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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Date: Thursday 7 March 2002

B e f o r e:

LORD JUSTICE DYSON

MR JUSTICE JOHNSON

and

THE RECORDER OF MANCHESTER
(His Honour Judge Sir Rhys-Davies QC)
Acting as a Judge of the Court of Appeal Criminal Division

R E G I N A

- v -

GRAHAM WESTGARTH SMITH

MIKE JAYSON

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(Official Shorthand Writers to the Court)

MR J GOLD appeared on behalf of THE APPELLANT SMITH
MR J KIRK appeared on behalf of THE APPELLANT JAYSON
MR B HERON and MISS I DELAMERE appeared on behalf of THE CROWN

J U D G M E N T

1. LORD JUSTICE DYSON: In these two appeals the appellants were convicted of the offence of making an indecent pseudo-photograph of a child contrary to section 1(1) of the Protection of Children Act 1978 ("the Act"). In the case of Smith, the image was shown on

an attachment to an e-mail. In the case of Jayson, the image was downloaded by the appellant from the Internet on to his computer screen. In each case, the image was saved in the temporary Internet cache as a result of the automatic function of the computer. It is well known that electronic communication by means of the Internet and e-mails has led to an explosion in the dissemination of pornographic material, and in particular of indecent photographs of children. This has generated prosecutions for offences under section 1(1) of the Act.

2. So far as material, the Act provides as follows:

> "1(1) It is an offence for a person --
>
> (a) to take, or permit to be taken, or to make any indecent photograph or pseudo-photograph of a child; or
>
> (b) to distribute or show such indecent photographs or pseudo-photographs; or
>
> (c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or
>
> (d) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs or intends to do so.
>
> ....
>
> (4) Where a person is charged with an offence under subsection (1)(b) or (c), it shall be a defence for him to prove --
>
> (a) that he had a legitimate reason for distributing or showing the photographs or pseudo-photographs, or (as the case may be) having them in his possession; or
>
> (b) that he had not himself seen the photographs or pseudo-photographs and did not know, nor had any cause to suspect them to be indecent.
>
> ....
>
> 7(1) The following subsections apply for the interpretation of this Act.
>
> (2) References to an indecent photograph include .... a copy of an indecent photograph ....
>
> ....
>
> (4) References to a photograph include --
>
> (a) the negative as well as the positive version; and
>
> (b) data stored on a computer disc or by other electronic means which is

capable of conversion into a photograph.

....

(7) 'Pseudo-photograph' means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.

....

(9) References to an indecent pseudo-photograph include --

(a) a copy of an indecent pseudo-photograph; and

(b) data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph."

3. In considering these provisions, we have in mind what this court said in R v Bowden [2000] 1 Cr App R 438. In that case, the defendant had downloaded from the Internet indecent photographs of children under 16 years of age. Giving the judgment of the court, Otton LJ said this at page 444E:

> "In our judgment, section 1 as amended is clear and unambiguous in its true construction. Quite simply, it renders unlawful the making of a photograph or a pseudo-photograph. There is no definition section. Accordingly the words 'to make' must be given their natural and ordinary meaning. In this context this is 'to cause to exist; to produce by action, to bring about' (*Oxford English Dictionary*). As a matter of construction such a meaning applies not only to original photographs but, by virtue of section 7, also to negatives, copies of photographs and data stored on computer disc.
>
> We do not accept that section 1 in its present form is either ambiguous or obscure. We are certainly not persuaded that in some way the draftsman nodded and produced an ambiguous, obscure or illogical result. Nor do we accept that the natural interpretation leads to any absurdity suggested by counsel. We prefer the submission of Mr Michael Crimp on behalf of the respondent: 'A person who either downloads images onto a disc or who prints them off is making them. The Act is not only concerned with the original creation of images, but also their proliferation. Photographs or pseudo-photographs found on the Internet may have originated from outside the United Kingdom; to download or print within the jurisdiction is to create new material which hitherto may not have existed therein'."

4. With that introduction we turn to consider the two cases.

Smith

5. On 20 December 2000, at Lewes Crown Court, before His Honour Judge Kemp and a jury, the appellant was convicted of one count of making indecent pseudo-photographs of a child. He was sentenced to two years' probation. He appeals against conviction with leave of the full court, after refusal by the single judge.

6. The facts may be briefly stated. After a police raid on the appellant's property on 13 July

1999, a computer and separate hard disc drive were recovered. After the separate hard disc was analysed, it was found that the Inbox contained an e-mail with attachments which showed images of a naked girl called Eva, apparently taken by her mother, an internationally renowned photographer. The attachments had been sent to the appellant on 26 July 1998 by someone calling herself "Yvonne Nystrom", whose e-mail address is "smallthings@hotmail.com". The message accompanying the images was in the following terms:

> "Hello Geordie [admitted to be a reference to the appellant], I am an Eva fan too, so I may leave some images as thanks for the one you putted on the newsgroup.... Tell me if you like me to send more of her."

7. The appellant subsequently replied by e-mail on 27 July, saying:

> "Thanks very much. I have not seen these pictures before. In fact I have one book of Irina ...."

8. The following day, Yvonne Nystrom replied saying:

> "Want some more?"

9. On 29 July, the appellant replied saying:

> "Yes, please, send them on. Thank you. I have such a limited collection at the moment. I will do some fresh scans at the weekend and post them to Usenet."

10. The only evidence called at trial to which it is necessary to refer was that of Mr Webber, a self-employed computer consultant. He gave expert evidence regarding his examination of the separate hard disc and its contents, and the process by which e-mails and their attachments are sent. He explained that once an attachment has been opened, if it is not saved to a file or a directory, it remains on the surface of the hard disc unless and until it is deleted. Even if it is deleted by the user, the attachment can be retrieved by an expert such as himself. In the present case, however, the images in question had not in fact been deleted and remained as part of an e-mail in the appellant's Inbox.

11. At the close of the case for the prosecution, a submission was made on behalf of the appellant that there was no case to answer. The basis for this submission was that upon the proper construction of section 1(1)(a) of the Act the appellant had not "made" a pseudo-photograph within the meaning of that provision by simply opening an attachment to an e-mail and looking at the images, without doing more. The submission advanced by Mr Gold, who appeared on behalf of the appellant then, as he has before us, was recorded in the judge's ruling as being that what the appellant had done was:

> "an intentional act in simply accepting the e-mail and opening the attachment".

12. On behalf of the Crown, it was submitted that the appellant had effectively solicited the photographs by e-mail, had shown an interest in receiving them and in opening them, and in failing to delete them whereby he had "made" the pseudo-photographs.

13. In a careful ruling, the judge considered the case of Bowden to which we have already referred, as well as the decision of the Divisional Court in Atkins v DPP [2000] 2 All ER

425. At page 6E he said:

> "I accept the Crown's construction of section 1(1)(a). In my view, there is evidence from which the jury could conclude that this defendant has made a deliberate choice, has performed a deliberate act, and has 'made' these photographs in the sense that section 1(1)(a) and, indeed, the two cases to which I have been referred, seeking to interpret it further, have made entirely clear. He has sought to 'make' photographs, in effect by proliferating them rather than taking the option, which was otherwise available to him, which was to delete them altogether; and, in my judgment, there is therefore a case for him to answer under this section."

14. On behalf of the appellant, Mr Gold has submitted before this court that the judge's ruling was wrong. The appellant did not "make" the images when he opened the attachment. Section 1(1)(a) of the Act should be construed as narrowly as is reasonably possible, and it should not be construed so as to apply to a case such as the present. He distinguishes this case from that of a conscious and deliberate downloading of an image from the Internet. All that happened here was that the appellant read an unsolicited e-mail message and read the attachments to it. It is true that he failed to delete the message and the attachments from his e-mail Inbox, but even if he had deleted them, the images would still have been retrievable from the computer's hard drive. If the judge's ruling were correct, the effect would be to extend the scope of section 1(1)(a) unreasonably and too far. It would mean that "innocent" parties who open unsolicited e-mail attachments would be guilty of the offence. Mr Gold makes the further point that there would be an unreasonable overlap between the offence of "making" a pseudo-photograph contrary to section 1(1)(a) of the Act and being in possession of a pseudo-photograph contrary to section 160(1) of the Criminal Justice Act 1988.

15. We entirely accept that a person is not guilty of an offence of "making" or "being in possession" of an indecent pseudo-photograph contained in an e-mail attachment if before he opens the attachment he is unaware that it contains or is likely to contain an indecent image. The question of mens rea was not considered by this court in Bowden. In that case, the issue was what act was sufficient to constitute the offence of "making". It was said that the words "to make" must be given their natural and ordinary meaning, ie "to cause to exist; to produce by action; to bring about". It is not suggested in this case that the act of opening an e-mail attachment is not capable of being an act of making the image that appears on the attachment.

16. The question of mens rea was, however, considered by the Divisional Court in Atkins. Like Bowden, that was a case of downloading images from the Internet. Some were deliberately stored by the defendant on one of the computer's directories. Others were stored in the computer's cache, a temporary information store created automatically by an Internet browser programme when accessing a site on the Internet. The defendant was charged with making both the photographs stored in the directory and those stored in the cache. He was also charged with possessing the photographs stored in the cache. The Stipendiary Magistrate was not sure that the defendant had been aware of the operation of the computer's cache, but convicted him of the offence of being in possession, holding that the offence under section 160(1) of the 1988 Act was one of strict liability. He ruled that there was no case to answer in relation to the charges of making, since making required an act of creation, and it was not satisfied by storing or copying a document.

17. Both the defendant and the prosecution appealed. It was held that on its true construction, section 1(1)(a) of the 1978 Act did not create an absolute offence, encompassing the unintentional making of copies. It followed that the magistrate had properly acquitted the defendant of making the photographs stored in the cache, but that he should have convicted him of making the photographs stored in the directory. The offence of possession under section 160 of the 1988 Act was not committed unless the defendant knew that he had, or had once had, the photographs in his possession. Since it could not be shown that the defendant had been aware of the existence of the cache in the first place, he could not be guilty of being in possession of the photographs stored in the cache.

18. In giving leave to appeal in the present case, Pitchford J, giving the judgment of the court, said:

> "6. What the evidence appears to have established was that the applicant had an interest in material of the kind received by way of the attachment. There was no evidence whether he had solicited these particular pictures but, in the course of his ruling upon the applicant's submission of no case to answer, the learned judge said:
>
> 'It would appear that the e-mail on the defendant's hard disc indicated that he had answered some form of newsgroup presentation prior to 26 July 1998.'
>
> 7. In view of the authorities, R v Bowden [2000] 1 Cr App R 438 and R v Atkins [2000] 2 All ER 425, it seems to us that the issues which arise upon this application are whether (a) the mere opening of an attachment to an e-mail hoping or expecting the attachment to contain an indecent pseudo-photograph and/or (b) causing the computer by opening the attachment automatically to store the data in the computer's memory amounts to making a pseudo-photograph for the purpose of section 1 Protection of Children Act 1978. Upon these authorities, the answer, it appears to us, is not certain."

19. If this were a case as portrayed by Mr Gold of a person simply opening an unsolicited e-mail message and opening the attachments to it in ignorance of their actual or likely contents, we would have no difficulty in holding that the facts did not disclose an offence of making, contrary to section 1(1)(a) of the 1978 Act, or indeed of being in possession contrary to section 160(1) of the 1988 Act. For the reasons given by Simon Brown LJ in Atkins, these are not absolute offences. He held that the offence of making did not encompass the unintentional making of copies by images being automatically stored in the cache; and the offence of being in possession did not encompass having images stored in the cache, the existence of which was unknown to the appellant. By parity of reasoning, it seems to us that if the appellant had not known that the attachment contained or was likely to contain indecent photographs of pseudo-photographs of a child, he could not be guilty of the offence of making those photographs or pseudo-photographs when he opened the e-mail and its attachments. Nor could he have been guilty of making the photographs by the automatic storing of them in the cache if he was unaware of the existence of the cache.

20. But on the facts proved by the prosecution, this was not a case where the appellant simply opened an unsolicited e-mail and attachments, not knowing what the attachments were likely to contain. As appeared from the e-mail of 26 July 1998, there was evidence that the appellant himself had sent an image or images of Eva to the newsgroup. It was open to the jury to find on the basis of the e-mail of 26 July that he had been seeking indecent images of

Eva, the very girl whose photographs appeared in the attachments. When he read that e-mail, he must have appreciated that it was a response to his request for images of Eva. We emphasise the reference "I am an Eva fan too"; 'I may leave some images as thanks for the one you putted on the newsgroup"; and "tell me if you like me to send some more of her". To put the matter at its lowest, the jury would have been entitled to find that when he received the e-mail, he must have known that the attachment contained or was likely to contain indecent images of Eva. This is further confirmed by the fact that he replied on 27 July saying that he had not seen these pictures "before", and that on 29 July he asked for some more. Moreover, he had not deleted any of the images; they remained in his Inbox. In short, this case comes nowhere near the paradigm case of the innocent person who, wholly unsuspecting, opens an unsolicited e-mail or attachment quite unaware of what it contains.

21. In our judgment, the trial judge was plainly right to conclude that there was a case to answer. We should add for completeness that Mr Gold advanced an argument that if section 1(1)(a) is interpreted in the way contended for by the prosecution, there is a difficulty in that the statutory defence available to a charge of an offence under section 1(1)(b) and (c) is not available to a person charged with an offence under section 1(1)(a). And yet, he submits, a person may have a "legitimate reason" for making a photograph. Thus, he argues, Parliament could not have intended the offence under section 1(1)(a) to have the wide reach contended for by the prosecution.

22. We reject this argument. Mr Gold accepted that it was implicit in this submission that the decision in Bowden was wrong. In our judgment it was plainly right. Moreover, we see nothing surprising or absurd in the fact that Parliament decided to limit the availability of the statutory defences to offences under section 1(1)(b) and (c). For the reasons that we have given, the appeal of Mr Smith is dismissed.

Jayson

23. On 18 October 2001, in the Crown Court at Luton, before His Honour Judge Altman, the appellant Michael Jayson pleaded guilty to seven counts of making an indecent photograph of a child. He was sentenced to concurrent sentences of 12 months' imprisonment. He now appeals against conviction and sentence by leave of the single judge. The appellant's plea of guilty followed a ruling by the judge on the definition of "make" for the purposes of section 1(1)(a) of the 1978 Act. The judge ruled that the browsing of Internet child pornography amounted to the offence of making an indecent photograph if it resulted (a) in an image being displayed on the computer screen of the browser, or (b) the automatic downloading of the image to a temporary Internet cache, provided that there was the requisite mens rea.

24. The facts may be stated quite shortly. On 23 August 2000, the appellant's home was searched and his computer seized. The hard drive on the computer was analysed by an expert who was able to recover a number of pornographic images. Some of these depicted explicit adult sexual activity and adult males carrying out various sexual acts, including sexual intercourse and oral sex with young girls. Some of the children appeared to have been forced into the activity and were visibly distressed. Others were compliant. One image showed a female child aged about 5 being raped by an adult male.

25. It was common ground that these images had not been stored on to the hard drive. They had been stored by the computer because of an automatic function of the Internet Explorer Software. This software automatically stored on to a temporary Internet cache any material viewed on the screen by the operator while browsing. The cache was temporary because it

could only store a finite amount of data. All of the images had been automatically emptied before the computer was seized by the police. The images were retrieved by a special process undertaken by the prosecution computer expert. The function and purpose of the temporary cache was helpfully explained by the expert evidence recorded in Atkins at page 428G in these terms:

> ".... the browser automatically creates a temporary information store, a 'cache', of recently viewed documents. The reason for this is that when the user revisits the documents the browser may use the locally stored cache, provided that it is not too old and does not need updating, which saves time in fetching the documents .... The cache is automatically emptied of documents as it becomes full, but even then it is possible to retrieve information forensically. Expert computer users can access the cache directly."

26. The prosecution put its case on two bases: (a) searching the worldwide web and selecting images to appear on the computer monitor was sufficient to amount to "making"; or (b) the fact that images were stored automatically in the temporary Internet cache amounted to "making" an indecent photograph of a child. The judge agreed to hear submissions in preliminary argument before the jury were sworn. He heard evidence from computer experts, and ruled in favour of the prosecution on both points.

27. The judge described the process by which the images were accessed and how they came to be on the computer screen in the following terms:

> "In this case the operator, which I for the purpose of this ruling will describe as the defendant, joined some clubs so the process he went through was to call up a web page, select a category of, for instance, something called pre-teen, select from a choice of clubs and having joined the selected club or clubs then to call up through that club a series of pages, and it appears that on the pages would come a variety of indicators with various titles which can be explored, becoming more specific and narrowing down eventually until instead of titles the whole page or whole series of pages are illustrated or shown in miniature on a single page called thumb nails, and the final selection is made by clicking on a thumb nail and selecting a specific -- in this case allegedly pornographic picture, the content of which is known absolutely to the operator from his having looked at the thumb nail, being a facsimile miniature that has been selected.
>
> Each of those processes of narrowing down from one page to the next is a separate process to clicking the mouse so as to call up a screen from the Internet and creating an image on the screen. At one end of this process is what may well be so far as the intention of the operator is concerned, just a rather general exploration and it seems to me that what then follows is that there must be a gradual refining in the selection process and a clarification of the intention of the operator till at the other end there is the knowledge of the exact picture that is going to be called up to fill the screen.
>
> Although for ease it has been called a process of enlargement, strictly speaking the move from the thumb nail to the full screen picture is not an enlargement. Every process of calling up a fresh screen is the same process:

> It is by connection to the Internet manipulating the screens, selecting a particular screen and thereby the operator is in effect converting digital and other electronic information which does not exist so far as he is concerned in any form of a picture and it is converted into an image on his screen that can be viewed."

28. In his interview, the appellant told the police that he was computer literate, having had thirty years' experience with computers. It was the prosecution's case that he must have been aware of the fact that images called up on to his screen would be automatically downloaded into the temporary cache. Indeed, Mr Kirk concedes on behalf of the appellant that he was aware of how the temporary Internet cache operated.

29. On behalf of the prosecution, Miss Delamere submits quite simply that the positive action of causing the photograph to be downloaded from the web page on to the screen involves the making of a photograph. It is analogous to copying in that it is replicating the image from the web. She relies on the observation made in Bowden at page 445C:

> ".... we find it impossible to conclude that the reproduction of indecent material to be found on the Internet was not within the mischief aimed at by the legislation when the words 'to make' were included in the amending statute."

30. As for the act of saving to the temporary cache, she submits that it would be iniquitous for a knowledgeable operator to evade liability by using the temporary cache in a similar fashion to a designated file in order to store revisitable and viewable material. The destination of the images is not relevant. The fact that they are held in a temporary location for a finite period is also not relevant.

31. Central to Mr Kirk's argument is section 7(4)(b) of the 1978 Act, which as earlier stated provides that references to a photograph "include .... data stored on a computer disc or by other electronic means which is capable of conversion to a photograph". He submits that the use of the word "stored" connotes a requirement that the electronic data be retained for future use and in order to enable subsequent retrieval. He relies on the dictionary definition of the word "store" viz "Computing; retain (data or instructions) in some physical form that enables subsequent retrieval"; and "a quantity of something kept available for future use". He submits that in order to be guilty of the offence of making a photograph or pseudo-photograph by causing data to be stored on a computer disc, the necessary mens rea is that an offender must intend to store and intend to retrieve the material subsequently. It could not be said in relation to either of the two methods relied on by the prosecution that the appellant intended subsequent retrieval. The images that appeared on the screen would only remain in the computer's random access memory while they were being viewed. As for the images stored in the temporary cache, it was an obvious inference from the fact that these were not saved in a specific directory that there was no intention subsequently to retrieve them.

32. In further support of his submissions, Mr Kirk relies on the decision in Atkins. He makes the point that in that case all the photographs had been voluntarily called up on to the screen when the appellant was browsing the Internet. The allegation was that he had made the photographs by downloading them into a directory and into the cache, not by downloading them on to the screen. But we would observe that it was not alleged that the mere act of downloading them on to the screen was an act of making the photographs. The court did not,

therefore, have to consider whether the appellant made photographs when he downloaded images on to his screen. Simon Brown LJ said nothing on this subject in his judgment. It follows in our view that Atkins sheds no light on this issue.

33. In our view, the act of voluntarily downloading an indecent image from a web page on to a computer screen is an act of making a photograph or pseudo-photograph. We reach that conclusion as a matter of the ordinary use of language, and giving to the word "make" its ordinary and natural meaning, as did this court in Bowden. By downloading the image, the operator is creating or causing the image to exist on the computer screen. The image may remain on the screen for a second or for a much longer period. Whether its creation amounts to an act of making cannot be determined by the length of time that the image remains on the screen.

34. The question of retrieval is irrelevant to the issue of whether the downloading of the image on to the screen amounts to an act of making. Mr Kirk seeks to place a weight on the word "stored" in section 7(4)(b) which the word simply cannot bear. The definition in section 7(4) of the 1978 Act is part of the definition of a photograph. It has nothing to do with the quite separate question of what constitutes the act of making a photograph, still less does it identify the elements of the mens rea necessary to constitute the offence. In our judgment, that mens rea is that the act of making should be a deliberate and intentional act with knowledge that the image made is, or is likely to be an indecent photograph or pseudo-photograph of a child.

35. We note in any event that the requirement in section 7(4)(b) is that data stored on a computer disc or by other electronic means "should be capable of conversion into a photograph". It is not a requirement that the data should be retrievable. It is not suggested that an image downloaded on to a computer screen is not capable of conversion into a photograph. It plainly is. Mr Kirk submits that we should give a narrow interpretation to the offence under section 1(1)(a) of the 1978 Act. Whilst we recognise that this is a penal stature, it is also necessary to give effect to the plain meaning of ordinary words and to have in mind, as was stated in Bowden, that the plain mischief aimed at by this legislation when the 1978 Act was amended was the reproduction of indecent material to be found on the Internet.

36. We conclude, therefore, that the trial judge was right to rule that the act of downloading the images from the Internet to the screen of the appellant's computer was an act of making an indecent photograph provided that the requisite mens rea was present. That mens rea was as we have described; it did not require an intention on the part of the maker to store the images with a view to future retrieval.

37. We can deal more briefly with the second way that the prosecution put its case, since Mr Kirk's argument here is the same as that which we have already rejected. His submission is that the automatic transfer of an image to the cache is not an act of making an image because it is not accompanied by an intention to store and subsequently retrieve. He does not contend that, mens rea apart, the automatic transfer is not an act of making an image. But for the reasons that we have already given, the definition in section 7(4)(b) of the 1978 Act does not provide the clue to the mens rea in these cases.

38. It follows that the appeal of Jayson must also be dismissed.

39. We turn to consider his appeal against sentence. He is 56 years of age. He has a number of

previous convictions, but they are all spent. There was before the sentencing judge a pre-sentence report which indicated that in the opinion of the probation officer the fact that the appellant had placed his own sexual gratification before the protection of children, together with his social isolation, meant that there was some risk that he would commit similar offences in the future.

40. In passing sentence, the judge observed that the appellant had pleaded guilty to an offence of great seriousness, the maximum penalty for which had, since the date of its commission, been increased by Parliament to ten years. Nevertheless, the judge passed sentence upon the basis of the sentencing powers that were in force at the time when the offences were committed. The judge also took into account the fact that the appellant might not have appreciated the full criminality of what he had done, and that he had not intended to distribute the images to others. However, the judge did not accept that the offence was analogous to simple possession and that it should therefore attract a similar penalty. The offence was secret, difficult and expensive to detect, and very prevalent. The judge was, understandably, much exercised by the nature of the images which depicted children being forced to have sexual intercourse and perform oral sex. He said some of the children involved were clearly suffering. Even those who appeared to be compliant demonstrated the long-term damage that had been inflicted upon them.

41. We have considered very carefully the cogent submissions made by Mr Kirk on behalf of the appellant but, like the judge, we are bound to be influenced by the appalling nature of these indecent images. In our judgment, the concurrent sentences passed by the judge were neither wrong in principle nor manifestly excessive. Accordingly, this appeal against sentence is dismissed.

MR KIRK: My Lord, Mr Jayson is not here and so I have not been able to take his instructions as to whether he would ask that I seek leave to appeal to their Lordships' House on the basis that this is a matter of some general public importance. Can I suggest this course, in particular because my learned friend who represented the other appellant is not here either? May we be allowed 14 days within which to provide a written submission to that effect if we wanted to make that submission?

LORD JUSTICE DYSON: Yes, with a draft of a question or questions to be certified?

MR KIRK: Yes.

LORD JUSTICE DYSON: Mr Kirk, in principle we are sympathetic to this application -- I am not saying sympathetic necessarily to the substantive application, but the application that you should be given a breathing space. My only concern is that we are beginning to approach the end of this term, so I think 14 days is too long. I am going to say 10 days, which will give you until the beginning of the week after next. Unless I am told by the associate that it cannot be done in this way, what I propose would be is that, obviously after consulting my brother judges, would be to deal with the matter -- I do not think it will be possible for all three of us to be here together to pronounce it, but I will be able to pronounce. You can have ten days in which to make your application.

MR KIRK: Does your Lordship also invite the Crown to address the court in relation to whether this is a mater of general public importance?

LORD JUSTICE DYSON: I think we ought to hear from the Crown on that.

MR KIRK: It think it is their view that it is a matter of general public importance.

LORD JUSTICE DYSON: If you are going to go ahead, they may have observations to make on the form of the question. Do you want to say anything, Miss Delamere?

MISS DELAMERE: No, not at the moment, other than that in principle we do consider that it is a matter of general public importance.

LORD JUSTICE DYSON: I noticed that there was a certified question in the case of Atkins.

MISS DELAMERE: Yes.

LORD JUSTICE DYSON: What has happened to that? Do you know?

MISS DELAMERE: I am afraid I do not know.

LORD JUSTICE DYSON: I think it would be worth finding out because if that is going to the Lords anyway, that would be highly material.

MR KIRK: It may not be too late to join them.

LORD JUSTICE DYSON: I am not saying that we will necessarily accede to an application, but I think that if you decide that you want to make an application, then I think that you ought to serve on the Crown a draft of the question to be certified. I suppose we had better give directions for that. You have ten days in which --

MR KIRK: My Lord, I am quite content to provide it to my learned friend by Monday.

LORD JUSTICE DYSON: By Monday of next week?

MR KIRK: Yes.

LORD JUSTICE DYSON: All right. You have ten days in which to make your application. If you make such an application, then we would expect any observations that the Crown have to make either opposing the application in principle or supporting it and/or any observations on the form of the question or questions to be certified, to be lodged with the court at the same time as at the end of the ten day period you lodge your application. So we have the Crown's position.

What we have said applies equally to Smith. He is not here, but perhaps you can relay all that we have said to Mr Gold so that if he wants to make a similar application, the same directions apply to him.