Neutral Citation Number: [2023] EWCA Crim 40

Case No: 202201795 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
HER HONOUR JUDGE MONTGOMERY KC
T20197069

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 January 2023

Before :

LADY JUSTICE CARR
MR JUSTICE CAVANAGH
and
HIS HONOUR JUDGE CONRAD KC

- -

Between :

BRP — **Appellant**

- and –

REX — **Respondent**

- -
- -

Ms Paramjit Ahluwalia (instructed by **Philippa Southwell** of **Birds Solicitors**) for the **Appellant**
Mr Andrew Johnson (instructed by the **Crown Prosecution Service)** for the **Respondent**

Hearing date: 13 January 2023

- -

Approved Judgment

This judgment was handed down remotely at 10am on Wednesday 25 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Carr:

Anonymity

1. We make an anonymity order in this case in order to protect the interests of the proper administration of justice. We bear in mind that the normal rule is open justice, but an anonymity order on the facts of the present case is strictly necessary, pursuant to the principles identified in *R v AAD and others* [2022] EWCA Crim 106; [2022] 1 WLR 4042 ("AAD") at [3] and [4] and summarised in *Human Trafficking and Modern Slavery Law and Practice* (2nd ed) (at 8.103-8.108). The risk to the applicant of being the subject of forced labour in the United Kingdom ("UK") is real.

Introduction

2. We have before us an application for leave to appeal against conviction, together with an associated application for an extension of time (of almost three years). Both applications have been referred to the full Court by the Registrar.

3. The applicant, who is Chinese, is now 31 years old. On 10 June 2019, in the Crown Court at Birmingham before HHJ Montgomery KC, he pleaded guilty to a single count of conspiracy to supply Class B drugs. On 16 August 2019, alongside six other Chinese co-defendants, he was sentenced by HHJ Drew KC ("the Judge") to 18 months' imprisonment.

4. He now seeks to challenge his conviction on the ground that he was not advised, as it is said he should have been, of the possibility of a defence under s. 45 of the Modern Slavery Act 2015 ("s. 45") ("the Act"). At the time of the alleged offending he was a victim of forced labour and relevant exploitation. The contention is that a s. 45 defence would quite probably have succeeded and that, applying the test in *R v Boal* [1992] QB 591 ("*Boal*"), the conviction is unsafe.

5. We consider the appeal to be arguable. As for delay, the applicant's new solicitors have served two witness statements setting out the relevant timeline. Given that the appeal is arguable, that the delay has been explained and justified in large measure, and the nature and importance of the issues raised, it is in the interests of justice to grant the necessary extension of time. We therefore grant leave for the appeal to be heard in full and proceed accordingly.

The facts

6. In the afternoon of 22 January 2019 police attended the Southside Apartment Complex, a complex set in a gated and affluent part of Chinatown in Birmingham. One of the appellant's co-defendants arrived in a taxi carrying a large cardboard box. He was approached and informed that he was to be the subject of a drugs search, to which he responded that he would tell the police everything, and was taking the box to "Flat 324" ("the Flat"). He indicated to the police that the box contained cannabis.

7. The appellant was then seen to exit the Flat. He smelt strongly of cannabis. He was detained, along with five other co-defendants who were either also leaving or found within the Flat. The Flat contained two bedrooms. Police found and seized multiple mobile telephones, several Chinese passports and other documentation, English and

Scottish bank notes, and approximately 50 kgs of "skunk" cannabis. The value of the drugs was estimated to be over £200,000.

8. The appellant and his co-defendants were charged with conspiracy to supply on a single day, namely 22 January 2019.

The guilty plea and sentencing process

9. All but one of the defendants pleaded guilty. The appellant entered his guilty plea at the pre-trial review on a signed written basis dated 20 May 2019 ("the basis of plea") which stated:

> "1. That he was illegally resident in the UK; he did not have any family or support basis in the UK.
>
> 2. That he was induced through exploitation by others and his own naivety into "the Conspiracy".
>
> 3. That he made no financial gain from any profits of drugs supply.
>
> 4. He was made to live with several others in a small flat and had to share one room.
>
> 5. His passport was taken away from him.
>
> 6. All his personal belongings were contained in one small suitcase.
>
> 7. He had no influence over any other person.
>
> 8. His involvement in "the Conspiracy" falls just short of Duress.
>
> 9. Whilst he was aware that Cannabis was being held in the flat he took no part in the packaging or processing of the same.
>
> 10. His involvement did not exceed being an "extra body" in the flat."

10. On 15 August 2019 the Judge posted a note on the Digital Case System as follows:

> "All parties should be aware of the following: the bases of plea will need to be supported by evidence from the defendants if they intend to maintain them, as will any other similar basis of plea advanced orally in mitigation."

11. It appears that the appellant did not pursue his basis of plea. No evidence was called and there was no *Newton* hearing. The Judge did not refer to any basis of plea in his sentencing remarks.

12. The Judge indicated that "this was a commercial operation, run in an efficient and well-organised way in which drugs came into the UK, were re-packaged and then prepared

for onward supply either in this country or elsewhere". Although there was a clear connection to a more widespread operation, the Judge did not sentence the appellant on that basis. He placed the appellant's offending in category 2/lesser role for the purpose of the relevant Sentencing Council Guideline. He took a term of 21 months' imprisonment after trial, which he then reduced by 15% by way of credit for guilty plea.

Fresh evidence and developments following conviction and sentence

13. The appellant seeks leave pursuant to s. 23 of the Criminal Appeal Act 1968 to introduce fresh evidence as follows:

    i) A positive Reasonable Grounds decision of the Single Competent Authority ("SCA") dated 21 February 2020 ("the RG Decision");

    ii) A positive Conclusive Grounds decision of the SCA dated 8 February 2022 ("the CG Decision");

    iii) A report of Professor Katona, consultant psychiatrist, dated 8 September 2021;

    iv) An OASys report dated 7 April 2021 ("the OASys report");

    v) Two witness statements from the appellant dated 22 July 2021 and 6 June 2022.

14. This evidence self-evidently post-dates the appellant's conviction. We entertained it for the purpose of the appeal hearing *de bene esse*. We also permitted the appellant to give oral evidence and for his evidence to be tested in cross-examination.

15. The following facts and chronology of events emerge.

The appellant's entry into the UK in 2010

16. The appellant had entered the UK on a Tier 4 (General) Student Visa (valid from 18 December 2009 to 6 November 2012) in 2010 in order to study English at Bournville College. In his oral evidence he stated that the course involved around three to five hours' study a day, and that the annual cost of the course was around £4,000. The fees were paid by his parents in China into his UK bank account (with the Bank of China). His visa was curtailed in March 2012 when he ceased to study. He remained thereafter as an overstayer. He had many jobs thereafter, including cleaning, washing and working for takeaway restaurants.

The appellant's arrests in 2014 and issue of a bench warrant

17. The appellant was arrested on suspicion of attempted kidnap in June 2014 and served with immigration papers notifying him of his overstayer status. In September 2014 he was arrested for production of a controlled (class B) drug. In May 2015 a bench warrant was issued for his arrest in relation to the drugs matter.

The appellant's asylum claim: 2014/2015

18. In October 2014 he claimed asylum. In his screening interview on 23 October 2014 he stated that he came to the UK by air to study. His father had been arrested by the government for religious reasons. He did not know whether his father was alive and

believed that he would be persecuted as his father was, were he to be returned. He stated that he could not produce his passport because it had been lost in a burglary. He stated that he had been arrested in the UK and released without charge, because he (and his friend) had done nothing wrong. In interview in March 2015 he stated that he had a girlfriend and a child in the UK; he and his girlfriend were living together but not married.

19. His asylum claim was refused in November 2015. He had failed to attend a follow up interview and had failed to attend his trial in the Crown Court. He was now listed as "wanted" on the Police National Computer.

Events of 2019

20. The appellant's bench warrant remained in place until March 2019 when it was withdrawn. No evidence was ultimately offered on the drug charge and on 2 May 2019 a verdict of not guilty was entered under s. 17 of the Criminal Justice Act 1967.

21. Following the appellant's conviction in June 2019, the Secretary of State for the Home Department decided (on 29 August 2019) to deport him. On 24 December 2019, having completed his sentence and been further detained in immigration detention, he was granted immigration bail.

Events of 2020 and the RG Decision

22. On 17 February 2020 the Salvation Army referred the appellant to the National Referral Mechanism ("NRM").

23. On 21 February 2020 he was the subject of the RG Decision. The appellant's account, as recorded in the RG decision, included the following:

    i) In November 2018 he was an illegal overstayer living with a friend in Birmingham. He did not have a job and was "sofa-surfing". In December 2018 his friend was not happy with him staying, so he started looking for jobs online. He found an advert on a Chinese website called "Yingniao" for a cleaner's job, paying £25 a day with accommodation and food. He applied successfully;

    ii) The next day he was picked up by a man called "Big Bing" (also referred to as "Da Bing") ("Bing") and taken to an apartment near the south side of Chinatown. He was told to clean the Flat and to cook, although he was not allowed to go into the bedrooms or open their doors. He would sleep on the floor of the lounge; two men would also sleep in the apartment. He told Bing that he had a partner and a son, and showed him a picture of his son;

    iii) At the house he smelt a distasteful smell from a box. When he asked about it, he was slapped and kicked by Bing. He was told that it was cannabis and not to ask questions and do his job. He was to clean, get rid of the smell and any mess, to dismantle the boxes and dispose of the rubbish. He never touched the cannabis. When he objected to being involved in any illegal activities, Bing put his foot on the appellant's chest/heart and threatened to kill him if he told anyone. Bing said he would tell the police about his illegal overstayer status and threatened the appellant's family. The appellant was very scared as Bing said that he was

part of a gang. The appellant was told not to think of escaping as they would take his partner and child. The appellant felt like he had no choice but to abide by their instructions. There were no further threats because he did as he was instructed;

iv) He did all the cleaning and cooking. He would sometimes have to go out to buy things when visitors came, and to serve them;

v) The police raid was about a month after he started. Boxes would come once a week, although sometimes there would be no deliveries.

24. Two of the appellant's co-defendants were named by the appellant as individuals who had exploited him.

Events of 2021/2022: the OASys report, the appellant's witness statement, the report of Professor Katona and the CG Decision

The OASys report

25. The OASys report completed by the National Offender Management Service ("NOMS") recorded the appellant stating that he applied for a cleaning job at a flat and was then forced to be involved with the index offence. He stated that those actually in charge of the operation were not arrested. The report also recorded that the appellant was currently living with his partner and child in Coventry. They had been living together since 2016. The child is not the appellant's son but the appellant had requested that his name be put on the child's birth certificate. He relied on his partner for financial support and also received a stipend from the Red Cross.

The appellant's witness statement

26. In a very lengthy witness statement dated 22 July 2021, the appellant gave details of his background and relationship with his girlfriend and her son. He described how in 2011 he helped his girlfriend use another woman's identity to get pregnancy care. They became a couple in May/June 2011 and the child was born in August 2011. The appellant treated him like a son. His girlfriend left him in October 2011 but came back to him in January 2012. He then left her in the summer of 2012. He went briefly to Manchester but then to Birmingham. In 2014 he re-made contact with her, when she was living in Coventry with her son. He visited but did not stay with her permanently because the accommodation was not suitable. But, in 2016 his girlfriend moved to a different council house. By this time they were a couple again. The council rules meant that he could not stay there permanently so he only stayed occasionally. He would otherwise sleep with different friends and occasionally on the streets, working odd jobs.

27. In relation to the circumstances leading up to and surrounding his arrest in January 2019, he repeated the account recorded in the RG decision, with added detail. For example, when Bing put his foot on the appellant's chest, he had also called over three other individuals who started to beat the appellant. Bing also kicked the appellant and, having threatened to go to the police and find the appellant's family, said "Are we clear?" The appellant stated that Bing said that he was a Triad, and if the appellant tried to run away he would be able to find him or go after his family. Although the appellant never saw Bing again, Bing would call through to check where he was and that he was

working. Two other Chinese males were always present in the Flat. Even when the appellant was allowed to leave the Flat, he said that he could not really escape or go to the police or anyone else, because he was scared as a result of being told of the Triad connection and potential repercussions. He was never paid any money and was too scared to ask about this. He was very intimidated by those coming into the Flat and continuously received threats. He stated that he was kept in custody with some of his co-defendants. He felt scared and was threatened. He described telling his solicitor everything upon his release in December 2019, which led to his referral into the NRM.

28. The appellant addressed his asylum claim in 2014. He also sought to clarify events relating to the day when he took a child to the Home Office, namely 22 October 2014. He was attending for reporting or an interview. He states that he had been asked that day to look after a friend's son, aged four or five years old. When asked who the child was, he panicked and gave the details of his girlfriend's son. He also said that he was the father, since he knew that his name was on the boy's birth certificate. He continued the lie the next day in a screening interview. In March 2015 he falsely stated his partner's identity; he says he did so because that was the name on the boy's birth certificate. He responded to the refusal of his asylum and human rights claims and mentioned his arrest in June 2014.

29. In his oral evidence before us he repeated that he could not leave the Flat after the first day because he had been threatened by Bing, who was a gangster. He denied knowing how to get help from the authorities, despite having lived in the UK for some nine years. He only met Bing once. The extent of what Bing knew about his family was the area in which they lived, and the bus route that was closest to their home. He was allowed to leave the Flat, but only when given money to buy food. He admitted that he could have contacted the police but said he was afraid; the police could not provide 24-hour protection. He did not know if the two people in the Flat with him worked for Bing. He did not think about running away. He denied making up his account now to find a way of avoiding the consequences of his actions. When asked what had changed, so that he could speak about Bing now, he stated that Bing did not know his whereabouts anymore. The environment was different. He stated that he is currently living with his partner and son in her council house.

The report of Professor Katona

30. In his report dated 8 September 2021, following two remote interviews with the appellant and with an interpreter present, Professor Katona opined that the appellant fulfils the criteria for post-traumatic stress disorder ("PTSD"). He based his diagnoses on the presence of the following clinical features:

    i) The appellant's description of experiencing significant stressors (being threatened, beaten, confined and forced to work);

    ii) The appellant's description of intrusion phenomena in the form of intrusive thoughts and nightmares;

    iii) The appellant's description of avoidant behaviour in the form of trying to suppress his intrusive thoughts and not going to Birmingham's Chinatown;

iv) The appellant's description of significant alterations in arousal and reactivity in the form of disturbed sleep, irritability and being easily startled;

v) The appellant's description of having quite prominent negative alterations in cognitions and mood in the form of low mood and loss of interest;

vi) The fact that the appellant's PTSD symptoms had lasted for more than a month, had considerable functional significance to the extent of substantially impeding his day-to-day activity and could not be explained in terms of alcohol, medication, illicit drugs or other health problems.

31. In Professor Katona's view, the appellant's depressive and anxiety symptoms were best understood as "secondary to his PTSD".

32. Professor Katona recognised that it was not for him to come to any conclusions regarding the appellant's credibility. However, he stated that nothing in the appellant's account was "not clinically plausible". Further, in his opinion, the appellant was not feigning or exaggerating his symptoms.

The CG Decision

33. The CG Decision was made on 8 February 2022. The SCA accepted that the appellant was a victim of "modern slavery in United Kingdom during December 2018-January 2019 for the specific purposes of forced labour".

34. The SCA commented:

> "The [appellant] has given a generally detailed, plausible and relatively consistent account in relation to his claimed exploitation through his NRM referral and witness statement. Furthermore, it is noted that the account is also consistent with external information from the US State Department Trafficking in Persons Report 2021 in relation to the UK. The report stated that traffickers force adults to work in cannabis cultivation…"

35. It gave weight to the views of Professor Katona, including as to credibility, and to a trafficking assessment report dated 9 September 2021. It stated that there were no significant credibility issues in the appellant's account. The SCA went on:

> "Looking at the evidence in the round, it is considered the [appellant's] account has met the required threshold, namely "on the balance of probabilities" it is more likely than not to have occurred."

36. The SCA concluded:

> "Overall, it is considered that the [appellant] was recruited through an online job advert. The [appellant] was then transported from Chinatown (Birmingham) to a flat in the south of Chinatown (Birmingham). As a result of the recruitment and transportation the [appellant] meets part "a". The [appellant] was beaten and was subjected to death threats towards himself and

> his family, thus meeting part "b". Lastly, it is considered that [the appellant] was forced into providing labour against his will, in which he received no pay, therefore meeting part "c"."

(References to parts "a", "b" and "c" are references to the "action", "means" and "purpose" elements of trafficking).

Responses from the appellant's previous lawyers

37. According to the appellant's new solicitors, they received "some immigration and some trafficking material" from Lisa's Law Solicitors on 5 March 2020. The appellant instructed them to advise on appeal against conviction on 16 March 2020. There is a chronology of the steps taken between April 2020 and January 2022 to obtain relevant paperwork from the court, the SCA, immigration solicitors and his previous legal team, alongside obtaining legal aid.

38. In a statement dated 6 June 2022 the appellant stated that he was relieved when arrested because this meant that he was "no longer under the control of [his] traffickers". He did not tell the police about his treatment because he had been told that "they were a triad of gangsters and had powerful connections". He was not referred to the NRM, or advised of a s. 45 defence at any stage during the criminal proceedings.

39. Draft grounds of appeal were sent to the appellant's previous legal team on 17 May 2022 in accordance with the procedure identified in *R v McCook* [2014] EWCA Crim 734; [2015] Crim LR 350.

40. The original solicitors' files record the appellant's instructions at the police station on 23 January 2019 as follows:

> "I was arrested outside flat. I have a friend…I didn't go inside.
> Said busy so I left. I don't know anything about the drugs…"

41. The solicitor advocate representing the appellant at the time of his guilty plea stated that it was "very likely the case" that the appellant was not advised in relation to the availability of a s. 45 defence. The basis of plea would have been typed up during the course of a meeting with the appellant. Whilst there is reference to "duress", the solicitors' file contains no record of the potential availability of a s. 45 defence being mentioned.

42. The application for leave to appeal conviction was lodged on 10 June 2022.

Grounds of appeal and response

43. Ms Ahluwalia for the appellant submits that his conviction is unsafe and should be quashed. At the date of the index offence the appellant was a victim of forced labour, and subject to relevant exploitation. The basis of plea included clear indicators of relevant exploitation, including inducing the appellant into the conspiracy and making him live with several others in a small flat, sharing one room. At no stage did anyone instigate a referral into the NRM. The appellant was never advised as to the availability of a s. 45 defence; he was deprived of a defence which would quite probably have succeeded. There is no challenge by reference to abuse of process.

44. In terms of the appellant's credibility, Ms Ahluwalia emphasises the consistency of the appellant's account since the OASys report and the fact, for example, that the police noted the appellant to be "extremely nervous" when they apprehended him. The appellant had not exaggerated his case in the witness box.

45. Ms Ahluwalia recognised that the weakest part of the appellant's case related to the test in s. 45(1)(d). But, the appellant was in a real predicament. He had been the subject of actual violence on the first day and thereafter Bing had mechanisms of control, keeping an eye on the appellant.

46. For the respondent, Mr Johnson submits that the appellant's account should not be accepted. But even if that account were to be considered credible, the necessary ingredients of a s. 45 defence are not made out. This was not in any way a "typical trafficking" case. A reasonable person in the appellant's position would have walked away at or immediately after the first encounter with Bing, or when leaving the Flat to go shopping.

The relevant legal principles

47. The relevant legal background and principles were summarised most recently in *R v AFU* [2023] EWCA Crim 23 at [81] to [99]. For present purposes, it is sufficient for us to repeat the following summary only.

S. 45

48. The UK provides protection for victims of forced labour through s. 45, which came into force on 31 July 2015 and applies to all (relevant) offences committed after that date. S. 45 provides materially:

> "(1) A person is not guilty of an offence if:
>
> (a) the person is aged 18 over at the time of the act which constitutes the offence;
>
> (b) the person does that act because he 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….
>
> (5) For the purposes of this section-
>
> "relevant characteristics" means age, sex and any physical or mental illness or disability;
>
> "relevant exploitation" is exploitation…that is attributable to the exploited person being, or having been, a victim of human trafficking."

49. S. 1 of the Act provides, amongst other things, that a person commits an offence if they require another person to perform forced labour and the circumstances are such that they know or ought to know that the other person is being required to perform forced labour. S.3 of the Act provides, amongst other things, that a person is exploited if they are the victim of behaviour which involves the commission of an offence under s. 1.

50. It is for the defendant to raise evidence of each of the elements in s. 45(1), and for the prosecution to disprove one or more of them to the criminal standard: see *R v MK; R v Gega* [2018] EWCA Crim 667; [2019] QB 86 at [45].

51. Decisions of the SCA are not admissible at trial, but are admissible on appeal when it is contended that a person's trafficking status has been overlooked or inadequately considered (see *R v Brecani* [2021] EWCA Crim 731; [2021] 1 WLR 5851 at [40] and [41] and *AAD* at [79] to [89]). Whilst not binding, the decisions will usually be respected, unless there is good reason not to do so. However, there may be cases where it is necessary for an appellant's account to be tested independently for the purposes of safe resolution of the issues on appeal; for example, where a finding of trafficking is based on unsatisfactory evidence (see *AAD* at [108]).

52. As confirmed in *R v V* [2020] EWCA Crim 1355 at [25], a s. 45 defence does not arise automatically on proof that a person was a victim of forced labour. Whether or not a s. 45 defence exists is entirely a question of fact for a jury to decide. The degree of compulsion on the defendant, and the alternatives reasonably available to them, are "critical features" of the analysis: "the offence must be committed as a direct consequence of or in the course of trafficking or slavery and the criminality must be significantly diminished or effectively extinguished because no realistic alternative was available but to comply with the dominant force of another."

Appeals against conviction following a guilty plea

53. The court should be cautious when overturning convictions following guilty pleas. As Lord Hughes made clear in *R v Asiedu* [2014] EWCA Crim 567; [2014] 2 Cr App R 7 ("*Asiedu"*) at [19] to [25], and [32], it will ordinarily be difficult to overturn a voluntary confession. The defendant, having made a formal admission in open court that they are guilty of the offence, will not normally be permitted to change their mind. The trial process is not to be treated as a "tactical game".

54. Broadly, there are three categories of case in which a guilty plea may be vitiated, as summarised in *R v Tredget* [2022] EWCA Crim 108; [2022] 4 WLR 62 ("*Tredget*") at

[154] to [180] and *Archbold* (2023 ed) at 7-43 to 7-46. The relevant category for our purposes is that of cases where the guilty plea is vitiated. This can occur in several circumstances, including the appellant being under the influence of controlled drugs when they entered their plea (*R v Swain* [1986] Crim LR 480); a plea compelled by an adverse or incorrect ruling as to the law (*Asiedu*); improper pressure (*R v Nightingale* [2013] EWCA Crim 405; [2013] 2 Cr App R 7); or incorrect legal advice that deprived the defendant of a defence which quite probably would have succeeded such that a clear injustice has been done.

55. An appeal can succeed if the guilty plea is vitiated by erroneous legal advice or a failure to advise as to a possible defence, even where the advice may not have been so fundamental as to have rendered the plea a nullity. In this case, the effect of the advice must be to deprive the defendant of a defence which would probably have succeeded: *Tredget* at [158]; *R v Kakaei (Fouad)* [2021] EWCA Crim 503; [2021] Crim LR 1079 ("*Kakaei"*) at [67].

56. This test derives from *Boal*, where the court emphasised that in such situations a conviction should be overturned only "exceptionally", where "a clear injustice has been done" (see 599-600). This passage was cited with approval in *R v PK* [2017] EWCA Crim 486; [2017] Crim LR 716 ("*PK*") at [12]. The exceptionality of the defence was further emphasised in *Tredget* at [158] and *R v PBL* [2020] EWCA Crim 1445 at [23].

57. The *Dastjerdi* checklist (see *R v Dastjerdi* [2011] EWCA Crim 365 at [9]), applicable when determining whether a conviction following a guilty plea should be overturned, was subsequently applied in *PK* at [13]. On the facts in this case, as set out above, it requires:

    i) That the appellant should have been advised about the possibility of availing himself of the [s. 45] defence;

    ii) That the appellant was not so advised;

    iii) That, had [the appellant] been so advised, it was open to him to advance the defence;

    iv) That the prospects that [the appellant] would have been able successfully to advance such a defence were good.

Analysis and findings

58. The central issue on this appeal is whether or not the appellant had a good s. 45 defence. If he did, he was deprived of the opportunity to advance it through the failure of his legal advisers to advise adequately, including at the time that he entered his guilty plea, and there will have been a clear injustice.

59. As set out above, the respondent's position is that the appellant's account is not credible but that, in any event, even if credible, the necessary elements of compulsion and a lack of realistic alternatives for a successful s. 45 defence are not made out. The appellant, on the other hand, contends that he had a good s. 45 defence, and that the prosecution would not probably have been able to disprove any of the necessary elements of such a defence.

60. In order to resolve this dispute, we consider it necessary and expedient in the interests of justice to admit the fresh evidence identified in [13] above, together with the appellant's oral evidence before us. Neither the fact of the NRM referral, nor the RG or CG Decisions, were available before conviction. Although not all of the material is necessarily reliable, it is relevant to the strength or otherwise of a s. 45 defence and/or the advice given to the appellant during his trial and the sentencing process.

61. The following factors point towards the appellant's central account relating to the events of December 2018 and January 2019 being credible:

    i) The CG Decision;

    ii) The fact that he mentioned being "induced through exploitation" and "duress" in his basis of plea;

    iii) The fact that his account of events has remained largely consistent since the OASys report;

    iv) The fact that the appellant did not exaggerate his evidence in the witness box. Thus, for example, he confirmed that his face-to-face contact with Bing was limited to the first day when they met. He also stated that he was not sure whether the two men who remained in the Flat with him were associated with Bing. He did not suggest that he had given Bing details of his family's whereabouts beyond the broad area where they lived and the relevant bus route;

    v) Professor Katona's diagnosis of PTSD and his view that the appellant's symptoms are clinically plausible.

62. That said, there is real scope to doubt the appellant's credibility:

    i) The CG Decision is based essentially on an acceptance of the appellant's account, relying on the consistency of his version of events since 2021. That account was not tested by reference, for example, to the instructions given by the appellant to his solicitors upon arrest (which made no reference to any form of forced labour or exploitation). There was no reference to any of the more general and serious credibility issues affecting the appellant referred to below. Further, there is force in the respondent's submission that this was not a case requiring the application of the particular trafficking expertise of the SCA. There was no clear international dimension; rather this was, on the appellant's case, a case of domestic forced labour;

    ii) As for consistency, by the time that the appellant was speaking to NOMS in 2021 for the purpose of the OASys report (and subsequently), he was well aware of the context, having been referred under the NRM, and that it was in his interests to contend that he had been the subject of forced labour. This would also have been the position at the time of his lengthy witness statement of July 2021, which appears to have had the heavy input of lawyers;

    iii) The appellant is someone capable of grave deception when he considers it to be necessary - either in his own interests or the interests of those for whom he cares. He has a striking history of deception in circumstances where there could be no

excuse by reference to improper pressure, forced labour or trafficking concerns. We refer, by way of example, to the appellant's introduction in 2011 of his then pregnant partner to another lady whose identity his partner could steal for the purpose of facilitating access to pregnancy healthcare in the UK. This was at a time when the appellant was lawfully resident here under his student visa. In October 2014 he passed off another boy as his son when attending the Home Office. His explanation is that he feared being arrested for kidnap. The following year, in 2015, he gave the Home Office false details of his partner, with whom he said he was living and in a relationship;

iv) Further, making all due allowances for linguistic difficulties, the statement in the appellant's basis of plea that he "had no family…in the UK" was, at best, misleading. It suited the appellant at that stage to deny having any family in the UK; when it came to his asylum and human rights claims, he said quite the opposite. On any view, his statement that he had no "support basis" in the UK was false, given the support available to him from his partner;

v) The appellant's account is not inherently plausible. The suggestion is that one or more drug dealers would advertise on an open platform for assistance which would involve bringing a complete outsider into an environment that was obviously unlawful from the outset – a highly risky recruitment strategy. It is to be noted that the appellant was arrested on a Class B drug offence in 2014, albeit that the charge was later dropped. The circumstances surrounding the appellant's arrest for attempted kidnap earlier in the same year are difficult to understand. It is also far from obvious why it was necessary to hold the appellant in the Flat under any form of compulsion: he had no real function in the conspiracy, beyond clearing up the boxes that carried the drugs. He was not a cannabis gardener, or a courier, for example.

63. In the end result, we have not found it necessary to resolve the question of whether or not it is likely that the prosecution could have proved the appellant's account of the events of December 2018 and January 2019 to be fundamentally untrue. That is because, even accepting his account for present purposes, we consider it clear that the prosecution would have been likely to prove to the criminal standard of proof that at least one of the necessary ingredients of a s. 45 defence was not made out.

64. It is essentially common ground that, on the basis of the appellant's account, the requirements of s. 45(1)(a) and (c) would be made out. However, it is not accepted that the necessary degree of compulsion would be established and, most fundamentally, that a reasonable person in the same situation as the appellant and having his relevant characteristics (age, sex, physical and mental illness or disability) would have no realistic alternative to doing the act in question.

65. At the material time the appellant was 27 years old and an overstayer in the UK. He had no physical or mental illness or disability. (There is no evidence from Professor Katona that he would have had any mental illness in the immediate aftermath of his arrival in the Flat.) He spoke at least some English: he had studied it for two years between 2010 and 2012 (reaching ESOL level 2) and lived in the UK since then, working in multiple jobs over the years. Before us it was clear that he could both understand and speak basic English reasonably well. He had had considerable experience of interaction with the police and the Home Office. He was alive to how the

NHS worked (and how to gain access to it, albeit through dishonest means) and, for example, council housing rules. He had a female partner (and someone he regarded as his child) living not far away in this country, in a council house in Coventry. He had a wide network of friends and contacts in the UK, as evidenced by his lifestyle and occupations between 2012 and 2018. He had demonstrated his resourcefulness over this period, holding down various jobs. This is all consistent with his demeanour in court, which was of someone well capable of fending for himself.

66. The only reason given by the appellant for not leaving the Flat permanently was fear of Bing, whom he believed to be part of a gang, and what Bing (or others at Bing's behest) would do to him or his family.

67. Set against the background above, and even bearing in mind the appellant's immigration status and any related disinclination to go to the police, the respondent would have been able to prove that the reasonable person in the appellant's position would have felt able to leave, despite Bing's threats.

68. The threats were made only on the first occasion. Bing did not visit the appellant again. The appellant did not know if the others in the Flat worked for Bing or not. The appellant had given only very limited details of the whereabouts of his partner and son. Whilst it is important not to apply impermissible hindsight, the appellant confirmed that Bing has never contacted (or threatened) his family. More relevant, perhaps, is the fact that there is no obvious good reason why the appellant felt able from 2020 onwards to name and accuse Bing, but suggested that he was too scared to leave the Flat in 2019 because of Bing's threats.

69. Further, there is no suggestion that the appellant was held forcibly against his will within the Flat, for example, or controlled when he went out alone. He had his own telephone at all material times, and was able freely to make and receive calls, and did so. Unlike in a typical trafficking situation, the appellant had a well-established network of unconnected contacts in the UK and, most importantly, a partner living in the UK in settled accommodation to whom he could turn. In basic terms, he had somewhere to go, and many different people from whom he could have sought help, beyond and in addition to the authorities. It is notable that the author of the OASys report considered that the appellant had "acted recklessly in allowing himself to become involved with this offence and took a risk in continuing to do so rather than walking away from the crime". As Mr Johnson put it for the respondent, a reasonable person in the appellant's situation could realistically have walked away at the very outset or at least on one of the occasions when he was alone and away from the Flat.

70. In short, a s. 45 defence advanced by the appellant would quite probably have failed, in particular by reference to s. 45(1)(d). The objective reasonableness test would probably not have been satisfied: the respondent would probably have been able to prove to the criminal standard of proof that a reasonable person in the appellant's situation and with his relevant characteristics had a realistic alternative to being involved in the conspiracy.

Conclusion

71. In conclusion, and for the reasons set out above, the appellant was not deprived of the opportunity of advancing a good s. 45 defence. Although he should have been, but was

not, advised of the availability of a s. 45 defence before entering his guilty plea, there has been no clear injustice and his conviction is not unsafe. The appeal is dismissed.