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Neutral Citation Number: [2020] EWCA Crim 1408

Case No: 201901980 B4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 October 2020

Before :

LADY JUSTICE SIMLER DBE
MR JUSTICE GOOSE
and
MRS JUSTICE TIPPLES DBE

- -

Between :

REGINA
- and –

A

Henry Blaxland QC and Paramjit Ahluwalia appeared on behalf of the Appellant, instructed by Philippa Southwell of Birds Solicitors
Benjamin Douglas-Jones QC and Andrew Johnson appeared on behalf of the Crown

Hearing dates 15 July 2020

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Approved Judgment

Lady Justice Simler:

Introduction

1. This application for leave to appeal against conviction based on fresh evidence, concerns a young man who, it is now accepted, was a victim of trafficking. A "reasonable grounds to believe" decision was made by the Competent Authority under the National Referral Mechanism ("the NRM") in his case on 2 July 2018 and on 13 August 2018, a "conclusive grounds" decision (on the balance of probabilities) was made to the effect that he was a victim of trafficking. His immigration status has not yet been determined.

2. Before those decisions and his referral to the NRM, the applicant tendered an unequivocal guilty plea (in August 2016) to a single count of aggravated burglary. He was 18 at the date of the offence. He was sentenced on 10 February 2017 at Woolwich Crown Court to 4 years' detention in a Young Offenders Institution. Notwithstanding his age, and previous youth rehabilitation orders made in his case, the applicant was sentenced without a pre-sentence report, and without any relevant information being provided concerning how he had come to commit the offence. No consideration was given by either his defence team, the prosecution or the court to the question of whether the applicant had committed offences as a result of exploitation as a victim of trafficking.

3. The applicant appealed successfully against his sentence on the ground that inadequate credit for the powerful mitigation available to him was given. His appeal was allowed by this court and his sentence was reduced to a sentence of two years and eight months' detention.

4. On this application, Mr Blaxland QC who appears on the applicant's behalf, submits that notwithstanding his guilty plea, his conviction is unsafe on the basis that it was an abuse of process for him to have been prosecuted because:

    i) he was at the relevant time a victim of human trafficking.

    ii) There was a nexus between his exploitation as a victim of trafficking and the commission of the offence.

    iii) The circumstances in which he came to commit the offence were such that it was not in the public interest for him to be prosecuted.

    Although not recognised as such at the time of charging or sentence, he contends that police (and other public) authorities were aware that there were trafficking indicators present in relation to the applicant, including records from Social Services and Youth Offending Team services highlighting county lines exploitation and forced criminality. He relies on this material, together with the decisions of the Competent Authority which postdate his conviction, as credible fresh evidence affording grounds to appeal.

5. The court is entitled if it is in the interests of justice to do so, to receive fresh evidence pursuant to s.23 Criminal Appeals Act 1968 to determine whether the applicant's

conviction is unsafe notwithstanding his guilty plea. All the fresh evidence has been admitted and considered *de bene esse* without objection from the respondent.

6. Mr Blaxland contends that this is a case where there was a failure to apply the nexus and/or public interest tests in relation to the charging decision and the decision to prosecute. He submits that had the CPS guidance been properly applied, it would not have been in the public interest to prosecute at all, or alternatively, a different charging decision would have been made. Moreover, if the CPS retains a discretion not to prosecute offences within Schedule 4 of the Modern Slavery Act 2015 ("the 2015 Act") (to which the s.45 defence does not apply), then the court should retain the power both to prevent a prosecution from proceeding by staying the proceedings as an abuse of the process and to quash a conviction where the prosecution has failed to apply its mind to the test within the CPS guidance or where a flawed approach has been adopted. This is especially important in a case to which no substantive defence is available pursuant to s.45 of the 2015 Act.

7. The application for permission to appeal is resisted. Mr Douglas-Jones QC submits that following the recent decision of this court in *R v DS* [2020] EWCA Crim 285 ("*DS*"), an appellant who is a victim of trafficking is in the same position as any other criminal appellant in this court: he or she cannot challenge the Crown's decision that it was in the public interest to prosecute on the ground that the prosecution was an abuse of process by virtue of the special category of abuse of process that existed in victim of trafficking cases prosecuted before s.45 of the 2015 Act came into force. Alternatively, if the special category of abuse of process subsists in relation to offences to which s.45 does not apply by virtue of Schedule 4, this was a serious offence where the dominant force of compulsion from the alleged trafficking could not be said to have extinguished the applicant's culpability or criminality to or below a level at which he should not have been prosecuted in the public interest. The CPS was accordingly justified in prosecuting the applicant and his conviction is safe.

8. At the end of the hearing on 15 July 2020, the respondent acceded to a request for additional disclosure on behalf of the applicant. A timetable was agreed to enable further specific disclosure to be provided, and both sides made additional written submissions in response to that material which the court has now received.

9. The additional material relied on by Mr Blaxland comprises a summary of interview of the applicant post-charge, dated 21 April 2016; briefing notes entitled "Sue" made on 29 September 2016; debriefing notes of DC Wilson of the same date; the applicant's "cleansing statement" dated 12 October 2016; and the NRM referral form dated 21 May 2020 regarding the co-defendant.

The legal framework

10. The United Kingdom's international obligations in relation to the treatment of victims of trafficking and modern slavery derive from the Council of Europe Convention on Action against Trafficking in Human Beings 2005 (referred to as "ECAT") and the EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims 2011/36/EU ("the Directive"). The relevant obligations under ECAT and the Directive (in particular, article 26 of ECAT and article 8 of the Directive) have been implemented domestically by the enactment of the 2015 Act.

11. Section 45 of the 2015 Act, which provides a statutory defence for some victims of trafficking to some offences, came into force on 31 July 2015. It provides:

> "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 only 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.
>
> (7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.
>
> (8) The Secretary of State may by regulations amend Schedule 4".

12. It is not in dispute that aggravated burglary is an offence listed at paragraph 14 of Schedule 4 and accordingly the defence in s.45(1) and (4) is not available to a defendant charged with this offence.

13. Although at one stage the applicant was arguing that the effect of Schedule 4 to the 2015 Act, and in particular its exclusion of certain offences from the scope of the defence in s.45, was in conflict with the international obligations imposed by ECAT and/or the Directive, that contention is not maintained as a discrete ground of appeal on the applicant's behalf. Instead it is said to be relevant to the court's assessment of the merits of the substantive grounds identified above.

14. Before s.45 came into force, and in the absence of any domestic statutory implementation of the UK's international obligations under ECAT and the Directive, victims of trafficking who committed criminal acts as a result of compulsion arising from trafficking were protected through a number of means:

    i) First, through CPS guidance on the prosecution of offences by suspected victims of trafficking (and in particular when and in what circumstances a prosecutor can decline to proceed against such an individual).

    ii) Secondly, through the common law defence of duress or necessity (where applicable).

    iii) Thirdly, through the court's abuse of process jurisdiction enabling it to review CPS prosecutorial decisions and to stay proceedings as an abuse in an appropriate case.

15. The principles that applied and the proper approach to be adopted were set out in a number of cases including *R v LM* [2011] 1 Cr App R 12 ("*LM*"); *R v VSJ* [2017] 1 Cr App R 33 ("*VSJ*"); and *R v GS* [2019] 1 Cr App R 7 ("*GS*"). It is unnecessary at this stage to set out the full distillation of principles reflected by those authorities which are now well known, and sufficient for our purposes merely to refer to the principles identified in relation to the availability of the stay for "abuse" jurisdiction which is at the heart of this application.

16. In *LM* (which predated the 2015 Act and concerned offences committed in 2007) Hughes LJ VP made clear that the ultimate sanction of a stay of proceedings on grounds of abuse was available in certain limited circumstances, but emphasised the limitations on the jurisdiction because criminal courts in England and Wales decide whether an offence has been committed, and not whether it should be prosecuted.

However, the court held that they may have to decide whether a legal process to which a person is entitled (or has a legitimate expectation) has been neglected to his or her disadvantage. Since international obligations owed to victims of trafficking required a means by which active consideration is given to whether it is in the public interests to prosecute such victims when they commit criminal offences, the court accepted that the power to stay for abuse exists as a safety net to ensure this obligation is not overlooked to the disadvantage of such a defendant.

17. At paragraph 19 of *LM* the court held:

> "19. We make it clear that the occasions for the exercise of this jurisdiction to stay ought to be very limited once the provisions of the convention are generally known, as by now they should be becoming known. Moreover, the jurisdiction to stay does not mean that the court is entitled to substitute its own view for that of the prosecutor upon the assessment of the public policy question whether a prosecution is justified or not. The power to stay is a power to ensure that the convention obligation under Article 26 is met. The convention obligation is to provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so. Thus the convention obligation is that a prosecuting authority must apply its mind conscientiously to the question of public policy and reach an informed decision. If it follows the advice in the earlier version of the guidance, set out above, then it will do so. If however this exercise of judgment has not properly been carried out and would or might well have resulted in a decision not to prosecute, then there will be a breach of the convention and hence grounds for a stay. Likewise, if a decision has been reached at which no reasonable prosecutor could arrive, there will be grounds for a stay. Thus in effect the role of the court is one of review. …"

18. In *VSJ* (which post-dated the entry into force of the 2015 Act) this court identified the questions to be addressed by the prosecutor in cases not within the scope of the 2015 Act, where the defence of duress does not arise on the evidence, as follows:

> "21. …..
> (i) is there credible evidence that the defendant falls within the definition of trafficking…?
> (ii) Is there a nexus between the crime committed by the defendant and the trafficking? In the case of adults it is necessary to assess whether the defendant had been compelled to commit the crime by considering whether the offence:
>
> > "was a direct consequence of, or in the course of trafficking/slavery and whether the criminality is significantly diminished or effectively extinguished because no realistic alternative was available but to comply with the dominant force of another"; and
>
> (iii) Is it in the public interest to prosecute? There will be some crimes that it will be in the public interest to prosecute".

19. In both *LM* and *VSJ* this court emphasised that the question whether or not an offence committed is serious enough, despite any nexus with trafficking, to call for prosecution in the public interest is always fact sensitive. It will depend on the circumstances of the case and the seriousness of the offence. The degree of compulsion on the defendant and the alternatives reasonably available to the defendant will both be relevant factors in that decision.

R v DS

20. In *R v DS*, the defendant was charged with possession of class A drugs with intent to supply. He was 17 at the date of the offences. His case was referred to the Competent Authority and a positive conclusive grounds decision was made leading to a review by the CPS of its charging decision. The review was conducted under the relevant CPS guidance as follows.

21. Revised CPS guidance had been issued following the enactment of s.45 of the 2015 Act, and has since been updated. The most recent guidance is the CPS Legal Guidance on Human Trafficking, Smuggling and Slavery ("the Guidance") which sets out a four-stage approach to the prosecution decision. Stages one to three concern whether trafficking and any available defences are made out. Stage four concerns the question whether it is in the public interest to prosecute and requires consideration of all the circumstances of the case, including the seriousness of the offence and any direct or indirect compulsion arising from the defendant's trafficking situation. In relation to stage four, the Guidance provides:

> "Stage 4: Is it in the public interest to prosecute?
>
> **The Public Interest and Compulsion**
> "Compulsion" includes all the means of trafficking defined by the United Nations Protocol on Trafficking (the United Nations Convention against Transnational Organised Crime 2000 supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons): threats, use of force, fraud and deception, inducement, abuse of power or of a position of vulnerability, or use of debt bondage. It does not require physical force or constraint.
>
> ….
>
> The means of trafficking/slavery (i.e. the level of compulsion) may not be sufficient to give rise to defences of duress or under section 45 but will be relevant when considering the public interest test.
>
> In considering whether a trafficking/slavery victim has been compelled to commit a crime, prosecutors should consider whether a suspect's criminality or culpability has been effectively extinguished or diminished to a point where it is not in the public interest to prosecute.

> A suspect's criminality or culpability should be considered in light of the seriousness of the offence. The more serious the offence, the greater the dominant force needed to reduce the criminality or culpability to the point where it is not in the public interest to prosecute; see *VSJ* and *GS*."

22. Notwithstanding the conclusive grounds decision in DS' case, the prosecutor concluded that there was no clear evidence of a credible defence of duress or a statutory defence under s.45 of the 2015 Act and that it was, in any event, in the public interest to continue the prosecution given the seriousness of the offence (involving significant quantities of drugs demonstrating that DS was at a "medium level" in the hierarchy; and he had gone on to reoffend each time he had been arrested). However, the judge acceded to an application by DS to stay the proceedings. The prosecution appealed the terminating ruling, contending among other things, that the judge failed to appreciate that the enactment of the statutory defence in s. 45 had changed the nature and function of the jurisdiction he was being asked to exercise.

23. At paragraph 39 Lord Burnett of Maldon CJ made three observations he described as fundamental:

> "i) The jurisdiction to stay proceedings as an abuse of the process of the court is an important, but limited, power of a criminal court. It should not be widened in scope to meet particular needs unless there is a very clear reason for doing so.
>
> ii) The Convention and the Directive are not directly applicable in domestic law. It is for Parliament and the executive to decide how to give effect to the international obligations of the United Kingdom, and where it does so by legislation the function of the court is to apply that legislation. The Directive required Member States of the European Union to put in place arrangements that reflect its requirements. We have not identified any clear gap between the provisions of the 2015 Act and those obligations, and in our judgment the CPS Guidance means that the CPS is "entitled" not to prosecute for the purposes of Article 8 of the Directive. That being so, our primary focus is on the domestic law as found in the common law of duress and the statutory defence in section 45 of the 2015 Act.
>
> iii) The state's positive obligation under article 4 ECHR has been considered in *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1: at [185]: "member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking. The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers." There is a recognition of the operational choices in terms of priorities and

> resources that must be made in this context at [286]. The state's positive obligation to protect victims of trafficking is not expressed in terms of non-prosecution, see [287]: it "requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking…". We do not think that there is any basis for deriving a positive obligation not to prosecute victims of "forced or compulsory labour" in Article 4 of the ECHR. This, the court found, is the lowest level of gravity of oppression against which protection is required, below "slavery" and "servitude". That is the level of oppression for which DS contends in this case. If any such obligation did exist, it would be heavily qualified and there is no basis for concluding that the qualifications found in the common law of duress, and in section 45 of the 2015 Act, and the CPS Guidance are inadequate so that there is a violation of any such positive obligation under Article 4 ECHR which might exist."

24. He continued at paragraph 40:

> "40. In our judgment, the result of the enactment of the 2015 Act and the section 45 statutory defence is that the responsibility for deciding the facts relevant to the status of DS as a Victim of Trafficking is unquestionably that of the jury. Formerly, there was a lacuna in that regard, which the courts sought to fill by expanding somewhat the notion of abuse of process, which required the Judge to make relevant decisions of fact. That is no longer necessary, and cases to which the 2015 Act applies should proceed on the basis that they will be stayed if, but only if, an abuse of process as conventionally defined is found. By way of summary only, this involves two categories of abuse, as is well known. The first is that a fair trial is not possible and the second is that it would be wrong to try the defendant because of some misconduct by the state in bringing about the prosecution. Neither of these species of abuse affected this case, and it should not therefore have been stayed".

25. The appeal was accordingly allowed because of the court's conclusion that there is no room in the light of s.45 of the 2015 Act for the abuse of process jurisdiction to immunise a defendant from prosecution. The responsibility for deciding the facts relevant to the status of a defendant as a victim of trafficking lies with the jury.

The facts of this case

26. It has not been easy to piece together a clear history of the applicant's life in this country before the index offence. In summary, and focusing on recorded events, the history can be summarised as follows.

27. The applicant entered the UK in 2009 as an unaccompanied 11 year old boy (with an assumed birth date of 1 January 1998), having fled Afghanistan following the murder of his father. His journey here was dangerous, and he says (in his cleansing statement) that he smuggled himself in the vehicle wheel arch of a coach bound for England from France. On arrival in Ealing Road, London, he was placed in foster care in Sutton. He was vulnerable and had been traumatised by his experiences.

28. Although initially reasonably settled in foster care, on 11 November 2011 the applicant was excluded from school: he had been in a fight and on 16 December 2011 he was referred to Croydon's Youth Offending team for preventative work/support.

29. In about early 2012 he started to associate with negative peers. He has recorded that while in the Tooting Broadway area, he noticed the "SNT" gang. He saw that this gang were making money and he was keen to get involved to make some money for himself. He reports being asked to deliver some parcels by a 22 or 23-year-old Afghan man called Hameed. He said he "knew Hameed would hurt me" so he did not look inside the parcels. Hameed was the SNT's leader. In his cleansing statement, the applicant records that Hameed "*spent a lot of his time torturing me and during one fight he broke my nose. I ended my association with him and the gang when Hameed asked me to deliver a large parcel but I refused*."

30. On 23 and 24 July 2012 the applicant was recorded as having an "unauthorised absence" from school and on 26 July 2012 a "missing person alert form" was completed. He returned to his foster care on 7 August 2012.

31. On 16 August 2012 in an email from the operational manager of the "Looked After Child" team in Croydon, concern was expressed about the foster care placement he was in being unsuitable. He went missing again on 21 August 2012. On 30 August 2012 he was placed with a different foster carer in Croydon. In a "strategy meeting decision sheet for missing children" dated 7 September 2012 it is recorded that the applicant appeared to have become involved in criminal activity while missing. This was said to be with adults or other young people older than him.

32. The applicant committed his first burglary on 14 August 2012 and on 17 September 2012 he was arrested for a second burglary. A referral order for both offences was made on 27 September 2012.

33. He was recorded by Social Services as missing again on 25 October 2012 and on 9 December 2012 he committed a violent robbery of a necklace from a woman in front of her child.

34. At a strategy meeting for missing children on 18 December 2012, it was recorded that the applicant was drawn to older peers and that it was suspected he was in a gang. It was also noted that during the numerous episodes when he had been missing, he reported having been to Manchester, Southampton and possibly Leeds, possibly carrying drugs for older boys. Professionals acknowledged concerns that he was committing offences as a result of his fear of the older men, about his association with gangs, and that he was using multiple phone Sim cards. The professionals concluded that there was a high level of risk of harm to him and considered the need for him to be placed in a secure unit to manage the risks. He remained at his foster placement and was regularly reported as missing, including on 16 November 2012 and 4

December 2012. He was moved to an alternative foster placement on 7 December 2012 but on 4 January 2013 he was again reported as missing.

35. In his cleansing statement the applicant records that he noticed that another gang was making even more money than SNT by breaking into shops and stealing cigarettes. He joined this gang for its money making potential. He asserts that the gang began to control him but does not say how; nor is there any reference to force or violence used against him. He described the burglaries, robberies and drug offences committed with this group, including an offence in December 2013 when a butcher's shop on West Croydon High Street was burgled and the applicant stole £1200 of which his agreed cut was around £400/450.

36. On 8 February 2013 the applicant was sentenced to a 12 month Youth Rehabilitation order for the robbery. He failed to comply with the order. He was reported missing again in February 2013 and a missing child referral form dated 7 February 2013 refers to drug misuse by him to alleviate pain from his past experiences, and to a meeting having to be cancelled because the applicant had to meet a Nigerian man (suspected to be gang related), and would be in trouble if he did not keep his appointment.

37. In March 2013 the applicant was excluded from school. Records around that time suggest he was suspected of running drugs. The applicant left school in June 2013 and was recorded as missing on a number of occasions thereafter.

38. An October 2013 CAMHS file note recorded that he was experiencing symptoms of PTSD and depression. A CAMHS file note of 19 December 2013 recorded that the applicant was "not coming to appts because he thinks he is in danger from an adult gang".

39. There was a fifth burglary offence in February 2014. The applicant pleaded guilty on 11 February 2014 and was sentenced to a Youth Rehabilitation Order. File notes around this time indicated his desire to improve his lifestyle but that he was uncertain how to respond to the gang leaders and had requested advice from the professionals involved in his care.

40. On 8 April 2014 the applicant was relocated to a different foster placement in Barking because of the difficulties he was having in Croydon. However, between June and October 2014 he was noted as associating with a gang in the Tooting area. On 26 June 2014 he was sentenced to a Youth Rehabilitation Order and electronic monitoring for three months.

41. The cleansing statement records an incident in late 2014 when the applicant and members of the second gang broke into an Indian restaurant on High Street, New Addington, acting on inside information about £18-£19,000 kept in a safe on the premises. The applicant was to receive a cut of the takings. The burglary was unsuccessful and a month later, the applicant and other gang members committed another burglary of an off-licence in Hackney. The applicant stole £3000 worth of cigarettes and records that his share was £750.

42. He was moved again on 3 March 2015 to semi-independent accommodation in Dulwich. An "asset core profile" dated 11 March 2015 noted that the applicant had "explained that he knew the oldest peer present through his gang affiliations in the

Tooting area, who he knew would not accept any refusal on his part. Whilst this is a clear cause for concern in relation to the potential exploitation, he should be held responsible to some degree, for his continued affiliations with such peers, which he is aware is likely to increase his vulnerability levels and also risk of committing this type offence."

43. In a "pathway plan" dated 22 September 2015, an increased use of drugs was noted. In the same document the applicant was said to have been in Facebook contact with some of his previous "gang" associates. A document dated 2 December 2015 noted that the applicant needed to stay away from Croydon and Tooting because of "historical gang involvement" and should therefore live in Dulwich.

44. On 1 January 2016 the applicant turned 18 and on 20 April 2016, he committed the aggravated burglary that is the subject of this application.

45. The particulars of the indictment on the single count of aggravated burglary read as follows:

> "Mia Malik, Muberez Safi and Salem Jawed together with A and others on the 20th April 2016 having entered a building, namely 117 Courthill Road, London, SE13 as trespassers, stole therein tobacco, cash and electronic devices and at the time of entry had with them weapons of offence, namely a black spray canister, a hammer and an axe".

46. The burgled property was a lodging house attached to a pub. It appears that the applicant and his co-accused had information that an illegal tobacco business was being run from one of the rooms, and that they expected to find substantial amounts of tobacco and/or cash.

47. It was alleged that at about 3am on 20 April 2016 the applicant entered the property with others. Several of the rooms were occupied, including one by a mother and her two children. Some of the offenders, armed with a spray can, a hammer and an axe, kicked in (or broke open) doors. The occupants of the rooms were threatened – although no one was actually hurt – and the offenders made repeated requests for money. A number of items were taken including boxes of tobacco, wallets and their contents, electrical equipment (iPhones and laptops) and €5,350 in cash.

48. At least two cars were driven to the scene. They contained some or all of the gang and the weapons. Two residents of the lodging rang the police during the course of the burglary, and they were able to arrive on the scene very soon afterwards. The applicant was arrested shortly afterwards in a car with three others. A substantial amount of stolen property was found in the boot of that car and he was found in possession of the €5,350 cash, which represented the savings of one of the residents.

49. The applicant pleaded guilty at an early stage and made no mention of forced criminality to his lawyers or to the judge. His original sentence was reduced on appeal to one of detention for two years and eight months, as we have already indicated.

50. On 21 April 2016 he submitted voluntarily to a post charge police interview about his involvement in the aggravated burglary. He described meeting his co-accused in the

Tooting area and accompanying them to the location in Lewisham where he said, "Chinese people makes UK duty cigarettes". He explained that he remained in the car during the burglary because he was too drug intoxicated to take part. He admitted leaving the car to retrieve a bag containing a significant quantity of cash dropped by one of his co-accused. He said that he and his fellow gang members had arrived in two cars to commit the burglary. When his co-accused started leaving the property with numerous boxes and began filling up the two cars, he felt happy that the money was coming. He also explained how the second gang operated. He described being in a restaurant with a man called "CC" when the plan to commit the aggravated burglary on 20 April was formed. He admitted that they knew people could be living and sleeping at the premises. He also described his willingness to assist in providing details regarding other burglaries committed "in the past in the Peckham, Croydon and Tooting areas as he overhears conversations where criminals are involved in crimes each night and are armed with firearms".

51. The applicant was spoken to again while in prison on 13 July 2016 by police officers. He made no mention of threats or controlling gang behaviour. He took part in a scoping interview on 22 July 2016 and again made no mention of threats or controlling gang behaviour. On 29 September 2016 the s73 agreement (under the Serious Organised Crime and Police Act 2005) was signed and the applicant made the cleansing statement to which we have referred. Again he did not mention threats or controlling gang behaviour.

52. In addition to the specific material to which we have already referred, the fresh evidence consists in broad terms of records from the Home Office, Social Services, Child and Adolescent Mental Health Services and the Probation services concerning the applicant's background and the circumstances in which he was living when he came to commit criminal offences. The content of those records has been helpfully and extensively summarised in the representations to the Home Office by the applicant's solicitor, Sutovic and Hartigan, in support of an application for the applicant to be entered into the NRM and forms the basis of the summary account of the factual background we have given above.

53. Mr Blaxland relies on features of the applicant's background that are consistent with the guidance on County Lines Exploitation promulgated by the Ministry of Justice in October 2019[1] including the following potential indicators of county lines exploitation:

- Persistently going missing from school, home, care

- Children travelling to locations, or being found in areas they have no obvious connections with, including seaside or market towns

- Unwillingness to explain their whereabouts

- Unexplained acquisition of money, clothes, accessories or mobile phones which they are unable to account for

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839253/moj-county-lines-practical-guidance-frontline-practitionerspdf.pdf

- Excessive receipt of texts or phone calls
- Children having multiple mobile phone handsets or sim cards
- Withdrawal or sudden change in personality, behaviour or language used
- Relationships with controlling or older individuals and groups
- Leaving home or care without explanation
- Suspicion of physical assault or unexplained injuries."

He relies on the fact that, having considered the representations and the accompanying records, the Competent Authority concluded that the applicant is not only a victim of trafficking, but that his offences were committed as a direct result of his exploitation.

The appeal

54. Mr Blaxland submits that in light of the fresh evidence, and all that is now known about the circumstances in which the applicant came to commit criminal offences, if the Guidance had been properly applied by the CPS to the charge of aggravated burglary in the applicant's case, it would have been considered not in the public interest to prosecute at all, or clear reference would have been made to possible different charging decisions.

55. Mr Blaxland disputes the argument advanced by the prosecution in response to this application, that the reasoning of the court in *DS* leads to the conclusion that the 2015 Act has changed the legal landscape so that the abuse of process jurisdiction available to achieve compliance with the UK's international obligations to victims of trafficking, is no longer available (except on the traditional limited basis) irrespective of whether the s.45 defence is available. He submits that *DS* does not go that far and that an attenuated abuse of process jurisdiction continues to apply. He refers to *LM* and *VSJ* which indicate that the power to stay an indictment and for the appeal court to quash a conviction as an abuse derive from the court's duty to ensure that the state complies with its international obligations under the relevant anti-trafficking instruments. This 'safety net' remains necessary where no substantive defence is available to a defendant under s.45. If the CPS retains a discretion not to prosecute for offences within Schedule 4, the court must retain the power to prevent a prosecution from proceeding or to quash a conviction where the prosecution has failed to apply its mind to the test within the Guidance.

56. Moreover, although the seriousness of the offence is an important consideration in the decision whether to prosecute a victim of trafficking it does not provide a trump card in favour of the prosecution proceeding. He submits that there will be cases where the seriousness of the offence which the defendant has been compelled to commit exacerbates the extent of the exploitation by placing the defendant at increased risk both to his personal safety and to punishment if convicted.

57. He relies on the picture which has emerged from the material now available as demonstrating that the applicant was a highly vulnerable young person who was

exploited by criminal gangs over many years as a consequence of his vulnerability. Had the CPS properly informed itself of his situation and adopted the four stage approach to the prosecutorial decision in light of the material now available, he submits there are strong grounds for concluding that the applicant was a victim of trafficking and there was a nexus between the commission of the offence and the trafficking.

58. Mr Blaxland submits that the principal relevance of the additional fresh evidence material is that it demonstrates that police and prosecution were on notice that the applicant was a victim of trafficking at the time of his arrest and appearance in court. The interview following his arrest and the cleansing statement were directed towards obtaining information and intelligence about others involved in the commission of offences. They did not focus on the circumstances in which the applicant had come to be involved in the offences. Nonetheless, they provide clear evidence of the exploitation to which the applicant was subjected and additional support for his case that his involvement in the commission of criminal offences came about as a consequence of his exploitation by criminal gangs. Given the indicators of trafficking and exploitation, in the absence of sufficient investigation at the relevant time, he submits this court cannot now be sure that there was no connection between the commission of the offence and his status as a victim of trafficking.

59. So far as the public interest question is concerned, although he accepts that this was a serious offence and that the seriousness of the offence is of great importance in deciding the public interest question, Mr Blaxland contends it is not a complete answer. The offence of aggravated burglary cannot be divorced from the context of the control exercised over the applicant by the criminal gang over an extended period. In those circumstances this court's primary duty is to provide protection to him as a victim of trafficking by avoiding the consequences of his criminalisation. The applicant's conduct and willingness to cooperate are also a relevant factor in determining whether the seriousness of the offence in this case means he should be deprived of the possibility of not being criminalised by reference to the public interest. Mr Blaxland submits that in light of all the facts and material now available it was not in the public interest for the applicant to be prosecuted and accordingly, the court should quash the applicant's conviction. Alternatively, the court cannot be sure that it was in the public interest for the applicant to be prosecuted. Any doubt about the proper exercise of prosecutorial discretion should be resolved in favour of the applicant, and the court cannot accordingly conclude that the conviction is safe.

Our analysis

60. Cogently and clearly as those submissions were advanced by Mr Blaxland, we do not accept them for the reasons that follow.

61. We start with our conclusion that the 2015 Act has changed the legal landscape in relation to the protection available to victims of trafficking who commit criminal offences. The reason for the development of a special abuse of process jurisdiction in cases of this kind was because there was a lacuna in domestic law in relation to the UK's international obligations owed to victims of trafficking. However, Parliament has now considered the position and determined how those obligations in relation to criminal law should be implemented. It has done so by enacting the 2015 Act. In other

words, the lacuna has been filled by legislation the scope of which cannot be circumvented.

62. Parliament's decision to legislate by Schedule 4 of the 2015 Act to limit the scope of the s.45 defence (by excluding its application to serious sexual and violent offences) reflects the balance struck by Parliament between preventing perpetrators of serious criminal offences from evading justice and protecting genuine victims of trafficking from prosecution. An absolute defence for all offences was not required by the UK's international obligations and was not adopted in the domestic legislation introduced. The CPS must, as a prosecution service independent of the executive, apply the domestic law enacted by Parliament and there can be no abuse of process when it does that.

63. In *DS* the LCJ made clear that the abuse of process jurisdiction is no longer necessary in light of the enactment of the 2015 Act, recognising that there are offences to which the statutory defence in s.45 will not apply. For the reasons we have given, we respectfully agree.

64. It seems to us that just as this court held in *LM* (at a time well before the enactment of the 2015 Act) that the UK's international obligations were capable of being (and were) fulfilled by non-legislative means that included the then CPS guidance, the same remains true. In serious criminal cases to which Schedule 4 of the 2015 Act applies, the common law defence of duress/necessity and the four stage approach to prosecution decisions set out in the Guidance (that has express regard at stage four for the public interest) provide appropriate safeguards. Cases in which duress and the s.45 defence are not available, but where it would not be in the public interest to prosecute on the basis of a victim of trafficking's status will, we think, be rare. The seriousness of the offence will in such circumstances require an even greater degree of continuing compulsion and the absence of any reasonably available alternatives to the defendant before it is likely to be in the public interest not to prosecute an individual suspected of an offence regarded by Parliament as serious enough to be included in Schedule 4.

65. Nor, for the reasons advanced by Mr Douglas-Jones is there any conflict between the Schedule 4 exclusions and the UK's international obligations under the Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT") or the EU Directive 2011/36/EU (5 April 2011). Neither is directly applicable in domestic law and it was for Parliament to decide how to give effect to those international obligations. In any event, neither article 26 of ECAT nor article 8 of the Directive require member states to provide blanket immunity from prosecution for victims of trafficking who commit criminal offences and neither require that a statutory defence be available, still less in all cases. So much is clear from the express words of Recital 14 and article 8 of the Directive, and article 26 of ECAT themselves.

66. Notwithstanding that conclusion, and given the fresh evidence in this case and the absence of any consideration of the indicators that the applicant was a victim of trafficking, the question we must address is whether this is a case where the CPS would or might well not have prosecuted had all the information now known been known then.

67. It is undoubtedly the case that the applicant experienced terrible tragedy and trauma in Afghanistan and was a vulnerable young boy on his arrival in this country. It seems to

us there is little doubt (and this is conceded by the prosecution) that he was a child victim of trafficking, and was recruited for criminal activities as a child. The indicators of trafficking were manifest and we see entirely why the positive conclusive grounds decision was made in his case. We well understand the evils of human trafficking and the way in which trafficking occurs in the case of vulnerable young people. Nonetheless, even in the case of victims of trafficking, there is no blanket immunity from prosecution.

68. In our judgment, knowing what we know now and even accepting as we do that the applicant was historically a victim of trafficking and was both vulnerable and traumatised, we are unable to conclude that the decision to prosecute might have been different in this particular case. First, the aggravated burglary offence is very serious. It was planned and premeditated. Weapons, including an axe and a hammer, were taken by a gang of young men into a home in the early hours of the morning where children were present. Doors were kicked in and the occupiers were threatened. It must have been terrifying. The applicant, a member of the gang responsible for this well-planned operation, was found with the stolen money in his possession very soon afterwards. His culpability was high. That being so a very high level of compulsion would be necessary to extinguish his culpability or criminality or diminish it to a point where it would not have been in the public interest to proceed with the prosecution.

69. Secondly, we accept the submissions made by Mr Douglas-Jones on behalf of the prosecution that by 2016, having been the subject of many interventions by Social Services and others, and been relocated to Barking and then to Dulwich to distance him from his historic gang involvement, the objective evidence suggests that the applicant had reasonable opportunities to extricate himself from the gang or gangs. The evidence is insufficient to establish that the nexus and level of compulsion were diminished to such an extent that the applicant's culpability or criminality were extinguished or significantly reduced. In particular, notwithstanding the provision of the cleansing statement in which he had an opportunity to explain any coercion or force under which he was acting, he has provided no evidence that the aggravated burglary was committed as a consequence of the dominant force of compulsion from his traffickers.

70. We are reinforced in coming to that conclusion by the additional material we have received. This shows that as early as about 2012 the applicant made a conscious and voluntary decision to associate with the SNT gang in order to make money. Significantly he had sufficient autonomy to refuse to commit a criminal offence for that gang and ended his relationship with them. That was done notwithstanding his treatment by Hameed, the only person he referred to as having used force or threats to coerce him into committing offences. He then made a conscious decision to become involved with a second gang for financial reasons and to benefit from a cut of the proceeds of their criminal activities.

71. It seems to us that this is a case where the applicant's personal circumstances including as a victim of trafficking, were and are properly to be reflected by way of mitigation of sentence. His culpability and criminality were not however extinguished or so diminished as to lead to the conclusion that he would or might not have been prosecuted. To the contrary, the public interest dictated that the prosecution for this serious aggravated burglary should proceed. For all these reasons we are sure that his

conviction is safe and accordingly we refuse the application for leave and the extension of time sought.

72. Finally, Mr Blaxland invited us to make an order anonymising the proceedings on an indefinite basis under s. 11 of the Contempt of Court Act 1981. We bear in mind the importance of the principle of open justice. We have concluded that such an order should be made as being both necessary and proportionate. In reaching that conclusion we have regard to the applicant's current circumstances as a recognised victim of trafficking and to the ongoing immigration matters which if litigated will lead to the grant of anonymity in immigration proceedings. Having regard to the considerations identified in the authorities we have concluded that it is necessary in the interests of justice for anonymity to be maintained in all the circumstances of this case.