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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE CROWN COURT SITTING AT BELFAST

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THE KING

v

FRANCIS DEVLIN

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Mr Brendan Kelly KC with Mr Stephen Toal (instructed by KRW Law Solicitors) for the Applicant
Mr Liam McCollum KC with Mr Samuel Magee KC (instructed by the PPS) for the Respondent

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Before: Keegan LCJ, McCloskey LJ and Kinney J

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

Introduction

[1] This is a renewed application for leave to appeal a custodial sentence of four years' imprisonment split equally between custody and licence imposed on 13 June 2023 by Mr Justice Fowler ("the judge") in relation to four counts of conspiracy to cheat the public revenue. On 26 June 2023 the single judge, McFarland J, refused leave.

[2] The sole issue on appeal relates to the impact of imprisonment on the applicant's son, and whether the admitted adverse impact of this should result in a suspended sentence. This question has been addressed in a decision of the Court of Appeal in England & Wales of *R v Petherick* [2012] EWCA Crim 2214, which we will discuss in this judgment.

Factual Background

[3] The background facts are not disputed and so we need record them in summary form only as follows.

[4] The offending occurred between 14 May 2009 and 13 March 2012. The applicant was arrested and interviewed in 2012. He pleaded guilty at a very late stage in proceedings, on 13 June 2023. The applicant was at the head of an organised crime gang which provided for labour within the construction industry by way of taking cash in hand payments to avoid tax and VAT. This was via a parent company called TMS Construction Limited. As part of the criminal enterprise other sham companies were set up, a sham company bank account was established, false invoices were created, and a sophisticated working arrangement was put in place to avoid detection. The applicant along with one other spearheaded the recruitment of other individuals to be part of the criminal enterprise. As a result, after a comprehensive HMRC investigation known as Operation Concentric, 37 people were charged with various fraud offences in what has been described as one of the largest frauds in this jurisdiction.

[5] The paperwork reveals that through the operation of the scheme at least £1.44m in VAT and £2.65m in income tax, and PAYE and corporation tax was diverted from HMRC. The estimate that can be vouched for loss to the public purse is therefore approximately £5 million. However, it is part of the accepted contextual background of this case that the actual financial loss because of the fraud may well be a much higher than the figure quoted due to the impossibility of tracing every penny that has been defrauded from the public purse. In fact, the estimates are that many millions of pounds were lost.

[6] As we have said, there were others involved in this criminal enterprise. These individuals had different levels of responsibility. However, it is accepted that the applicant and Mr McStravick, were the controlling minds behind the fraud via their company. They recruited the other individuals to set up and operate the numerous scam companies involved in this fraud. Self-evidently this case required considerable time for the prosecution to prepare for trial as it was an extremely complex case.

The Sentence

[7] Before conducting the sentencing exercise, the judge had before him the benefit of a pre-sentence report which sets out the applicant's position in relation to the offending. The applicant's stated position was encapsulated in the following extract from the report:

> "Mr Devlin places the context of the offences on the 2008 financial crisis. He recalls companies that he had worked for or had contact with, experiencing challenges and remaining viable. He describes many of these companies

> as hanging by a thread while other companies were collapsing around him. Mr Devlin says he made a bad decision in forming a company of his own at that time. He tells me that he planned to use the company to avoid liability such as VAT and taxes. Mr Devlin tells me that he saw this as an opportunity to make a business work within the context of the financial crisis. Mr Devlin advised of the methods used in the fraud and in simple terms he tells me that money earned from one company could be off-set against other companies who would then, in turn, not honour their liabilities. Mr Devlin tells me that he continued to operate in this manner for a number of years until his office was raided in 2012. While he acknowledged that his actions were completely wrong, he rationalises his actions in the belief that this method was undertaken in order to maintain the validity of the companies during very difficult trading circumstances given the global recession following the financial crash of 2008. The defendant has no difficulty in expressing his regret in being involved in such an enterprise. He tells me that since then he has operated everything entirely by the book and he says that he only wishes he had always worked this way."

[8] The judge's sentencing remarks refer to the above account from the applicant. They also refer to the personal circumstances of the applicant. In particular, the judge refers to the fact that the applicant is a man of good character who was then self-employed earning a salary and had 10 full time staff.

[9] The judge also comprehensively considers the position of the applicant's son, then 16 years of age, who had a diagnosis of Autistic Spectrum Disorder, ("ASD"). In considering this issue the judge had the benefit of expert reports from consultants in child and adolescent psychiatry Dr Harding, and Dr Leddy and a consultant psychiatrist, Dr O'Kane, all of whom stressed the adverse effect imprisonment would have on the applicant's son.

[10] As to this issue the sentencing remarks read as follows:

> "Mr Devlin is understandably concerned about his autistic son and how he will be able to cope in his father's absence if he were to be imprisoned. I have considered in detail Dr Harding's Child and Adolescent Forensic Psychiatric Report. He produced a very detailed history of Mr Devlin's son's diagnosis and also astute observations from a consultation that he had with Mr Devlin's son, from this report, it is clear that this young man has a well-established

diagnosis of Autism Spectrum Disorder affecting his emotional, social and academic functioning.

Dr Harding concludes in his report that this young man is profoundly disabled by his ASD and it is clear to him, Dr Harding, that the underlying neuro developmental disorder has had a significant impact on his ability to interact with the world around him. It was made clear to the doctor that this young man is at a key phase of his life and development from social, academic and emotional standpoints. The support he has at this time and at this point in his life is essential for his current and future happiness and wellbeing. The social and emotional development is starting to flourish as he transitions into adulthood. This flourishing is extremely fragile currently.

He goes on to state that this is a critical academic stage of the son's life, the successful negotiation of which being essential for his future wellbeing, success and happiness. In the doctor's opinion, it is essential that he is allowed to fulfil his potential, both academically and socially. He is an intelligent boy and could do well in his examinations and the outcome of these will have a dramatic impact on his life trajectory; that if he were to be excessively stressed at this point in his academic life, then his examinations would inevitably be impacted upon, and this would be likely to have a negative impact on his life trajectory moving forward.

The doctor then goes on to consider that it is clear that this young man has a particular bond with his father that is both nurturing and containing and his father provides him with a sense of social confidence and empowerment, that he looks up to his father and them being together is, in the doctor's view, a key factor in this young man's ongoing social development and the doctor suggests that the court, if it were to separate the son from his father at this critical point in his academic and social development, would be catastrophic. Removing the son from the home would, in his view have a deleterious impact on the son's academic achievement and would have a profound negative impact on his social and emotional development. He then, that is to say the doctor, went on to give his considered opinion as to the effect that removal of the applicant would have, and he indicated that it would be in his view that the court should consider the option of not sending the applicant

> into custody. These views of this consultant psychiatrist have been reviewed by Dr O'Kane and Dr Leddy who have agreed with the content of that report."

[11] The judge concluded that there would be an adverse impact upon the applicant's son and the applicant's wife should a custodial sentence be imposed.

[12] Next the judge considered whether a suspended sentence could be imposed. On this issue he concluded as follows:

> "In terms of sentencing in circumstances such as these, there is a balance to be struck between what are serious cases in which a deterrent sentence is required and taking into account and considering the impact that that will have on a child of the family and, indeed, on the applicant's wife. I do recognise that it is important to consider the consequences of imprisonment of a father and a husband, particularly in circumstances where a deterrent sentence is required. I remind myself of the authority of *The King v King* and the observations that a suspended remain a sentence which can be deterrent, however, while the above principles remain applicable, the case of *Kidd* first of all be distinguished on the facts from the present case. The present case concerns very substantial amounts of sums of money over a protracted period of time and the conspiracy to cheat and the steps that were taken to achieve it were extensive. The culpability of Mr Devlin in the context of this fraud, in my opinion, is high, with the consequent sentencing range high, I am sure the irony of the present situation is not lost on Mr Devlin, an intelligent man, where his actions have caused considerable sums of money to be diverted and unavailable for essential services for very vulnerable and deserving persons within our community. Regrettably, having weighed up the competing issues I cannot conclude that the circumstances in this case are such that it is so exceptional that I should dispense the sentence in the previous case."

[13] The judge went on to make an allowance for the delay in this case and the plea of guilty. In the circumstances of the case, he considered that the appropriate range was 6-8 years in custody with a starting point of seven years, he reduced that starting point to take into account the difficulties which the imprisonment would have on the family of the applicant including his son and wife to six years, and he then reduced for a period of delay by a further period of six months. Ultimately, he arrived at a sentence before reduction for a plea of guilty to 5½ years' custody. In terms of reduction for the plea he reduced the sentence to one of four years determinative

custody split equally between custody and supervised licence as a result of the plea of guilty.

Arguments on Appeal

[14] Commendably, Mr Kelly confined his submissions to the real issue which is the impact on the applicant's son of a sentence of imprisonment. He accepted that the seven-year starting point was entirely appropriate. He also conceded that the four-year sentence was appropriate given the magnitude of the fraud in this case. However, Mr Kelly contended that the effect on the applicant's son was of such an extreme nature that this court should consider suspending the sentence given that these were truly exceptional circumstances.

[15] In support of this argument, Mr Kelly relied upon the previous medical evidence which had been filed before the sentencing judge. In addition, he sought to adduce an addendum psychiatric report from Dr Harding dated 20 September 2023 which we allowed to be admitted for consideration on appeal (see *R v Ferris* [2020] NICA 60).

[16] The updated report of Dr Harding essentially points out that as was predicted the applicant's sentence and imprisonment around the time of the child's GCSEs had a negative impact on his academic attainment in those examinations and that he did not receive a predicted grade in one of his favourite subjects, computer studies. Dr Harding, however, points out that the school luckily agreed that he could still do an A Level in the subject.

[17] Summarising the current position, the report of Dr Harding stated that:

> "The son presents with signs and symptoms of a gestating depression, and whilst I would not wish to medicalise his mood state now, he would very likely meet the threshold for depression where he to be assessed face to face by his GP or mental health practitioner. In my view, he is on the verge of being clinically depressed if he remains separated from his father. In my view, his depression will probably only get worse, he will very likely become more socially isolated, and his Autism Spectrum Disorder is likely to regress further. The son's mother has her own mental health difficulties and has become extremely isolated and depressed since the son's father was imprisoned. The effect on the son and his mother has been profound, and my concern is that with further passing months and years, the effects on the son will become more severe, entrenched and will likely lead to life long mental health difficulties and disability with regards to his Autism Spectrum Disorder."

[18] Against the arguments made by the defence, the prosecution stressed that the offending involved here was extremely serious on any reading. The prosecution written submission states that it was "one of the most serious and complex fraud investigations in the history of this jurisdiction." The prosecution also highlighted the fact that the applicant was an author and orchestrator of that scheme and was responsible for the cheating of public services by his sustained massive dishonest appropriation of vital public monies.

[19] Understandably the prosecution did not take any issue with the content of the expert reports or the updated opinion of Dr Harding. Whilst the prosecution expressed sympathy for the applicant's son, the persecution position was that this issue should not prevail over the public interest in achieving proper punishment for such serious offending.

The Issue

[20] Having summarised the respective arguments above this case boils down to a balancing between the private third-party interest of the applicant's son against the public interest which is intricately related to the high level of offending and the high culpability involved in this case.

Legal Principles in Play

[21] Pursuant to section 18(1)(a) of the Treatment of Offenders Act (Northern Ireland) 1968 in respect of sentences shorter than seven years' imprisonment the court may order that the sentence of imprisonment be suspended by up to a period of five years. It follows that a four-year sentence may still be suspended in this jurisdiction. That we note is different to the position in England & Wales where the ability to suspend a sentence is only available for sentences of two years or less. The power to suspend the applicant's sentence of four years imprisonment was therefore available to the trial judge. However, we are bound to say that the frequency with which a court would suspend a sentence of four years imprisonment will be extremely rare.

[22] Article 23 of the Criminal Justice (Northern Ireland) Order 1996 also inserted subsections (1C) and (1D) into section 18 of the Treatment of Offenders Act (Northern Ireland) 1968 thereby creating a requirement that the judge find exceptional circumstances before imposing a suspended sentence upon a defendant. Although Article 23 has never been brought into force this court has nevertheless held that where a court would normally be required to pass an immediate custodial sentence (for example, because of the need for deterrence, or to mark society's condemnation of certain behaviour) it should carefully enquire into the circumstances of the offence to see whether a suspended sentence could be justified on the basis of exceptional circumstances. Morgan LCJ held in *DPP's Ref (Nos 13, 14, and 15 of 2013) (R v McKeown and others)* [2013] NICA 63 at paragraph [11] as follows:

> "Where a deterrent sentence is required previous good character and circumstances of individual personal mitigation are of comparatively little weight. Secondly, although in this jurisdiction there is no statutory requirement to find exceptional circumstances before suspending a sentence of imprisonment, where a deterrent sentence is imposed it should only be suspended in highly exceptional circumstances as a matter of good sentencing policy."

[23] Of course, the decision to suspend a sentence of imprisonment should only be taken after a judge has decided that the custodial threshold has been passed and determined the length of the sentence commensurate with the offence. There is no issue in this case in relation to either of those ingredients of the sentencing exercise. In addition, given the nature of this offending it is clear that the court was obliged to impose a deterrent sentence.

[24] The Court of Appeal in Northern Ireland has consistently stated that where a deterrent sentence is required as a matter of good sentencing policy, the court should only suspend the sentence of imprisonment in highly exceptional circumstances – see *DPP's References (Nos 13, 14 and 15 of 2013) (R v McKeown, Lynn and Ferris* [2013] NICA 63).

[25] The central question in this appeal, therefore, is whether the impact on a third party is so strong a factor as to warrant an assessment of highly exceptional circumstances justifying a suspension of the applicant's four-year sentence of imprisonment.

[26] The judgment of the Hughes LJ in the Court of Appeal in England & Wales of *R v Petherick* took the form of a practice note to deal with the interests of third parties, principally children, within the sentencing process reflecting the impact of article 8 of the European Convention on Human Rights ("ECHR") which came into force in domestic law in 2000 by virtue of the Human Rights Act 1998.

[27] We take this opportunity to expressly approve the application of the *Petherick* guidance in Northern Ireland. Paras [17]-[25] contain a comprehensive checklist of factors which must be balanced when considering the impact of a sentence of imprisonment upon others. We set this out in extenso:

> "17. We do think however that we ought to say these brief things by way of general observation. First, the sentencing of a defendant inevitably engages not only her own article 8 family life but also that of her family and that includes (but is not limited to) any dependent child or children. The same will apply in some cases to an adult for

whom a male or female defendant is a carer and whether there is a marital or parental link or not. Almost by definition, imprisonment interferes with, and often severely, the family life not only of the defendant but of those with whom the defendant normally lives and often with others as well. Even without the potentially heart-rending effects on children or other dependents, a family is likely to be deprived of its breadwinner, the family home not infrequently has to go, schools may have to be changed. Lives may be turned upside down by crime.

18. Second, the right approach in all article 8 cases is to ask these questions: A. Is there an interference with family life? B. Is it in accordance with law and in pursuit of a legitimate aim within article 8.2? C. Is the interference proportionate given the balance between the various factors? That is carefully set out by Lady Hale in her speech in HH. Although she was in the minority as to the outcome in relation to one of the persons sought for extradition, she gave at paragraph [30] this analysis with which there was general agreement. That approach is as true of sentencing as of any other kind of case in which family life is in question. Of course in sentencing, the first two questions will usually be straightforward. There will almost always be some interference with family life, and it will be in accordance with law and due to legitimate aims. It is the third question which may call for careful judgment.

19. Third, long before any question of article 8 or of the Human Rights Act 1998 was thought of, sentencing practice in England and Wales recognised that where there are dependent children that is a relevant factor to sentencing. That is most conveniently to be extracted from the careful words of Lord Judge, CJ, in *HH* at paragraphs 126 to 130, to which reference should be made if this point is taken. In particular, at paragraphs 128 and 129 he said:

> '128. The continuing responsibility of the sentencing court to consider the interests of children of a criminal defendant was endorsed time without number over the following years. Examples include *Franklyn* (1981) 3 Cr App R(S) 65 Vaughan (1982) 4 Cr App R(S) 83, *Mills* [2002] 2 Cr App R (S) 229, and more recently *Bishop* [2011] EWCA Crim 1446 and, perhaps most recently in *Kayani*; *Solliman* [2011] EWCA Crim

> 2871, [2012] 1 Cr App R 197 where, in the context Of child abduction, the court identified 'a distinct consideration to which full weight must be given. It has long been recognised that the plight of children, particularly very young children, and the impact on them if the person best able to care for them (and in particular if that person is the only person able to do so) is a major feature for consideration in any sentencing decision.'
>
> 129. Recent definitive guidelines issued by the Sentencing Council in accordance with the Coroners and Justice Act 2009 are entirely consistent. Thus, in the Assault Guideline, taking effect on 13 June 2011, and again in the Drug Offences Guideline, taking effect on 29 February 2012, among other features the defendant's responsibility as the sole or primary carer for a dependant or dependants is expressly included as potential mitigation."

20. Fourth, it follows that a criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected it will take it into consideration. It will ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve.

21. Fifth, in a criminal sentencing exercise the legitimate aims of sentencing which have to be balanced against the effect of a sentence often inevitably has on the family life of others, include the need of society to punish serious crime, the interest of victims that punishment should constitute just desserts, the needs of society for appropriate deterrence (see section 142 Criminal Justice Act 2003) and the requirement that there ought not to be unjustified disparity between different defendants convicted of similar crimes. Moreover, as Sachs J pointed out in the South African Constitutional Court *in N v The State* [2007] ZACC 18, in a case in which there was under consideration a specific provision in the Constitution which required the interests of an affected child to be "the paramount consideration", not only society but also children have a direct interest in society's climate being one

of moral accountability for wrongdoing. It also needs to be remembered that just as a sentence may affect the family life of the defendant and of his/her innocent family, so the crime will very often have involved the infringement of other people's family life. There is a good example afforded by the striking facts of the second defendant *Solliman* in *Kayani and Solliman* [2011] EWCA Crim 2871 at paragraph 54. He, by his crime of abduction of children, had utterly destroyed the abducted children's relationship with their mother and his well-deserved imprisonment was now to punish them again by depriving them of his own care as their otherwise unexceptional remaining parent. This present case is also one in which article 8 rights are affected not only in the defendant and her child but in the deceased and his family.

22. Sixth, it will be especially where the case stands on the cusp of custody that the balance is likely to be a fine one. In that kind of case the interference with the family life of one or more entirely innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate.

23. Seventh, the likelihood, however, of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver and *M v South Africa* is again a good example. Even with the express Constitutional provision there mentioned, the South African Constitutional Court approved the result in which in one of the cases a sentence of four years was necessary upon a fraudulent mother, despite the fact that she was the sole carer for a number of children who were likely to have to be taken into care during her imprisonment - see paragraphs 43 to 44. Likewise, in *HH*, the majority of the Supreme Court was satisfied that there was no basis on which the extradition to Italy could be prevented of a father who was in effect the sole carer for three young children, but who had been a party to professional cross border drug smuggling. His extradition of course meant not only his imprisonment, but his imprisonment too far away from the children's home for there to be more than the most rare of contact.

24. Eighth, in a case where custody cannot proportionately be avoided, the effect on children or other family members might (our emphasis) afford grounds for mitigating the length of sentence, but it may not do so. If it does, it is quite clear that there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges.

25. Ninth, those briefly stated principles are we think sufficient to guide sentencing judges and do no more than reflect what has been the practice of the criminal courts since long before arguments were habitually couched in terms of article 8 or human rights generally. We add that we do not think that those principles are affected by the question which is sometimes raised, and which has been adverted to in Miss Russell's written submissions, namely whether article 3 of the United Nation's Convention on the Rights of Children and the similarly expressed article 24.2 of the European Union Charter of Fundamental Rights, do or do not apply to the sentencing of adults. As to that, on the one hand it is difficult to imagine that the framers of those conventions can have meant to include the sentencing of adults as decisions "concerning children", any more than they meant to include other decisions such as, for example, the enforcement of judgment debts against parents or the termination of the employment of parents within that expression. If they did, that would involve a requirement that the effect on a child of such a decision should be "a primary consideration." Moreover, article 9 of the same convention makes clear that the separation of a child from parent may occur as the result of imprisonment which it clearly contemplates. As Lady Hale observed in *ZH (Tanzania)* it clearly distinguishes between the separation of a child and parent as a consequence of a decision as to the child's upbringing on the one hand and separation as a consequence of detention or imprisonment on the other. As against that, there are passages in *HH* where it appears to have been assumed, though without argument to the contrary, that article 3 at least does apply - see passing references at paragraphs [16], [98], [143] and [155]. The reason why we say that it is not necessary to resolve that question in the sentencing in the Crown Courts is because it is clear from *HH* that even on that assumption and even if those provisions of those conventions applied,

> it is the balancing which is required by article 8 in the form that we have endeavoured to set it out which is the effective test for sentencing."

[28] Other decided cases belonging to this area were cited in written argument. Each is necessarily fact specific. What we take from the other cases we have seen is that the guidance that we have just recited in *Petherick* has been consistently applied in England & Wales and that the outcome of each case will depend on the factual circumstances.

[29] A good illustration of the intensely fact sensitive nature of the exercise is the decision of this court in *R v Kidd* [2022] NICA 75. In that case the court was minded on appeal to suspend a sentence in relation to a benefit of £20,000 being obtained from converting the chips in Sky digi boxes. This was obviously a case of lesser culpability where the court did take into account the fact that the appellant in that case had served part of the sentence which was only an 18-month sentence, and also delay and the effect on his family given his clear record to impose a suspended sentence. It is patently obvious that the facts of that case differ substantially from the facts of this case.

[30] Wisely the applicant did not try to compare other co-accused given the fact that, as we have said, each case will depend uniquely on their own facts. The remaining question is upon application of the guidance in *Petherick* to this particular case whether the judge was wrong in principle to reach the conclusion he reached.

Our Conclusion

[31] In arriving at our conclusion we have considered all of the expert reports which have been garnered in relation to the son and also there is a high number of testimonials provided on behalf of the applicant which are very complimentary of him as an employer, as someone who undertakes voluntary work and as someone who clearly has a strong commitment to his son. It is within this entire factual matrix that we reach our conclusion as follows applying the *Petherick* guidance.

[32] We start by restating the obvious point that the sentence imposed was not manifestly excessive. Four years for such a significant fraud was, to our mind, merciful in that it did allow for a reduction due to the effect that would be likely on the son and the family. The trial judge knew the impact of the sentence upon the applicant's son. He had detailed medical evidence in relation to that. He knew that the son depended on his father, and he took that into account.

[33] The question, therefore, is whether the sentence could be said to be disproportionate in all the circumstances. On one side of the balance is the fact that this was a high-level fraud committed over a period of time which involved considerable loss to the public purse and was of a sophisticated and complicated

nature. Against that, the applicant is a man of clear record who has shown some remorse and who has this strong family responsibility.

[34] We also note that there is no issue taken with the methodology applied by the sentencing judge, we bear in mind that he had carriage of this complicated case over a long period of time and, so, he was well placed to consider the delicate matter of balancing the interests at play. This is a matter which was well within the remit of the judge's evaluation. The high culpability and the high level of harm place this case with a high starting point. No issue is taken with that.

[35] This is also a case where because of the need for proper deterrence there must be extraordinary factors to warrant suspending the sentence. As with any proportionality exercise there will always be argument on the edges about the exact amount of weight to be given to competing factors. It is not argued that the judge failed to take into account all relevant factors. Nor is it argued that he ignored any relevant factor or that he applied inappropriate weight to the competing factors.

[36] With these uncontroversial observations made we turn to the specifics of the sole appeal point which engages with the adverse impact of the father's imprisonment on his son.

[37] In this regard we have noted that the son's ASD was diagnosed early in his life and has been helpfully addressed through the statementing process within his education and through supports and services and through the ability of his mother and father to help their son. It is right to say that he happily has his mother to look after him in this case although the point in relation to the need for his father is not lost on us because the father was a strong and settling influence for his son. The tragedy of this case is that the son is clearly impacted due to the misdeeds of his father.

[38] Clearly the article 8 rights of the child are engaged in any sentencing exercise of this nature. The judge recognised this when sentencing. The ultimate obligation of the sentencing court was to apply the article 8 considerations to strike a proportionate balance when determining the appropriate sentence.

[39] There is little doubt that the medical evidence concerning the applicant's son is significant and, given the interference in the child's right to private and family life, it required a full and proper assessment of the proportionality of a prison sentence removing the father from the family home for a period in the region of two years, with a possibility of further detention should the father not comply with his licence conditions.

[40] Against these intensely private interests which relate to the applicant's son must be weighed the public interest. The duty of the courts to impose appropriate punishment on criminals is clearly a very weighty factor in the balance. As Hughes LJ stated in his seventh point in the *Petherick* guidance, the graver the offence the lesser is the interference in family life. In this case the applicant's criminality is very grave

and his culpability is elevated. He is also an intelligent man who entered third level education, with a successful business life and an annual income in excess of £100,000. Despite having all these advantages in life, he found it necessary to set up and run with his co-accused an organised crime group, recruiting people into that organisation and cheating the HMRC out of sums in the region of £5 million over a sustained period.

[41] A weighty factor is that this is clearly not a case on the cusp of the custody threshold. Rather, this was a case where custody could not proportionately be avoided, even with the effect on children or other family members. In addition, the sentence was mitigated to take into account the effect on the son of his father's imprisonment.

[42] Thus, whilst there are factors in this case which point to difficult circumstances for the family, with whom the court is sympathetic, we do not consider that the circumstances were so exceptional to merit a suspension of the sentence in light of the nature and extent of the index offending. In this case the public interest requiring condign punishment and deterrence decisively outweighs the competing private interests.

[43] Our final words are for the benefit of the young man who was central to this appeal. We are sorry that he has suffered but that is entirely down to his father's actions. He is clearly a young man who will continue to need help as he develops. He is in no way responsible for the situation that has arisen. He is a young man who we consider has good potential in life to be an upstanding member of the community. He is clearly loved and supported by his family. He will know that if people, like his father, offend there are consequences, and they will have to be properly punished. However, time will pass, and his father will be released from prison in due course. His son should know that in the meantime he has the support and day to day care of his mother and others and he has his father's emotional support, albeit that he is currently incarcerated.

[44] Accordingly, we refuse leave and dismiss the appeal.