Case No: 201401659 C4, 201401814 C4,
201602628 C1, 201602631 C1,
201701474 C1, 201701476 C1,
201702315 C1, 201702318 C1

Neutral Citation Number: [2017] EWCA Crim 1228

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT AND THE CROWN COURT AT LIVERPOOL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2017

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE HALLETT
Vice President of the Court of Appeal Criminal Division
and
MR JUSTICE GOSS

- -

Between:

Regina	**Respondent**
- and -	
Janhelle Grant-Murray and Alex Henry	**Applicants**
Regina	**Respondent**
- and -	
Joseph McGill, Corey Hewitt and Andrew Hewitt	**Applicants**

- -
- -

Sallie Bennett-Jenkins QC for the **Applicant Grant-Murray**
David Bentley QC and **Peter Marshall** for the **Applicant Henry**
Jacob Hallam QC for the **Respondent in the first application**

Henry Blaxland QC and **Shahida Begum** for the **Applicant McGill**
Joel Bennathan QC and **Joanne Cecil** for the **Applicant Andrew Hewitt**
Mr Tim Moloney QC and **Jude Bunting** for the **Applicant Corey Hewitt**
NR Johnson QC and **Anya Horwood** for the **Respondent in the second application**

Hugh Southey QC for the **Intervener in the second application, The Equality and Human Rights Commission**

Tom Hickman for the **Ministry of Justice** in the application on sentence in the second application

Hearing dates: 14 and 15 June and 11 and 12 July 2017

- -

Judgment

Lord Thomas of Cwmgiedd, CJ:

This is the judgment of the court to which we have all contributed

1. These two renewed applications for leave to appeal, (1) R v Grant-Murray and Henry and (2) R v McGill, Corey Hewitt and Andrew Hewitt, were heard together as the grounds raised related to the decision of the Supreme Court in *R v Jogee* [2016] UKSC 8. In addition, the second application raised issues relating to the trial of young defendants in the Crown Court.

THE APPLICATIONS OF GRANT-MURRAY AND HENRY

2. On 12 March 2014 at the Central Criminal Court before HH Judge William Kennedy and a jury, the applicants Grant-Murray and Henry were convicted of the murder of Taqui Khezihi (the deceased) and the wounding of his brother Bourhane Khezihi with a knife contrary to s.18 of the Offences Against the Person Act 1861. Their co-accused, Cameron Ferguson, changed his plea to guilty on both counts. A further co-accused, Younis Tayyib, was acquitted. Henry was sentenced to life imprisonment with a minimum term of 19 years, less time on remand.

3. The applicants renew their application for leave to appeal after the Single Judge refused their application. The grounds are:

   i) The judge erred in his rulings relating to the admission of bad character evidence; and

   ii) The judge misdirected the jury on joint enterprise following the change in the law in *R v Jogee* [2016] UKSC 8; an extension of time is needed for this ground of appeal. It is contended there would be a substantial injustice if the conviction was not quashed.

   iii) Fresh evidence has become available evidence of Henry's subsequent diagnosis of autism; he makes an application under s.23 of the Criminal Appeal Act 1968 (the 1968 Act) to call medical evidence.

   iv) 'Fresh evidence' emerged at the sentencing hearing of Ferguson when Ferguson's counsel admitted on his behalf that he had inflicted the fatal wound to the deceased and the wound to his brother. Grant-Murray makes an application under s.23 of the 1968 Act to call evidence of counsel's submissions.

Factual background

4. Shortly before 3 p.m. on the afternoon of 6 August 2013 the four defendants, who knew each other well, were together at the Arcadia shopping centre in Ealing Broadway. Grant-Murray and Tayyib left together and headed along the Mall, Ealing towards the latter's home in Northcote Avenue, a street which ran south from the Mall. Henry and Ferguson remained at the shopping centre for a while.

5. The deceased, his brother, Bourhane, and two friends, Thompson and Tijani went in Tijani's car to the *Costcutter* supermarket which is on the corner of Northcote Avenue

and the Mall. When they arrived the deceased's brother Bourhane and two of the others went into the *Costcutter* supermarket.

6. As Grant-Murray was walking down Northcote Avenue, he encountered the deceased and his friends on Northcote Road, where they were standing by their car. A spontaneous confrontation occurred between Grant-Murray and the deceased and his brother Bourhane; it is not clear why the confrontation took place, but it may have been triggered by a stare. Tayyib arrived and attempted to act as a peacemaker.

7. Grant-Murray walked away, but he was followed by the deceased and his friends. The confrontation continued and steadily escalated. At about 3.09 p.m. Grant-Murray went into *Costcutter* and took a bottle of wine. He then returned to confront the group with it. Bourhane took off his belt and held it ready to use as a weapon if necessary. A CCTV camera showed them in Northcote Avenue at about 3.09 p.m.

8. At about 3.10 p.m. Grant-Murray used his phone to make a call to a friend who was not one of the defendants. Bourhane gave evidence that Grant-Murray said "bring the nank" which he understood as a request that a knife be brought to the scene. Grant-Murray denied saying this. Grant-Murray also made two calls to Ferguson. It was accepted by the prosecution that the calls did not connect and therefore nothing was said to Ferguson.

9. The deceased and Bourhane crossed the Mall into a side road, Hamilton Road, that ran in the opposite direction to Northcote Avenue. Grant-Murray and Tayyib followed them, Grant-Murray holding the bottle.

10. Henry and Ferguson by this time had left the shopping centre and were walking along the Mall towards the junction with Northcote Avenue. At 3.12 p.m. CCTV showed them on the Mall. A witness described hearing Grant-Murray shout "hurry up come on". As they approached they ran across the Mall to join Grant-Murray and Tayyib who were on the other side of the Mall.

11. Bourhane heard Grant-Murray shout that he and his brother were "fucked now". A violent confrontation took place a short way into Hamilton Road after its junction with the Mall. It was observed by numerous witnesses; none of these saw knives used. Bourhane claimed he saw Ferguson and Henry with a knife. The deceased and Bourhane were both stabbed in the back. This part of the incident was not captured on CCTV, but the police subsequently found the bottle of wine taken by Grant-Murray discarded in some bushes just off Hamilton Road.

12. At 3.13 p.m. CCTV recorded Ferguson crossing the Mall and then running up Northcote Avenue. He can be seen carrying a belt which came from the deceased and Ferguson's bloodstained polo neck shirt was found discarded in an adjoining street. Ferguson, Grant-Murray, Henry and Tayyib met up later in Ealing.

13. It was Henry's evidence that Ferguson confessed to stabbing the deceased and his brother.

The trial

The respective cases of the prosecution, Henry and Grant-Murray

14. The prosecution case was that after the confrontation began, Grant-Murray called one of his friends to ask him to bring a knife, although it was accepted in the course of the trial, as we have set out, that Grant-Murray did not ask Ferguson to bring a knife as the call did not connect. However, when Grant-Murray saw Ferguson and Henry had arrived in the Mall after he had crossed the road in pursuit of the deceased and his brother, he called for their assistance knowing they would be armed, as was their habit, with knives. All four men were involved in a joint attack on the two brothers. It was the prosecution case that the persons who stabbed were Ferguson and Henry.

15. Grant-Murray and Henry both said that that they had no knowledge that Ferguson or any other co-accused was in possession of a knife.

Ferguson's plea

16. On the sixth day of the trial Ferguson pleaded guilty to both counts. The prosecution case following this plea was that there was adequate evidence to show that Henry also stabbed the deceased. Alternatively, the prosecution contended he was guilty on the basis of secondary liability, as were Grant-Murray and Tayyib.

17. After Ferguson's plea there was discussion regarding the precise basis upon which he had pleaded as it was contended by the other defendants that it was relevant to the trial as a whole. Ferguson's legal team said that Ferguson was unwilling to see Henry's legal team. His counsel said:

> "[Henry's] solicitor has no right to see my client. Advantage is being taken of the fact that he is at the Central Criminal Court and he would not be able to be seen in Belmarsh."

Further legal argument followed. Counsel for the others expressed concern that if there was no clarity about the basis of plea, and particularly whether Ferguson accepted responsibility as a principal, they would be unable to address a jury with certainty and clarity regarding the positions of their own clients. However, the judge concluded that the position of the other defendants was largely unaffected by the plea. They were entitled to address the jury on the basis that Ferguson was a principal, and whether the evidence supported that contention was a matter for the jury.

18. The judge's direction to the jury in his summing up was that Henry could either be convicted on the basis of primary or secondary liability. He further directed that Ferguson's plea could not by itself prove anything except the murder of the deceased and the offence against Bourhane and Ferguson's participation in the commission of each offence.

19. Following the conviction of Henry and Grant-Murray it became clear during sentencing that Ferguson's basis of plea was that he had stabbed both the deceased and Bourhane.

20. We turn to the grounds of appeal.

Ground I: There would be a substantial injustice as the directions given did not accord with the law as established in the decision in *R v Jogee*

21. The ground relating to *R v Jogee*, was not before the single judge as his decision was made before the judgment of the Supreme Court. As the application was made out of time and in respect of a change in the law, both Grant-Murry and Henry had to establish that substantial injustice would arise if their appeal was not allowed: see *R v Johnson and others* [2016] EWCA Crim 1613.

22. The direction of the judge made clear to the jury that before they could convict either Grant-Murray or Henry as a secondary party, they had to be sure that he:

    i) knew that a knife had been taken to the scene by another; the judge emphasised the need for proof of knowledge of the knife, as distinct from belief or suspicion.

    ii) anticipated (or realised) that that other person would or might use that knife intentionally to kill or to cause grievous bodily harm and

    iii) participated in the stabbing by intentionally encouraging another or intentionally assisting it to happen; they had to be sure that his intention by his actions or words when present at the scene was to encourage or to assist the stabbing.

23. Thus it must be clear that the jury concluded, if they convicted Henry on the basis of secondary liability and Ferguson on that basis, that each knew Ferguson had a knife and participated in the attack with that knowledge. It would have been a ready inference that each knew Grant-Murray would or might intentionally use the knife to kill or cause really serious bodily injury. As regards Grant-Murray, his shouting out "you're fucked now" after the arrival of Henry and Ferguson was powerful evidence that he appreciated that they were armed and would use the knives to kill or cause really serious bodily injury. There is therefore no basis for contending that if the jury had been directed in accordance with the law as set out in *Jogee* it would have reached a different conclusion on the evidence before them. There is therefore no ground upon which it can be contended that substantial injustice would arise.

24. Henry, however, further contended that, if we admitted the fresh evidence relating to his autism, we should approach the issue on the basis of the law as set out in *Jogee* and not the former law. We defer considering that issue until we have determined the admissibility of the evidence of autism – the third ground of the application.

Ground II: The admission of bad character evidence

25. This ground is advanced by both Grant-Murray and Henry. It is necessary briefly to set out the background.

Application to adduce bad character evidence of Bourhane

26. Bourhane gave evidence in which he stated that neither he nor his brother were aggressive people, and that they had seen nothing like the present circumstances since they were aged about 11 or 12. Defence counsel sought to adduce bad character evidence going to the aggression and credibility of both Bourhane and the deceased; each had convictions for offences of violence.

27. The judge gave a preliminary ruling indicating that if such bad character evidence were adduced, it would entitle the prosecution to adduce the previous convictions of the accused. The application was withdrawn following this preliminary ruling.

The previous convictions of Grant-Murray, Henry and the other defendants

28. Grant Murray had a number of previous convictions. Three related to knives:

    i) His conviction on 21 September 2010 of possessing a bladed article in a public place. Police officers had seen him in a group; when they approached, he ran away and was seen to throw an object into some bushes. In the bushes the police found a small, silver coloured lock knife.

    ii) His conviction on 9 December 2011 of harassment and possession of a knife. He had been among a group which included Tayyib who were threatening another young man. Grant-Murray and Tayyib were part of the group that was in joint possession of a knife.

    iii) His conviction on 8 April 2013 of possession of a knife. He had been stopped on 5 April 2013 in Home Farm Road, Ealing and found to have a small silver coloured lock knife in his trousers. The blade was approximately 5cm long and the width approximately 2cm at its widest point. The handle of the knife was approximately 7cm long; it was fitted with a clip.

29. Henry also had a number of previous convictions dating from June 2007 for assault and other offences. He had a conviction for possession of a bladed article in a public place. This conviction was on the same day (8 April 2013) and at the same court as Grant-Murray, though the offence related to a different incident. Henry was seen by police officers in Osterley Park Road in Southall. He had pulled an item from his trousers and discarded it. It was seized and found to be a small silver coloured lock knife; the blade was approximately 5cm long and the width approximately 2cm at its widest point. The handle of the knife was approximately 7cm long; it was fitted with a clip.

30. Tayyib and Ferguson each had one conviction for possessing a knife, respectively on 9 December 2011 and 17 May 2012.

Admission of bad character evidence

31. The prosecution subsequently applied to adduce the convictions of Henry, Grant-Murray and Tayyib under s.101(1)(d) of the Criminal Justice Act 2003 (CJA 2003) and that of Ferguson under s.101(1)(b). It was submitted that the convictions were admissible as evidence as it was significant evidence showing that each knew that it was likely that the others were carrying a knife that day.

32. All the defendants argued that previous convictions for possession of a knife could not, in the context of a spontaneous and unplanned confrontation, be relevant to the question of knowledge that Ferguson (and/or Henry) were armed with a knife. Moreover, although the prosecution presented their submission as a matter in issue between the prosecution and the defence, they were in fact making an argument about

propensity. This was logically flawed; there was no evidence to support knowledge of a knife prior to the spontaneous explosion of violence.

33. The judge held that the convictions demonstrated a familiarity with the possession, production and use of knives in violent encounters in public places, and so met the test of relevance and admissibility under the CJA 2003.

The submission on the appeal

34. It was initially submitted on behalf of Grant-Murray that the judge had been wrong in both his rulings; the application in respect of the first ruling was abandoned before us. The point pursued before the single judge and us by both Grant-Murray and Henry was that the judge had been wrong in his second ruling because the convictions could not be relevant to the issue as to whether the defendants knew it was likely that the others would carry a knife.

35. In a short but characteristically succinct decision, the single judge rejected this ground of appeal as unarguable. The previous convictions for possession of knives were relevant and admissible as they made it far more likely that Grant-Murray did call for a knife over the phone, that Ferguson and Henry came to the scene themselves carrying knives, that Ferguson and Henry each knew that the other was carrying a knife and when Grant-Murray said upon arrival of Ferguson and Henry to the other group that they were "fucked now", he did so because he knew that Ferguson and Henry arrived armed with knives.

36. In our view, the single judge was unarguably right and we therefore refuse the renewed application. It is not necessary for us to say more as the reasoning of the single judge was as full as the point deserved. No arguments of any different kind were advanced before us.

Ground III: Application to adduce fresh evidence relating to Henry's autism

The background to the application

37. It was clear from the materials placed before us that Henry had a significant history in relation to behavioural problems which originated at least from 2002; he was assessed on several occasions to ascertain if he had any mental illness.

38. No reliance whatsoever was placed on his having any mental illness during the trial.

39. After his conviction his mother, Dr Halsall, sought evidence of Henry's mental illness. She, apparently, has some kind of medical training as a clinical psychologist, although no proper information was made available to us about her medical specialism. We understand that in 2014 she was employed as a clinical trials manager of the psychology Department of the Institute of Psychiatry in London.

40. She provided a statement to the court in support of the application to adduce fresh evidence from Professor Baron-Cohen. We heard *de bene esse* the evidence of Professor Baron-Cohen, Professor of Developmental Psychology at the University of Cambridge and Director of the Autism Research Centre at Cambridge University. We

then suggested a waiver of privilege and the production of all documents relating to Henry's medical history, as neither Professor Baron-Cohen nor those instructing him had sought to obtain such a history before he arrived at his assessment of Henry having autism.

Henry's medical history and the position at trial

41. Pursuant to the order we made, some material was produced. It is necessary to set it out in some detail as the prosecution relied on it in support of their submission that the evidence of Professor Baron-Cohen should not be received under s.23 of the 1968 Act:

i) Henry was born on 3 December 1992. His parents separated in 2000 and went through an acrimonious separation and divorce.

ii) He was first referred to the Child and Adolescent Mental Health Service for assessment in February 2001 when he was 8 on the basis of his disruptive behaviour. Although the family was offered two appointments, they did not attend. He was referred again in August 2002 when he was 9. As the report of Dr Ndukwe of the neurodevelopmental team at Windmill Lodge, Southall (a unit of the Child and Adolescent Mental Health Service (CAMHS) run by the West London Mental Health Trust) set out, no evidence of mental illness could be diagnosed. The assessment showed he was a very anxious child who probably felt overwhelmed by the hostility between his parents after an acrimonious separation. There was the possibility of mild depression. Thereafter there were frequent reviews of his progress and condition; reports showed he had friends and enjoyed being the centre of attention.

iii) In May 2006, he was assessed by Ms A Hilton, a consultant family therapist at Windmill Lodge, after his exclusion from school in March 2006. He was placed on a treatment waiting list. He was again assessed by a senior social worker in September 2006; this showed his home life did not provide boundaries for behaviour appropriate to his age. The medical notes disclose continued supervision. His mother, Dr Halsall, asked whether a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) or Autism Spectrum Disorder was being considered, though she had only seen him once a week since 2002 as she found him difficult to control. Henry described his activities as including football, Sudoku, bike rides and socialising or hanging out with friends.

iv) On 21 November 2006, he was assessed by Dr Rebecca Martyn, a clinical psychologist at Windmill Lodge, as the school from which he had been expelled thought he might have ADHD. His previous history was reviewed. The doctor concluded that his behavioural problems stemmed from his parents' acrimonious divorce and the large amount of unsupervised time outside the home.

v) In May 2007, Henry and a co-defendant assaulted two males; he punched them in the groin. A Youth Offender Panel assessment recorded that he was said by his father to be a member of a gang; he told the panel he had about 20 friends

whom he preferred to be with. The report noted he appeared to have a large friendship group.

vi) In June 2007, when he was 14, he was assessed by two educational psychologists employed by Ealing Borough Council who produced a report dated 7 July 2007. By that time he was living with his father, but out a lot on his own and involved with the MDP gang; he had been permanently excluded form school. His mother considered he had characteristics of ADHD, Obsessive Conduct Disorder and Conduct Disorder. Various recommendations were made as to his future, but there was no diagnosis of any mental illness.

vii) In the autumn of 2007, Henry's mother wrote expressing her concerns as to the risks posed by Henry to himself and others; in her view there were signs of obsessive compulsive disorder. She asked for therapeutic intervention to prevent this. In the autumn of 2007 and early 2008 there were extensive meetings of experts responsible for his behaviour, including the youth offending team, as he continued to commit criminal offences and to be member of the MDP gang and heavily involved in its activities. It was agreed during these meetings that there were no symptoms to do with ADHD or autistic spectrum disorder. He was noted as being a bright 15 year old who was articulate and charismatic.

viii) On 21 June 2008 Dr Dee Arnand, a chartered psychologist with very extensive experience, produced a report for the Acton Youth Court in respect of a serious case of assault and false imprisonment Henry committed with 9 others. The lengthy and thorough report set out a detailed analysis of Henry's history, a record of the interview with Henry and his father, the assessment of Henry. The report noted that there was not enough evidence to make a diagnosis of Conduct Disorder, though he exhibited some of its traits. He may have exhibited some symptoms of predominantly Hyper-active type ADHD. There was no suggestion of autism. The report recorded that Henry saw his mother for an hour once a fortnight and his association with others in criminal activity had had a significant impact on his behaviour.

ix) In April 2009, he was charged with using threatening and insulting words or behaviour with a group of 4 other boys; the Youth Offender panel report recorded that he had a large group of friends with whom he was besotted; he was progressing on a Prince's Trust Course. He was made subject to an anti-social behaviour order.

x) Later in 2009, he lived with his mother in Aylesbury for 9 months as part of his conditions, but this terminated when she handed him back to the Ealing Youth Offender Service in December 2009. A report in March 2010 recorded he had been mixing with a different group in Aylesbury and was doing well; when he moved back to live with his father he resumed contact with his associates in Ealing.

42. Although he was represented by Mr McCorry, a solicitor on several occasions, Mr McCorry was never informed and never perceived that Henry suffered from any form of mental illness or disability.

The reports and evidence of Professor Baron-Cohen

43. Henry's mother approached Professor Simon Baron-Cohen in April 2015 and the Professor agreed to assist him *pro bono*. Professor Baron-Cohen runs a clinic for people "seeking a diagnosis of autism".

44. He first examined Henry in June 2015 for two hours at the prison at which Henry was held. He thereafter received an anonymous letter stating that Henry was 'pulling the wool over his eyes'. He therefore examined him again on 17 December 2015 in the same prison.

45. The only previous medical history of which the Professor had knowledge at the time he made his reports and gave evidence to us was the report of two educational psychologists employed by Ealing Borough Council and dated 4 July 2007 to which we have referred at paragraph 41(vi). As Professor Baron-Cohen explained to us, he had received information from Henry's mother relating to Henry's background; he considered he could reach a diagnosis without any knowledge of the medical history beyond the one report to which we have referred. He said he took into account the mother's motivation in wanting to prove her son had autism.

46. In his reports and in his oral evidence to us Professor Baron-Cohen gave his diagnosis that Henry had autism at the time of the murder of the deceased. It was a neurodevelopmental condition which meant that the brain developed differently. It had two principal effects: first it affected social development and communication; second it produced narrow interest obsessions, a difficulty in adjusting to social change and sensory hypersensitivity.

47. From what he had been told by Henry's mother and from Henry's own account to him, Henry had shown both of these characteristics. There was no doubt he had autism at the time of the murder. It was not uncommon for the diagnosis to be overlooked, as autism was sometimes described as an "invisible disability".

48. His autism would have had two principal effects:

    i) Difficulty in properly processing in his mind the circumstances as they presented themselves to him on the day of the murder and therefore making any decision in relation to the attack on the deceased. His autism may have led him to believe in a black and white morality requiring him to protect his friend; as the incident in which Henry was involved lasted so short a time, his autism would have given rise to sensory overload and therefore may have made it difficult to assess the consequences of his actions. This could go to his "no comment" interview and to his comprehension of Ferguson's intention to use the knife. Without an awareness of Henry's autism the jury would not have known how Henry's mind and brain worked and how it might affect his behaviour, particularly when under stress; common sense inferences would not necessarily be drawn.

    ii) Difficulty in communicating. Although Henry was capable of effective participation at the trial and giving a coherent logical account, his autism would have been relevant to the jury's assessment of his credibility, as autism affected both verbal and non-verbal communication skills. If advised to make

a no comment interview, he might just rigidly apply that advice, though he had of course not done many things he had been told to do. Knowing he had autism might affect the way in which the jury interpreted his answers.

49. Professor Baron-Cohen also considered that autism would have been relevant to his previous convictions, as being aggressive can be part of autism.

50. The prosecution in cross-examination challenged the diagnosis on the basis that Professor Baron-Cohen had not obtained Henry's full medical history and had relied on the account of Henry's mother which was self-serving. She had, for example, provided evidence of Henry's obsessions; of his lack of friends; and saying he could not travel on his own when he clearly could. Professor Baron-Cohen did not know of other material matters such as Henry's fondness for football and playing it with friends and his visits to youth clubs.

51. On being shown the transcript of the evidence given at trial by Henry in relation to his reaction when he arrived at the scene, he accepted that someone with autism would be able to interpret who was being confronted and how that person might have felt if confronted; it was quite a simple emotional situation. He accepted that Henry was able to give a coherent account of what he and other people did; he re-phrased his view to say that as those with autism might have sensory overload, "it may mean that his decision making during the incident was not optimal".

52. After seeing the additional material which we have summarised at paragraph 41, Professor Baron-Cohen stated in a report dated 11 July 2017 that the reports of Henry's assessments of August 2002 and July 2007 set out symptoms consistent with a developmental history of an autism spectrum condition which was not diagnosed. His report did not contain the kind of analysis of a defendant's history that the court ordinarily would expect in a case of this seriousness, though the members of the court have noted other occasions when some psychologists have given an opinion without obtaining the full medical history or providing an analysis of it.

The submissions

53. It was argued on behalf of Henry that the evidence of Professor Baron-Cohen should be accepted as showing that Henry had autism at the time of the murder of the deceased. This was fresh evidence which could now have been called at trial, as despite all the referrals made in respect of Henry, autism was never diagnosed. Knowledge of autism would be relevant to the assessment of the state of mind of Henry at the time of the incident and to his credibility. It would therefore be important for the jury to know of the diagnosis just as knowledge of Asperger's syndrome was found by this court to be similarly relevant and of assistance to the jury in *R v Thompson* [2014] EWCA Crim 836 at paragraphs 30 to 34. We do not think that case is of any real assistance, as it is the duty of the court to consider in each case the relevance of such evidence to the issues in the case; a court is not assisted by cases that may, as *Thompson* did, turn on their own facts.

54. It was submitted that the court should consider the new evidence in relation to the law as set out in *Jogee* as what was not required was a conditional intent; his autism would be relevant to determining whether he had that conditional intent.

55. It was also submitted on his behalf that if we accepted that the fresh evidence should be admitted, we should substitute a conviction for manslaughter rather than order a re-trial.

56. The prosecution submitted that the court could not be sure that Professor Baron-Cohen's evidence was capable of belief as no disclosure had been made of the medical history and privilege had not been waived. After the prosecution had received the medical history we have set out, they contended that the evidence of Professor Baron-Cohen was not capable of belief as the account given by Henry and his mother on which Professor Baron-Cohen had based his opinion was at variance with what the reports disclosed – particularly:

    i) Those who had examined him over the years who had obtained information from a wide variety of sources had found he was not suffering from autism spectrum disorder.

    ii) Henry was out-going, had many friends and was capable of presenting himself in many guises.

    iii) For the greater part of the time between 2002 and the murder in 2013, he had been residing at his father's home; he was only with his mother for limited periods and she could not therefore give the necessary information to Professor Baron-Cohen

57. There was nothing to show that there was a reasonable explanation for the failure to adduce the evidence at the trial. In any event the prosecution submitted that there was no basis for saying that Henry's autism as described by Professor Baron-Cohen could be relevant to the decision of Henry to participate in the attack on the deceased and his brother. It could only go to the ability to explain himself.

Our conclusion

58. This court made clear in *R v Erskine* [2010] 1 WLR 183, [2009] 2 Cr App R 29 the approach that should be adopted to the receipt of fresh evidence under s.23 of the 1968 Act.

> "Virtually by definition, the decision whether to admit fresh evidence is case- and fact-specific. The discretion to receive fresh evidence is a wide one focussing on the interests of justice. The considerations listed in subsection (2)(a) to (d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and

> persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the "interests of justice" test will be satisfied."

59. In determining the interests of justice we have therefore looked particularly at the information provided to Professor Baron-Cohen, his evidence and his reports, the circumstances in which the trial took place and what must have been known to those representing him and the effect such evidence would have had if it had been before the trial court. We have also taken into account the well-known test in *Pendleton* [2001] 1 WLR 72 namely, whether, if such evidence had been before the jury whether it might reasonably have affected the decision of the jury to convict. Ultimately, we have to determine whether to admit the evidence by taking into account these factors in considering whether it is in the interests of justice that the evidence be admitted.

60. We have no doubt about the expertise and integrity of Professor Baron-Cohen. However, in assessing his evidence, we have taken account of the fact that he expressed his views without obtaining the full history of Henry, considering it and analysing it for the benefit of the court. It is in our view insufficient simply to say that the diagnosis of autism is often missed without, in a case such as this, carefully analysing and explaining why over a 10 year period, despite protestation by Dr Halsall to the professionals involved, those who had examined him and worked to try and help Henry had been so wrong. Furthermore, although Professor Baron-Cohen told us that he had discounted Dr Halsall's motivation, the information provided to him was limited by the fact that Henry had only lived part of his time with her; the much more significant material was that to be found by a careful and critical examination and detailed analysis of the information relating to the time he had spent with his father, as set out in the extensive history. Even when Henry had spent time with his mother at Aylesbury in 2009, a report shows he had friends; those friends and a change of location had led to a considerable improvement in his behaviour. This was in contradistinction to his behaviour when he was with the friends and gangs with whom he associated in Ealing when living with his father who provided little, if any, supervision or structure to his life. Henry was not a person on the materials before us who was of the type described by his mother as socially isolated or as someone who spent time in his room on his own.

61. Furthermore, in the light of the detailed history we have set out, we would have expected a detailed explanation from the lawyers who accepted they had acted for him for sometime as to why no one had obtained a medical report for the trial. We have had no such proper explanation.

62. Finally, we have assessed the two ways in which it is said that knowledge of the autism might have had an effect. It seems to us, having regard to all the evidence, that it can have had no effect on the issue of Henry's thinking process at the time of the murder in the respects identified by Professor Baron-Cohen. Henry's own evidence did not show he had any such difficulty; he explained he went to the aid of a friend and acted as he did to protect his friend and himself. Even Professor Baron-Cohen accepted, as we have set out at paragraph 51, the autism which the Professor diagnosed "may mean that his decision making during the incident was not optimal".

63. Nor in our judgment would knowledge of autism (on the assumption that Professor Baron-Cohen's evidence was accepted by the jury) have had any material effect on

the assessment of his credibility, taking into account the very significant amount of additional information about his background and his association with gangs and his long history of criminality that would have had to have been put before the jury.

64. Therefore taking into account all these factors in reaching our judgement in the interests of justice under s.23 of the 1968 Act, we decline to receive the evidence. This ground of appeal therefore fails.

The position of Grant-Murray

65. Although this ground of appeal relates primarily to Henry, it was also relied upon by Grant-Murray. It was submitted that if the court concluded that if the jury had known of Henry's autism and this might have made a difference to the decision of the jury on Henry's credibility, then this would also have had an impact on the position of Grant-Murray.

66. We would not have accepted this submission, even if we had admitted the evidence of Professor Baron-Cohen. The judge carefully directed the jury to consider the position of each defendant separately and carefully summed up the evidence against each. They would therefore have assessed the *mens rea* of each and the credibility of each. There is no basis for saying that if fresh evidence had been admitted in relation to Henry, it could have any effect on the safety of the conviction of Grant-Murray.

Ground IV: The effect of Ferguson's plea

67. Grant-Murray sought to adduce Ferguson's basis of plea as advanced by his counsel in his submissions as fresh evidence. Henry had initially also sought to rely on this ground, but abandoned it at the hearing of the appeal.

68. The single judge refused leave for a number of reasons. Each was sufficient in itself to make this ground of appeal unarguable. Following his plea Ferguson was competent and compellable at the trial. If his evidence was to be relied on, as appears to be the case for this argument to have been pursued on appeal, it is impossible to discern a reasonable explanation for the failure to adduce the evidence at trial. Even if he were not a cooperative witness; that was the time at which to call him, not on an appeal. It was therefore not fresh evidence. Moreover, there was no statement from Ferguson; it was therefore difficult to understand what 'fresh' evidence exists that could be admitted at a new trial. Even if there had been, that would not have obviated the need to call him at a trial.

69. This ground of appeal is hopeless.

The application for leave to appeal against sentence

70. It was submitted that in the event we dismissed the renewed application in respect of conviction, we should review the sentence passed on Henry as his autism was a mental disability and was therefore a mitigating factor under paragraph 11(c) of Schedule 21 to the CJA 2003.

71. For the reasons already given, we do not accept that the evidence of Professor Baron-Cohen and his diagnosis of autism, provides any significant mitigation for the offence. At worst Henry suffered from mild mental illness that was immaterial to his

culpability for murder. It is not therefore a factor to which the trial judge would have given much, if any, weight in assessing the length of the minimum term, if he had been informed about it. The trial judge fully and fairly reflected all the relevant aggravating and mitigating factors in the sentence imposed. Accordingly, the application for leave to appeal against sentence must fail.

THE APPLICATIONS OF MCGILL, ANDREW HEWITT and COREY HEWITT

72. The applicants McGill, Andrew Hewitt and Corey Hewitt were convicted of the murder of Sean McHugh (the deceased) at the Crown Court at Liverpool before the Recorder of Liverpool, HH Judge Goldstone QC, and a jury on 7 May 2014. Their co-accused at trial, Reece O'Shaughnessy and Keyfer Dykstra, were also convicted of murder. A further co-accused, Francis Lowe, was acquitted of both murder and manslaughter. McGill, Andrew Hewitt and Corey Hewitt were all sentenced on 9 July 2017 to be detained at Her Majesty's Pleasure, with minimum terms of 9 years for McGill, 9 years for Andrew Hewitt and 6 years for Corey Hewitt, less time on remand.

73. Each applicant applies for an extension of time of between 2 to 3 years in which to make applications for leave to appeal against conviction and sentence. The reasons advanced for the grant of the extensions of time is that none of the applicants' instructed trial counsel lodged grounds of appeal; fresh counsel have been instructed and the applicants would suffer substantial injustice if time were not extended. All applications, including applications to rely on fresh evidence have been referred to the Full Court by the Registrar.

Factual background

74. The facts relating to the murder and respective cases for the prosecution and defence can be summarised shortly.

75. The evidence before the court was that the defendants at the trial were members of a gang known as the Laneheads; they met at a cinder path near to a laundrette in Priory Road, Anfield, Liverpool where they kept their weapons. The deceased was from Walton, Liverpool. It was believed he had been a member of a gang known as the Walton Village Heads which was involved in a fight with the Laneheads gang. Dykstra, a member of the Laneheads, had been stabbed in July 2013. The gang had shouted they were going to kill the deceased.

76. On 30 September 2013 the deceased, aged 19, and a friend, Josh Williams, went to the Liver Laundrette to wash his clothes. A dispute arose and he ran back into the laundrette at 7.03 p.m. He was followed two seconds later by Keyfer Dykstra (then aged 14), and a second after that by McGill (then aged 13). The deceased threw his phone to the proprietor, Collette O'Donoghue, and asked her to call the police. She did so. He barricaded himself inside a small room at the back of the laundrette. Dykstra was at that time unable to open the door leading into the back and left the

laundrette followed by McGill. Dykstra, who had a knife in his hand, pursued the deceased's friend, Josh Williams, who had fled from the laundrette.

77. The main room was covered by a CCTV camera; the back room was not. McGill returned to the laundrette and kicked at the door to the back room where the deceased was hiding; he then spread liquid detergent on the floor outside the door. Within 4 seconds Andrew Hewitt (then aged 14) and Corey Hewitt (then aged 13) arrived with other youths. Efforts to open the door failed. They left.

78. Forty five seconds later McGill returned, followed 25 seconds later by Andrew Hewitt, Corey Hewitt and by O'Shaughnessy (then aged 19) who carried a sheathed swordstick. Within 7 seconds they had been joined by Dykstra. The youths made several efforts to force the door open. Corey Hewitt threw a bottle of detergent against the door. They all left.

79. After another 45 seconds McGill, Corey Hewitt and Andrew Hewitt, returned. Further efforts were made to force the door. Next to appear was Keyfer Dykstra. Five minutes and 8 seconds after the deceased had first closed the door on his pursuers it was forced open by Dykstra and Andrew Hewitt.

80. No sooner had they gone in than Corey Hewitt and McGill ran through the launderette towards the back, together with a hooded youth, alleged by the prosecution to be Francis Lowe. McGill was in the back room for 8 seconds. As McGill emerged from the back room Reece O'Shaughnessy ran through carrying the swordstick. Within seconds of his going in, Andrew Hewitt ran out. The first to emerge after Andrew Hewitt was the hooded youth, then 26 seconds after he had gone in, O'Shaughnessy, this time holding the sheath of the swordstick. Twenty five seconds after him, Dykstra ran out, followed 4 seconds later by Corey Hewitt carrying the blade of the swordstick.

81. In the 6½ minutes or so after the deceased had first run into the laundrette and shut himself in behind the door leading to the back, he had been fatally stabbed by the swordstick, either inside the room or outside in the alley. A black-handled knife in two parts bearing DNA which matched Dykstra, but none of the other defendants, was left on the floor of the back room.

82. The deceased left the premises, bleeding, and died of his wounds a few days later. No injuries were caused to anyone else. The evidence of the pathologist was that the fatal injury was consistent with having been caused by a sword.

83. The evidence of three of the other witnesses was significant:

    i) The manageress of the laundrette was in the back room when the deceased, who was panicky and scared, ran back in. She heard the door being kicked and banged. She could hear shouting, words to the effect of "We're going to get you. We're going to hurt you. We're going to fucking kill you." After she had called for the police on the deceased's mobile phone, she went outside at the back of the premises. The banging on the door stopped momentarily. She heard more banging and shouting. Suddenly someone was on the floor with more than one person standing over him. She heard more than one

person shout, "We're going to fucking kill you" whilst the deceased was on the ground.

ii) Philip Seery, who was in the vicinity saw the chase back to the laundrette and the attempts by the youths to open the back door. They appeared to be encouraging each other. He was told by the group that the man in the laundrette had "stabbed one of our mates".

iii) Sara Overend, a teaching assistant at Joseph McGill's school said that on 1 October 2013 he had told her that he would not be in school the following day. He had been carrying a knife and his friend had used it. The comments were made to her in a fitness class and repeated in a maths class, adding 'something about a laundrette'.

The prosecution case at trial

84. The prosecution case was that the behaviour of the applicants and their co-accused bore the hallmarks of a gang, calling themselves 'the Laneheads', and what they had in mind when they went after the deceased was to take part in or watch a revenge attack for an earlier stabbing of Dykstra. The gang had a regular meeting place nearby on a cinder path where they kept and replaced weapons for their use whenever the need arose. Although the jury might not be able to be sure who delivered the fatal stab wound to the deceased, they could be sure that they were separately and together lending themselves to an attack to which they knew a blade or blades would be taken and would be used or there was a real risk that they would be used.

85. As against each of the applicants the prosecution case was:

i) McGill had admitted in interviews that he was a gang member, had a connection to the cinder path used by the gang and had been there with Dykstra, Corey Hewitt and Andrew Hewitt earlier in the evening. He joined the chase of the deceased because he was told to by a boy on a bicycle whom he would not name but was admitted to be Dykstra. He followed the deceased into the laundrette. Dykstra kicked at the backroom door, as did he. Dykstra eventually kicked through the door and pulled a knife, which he later described as a 'little machete', out of his waistband. He said he left as he did not wish to become involved and that he did not know any of those chasing was armed with a weapon. He thought the group would chase the deceased, give him a beating and then let him go. He sprayed the detergent on the floor to make the chasing group slip up and not to hinder the deceased. The prosecution also relied on the CCTV recording of his behaviour by spraying liquid detergent on the floor, and spreading it around, kicking the door and poking at a letterbox in the door, and the evidence of Sara Overend, the teaching assistant, said the he had a knife and his friend had used it. He did not give evidence.

ii) Corey Hewitt, in interview, admitted being present but initially said he did not see any weapon and was not aware of any swordstick. In his fourth interview, he said O'Shaughnessy had stabbed the deceased, poking him in the thigh more than once; he picked up the knife that had been thrown down by O'Shaughnessy, to provide cover for him. In evidence, he said he followed others into the back room in order to watch the fight. He saw the swordstick,

which was pulled from its sheath by O'Shaughnessy, who prodded the deceased to his leg with it. The deceased went out of the back door to the alleyway. He followed Dykstra back through the laundrette picking up the sword from the floor, in order to protect O'Shaughnessy.

iii) Andrew Hewitt had said in interview that the deceased had threatened to kill him that night. He admitted that he had tried to kick open the door but had no intention of doing anything once he got through the door. He was hit by something and ran out of the back room. He did not hear any threats to kill. In his third interview he said he had seen a "big knife" being pulled out by Reece O'Shaughnessy but he had not seen the stabbing. He did not give evidence.

The defence case made by the applicants at trial

86. The case made by each of the applicants can be summarised:

i) McGill's case was that what he had said in interview was the truth. He was only in the back room for less than 8 seconds. There was no reliable evidence to demonstrate that he knew about the presence of a knife, far less that he intended or foresaw that it would be used. He left before the swordstick arrived into the backroom. Sara Overend was unreliable, his DNA was not found on the knife and his remarks were misunderstood.

ii) Corey Hewitt's case was that he lacked the foresight to be part of a joint enterprise.

iii) Andrew Hewitt's case was that he was not part of a gang and met the others by coincidence. The swordstick was produced shortly before he left the room; he would have had little time to see it and was not in the vicinity by the time it was used. He had no intention to kill or cause serious injury.

The grounds of the applications for leave to appeal

87. As we have said, the renewed applications were made two to three years after the trial by freshly instructed counsel and not by those who had represented the defendants at trial; McGill's application was made on 20 May 2016, Corey Hewitt's was made on 30 March 2017 and Andrew Hewitt's on 22 May 2017. Each of the applicants therefore required a significant extension of time for their applications for leave to appeal and to satisfy the court that they met the threshold.

88. The grounds for the applications contained initially many more grounds than were relied on by the end of the application before the court. The bases on which the applications were advanced by that time were the following:

i) All three applicants rely on grounds relating to misdirection on joint enterprise following *R v Jogee* [2016] UKSC 8, and regarding the personal characteristics of the applicants.

ii) Each applicant contends that he was unable properly to participate in the trial and therefore his right to a fair trial was breached.

a) McGill who was born on 5 October 1999 was aged 13 at the time of the murder (though within a few days of his 14th birthday). He was 14 at the time of the trial. It was contended that because he was not properly able to participate in the trial in accordance with procedures applicable to persons of his age he had been denied a right to a fair trial. No application was made by his trial counsel, Stuart Driver QC and Miss L Birkett, for him to sit outside the dock. Even if no application had been made the judge should have ordered him to sit outside the dock or given reasons for not so ordering. As he had sat within the dock, he was unable to participate effectively in the trial; he had not given evidence because of the pressure he had been under from his co-accused whilst sitting in the dock. In support of this ground, an application was made under s.23 of the 1968 Act to admit the fresh evidence of Dr Enys Delmage, a Consultant in Adolescent Forensic Psychiatry at St Andrews Hospital, Northampton. We heard that evidence over a video link *de bene esse*.

b) Corey Hewitt who was born on 7 October 1999 was at the time of the murder aged 13 (though within a few days of his 14th birthday). He was 14 at the time of the trial. It was contended that because he was not properly able to participate in the trial in accordance with procedures applicable to persons of his age he had been denied a right to a fair trial. Like McGill, he relied on the fact that no application was made by his trial counsel, Andrew Fisher QC and Alaric Walmsley, for him to sit outside the dock and the judge had not ordered this. He had given evidence, but the judge did not control the cross-examination by the prosecution so that it properly followed the procedures applicable to young persons.

c) Andrew Hewitt who was born on 17 October 1998 was at the time of the murder aged 14 (though within a few days of his 15th birthday). He was 15 at the time of the trial. It was contended that he was unable to participate effectively in the trial as he had no intermediary for the conferences with his legal advisers, John McDermott QC and Michael O'Brien, in the period prior to the trial. He had therefore been denied his right to a fair trial. He did not give evidence.

iii) All three applicants further contend that their mandatory sentences of detention at Her Majesty's Pleasure are arbitrary and incompatible with Articles 3 and 5 of the ECHR.

iv) The minimum terms imposed were manifestly excessive.

Ground I: The directions of the jury on joint enterprise under the law before the decision in *R v Jogee* and tailoring the directions for young defendants

89. All the applicants advanced the ground of appeal that, after the decision of the Supreme Court in *R v Jogee*, the judge erred in directing the jury that foresight of at least really serious harm was sufficient to give rise to liability as a secondary party, though their respective grounds express the submission in slightly differing terms.

90. McGill seeks leave on two further bases, first that there was failure to direct the jury to consider his age, immaturity, cognitive ability and Attention Deficit Hyperactivity Disorder (ADHD) in relation to the issue of his foresight of the commission of the crime and his actions in withdrawing from the incident and, second, that the legal directions as to joint enterprise ought to have been tailored to consider his youth, development, maturity and intellectual ability. Corey Hewitt also complains that the judge erred in failing to tailor the directions on joint enterprise to consider his age, developmental maturity and cognitive disability.

91. After summarising the respective arguments and the background to the events in the laundrette, the judge gave an introductory direction in relation to joint enterprise that accorded with the conventional direction pre *Jogee* and the fact they did not need to be sure who stabbed the deceased before they could convict a defendant of murder. At the conclusion of his summing-up, he provided the jury with a written 'route to verdict' through a series of questions they should ask themselves which he proceeded to go through with them.

> "*Question 1*:
>
> Am I sure that SM, Sean McHugh, was deliberately stabbed?
>
> If the answer is 'no', verdict for all, not guilty.
>
> If the answer is 'yes', consider question 2.
>
> *Question 2*:
>
> Am I sure that X, that is the defendant whose case I am considering, deliberately stabbed Sean McHugh?
>
> If the answer is 'yes', consider question 3.
>
> If the answer is 'no', consider question 4.
>
> [So we will consider question 3 first.]
>
> *Question 3:*
>
> Am I sure that when he deliberately stabbed Sean McHugh X intended either to kill him or to cause him really serious injury, that is a murderous intent?
>
> If the answer is 'yes', your verdict in relation to the stabber will be guilty of murder.
>
> If the answer is 'no', your verdict in relation to the stabber will be not guilty of murder, guilty of manslaughter.
>
> *Question 4*:
>
> Am I sure that X knew, before the stabbing occurred, that a sword or other bladed instrument had been brought to the fight?

If the answer is ‘no’, your verdict is not guilty.

If the answer is ‘yes’, you will consider question 5.

Question 5:

Am I sure that X took part by active involvement, that is by means of actions, words or encouragement in the fight as opposed to being a mere bystander?

If the answer is ‘no’, your verdict will be not guilty.

If the answer is ‘yes’, consider question 6.

Question 6:

Am I sure that X who (a) knew before the stabbing occurred that a sword or other bladed instrument had been brought to the fight, and (b) took part in the fight with SM, Sean McHugh, (took part that is as defined in question 5), either intended that the sword or other bladed instrument was to be used, or saw a real risk that it might be used?

If the answer is ‘no’, your verdict will be not guilty.

If the answer is ‘yes’, then you will go on to consider question 7.

Question 7:

Am I sure that X who (a) knew before the stabbing occurred that a sword or other bladed instrument had been brought to the fight, and (b) took part in the fight either intending that the sword or other bladed instrument was to be used, or, seeing a real risk that it might be used, had not withdrawn from the joint enterprise at the time of the stabbing?

If the answer is ‘no’, your verdict will be not guilty.

If your answer is ‘yes’, you will then go on to consider question 8.

Question 8:

Am I sure that X, who, (a) knew before the stabbing occurred that a sword or other bladed instrument had been brought to the fight, and (b) took part in the fight, either intending that the sword or other bladed instrument was to be used or saw a real risk that it might be used, and, (c) either intended that the sword or other bladed instrument was to be used, and (d) had not withdrawn from the joint enterprise at the time of the stabbing, either intended that the sword or other bladed instrument was to

be used with murderous intent (for which go back to question 2)?

If the answer is 'yes', your verdict will be guilty.

If the answer is 'no', your verdict will be not guilty of murder but guilty of manslaughter.

Our conclusion

92. Consistent with the approach adopted by this court in *Johnson* [2016] EWCA Crim 1613, we consider the strength of the case that the applicants would not have been convicted of murder if the jury had been directed in accordance with the law as set out in *Jogee*.

93. By their verdicts, we infer that the jury made the following findings of fact:

i) This was an attack to which each of the applicants, together with Dykstra and O'Shaughnessy, were involved. The participants chased and/or knew that the deceased was trapped in a room. There was a common purpose to 'get' the deceased and cause him serious bodily harm.

ii) Each of the participants had agreed to carry out the venture of attacking the deceased and was liable for the acts to which they expressly or impliedly assented, namely the infliction of really serious bodily injury or the stabbing of the deceased.

iii) Each of them knew of the sword and/or knife and the intention for it to be used.

94. Accordingly, given the jury's findings of fact, putting on one side the individual additional grounds advanced on behalf of McGill and Corey Hewitt, their verdicts post *Jogee* would have been no different. We are satisfied that there has been no injustice, let alone substantial injustice.

Submissions on tailoring the directions

95. Turning to those discrete grounds, it is argued that it was wrong to have directed the jury in standard terms and in terms applicable to all defendants. There was no modification to take into account:

i) the age of individual defendants and no direction to the jury as to how properly to assess the reaction and response of a 13 year old child with difficulties;

ii) in the case of McGill his cognitive ability was in the bottom 5% for children of his age and he had been diagnosed with ADHD so that he could become distractible and physically agitated, as demonstrated in his police interviews. In the case of Corey Hewitt, he had an IQ of 69 and overall was operating at the second percentile.

These matters were relevant to the jury's consideration of foresight and intent and more generally principles of secondary liability.

96. It was submitted that children are 'doubly vulnerable' because of their young age and developmental immaturity, their needs, including learning disabilities, mental health problems and communication difficulties. These vulnerabilities serve, in addition to developmental immaturity, to constrain the ability to act freely and maturely, raising further questions about culpability. (See further the *Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court*, chaired by Lord Carlile of Berriew QC, June 2014).

97. Furthermore, it was submitted that there is 'a strong base of emerging evidence highlighting consistent and universal differences in the judgment and consequential thinking processes between children and young people and adults'. The science has significant implications for traditional formulations of culpability. Adolescents, by virtue of their inherent psychological and neurobiological immaturity, are not as responsible for their behaviour as adults. *Roper v Simmons 543 U.S. 551 (2005), Graham v. Florida 130 S. Ct. 2011 (2010), Miller v Alabama, 132 S. Ct. 2455, 2460 (2012).*

98. It was submitted that the issues are compounded when the profile of young offenders is considered, for example socio-economic factors, development, needs, vulnerabilities, history of trauma and abuse and the presence of quite separate mental health and neurodevelopmental disorders. In recognition of the developing science and consequences in the criminal justice system, the Law Commission has recommended discussion of a defence relating to developmental immaturity and capacity.

99. This research, it was submitted, had implications for the approach to be taken to cases involving children and principles of secondary liability. The science went directly to issues of decision making, foresight and consequential thinking. This extended to the directions given to juries which require tailoring to take such matters into account. It was insufficient to provide a jury with the same directions for children in such cases as adult offenders or for children to be judged by the same standards as those applicable to adults.

Our conclusion on tailoring the directions

100. McGill's case was that he appreciated what might unfold and took steps to extricate himself. The jury were aware of his youth and deficits and will have some knowledge of adolescent behaviour; directions tailored to those specific aspects were inconsistent with his case and could not have materially altered or affected the approach of the jury.

101. Similar considerations apply in the case of Corey Hewitt. His case at trial revealed consequential thinking in relation to his removal of the sword-stick. His trial counsel sought a direction in relation to assisting an offender. The jury rejected the defence case.

102. It is also of relevance, though not determinative of the grounds now relied on in the cases of both these applicants, that experienced trial counsel, including leading counsel, did not consider that any specially tailored directions were appropriate. We are quite satisfied that even if such directions had been given in their cases, they could have had no material effect on the jury's approach to its decision-making.

103. Accordingly, the applications in the cases of Joseph McGill and Corey Hewitt for leave to appeal on these further grounds are without merit.

Ground II: The inability of each applicant to participate in the trial and the breach of their right to a fair trial

104. Although each applicant had a different and particular basis for advancing this ground of application for leave to appeal, the common thread was that the trial had not been conducted either by the applicants' then legal advisers or the judge in accordance with the procedures applicable to the trial for young persons of their age. It is convenient first to summarise those procedures.

(1) Criminal Procedure as applied to those under 18

The material provisions

105. Under s.44(1) of the Children and Young Persons Act 1933,

> "Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training."

106. Article 3 (1) of the United Nations Convention on the Rights of the Child 1989 provides that the best interests of the child shall be a primary consideration.

107. In *T and V v UK* [2000] 30 EHRR 121, the Strasbourg court required adaptations to the procedure in criminal trials for young persons so that they could effectively participate in the trial process.

The Practice Direction on the trial of young persons

108. As a result the then Lord Chief Justice, Lord Bingham CJ, issued a practice direction in respect of the trial of young persons to ensure compliance with a young person's right to a fair trial. This required significant adaptations and minimum standards of practice to guarantee a child's effective participation.

109. This practice direction has been modified over the years, in the light of the increased appreciation of the issues judges face when trying children. In 2013, children were recognised as "vulnerable people in court" and a section on intermediaries was introduced. The current *Criminal Practice Directions 2015* [2015] EWCA Crim 1567 consolidated with A*mendment no. 2* [2016] EWCA Crim 17, direct a trial judge to consider a number of supporting measures for vulnerable defendants in accordance with the judge's duty to "take every reasonable step to encourage and facilitate the participation of vulnerable defendants (CrimPR 3.9(3)(a) and (b)) so that they may give their best evidence, comprehend the proceedings and engage fully with his or her defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends. Regard should be had to the welfare of a young defendant as required by section 44 of the Children and Young Persons Act 1933, and generally to Parts 1 and

3 of the Criminal Procedure Rules (the overriding objective and the court's powers of case management).

110. The measures include:

i) There should be the provision of an intermediary for the purposes of preparation for the trial and during the trial and a pre -trial visit arranged where appropriate.

ii) Subject to the need for appropriate security arrangements, and if practicable, the trial should be held in a courtroom in which all the participants are on the same or almost the same level and a vulnerable defendant, especially if young, should normally, if he wishes, be free to sit with members of his family or others in a like relationship, and with some other suitable supporting adult such as a social worker, and in a place which permits easy, informal communication with his legal representatives.

iii) The wearing of robes and wigs should take account of the wishes of a vulnerable defendant.

iv) The conduct of the trial should be according to a timetable which takes full account of a vulnerable defendant's ability to concentrate with frequent and regular breaks, if necessary.

v) The trial judge should ensure, so far as practicable, that the whole trial is conducted in clear language that the defendant can understand and that evidence in chief and cross-examination are conducted using questions that are short and clear. The conclusions of the 'ground rules' hearing should be followed, and advocates should use and follow the advocates' 'toolkits'.

The use of an intermediary

111. The provision of intermediaries for defendants was developed by the court under its inherent jurisdiction. The circumstances where an intermediary is required were explained in *OP v Secretary of State for Justice* [2015] Cr App R 7 at paragraphs 34 and 35 and in *R v Rashid* [2017] 1 WLR 2449 [2017] 1 Cr App R 25, [2017] Crim LR 418 and are set out at paragraphs 3F.11 to 16 of the current Criminal Practice Direction.

Ground rules hearings

112. In several judgments of this court, guidance has been given on the need for ground rules hearing and for a proper approach to asking questions of young persons and other vulnerable witnesses, including defendants. In *R v Lubemba* [2015] 1 WLR 1579 [2014] EWCA Crim 2064 where, having considered the effect of *R v Barker* [2010] EWCA Crim 4, the court stated:

> "39. In *R v Wills* [2011] EWCA Crim 1938, [2012] 1 Cr App R 2, the court endorsed the *Barker* approach and the approach of the Advocacy Training Council (the "ATC") as set out in their report entitled "*Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court*".

40. Experts in the field responded to the ATC's recommendations and produced Toolkits on how to treat vulnerable witnesses fairly and to get the best from them, without undermining the accused's right to a fair trial. The Toolkits may be downloaded at no cost from the Advocates Gateway Website. They provide excellent practical guides and are to be commended. They have been endorsed by the Lord Chief Justice in the Criminal Practice Directions Amendment No. 2 as best practice. The Directions include at 3E.4 the following:

> "All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. For adult non vulnerable witnesses an advocate will usually put his case so that the witness will have the opportunity of commenting upon it and/or answering it. When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions. Where limitations on questioning are necessary and appropriate, they must be clearly defined. The judge has a duty to ensure that they are complied with and should explain them to the jury and the reasons for them. If the advocate fails to comply with the limitations, the judge should give relevant directions to the jury when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance. Instead of commenting on inconsistencies during cross-examination, following discussion between the judge and the advocates, the advocate or judge may point out important inconsistencies after (instead of during) the witness's evidence. The judge should also remind the jury of these during summing up. The judge should be alert to alleged inconsistencies that are not in fact inconsistent, or are trivial."

41. Further, considerable progress has been made in terms of the provision of training for judges and advocates. The aim of the training, which all judges who try cases involving vulnerable witness are expected to undergo, echoes the aim of the Toolkits.

42. The court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. To that end, judges are taught, in accordance with the Criminal Practice Directions, that it

> is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert."

113. It is important to emphasise that these observations apply to defendants as much as to other witnesses. More detail of the conduct of ground rules hearings are set out in Criminal Practice Direction 3E.1 to 3E.6 and Rule 3.9(6) and (7) of the Criminal Procedure Rules. They are also dealt with in the Advocate's Gateway Toolkits which are mandated as best practice by Criminal Practice Direction 3D.7.

Tagged questions

114. It is particularly important for tag questions to be avoided – an issue which arose in relation to the application of Corey Hewitt as we set out at paragraphs 175 -176 and 188-194 below. Tag questions are defined as making a statement with the addition of a short question inviting confirmation, for example, 'John didn't touch you, did he?' or 'John didn't touch you, right?'. Questions of this kind are "powerfully suggestive and linguistically complex". This form of question should be avoided with children. The direct question should be put instead, e.g. 'Did John touch you?'; 'How did John touch you?'

115. Although they should be avoided, this does not mean that all tag questions have an adverse effect, as we explain at paragraph 194 below.

(2) The course of the trial

The pre-trial timetable

116. The first hearing in the Crown Court was on 16 October 2013, just over two weeks after the murder of the deceased. A plea and case management hearing was fixed for 17 January 2014 (when it in fact took place) and a trial date was fixed for 3 March 2014 (when it in fact began).

The facts relating to sitting outside the dock

117. No record appeared in the papers before this court which indicated any consideration had been given as to whether the defendants should sit in the dock. Certainly there is no record of any application being made to the judge during the trial and the judge has confirmed to this court that to the best of his recollection no such application was made. Counsel have all confirmed they made no such application. The transcripts indicate that, despite the clear provisions of the CPR and the Practice Direction, the issue of where the child defendants should sit was never addressed in open court. The judge was never asked to rule on where they should sit. As a result they were all placed in a secure dock.

118. At the PCMH on 17 January 2014, the judge discussed with counsel a number of preliminary issues including special measures such as the use of intermediaries and regular breaks.

119. It was the joint request of all defence counsel that wigs and gowns be worn.

The taking of breaks during the day

120. On 4 March 2014, the second day of the trial, the judge discussed with counsel the breaks that should be taken; the proposal made by the judge was agreed by counsel for all. For the most part, during the trial 20 minute breaks were taken at hourly intervals.

Intermediaries and ground rules hearing

121. At the PCMH on 17 January 2014, the judge made clear that he would consider any application for an intermediary to assist any defendant who needed one; such applications to be served within 28 days. We deal, when considering the case of each applicant, with the specific course taken in respect of the provision of an intermediary for each.

122. On 18 March 2014 the judge directed that a ground rules hearing take place before the defendants gave their evidence; he suggested 20 March 2014. He asked that there be an intermediary assessment. We deal with this in greater detail in respect of McGill (who in the event did not give evidence) at paragraphs 139-141 and following below and in respect of Corey Hewitt (who gave evidence) at paragraphs 173 and following below.

The subsequent course of the trial

123. The prosecution closed its case on 20 March 2014.

124. The judge summed up the case between 28 and 30 April 2014.

(3) The failure to make proper inquiries criticism of the previous legal teams

125. It is clear from what we have already said that this ground of appeal involved substantial implicit criticism of trial counsel representing McGill and Corey Hewitt.

126. As we have noted, the application in respect of Andrew Hewitt was only made on 22 May 2017. Mr Moloney QC sought the trial documents immediately. It was made clear by Mr Moloney to the trial team on 23 May 2017 that he made no criticism of them. It is evident that every possible step was thereafter made to obtain the account of trial counsel and the documents that explained how the defence had been conducted. When these were obtained, the submissions made to us were significantly narrowed.

127. In *McCook* [2014] EWCA Crim 734, [2016] Crim App R 30, [2015] Crim LR 350 this court set out the duty of an advocate instructed by an applicant or appellant on an appeal where the advocate had not been the advocate at trial, irrespective of whether there was any criticism of the trial advocate. The court said:

> "In any case where fresh solicitors or fresh counsel are instructed, it will henceforth be necessary for those solicitors or counsel to go to the solicitors and/or counsel who have previously acted to ensure that the facts are correct, unless there are in exceptional circumstances good and compelling reasons not to do so. It is not necessary for us to enumerate such exceptional circumstances, but we imagine that they will be very rare."

128. Unfortunately, this did not happen in the present appeal, as far as all the applicants are concerned. By the time of the first hearing of the appeal on 15 June 2017, those now instructed by the applicants (McGill and Corey Hewitt) had made some, but inadequate, enquiries of the legal team at trial. One of the teams on the application made a few enquires of trial counsel and then sent them a 39 page draft setting out the grounds of appeal followed by a 28 page finalised grounds.

129. We directed that proper enquires be made and full disclosure given before the resumed hearing on 11 and 12 July 2017. Even then, the enquires were not adequate. We directed that further specific questions which we drafted be put to the previous legal teams.

130. Although applications for leave to appeal which involve either express or implicit criticism of the lawyers at trial, or where the information available to the new advocate is incomplete (for example where an application is made to adduce fresh evidence) ought to be few and far between, we have noted an increase in such cases. There seems to be an assumption that inquiries are only necessary where criticism is made of the trial representatives. That is not the case.

131. For the avoidance of doubt, new advocates instructed in a case, whether or not they believe the grounds involve criticism of the trial representatives, must make all proper and diligent enquires of previous counsel, advocates and solicitors, so that they have all the information properly to understand what took place prior to and during the trial. This will also be necessary in every case involving an application to call fresh evidence. They must then expressly certify in the grounds of application for leave to appeal submitted to the court on form NG that that has been done. The court will not entertain an application without such a certification.

132. As the present applications have shown, a failure to make proper inquires before the application is made can result in very significant extra time and cost being expended and grounds being pursued which are found to be unsustainable.

133. We would emphasise that it is a wholly inadequate compliance with this duty to send the lawyers instructed at the trial the grounds of appeal and to ask for comments. Inevitably the application will be made sometime after the trial and those representing the applicant at the trial must have identified for them the issues that relate to the conduct of the trial which are relevant to the appeal. Specific questions must be formulated and specifically put. Some questions will simply be for information that is not apparent from the papers. In other cases there will be implicit criticism; in such a case there can be no shying away from putting fairly and squarely the implicit criticism of those then acting for the applicant at the trial so that the appellate court has all the information before it when it commences the consideration of the

application. The fact that a trial lawyer might have retired or left the profession to take up office or for some other reason does not excuse the newly instructed advocate from pursuing such inquiries with that person.

(4) **The specific grounds of the application made by McGill in relation to his ability to participate in the trial and the denial of a fair trial.**

The initial position in relation to the provision of an intermediary for McGill

134. In January 2012 McGill had been the subject of psychiatric reports by Dr Kingsley, a consultant child and adolescent psychiatrist at the Cheadle Royal Hospital, following an accident in May 2011 that required the amputation of his finger tip. Dr Kingsley concluded that McGill's overall symptoms at that time met the criteria for post traumatic stress disorder. Moreover, he recommended that, although it was not related to the accident, McGill would benefit from a trial of medication to combat symptoms of ADHD. However, there was no clear evidence that would support a diagnosis of Autistic Spectrum Disorder. In a further report in March 2013, Dr Kingsley noted a significant improvement.

135. At the PCMH on 17 January 2014 (to which we referred at paragraph 121), Mr Driver QC, McGill's trial counsel, told the judge that he had asked for a psychologist's assessment with a view to an intermediary being instructed.

136. The assessment was carried out by Dr Ben Harper, a principal clinical psychologist working within local authority and National Health Service mental health teams, who saw McGill on 31 January 2014 and 3 February 2014; he also carried out a parental interview on 3 February 2014.

137. In his report dated 17 February 2014, he concluded that McGill was an emotionally immature young person with limited intellectual functioning; his overall cognitive ability fell within the 4th Percentile Rank, placing his overall ability within the 'Borderline' range of functioning for children of his age. He had a poor attention span; during prolonged periods of time he would become distractible (physically agitated) and find it difficult to attend to information. Due to his learning needs and his psychiatric diagnosis of ADHD, he would benefit from a Registered Intermediary to enhance his existing comprehension of the court process. He would also benefit from receiving information that had been 'chunked' into basic language appropriate for a 10-11 year old child. However, he had a clear understanding of the approaching trial, including the charge, his plea, and the roles of judge, jurors and prosecution team; he had the ability to make an informed decision on plea.

138. During the trial the judge directed that an intermediary would be authorised to assist McGill (and others), but only with giving evidence.

The assessment by Paula Backen during the trial

139. Paula Backen who then worked at Communicourt attended for an intermediary assessment on 19 March 2014 following the judge's direction to which we have referred at paragraph 122. She was asked to provide an oral report on McGill; she did not do so, but instead was asked to assist on 20 March 2014 in respect of the ground rules to be applied to Corey Hewitt.

140. She was then asked to submit a written report on McGill which she did on 26 March 2014. She saw Dr Harper's report and interviewed McGill in the court cells. She concluded that he coped well with instructing his counsel and had good insight into the court process and his part in the trial. Although there were difficulties with his medication, he coped well with understanding (even without medication). She concluded that there was no need for the presence of an intermediary during his appearance as a witness if basic ground rules (in particular adherence to Toolbox 6 of the Advocates' Gateway) were set and followed. She recommended continued adherence to the practice of breaks and that counsel should encourage him to take his medicine.

141. On 27 March 2014, counsel informed the court that McGill would not give evidence.

142. In addition to her report, Paula Backen provided a written statement; although she was called to give evidence before us in relation to the application by Corey Hewitt (see paragraphs 175 and following), she was also asked some questions by Mr Blaxland QC on behalf of McGill, but nothing emerged which was not covered in her report or her statement.

The report by Dr Harper prior to sentencing

143. On 27 May 2014, following conviction, but prior to sentencing, Dr Harper prepared a second report commenting upon McGill's maturity and intellectual capacity. He stressed that McGill had poor emotion-regulation skills, struggled to learn and internalise new behaviour and would benefit from future offending behaviour programmes that were short and repetitive.

The reports and evidence of Dr Delmage

144. Nearly 18 months after the conviction, Dr Delmage, a consultant in adolescent forensic psychiatry, interviewed McGill in November 2015 for 2½ hours, when he was 16. Dr Delmage spoke to his mother on 22 December 2016. He provided a report dated 20 April 2016 (based on the interview and prior psychiatric reports) on McGill's ability to engage meaningfully with the trial process.

145. He recounted in his report how McGill, despite being told that he and his co-defendants would have a break every hour, said he was often in court from 9 a.m. to 1 p.m. with no breaks. He reported being unable to understand much of the language in court, that the process was not explained to him; that he had not understood that he could ask questions to clarify what he had heard. Additionally, he was not compliant during the trial with medication to manage his ADHD.

146. Dr Delmage concluded in his report that at the time of trial McGill was fit to plead. However, he was "only partially able to give evidence in his defence and did not have a good understanding of some possible types of defence such as duress". Duress would not have been a defence and in his evidence to us Dr Delmage explained the reference should have been to the defence of loss of control. He thought that McGill would have struggled in a court setting and that might have affected his fitness to plead; when his evidence on fitness to plead was challenged in cross-examination, he was evasive and did not answer the questions put. McGill's lack of understanding was said to be due to his low cognitive functioning and inadequately treated ADHD.

Few attempts were made in the Crown Court to promote his ability to understand and participate in the proceedings. Little account was taken of his age, level of maturity, intellectual capacity, or his additional difficulties related to his Hyperkinetic Disorder.

147. At trial Dr Delmage would have recommended:

> "That [McGill] not be kept in the dock with his co-defendants but instead be placed with a family member or other support, be given regular breaks every 30 minutes as recommended in both Dr Harper and Paula Backen's reports not just for legal aid but to relax and process his thoughts, that the formalities of the court including wigs and gowns be dispensed with, that he have a Registered Intermediary to support him, that simple language be used, that regular checks be made on his level of understanding, and that he be given dynamic means of passing on comments or questions in a formal and timely fashion."

148. Dr Delmage concluded that McGill was unable effectively to participate in the proceedings. If the steps above had been taken, he may have been able to give salient evidence in his defence.

149. On 19 April 2017 Dr Delmage provided a short supplementary report expanding on how adolescent brain development can affect behaviour at trial, including an increased likelihood to waive their rights, accept plea agreements and make false confessions.

150. In evidence to us Dr Delmage said he did not doubt Dr Harper's conclusions. He also told us that he had reached these conclusions without ascertaining what instructions McGill had given to his solicitor during the trial and in his statement. He did not ask for information from the legal team which had represented McGill at trial. He also accepted the conclusions of Paula Backen to which we have referred at paragraph 139-140 above but was surprised at her conclusion that she did not recommend the use of an intermediary.

The submissions made on behalf of McGill

151. Mr Blaxland QC, counsel for McGill on the application before us, submitted that the judge had failed to comply with the Practice Direction relating to the conduct of trials of young defendants; McGill should have been allowed to sit with a member of his family or appropriate adult outside the dock. If that had been done, McGill would have been able properly to participate in his trial and would not have been subject to pressure from the other defendants in the dock which resulted in him not giving evidence; these were fellow members of the gang. His youth and his ADHD and other circumstances set out in the report of Dr Harper made it even more important that he did so.

152. During the course of the trial, the defendants had misbehaved in the dock. This would have been avoided for McGill had he not been placed in the dock; furthermore his behaviour in the dock would not have led to him being remanded into custody during the course of the trial.

153. If he had given evidence he could have provided evidence in relation to the evidence given by his school teacher (which we summarised at paragraph 83.iii) above) to the effect that he had told the teacher that he had given Dykstra the knife (which was found in the room at the back of the laundrette where the deceased had been attacked and on which Dykstra's DNA was present).

154. It was initially submitted that there had been a failure to consider providing him with an intermediary until three weeks into the trial, but in the light of the information provided by trial counsel this ground was abandoned.

The account of trial counsel

155. Trial counsel made clear:

i) That McGill was streetwise; his mother had expressed no concern. There was no issue about his ability to understand, only about his ability to concentrate.

ii) The judge took regular breaks, as agreed, and all parties were alert to the need to take a break. If the judge failed to take breaks at the appropriate time, he was reminded by counsel to do so.

iii) McGill was seen at every break in the proceedings by either junior or leading counsel or both to ensure he understood the proceedings. No-one, his legal team, his mother (with whom counsel discussed the conduct of the trial) or McGill himself raised any concern about a lack of understanding.

iv) The decision that he would not give evidence had been discussed for some time. The considerations were recorded by Mr Driver QC in a memorandum dated 26 March 2014. McGill had said in interview to the police that he saw Dykstra produce a knife; he then left the room. In instructions given to counsel, McGill said that he saw someone grab a knife and tried to stab the deceased in the neck twice, breaking the knife. On 18 March 2014, he told his counsel that he saw Dykstra punching the deceased. He said he had lied in interview when he said Dykstra had a knife; he was told of the difficulty that would cause, and said he would stick by what he said in interview. This third version of events caused counsel to have grave doubts about calling McGill. Prior to the decision made on 25 March not to give evidence, McGill had for some weeks been telling counsel and his mother he did not want to give evidence.

v) He took his medication inconsistently. This was discussed, raised and addressed repeatedly by the judge; on one occasion special arrangements were made for his medication to be taken at court.

vi) He was capable of acting in a single-minded way outside the influence of his co-accused.

vii) In addition there were substantial problems with his behaviour which did not arise from peer pressure and which led to him being remanded into custody. Some of these included having a mobile phone in breach of his bail conditions, being abusive to the social worker accompanying him at lunch time, running

out of the room allocated for him to use during breaks so that he had to be apprehended by the police, expressing the intention to use the internet to trace a witness subject to special measures. Save for the last, these incidents all happened outside of the dock where he was not subject to peer pressure.

Our conclusion on whether to receive the evidence of Dr Delmage

156. As we have set out, we heard his evidence *de bene esse*. We have set out at paragraphs 58-59 of this judgment the considerations that a court should take into account under s.23 of the 1968 Act. We do not admit the evidence. Mr Blaxland QC accepted it was of limited assistance. It is therefore not necessary for us to set out our detailed view on Dr Delmage; it is sufficient to say that his evidence was not evidence to which we could attach any weight, particularly as it was in part based on inaccurate statements made to him by McGill. Unfortunately, his willingness as an expert to opine on the basis of inaccurate, incomplete and partisan accounts appears to be yet another growing trend before this court. Furthermore, his evidence about the mental state of McGill at the time of the trial added nothing of value to the contemporaneous material already before the trial court, particularly the first report of Dr Harper.

Our conclusion in respect of sitting outside the dock

157. It is regrettable that this issue was not addressed in open court. It should have been. We set out at paragraphs 227-228 below the steps that we have asked be taken to ensure this omission does not occur in the future.

158. However, regrettable though this was, we have no doubt that the judge would have held that for reasons of security and as a matter of practicality it was not possible to have five young defendants outside the dock and the one adult defendant in the dock. The intermediary report of Naomi Mason, the intermediary for Corey Hewitt, raised the issue of sitting outside the dock (as we set out at paragraph 170 below). This was handed to the judge. Given the number of participants – defendants, lawyers, intermediaries, security staff and lawyers, the courtroom was not large enough to seat each of five defendants in the well of the courtroom with adequate security. Furthermore, the behaviour of some of the defendants was extremely worrying; given the information supplied about his behaviour which we have summarised at paragraph 155 vii), it is difficult to see how it would have been practical to allow him to sit outside the dock. We have noted that his remand in local authority accommodation had to be changed to secure accommodation on 6 March 2014 because the judge concluded that he was using social media to either interfere with witnesses directly or get someone else to do so for him.

159. Mr Blaxland QC's submissions also ignore the rights of the deceased victim's family. It must also be recalled that this was a murder that arose out of a dispute between gangs who were capable of inflicting extreme violence, as what happened in the laundrette clearly demonstrated. The family of the deceased victim and his friends were, as was their right, in court. It was essential that proper order and security be maintained.

The alleged consequences of sitting in the dock

160. In any event, we reject the assertion that McGill was in any way prejudiced by sitting outside the dock. He was offered as much assistance as was necessary. It is pure speculation to suggest that the defendants as a group would have behaved any better had they been seated in the well of the court; and the evidence suggests otherwise. Many of the problems with the defendants' behaviour arose before and after hearings and outside the dock.

161. It is clear that his decision not to give evidence was based on considerations relating to his inconsistent accounts; the professional judgment of his leading counsel was that he was likely to be an unpredictable and inconsistent witness. There was no evidence that supported the contention that his decision had anything to do with his being placed in the dock; this, too, was pure speculation. The behaviour in the dock between defendants relied on by counsel on the appeal were never raised with trial counsel and we have had no evidence about them; as his leading trial counsel stated, McGill never told him that any co-defendant tried to influence him.

The direction on the inference that could be drawn from the failure to give evidence

162. The jury were directed that adverse inferences could be drawn from the failure of McGill and Andrew Hewitt to give evidence. No criticism could be made of the terms in which it was given, as it was in accordance with the law and entirely fair.

163. The submission made is that no such direction should have been given in the light of McGill's low cognitive ability and his age.

164. The judge carefully considered the submissions made to him and the evidence, including the report of Dr Harper and Paula Backen; the decision he expressly made on 27 March 2014 was based on that evidence. It was well within that area of judgement open to the judge. It is clear that McGill was capable of giving evidence; a material part of the interviews he had given were played to the jury.

165. As we have already concluded that the evidence of Dr Delmage will not be received by us, there is no new material that was not before the judge that would have entitled us to review a decision which was, as we have said, within the area of judgement open to him.

166. We are therefore unable to accept this submission.

Our conclusion

167. We have reflected on all the submissions made by Mr Blaxland QC on behalf of McGill. We have asked ourselves the question whether his right to a fair trial has been breached. We are entirely satisfied that it was not. Nor can we discern any grounds for doubting that his conviction for the murder was entirely safe.

168. The application on the ground of inability to participate effectively in the trial and the consequent denial of a fair trial is refused.

(5) The specific grounds of the application made by Corey Hewitt in relation to his ability to participate in the trial and the denial of a fair trial.

The position at the start of the trial

169. As we have said, Corey Hewitt was 14 by the time of his trial. He was of previous good character with no convictions, warnings or reprimands on his record.

170. After the pre-trial hearing on 17 January 2017 (to which we have referred at paragraph 121) Corey was assessed by Naomi Mason, a registered Intermediary, then employed by Communicourt who provided a report dated 24 January 2014. In that report, Miss Mason concluded:

i) His receptive vocabulary was similar to that of a child aged 7.

ii) His understanding of the meaning of sentences when constructed in different types (grammatical structure) was similar to that of a child aged 8.

iii) His auditory working memory capacity (processing and understanding information in sentences) was limited to, at most, 4 key words. His level was similar to that of child in infant school.

iv) He had a limited ability to challenge and would not always say when he did not understand partly because he did not necessarily realise he had misunderstood.

v) He struggled with abstract concepts, figurative language and non-literal use of language.

vi) She had no doubt, therefore that he had 'considerable communication difficulties'. She recommended the use of an intermediary to assist in trial preparation, giving instructions, helping him understand the evidence and trial process, and that, ideally, the intermediary should sit next to Corey Hewitt in court where his attention could be better managed. If he sat in the dock, the intermediary should sit next to him. She also recommended that those questioning Corey Hewitt should use "clear, concrete language, simple everyday words and phrases", keep to a chronology, introduce each topic, speak slowly and in short sentences, avoid 'tag' questions, avoid negatives, allow time for him to process what had been said, refocus him if he went off at a tangent and check he understood. He required frequent breaks during the trial.

We were told that this report was provided to the judge.

171. Her findings have been substantially supported by Dr Rachel Worthington and Dr Helen Brown both Clinical Psychologists. Dr Worthington provided a pre-trial report dated 13 February 2014 and Dr Brown prepared a post trial and pre-sentence report for the judge dated 17 June 2014. Her findings revealed that Corey Hewiit has significant cognitive difficulties amounting to a disability (full scale IQ of 69, placing him in the 'extremely low range' and at the second percentile).

172. Claire Ainscow was present as an intermediary for Corey when the trial began on 3 March 2014 and the following day, 4 March 2014, when counsel told the judge that Corey did not want an intermediary in the dock.

The ground rules hearing for Corey Hewitt before he gave evidence

173. Before Corey Hewitt gave evidence, there was a ground rules hearing at which it was directed that Naomi Mason would stand beside Corey; there were to be intervals after 30 minutes.

174. Corey Hewitt began his evidence on 24 March 2014 at 4 p.m. at the express request of his counsel; Paula Backen acted as the intermediary. He concluded his evidence on 27 March 2014.

The evidence of Paula Backen

175. The intermediary Paula Backen provided a report on the conduct of the trial dated 22 November 2016 in which she made a number of criticisms of the way in which the applicant was questioned. She identified eight ground rules and the following incidents of failure to comply with them:

    i) Non-literal language: 13 examples of expressions such as "will you take it from me?"

    ii) Complex vocabulary: 53 examples of use of words such as "circumstances" "footage" and "initially"

    iii) Not allowing time so that the applicant jumped in: 8 examples

    iv) Long/multiple questions: 86 examples such as "But having seen what it was you said no" "So what - when and how did you go there?"

    v) Checking understanding: 2 examples

    vi) Unclear chronology: 1 example

    vii) Tagged questions: 150 examples of questions such as "Mr S is about to come into the room, isn't he?"

    viii) Negatives: 22 examples of questions such as: "It would not get you into trouble witnessing a stabbing?"

176. She complained that the judge failed to understand her role, support her when she tried to intervene and failed to rebuke co-defending counsel when he ignored her intervention. She explained the mischief in tagged and negative questions.

The submissions made on behalf of Corey Hewitt

177. Mr Bennathan QC submitted:

    i) Corey Hewitt should not have been in the dock; he had no appropriate adult, or intermediary, or access to his legal team.

    ii) The intermediary direction was made for evidence only, notwithstanding Ms Mason's recommendation (later supported in the psychological report). On the basis of the reports available at the time of trial, an intermediary should have been made available to the applicant for pre-trial conferences and throughout the trial and not just for the duration of his evidence. The failure to provide an

intermediary in this way 'must have' resulted in the applicant's failure properly to engage with the process and communicate effectively with his lawyers and with the court.

iii) Although Corey Hewitt gave evidence with the assistance of an intermediary, there was a failure to comply with the Ground Rules. This included the use of non-literal language, complex vocabulary, insufficient time allowed resulting in Corey Hewitt jumping in to answer, failure to sign post, lengthy and multiple part questions, tagged questions and statements used as questions. Mr Bennathan QC placed particular reliance on paragraph 52 of *Lubemba* in which court upheld the judge's repeated interventions in the trial of Lubemba because trial counsel asked questions that were unsuitable for a vulnerable witness. He attempted to counter the suggestion from trial counsel and the prosecution that the applicant gave evidence well with the assertion that this is 'not good enough in a trial in which the case turned on his account'. The whole point of special measures was to achieve best evidence.

iv) Individually and cumulatively, the breaches of the Practice Direction, failure to provide an intermediary and/or a person of support throughout the trial and breaches of the ground rules violated Corey Hewitt's right to a fair trial in accordance with *T and V v UK*.

The information provided by trial counsel

178. The flaw in Mr Bennathan QC's general argument that Corey Hewitt could not participate effectively in the trial is that it is based largely on speculation and assertion. Whatever the experts may have thought would be the case, and despite Corey Hewitt's undoubted difficulties and his young age, the evidence shows that he was fully engaged in the process, understood the process and was able to communicate effectively with his trial representatives and to the jury.

179. The applicant's trial counsel, Mr Andrew Fisher QC, made clear he considered the assertion that Corey Hewitt was unable to participate in his trial as "simply untrue and entirely without foundation". His junior Mr Alaric Walmsley was very experienced with dealing with young defendants from his work in the Youth and Crown Courts; both were acutely conscious of the applicant's age and difficulties, as set out in Dr Worthington's report, and of the need for very great sensitivity in managing the trial process for his benefit. The applicant was 'quite content' with the seating arrangements and with the wearing of wigs and gowns. Their evidence to the court was that he fully understood the trial process.

180. Corey Hewitt had a team of three care workers with him throughout the trial all of whom were from the care home in which he was residing and all of whom he knew well. One care worker sat immediately next to the dock so that the care worker and the applicant could see each other and the care worker could ensure his understanding and well-being.

181. One accompanied the applicant at all the meetings with counsel. Mr Fisher has confirmed that the applicant had assistance in all his conferences with counsel and that they checked repeatedly during every break that he understood what had been said and done throughout the proceedings. There was a conference room reserved for

him to which he went at every break and at the end and beginning of the day which he accessed through a back stairs so that he did not have to interact with anyone at trial. Whilst on bail there were no restrictions on his meeting his family and trial representatives as often as was desired and necessary and, similarly, when his bail was removed, counsel, accompanied by a care worker, could see him before and after court and during every break. The applicant, far from being unhappy about his bail being removed, regarded his secure accommodation as an improvement on local authority care accommodation. The evidence from Mr Fisher QC was unequivocal that he articulated during the whole of the trial his understanding and was able to participate fully and effectively at the trial.

182. Ms Backen was able to see him outside the court room and satisfy herself he was fully understanding and engaging with the process. She expressed no concerns whatsoever other than during the applicant's evidence (to which we shall come in a moment). The applicant's family attended every day of the trial and were able to see and speak to him on a regular basis. In his evidence, he was an 'exemplar' and 'showed up all the others by his manner, his sense and understanding. He gave his evidence 'astonishingly well'. In the dock he was 'entirely distinguishable by the way in which he obviously distanced himself from the other defendants'.

183. In the light of all of the evidence and material before us we now address the specific complaints.

Conclusion on sitting outside the dock

184. Although it is regrettable that the question of his sitting outside the dock was not canvassed in open court, we dismiss this ground of complaint for the same reasons we have dismissed the complaint in the case of McGill (see paragraph 157 above). His trial counsel Mr Fisher QC's evidence was that Corey Hewitt told his legal team he was entirely happy with the arrangements in the courtroom.

185. Even if it had been appropriate for arrangements to be made for him to sit outside the dock, it would have made no difference. As is evident from the material set out at paragraphs 179-181, he was fully supported and fully understood the trial process. He was fully able to participate in the trial and put his case.

Conclusion on the provision of intermediary

186. First, the judge made it clear that he would allow for an intermediary for any defendant that needed one in conferences with counsel. He did not direct one should be made available for the applicant for the whole of trial because he was not asked to do so. He was not asked to do so because one was not necessary.

187. The applicant had the assistance of counsel and solicitors, care workers, family members and the intermediary, Ms Backen, before and during the time he was in the witness box. He was able to give a full account of himself to his solicitors and counsel. He understood the proceedings and was well able to engage with them and communicate effectively.

Conclusion on the questioning of the applicant

188. We have the benefit of a transcript of the questioning of the applicant and of the views of those who represented the applicant at trial. We do not recognise the complaints made of the judge by Ms Backen. Far from resisting her ground rules, as she claimed, the judge was wholeheartedly supportive of them. He had provided copies of the advocate's toolkit for counsel in advance and could not have done more to emphasise their importance.

189. Before the applicant began his evidence the judge asked Ms Backen specifically if she was happy with the arrangements and she said she was. She made no complaint about the seating arrangements or wearing of wigs and gowns; had she considered they were affecting the applicant's ability to participate effectively in the trial, we are confident she would have done so.

190. Her criticism of the judge for allowing 'cross examination' of the applicant to begin at 4 p.m. one afternoon, is misplaced. It was the applicant's counsel who asked if he might ask a few general questions in chief of the applicant because that is what the applicant wished. The judge was initially opposed to the idea. Ms Backen did not intervene and the judge agreed.

191. Whenever Ms Backen suggested a break that interfered with the planned timetable of breaks, the judge accepted her advice and that the applicant's ability to concentrate may vary session from session. When questioning ran over into a planned break he sought her agreement before continuing at counsel's request. When counsel played part of his taped interview to him and she objected to the amount of 'auditory processing' at the end of the day, the judge immediately adjourned.

192. We also note that in the hundreds of questions asked of the applicant, the vast majority were short simple and clear. When counsel inadvertently slipped into error and failed to adapt their questioning sufficiently, the judge repeatedly supported Ms Backen and endorsed her interventions. The judge on occasion took the initiative and directed counsel to re-phrase their question for example where defence counsel asked a question in these terms: "Well as a friend or a cousin or a mate or what would you…" The judge interrupted to reminded defence counsel of the ground rules. However, before the question could be simplified the applicant provided a correct answer. On another occasion, when counsel for the co-accused Dykstra felt Ms Backen's intervention was not justified, the judge responded that he was "duty bound" when the intermediary invited him to ask counsel to re-phrase a question to draw it to counsel's attention.

193. There were undoubtedly a number of tagged questions (as we have defined them at paragraph 114 above) and some over complex questions. We accept it would have been preferable had counsel avoided them. However, we note that of the 150 tagged questions now identified by Ms Backen on the transcript, she deemed it necessary to intervene on relatively few occasions which suggests she did not have the concerns she expresses now at the time. Defence counsel Mr Fisher QC does not share her concerns. He decided not to object because he was satisfied the applicant was well able to deal with the questions. The judge himself was constantly alert to the possibility of a misunderstanding and intervened repeatedly to require counsel to re-phrase their questions. Counsel then responded appropriately.

194. In any event, as Ms Backen herself recognised, tagged questions are not inherently an issue. It depends on the content of the question and its structure. Many of the questions to which exception is now taken were questions containing two positives and were not therefore complex or difficult to follow, even for an applicant with Corey Hewitt's problems. Those that did contain a positive and a negative in the question, in the context of the questioning as a whole, do not seem to have troubled the applicant. He held his own and stuck to his account.

195. Mr Bennathan QC's reliance on paragraph 52 of *Lubemba* (to which we have referred at paragraph 177 iii) above is misplaced. At paragraph 52 the court concluded that on the particular facts of that case counsel's cross examination was inappropriate and justified the judge's interventions, but her questioning contained far more than simply tag questions. Many were confusing, too long and too complex. This is a very different situation. The applicant was not confused or prevented from giving his best evidence by the form or structure of the questions asked.

196. We have borne in mind that there was one occasion when Ms Backen rightly objected to a tagged question from counsel for the co-accused containing a negative and counsel did not appear to accept her intervention, but, counsel's response to her was not in the terms she remembered. Furthermore, the judge supported her intervention. Counsel asked "You will not just agree with anything I say, will you?"; the applicant answered: "No". Ms Backen raised her hand and counsel told her "You can raise your hand up all you want I think he understood". He did not say: "You can raise your hand all you like, I am just going to carry on" as she claimed. The judge then directed counsel to avoid tagged questions. Later in the same counsel's questioning the judge insisted he stop so that the intermediary's objection could be heard and again counsel re-phrased the question.

197. We have found only two occasions when Ms Backen was specifically overruled and on each occasion the judge was satisfied either that her concerns were not justified or if they were initially justified, had been overtaken by the applicant's response and later questions.

198. Ms Backen's memory of events is therefore not reliable. She was not undermined and undervalued and repeatedly over ruled as she thought. The vast majority of her interventions were upheld and in courteous terms. Unfortunately, it became apparent to the members of this court during Ms Backen's evidence before us that, for all her experience, she has become less than objective in her assessment of how she was treated and the applicant questioned. We note for example her description of her time as intermediary for Corey Hewitt as 'extremely traumatic' and she claims she was treated as an 'enemy of the court'. There is nothing on the transcript or in any of the material before us that could come close to justifying that description objectively.

199. We fear that Ms Backen may have misunderstood her role. If so, she may not be the only one to do so. Intermediaries provide a very useful service to the court and to the vulnerable witness or defendant and we are grateful to them for their expertise. However, they are instructed to provide advice and guidance to the judge (and to the advocates), not to dictate to anyone what is to happen. Their role is to provide a report and, if required by the court, to provide assistance to a witness or defendant *as directed by the judge*. They should not interfere with the functions of others unless specifically directed to do so by the judge. It does not follow from the fact that a judge

does not adopt every one of their suggestions or uphold every one of their interventions that a witness or defendant has been treated unfairly. Ultimately the burden rests on the trial judge to ensure the effective participation of a vulnerable person, not on the intermediary.

200. Thus, we are satisfied the judge controlled the proceedings and intervened appropriately to ensure that the applicant was able to understand the questions asked of him and communicate his answer effectively. The result was that, as his own counsel described, he gave his evidence extremely well.

Overall conclusion

201. We have stood back and considered all the submissions made by Mr Bennathan QC on behalf of Corey Hewitt and asked ourselves the question whether his right to a fair trial had been breached. We are entirely satisfied that it was not. Nor can we discern any grounds for doubting that his conviction for the murder was entirely safe.

202. The application on the ground of inability to participate effectively in the trial and the consequent denial of a fair trial is refused.

(6) **The specific grounds of the application made by Andrew Hewitt in relation to his ability to participate in the trial and the denial of a fair trial.**

His position at the commencement of the trial

203. Andrew Hewitt's junior advocate, Mr O'Brien, visited Andrew Hewitt on several occasions to take instructions. On 9 December 2013, he discussed the instruction of a psychologist and an intermediary.

204. A report dated 8 January 2014 was obtained from Dr Saima Latif, a chartered psychologist who practised from 1998 but has been in full time practice as an expert witness since 2010. This report was based on an assessment made on 13 December 2013. It concluded that he had an extremely low level of intelligence, but was able to give instructions. He might not comprehend the more complex aspects of the trial, but he would be able to participate in it. He should have regular breaks; the provision of an intermediary would be helpful. He did not need assessment by a psychiatrist. Although he had told her he had been previously been diagnosed with ADHD at primary school (but she had seen no medical records), he told her he had changed and was much calmer. Dr Latif was not concerned, as he was attentive and fully concentrated.

205. Lucy Adams, a qualified speech and language therapist, and then a registered intermediary with Communicourt, saw the applicant on 10 January 2014. He agreed to be assessed, telling the intermediary that he did not know whether he wanted an intermediary. She produced a report on 10 January 2014 recommending the use of an intermediary before the trial at conferences, adaptations to the trial process (including 20 minute breaks every hour) and the presence of an intermediary at trial by sitting next to him in the dock and simplifying key points.

206. Mr McDermott QC saw Andrew Hewitt on 17 January 2014; there was no further conference until the commencement of the trial. Mr McDermott had full instructions and no further conference was required.

207. Later that day an application was lodged for an intermediary to be present throughout the trial process; it was supported by the report of Lucy Adams. It appears that the judge asked to see the report that stated that Andrew Hewitt had ADHD and Miss Latif's report (after the removal of a privileged passage relating to his account of the murder) was supplied to the court on 20 January 2014 together with a report from Alder Hey.

Andrew Hewitt's refusal to use an intermediary

208. On the second day of the trial, 4 March 2014, Andrew Hewitt informed his counsel that he did not require an intermediary. The notes suggest that when offered an intermediary Andrew Hewitt commented to his solicitor and leading counsel that they knew what he was talking about and that he had no problem reading or changing his mind if he wanted to.

The submission made

209. Mr Moloney QC's contention on behalf of Andrew Hewitt that Andrew Hewitt was unable to participate effectively in the trial and was thus denied his right to a fair trial was pursued at the first hearing of the application in June 2017 on only one basis. It was submitted that in the light of his age and the evidence in relation to his cognitive capacity and his ADHD, he should have had an intermediary during the pre-trial conferences. If an intermediary had then been present, then Andrew Hewitt would have been familiar with the advantages derived from an intermediary and would have kept the intermediary during the trial.

210. However examination of the documents held by the trial team and their answers to questions showed, as we have set out, that there were no pre-trial conferences between 17 January 2013 and the commencement of the trial on 4 March.

211. The application was pursued on the basis that, with the benefit of hindsight, the trial team should have attached more weight to the opinion of Dr Latif and Lucy Adams.

The account of trial team

212. The account of the trial team was:

i) Andrew Hewitt, for all his cognitive issues and lack of formal education, was single minded, self confident, assertive and determined, despite his age. He was street wise and very aware, understood the course of the trial, the issues and was able to give clear instructions.

ii) The suggestion that no apparent efforts were made during the proceedings to ensure Andrew Hewitt understood what was happening was "a travesty of the truth".

iii) The suggestion he sit away from the dock with his mother would have been ridiculed by him.

iv) If Andrew Hewitt had been asked to attend a conference with the intermediary present, he would have refused to see her or even if he had he would have scorned her assistance.

v) There was no way in which they could have forced an intermediary on Andrew Hewitt. If they had tried to get him to use an intermediary earlier his attitude would have been the same.

vi) A schedule produced showed that there were numerous occasions during the trial when he was asked about having an intermediary. He refused. His mother confirmed her view on 24 March 2014 that he did not want an intermediary. He told leading counsel that he did not think the intermediary had assisted Corey Hewitt.

vii) His ability to understand questions and communicate answers was never in doubt in the many hours they spent with him during trial. The trial team took into account all the difficulties the reports had identified.

viii) Andrew Hewitt participated effectively in the proceedings throughout. As the attendance notes demonstrated, there were consultations with him every day of the trial.

ix) He enjoyed a good relationship with his trial team; he listened to the evidence, discussed the evidence and gave instructions as the trial progressed.

The privileged documents fully reflect this account.

The direction on the inference that could be drawn from the failure to give evidence

213. Andrew Hewitt did not give evidence at trial. The jury were directed that adverse inferences could be drawn from this.

214. No submission was made to us that his decision not to give evidence was in any way influenced by the procedure adopted at the trial, his having dispensed with the intermediary or his presence in the dock. It is therefore not necessary for us to set out the reasons set out in detailed privileged documents made available to us as to why he did not give evidence.

215. Trial counsel did not make any submission that a direction should not be given as this would have been disingenuous and misled the court.

216. We can see no basis for an application on this basis.

Overall conclusion

217. The application for Andrew Hewitt was very properly conducted by Mr Moloney QC. When the account of the trial team was obtained and the privileged documents (which contained detailed and meticulous notes) examined, it is impossible to see what ground of complaint Andrew Hewitt in fact has that he was unable effectively to participate in the trial. The materials before us unequivocally point to the conclusion that he effectively participated in the trial. Whatever weight should have been attached with the benefit of hindsight to the views of Dr Latif and Lucy Adams, it is

clear that it would have made no difference to Andrew Hewitt's refusal to use an intermediary.

218. The application on the ground of inability to participate effectively in the trial and the consequent denial of a fair trial is therefore refused.

(7) Extensions of time

219. We have considered the matters set out in the second grounds of appeal as relating to all applicants by a review of the merits. We have not considered the very substantial extensions of time that would be required. We will return to the question of extensions of time when considering the applications in respect of sentence. However, we should record that, given what has emerged about the proper and skilful conduct of the trial by the advocates and the judge, it is difficult to see why the interests of justice could in any way have been served by granting an extension of time. See *R v Thorsby* [2015] EWCA Crim 1; [2015] 1 WLR 2901: paragraphs 12-18, *R v Roberts (Mark)* [2016] EWCA Crim 71; [2016] 1 WLR 3249: paragraphs 36-39, *R v Geraghty* [2017] 1 WLR 657.

(8) The adequacy of current procedures for the trial of young persons

The submissions of the Equality and Human Rights Commission

220. The Equality and Human Rights Commission provided submissions as an Intervener. These accept that many factual aspects of the trial procedure remain in dispute, but nevertheless express concern about the failure to provide support to young and vulnerable defendants. It is argued that this apparent oversight is symptomatic of a wider problem within the criminal justice system of England and Wales that brings us into conflict with obligations under international law. The judge should take an active role in ensuring compliance with the requirements of the Practice Direction in respect of young persons; in each case, for example, the judge should raise with the advocates the question as to whether a young defendant should sit in the dock, and if it was decided that the young defendant should, short reasons should be given. This would reinforce compliance with the court's duty.

221. The submissions provide suggested guidance for advocates and the Crown Court, including an emphasis on ground rules hearings and a strong presumption that young people should sit with their family or legal team. Most pertinently, it is argued that where an appeal court concludes that all possible steps to maximise participation were not taken, quashing a conviction may be the most appropriate response, irrespective of whether trial lawyers were responsible for any failure to put safeguards in place. There should be a similar proactive duty on the court in respect of intermediaries.

222. It was also submitted that mandatory training should be given before a judge could try a young or similarly vulnerable defendant. It was submitted the Bar Standards Board and the Solicitors Regulation Authority should make training in relation to young persons and similarly vulnerable witnesses and defendants compulsory.

The submissions of the applicants as to the adequacy of current procedure

223. In addition, counsel for the applicants contended that despite the significant improvements made consequent on the decision of the Strasbourg Court and continually updated through the Practice Directions, and relying on the Law Commission report 'Unfitness to Plead (Law Com No. 364) and the Review of the Youth Justice System in England and Wales by Charlie Taylor December 2016, "the general consensus is that the measures currently deployed are simply not good enough to ensure effective participation".

Our observations

224. We reject the assertion that 'the general consensus is that the measures currently deployed are simply not good enough to ensure effective participation'.

225. The material upon which reliance was placed does not take into account the very significant improvements made in recent years to ensure vulnerable defendants participate effectively in the trial process and the wide range of special measures designed specifically to cater for the needs of the vulnerable; we do not criticise the Commission, as the changes are moving at a pace that may not be readily discernible without detailed study of the changes and the development of the case law. They include the provision of intermediaries for defendants when necessary, the extensive training of judges and advocates (a national roll out of the training of advocates is currently underway), the provision of and repeated judicial endorsement of advocacy toolkits for questioning vulnerable witnesses and the holding of ground rules hearings designed to ensure the particular needs of individual witnesses and defendants are met.

226. We confirm, if confirmation is needed, that the principles in *Lubemba* apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness. We also confirm the importance of training for the profession which was made clear at paragraph 80 of the judgment in *R v Rashid (Yahya)* (to which we have referred at paragraph 111 above). We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training. That consequence should help focus the minds of advocates on undertaking such training, whilst the Regulators engage on the process of making such training compulsory. We continue to press the Ministry of Justice for further resources to extend the training of judges; it would, if resources permitted, be desirable to provide more extensive training in respect of evidence given by young defendants and witnesses.

227. In the meantime, we accept that further improvements can be made to the procedure so as to ensure a proper focus on the needs of a vulnerable defendant at the earliest possible stage in the proceedings. The court therefore asked the Criminal Procedure Rules Committee to review the form used for the PTPH hearing; this form has proved an effective and vital means of identifying the issues that are likely to arise at the trial. The Committee had been asked to include within the form a check list of all the relevant matters that need to be considered when young persons are to be tried in the Crown Court. As the form will require the judge to give reasons for departing from the Practice Direction, focus on the needs of young defendants will be intense. The Committee has agreed to make revisions to the form.

228. As was apparent, it was not possible for the court to find a record of some of the decisions relating to the trial of these defendants. This omission should therefore also be addressed through the amendment to the form.

Ground III: Incompatibility of the sentence with Rights under the ECHR

229. We have set out at the outset of the part of the judgment relating to these applicants the sentences passed at paragraph 72 above.

230. It was submitted by McGill, Corey Hewitt and Andrew Hewitt that the sentence of detention during Her Majesty's pleasure, as a mandatory indeterminate sentence, was incompatible with the defendant's rights under Articles 3 and 5 of the ECHR.

The current statutory position

231. As the submission was directed at the mandatory imposition of an indeterminate sentence for young persons, it is necessary first to set out the statutory provisions as to the imposition of the sentence and the provisions and practice governing release and recall.

232. The sentence contains, as is well known, two elements: a minimum fixed term which reflects the element of punishment and retribution and an element of public protection and the indefinite period thereafter, where detention is governed by the need to protect the public.

The relevant statutory provisions for the imposition of the sentence

233. S. 1(1) of the Murder (Abolition of Death Penalty) Act 1965 provides:

> "No person shall suffer death for murder, and a person convicted of murder shall, subject to subsection (5) below, be sentenced to imprisonment to life."

234. S. 90 of the Powers of Criminal Courts (Sentencing) Act 2000 (The 2000 Act) provides for a different mandatory penalty for those under 18:

> "Where a person convicted of murder…… appears to the court to have been aged under 18 at the time the offence was committed, the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's pleasure."

The statutory provisions and practice relating to release on licence

235. S. 28(6) of the Crime (Sentences) Act 1997 (the 1997 Act) provides that once an offender has served the minimum term of his sentence, the Parole Board shall not give a direction for release unless it is "satisfied that it is no longer necessary for the protection of the public". Plainly there is no guarantee of release at the end of the minimum term; the statutory threshold for release is a high one.

236. However, it is possible to reduce the minimum term through review after half of the minimum term has been served: see *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159. The review process was recently considered in the Divisional Court in *R (Cunliffe) v Secretary of State for Justice* [2016] EWHC 984 (Admin).

237. S. 28(5) provides that when a person is released, he is released on licence. S. 31(1) of the 1997 Act provides that the licence imposed as part of a s.90 sentence shall remain in force until the person's death. S. 31(2) and (2A) provide for the imposition of conditions. S. 31(3)(a) provides that the Secretary of State shall not impose, vary or cancel any such condition other than in accordance with the recommendations of the Parole Board.

238. The August 2015 Standard Conditions include residing at an address determined by the supervising officer, not leaving the UK without permission, and a requirement to "be well behaved and not to do anything which could undermine the purposes of their supervision which are to protect the public, prevent them from re-offending and help them resettle successfully into the community."

The statutory provision and practice relating to recall

239. S. 32 of the 1997 Act provides that the Secretary of State may recall a person who has been released on licence to prison.

240. The parties dispute the range of circumstances in which this may occur. The Secretary of State contended that an offender could only be recalled for behaviour giving rise to a risk of offending linked to murder or serious harm to the public, and not, for example, giving rise to a risk of non-violent offending: *Stafford V UK* (2002) 35 EHRR 32, at [81-82] applied: *R (Green) v Parole Board* [2005] EWHC 548 (Admin).

241. *Stafford* concerned an offender convicted of murder and sentenced to life imprisonment. He was released on licence and subsequently convicted of fraud, receiving a determinate sentence. The question that arose was whether the Home Secretary could refuse to release him on licence due to the further risk of non-violent offending relating to fraud: *R(Green) v Parole Board* at paragraph 27. This clearly relates not to recall to prison, but to release on licence.

242. However, the term requiring the person to be "well behaved" is, on its ordinary meaning, a broad term: see *R (Calder) v Secretary of State for Justice* [2015] EWCA Civ 1050 at paragraphs 21-26 (disapproving the exegesis to the term given in *R (McDonagh) v Secretary of State for Justice* [2010] EWHC 369 (Admin)). As is clear from *Calder*, however, a breach in itself is not enough; the Secretary of State must have evidence on which he can conclude that it is necessary to recall the person to prison (see paragraphs 27-29 of the judgment).

Suspension of a licence

243. Guidance provided by the National Offender Management Service (now Her Majesty's Prison and Probation Service) provides that a Supervising Officer may apply to the Parole Board for suspension of the supervision element of an indeterminate licence. An offender may not make such an application. Under the

current version of the guidance dated 4 March 2015, the application may only be made after 10 years of satisfactory compliance in the community for sex offenders, noteworthy cases or offenders convicted of the murder of the child. For other offences a minimum period of four years living in the community applies.

244. However, there are two minimum supervision conditions that cannot be suspended: (a) the requirement of being well behaved and (b) a requirement not to commit a further criminal offence. Experience has shown that the risk of recall is real (see *Faulkner v Parole Board* [2013] 2 AC 254 at paragraph 74) and is potentially detrimental to progress (see an example given in *R v Roberts (Mark)* [2016] 1 WLR 3249 at paragraph 147).

The present case law relating to mandatory sentences of life imprisonment

245. There is a significant body of case law relating to the three different types of life sentence that were available to the courts – the mandatory life sentence for murder, the automatic life sentence for further serious offending and the discretionary life sentence. It is only necessary to refer to some of the decisions when considering the arguments in relation to the mandatory nature of the sentence of detention during Her Majesty's pleasure.

246. The starting point is *V v United Kingdom* (1999) 30 EHRR 121. A challenge was brought to the sentence of detention during Her Majesty's pleasure imposed under s.90 of the 2000 Act on the basis it was severely disproportionate and in breach of Article 3 and unlawful under Article 5. The Strasbourg Court considered a range of international texts, including Article 17.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), and the United Nations Convention on the Rights of the Child and the earlier decision in *Hussain v UK* (1996) 22EHRR 1, but rejected the challenge:

> "96. In assessing whether the above facts constitute ill-treatment of sufficient severity to violate Article 3 (see paragraph 68 above), the Court has regard to the fact that Article 37 of the UN Convention prohibits life imprisonment without the possibility of release in respect of offences committed by persons below the age of eighteen and provides that the detention of a child "shall be used only as a measure of last resort and for the shortest appropriate period of time", and that Rule 17.1(b) of the Beijing Rules recommends that "[r]estrictions on the personal liberty of the juvenile shall … be limited to the possible minimum" (see paragraphs 43-44 above).
>
> 97. The Court recalls that States have a duty under the Convention to take measures for the protection of the public from violent crime (see, for example, the A. v. the United Kingdom judgment of 23 September 1998, Reports 1998-VI, p. 2699, § 22, and the *Osman v. the United Kingdom* judgment of 28 October 1998, Reports 1998-VIII, p. 3159, § 115). It does not consider that the punitive element inherent in the tariff

> approach itself gives rise to a breach of Article 3, or that the Convention prohibits States from subjecting a child or young person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention or recall to detention following release where necessary for the protection of the public (see the *Hussain* judgment cited above, p. 269, § 53).
>
> 98…. It does not consider that the punitive element inherent in the tariff approach itself gives rise to a breach of Article 3, or that the Convention prohibits states from subjecting a child or young person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention or recall to detention following release when necessary for the protection of the public.
>
> ...
>
> 104…There can be no question but that the sentence of detention during Her Majesty's pleasure is lawful under English law and was imposed in accordance with a procedure described by law. Moreover, it cannot be said that the applicant's detention is not in conformity with the purposes of the deprivation of liberty permitted by Article 5 (1) (a) so as to be arbitrary."

247. In *R v Offen* [2000] EWCA Crim 96, [2001] 1 WLR 257, [2001] 2 Cr.App.R. (S) 10, the Court of Appeal Criminal Division considered provisions of the 2000 Act requiring the imposition of an automatic sentence of life imprisonment upon adults convicted of a second serious offence, unless there were "exceptional circumstances". The automatic life sentence introduced under that Act was for quite different circumstances from the mandatory sentence of life imprisonment for murder. In giving the judgment of the Court, Lord Woolf CJ upheld the provision, but gave guidance as to the way in which "exceptional circumstances" had to be approached in a proportionate manner so as to include a defendant who did not pose a significant risk to the public.

248. In *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903, the appellants sought to argue that the mandatory imposition of life imprisonment upon adults convicted of murder was contrary to Articles 3 and 5 ECHR. In the case of each appellant the trial judge had concluded that they did not represent a significant danger to the public and a reduced minimum term was accordingly set. The appellants sought to rely on *Offen* in arguing that a life sentence ought only to be imposed where a defendant posed a significant risk to the public. Several onerous features of life imprisonment were highlighted: (a) those convicted could not know when they would be released; (b) at the end of the tariff term it was for the prisoner to show that he was safe for release, the onus being on him; and (c) even after release the prisoner remained liable to recall for the rest of his days. In the case of those not judged to be dangerous these safeguards served no valid penological purpose.

249. These arguments were rejected. In giving the leading speech, Lord Bingham said that the court should not consider whether the mandatory life term was desirable, but whether it was lawful. The mandatory life sentence was quite different from the automatic life sentence under consideration in *Offen.* The life sentence for murder was only imposed on those who had taken a life, as adults, with the intention of doing so or causing really serious injury, and whose responsibility for their conduct was not found to be diminished. Any discussion about the future risk posed to the public inevitably took place in the context of a person who had been shown to commit violence with fatal consequences to another. The provisions relating to the automatic life sentence in issue in *Offen* were different. Moreover, the complaints were not of sufficient gravity to engage Articles 3 and 5. They had been sentenced to tariff terms that reflected the judges' views of the particular facts and circumstances of each case. The process had not been arbitrary. Moreover, it was doubtful that the burden was in truth on the prisoner to persuade the Parole Board to recommend release. It was an administrative process requiring the board to consider all the available material and to form a judgement. Any decision was subject to challenge. Finally, although a prisoner might prefer not to be subject to the threat of indefinite recall, no danger would exist in the absence of any resort to violence. In addition, any such recall would be subject to an independent assessment by the Parole Board.

250. In *R v Parchment, Davidson, Herbert and Stewart* [2003] EWCA Crim 2428, three of the appellants were convicted of murder. They were between 15 and 16 years of age at the time of the offence and accordingly were sentenced to detention during Her Majesty's pleasure. It was argued that *Lichniak* was distinguishable, but this court presided over by Mantell LJ rejected the contention saying that no distinctions could be found which would enable the court to take a different approach (see paragraph 22).

251. The case law is clear and unequivocal. The sentence of detention during Her Majesty's pleasure is not incompatible with the ECHR.

The submissions of the applicants

252. Although each of the applicants made separate written submissions, the oral argument was advanced by Mr Bennathan QC. They can be summarised as follows:

i) *Offen* established the general principle that the automatic imposition of a lifelong preventative sentence where it was not necessary violated Articles 3 and 5; the court had accordingly in effect to read down the provisions of the 2000 Act applying to automatic life sentences. Although *Lichniak* had not applied the same principle to cases of murder, the position of those under 18 was different; *Parchment, Davidson, Herbert and Stewart* did not give sufficient consideration to the principle in *Offen* and to distinguishing *Lichniak.* The approach to adult defendants should be distinguished for the reasons set out in the following sub-paragraphs.

ii) The ECHR is a living instrument. The Strasbourg Court had not been unanimous in *V* and it was time to revisit that decision and the decision in *R v Parchment, Davidson, Herbert and Stewart* in the light of worldwide developments in the approach to the sentencing of juveniles. Neither *R v V* nor *Hussain v UK* had addressed the mandatory nature of the sentence.

iii) The UN Convention on the Rights of the Child demanded that any sentence imposed on a person under 18 should be for the shortest appropriate period of time. This principle has been affirmed in domestic law in *R (Smith) v Secretary of State for the Home Department.*

iv) The special welfare principle enshrined in Article 3(1) and Article 37(b) of the UN Convention on the Rights of the Child clearly did not apply to adult offenders. Many judgments of the UK courts made clear the importance of this Convention; see for example the judgments of Baroness Hale in *R(D) v Camberwell Green Youth Court* [2015] 1 WLR 393 and of Moses LJ in *R(C)* [2014] 1 WLR 1234 at paragraphs 38 and following.

v) The denunciatory element of the mandatory life sentence for adults does not apply to children. The mandatory life sentence for adults was introduced at the same time as the abolition of the death penalty for murder, whereas the death sentence for juveniles had been abolished in 1908.

vi) The decision of this court in *R v JW* [2009] 2 Cr App R(S) 94 in relation to detention for public protection showed the kind of considerations to be taken into account when sentencing.

vii) The decision of the US Supreme Court in *Roper v Simmons* 543 US 551 (2005) emphasised the special need for a different approach to the sentencing of children.

viii) The advanced copy of the report of the UN Committee on the Rights of the Child's Concluding Observations on the fifth periodic report on the UK (published in June 2016) recommended at paragraph 82 the abolition of the mandatory imposition of life imprisonment for those under 18.

ix) General Comment No. 10 (2007) of the UN Committee on the Rights of the Child strongly recommended that States abolish all forms of life imprisonment for offences committed by persons under the age of 18.

x) In a March 2015 report, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment argued at paragraph 74 that mandatory sentences for those under 18 were incompatible with the State's obligations regarding those under 18. Such punishment was grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a person under 18. In the light of the unique vulnerability of those under 18, they should be subject to sentences that promoted rehabilitation and re-entry into society.

xi) No evidence was available in the present case to justify the proposition that any of the applicants would continue to present a significant danger to the public after the conclusion of his tariff period. A lifelong exposure to continued detention and the liability to recall could not be justified.

xii) Recent research into adolescent brain development showed in the case of a child the imposition of a life sentence could not be justified without a specific assessment as to future dangerousness.

xiii) The Court should therefore make a declaration of incompatibility.

253. We were referred to the report of the Child Rights International Network, *Life Imprisonment of Children in the European Union,* published in April 2014. The Report is critical of the approach of the United Kingdom. It observes that of the 28 States within the EU, 22 include within their laws an explicit prohibition on life imprisonment for children, or a clear limit on the period for which children may be detained which falls short of *de facto* life imprisonment. England and Wales are highlighted as an outlier for the relatively frequent use of detention during Her Majesty's pleasure. The Ministry of Justice is criticised for its failure to maintain figures on how long children serving these sentences actually remain in custody. We were also provided with a witness statement by Leo Ratledge of the Children's Rights International Network which explained their work. He explained that there was no State (whose regime the Network had considered as not allowing life imprisonment for children) which had legislation which permitted either recall at the end of the determinate part of the custodial sentence or indefinite on-going supervision with provision for recall, unless a further offence was committed.

254. The Secretary of State criticised the quality of this evidence and referred us to a further report published in October 2012 by Children's Rights International Network on *Inhuman Sentencing, Life Imprisonment of Children in the Commonwealth* which showed that 45 out of 54 Commonwealth States provide for one or more types of life imprisonment of young persons under 18.

255. Mr Bennathan QC emphasised the position of Corey Hewitt; he was 13 at the time of the murder. In his case the fact that he had been convicted of murder did not mean he was either dangerous or likely to pose a risk to the public. The report of Dr Louise Bowers of the Forensic Psychologist Service dated 26 January 2017 showed the significant progress he had made; as a result of that progress in custody, his risk of engaging in future violence that could cause a risk of serious harm was very low. There were similar considerations in respect of the others.

Our conclusion

256. At the outset it is necessary to make clear that this submission must be seen in the context of the murder we have described. It was a murder which took place in the context of gang violence in Liverpool, in which the deceased was hunted down, cornered and a knife and a swordstick used on him. It is clear that each of those convicted participated in the fatal attack upon him knowing of the presence of the weapons used to kill him. This is therefore a case where it can properly be inferred that each of the applicants at the time of their conviction posed a significant risk of committing serious violence that would cause serious harm, and that, for the protection of the public, the risk they pose must be reviewed at the conclusion of the minimum term. A period of licence was amply justified on the facts. We therefore reject the factual premise underlying the submissions made.

Our view of the case law

257. In *V v United Kingdom* the Strasbourg court carefully considered the mandatory sentence of detention during Her Majesty's pleasure upon juveniles and found no violation. In doing so it specifically considered Article 37 of the UN Convention on

the Rights of the Child and Article 17.1(b) of the Beijing Rules. We reject the submission that the court did not consider the mandatory nature of the sentence and the life licence: see paragraphs 35-39 of the judgment.

258. In *R v Parchment, Davidson, Herbert and Stewart* this court applied the reasoning in *R v Lichniak* to the sentence of detention during Her Majesty's pleasure. There is no basis for doubting the authority. In the present case, the reasoning of Lord Bingham applies with considerable force to these youths – this was a case where there was a substantial risk of further violence; it was quite different from *Offen.*

The evidence before us of practice in other States.

259. We have carefully examined the State practice and reports relied on. We are not satisfied that they address the specific operation of the sentence of detention during Her Majesty's pleasure as we have set it out. For example, the UN Committee on the Rights of the Child did not explain the basis for their concerns. It was not clear whether the UN Committee understood the way that the provision of the minimum term and the assessment of release operated in practice. Similarly, the report of the UN Special Rapporteur does not address the fact that the sentence in each case is reflective of the individual circumstances. Nor is the information in respect of the EU States sufficiently clear to enable us to compare the regimes as operated in other States with the sentence of detention during Her Majesty's pleasure.

The proportionality of the judge's decision and of the regime for release

260. It is clear from the sentencing remarks of the judge that he carefully approached the fixing of the minimum terms in a manner that took into account their culpability and their individual circumstances. The terms were proportionate. The argument that the sentencing of juveniles should be based on individualised assessments ignored that this is precisely what happens under the sentencing regime for detention during Her Majesty's pleasure. When the sentenced is passed, the minimum term is fixed on the basis of a detailed consideration of the circumstances of the offence and the offender. When the minimum term is reviewed at the end of the minimum term and when the licence conditions are fixed, the individual circumstances of the offender are again considered and the decision made on that basis. The only part of the regime that is not adjustable to the circumstances of the individual is the inability to curtail the life-long nature of two of the licence conditions to which we have referred at paragraph 244.

261. Furthermore, there is no evidential basis for contending that the Parole Board would detain these applicants beyond the minimum term if they posed no risk; there would in any event be a remedy by way of judicial review.

262. All of these considerations have lead us to the clear conclusion that on the facts of this case there is no basis on which it could be said that the sentences imposed were in breach of Articles 3 and 5.

Our freedom to depart from the case law

263. Even if we had taken a different view of the circumstances of this case, we do not consider that it would have been appropriate for us to depart from the decision of the House of Lord in *Lichniak* and the Strasbourg court in *R v V.* We would have pursued

the course in such circumstances suggested in *Kay v Lambeth LBC* [2006] 2 AC 465, at paragraph 42 and left the question of reviewing the international developments relied on and determining whether the case law should be changed to the Supreme Court.

264. Accordingly, we regard the ground of the application for leave to appeal as to the mandatory nature of the sentence as without legal merit. On the facts of the case there could be no criticism of the minimum terms for the reasons we give in the next section. Plainly the risk to the public posed the applicants will have to be assessed at the end of that period by the Parole Board and a period of release on strict licence conditions will certainly be required. The wider points argued in relation to detention for Her Majesty's pleasure therefore simply do not arise on the facts of these appeals. Their determination would make no difference to the outcome.

265. As this court has pointed out in the cases to which we referred at paragraph 219, it is particularly important in appeals in relation to sentencing that the application is made within the prescribed time limits. It is clear from the privileged material that the issue of an appeal against sentence was discussed shortly after sentence and a decision made not to seek leave to appeal. As there was no good reason for the late application for leave to appeal in relation to the mandatory nature of the sentence and as the points raised do not arise on the facts and would make no difference to the outcome, we refuse an extension of time. If we had granted an extension of time, we would have refused leave to appeal.

Ground IV: The length of the minimum terms

266. It was contended that the minimum terms were manifestly excessive on the basis of the principles ordinarily applied by this court.

267. Although a court will have regard to all the circumstances in determining whether an extension of time should be granted, a long time lapse (such as has occurred in these appeals) requires a good reason for the court to extend time. We cannot discern in any of the papers before us any good reason for the late application on the basis that the sentences were manifestly excessive. Although we also refuse leave on that basis, we have also considered the merits.

McGill

268. It was submitted that the judge had not sufficiently taken into account his cognitive difficulties; the judge had referred to his educational difficulties, but not to his ADHD.

269. We regard this ground of appeal as without merit. The judge took into account all the relevant factors and set the minimum term at the lowest possible level.

Corey Hewitt

270. Corey Hewitt is now 17; he will be 18 on 7 October 2017. He would ordinarily then be transferred to the adult estate to serve the remainder of his sentence. His minimum term expires on 19 January 2020. The principal submission made related to seeking a reduction to enable him to stay within the prison estate for those under 18.

271. We were provided with a psychological risk assessment report by Dr Loiuse Bowers to which we have referred at paragraph 255. It was submitted to us that, given his progress has been so good, we should consider reducing his minimum term so as to permit him to remain at Barton Moss Secure Care Centre and be released directly from there.

272. However, it important for a court to recognise the distinction between its function in fixing the minimum term and the function of the Secretary of State and the Parole Board in managing the terms of his sentence and release; there is a clear division of responsibilities under our constitution. It is particularly important in an appeal brought so long out of time that the court does not usurp the function of the Secretary of State. Although we see the force of the argument made by Mr Bennathan (based on the report of Dr Bowers and the other reports including the tariff assessment and sentence review reports and the YOT case manager's reports) that it might be beneficial to Corey Hewitt to remain at Barton Moss and be released from there, that is a matter within the remit of the Secretary of State. He can reduce the minimum term and he can, as Mr Bennathan's skeleton arguments points out, designate lower conditions of security. It would not be right for us to interfere with the length of the minimum term to achieve our view of how the Secretary of State should carry out his duties. That is a matter for his decision, subject, of course, to judicial review.

273. The submission that the length of the minimum term did not reflect Corey Hewitt's culpability and his disabilities was without merit. The term was the least possible the judge could properly have passed.

Andrew Hewitt

274. It was submitted that the judge had not taken sufficient account of his youth, his cognitive disabilities and his immaturity.

275. Again, this submission has no merit. The judge fully took into account his culpability his youth his immaturity and his disabilities. He set the minimum term at the lowest possible level.