Case Note

The Journal of Criminal Law

The Journal of Criminal Law
2022, Vol. 86(3) 212–215

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DOI: 10.1177/0022018322110311 9
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Prosecution of Victims of Trafficking

R v AAD, R v AAH, R v AAI [2021] EWCA Crim 106

Keywords
Human trafficking, expert evidence, decision to prosecute, abuse of process, appeals

In three conjoined appeals, the Registrar of Criminal Appeals invited the Court of Appeal to give guidance on various matters relating to the prosecution of victims of trafficking ('VOTs').

AAI was sentenced to 18 months imprisonment in 2008 for failing to attend an interview at the Sierra Leonean High Commission in order to obtain and Emergency Travel Document to return to Sierra Leone. AAH was sentenced to 12 months imprisonment in 2016 for possession of a false identity document. AAD was sentenced to 8 months imprisonment in 2018 for producing a class B drug, cannabis. Both AAH and AAD pleaded guilty. In all three cases, the Single Competent Authority (SCA, a unit within the Home Office which decides who should be treated as a VOT under the National Referral Mechanism) later issued a Conclusive Grounds Decision, determining on the balance of probabilities that the appellant was a VOT. In the case of AAH, the decision was issued after he successfully challenged a previous, negative decision in the First Tier Tribunal.

AAI appealed on the ground that it was an abuse of process to prosecute him because there was a nexus between his offence and his being a VOT and prosecution was not in the public interest; and also on the ground that fresh evidence showed he had a reasonable excuse for failing to attend the High Commission, in that he was suffering from PTSD. He also appealed against his sentence. AAH appealed on the ground that her conviction was unsafe because she was a VOT, and she had a defence either under the Modern Slavery Act 2015, s. 45, or under a broader 'non-punishment principle' which was argued to be part of English law in line with the UK's international obligations. AAD appealed on the ground that as a VOT he had a defence under the 2015 Act and had wrongly been advised to plead guilty at his trial.

Held, allowing AAH's appeal against conviction and AAI's appeal against sentence, and dismissing the remaining appeals, a Conclusive Grounds Decision of the SCA was admissible evidence in an appeal (*SG* [2018] EWCA Crim 1824 and *AAJ* [2021] EWCA Crim 1278 followed). However (*per curiam*) such evidence was not admissible evidence at trial unless the normal criteria for the admission of expert evidence were satisfied (*Brecani* [2021] EWCA Crim 731 approved). Although the decision was inadmissible at trial it was material that the CPS was required to take into account in deciding whether to prosecute, and this was sufficient to meet the UK's obligations under ECHR art 4 (*VCL & AN v UK* (2021) 73 EHRR 9 considered). Where the decision was admissible at appeal there would be some cases, particularly where the decision was based on weak and untested hearsay evidence, where it would be appropriate for the appellant to give oral evidence and be cross-examined. It was

for the Court to decide when such evidence was 'necessary and appropriate in the interests of justice' (Criminal Appeals Act 1968, s. 23).

Following the introduction of the defence under the Modern Slavery Act 2015, s. 45, it remained possible to challenge a decision to prosecute a VOT as an abuse of process. Where the prosecution departed from a positive Conclusive Grounds Decision without a good reason, this could be challenged on ordinary public law grounds as irrational or as a failure to take account of a relevant consideration. Such cases were likely to be very exceptional.

The Court rejected AAH's argument that the defence available to VOTs should be based on the causal nexus between their offence and their trafficking, rather than on compulsion as defined in s. 45 and in *Joseph* [2017] EWCA Crim 36. The intention of Parliament to create a defence based on compulsion was clear and was compatible with the UK's international obligations.

With regard to when an appellant could challenge the safety of a conviction despite a plea of guilty, the Court reiterated the guidance given recently in *Tredget* [2022] EWCA Crim 108.

AAI's first ground of appeal, that he was a victim of trafficking, was beset by credibility problems. There were fundamental inconsistencies in his account. Despite his psychiatric illness, his decision not to attend the Sierra Leone High Commission was his free choice based on his fear of returning to a country where he had experienced atrocities. His second ground of appeal therefore failed. However, in light of the psychiatric evidence the sentence of 18 months imprisonment was manifestly excessive and would be reduced to 12 months.

In the case of AAH, there was no reason to question the decisions of the SCA and the First Tier Tribunal. The Tribunal judge found that she was a vulnerable person who had been coercively trafficked for purposes of sexual exploitation and forced labour. Had those decisions been available to the prosecution the prosecution would have been discontinued, or if not it could have been successfully challenged as an abuse of process. This brought AAH's plea of guilty within the *Tredget* criteria for appealing against her guilty plea, and her conviction was unsafe.

In the case of AAD, the Court was unpersuaded by crucial aspects of the SCA's decision that he was subjected to trafficking for forced labour and forced criminality. He was able to leave the property and had in fact taken a decision to leave it permanently, only to return because he could not find other people from Vietnam and decided against going to the police because he did not have any papers. He did not meet the conditions for the defence under the Modern Slavery Act, s. 45, in that he was not compelled to commit the offence and had a reasonable alternative to so doing.

Commentary

This decision confirms the anomalous position created by the Court's previous decisions in *Brecani* [2021] EWCA Crim 731 and *AAJ* [2021] EWCA Crim 1278, by which decisions of the SCA are to be taken into account, and may indeed be accorded great weight, both in deciding whether to prosecute a putative VOT and on appeal, and yet are inadmissible as evidence at trial. Previously the English courts have taken a highly pragmatic view of when officials can be classed as 'experts' for the purpose of putting the results of their investigations before the courts. Thus police officers have been allowed to give 'expert' evidence on matters including patterns of drug dealing, gang membership, and even the interpretation of rap lyrics. In so doing they could draw on the collective experience of their colleagues as well as their own knowledge (*Myers* [2009] UKPC 40). In a similarly pragmatic vein, the Divisional Court in *DPP v M* [2020] EWHC 3422 (Admin) treated the minute explaining the competent authority's decision as admissible expert evidence. This decision was overruled by the Court of Appeal in *Brecani,* on the ground that the relatively junior civil servant making the decision was not an expert. The present case follows *Brecani,* and although not absolutely ruling out the possibility that some SCA decisions might be based on expertise, makes clear that the common-law tests of whether the expert is competent and their evidence is necessary must be strictly applied.

Apart from the pragmatic reasons for admitting the evidence there is a strong argument of principle based on the human rights of VOTs. It is clear from the ECtHR decision in *VCL* that states have an obligation to establish an authority to determine who is a VOT, and not to prosecute those who are determined to be victims unless there are good reasons, consistent with the European Convention Against Trafficking in Human Beings, for doing so. The Court of Appeal reasons that *Brecani* is consistent with this obligation because the SCA decision can be taken into account at three stages: in the CPS's decision whether to prosecute, in a challenge to that decision as an abuse of process, and in an appeal. It envisages, however, that only in 'a most exceptional' case [142] will a CPS decision to prosecute either fail to take account of the Conclusive Grounds decision at all, or reject it on irrational grounds. Where there is some rational ground for disagreeing with the SCA, the defence will have to adduce sufficient evidence, independent of the SCA's findings, to raise an issue as to whether the defendant is a VOT who acted under compulsion. Only then will the burden shift to the prosecution to disprove that defence to the criminal standard (*MK* [2018] EWCA Crim 667). This may mean that there is no alternative but for the defendant to give evidence in order to meet the evidential burden. To put victims in this position when they may be traumatised and fearful for their own safety or that of their families seems hard to reconcile with the obligation to protect victims under article 28 of the Convention Against Trafficking.

Whether the Court has succeeded in reconciling *Brecani* with the state's obligations under ECHR art 4 is questionable. According to the ECtHR in *VCL v UK,* evidence of the defendant's 'status' as a VOT is a 'fundamental aspect' of the defence ((2021) 73 EHRR 9 at [196]). The prosecution must be able to show good reasons why the defendant should be punished despite the 'status' conferred by the SCA's decision. The decision on abuse of process, however, does no more than establish that the prosecution has considered the Conclusive Grounds decision and reached a conclusion that is not irrational. The Court of Appeal (at [130]) deems this sufficient to satisfy the requirement in *VCL* that the prosecution must have 'clear reasons' to prosecute an officially designated VOT. It is submitted that the non-punishment principle (Convention Against Trafficking, art. 26) requires reasons that are not only clear, but are proved to be correct, and in the absence of such proof the defendant cannot have a fair trial. The possibility of an appeal cannot satisfy the non-punishment principle because by the time of an appeal the defendant will have been convicted and undergone at least part of their punishment. If a conviction is rendered unsafe by evidence that was excluded at the trial, that is a strong indication that the trial was unfair.

The argument for an interpretation of the trafficking defence based on coercion rather compulsion was advanced on behalf of AAH, but if it had been accepted it would have been more beneficial to AAD. AAH's appeal succeeded on the basis of the compulsion-based defence, but AAD's situation shows clearly why the difference between the two is significant. He was not physically compelled to remain on the premises where he was growing cannabis but, from the brief summary of facts in the judgment, seems to have been too fearful to break away from his traffickers after he failed to find other Vietnamese people who might have helped him. It would be hard to deny that his continuing to cultivate the plants was a direct result of his trafficking, but the Court found that the required element of compulsion was lacking.

The argument developed by AAH's counsel, Felicity Gerry QC, drew on an article by Bijan Hoshi, 'The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law' (2013) 1 Groningen J. Int. L. 54. In similar terms to those used to criticise the lawyers who advised AAD on his guilty plea [70], Hoshi argued that prosecuting trafficking victims on the ground that they had some element of free choice exposes them to a potentially traumatic process and 'fails to grasp the subtle and nefarious methods by which traffickers can exert total dominance over trafficked persons, such that even in the absence of a high degree of pressure (or, indeed, any overt pressure at all), the trafficked person may, in reality, have little choice but to commit the criminal act' (ibid., 55). Hoshi acknowledged, however, that there was no hard, binding international law requiring a causation-based defence, and that both the CoE Convention Against Trafficking and the EU Trafficking Directive contained requirements that were compulsion-based or at best ambiguous. Moreover he was writing before the enactment of the Modern Slavery Act 2015 with its unambiguously compulsion-based

defence. Given this, and the rejection in *Joseph* of any expansion of the common law defence of duress to meet the needs of trafficking victims, the attempt to revive Hoshi's argument before the Court of Appeal appears something of a forlorn hope.

As all the appellants were adults, there was no need for the Court to address the point raised by GRETA (the Council of Europe's Group of Experts on Action Against Trafficking in Human Beings) in its Third Round Evaluation Report on the UK (2021). GRETA does not take issue with the Modern Slavery Act's requirement that a reasonable person in the position of an adult defendant would have no reasonable alternative but to do the relevant acts (s. 45(1)(d)), but argues that compulsion should not have to be proved where the VOT is a child, even to the less stringent standard laid down by s. 45(4)(c). The reasoning behind this recommendation is not very clear, but it appears to be that the relevant compulsion in the case of an adult is compulsion attributable to the means of trafficking, whereas in the case of a child, the definition of trafficking does not include the use of coercive means. Unfortunately this is a double-edged argument. Precisely because a child recruited into criminal activity could be considered a VOT even if no coercion was used and they were generously remunerated for their illicit activities, courts are likely to be reluctant to grant them a defence on the basis that their participation in crime is a direct result of their recruitment. Therefore, although there is some scope for a further attempt to persuade the Court of Appeal to broaden the trafficking defence, one cannot entertain high hopes for its success.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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