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*Judgment: approved by the court for handing down  
(subject to editorial corrections)\**

ICOS No: 21/50829/A01

Delivered: 02/12/2022

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

ADRIAN KIDD

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Mr McCartney KC with Mr G O'Kane (instructed by EJ Lavery Solicitors) for the  
applicant  
Mr Johnston (instructed by the PPS) for the respondent

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Before: Keegan LCJ, Treacy LJ and Rooney J

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*Ex Tempore*

**KEEGAN LCJ** (*delivering the judgment of the court*)

*Introduction*

[1] We are grateful to both counsel for the oral submissions today and for the skeleton arguments they have provided which are of high quality. We can give a ruling this afternoon in relation to this appeal.

[2] The applicant renews an application for leave to appeal his sentence of 18 months, comprised of nine months' imprisonment and nine months on licence, imposed by His Honour Judge Rafferty KC ("the judge"). The sentence imposed was in relation to a number of offences to which he pleaded guilty. These offences were conspiracy to defraud persons unknown in the supply of television boxes in relation to Sky TV between 1 August 2015 and 21 September 2017, an associated offence of sale of unauthorised decoders, possession of android TV boxes in connection with a fraud and converting criminal property.

[2] The applicant's co-accused, his wife, also pleaded guilty to related offences and received a sentence of 12 months; suspended for three years. It was accepted in relation to her that she had a lesser role.

### *Factual background*

[3] Following a search of the applicant's home on 22 September 2017 nine android boxes and some computer equipment was seized which provided proof of an illegal streaming service to the end users to avail of Sky TV's premium content. The applicant was linked by his username and hotmail email address. The applicant was found to have been purchasing digi boxes which he then chipped allowing the user to access chosen Sky and other TV packages. He set up a PayPal account whereby customers placed their order and made payment. Then he supplied the chipped digi boxes. It was agreed that over a 23 month period £93,000 was paid into the applicant's PayPal account. Whilst impossible to be precise the net profit figure was estimated by counsel to be at least somewhere, as the learned judge said, in the region of £20,000.

### *Examination of the sentence*

[4] The judge's sentencing remarks are before the court, and we have considered them. He chose a three-year headline sentence which he then reduced to two and a half years by way of mitigation. He allowed the maximum discount of one third for the guilty plea. He referred to a further allowance of two months for totality bringing the sentence down to 18 months.

[5] The three grounds of appeal that are put forward are as follows:

- (i) That the starting point was too high;
- (ii) That the judge failed to give weight to the applicant's own circumstances and those of his children; and
- (iii) That the judge failed to give weight to delay.

[6] In examining this sentence we obtained some assistance from the decision of the Recorder of Belfast in an unreported case of *R v Rymacki* [2013] NICC 20 and a decision of the Court of Appeal in *R v Mahoney* [2016] NICA 27. *Rymacki* was a case involving the selling of goods bearing an unauthorised trademark and trading in counterfeit products where a suspended sentence was imposed. *Mahoney* was a case involving a sophisticated web fraud which attracted a significant custodial sentence.

[7] In *Mahoney* the court approved some general guidance drawing from *Rymacki* and a case of *R v Khan* [2013] EWCA Crim 892: This is found at para [18] as follows:

“[18] He recognised that the need for deterrence meant that only in exceptional circumstances should a custodial sentence be suspended. He then considered the appropriate starting points:

As to the length of such a sentence much will depend on the circumstances of the case. Offences of this nature are essentially confidence frauds, so the seriousness of the offence will depend largely on the amount of loss to the trademark owner or profit generated by the offenders whichever figure is the more accurate in determining the correct level of culpability. Sums up to £20,000 should attract sentences, after a contest, with a starting point of between 1 and 3 years, sums up to £100,000 should have a starting point of between 3 and 4 years, sums up to £500,000 should have a starting point of 4 and 5 years, and for sums over £500,000 the starting point should be between 5 and 6 years.”

[8] In *Mahoney Morgan* LCJ also stressed the need for flexibility in sentencing for these types of offences given the different circumstances in which they will arise and varying levels of culpability and harm. At para [21] he said:

“Starting points should not be determined by reference to harm only. We note that the Recorder of Belfast [in *Rymacki*] was careful to ensure that there was a wide range of starting points to reflect the varying culpability of the offenders. Even so these should not be seen as sealed compartments. In cases involving amounts over £500,000 and high culpability we consider that starting points of 7 or 8 years are appropriate. On the other hand, where the harm is small and the culpability low a community sentence may be appropriate.”

[9] The facts of this case do not fall easily in line with either of the two cases referred to above. Taking into account all of its particular facts we think that the starting point chosen by the judge was within range. It reflects the culpability of the applicant and the bracket of harm which is defined by the loss occasioned explained in the authority set out at para [7] above.

[10] This case is one involving serious offences of fraud which clearly merited a finding that the custodial threshold was passed. Therefore, we do not believe that the starting point was too high. We dismiss that ground of appeal.

[11] The second ground of appeal that the judge failed to give weight to the applicant’s own circumstances and those of his children. In relation to this ground of appeal Mr Johnston frankly conceded that further information has become available which has a bearing on whether there are exceptional circumstances present in this case. The judge did consider the applicant’s circumstances carefully. He had a positive pre-sentence report which we will come to in a moment. However,

he did not have the additional information that we have today before this court. That information is comprised in an affidavit of the applicant's wife, Kelly Kidd, of 30 November 2022 with medical evidence attached in relation to the children of the family. This evidence was undisputed by the prosecution.

[12] The affidavit explains that since the applicant went to prison 12 weeks ago the impact on her and the children has been considerable. Her son, who has ADHD, has struggled and exhibited tantrums. Ms Kidd states that "these can be hard to manage and are upsetting for the other kids." She also refers to an obvious change since the defendant was imprisoned which is "the phone calls that I am now getting from her son's school about his behaviour. A number of the calls have been received when I am at work, and this is affecting my ability to do my job properly."

[13] Attached to the affidavit are some vouching documents in relation to her son's presentation. The extreme outworking of his father's imprisonment was obviously not known at the time of sentence. His behaviour has clearly heightened. Also, the basis upon which Ms Kidd was sentenced to allow her to care is undermined by the fact that she cannot undertake both her work and look after this child as was hoped.

[14] There is another child of the family who requires support due to issues with her back. The affidavit also refers to family finances being extremely stretched. This new evidence adds another dimension to the case which Mr Johnston conceded. Accordingly, we find merit in the second ground of appeal, the effect of which we will turn to in a moment.

[15] The applicant's circumstances are that he has a clear record, save a speeding conviction. There is no record of dishonesty. He also has a work history which we think significant. He lives in rented accommodation and has no trappings of wealth. We were told today by Mr McCartney that employment is open to him. We were also told today that he is an enhanced prisoner, he has served three months' imprisonment which has obviously had an impact and effect upon him, and we were told that he may be released early if the sentence stood as a result of his enhanced status.

[16] The third ground of appeal relates to the failure of the judge to give weight to delay in prosecuting this case. We also think that this is a valid ground of appeal. Mr Johnston candidly accepts the problematic fact that the judge did not refer to the issue of delay at all in his ruling. Whilst an investigation such as this is complicated, five years is a long period for a man of clear record to have to endure waiting to hear his fate. This also had an adverse effect on his mental health. In this case the considerable delay must be factored into the sentence.

[17] Having found merit in two of the grounds of appeal the issue for us is whether the final sentence of 18 months, nine months' imprisonment and nine

months on licence, should be adjusted in the light of the evidence we have examined as to the circumstances of the applicant and his family and the issue of delay.

### *Conclusion*

[18] The issues raised in Ms Kidd's statement, accepted by the prosecution, place a different complexion upon this case. We consider that there are exceptional circumstances in relation to the family dynamic allied to the issue of delay. The fact that the applicant has the offer of employment and has served three months of imprisonment is also of significance to us. All of this taken together leads us to the conclusion that we should suspend the sentence in this case.

[19] In taking this course we reiterate the fact that offences of this nature are serious and will usually be punished by custodial sentences. In the society in which we live people should not think that they can undertake fraudulent activity of this nature with impunity.

[20] A suspended sentence remains a sentence which is deterrent. If during the currency of this suspension which we are going to set at three years (which coincides with the suspended sentence in the case of the applicant's wife) the applicant reoffends he will be sentenced for any recent offence and the remainder of the suspended sentence may be activated. We hope that the applicant has learned his lesson, that he will take up employment, that he will make his money lawfully going forward and that he will attend to the critical needs that his family clearly have.

[20] We will grant leave. We allow the appeal and substitute a suspended sentence for the sentence imposed on the basis of the exceptional circumstances we have identified.