

[2019] EWCA Crim 984
2018/01831/B5
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 7 June 2019

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE MARTIN SPENCER

and

MR JUSTICE SWIFT

REGINA

- v -

N

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr B Newton appeared on behalf of the Applicant

Mr J Marsland appeared on behalf of the Crown

J U D G M E N T
(Approved)

Friday 7th June 2019

LADY JUSTICE NICOLA DAVIES:

Introduction

1. On 7 July 2016, in the Crown Court at Birmingham, the applicant pleaded guilty to one count of production of a Class B drug (cannabis). On the same day he was sentenced to four months' imprisonment.
2. The applicant's applications for an extension of time (635 days) in which to apply for leave to appeal against conviction and to rely on fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1968, have been referred by the single judge to the full court.
3. Having read the statement of the applicant's solicitor, the extension of time sought is granted.
4. On 13 March 2019 an order, pursuant to section 11 of the Contempt of Court Act 1981, was made by the court directing that the identity of the applicant not be reported. In the proceedings before the First Tier Tribunal ("FTT") anonymity was also granted to the applicant. We continue the anonymity order granted by this court.

Grounds of appeal

5. It is submitted that the conviction is unsafe because, as a victim of trafficking, the applicant ought not to have been prosecuted for the offence and, had the issue been raised, it would have been appropriate for the trial judge to stay the proceedings as an abuse of process.

Fresh evidence

6. An application pursuant to section 23 of the Criminal Appeal Act 1968 is made to adduce fresh evidence, namely:
 - (a) The statement of the applicant for the appeal, dated 20 April 2018;
 - (b) The attendance note of the solicitor advocate, dated 7 July 2016;
 - (c) The Notice of Deportation Order, dated 18 July 2016;
 - (d) A letter from Turpin & Miller LLP, dated 12 October 2016, enclosing a statement of the applicant, dated 6 October 2016 in respect of the asylum claim;
 - (e) The Asylum Screening Interview of 20 October 2016;
 - (f) The Statement of Evidence Form, dated 4 November 2016;
 - (g) The Conclusive Grounds Decision and Minute, dated 23 January 2017;
 - (h) The Rule 35 Report of 14 March 2017;
 - (i) The FTT Report and Decision, dated 11 July 2017.
7. We accept that this fresh evidence relates to the broader factual evidence in the case which is relevant to the substantive issue, namely, whether the applicant is a victim of trafficking and whether this undermines the safety of his conviction. The documents emanating from

the attendance at the Crown Court have become relevant subsequent to the proceedings. The immigration and asylum documents, including the medical report, were the result of the immigration proceedings and the applicant's asylum application which led to the Conclusive Decision that he is a victim of trafficking and the FTT decision to the same effect.

8. None of the documents were available at the time of the original hearing. There is nothing to suggest that they are not capable of belief. There is a reasonable explanation for their production for the purpose of this hearing. The documents are relevant and admissible. Accordingly, the documents will be received by the court.

Background facts

9. On 6 June 2016, the police executed a search warrant at 72 Brook Meadow Road, Shard End, Birmingham. They discovered 411 cannabis plants being cultivated with the use of equipment in the bedrooms and loft area of the property. The applicant was alone in the house and was found in the loft area. He was arrested and taken to a police station. He declined to comment when interviewed.
10. On 7 July 2016, the applicant was represented by a solicitor advocate who made an attendance note of the pre-court conference which took place with the use of an interpreter and by video-link. The note contains the following:

"Client is anxious to know what sort of sentence he will receive if he pleaded guilty to the charge. He confirmed that until he arrived in the UK he had never seen Cannabis before in Vietnam.

On the basis of the strong evidence he was advised to plead guilty and obtain credit resulting in a discount in sentence. He was brought into this Country via an agent who upon arrival told him in strong terms [that there] was a cost attributable to his passage here.

He was taken to the location where the set up was already in situ and simply told what to do. The men exploited him and then subjected him to coercion telling him that all sorts of terrible outcome would befall him if the police found out about his immigration status.

In order to survive he complied and feed (sic) the plants with the men visiting only at night 2/3 times each week to feed him and provide makeshift bedding. In legal terms he was not subject to extreme duress so as to totally negate his will but would have been very fearful.

He was told to remain indoors and to ensure he was always locked inside. If anyone came to the address he was to hide out of the way and warned not to speak about those who organised the Cannabis factory."

11. The mitigation presented to the court by the applicant's advocate is recorded as follows:

"You have his timely guilty plea your Honour and also a 24-year-old man of previous good character and before I move on to the guideline, on behalf of Mr [N] may I deal with matters more

generally. He was brought into this country by an agent fairly recently. He was taken to the accommodation, told what to do. The cannabis was already in situ. He was told that for his passage to the United Kingdom was cost incurred and he will have to pay that off by feeding the plants. He wasn't allowed to leave the property. The others that he refers to visited the property every two to three days approximately to bring him food and provide him with a make-shit (sic) mattress to sleep upon.

Mr [N] tells me that prior to coming to the UK [he] had not seen cannabis beforehand but of course once here, the situation was explained to him in strong terms. So you have a relatively naïve 24-year-old who although not subject to duress was certainly exploited and coerced by telling horrendous stories of what the police might do if they find out about his status. So while it is accepted that there were a high number of plants, that in respect of the guidelines I would submit that his role was a lesser role given the factors I have referred to which, of course, brings the sentencing range down considerably and those are my submissions."

12. In sentencing the applicant, the judge stated:

"[N], you are 24 years old and, as far as I know, you have never been in trouble with the police anywhere before, and you were taken advantage of by the people who brought you here, who promised you a better life. They used you by using you as a gardener for their cannabis factory. ..."

The remaining sentencing remarks dealt with the categorisation of the offending, forfeiture and destruction of the drugs, and the term to be served.

13. On 18 July 2016, the Home Office served on the applicant a decision to deport, which had been made pursuant to section 5(1) of the Immigration Act 1971. The deportation order was signed on 14 September 2016.

Asylum proceedings history

14. The history of the asylum proceedings is as follows:

- 26 August 2016 – application for asylum made to the Home Office;
- 12 October 2016 – asylum claim recorded by the Home Office;
- 20 October 2016 – the Home Office conducted an Asylum Screening Interview with the applicant. The applicant was interviewed substantively about his claim on 4 November 2016. A summary of what was said by him at interview regarding his history of trafficking and slavery was summarised in the applicant's skeleton argument as follows:

"i. The Applicant is a national of Vietnam and was first trafficked in 2005 at the age of thirteen years. He had been anxious to leave Vietnam having suffered police harassment after he joined a demonstration. His grandmother passed away leaving

no one to care for him. Arrangements were made with a trafficker for the Applicant to leave the country, the Applicant signing over his grandmother's property on the understanding that this would be returned to him after working for a period of time.

ii. The Applicant was trafficked initially to Hanoi and from there by other traffickers to Russia. In Russia, he was locked inside a garment factory where he worked and slept for seven years without being able to leave. He was forced to work in the factory for sixteen or seventeen hours per day without pay.

iii. The Applicant was subsequently trafficked from Russia to Germany in July 2012. He was taken by traffickers to a holding place, where he stayed for one or two weeks before being able to escape. He claimed asylum in Germany and remained there for two years, but became homeless and destitute. He met some people who offered him food and a place to live if he went with them to France. In France, he discovered that these individuals were connected to the same trafficking network when he was punished for having escaped in Germany by being beaten and kicked by four or five people.

iv. He was held in France for two years, working as a porter in storage, before being trafficked to the UK on 15 March 2016. He was taken to a cannabis factory in Birmingham where he was forced to work until discovered by the police on 6th June 2016 during their search of the premises, which led to his arrest.

- 7 December 2016 – the Competent Authority (Home Office) made a positive Reasonable Grounds Decision identifying the applicant as a potential victim of trafficking;
- 23 January 2017 – the Competent Authority made a positive Conclusive Grounds Decision accepting that the applicant was a victim of trafficking;
- 14 March 2017 – the applicant was examined by a medical practitioner at the Harmondsworth Immigration Removal Centre. The medical practitioner recorded incision scars on the applicant's left index finger and left ankle, as well as blunt-trauma scars on his right shin and back and confirmed that these may be attributed to being cut with knives, punched and kicked during the trafficking situation, as described by the applicant.
- 25 February 2017 – refusal of the applicant's asylum claim, which was subsequently withdrawn due to inadequate consideration of the history of trafficking.
- 12 April 2017 – the Home Office made a further decision to refuse asylum. This was appealed and listed before the First Tier Tribunal (Immigration and Asylum Chamber) on 18 May 2017.
- On 11 July 2017, the FTT promulgated its decision and reasons. It included the following:

"111. I find to be extremely significant in this case, is that not only is the appellant a victim of traffickers from Vietnam to Russia, but he has also been further trafficked from Russia to

Germany, and then it appears from Germany to France and then again from France to the United Kingdom. He clearly has a genuine fear that the traffickers could find him. It is not disputed that he has had repeated experiences of being trafficked into different exploitative situations, during some of which he feared for his life.

...

118. Accordingly, given that the respondent had already accepted the core of his claim that he was a victim of human trafficking, and I have since found that there is not sufficiency of protection for the appellant in Vietnam and there is no internal relocation alternative, I therefore find that it would be unreasonable to expect the appellant to return to Vietnam and that he does qualify for international protection. Accordingly, I find the appellant can qualify as a refugee under the 1951 Convention Relating to the Status of Refugees.

...

128. As explained in detail above, I have explained why there would be very significant obstacles to the appellant's integration back into Vietnam. As stated above, the appellant is at genuine risk of further trafficking and there is not sufficiency of protection for the appellant back in Vietnam. ..."

The Notice of Decision records that the Tribunal allowed the applicant's application for asylum and the application for revocation of the deportation order.

- The applicant has now been granted limited leave to remain in the United Kingdom.

Consideration which led to the Conclusive Grounds Decision

15. The consideration concluded that each of the component parts of the definition of modern slavery: recruitment, harbouring and transportation was met. It is recorded that the applicant was

"...recruited by the traffickers in order that you could escape from Vietnam and you could be provided with work. You were transported to various counties (sic) around Europe specifically to work for those who had trafficked you. Your travel documents were provided by the traffickers and were taken from you on arrival."

16. As to the means of human trafficking, it is stated that:

"It is considered that your case meets part 'b' of the definition of Human Trafficking because you were threatened and told that if you ever escaped, the traffickers would find you. You escaped when in Germany and they beat you. You were told that they would return your property documents to you when you had been working for them for a while but this didn't happen. You worked

for them for 7 years in Russia and for 2 years in France. Although they fed and sheltered you, you were never paid. Your moments were monitored and you were locked into your places of work which was also where you lived."

As to the purpose of human trafficking, forced labour was identified. It was stated that:

"... as you were locked into the places where you lived and worked you had no freedom of movement nor income over which you control. In Russia you were working 16 or 17 hours in a garment factory where you also lived. When you were brought to the UK you were forced to work in a cannabis factory from where you were arrested and convicted of production of class B controlled drug – cannabis – for which you were sentenced to 4 months' imprisonment."

Victim of trafficking

17. A person is a victim of trafficking ("VOT") if he or she falls within the definition of Article 2 of the EU Directive 2011/36/EU as follows:

"Offences concerning trafficking in human beings

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.

3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used."

18. This reflects the definition of a victim of trafficking in the Council of Europe Convention on Action against Trafficking in Human Beings (article 4). A victim of trafficking, for the purposes of the Convention against Trafficking, is anyone who was presently or who had been the victim of trafficking: *R (Atamewan) v Secretary of State for the Home*

Department [2014] 1 WLR 1959 (Aitken LJ at [69] to [80]).

19. The case law has developed in relation to appeals against conviction in respect of victims of trafficking. It was addressed in *R v GS* [2018] EWCA Crim 1824, [2018] 4 WLR 167 by Gross LJ as follows:

"1. Huge strides have been made, domestically and internationally, in recognising the evil of human trafficking, in protecting victims of trafficking ('VOTs') and, where appropriate, shielding VOTs from prosecution or penalties. However, as repeatedly made clear, where crimes have been committed by VOTs, even arising from their own trafficking, there is no blanket immunity. Decisions are necessarily fact sensitive, taking into account the public interest both in prosecuting alleged offenders and in protecting VOTs. ..."

20. We accept the applicant's summary of the principles to be derived from previous decisions of this court, namely:

"(i) Neither article 26 of the ECAT, nor article 8 of the Directive confers a blanket immunity from prosecution on VOTs.

(ii) Instead, the UK's international obligations require the careful and fact sensitive exercise by prosecutors of their discretion as to whether it is in the public interest to prosecute a VOT. That discretion is vested in the prosecutor, not the court.

(iii) The decisions of the FTT and the Competent Authority as to whether an individual is a VOT do not bind prosecutors or the court but will be respected (subject to submissions as to their basis or limitations) unless there is a good reason not to follow them.

(iv) There is no closed list of factors bearing on the prosecutor's discretion to proceed against a VOT. Generalisation is best avoided. That said, factors obviously impacting on the discretion to prosecute go to the nexus between the crime committed by the defendant and the trafficking. If there is no reasonable nexus between the offence and the trafficking then, generally, there is no reason why (on trafficking grounds) the prosecution should not proceed. If there is a nexus, in some cases the levels of compulsion will be such that it will not be in the public interest for the prosecution to proceed. In other cases, it will be necessary to consider whether the compulsion was continuing and what, if any, reasonable alternatives were available to the VOT. There will be cases where a decision to prosecute will be justified but due allowance can be made for mitigating factors at the sentencing stage. ..."

Section 45 of the Modern Slavery Act 2015 ("section 45")

21. This provision, effective from 31 July 2015, provides a defence for victims of slavery or trafficking who commit an offence. The relevant subsections state:

"45. Defence for slavery or trafficking victims who commit an offence

- (1) A person is not guilty of an offence if –
 - (a) the person is aged 18 or over when the person does the act which constitutes the offence,
 - (b) the person does that act because the person is compelled to do it,
 - (c) the compulsion is attributable to slavery or to relevant exploitation, and
 - (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
- (2) A person may be compelled to do something by another person or by the person's circumstances.
- (3) Compulsion is attributable to slavery or to relevant exploitation if –
 - (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
 - (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.
- (4) A person is not guilty of an offence if –
 - (a) the person is under the age of 18 when the person does the act which constitutes the offence,
 - (b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and
 - (c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.
- (5) For the purposes of this section –

'relevant characteristics' means age, sex and any physical or mental illness or disability;

'relevant exploitation' is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.
- (6) In this section references to an act include an omission."

CPS Guidance

22. The relevant parts of the CPS Legal Guidance on Human Trafficking, Smuggling and Slavery, as at 7 July 2016 were as follows:

"Suspects in a criminal case who might be victims of trafficking or slavery

This part of the guidance applies to victims of trafficking who are also suspects in a criminal offence ...

Indicators of trafficking

Prosecutors should be alert to the particular circumstances or situations where someone suspected of committing a criminal offence might also be a trafficked victim ...

Awareness of the prosecutor's obligations

When considering whether to proceed with prosecuting a suspect who might be a victim of trafficking, prosecutors should be aware of the clear obligation imposed to consider whether to not to prosecute where the suspect has been compelled to commit a criminal offence as a direct consequence of being trafficked.

...

A three-stage approach to the prosecution decision

In addition to applying the Full Code Test in the Code for Crown Prosecutors, prosecutors should adopt the following three stage assessment:

1. is there a reason to believe that the person has been trafficked? if so,
2. if there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds; but
3. even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not ...

The duty to make proper enquiries and to refer through the National Referral Mechanism (NRM)

In considering whether a suspect might be a victim of trafficking, as required in the first stage of the assessment, prosecutors should have regard to the following:

1. the duty of the prosecutor to make proper enquiries in criminal prosecutions involving individuals who may be victims of trafficking.
2. The enquires should be made by:
 - advising the law enforcement agency which investigated the original offence that it must investigate the suspect's trafficking situation; and

- advising that the suspect is referred through the NRM for victim identification. All law enforcement officers are able to refer potential victims of trafficking through the NRM. ...
- If an adult suspect does not consent to their referral, the charging decision should be made on whatever other information might be available, without the benefit of the Competent Authority's (CA) decision on their victim status ...
- These steps must be done regardless of what has been advised by the investigator or whether there is an indication of a guilty plea by the suspect's legal representative ...

Referral through the NRM and the Competent Authority decision

...

- A conclusive decision is whether on the balance of probability it is more likely than not that the individual is a victim of human trafficking.
- Prosecutors should take account of the CA decision (reasonable grounds or conclusive grounds) of the identification and status of the suspect as a victim of trafficking when considering the decision to prosecute.

Where there is credible evidence of trafficking (a positive CA decision)

- Prosecutors should consider whether or not there is clear evidence of a credible common law defence of duress, as required in the second stage of the assessment. **If so, the case should be discontinued on evidential grounds.** [Emphasis in the guidance]
- If not, consider whether or not the trafficking victim was compelled to commit the offence."

23. The Guidance addresses the approach to be taken by prosecutors where information or evidence comes to light in relation to the victims of trafficking following the charging of a suspect, including where this arises in mitigation, as follows:

"Credible evidence of trafficking post-charge

In cases where a decision has already been taken to charge and prosecute a suspect, but further information or evidence comes to light, or the status of a suspect as a possible credible victim of trafficking is raised post-conviction, for example in mitigation or through a pre-sentence report, then prosecutors should seek relevant adjournments and ensure that the steps outlined in the section 'The duty to make proper enquiries and to refer through the NRM' above are carried out."

24. The CPS Guidance, updated to encompass section 45, was published after the applicant's conviction. It is the respondent's contention that, in determining the safety of the applicant's conviction, it should take account of the updated Guidance.

The applicant's case

25. The referral of the applicant to the NRM has resulted in the Competent Authority determining conclusively that he was a genuine victim of trafficking at the time of his arrest in June 2016. The facts of the criminal case were such that his victimhood was integral to his involvement in the production of cannabis. The information provided in the applicant's plea of mitigation is consistent with his trafficked status and should have raised concerns at the time. In accordance with the CPS Guidance, the applicant's plea of mitigation should have triggered an application by the prosecution for an adjournment to enable further enquiries and referral to the NRM to be made.
26. It is the applicant's case that had the clear signs of his being a victim of trafficking been noted and raised, the statutory defence under section 45 would have applied. The facts presented by the applicant provide a clear evidential basis for the offence having been committed as a direct consequence of his situation of trafficking and exploitation, and that he was compelled to commit it. It was also reasonable in all the circumstances, taking into account the applicant's characteristics.
27. It is acknowledged that the CPS Guidance in force at the time did not address the statutory defence. However, the defence applied and the correct approach would have been for the CPS to reconsider its charging decision based on an assessment of the applicant's status as a victim of trafficking. Further, in accordance with that Guidance, the applicant's case was such that it was not in the public interest to prosecute, as his offence was a direct consequence of, or in the course of, trafficking and he was compelled to commit the offence.
28. In summary, it is the applicant's case that he would not have been prosecuted for the offence or, alternatively, that he had a viable defence in law that rendered his guilty plea equivocal on the mitigation advanced and that his conviction is consequently unsafe.
29. Today, Mr Newton, on behalf of the applicant, has realistically accepted that the original charge was appropriately made on the evidence as it presented at the time of the charging.

The respondent's case

30. There being acceptance by the applicant that the original charging was properly made on the evidence then available to the CPS, the focus of this hearing has been directed to this issue: had the original proceedings been adjourned following the mitigation advanced on behalf of the applicant, whether the view would have been taken by the Crown, on receipt of all subsequent information, that the section 45 defence would probably succeed? It is now accepted by Mr Marsland that, on the information before the court, as provided in the applicant's mitigation, there was sufficient information to raise an issue as to the possibility of trafficking and thus proceedings should have been adjourned. This would have been consistent with the Guidance provided by the CPS, current at that time.
31. The respondent has addressed the issue of whether there is clear evidence of a section 45 defence as follows: the respondent does not concede that there was. The respondent accepts that the applicant was over 18 at the time of the offence. There is evidence that the applicant was compelled to commit the offence and that the compulsion is attributable to relevant exploitation. However, the respondent relies upon section 45(1)(d), namely,

that a person is not guilty of an offence if “a reasonable person in the same situation as the person, and having the person’s relevant characteristics, would have no realistic alternative to committing the offence”.

32. The respondent submits that a reasonable person in the same situation as the applicant, and having the applicant's relevant characteristics, would have had a realistic alternative to committing the offence by engaging with the UK authorities, not least the police. In support of that submission, the respondent relies upon the following:
- (i) The applicant was left apparently unsupervised for days at a time by his traffickers in the property.
 - (ii) The applicant was aware of the possibility of engaging with government authorities in Europe, as he had done in claiming asylum in Germany and having been in receipt of benefits there.
 - (iii) Not only was the applicant aware of such a possibility, he had, for a time, successfully done so in Germany.
 - (iv) Given his experience of the German authorities, the applicant was unlikely to believe "horrendous stories of what the police might do if they [found] out about his status".
 - (v) The applicant had the necessary characteristics to take opportunities to escape his traffickers, as demonstrated by his previous attempts, including his successful attempt in Germany.
33. The further and separate issue addressed by the respondent is: Is it in the public interest to prosecute? The respondent contends that it would have been for the following reasons:
- (i) Assisting in the production of cannabis as part of a sophisticated set up concerning 411 plants – a quantity capable of producing quantities for commercial use – was an offence of some seriousness (even if not of the most serious).
 - (ii) In the context of the seriousness of the offence, the level of compulsion and its effect on the applicant was not such that his culpability was extinguished. There were realistic alternatives available to the applicant.
 - (iii) The applicant's culpability may have been diminished but remained significant and so prosecution was appropriate, with due allowance to be made in the sentencing decision for diminished culpability.

Discussion

34. We begin with a fundamental point, namely that this is a fact-sensitive decision. It is one which has focussed evidentially upon the available defence provided by section 45. In making this determination, we do not seek to broaden the scope of this judgment beyond the factual issue which is the defence provided by section 45 on the facts of this applicant’s case.
35. We commend Mr Newton, on behalf of the applicant, and Mr Marsland, upon behalf of the respondent, upon the quality of their detailed written submissions and their succinct oral submissions.
36. As the appeal has developed, two grounds of appeal are identified. The first is that the CPS should not have made the original decision to charge or prosecute the applicant. At the time of the police search and his arrest, the applicant was the only person in the property where over 400 cannabis plants were being grown. He was found in the loft.

When interviewed by the police, the applicant declined to comment. Given his presence in a house containing so many cannabis plants, for which he provided no explanation when interviewed, there was a proper evidential basis to warrant charging the applicant. Prior to his appearance in the Crown Court, there was no information available to the CPS which could or should have raised a concern that the applicant could be a victim of trafficking. There were no grounds which would have warranted referral to an appropriate agency because those who arrested the applicant – and thereafter, the CPS – were given no information to alert them to such an issue. In the circumstances there are no grounds to challenge the original decision of the CPS to prosecute.

Ground 2: At the Crown Court, when the possible trafficking issue was raised, should the proceedings have been adjourned or stayed?

37. It is clear that the applicant was not advised by his then advocate as to any possible defence pursuant to section 45. The pre-court conference, conducted via video-link and an interpreter, between the advocate and the applicant occurred immediately before the court hearing, time was limited. There had been no prior consultation between the instructed advocate and the applicant. Had circumstances permitted, more detailed instructions should have been sought and could have been given. This should have led to advice being tendered that the applicant had a section 45 defence available to him. That said, we are not unmindful of the constraints within which the pre-court conference took place.
38. In the mitigation advanced on behalf of the applicant before the court, the following points were identified: the applicant was brought into the country by an agent; he was taken to the accommodation; the cannabis was already in situ and he was told what to do; the applicant was told that he would have to pay off the cost incurred for his passage to the United Kingdom by feeding the plants; he was not allowed to leave the property; other people visited the property every two or three days to bring him food and to provide him with a mattress upon which to sleep. The applicant was described by his advocate as being exploited and coerced by the telling of stories of what the police might do if they found out about his status.
39. In sentencing the applicant, the judge stated that he was taken advantage of by the people who brought him to the UK. They used him as a gardener for their cannabis factory.
40. In our judgment, the information placed before the court was sufficient to raise an issue that the applicant was a possible credible victim of trafficking. This should have been apparent to the applicant's advocate, the representative of the prosecution, and the judge. It would have been open to the judge to raise this issue. He did not do so. However, the Guidance provided by the CPS expressly provides for this situation. Had the Guidance been followed, as we believe it should have been, the prosecutor should have sought an adjournment to ensure that the steps set out in the relevant section of the Guidance, namely, the duty to make proper enquiries and to refer through the NRM, should have taken place. Had this been done, we believe it reasonable to conclude that the referral would have resulted in the Conclusive Grounds Decision (made in January 2017), namely, that the applicant is a victim of human slavery. Our view as to the Conclusive Decision is reinforced by the findings of the FTT which were made available to the court.
41. It being accepted by the respondent that subsections (1)(a) to (c) of section 45 are met, the court has focussed its attention upon subsection (1)(d). The applicant arrived in the United Kingdom on 15 March 2016. He was captured in Dover by immigration authorities and returned to France. Traffickers returned him to the UK in a lorry. Those facts are set out in the Conclusive Decision. The police raid on the property was on 6 June 2016. It is unclear on what date the applicant was returned to the UK by the traffickers,

but it must have been a relatively short time before the police raid.

42. There is nothing to dispute the applicant's account that he was locked in the property in Birmingham and was visited every two or three days by his captors. In the same Conclusive Decision, it is noted that the applicant escaped in Germany. However, he was subsequently beaten by the traffickers in France because of the escape from the traffickers. It is noted that his movements were monitored and he was locked into his places of work, where he also lived. We accept that those observations relate to his experience in Russia and Europe, but it is not unreasonable to conclude that, because it was the traffickers who brought the applicant to the UK, his fear of being similarly treated would have been in the applicant's mind when in the property in Birmingham. We note that there was reference to this in the asylum interview contained in the Statement of Evidence Form. All these documents would have been available when the Conclusive Decision was made and could have been available to the CPS in reconsidering this matter.
43. In applying the section 45(1)(d) test, account has to be taken of the reasonable person in the same situation as the applicant and having the applicant's relevant characteristics, as a result of which he had no realistic alternative but to do the act. The factual position, as found by the Conclusive Decision, was that for the short time that he was in Birmingham, the applicant had no travel documents; he had a history of being beaten by traffickers following his earlier escape in another country; he was in a new country; and he had no contact with any persons other than those involved with the traffickers. We regard the respondent's submission that in those circumstances section 45(1)(d) is not met as failing to appreciate the reality of the applicant's situation, and his circumstances, which include his history at the hands of the traffickers in other countries and resultant fears.
44. Were appropriate weight to be given to these facts, as contained in the Conclusive Decision, we believe that a decision would or should have been made that the defence pursuant to section 45 would probably succeed. In our judgment, no public interest consideration would outweigh such a determination.
45. In summary, we conclude that, following the appropriate CPS Guidance at the time, the applicant's case should have been adjourned for referral to the NRM. Following the Conclusive Decision, a fair decision based on the facts of that decision and the evidence upon which it was based would be that a defence pursuant to section 45 would probably succeed. In the circumstances the conviction cannot be regarded as safe.
46. Accordingly, we grant leave and allow the appeal. For the reasons identified we find that the appellants' conviction is unsafe. It is quashed.

MR NEWTON: My Lady, I am very grateful. My position is covered by the referral of this case by the single judge. But may I make an application for an extension of the representation order for my instructing solicitor? I apologise that it is not in writing. It is something which she raised with me last night. It is for a very modest amount of work which, basically, involved her continued involvement in this case after the grounds of appeal were submitted, an example of which is that the original Respondent's Notice raised a number of points that required additional information and the court directed her specifically to deal with that. There has been some other correspondence. I anticipate it is probably something in the region of ten hours. If the court is not minded to grant it, she will understand entirely. But it just seems to me, in the circumstances of a case like this, where the solicitor has had continued involvement in the case and has received directions from the court during the life of the case, if the court were minded to grant it, it would be appreciated.

LADY JUSTICE NICOLA DAVIES: Well, we bear in mind two things. First, there has been ongoing communication between the applicant and the respondent, which is always of assistance to the court, and it is very clear from the quality of your written submissions that that was going on, and the court can only be assisted by that. We also bear in mind the vulnerability of the appellant in such circumstances. Will you allow me a moment?

(The court conferred)

LADY JUSTICE NICOLA DAVIES: Yes, we will grant it.

MR NEWTON: I am very grateful. Thank you, my Lady.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
