Neutral Citation Number: [2022] EWCA Crim 924

Case No: 202104013

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRADFORD
His Honour Judge Burn

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2022

Before:

LORD JUSTICE MALES
MR JUSTICE SWEENEY
and
HIS HONOUR JUDGE ANDREW LEES

- -

Between:

REGINA	**Respondent**
- and -	
BWM	**Appellant**

- -
- -

Ben Douglas-Jones QC (instructed by **Birds Solicitors**) for the **Appellant**
Nick Adlington (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 23 June 2022

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Approved Judgment

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30 a.m. on Tuesday 5 July 2022.

The appellant in this case is entitled to anonymity. This judgment is not subject to any reporting restriction, but nothing may be published which will disclose the appellant's true identity. A person who breaches this order is liable to a fine and/or imprisonment.

Lord Justice Males:

1. On 23rd July 2018 in the Crown Court at Bradford before His Honour Judge Burn the applicant, a Vietnamese national then aged 24, pleaded guilty to being concerned in the production of cannabis. On the same day he was sentenced to 13 months' imprisonment. His application for an extension of time (1,217 days) in which to seek leave to appeal against conviction and leave to call fresh evidence has been referred to the full court by the single judge.

2. There was initially a single ground of appeal, namely that the applicant's conviction on his own plea is unsafe because he was not advised (or not properly advised) of the defence available to him under section 45 of the Modern Slavery Act 2015, when that defence would probably have succeeded. Following the decision of this court in *R v AAD* [2022] EWCA Crim 106, the applicant seeks to add a further ground of appeal, that the conviction is unsafe because the prosecution was an abuse of process in that, had the prosecution known at the time what is now known about the applicant's status as a victim of trafficking, it would or might well not have prosecuted him.

3. There is now a conclusive grounds decision dated 28th June 2021, in which the Home Office, as the competent authority under the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, determined that the applicant is a victim of modern slavery. Previously, and in particular at the date of the applicant's plea of guilty, there was a conclusive grounds decision that the applicant was *not* a victim of trafficking. In the light of the more recent decision it is appropriate (applying the principles summarised in *R v L; R v N* [2017] EWCA Crim 2129 at [7] to [13]) to grant the applicant anonymity, as ordered provisionally by the single judge. Accordingly we direct that he should be referred to as "BWM". It is appropriate also to grant the extension of time as the application for leave to appeal was made promptly once the positive conclusive grounds decision was issued.

Section 45

4. Section 45 of the Modern Slavery Act provides a defence for victims of slavery or trafficking who commit certain offences under compulsion attributable to slavery or relevant exploitation. Subsection (1) provides:

> "(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."

5. *AAD* provides authoritative guidance on a number of topics relating to the defence under section 45, some of which we shall have to consider.

The basic facts

6. On 30th January 2018 police officers went to a large three storey commercial property at an address in Bradford which was divided into retail and business premises. In the lower ground and basement area of the building they found a significant cannabis farm. Four rooms contained a total of 412 flowering plants, while three other rooms contained 557 less established plants. The final room contained nine propagators which held 720 cannabis plants.

7. The estimated yield of the 412 flowering plants was approximately 24.7 kilograms of "skunk" type cannabis. The remaining plants could be used to restock the rooms in which the flowering plants were being grown. According to a forensic drugs report, the four flowering grow rooms were each capable of producing at least four crops a year. As a result, the total annual yield was estimated at 1,648 plants yielding 98.9 kilograms.

8. As police officers entered the property, the applicant and three other men, his co-accused, who were also from Vietnam, escaped via a crawl space into an enclosed courtyard at the rear of the building. They forced their way into a neighbouring building, two of the men smashing a window with garden furniture. They then smashed another window to escape into the road. However, they were subsequently detained and arrested. They were remanded in custody.

The proceedings

9. In interview, the applicant denied any involvement in the production of drugs and insisted that he was in the building to help with cooking, cleaning and tidying. He said that two other men were responsible for the watering and cutting of the plants and denied causing damage to the windows. He said that he had been kept in the property, which was locked, against his will for seven weeks, and had not been allowed out; that he was not paid for his work; and that he owed his captors money.

10. The applicant was charged with producing a controlled Class B drug contrary to section 4(2)(a) of the Misuse of Drugs Act 1971 and with criminal damage. He pleaded not guilty. Consistently with his account in interview, the applicant served a Defence Statement in which he accepted being present at the address at the material time, but denied the offence, saying that he would rely on the matters raised in his interview. He said that when in Vietnam he had been offered a job in Russia, but had been brought to the United Kingdom and taken to the Bradford address, where he did not know anyone and was instructed to cook and clean. He was aware that cannabis was being grown by others, but had no control over the enterprise, was unable to leave the building and was effectively imprisoned. Although the Defence Statement did not refer expressly to section 45, it was evidently prepared with that statutory defence in mind. Certainly that defence was well in mind by the time of the trial.

11. In fact, on 23rd April 2018, the Home Office had issued a negative conclusive grounds decision finding that the applicant was not a victim of trafficking, but neither the prosecution nor the defence were aware of this at the time. The decision was shown to

prosecution counsel, Mr Nick Adlington, on the morning of the trial and he provided a copy immediately to the applicant's trial counsel, Mr Robert Stevenson.

12. The trial was due to begin on 23rd July 2018. During a discussion of preliminary matters before a jury was empanelled, the trial judge, Judge Burn, made an unsolicited observation that the sentence for the applicant and his co-defendant would be of the order of 12 months, which would mean that they would already have served all or almost all of (the custodial element of) the sentence. It appears clear from the sentence which he was to pass that the judge was referring to the sentence which would be imposed in the event of a guilty plea. Mr Stevenson pointed out that the applicant had a previous conviction from 2014 for being concerned in the supply of cannabis, but the judge indicated that this would not make much difference to the sentence.

13. Mr Stevenson had already seen the applicant in conference before this discussion took place, but the judge now allowed time for a further conference, the result of which was that it was agreed that the applicant would plead guilty to a new count of being concerned in the production of cannabis and that the existing counts on the indictment would not be proceeded with. The same pleas were entered by the applicant's co-defendants.

14. The judge proceeded straight to sentence. He referred to the conclusive grounds decision that the applicant was not a victim of trafficking, but commented that there were "obvious elements of exploitation here". He said that none of the defendants had been enslaved; they had been working for some kind of financial arrangement without their freedom being fully taken away, but they each had very few options when it came to getting involved in the operation. He drew no distinction between the defendants, saying that in each case the sentence after trial would have been one of 16 months' imprisonment which he reduced by three months to take account of their guilty pleas. Thus the sentence in each case was one of 13 months.

15. In view of the grounds of appeal, which submit that the applicant was not advised about the defence available to him under section 45, the applicant has waived privilege and we have the comments of Mr Stevenson as trial counsel. He indicates that the applicant was advised about the defence under section 45, including that it would have some difficulty in view of the factors which had led to the negative conclusive grounds decision. These included the applicant's previous conviction for being concerned in the supply of cannabis and inconsistencies in the accounts of his history which the applicant had given on different occasions. A practical dilemma which the applicant faced was that in order to run a defence under section 45 with any real prospect of success, it would be necessary to apply to adjourn the trial for what might be a lengthy period, with the applicant in custody, while on a guilty plea the judge had indicated that, in effect, the sentence had already been served. Mr Stevenson indicates that it was the applicant's decision to plead guilty, and that he was advised that he should only do so if that was his genuine wish.

The applicant's account of being trafficked

16. The proof of evidence taken from the applicant for the purpose of the criminal trial set out only the bare bones of any defence under section 45. It said no more than that the applicant was trafficked with the promise of a job in Russia, where his passport was taken from him, that he was brought to the United Kingdom to work, and that he was

unable to leave the building and effectively imprisoned there. There was in existence a more detailed statement of the applicant, dated 6th August 2015, which had been taken for the purpose of his asylum claim, but it appears that this was not in the possession of his criminal defence team.

17. The account given by the applicant in this asylum statement was as follows.

18. He was born in Vietnam on 28th June 1994. His father worked in an illegal occupation and had borrowed money from criminals. This debt was the source of the family's problems, with criminals coming to the family house, beating and threatening his parents and demanding money. His father had died in what may have been a motor accident, but the family had been threatened that if the debt was not paid, they would suffer the same consequences. As the applicant grew older, he too was beaten and has a scar on his eyebrow as a result. It was impracticable to report all this to the police, because the police in Vietnam were corrupt.

19. Eventually one of the creditors told the applicant that if he left Vietnam, he would get a better job and would be able to pay back the money owed. He offered to lend the applicant US $20,000 to enable him to leave Vietnam. The applicant never got the cash, but signed a piece of paper acknowledging the debt. The creditors provided the applicant with a passport. The applicant left Vietnam and flew to Russia in about November 2012. In Russia he was met and taken to an abandoned area where there were tents. He stayed there for about a week. He was given €1,500 in cash and told what to do when he reached his next destination. He was put onto a lorry, paying the driver €1,200 or €1,300 from the money which he had been given. He was not told the destination, which turned out to be Poland. There he was met and his belongings and mobile phone were taken away. He was given €800 in cash and, after a few days, was put on another lorry. He paid the driver the money which he had been given. Again, he did not know where he was going, but was told that he would be met. The lorry drove to France and, once again, the applicant was met and taken to a place where he stayed for a few days, before being taken to a car park and given €600 to pay the next driver. He was put on a lorry to the United Kingdom, together with seven others. He was told that, on arrival, he should follow a Vietnamese woman named Lan who was also on the lorry.

20. The applicant arrived in the United Kingdom on 1st December 2012 after a seven hour journey. The people in the lorry were struggling to breathe and banging on the side of the lorry. The police opened the door and the applicant was taken, first to a police station, and then to Yarl's Wood Immigration Centre. He was detained there for a few days, during which he was interviewed. He heard the word "asylum", but did not understand what it meant. After a few days, he was taken to Glasgow by the immigration authorities and was taken to a flat, where he was given the key and some money. Lan had also been taken to Glasgow and was given a flat in the same building. The next day she came to the applicant's room and told him to follow her, which he did. He thought that he should do so because his mother and brother in Vietnam were still under the control of their creditors. Lan took the applicant to the train station and they caught a train to London, where the applicant was taken to a flat with other immigrants. About twice a week a Vietnamese person came and took the applicant to work, loading boxes of equipment onto a van and delivering them to houses at night. At the time he did not realise that these contained equipment for cultivating cannabis. If he asked questions, he would be threatened or hit. He was told that each time he

worked £50 was deducted from the loan of US $20,000 which he had been given in order to come to the United Kingdom. This pattern went on for about eight or nine months.

21. After that, in about September 2013, the applicant was told that he had to go back to Scotland. He was taken by train to a flat in Dumbarton. A couple of weeks later he was taken to a warehouse where he picked up devices for cannabis cultivation to be put into the flat. He did not attempt to escape because he did not know what he would do if he did, speaking no English and having no money. He was scared what would happen to his family if he did escape. He knew that cultivating cannabis was illegal, but was totally under the control of those telling him what to do. He stayed in the flat growing cannabis for about five months, with a Vietnamese person called Quang visiting every week to check on him and bring food. He was not allowed to leave the flat.

22. In February 2014 the police came and arrested him. Another Vietnamese person called Ly was there, but he managed to jump through the window and run away. The applicant was interviewed, but did not tell the police his story and was advised to answer "no comment", which he did. He was remanded for about four months in a young offenders institution, after which he was brought to court for sentencing. He had remained in the young offenders institution up to the date of the 6th August 2015 statement. While there he learned that his mother had died and his brother had been adopted in Vietnam. In fact, although the statement does not say so, the applicant was sentenced to 38 months in a young offenders institution and was recommended for deportation.

23. Following the submission of this statement by the applicant's immigration solicitors, and while the applicant was still in the young offenders institution, the Home Office issued a negative conclusive grounds decision stating that the applicant was not a victim of trafficking. The decision identified inconsistencies in the account given by the applicant when compared with previous statements which he had given and concluded that his account was not credible. The inconsistencies concerned the length of his stay in Russia, the amounts which he had paid in order to get to the United Kingdom, whether he had returned to France after arriving in the United Kingdom, how long he had been in Scotland before his arrest, and the reason why he had remained in the house growing cannabis where he had been arrested. In his latest statement he had said that he had been forced to remain there, but in an earlier statement he had said that he stayed there because he was homeless with no mention of being subjected to or threatened with violence.

24. As at July 2018, the date of the trial in Bradford, the applicant had given no account (or at any rate none which we have seen) to explain how he came to be growing cannabis in Bradford after completion of his sentence in Scotland. However, this gap is filled in by statements which the applicant made subsequently for the purpose of resisting his deportation.

25. According to these statements, on completion of his sentence the applicant was detained under immigration powers and was not released for another 15 months. He then sought out another Vietnamese person who had visited him in detention, with an address in Slough. In Slough he was unable to find this person and was street homeless, sleeping on park benches for a few days. He was then approached by a group of men, one of whom knocked him unconscious with an electric stun gun. He woke up in the boot of a moving car, with his hands tied and his head covered by a bag. He was taken to the

basement of a house which was being used as a factory for producing drugs. The door was kept locked and he was never allowed to leave. He was forced to work, weighing and packing heroin into small bags. He was given food and drink, but never enough. He was hungry all the time. He slept on the floor. He was beaten with a wooden bat. He was tortured with hot candle wax being dripped onto his back. He was raped on many occasions.

26. One day the applicant was taken from this house and driven with two men to a house in what turned out to be Bradford. He was locked in there for about two months, with nothing to do. One night he was taken to another building, with cannabis plants in the basement. He was told not to try to escape and that, if he did, he would be killed. Two other Vietnamese men were also there. A third arrived after a few weeks. The two who were originally there were in charge and beat the applicant and the third man regularly, forcing them to do all the work of growing the plants. Working conditions were very bad. The applicant knew that growing cannabis was illegal, but had no choice and was worried that if he did not do as he was told, he would be beaten or tortured. He was in the cannabis factory for about seven weeks before the police arrived and arrested him.

27. This was the arrest which led to the proceedings in Bradford Crown Court.

28. On 6th February 2018 the applicant was once again referred via the National Referral Mechanism to the Home Office as the competent authority for deciding whether he was a victim of trafficking. Two days later he received a positive reasonable grounds decision, stating that there were reasonable grounds to suspect that he was. However, a negative conclusive grounds decision was issued on 23rd April 2018, which reached the same conclusion that the applicant was not a victim of trafficking as the previous 2015 decision. Again it was said that the applicant's account was not credible and that there were inconsistencies in his statements. His previous conviction for being concerned in the production of cannabis was noted and his account of being kidnapped and abused after his release from detention in Scotland was described as "an unsubstantiated and easy and convenient thing for you to say".

29. Following completion of the sentence imposed by Judge Burn, the applicant was not released but was again detained in immigration detention, this time until July 2019. He made a further claim for asylum, in the course of which he made further statements. In those statements, in addition to giving the further information which we have set out, he repudiated part of what he had previously said. He admitted that he had lied in his initial asylum interview, saying that he was very frightened. He said that some other things he had said, or appeared to have said, were wrong (in particular, statements that he had been given cash: he had not been given cash, but had been told that the cost of journeys would be added to his debt) and must have been the result of misinterpretation.

30. Eventually, on 28th June 2021 the Home Office issued a positive conclusive grounds decision stating that the applicant was a victim of modern slavery. Applying the standard of proof "on the balance of probabilities", it was accepted that he was a victim of modern slavery in Vietnam, Russia, Poland, France and the United Kingdom during the period from 2012 to 2018.

The psychiatric report

31. A psychiatric report dated 28th October 2019 was prepared by Dr Nuwan Galappathie, a consultant forensic psychiatrist, following an examination of the applicant on 5th October 2019. Dr Galppathie set out the account which the applicant had given him and referred to information from his health records while in detention. He diagnosed the applicant as suffering from two forms of mental disorder, namely Recurrent Depressive Disorder (characterised by repeated episodes of depression, difficulty sleeping, low energy levels, poor appetite and weight loss, with thoughts of self-harm and suicide) and Post Traumatic Stress Disorder as a result of his experiences. Symptoms of the latter included frequent flashbacks of previous trauma, nightmares and anxiety. It was noted also that the applicant's scars to the head had been found to be consistent with his account.

32. Dr Galappathie found no evidence of malingering or feigning of the applicant's symptoms, which appeared consistent with what would be expected from an individual with the experiences which the applicant described. He added that the applicant's mental health problems were likely to have a significant adverse effect on his ability to give consistent accounts of his experiences.

33. However, the report also went further, stating positively that these problems were caused by the applicant having been trafficked:

> "In my opinion, his mental health problems by way of depression and PTSD are likely to have been directly caused by [the applicant] being trafficked and forced to work in a cannabis factory. His mental health problems are also likely to have been caused by his account of being prevented from leaving, having threats made against him and his family, being physically beaten and sexually abused."

The application to adduce new evidence

34. The applicant seeks to adduce new evidence on appeal, namely:

(1) documents leading up to and including the 2015 and 2018 negative Conclusive Grounds Decisions;

(2) documents leading up to and including the 2021 positive Conclusive Grounds Decision;

(3) the applicant's further witness statements to which we have referred; and

(4) the applicant's medical records and psychiatric report.

35. The criteria for the admission of new evidence on appeal are set out in section 23 of the Criminal Appeal Act 1968. The test is whether it is necessary or expedient in the interests of justice to receive such evidence. In considering that evidence it is necessary to have regard to whether the evidence appears to be capable of belief, whether it appears that it may afford any ground for allowing the appeal, whether it would have been admissible in the proceedings below, and whether there is a reasonable explanation for the failure to adduce the evidence below. In the context of a potential defence under section 45 of the Modern Slavery Act, it is established that a conclusive

grounds decision is admissible on appeal (always assuming that it is necessary or expedient to receive such evidence) notwithstanding that such a decision would not be admissible at trial (see *R v Brecani* [2021] EWCA Crim 731, [2021] 1 WLR 5851, and *AAD* at [79] to [82] and cases there cited).

36. *AAD* goes on at [83] to explain, citing *R v AAJ* [2021] EWCA Crim 1278 at [39], that:

> "The decision of the competent authority as to whether or not a person has been trafficked for the purpose of exploitation is not binding on the court, but, unless there is evidence to contradict it or significant evidence that has not been considered, it is likely that courts will respect the decision."

37. However, this is only a general approach, and in some cases the account given by an appellant may require testing by way of appropriate questioning (*AAD* at [84]).

38. In the present case we are satisfied that it is necessary to admit the new evidence, with one qualification. Although much of the evidence should have been available in the court below, that is not necessarily a decisive consideration. The evidence is (broadly speaking) capable of belief and may afford grounds for allowing the appeal. The qualification relates to the positive statement by Dr Galappathie that the applicant's mental health problems were caused by the applicant having been trafficked. Whether a defendant has been trafficked is a question of fact on which it is not for a psychiatrist to pronounce, although he can say (as Dr Galappathie does) that the applicant's mental disorders are consistent with his account and (in the absence of any other explanation) supportive of it; and that an individual suffering from depression and PTSD may find it difficult to give a consistent account of his experiences.

The section 45 defence

39. In the present case the prosecution has not sought to cross examine the applicant on the account given in his latest statements as summarised above. Those statements appear to us, in their essentials if not in every detail, to be capable of belief. It is not surprising, particularly in the light of Dr Galappathie's report, that there should be some inconsistencies in the applicant's account. Following the approach described in *AAJ* at [39] and approved in *AAD* at [83] of respecting the decision of the competent authority unless there is reason not to do so, we accept that the applicant is more likely than not to be a victim of trafficking. Mr Adlington for the prosecution did not dissent from this conclusion.

40. We accept also that the prosecution would be unable to prove to the criminal standard that the applicant was not acting under compulsion during the time when he was concerned in the production of cannabis in Bradford. He has given plausible evidence that he was, which the prosecution has not attempted to challenge. In this respect the position of the applicant is materially different from that of the appellant AAD in the *AAD* case. In that case it was accepted that AAD was a victim of trafficking, but he was not forced to cultivate cannabis against his will, which meant that the element of compulsion, which is an essential part of a section 45 defence, was lacking. It was for that reason that his appeal failed (see [181] and [182]).

41. It follows that if what is now known, including the latest conclusive grounds decision, had been known at the time of the proceedings in Bradford Crown Court, the applicant would probably not have been prosecuted (applying Stage 1 of the CPS guidance, the CPS must abide by the decision of the competent authority unless there are clear reasons not to do so and, applying Stage 3 of the guidance, the evidence limb of the full code test would probably not have been fulfilled) and if he had been prosecuted, he would have had a defence under section 45 of the Modern Slavery Act.

The applicant's guilty plea

42. However, the position was different in 2018 at the time of the proceedings below. At that time there was a negative conclusive grounds decision and the applicant chose to plead guilty, despite receiving advice about the possibility of a defence under section 45. It is therefore necessary to consider whether the applicant should be permitted to vacate his guilty plea, which unless vacated stands as a formal public admission of guilt (and therefore as an admission that he has no valid defence), as Lord Hughes explained in *R v Asiedu* [2015] EWCA Crim 714:

> "19. A defendant who pleads guilty is making a formal admission in open court that he is guilty of the offence. He may of course by a written basis of plea limit his admissions to only some of the facts alleged by the Crown, so long as he is admitting facts which constitute the offence, and Asiedu did so here. But ordinarily, once he has admitted such facts by an unambiguous and deliberately intended plea of guilty, there cannot then be an appeal against his conviction, for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court. A defendant will not normally be permitted in this court to say that he has changed his mind and now wishes to deny what he has previously thus admitted in the Crown Court."

43. The circumstances in which an appellant who pleaded guilty but was subsequently found to have been a victim of trafficking can nonetheless appeal against conviction were considered in *R v T* [2022] EWCA Crim 108 and affirmed in *AAD* at [155] to [157], building on what had been said in *Asiedu*. Three broad categories of case were identified where a conviction can be overturned following a guilty plea, albeit this was stated not to be a closed list. The first category is where the plea of guilty is vitiated in some way. Examples are where the plea is equivocal or unintended; where it is compelled as a matter of law by an erroneous ruling by the trial judge; where the appellant has been subjected to improper pressure, for example from the judge; or where erroneous legal advice or failure to advise as to a possible defence has deprived the appellant of a defence which would probably have succeeded (see also *R v Mateta* [2013] EWCA Crim 1372, [2014] 1 WLR 1516). The second category is where the appellant ought not to have been prosecuted at all on the grounds that it was offensive to justice to bring him to trial. Finally, there was said to be "a small residual third category" where "it is established that the appellant did not commit the offence, in other words that the admission made by the plea is a false one".

44. Mr Ben Douglas-Jones QC for the applicant accepts that the applicant was advised about the possibility of a defence under section 45, but criticises the advice which the applicant received. He submits that the advice given was wrong because it was based upon what has now been shown to have been an erroneous negative conclusive grounds decision. Further, instead of being advised that he would need to challenge this conclusive grounds decision which would be difficult and would need an adjournment while the applicant would remain in custody, he should have been advised that he did not need to challenge that decision and merely needed to give evidence for the jury to assess his account of having been trafficked and acting under compulsion. Moreover, he should also have been advised that he should only plead guilty if he was guilty.

45. We would not criticise the advice given by trial counsel, based on the facts as they were known at the time, about the prospect of establishing a defence under section 45. The admissibility or otherwise at trial of a conclusive grounds decision had not yet been determined and, in any event, counsel was entitled to give it weight as the view of the competent authority when formulating his advice. Further, it was apparent (as the applicant's latest statements accept) that there were inconsistencies and errors in the applicant's account. If the applicant had contested the trial, he would have faced cross-examination on those inconsistencies and errors and he did not as yet have the benefit of a psychiatric report supporting his account and going some considerable way to explain away inconsistencies. It was therefore reasonable to advise that the defence under section 45 would face difficulties and that, if it was to be advanced, it would be prudent to apply for an adjournment. In his written submissions Mr Douglas-Jones appeared to submit that an adjournment was unnecessary as the prosecution case itself acknowledged that the applicant had been exploited, but this falls far short of establishing the elements of a section 45 defence, even acknowledging that once the issue was raised, the burden would be on the prosecution to disprove those elements. In oral submissions, however, Mr Douglas-Jones accepted that an adjournment would be necessary in order to run the defence under section 45 with a real prospect of success. It is not clear to us whether the applicant was advised in terms that he should only plead guilty if he was guilty but, even if this advice was not given, it is very doubtful whether it would have made any difference.

46. It seems clear that the decisive factor in the applicant's decision to plead guilty was the fact, confirmed by the judge's unsolicited indication, that the applicant had already served all or almost all of the sentence which he would receive if he pleaded. This court has made clear that such indications should not be given. They risk creating inappropriate pressure on a defendant and narrow the proper ambit of his freedom of choice, as explained in *R v Nightingale* [2013] EWCA Crim 405 and reiterated in *T* and *AAD*. Such indications are, moreover, unnecessary as the existence of sentencing guidelines, including as to the credit to be given for a guilty plea, makes it relatively straightforward for a defendant's lawyers (at any rate in a case such as this) to advise about the likely sentence.

47. Moreover, the judge's indication was particularly ill-advised as it must have conveyed the impression that, if the applicant pleaded guilty, he would shortly be released. In view of the applicant's status as an illegal immigrant, that was a matter over which the judge had no control and of which in all probability he had no knowledge. It appears that the applicant was advised, in the light of the judge's comments, that his sentence had effectively been served, but there is no indication that he was advised about what

would happen to him next. This was in fact that he was likely to be held in immigration detention until he was deported.

48. Accordingly the real choice which the applicant faced was between pleading guilty, in which case he would be held in immigration detention and then deported, or pleading not guilty and applying for an adjournment, in which case he would be likely to be held in custody until his trial could take place, but with the prospect of improving his immigration position in the event of an acquittal. None of this, it seems, was explained to him. In these circumstances it seems to us that the applicant's guilty plea can properly be regarded as vitiated by a combination of the pressure placed upon him by the judge's comments and a lack of understanding of the consequences of the decision which he was being asked to make. This is a case where the Court of Appeal should intervene on the basis that the applicant's conviction is unsafe. It has now become clear that the applicant had a good defence under section 45 which would quite probably have succeeded if the evidence which is now available had been available at the time. His public admission of guilt was based on a false understanding of his true position.

Abuse of process

49. It is therefore unnecessary to say anything about the proposed further ground of appeal to the effect that the prosecution of the applicant was an abuse of process.

Conclusion

50. For these reasons we grant leave to appeal and allow the appeal. The conviction is quashed.