Neutral Citation Number: [2024] EWCA Crim 991

Case No: 202301365 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEICESTER
His Honour Judge Spencer KC
T20210136

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/08/2024

Before :

LADY JUSTICE MACUR DBE
MRS JUSTICE STACEY DBE
and
HIS HONOUR JUDGE MICHAEL CHAMBERS KC

- -

Between :

Rex	**Respondent**
- and -	
BNN	**Applicant**

- -
- -

Mr R Kherbane (instructed by **Birnberg Peirce**) for the **Applicant**
Mr A Johnson (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates : 19 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

ANONYMITY

No publication shall refer to the name of the Applicant.

This order is made pursuant to section 11 of the Contempt of Court Act 1981.

Macur LJ :

1. The Applicant seeks an order for anonymity under section 11 of the Contempt of Court Act 1981. The Respondent submits that, regardless of outcome of this application and prospective appeal, that there is good reason to afford this protection since the Applicant has previously been found to be a VOT, and a previous criminal prosecution in 2016 was abandoned accordingly.

2. We have regard to the important principle of open justice and have scrutinised the application, but in the circumstances, we agree that the applicant's welfare requires that his anonymity is preserved. In these circumstances the applicant's name has been anonymised by the assignment of the three random initials "BNN".

Introduction:

3. On 3rd November 2021 the applicant pleaded guilty on re-arraignment to one count of producing a controlled drug of Class B (cannabis). On the same date he was sentenced to 9 months imprisonment which brought about his immediate release from custody. Consequential orders were made.

4. His application for an extension of time (510 days) in which to seek leave to appeal against conviction has been referred to the full court by the Registrar, who also granted a representation order for fresh counsel. Mr Kherbane appears on his behalf.

Background summary:

5. The applicant is a Vietnamese national of previous good character. He says he was born on 17th September 1976 in the city of Hai Phong in Vietnam. He worked with the Vietnamese military between 1997 and March 2015. He joined the Communist Party in 2003 before later defecting. In 2011 he applied for and in 2012 was granted a loan from the military bank in Vietnam to purchase fishing equipment for his fishing farm. He was unable to repay this loan due to the collapse of his business. He and his family became indebted to the triads or well-known "Black Society" in Vietnam. Members of the triads made threats against him, and eventually in 2015 trafficked him to the United Kingdom through Russia, China, and France, where he was forced to work for them to repay his debt.

6. On 10th February 2016 he was arrested by Hertfordshire Police; ultimately, he was not charged with any offence. On the following day, he claimed asylum and was referred by an immigration officer through the National Referral Mechanism ("NRM") to the Single Competent Authority ("SCA"). He was released from police custody. Whilst being taken by taxi to accommodation in Birmingham, he disappeared after stopping to use the bathroom at Northampton Services. He claimed that he was abducted by his traffickers and taken back to the premises at which he had been previously working.

7. In November 2016, he was hospitalised at Kings College Hospital. A member of the nursing staff made a fresh NRM referral.

8. On 22nd March 2018, the SCA made a positive Conclusive Grounds Decision ("CGD"). The decision maker considered that whilst there were discrepancies in his

account, they were minor and not sufficient to damage his credibility. It noted that Hertfordshire Police had stated "from what we were told and advice from my Sgt., he was clearly a victim of Human Trafficking and was to be NFA for the cannabis factory". They concluded that on "all the evidence in the round … the [applicant] was subjected to forced criminality in the UK".

9. Subsequently, he made a claim for asylum, which was refused on 8th May 2019. The FTT made positive findings as to BNN's trafficking and re-trafficking within the UK but refused the immigration claim for humanitarian protection because, (a) BNN's legal representatives had not produced expert evidence or country guidance during proceedings as to why he could not, for example, relocate internally within Vietnam to avoid traffickers or the triads, and (b) the judge found that he may be able to do so.

10. By 20th June 2019 he had exhausted all rights of appeal. Mr Kherbane informs us that his Asylum Support payments stopped in December 2019 (albeit that the 2021 CGD states that this did not happen until January/February 2021.) BNN said he initially lived in a hotel before moving to share a flat in Ilford. In March 2020 he moved to live with a Vietnamese friend with whom he stayed until March 2021. When that came to an end he was left without accommodation, food or money. He met people in China Town London who offered to help him. He was taken to Leicester.

Facts of the extant offence:

11. In February 2020, JB leased a house he owned in Leicester to two Chinese nationals, DT and LH.

12. On Friday, 19th March 2021, police officers attended the property in response to information that it was being used to cultivate cannabis. The electricity supply to the property appeared to have been bypassed. They forced entry and found 342 cannabis plants growing in five different areas with a significant retail value.

13. The applicant was present and attempted to flee but was ultimately apprehended. Two mobile phones were seized from him. When later interviewed he answered "no comment" to all questions. He refused to divulge the PIN of one of the phones.

14. PO Kirt, the police drug expert concluded that:

> "The cannabis plants being grown … had the necessary equipment, and evidence of, the ability for each plant to reach full maturity and harvest. It is my opinion that [BNN] was acting as a "gardener", cultivating cannabis on a commercial scale on behalf of or in cooperation with an organised crime network who have the means to set up sophisticated cannabis production facilities on an industrious scale in order to sell cannabis for cash profit".

15. BNN's first court appearance was on 22nd March 2021 before the Magistrates' Court. His case was sent to the Crown Court for trial, and he was remanded in custody.

16. On 28th April 2021he made an application for bail to the Crown Court. His representative stated, inter alia, that:

"[BNN] has indicated in his instructions that he was threatened and forced to remain at the property … The defence will look into this matter further and whether BNN has a defence under the Modern Day (sic) Slavery Act".

The application was refused.

17. On 4th May 2021 the applicant appeared at a Plea and Trial Preparation Hearing via video link represented by Ms Power of counsel. She noted on the DCS side bar, "D threatened with force to remain at the premises. Acted under compulsion. D may have a defence under the Modern Slavery Act 2015 (s45)". The CPS indicated on the PTPH form there was no intention to obtain disclosable material from a third party.

18. At the outset of the hearing, the judge asked counsel "is any government department involved in assessing the defendant as a victim of modern slavery?" Ms Power replied that she did not know but had been trying to find out. The judge then said:

"I'm giving you ten minutes. I can tell you this... 342 plants – can you translate this. 342 plants worth nearly £250,000. The courts are familiar with people being put under pressure to come to the UK from Vietnam. If the defendant pleads guilty today now, he will get a lot of credit for that plea. I give an indication that my maximum sentence would be in the region of twenty-four months' imprisonment. He would have to serve half of that, which is twelve months' imprisonment. I think he has been on remand since March 2021. So, if he pleads guilty today, he has probably served his sentence and soon he would be taken from prison to a detention centre with a high probability of him being deported back to Vietnam as soon as possible. If he pleads not guilty and members of the public have to decide if he is guilty or not, the starting point for a prison sentence for a significant category 2 is four years' imprisonment. It's his choice; I'm giving you sentence".

19. No application had been made for a Goodyear indication. The case was adjourned for Ms Power to take instructions. When the case returned to court, she indicated that her conference had been "fruitless". The applicant was arraigned and entered a not guilty plea. Towards the conclusion of the hearing, the Judge addressed the applicant, in terms:

"The courts are extremely busy at the moment because of the coronavirus pandemic. This means there is no 100 per cent guarantee that your case will finish in November 2021. If the delays are really bad, you may be kept in prison for longer, waiting for your case to conclude. I am ordering you to stay in prison".

20. On 12th August 2021 the applicant was again referred through the NRM to the SCA.

21. On 26th August 2021 the SCA decided that there were reasonable grounds to suspect that he was a victim of trafficking. A hearing had been listed on that day for an update on the NRM referral. Counsel then appearing did not seem to be aware of the positive reasonable grounds decision made by the SCA. The judge commented, again unsolicited:

"Look, I'll be frank with you. In my experience, very, very few cases, even with a conclusive grounds decision in favour of the defence, lead to the prosecution turning turtle and saying we are not proceeding with this prosecution. Of course, there's a handful of cases where they do…" and that if the ongoing NRM process continued past the currently fixed 1 November 2021 trial date, "the Defendant may very well have served any sentence he would receive on conviction".

22. On 3 September 2021, the CPS were notified that the Applicant had been the subject of a positive reasonable grounds decision.

23. On 8 September 2021, the CPS responded to note that they would, "reconsider the case by reference to the public interest test once the conclusive grounds decision had been received."

24. Following a 'mention' in the Crown Court on 23 September 2021 Mr Bell, defence counsel, produced a short attendance note for the benefit of his instructing solicitor that has been uploaded on to the Digital Case System. The note includes the following: "Reading between the lines, the Judge clearly takes the view that this case will not proceed to trial - either the Crown will drop it, or the Defendant will plead - and the sooner the nettle is grasped the better. He may be right."

25. On 3 October 2021, a defence case statement was uploaded which, in addition to taking issue with "any assertion that (BNN) knew that the drugs were in fact … cannabis" he "will rely upon the fact that his vulnerability was exploited by others", that he was "vulnerable due to dire financial constraints and his status in this country once having been trafficked to the UK" and that he received no remuneration for the "few days" he had spent at the premises looking after the plants prior to his arrest.

26. On 8 October 2021 a note of the prosecution review indicated:

"The Police have provided an immigration document which confirms D was a victim of modern slavery in 2018 and that parts of his claim in this referral is supported the fact he did stay at an address in Ilford after this. This document will be disclosed. With regards to the NRM referral – further examination is being made regarding his claims that he was in contact with police and social services on 10/02/2016 and the fact that he was treated at Kings College Hospital in London from April 2016 – October 2016. Thus, a PND check and medical records have been sent to the various departments. These have been sent and we are awaiting a reply.

I am also told the phone was not sent for further triage by the OIC after the initial stage of triaging failed following D not providing his PIN. It would appear therefore that we would have little to rebut the defendants claim of modern slavery as the phone has not gone."

27. On 26th October 2021, the review referred to information that had been provided by other police forces. It noted that the Applicant had previously been arrested for the cultivation of cannabis, but that no further action had been taken due to him "claiming that he was trafficked and forced to look after the plants."

28. It is also noted that the Applicant had been stopped by British Transport Police during the COVID pandemic restrictions on 6th May 2020 at Sheffield Railway Station, and

the circumstances "discredits his defence of being trafficked / a slave. He was clearly stopped on his own by police and chose not to tell them that he was a victim of human trafficking", but then also notes that whilst "this would assist to disprove his claims of being a modern slave but has a limited amount of value as it is from 06/05/20". Further noted was that "clearly the defendant had access to mobile phones which were found on his person. One of these phones has been triaged, the other which he has refused details for. He has however not chosen to call the police during this time and notify us of him being kept at the address against his will. He has not given police details to access the phone which would surely give some indication as to whether or not he is being kept at the address against his will. At this stage even without the SCA decision I am of the view we would continue with the prosecution based on the evidence at the scene in terms of living standards, he [sic] fact D had two phones, one of which he would not provide the PIN for and that he tried to escape from the police. Counsel's advice however remains outstanding."

29. On the following day, the review noted that further disclosure had been made. It noted the final SCA decision was outstanding. It commented that whether the aforementioned material regarding the previous arrest for cultivation in Hertfordshire, and the stop of the defendant in Sheffield, had been provided to the SCA was unknown, but "this however will not affect whether we run the trial."

30. On November 3, the case was listed for trial before HHJ Spencer KC, who had had no previous involvement with the applicant. The applicant was represented by counsel (now deceased) and was assisted throughout by an interpreter. The case was called on and application made for the applicant to be rearraigned.

31. The applicant duly entered a guilty plea. A handwritten endorsement was signed by the applicant. It stated:

"1. I will plead guilty to the offence of producing a controlled drug.

2. I do not accept this was my cannabis.

3. I was coerced and intimidated into playing the role of a gardener for three days.

4. I accept that this still puts me into a "lesser role" for the offence.

5. I hope that this mitigation and other matters will enable the judge to pass a sentence that matches the time I have already served or close to it.

6. This is my decision."

32. Prosecution counsel opened the case, and noted that, no monies were recovered from BNN, and that "the sophistication of the operation is beyond the means and capabilities, respectfully, of this defendant". Prosecution counsel confirmed that BNN had previously been trafficked and had asserted he had been re-trafficked. He noted, "the Crown accepts that there will have been, in his past, that degree of coercion and pressure." (Emphasis added)

33. There was no pre-sentence report.

34. In mitigation, counsel stated that BNN was "set to work for a Chinese gang … who trafficked him ultimately to this country" and that whilst "falling short of a defence, he was nonetheless subjected to coercion to become involved in this. The only reason he was here was because of the influence of this gang and that is why he did what he did". (Emphasis added)

35. In his sentencing remarks, the judge said that "This sadly is a familiar tale... controlled by others who put them to work... I have considerable sympathy with you. From a starting point of twelve months' imprisonment, … I think the right discount is 25 per cent; that is a sentence, therefore, of nine months' imprisonment. You have more than served that, given that you have been in custody since your arrest on 19 March. That means you will be released later today."

36. In response to subsequent McCook/ waiver of privilege inquiries, defence counsel observed: "The position with [BNN] on the date I represented him was that he was fully aware that a defence under the Modern Slavery Act was being explored on his behalf. Indeed he had made a statement to this effect that I have forwarded with my last email. The position that appertained to [BNN] on the date I represented him was this: i) We / he could have continued to explore the potential defence of him being a victim of modern slavery; ii) We could continue to trial with the prosecution not accepting the proposed defence; iii) He could accept the charge and plead Guilty. It was his instructions that he wanted to plead Guilty. That is why the manuscript document I have drafted and also forwarded with my last email was drafted. The issue of his having been coerced into the conduct constituting the offence was then used in mitigation in order to persuade the judge to accept a lesser categorisation and a lesser sentence. [BNN] was not advised by me that he had no defence under the Modern Slavery Act. To the contrary he was told again – what he already knew – that the defence was being explored on his behalf. He made the decision to plead Guilty and it was only at that point that it was accepted in mitigation that there was no (longer) a defence under that Act. I hope this explains the position although I'm afraid it may not be of any assistance to [BNN] in his current position."

Events after court proceedings and fresh evidence

37. The SCA had regard to the 2016 NRM, asylum interviews and other submitted documents, including a witness statement from BNN dated 12 October 2021 prepared specifically in relation to the NRM referral.

38. His account as to his experiences from March 2021 was summarised as follows:

> "In March 2021 you met people in China Town, London who offered to help you. A man called 'Aythong' brought you to Leicester after offering you a job cleaning and painting a house for up to 3 or 4 days. After 3 or 4 days you were taken to Harrow Road where you were you would be doing the same job. However, on arrival at the property, you were told to look after cannabis plants. You were threatened – told you would be beaten, put in a van and returned to Vietnam. You remained at the property until your arrest on 19/03/2021."
>
> Whilst that account was found "not particularly detailed" it was "plausible and consistent." He was "subject to recruitment and transportation…deceived, subject to threat and placed in a position of vulnerability [and] subjected to forced criminality."

39. On 21 December 2021 the SCA determined that "Looking at the evidence in the round, it is considered that your account has met the required threshold, namely on the balance of probabilities, it is more likely than not to have occurred.

Decision: Applying the standard of proof on the balance of probabilities, it is accepted that you were a victim of modern slavery."

40. In a witness statement dated 17th October 2022 the applicant sets out his account of how he came to enter a guilty plea to the following effect:

A discussion took place in a meeting room. He was told that if he pleaded guilty, counsel would ask the judge to pass a sentence allowing him to be released that day, "but he warned me that if I maintained my not guilty plea, I could be sentenced to 36 months, or between 5 to 7 years in prison". BNN stated that he "felt very afraid when the barrister told me this, but I also felt confused because the advice to plead guilty was different to the previous advice that I had received, that I could plead not guilty". He was very anxious that day, because it was "very difficult being in prison." The main factor weighing on his mind "was the prospect of immediate release from prison … compared with the prospect of being in prison for up to 7 years if I was found guilty after a trial." The applicant says, "I told the barrister I would plead guilty to being coerced and intimidated into looking after the plants", but that after the conference concluded, he began to have "some doubts about why the barrister was advising me to plead guilty". He indicated that he tried to get the attention of the custody staff but failed. "From that point it felt as though everything happened really quickly and I did not understand what was going on. He did not understand why, having pleaded guilty and been told by the judge that he had already served his sentence, he was not released from custody."

41. Following his release from detention, on 29th December 2021, the Applicant was taken to a Salvation Army safehouse.

Application for an extension of time in which to apply for leave to appeal and admission of fresh evidence pursuant to section 23 CAA 1968.

42. In orthodox fashion, we "examine the merits of the underlying grounds before the decision is made whether to grant an extension of time". See *O* [2019] EWCA Crim 1389.

Grounds of Appeal

43. There are three draft, alternate grounds of appeal that the conviction is unsafe because:

The applicant entered an equivocal guilty plea; (alternatively)

His plea was entered as a result of undue pressure; (alternatively)

The Crown Prosecution Service did not apply its own guidance on taking steps to investigate, gather relevant information and to await the SCA conclusion in order to properly decide whether to prosecute a victim of trafficking.

44. The fresh evidence upon which the Applicant seeks rely comprises:

a. First-tier Tribunal (Immigration and Asylum Chamber) Determination dated 7th March 2019;

b. Psychologist report of Dr Amy Chisholm dated 20th April 2022;

c. Two sets of positive Conclusive Grounds Decisions by the SCA dated 4th April 2018 and 2nd December 2021;

d. Two reports produced by the Helen Bamber Foundation, containing clinical observations about the applicant dated 6th July 2022, and 12th January 2023; and

e. The bundle of additional documents requested by the prosecution during the present proceedings including his asylum interview records dated January 2018, National Referral Mechanism ("NRM") dated 12th August 2021, witness statement taken by SKR Legal Solicitors dated 12th October 2021, and responses to the SCA questionnaires completed by SKR Legal Solicitors dated 14th October 2021.

45. Mr Johnson for the Respondent take no issue that we should consider the fresh evidence *de bene esse* but seeks to cross examine the Applicant on issues going to the facts of the extant offence and circumstances surrounding his plea rather than the circumstances in which he was originally trafficked to the UK. He accepts that the SCA appears to analyse BNN's circumstances to some extent within the decision minute but notes that this amounts to little more than setting out the Applicant's account and accepting it.

46. The SCA had placed "significant" weight to a report from the United States Department of State, which provides generic information which would support "just about any account by an Albanian or Vietnamese national alleging they were forced to cultivate cannabis in the United Kingdom."

47. Mr Johnson submits that this is a case which falls into the category hypothesised in *AAD and Others* [2022] EWCA Crim 106 at [108]; the finding of trafficking in the context of the extant offence is based on hearsay evidence from the Applicant, most significantly, the Applicant's witness statement dated 12th October 2021. The SCA itself noted that the account was "not particularly detailed", although finding it was "plausible and consistent".

48. BNN attended the hearing before us with an interpreter. He has remained throughout with no visible sign of distress in the court room surroundings. At the outset of the hearing we heard extensive submissions from Mr Kherbane as to why the Applicant should not be required to give evidence regardless of any accommodation that could be made in terms of special measures, and despite the indication from Mr Johnson as to the narrow confines of the topics he intended to cover, as indicated above, and, what is more, that BNN's evidence may result in the Respondent conceding that it was not in the public interest to prosecute and nor to maintain opposition to the application and appeal.

49. Nevertheless, Mr Kherbane tenaciously argued that BNN's evidence on these matters was unnecessary in the context of :(i) the known facts of the offence and the domestic

circumstances in which he was observed to be living at the time of his arrest; (ii) the transcripts of the court hearings at which plea was discussed and ultimately tendered; and (iii) that it would be detrimental to the applicant's well-being having regard to the psychologists reports referred to in (b) and (d) of paragraph [44] above.

50. We were not persuaded by Mr Kherbane's submissions in these regards. As to the facts of the offence, the Applicant made no comment in interview, and his subsequent account of how he came to be housed in the East Midlands lacked detail. Once in police custody there was no apparent good reason for him to refuse to divulge the PIN to the mobile phones.

51. As to the Court trial process, the contents of the prosecution opening, plea in mitigation and sentencing remarks do not supply the deficiencies of information or corroborate the assertions in BNN's witness statement as to how he came to make his plea. The witness statement dated 17 October 2022 is at odds to Counsel's response to McCook/ waiver of privilege inquiries which seeks to provide a context to the transcripts of the PTPH and hearing at which the plea was tendered.

52. As to vulnerability, the report of Dr Chisholm, a clinical psychologist, whose opinion that BNN consistently presented with symptoms of PTSD explicitly based on being beaten and exploited and met the diagnostic criteria for a Major Depressive Episode, subsequently agreed by the Helen Bamber Foundation and Dr Angeliki Argyriou, do not suggest that he is unfit to give evidence or would be unable to give evidence on the issues indicated above. The reports indicate his apparent difficulties or distress to be in relation to his recall of the traumatic events of his actual trafficking from Vietnam. His 'memory problems' were assuaged by a specified method of interview. That he is said to be vulnerable by his previous experience of trafficking is based almost entirely on the Applicant's own account. As indicated in *AFU* [2023] EWCA Crim 23 at [90] and the authorities cited therein, "The extent to which expert evidence can be of assistance when assessing an account of trafficking will likely depend on the extent to which it relies on the accuracy of an individual's untested account of events".

53. Overall, we regarded aspects of the information given by BNN and upon which this application centres to be "unsatisfactory and untested". Consequently, we indicated to Mr Kherbane that it would be "preferable" that BNN give evidence to assist with the proper resolution of the issues in this appeal. (See *AAD* @ [108].) BNN declined to do so.

54. We were left in little doubt that this had been his settled intention prior to his attendance at Court. We draw no adverse inference from this refusal but are obviously unable to obtain clarification of lacunae or apparent inconsistencies in his account to assist our consideration of the submissions made on his behalf.

Grounds 1 and 2

Equivocal plea

55. This Court in *R v Tredget* [2022] EWCA Crim 108; [2022] 4 WLR 62, identified three categories of case in which an appellant can submit that, notwithstanding a guilty plea, his or her conviction is unsafe, including as is relevant to grounds 1 and 2

in this case, where it is asserted that the plea was equivocal or vitiated by improper pressure. The "circumstances relied on by the appellant need to be established by him or her."

56. We have not benefitted from hearing the Applicant give evidence in amplification of his statement of 20 October 2022 as to what happened at the time of entering his guilty plea. The transcripts do not establish that the Applicant's plea was equivocal. No caveat was stated at the time of plea, and defence Counsel explicitly mitigated on the basis that the exploitation of BNN fell "short of a defence." We find no reason to disregard defence counsel's response to the McCook/ waiver of privilege inquiries as indicated above.

57. This Court in *BEP* [2022] EWCA Crim 1881 dealt with similar circumstances as appertain here. In that case there was no suggestion that the defendant had not been advised of the possible section 45 defence, but he wished "to get as much credit as possible for a guilty plea." The fact that the applicant in that case, as did the applicant in this, maintain his account of coercion and exploitation in mitigation and received a correspondingly reduced sentence, does not establish that he equivocated in what is an objectively unambiguous and deliberate plea of guilty. The applicant had a retained freedom of choice to continue to trial.

58. There is nothing in this ground.

Improper pressure

59. Mr Johnson accepts that it is "at least arguable" that pressure was placed on the Applicant to plead guilty during the PTPH. We agree. It was not appropriate for the Judge to give an unsolicited indication of sentence not least that it seemed 'wide of the mark' in accordance with the Sentencing Guidelines; see *Rees* [2023] EWCA Crim 487 at [29]. However, the Applicant did not enter a guilty plea then, or even very shortly thereafter. If he had, it would be essential to understand whether this had "narrowed the proper ambit of his freedom of choice": *Nightingale* [2013] EWCA Crim 405 at [16].

60. In the absence of oral evidence from the Applicant, we are unable to be satisfied that there was a link between what was said at the PTPH and the decision months later to enter a plea. The endorsement he signed makes clear that the decision to make guilty was his decision. The late Mr Anning's account is, the Respondent submits, clear and reliable, and demonstrates that the decision to enter a guilty plea was freely made. We find no reason to disregard defence counsel's response to the McCook inquiries.

61. This ground is unarguable.

Ground 3

Abuse of process

62. "The Crown Prosecution Service Guidance on Modern Slavery, Human Trafficking and Smuggling" clearly defines the "Prosecutors Obligations" when deciding whether to prosecute a defendant who might be a VOT or VOS under international law. Our reading of the CPS file, duly disclosed in these proceedings, corroborates the several

concessions realistically made by Mr Johnson that this Guidance was "regrettably" not observed or applied by the reviewing lawyer. This ground is arguable, and we grant permission to appeal.

63. First, the Applicant's potential status as a victim of trafficking should have been identified earlier in the proceedings. There was factors indicative of trafficking present when the Applicant was arrested. The Applicant should have been referred through the NRM to the SCA by the police pursuant to their duty under section 52 of the 2015 Act. Second, the initial approach taken by the reviewing prosecutor focussed on whether the section 45 defence had been raised, when Guidance required him to independently consider whether the issue arose. Third, whilst the reviewing prosecutor had the issue of modern slavery clearly in mind, the reviews then undertaken did not expressly follow the stepped approach required by the Guidance and there was no direct reference to the policy.

64. In *AFU* this Court summarised at [113] two different approaches that the Court might take, depending on how a case had been dealt with at first instance:

> "The authorities emphasise that the decision to prosecute is ultimately for the prosecution, and not the court. Where the prosecution has applied its mind to the relevant questions in accordance with the applicable CPS guidance, it will not generally be an abuse of process to prosecute unless the decision to do so is "clearly flawed" (see AGM at [12] and *R v BYA* [2022] EWCA Crim 1326 at [20]). The court does not intervene merely because it disagrees with the ultimate decision to prosecute: see *AAD* at [119].
>
> However, if CPS guidance has been disregarded, such that the question of whether to prosecute has not been properly considered (or considered at all), the court can intervene more readily: see *AGM* at [13] and [56]. It will then be open to the court to consider the public interest question without trespassing on ground which has been appropriately considered by the prosecution authorities."

65. It is not, however, 'for the appellate court to substitute its own view, but rather to review the decision to prosecute by reference to considerations of including those of rationality and procedural fairness': see *AFU* at [117].

66. Mr Kherbane submits that BNN's history of exploitation, which he contends is appropriately traversed and analysed in the CGD, corroborated by the circumstances in which the applicant was found to be living in the premises on 19 March 2021 and relative low seriousness in the nature of the offence concerned renders the decision to prosecute an abuse of process.

67. At the outset, we reject the argument that the offence was not serious per se. The extent of the cannabis growth involved in this case was not de minimus.

68. We are not satisfied that the SCA decision survives detailed forensic examination. Absent oral evidence from BNN we challenged Mr Kherbane on the source of certain

of his submissions. Accordingly, Mr Kherbane invited us to watch a video exhibit regarding the conditions in which BNN was living at the time of his arrest. We did so, however, the Conclusive Grounds Determination in this respect is based upon the evidence of PO Kirt, who had been supplied details by officers attending the scene. We do not agree that the hearsay description, upon which the SCA and Mr Kherbane relies, is portrayed in the video.

69. It does not appear to us that the video evidence is determinative of BNN being present under compulsion or only of recent occupancy. There were several issues that call for an explanation. First, there is indication of male and female footwear and significant quantities of underwear – some obviously recently laundered and drying. There is a well-stocked fresh fruit bowl and a large number of canned drinks and a thermos flask, several bowls and glasses. The living quarters are cramped, by reason of the utilisation of the bedrooms and what had been the living room for cultivation of cannabis. The bedding is not sparse and apparently clean. The kitchen is well provisioned with bowls, eating utensils, washing up liquids etc. The outside toilet is clean and provisioned. The terraced house had front and back locking doors with the keys in place. Whilst lack of physical constraint is not determinative of enforced compulsion and restriction through fear of repercussions, the failure of BNN to bolt and secure the doors internally does not corroborate his account that he stayed within the premises fearful of robbers.

70. Further, as regards the two telephones in BNN's possession, the Conclusive Grounds decision states: "However, Leicester Police stated that there was 'nothing deemed of evidential value for either the offence of cultivation of cannabis or with regards to slavery of the defendant on either of the mobile phone devices" (Additional information). This is an inaccurate summary of the information contained in the extract from the Crime Report. One telephone was accessed manually and revealed ingoing and outgoing calls. The SIM card of the second mobile phone did not reveal any pertinent evidence, however, the excerpt also records "As the iPhone has a passcode that the suspect has refused to provide, I am unable to complete a triage on this phone."

71. Finally, the SCA were unaware of BNN's presence in Sheffield in May 2020. This issue may of course be a red herring but does not sit easily in BNN's account of his movements in the UK.

72. Neither the 2019 FTT decision nor the documents in [44] above aid our consideration of the issue of abuse of process.

73. The psychological reports proceed based on BNN's self-asserted participation in the offence in 2021 under coercion. The fact of his diagnosed PTSD and 'vulnerability' may weigh in the public interest balance but are not necessarily indicative of "extremely diminished culpability" as Mr Kherbane suggests.

74. As explained in *R v V* [2020] EWCA Crim 1355, at [25]:

> "as is clear from the terms of section 45, the statutory defence does not arise automatically on proof that a person was the victim of trafficking. Neither the international conventions relating to human trafficking, nor our domestic legislation

> affords automatic immunity from prosecution in these cases. The effect of both international and domestic legislation is that a number of questions of fact must be addressed to determine whether the defence is satisfied in a case where there is credible evidence that the defendant is a victim of trafficking. These are, by reference to the domestic provisions: … [section 45 (1) (b) – (d)]
>
> In other words, the degree of compulsion on the defendant and the alternatives reasonably available to him or her 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."

75. We do not accept Mr Johnson's submissions that a prosecutor is entitled to avoid making a decision on 'public interest grounds' in any case in which there is an ambiguous factual position; see *AFU* at [138].

76. Nevertheless, examining the circumstances in this case, we agree with Mr Johnson that it is readily apparent that all 'gardeners' are exploited to some extent by virtue of their position in the drug supply chain. BNN was obviously 'vulnerable' because of his lack of status and Asylum Support funding which may well have led him into criminality. However, this was a serious offence. BNN's ability to seek help for his predicament arose from his length of time living independently in the UK, his association with and experience of the Salvation Army, other charities and NHS services, his ability to travel independently as indicated by his trip to Sheffield, and use of the mobile phones in his possession. The Applicant's decision not to pursue a section 45 defence is relevant. His lack of co-operation in the police investigation when in a place of safety is pertinent.

77. Consequently, we see no reason to reject the Respondent's submission that a decision to prosecute BNN regardless of the availability of a section 45 defence and bearing in mind all relevant factors in due accordance with the CPS Guidance would be reasonable; see *Henkoma* [2023] EWCA Crim 808 at [38] and [39].

78. We are in no doubt that the conviction is safe. The appeal is dismissed.