I may liaise with my Lord's clerk. If we draft a short paragraph and it will be confined to that.

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MR JUSTICE CALVERT-SMITH: Certainly including my encouragement to the Parole Board on the information I have received to expedite a hearing, if that is possible.

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MR WHITTAM: My Lord, thank you.

So far as the transcript of the proceedings are concerned, I am instructed that it would assist if my Lord was to direct a transcript be available within seven days. It will assist its production.

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MR JUSTICE CALVERT-SMITH: Is that practical? I will make that order.

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MR WHITTAM: So far as the list of personnel present in court, does my Lord wish to see it?

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MR JUSTICE CALVERT-SMITH: No, thank you. I can trust you, Mr Whittam and Miss (inaudible) sits behind you. Nobody came in who should not have. Providing it is held --

MR WHITTAM: We have it and their designations.

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As far as the documents are concerned, does my Lord want to retain my Lord's bundle. Should we keep all those and the originals again --

MR JUSTICE CALVERT-SMITH: Every single document you have provided me with is in this file.

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MR WHITTAM: That will be retained by the specified prosecution. Unless there are any other matters that I can assist my Lord with.

MR JUSTICE CALVERT-SMITH: Thank you very much, Mr Whittam.

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Miss Forshaw.

MISS FORSHAW: My Lord.

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MR JUSTICE CALVERT-SMITH: You will no doubt explain to your client what has gone on. It may have been confusing at times. The position is that he will be in a position to apply for parole very, very shortly.

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MISS FORSHAW: My Lord, there is one matter I am instructed to raise with my Lord as a result of something which has

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been routed by email communication with your Lordship's clerk. It is just this: the industry of my instructing solicitor in this case is so far not remunerated at all.

MR JUSTICE CALVERT-SMITH: I had not been made aware of that.

MISS FORSHAW: I was simply asked, I think --

MR JUSTICE CALVERT-SMITH: Is there no provision for -- no, I suppose the legal services would not even be told the identity of the accused.

MISS FORSHAW: As a matter of fact there was a legal aid order made in relation to Imran Khan, who initially represented this defendant. It was under the VHCC regime, as I understand it. When my instructing solicitor --

MR JUSTICE CALVERT-SMITH: Let us cut through this. What are my powers? If I can order a proper legal aid certificate for the purposes of the preparation of and the conduct of this hearing, I will.

MISS FORSHAW: I am told all my Lord has to say is that a legal aid order ought to be made in this case.

MR JUSTICE CALVERT-SMITH: I will say that then, if that is sufficient to your purposes.

MISS FORSHAW: I am told it is.

MR JUSTICE CALVERT-SMITH: And I am grateful to the two of you for the obvious care which you have dealt with these

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proceedings.

MISS FORSHAW: I am grateful and that legal aid order should cover preparation.

MR JUSTICE CALVERT-SMITH: Preparation and today's hearing.

MISS FORSHAW: And would my Lord say continue if representation is considered in his best interests during briefing procedures which I understand are going to be taking place not only with the United States but with our own --

MR JUSTICE CALVERT-SMITH: That sounds to me, Miss Forshaw, without chapter and verse, as being something that is beyond the remit of a judge to order. That sounds more like duty solicitor --

MISS FORSHAW: I am not entirely sure how that regime is ever authorised but I thought if I did not ask I would not get --

MR JUSTICE CALVERT-SMITH: I will make my own enquiries about that and if I can so order then I will because clearly there is more work to be done and I would not want your instructing solicitor to have to do it *pro bono*.

MISS FORSHAW: Yes.

MR JUSTICE CALVERT-SMITH: But I am not sure of my powers in that regard.

MISS FORSHAW: I suspect he would any way; I was just trying

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to be rather protective of him, my Lord. In any event,
to cover today and preparations for today and if there
is any route through which he can --

MR JUSTICE CALVERT-SMITH: Continue to represent?

MISS FORSHAW: -- be properly remunerated for any assistance
I know he proposes to give him in future.

MR JUSTICE CALVERT-SMITH: I do not know how this is going to be
handled with the Parole Board, but they will have to
know who he is or somebody at the Parole Board will have
to know who he is and consider an application. I think
he has behaved himself in the sort of way that would
give confidence to the Parole Board to release him early
and I am quite sure that persons who are making that
sort of application can apply for and get legal
assistance. Am I wrong?

MR WHITTAM: As far as I am aware they are, but I am afraid
I am not privy.

MR JUSTICE CALVERT-SMITH: Those who sit behind you; you
have somebody who may know more than you do.

MR WHITTAM: I am afraid not in the detail that my Lord
would require.

MR JUSTICE CALVERT-SMITH: No.

MR WHITTAM: If we can be of any assistance --

MR JUSTICE CALVERT-SMITH: Those people who have appeared in
the constant extreme in the last few years before the

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Administrative Court, complaining that their cases have not been reached or that they are still category A and have not been re-categorised, they all seem to have legal aid, so I do not think there should be a problem with that. If it was concerning that application, I think that would require a fresh -- the question is further debriefs.

MISS FORSHAW: And what happens to him if he, for example, is to go to the United States and when he is represented not just in this country pending that date but, my Lord, the problem has been -- and I am sorry because it seems rather undignified to raise it before my Lord --

MR JUSTICE CALVERT-SMITH: I understand.

MISS FORSHAW: -- but the problem is because it is so confidential one cannot even ask around about others who might have been in a similar position, nor can we reveal our position to the legal aid board.

MR JUSTICE CALVERT-SMITH: You cannot. I might be able to, as a general enquiry.

MISS FORSHAW: Thank you. That is really what I was asking rather impertinently.

MR JUSTICE CALVERT-SMITH: Very well. Thank you.

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We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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Signed on behalf of WordWave International Limited.

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