Neutral Citation Number: **[2022] EWCA Crim 106**

Case No: 202100009B4/202000720B1/202000722B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Manchester Minshull Street
HHJ LEWIS
T20080335 (AAI)
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Snaresbrook
HHJ KENNEDY
T20167130 (AAH)
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Stoke On Trent
MR RECORDER BUTTERFIELD QC
T20170370 (AAD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2022

Before:

LORD JUSTICE FULFORD
(VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION))
MR JUSTICE JULIAN KNOWLES
and
SIR NIGEL DAVIS

- -

Between:

AAD, AAH, AAI	**Appellants**
- and -	
REGINA	**Respondent**

- -
- -

Francis FitzGibbon QC (instructed by **Philippa Southwell, Birds Solicitors**) for the **Appellant AAD**
Felicity Gerry QC (instructed by **Philippa Southwell, Birds Solicitors**) for the **Appellant AAH**
Stephen Knight (instructed by **Wells Burcombe Solicitors**) for the Appellant AAI
Parosha Chandran (instructed by Duncan Lewis Solicitors) for the UN Special Rapporteur on Trafficking in Persons, especially Women and Children, as Intervener
Ben Douglas-Jones QC and Andrew Johnson (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing dates: 17th - 18th November 2021

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Approved Judgment

LORD JUSTICE FULFORD VP:

This is the judgment of the court to which all members have contributed.

Introduction

1. The Registrar has directed that these three cases are listed together in a "special court" with a view to providing further guidance in cases involving victims of trafficking ("VOT/VOTs"). We grant leave to appeal to AAI and AAH. As set out below, leave to appeal has already been granted to AAD (see [54] below).

Anonymity

2. In all three cases the appellants apply for an anonymity order under section 11 Contempt of Court Act 1981. The Registrar directed that they are to be listed anonymously, at least until the merits of these discrete applications have been decided by the full court.

3. The principal authority relating to adults and anonymity in the present context in the Court of Appeal (Criminal Division) is *R v L; R v N* [2017] EWCA Crim 2129. The court in that case heard evidence from Philippa Southwell, a solicitor advocate specialising in modern slavery cases (who instructs Felicity Gerry Q.C in the present case), as to the concern on the part of those who cooperate with the authorities that reprisals, including to the individual's family, would occur if their identities and the assistance they had provided were revealed. Bearing that evidence in mind, along with the need for consistency with other courts such as the approach applied in the Court of Appeal (Civil Division) and the Upper Tribunal's Guidance Note 2013 No 1: Anonymity Orders, it was accepted that it would, in principle, be desirable for the Court of Appeal (Criminal Division) to follow the practice of providing anonymity protection to an appellant in cases raising asylum and international protection issues. The court also summarised the United Kingdom's international obligations in this context. These derive from various instruments, including the Council of Europe Convention on Action Against Trafficking in Human Beings 2005, ratified in December 2008 ("the CE Convention"), and the EU Directive 2011/36 on Preventing and Combating Trafficking in Human Beings ("the EU Directive"). The aim, in summary, is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings.

4. The court nonetheless expressed concern that other important issues will be at stake, such as the principle of open justice in the context of criminal trials and appeals, and the court observed that anonymity orders should only be granted when they are strictly necessary. The court, moreover, had not had the benefit of representations from the press, which we note equally applies in the present appeals. The Vice President (Hallett LJ) highlighted that questions may arise on criminal appeals in relation to the risk on return; equally, the background facts relied upon may be different from those in any associated asylum case. The court envisaged circumstances where there may be less restrictive means (short of an anonymity order) of addressing the risk of harm. Therefore, rather than adopting a blanket approach or attempting to provide general guidance, the court resolved the question of anonymity on the basis of the particular facts of each of the individual appeals (see [14] and [15]). This is an approach we have adopted and which, with respect, we commend. We have resolved the anonymity

question individually in our consideration of each appellant's case (see [170], [171], [177] and [184] below).

AAI

Background (AAI)

5. On 1 September 2008, in the Crown Court at Minshull Street, Manchester, before Judge Lewis and a jury, the appellant (then aged 25, now aged 39) was convicted of one count of failing to take action as required by the Secretary of State, contrary to section 35 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 ("section 35").

6. On the same date he was sentenced to 18 months' imprisonment, and the judge ordered that, pursuant to section 240 of the Criminal Justice Act 2003, 207 days spent on remand should count towards his sentence.

7. Before this court, he applies for an extension of time of more than 12 years in which to apply for leave to appeal against conviction and sentence following referral to the full court by the single judge. His application for leave pursuant to section 23 of the Criminal Appeal Act 1968 ("section 23") to introduce fresh evidence concerning his suggested status as a VOT was likewise referred to the full court.

8. The parties agree that this is a "change of law" case, therefore requiring exceptional leave out of time and thus it is for the appellant to demonstrate the suggested substantial injustice that would result if leave to appeal is refused (see *R v GS* [2018] EWCA Crim 1824 and *R v O* [2019] EWCA Crim 1389). AAI contends that this is demonstrated by the adverse consequences to his mental health and his immigration status should the court refuse his application. The appellant relies on the increased awareness, along with the improvements regarding the protection, of VOTs in the United Kingdom since 2008 and the fact that for a significant period he was, for psychiatric reasons, unable to disclose the details of his trafficking. The respondent does not seek to argue that the appellant fails to meet the substantial injustice test if the court decides that the appellant's substantive submissions justify an extension of time.

9. As to the facts, the appellant sets out that he was born in Sierra Leone in 1982. He was a victim of the civil war in that country, and he suffered considerably at the hands of the Revolutionary United Front ("RUF") who abducted him and murdered his parents. He alleges he was raped by multiple men and was seriously assaulted in other ways, from which he bears observable scars. He eventually escaped, and in Freetown he met and went to work for an individual we refer to as "T" who promised to help him with accommodation and education (which never materialised). The appellant claims he was in fear of T, who organised his journey to the United Kingdom, in return for an understanding that the appellant would send him money from Europe.

10. On 20 May 2003, the appellant arrived in the United Kingdom from Sierra Leone and claimed asylum. On 17 July 2003, his asylum claim was refused and his asylum appeal was dismissed on 17 December 2003. On 11 April 2005 the Sierra Leonean High Commission indicated that they had accepted the appellant as a Sierra Leonean national and agreed to issue him with an Emergency Travel Document ("ETD").

11. The appellant thereafter ceased reporting as required. On 11 January 2007 he was encountered by immigration officers in asylum accommodation provided to a friend of his, and he was arrested. There were two unsuccessful attempts by the Secretary of State for the Home Department ("SSHD") to remove the appellant to Sierra Leone. On 15 February 2007, he was flown to Sierra Leone. The view was expressed by the local authorities that he had not been interviewed for the ETD, and it was pointed out that it did not contain a thumbprint or signature. The appellant, furthermore, claimed to be Sudanese (albeit he disputes the accuracy of this latter contention). He was returned to the United Kingdom. On 19 February 2007 he was again flown to Sierra Leone, but the authorities refused to admit him on the basis that they did not accept he was a Sierra Leonean national.

12. On 4 December 2007, he was taken to the Sierra Leonean High Commission to attend an interview to obtain an emergency ETD to facilitate his removal from the UK. The interview was terminated because, in the view of the accompanying immigration official, he had refused to answer questions by stammering and shaking. He again indicated he was not from Sierra Leone (either by shaking his head or verbally). On 28 December 2007, the appellant was served with a notice under section 35 Asylum and Immigration (Treatment of Claimants etc.) Act 2004 by the SSHD, requiring him to attend an interview and answer accurately and fully questions put to him at the Sierra Leonean High Commission, with a view to obtaining an ETD. He failed to comply with the notice, stating that he was not willing to do so because he had already attended the High Commission for an interview. He was subsequently charged with the offence under section 35(3).

13. His case at trial was that he refused to be interviewed by the High Commission because he had already been interviewed; he had been returned to Sierra Leone twice and been refused entry; and he feared for his safety in Sierra Leone. He ran the defence of reasonable excuse. Due to the passage of time, resulting in the loss of relevant transcripts, the full details of how the defence case was put at trial is no longer available. It would appear that the appellant contemplated arguing that although his stated reasons for non-cooperation in themselves did not amount to a reasonable excuse, the fear of the consequences of deportation may have caused psychiatric illness with the result that he was unable to comply with the notice. However, no psychiatric evidence was put before the jury.

14. As set out above, on 1 September 2008, the appellant was convicted and sentenced. On 27 October 2008 he was served with a notice of liability for automatic deportation. He did not submit any grounds for exemption from automatic deportation within the 20 working days specified period. A Deportation Order against the appellant was signed on 1 June 2009 and served on 19 June 2009. On 18 April 2013, the appellant submitted further representations which constituted a fresh claim for asylum and an application to revoke the deportation order. On 5 August 2014 the appellant appealed against the refusal to reconsider the deportation decision. During December 2016, he was referred to the National Referral Mechanism ("NRM"). On 22 February 2017, there was a Single Competent Authority ("SCA") positive reasonable grounds decision that the appellant is a victim of human trafficking or modern slavery, followed on 11 January 2019 with a SCA positive conclusive grounds decision.

15. On 2 November 2019, the appellant received negative advice on appeal from his previous representatives. On 17 September 2020 the First-tier Tribunal allowed the

appellant's immigration appeal on asylum and human rights grounds. In August 2020 his current solicitors were instructed and the Grounds of Appeal were lodged on 29 December 2020.

16. On 1 March 2021 the appellant was granted leave to remain in the United Kingdom until 2026.

The Appeal (AAI)

17. The first ground of appeal is that it was an abuse of the process to prosecute the appellant because he was a victim of trafficking at the time of the offence, there was a nexus between his exploitation as a victim of trafficking and the commission of the alleged offence and the circumstances in which he came to commit it were such that it was not in the public interest for him to be prosecuted.

18. The law in this area has been set out with completeness and clarity in a number of decisions of other constitutions of this court, and it will not assist to rehearse it yet again in detail in this judgment. Suffice it to observe that the approach to be adopted in cases that preceded the Modern Slavery Act 2015, such as the present, is to be found in cases such as *R v Joseph and others (Anti-Slavery International intervening)* [2017] EWCA Crim 36; [2017] 1 WLR 3135; [2017] 1 Cr App R 33. The effect is to require of prosecutors a three-stage exercise of judgment: (1) is there a reason to believe that the person has been trafficked? If so, then (2) if there is clear evidence of a credible common law defence (*e.g.* duress or necessity) the case will be discontinued in the ordinary way on evidential grounds, but, importantly, (3) even where there is not, but the offence may have been committed as a result of compulsion arising from the trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.

19. The second ground of appeal is that fresh evidence demonstrates that he had a reasonable excuse for failing to comply with the direction under section 35. Psychiatric evidence now available shows that the appellant was being subjected to extreme psychological suffering by the attempts to remove him to Sierra Leone and he was, as a result, unable to comply with the section 35 notice. These factors, it is argued, provided a reasonable excuse (see *R v Tabnak* [2007] EWCA Crim 380; [2007] 1 WLR 1317 at [20]). It is suggested, furthermore, that the judge's direction to the jury was deficient in this context. The evidence before this court on the latter contention is sketchy. Trial counsel for the appellant has provided the following note:

> "*13. "Prosecution burden of proof. Standard of proof: sure. Judge's directions: 1-4 not in dispute. Prosecution to prove that defendant had no reasonable excuse. What may or not constitute reasonable excuse? Defendant: did not want to go back to Sierra Leone. If what he meant that if returned to Sierra Leone, his life would be in danger - not amount to reasonable excuse.*
>
> *14. "Law is not permitted to resurrect grounds of asylum in criminal case. Immigration proceedings have been run to their conclusion.*
>
> *15. "There is no definition of 'reasonable excuse": it must be decided on its own facts. If he feared for his life that on any subsequent journey would be beaten up by escorting officers, that could be capable of being reasonable excuse. If it was*

or may have been reasonable excuse - not guilty. But if sure that not not reasonable excuse. Although at one point he did say, "I've been before, not going again" - whether that reasonable excuse."

20. The appellant seeks leave to adduce fresh evidence under section 23 of the Criminal Appeal Act 1968. First, there is an array of psychiatric evidence from Dr Alex Frank, Dr Tahira George, Dr Craig McNulty, Professor Jacqueline Knorr and Professor Cornelius Katona. This is to the effect that that appellant has reported nightmares, an inability to sleep and stress. He has been diagnosed as suffering from post-traumatic stress disorder ("PTSD") of substantial severity, a depressive illness of at least moderate severity, Phobic Avoidance Behaviour and possibly psychosis. He additionally suffers from significant intellectual impairment. Second, there is diverse documentary evidence which is said to demonstrate his status as a VOT from Brian Dikoff (legal organiser, Migrants Organise Limited) dated 7 December 2020, Christine Oliver (manager of the Ex-Detainee Project) dated 17 December 2014, Imogen Townley (immigration solicitor) dated 30 November 2020, Gavin Rose (current solicitor, consultant with Wells Burcombe Solicitors) dated 4 February 2021 and Sally Montier (author of a Trafficking Assessment Report) dated 12 October 2021.

21. In slightly greater detail, Professor Katona in his report dated 5 November 2019 set out both his own conclusions and he summarised the conclusions reached by other medical professionals as to the mental and physical circumstances of the appellant. This included reference to a report on 20 December 2010 by Dr Stera to the effect that the appellant suffered nightmares, was unable to sleep and was stressed. There is a record by Dr A Jalal dated 18 April 2012 that the appellant had been referred to the Hillingdon Assessment and Brief Treatment Team because of Post-Traumatic Stress Disorder, depression and possible psychosis. The appellant reported that he had been raped in Sierra Leone during the civil war. On 25 June 2012 Dr Stera confirmed the diagnosis of PTSD.

22. Dr Alec Frank on 15 March 2013 set out some of the appellant's history as provided by the latter, which included witnessing the murder of his parents by rebels, who thereafter abducted him. He had witnessed numerous others being murdered, mutilated and raped. He was drugged, whipped with lengths of flex and raped repeatedly by "up to eight men". The appellant reported nightmares from which he awoke sweating, screaming and terrified. He is convinced he is being constantly watched and has felt unable to disclose the atrocities he witnessed. He has flashbacks of his mother being strangled and then shot. It was noted that the appellant bore over 20 scars that reflect a history of torture and ill-treatment. It was suggested that these corroborated his account of having been brutalised and tortured. Dr Frank concluded that the appellant suffers from PTSD of very substantial severity and a depressive illness of at least moderate severity.

23. Dr Tahira George, a consultant psychiatrist, added in a report dated 27 January 2017 that the appellant had developed Phobic Avoidance Behaviour, which involves the appellant avoiding memories or conversations concerning the trauma he suffered. Dr George was of the view that the appellant was at significant risk of suicide if returned to Sierra Leone. Dr George completed further reports on 8 September and 17 December 2017.

24. On 6 June 2018, Dr McNulty a clinical psychologist reported that the appellant performs at a level that would be predicted of a seven-year-old. His full IQ is 58-66, which indicates a significant impairment of intellectual ability. He concluded that the appellant was unlikely to be able effectively to give evidence or to "respond reliably".

25. There is a lengthy report dated 13 November 2019 from Professor Jacqueline Knorr on the suggested risks facing the appellant if returned to Sierra Leone, on the basis that he had been trafficked as a child soldier and the experiences he has described, along with the poor socio-economic conditions in Sierra Leone.

26. There is an equally lengthy report from Sally Montier dated 12 October 2021 who is an "Independent Consultant Human Trafficking and Modern Slavery" in which she arrives at the conclusion that the appellant is particularly vulnerable to recruitment for exploitation by traffickers. She opines that the account from the appellant of his recruitment and exploitation meets the "trafficking definition". She expresses the view that the appellant was transported to the United Kingdom through the means of abuse of a position of vulnerability and coercion.

27. The respondent suggests that there may be utility in the court receiving the fresh evidence relied upon by the appellant *de bene esse*. The respondent accepted in submissions that the appellant is a VOT. It is submitted, however, that there was no significant nexus between his trafficking and the offending. Accordingly, it is argued he was not compelled to commit the offence due to his status as a VOT.

28. It is highlighted by the respondent that the positive conclusive grounds decision was reached by the SCA with considerable hesitation. There are said to be reasons to doubt the appellant's credibility, as expressed by Mr Bisgrove (SEO SCW & Regional Modern Slavery Lead for Criminal casework (Leeds)), the author of the positive grounds decision. The respondent therefore invites the court to consider whether there are good reasons to depart from that decision. It is argued that that the necessary element of compulsion has not been made out.

29. It is convenient to highlight at this stage the wholesale inconsistencies, as analysed by Mr Bisgrove, that exist in the appellant's account as regards the man T. In his statement of May 2003, the appellant described T as simply someone who organised his trip out of Sierra Leone, having provided him, via a second individual, with a ticket and passport. He spoke of having been helped by people who took pity on him. A similar explanation was given in his interview on 27 June 2003. Dr George was told of an agent who approached the appellant and helped him get into a lorry to escape to the United Kingdom. There was no mention of T or pressure of the kind now relied on by the appellant. In his statement made in March 2015 he suggested that T accompanied him to Gambia in a lorry, from where he flew alone to the United Kingdom. He said that T assisted him out of compassion and did not request any money in return for his kindness. Although the precise circumstances were described differently, in the appellant's statement of 20 August 2015 he maintained the philanthropic description of T.

30. The appellant's representatives provided a letter on 19 December 2016 in which it is claimed that the appellant washed T's feet and worked for him at the beach, assisting tourists. T disciplined other workers who did not obey his instructions. In due course, T organised the appellant's trip to the United Kingdom, suggesting that the appellant

would send money back to him. Against this background, we note Mr Bisgrove concluded:

> "103. It is considered that your most recent claim that (T) sent you to Europe in order for you to send money back to him lacks credibility given than no reception arrangements were made for you in the UK. It is not accepted that this man would pay for you to travel to Europe and insist only that you telephone him in Sierra Leone upon arrival.
>
> 104. Your legal representatives have stated that you have *"been under* (T's) *control since [you were] a child"*. If we are to disregard your original account in which you met (T) in 2003 when you were 20 years of age, your most recent account would be that you worked for him from the age of 17 until you were 20. You were a young adult and you claim that 'T' too was a young adult. It is not accepted that your age, and "*psychological control"* explains why 'T' would have taken such a financial risk. This aspect of your claim also lacks credibility.
>
> 105. In the absence of any other explanation for these discrepancies I have concluded that you have been unable "*to remain consistent throughout [your] written and oral accounts of past and current events".* Your inability to do so in this instance and the others cited in this section of this letter have led me, as a Competent Authority, to disbelieve your claim."

31. However, he also concluded:

> "Despite the large number of inconsistencies in (the appellant's) accounts, in light of the findings of Dr McNulty when assessed against the guidance relating to 'Mitigating Circumstances', I am compelled to accept that the individual is more likely than not to have been a victim of modern slavery i.e. to the required standard of proof of "on the balance of probabilities"."

32. In his judgment of 17 December 2020, First-Tier Tribunal Judge Neville (Immigration and Asylum Chamber) described the factual circumstances that were accepted by the Home Office as follows:

> "11. (g) T had simply relied on psychological control to obtain the (appellant's cooperation) in sending money from the UK. It was only on arrival in the UK and upon being accommodated by the Home Office that the appellant had questioned whether T did indeed know where he was. While the appellant was unsure of how much power T had, or whether he would be able to find him as threatened, the appellant decided in the end not to contact him. He nonetheless remained afraid of T and that he might one day be located and face consequences."
>
> […]

> "36. I should add that the appellant has previously claimed a fear of persecution at the hands of the rebels and their leadership, from others in reprisal for his perceived alignment with them, and from T. This is no longer pursued by the appellant and I need not deal with whether this fear is well-founded. Nonetheless I do find that this fear is subjectively experienced by the appellant and can be seen in the psychiatric evidence to contribute to his vulnerability on return."

33. It is suggested that the court is significantly hampered by the lack of a transcript of the summing up. The respondent's contention is that there is no basis for criticism of the way the case was left to the jury, given the absence of psychiatric evidence before the jury and the lack of anything to indicate that the appellant was doing other than "exercising a power of choice" (*R v Tabnak*). In all the circumstances, it is submitted the direction on reasonable excuse cannot be impeached. The fresh evidence does not arguably change that position, given the appellant is not within the exceptional case hypothesised by the court in *R v Tabnak*, in that there is nothing to indicate that the appellant was unable to comply with the section 35 notice.

AAH

Background (AAH)

34. On 15 March 2016 in the Crown Court at Snaresbrook before Judge Kennedy, the appellant (then aged 32, now aged 38) pleaded guilty to a single count of possession of an identity document with improper intention, to make a gain for herself or another (count 1). Count 2 (a charge of fraud) was ordered to lie on the file in the usual terms.

35. On 1 November 2016, before the same court, the appellant was sentenced to 12 months' imprisonment.

36. The appellant seeks an extension of time (*viz.* 1414 days) in which to apply for leave to appeal against conviction, both applications having been referred to the Full Court by the single judge. The principal reasons for the delay in lodging the application are what are said to be the necessary time taken by the appellant's fresh representatives to receive and collate a full set of papers from the original trial representatives and her immigration solicitors, and the process of taking instructions and providing the appellant with advice. Furthermore, the new positive reasonable grounds decision was provided by the SCA on 16 August 2017, coupled with a grant of 5 years' leave to remain.

37. In support of the application for leave to appeal, it is submitted that had the appellant's status been known as someone who had been trafficked, she would not have been convicted for four principal reasons: she would not have been prosecuted; she would successfully have applied for the proceedings to be stayed; she would have been permitted to vacate her plea; and the jury would not have returned a guilty verdict given she was compelled to commit the crime through exploitation and/or the crime was caused by traffickers.

38. The appellant additionally seeks leave to introduce fresh evidence regarding her status as a VOT. This material comprises the positive reasonable grounds determination dated 5 June 2016, along with the accompanying minutes; the negative conclusive grounds determination dated 25 August 2016; the determination of the First-tier Tribunal dated 11 July 2017; the positive conclusive grounds determination dated 20 July 2017, again with the accompanying minutes; the transcript of the submissions in mitigation and the judge's remarks from the sentencing hearing; letters from the Home Office dated 9 and 16 August 2017; the appellant's asylum decision; a chronology prepared by Duncan Lewis solicitors for the immigration proceedings; statements of support from various key workers; evidence from the appellant; evidence given in the immigration proceedings by Ejiro Ziregbe (a friend); evidence from Julie Barton (a trafficking expert); and an expert report from Professor Katona (a psychiatrist).

39. It is submitted that this material amply demonstrates that the appellant committed the crime as a result of being trafficked and her exploitation.

40. As to the facts, the appellant contends she is a Nigerian national from the Yoruba tribe. She escaped from a proposed marriage that her father had arranged, and for this reason she left Nigeria in August 2007 with the help of an agent. The arrangement was that she would work to pay for her ticket, but she escaped the house to where she had been taken. The agent contacted her in 2009, however, and threatened her indicating he wanted his money returned. The appellant was introduced to another man who groomed her for sexual exploitation. He found her a job in a care home and he took her wages.

41. On 28 May 2015, the appellant attended an interview for a job as a care worker with Care Management Group Ltd. She provided the company with a French passport and a French ID card which were not her own. She was subsequently offered the job.

42. Thereafter, the appellant worked for the company at a care home for approximately seven months. However, following an enhanced Disclosure and Barring Service check, it became apparent that the documents she had provided were false. The appellant was arrested at her workplace on 15 February 2016. On arrest, she provided police with her address, where the police found her genuine Nigerian passport confirming her true identity.

43. In interview, she declined to answer any questions and exercised her right of silence.

44. She pleaded guilty at the pre-trial and preparation hearing on 15 March 2016.

45. At the sentencing hearing on 1 November 2016, the judge set out the procedural background, explaining that following her guilty plea, the sentence had been adjourned for the appellant to be referred through the NRM system as a potential VOT. However, the SCA had provided a negative conclusive grounds decision on 25 August 2016, stating that the appellant's account was not credible. The appellant's representatives requested a further adjournment of the sentencing hearing to challenge that decision which the judge refused, stating that a very detailed decision had been obtained from the SCA and whilst that decision could be challenged, criminal cases had to be concluded within a reasonable time.

46. We note that First-Tier Tribunal Judge Real in a decision dated 20 July 2017 accepted the appellant's account as to how she came to the United Kingdom and the events that

occurred in this country following her arrival. It was acknowledged that she fears returning to Nigeria, given she is a woman facing forced marriage, gender-based violence and re-trafficking.

47. Following that decision, on 16 August 2017, the SCA accepted there were conclusive grounds to believe that the appellant was a potential victim of human trafficking.

The Appeal (AAH)

48. The single ground of appeal is that the appellant's conviction is unsafe because she was a victim of human trafficking when she committed the offence set out above and that she should have been protected, not prosecuted and punished. It is submitted that the appellant's conviction is unsafe because her case engages the United Kingdom's commitment to the "non - punishment principle" which removes liability for criminal offending by trafficked persons, either via the Modern Slavery Act 2015 or by way of decisions of the Court of Appeal. It is suggested this is not limited to the concept of compulsion as set out in the Modern Slavery Act 2015 but instead is based on principles of protection which can be applied in English law via causation or a policy that requires appropriate protection for trafficked individuals.

49. It is argued that the authorities insufficiently enquired into her trafficked status, and, furthermore, that it should have been established whether the individual preparing the conclusive grounds assessment was an expert. Alternatively, an independent expert should have been instructed. This would have meant she would not have been prosecuted; or she would successfully have applied for the proceedings to be stayed; or she would not have pleaded guilty; or she would have been permitted to vacate her plea; or, if there had been a trial, the jury would not have returned a guilty verdict given she was compelled to commit the crime through exploitation and/or the crime was caused by traffickers (see [37] above). Put otherwise, the fresh evidence, which should have been available in the Crown Court, demonstrates that if her trafficked status been properly considered at the time she would not have been convicted either on her own guilty plea or by a conviction of a jury.

50. Given it is contended that a suitably qualified expert should have prepared a conclusive grounds assessment prior to the defendant entering a plea, it is additionally argued that until assessments of this quality are available from individuals who are able to give evidence in the Magistrates' and Crown Court, appropriate expert evidence should be commissioned by the Crown Prosecution Service in order to fulfil the United Kingdom's obligation to protect victims of trafficking.

51. As with AAI, the respondent submits that there may be utility in the court receiving the fresh evidence relied upon by the appellant *de bene esse*. It is not accepted that the appellant is a VOT. It is argued, furthermore, that the appellant was not compelled to commit the offence in a way that means that her culpability was significantly diminished or effectively extinguished. Accordingly, the respondent argues her conviction is safe. It is contended that the approach of the trial representatives is not open to material criticism. The appellant had given no instructions at the time of her plea to indicate that she was a VOT. When she did give those instructions, the proceedings were adjourned and she was referred through the NRM.

52. It is accepted that if the court finds she was a VOT and that her culpability was significantly or effectively diminished, it would not have been in the public interest to prosecute.

AAD

Background (AAD)

53. On 15 February 2018 in the Crown Court at Stoke-On-Trent before Mr Recorder Butterfield Q.C. the appellant (then aged 37, now aged 40) pleaded guilty to producing a controlled drug of class B contrary to section 4(2)(a) of the Misuse of Drugs Act 1971 and was sentenced to 8 months' imprisonment. His co-accused, Quang Van Hoang, pleaded guilty to a like charge and was sentenced to a 12-month conditional discharge.

54. He appeals against conviction by leave of the Full Court (Singh LJ, William Davis and Ellenbogen JJ) on 25 March 2021, and the necessary extension of time (712 days) was granted.

55. The appellant additionally seeks leave pursuant to section 23 of the Criminal Appeal Act 1968 to introduce fresh evidence regarding his status as a VOT, including a referral letter dated 4 June 2018 from his solicitors and a report by Dr Mary Anderson dated 14 January 2019. Dr Anderson, who identified scars that are said to be consistent with his account of violent abuse as a child and during the period whilst he was trafficked, has observed that the appellant:

> "[…] is a vulnerable individual. He has experienced a spectrum of traumatic events: ill- treatment in childhood; physical injury by police in Vietnam; ill-treatment by his employers in Laos; ill-treatment with threats; and physical assault by his captors in UK; prolonged Immigration Detention. He feels desperate as a result of his inability to convince the UK authorities that they had mistaken his identity. He feels helpless as to his position and as a result remains more liable to victimisation and the possibility of exploitation in the future."

56. Additionally, the appellant seeks to introduce his witness statement dated 16 January 2019 and the conclusive grounds decision issued by the Secretary of State on 1 February 2019. The accompanying minute sets out a summary of the circumstances of his departure from Vietnam through to his arrest.

57. In the witness statement of 16 January 2019, the appellant provided his summary of the relevant events. He left Vietnam in 2002, having been persecuted by the authorities, and he lived in Laos until 2016, during which time he obtained employment. He returned to Vietnam for short visits.

58. He was offered the opportunity to leave Laos with the prospect of a better life and employment. He was introduced to an agent, and he paid $16,000 with a view to being relocated to Germany. He raised $2,000 from the sale of certain property and the balance was obtained by his family from a "*loan shark*". He flew from Laos to Hong Kong, and then on to Russia. He was required to pay an additional $9000 to be

transported, in a lorry, to the United Kingdom, arriving in November 2016. He was beaten up on arrival and told he owed an additional $700 which his family were required to raise. He was then taken to London, given a mobile telephone and abandoned by his traffickers.

59. He made the acquaintance of a man called Binh who found him casual employment for some seven months at several restaurants. When this work ended, another male called A Tu found employment for the appellant on a construction site in Liverpool. When the appellant complained, A Tu took him to an address in Stoke on Trent where the appellant believed he would be offered cleaning work. Instead, having moved some electrical equipment, he was given instructions to tend cannabis plants. He did not want to undertake this work. He suggests he was told he would be killed if he left or told the police about what was happening. He was not locked in; indeed, he had a key to the front door. On one occasion he left the premises, but he returned having failed to find other people from Vietnam. He suggests he was afraid to go to the police then or at another time because he did not have any papers. He claims that when he returned to the house, he was attacked by the "owners" of the house, who knocked out some of his teeth. Checks were periodically made on him.

60. On 3 October 2017, the appellant together with his co-defendant were seen approaching this property, which was in Middleport, by police officers who had been watching the house because the electricity was being abstracted. They entered the premises. Inside, at varying degrees of maturity, were 353 cannabis plants. The plants were in the three rooms on the first floor and within the loft space. The electricity used for this operation had been abstracted at the meter. The appellant was found to be in possession of three mobile telephones, one of which was an iPhone.

61. He was arrested and interviewed on 4 October 2017. He was represented by the duty solicitor and accompanied by a Vietnamese interpreter. He accepted his involvement in tending the plants and explained the circumstances in which he had been brought to the United Kingdom. His personal telephone was interrogated and revealed conversations in which he had taken part that contained references to him going out, including dancing in Leeds (*e.g.* "*when you come out then we can go dancing for fun*").

62. He told the officers that one of the mobile telephones was his, and the owners of the cannabis gave him the other two in order to receive their instructions. He suggested he had been told what to do. In addition, an official from the Home Office spoke with the appellant on 4 October 2017.

63. During mitigation, his counsel set out, *inter alia*, the following:

> "[…] Mr Nguyen was trafficked to this country. He came with the expectation and promise of working in the construction industry. He had worked in the construction industry both at home and in Russia in the past, and it was something of a surprise to him when he was put into the position of having to act as the gardener in these premises in Middleport, but he accepts of course that by doing so, he renders himself guilty of the offence and hence his guilty plea here today.

> He did not initially want to avail himself of the help that was offered via the human slavery and trafficking aspect of the case, he did review that decision but has taken on board what has been said both by the prosecution so far as the phone calls are concerned and perhaps I take on board what [is said about] greater freedom than one would have expected in cases of this type. And also the fact that there does not appear to be somebody there present at all times or in the background restricting liberty and with immediate threats of violence should he not have been prepared to do what he was asked to do."

64. Accordingly, the appellant decided not to rely on the statutory defence set out in section 45 of the Modern Slavery Act 2015 ("section 45"). As just described, it was acknowledged on his behalf that the recovered telephone messages indicated that he had some freedom, his liberty was not restricted and he was not threatened with immediate violence. Section 45 provides:

> **"Defence for slavery or trafficking victims who commit an offence**
>
> (1) A person is not guilty of an offence if—
>
> (a) the person is aged 18 or over when the person does the act which constitutes the offence,
>
> (b) the person does that act because the person is compelled to do it,
>
> (c) the compulsion is attributable to slavery or to relevant exploitation, and
>
> (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
>
> (2) A person may be compelled to do something by another person or by the person's circumstances.
>
> (3) Compulsion is attributable to slavery or to relevant exploitation only if—
>
> (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
>
> (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.
>
> (4) A person is not guilty of an offence if—
>
> (a) the person is under the age of 18 when the person does the act which constitutes the offence,

(b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and

(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.

(5) For the purposes of this section—

"relevant characteristics" means age, sex and any physical or mental illness or disability;

"relevant exploitation" is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.

(6) In this section references to an act include an omission.

(7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.

(8) The Secretary of State may by regulations amend Schedule 4."

65. In passing sentence the judge observed that the offending had a strong causal link with trafficking and he took the view that this affected the appellant's culpability. The judge noted that there was an absence of a formal determination that the appellant was a victim of trafficking and he had not been oppressed in the way that was often the case.

66. The appellant claimed asylum on the 8 March 2018 whilst in immigration detention. On 4 June 2018 he requested a reference to the NRM as a victim of trafficking. On 2 July 2018 a positive reasonable grounds decision was issued, which was confirmed in a conclusive grounds decision on 1 February 2019. The accompanying minutes set out the reasons for finding that the appellant was a victim of human trafficking, specifically forced labour, forced criminality and domestic servitude, and that he had been subjected to physical and psychological coercion.

67. He applied for judicial review following the refusal to grant him discretionary leave as a victim of trafficking, pending determination of his asylum claim.

68. In response to this appeal, trial counsel asserts that the appellant did not seek a determination of his status, even though the opportunity to do so clearly existed. In his view there was no prospect of avoiding a prosecution and there was no defence.

The Appeal (AAD)

69. The overarching contention is that the appellant's conviction for the offence of cultivating cannabis is unsafe because he was acting under compulsion as a VOT and he had a viable defence under section 45 (see [64] above). It is submitted the appellant's status as a VOT following the Secretary of State's conclusive decision on 1 February 2019 means that the appellant should not and, if the circumstances had then been known, would not have been prosecuted, given there is evidence of a "*reasonable nexus of compulsion*" between the offence and the circumstances of exploitation, as defined

in *R v L(C) & Ors* [2013] EWCA 991; [2013] 2 Cr App R 23. At [33] the court observed:

> "As we have already explained, the distinct question for decision, once it is found that the defendant is a victim of trafficking, is the extent to which the offences with which he is charged, or of which he has been found guilty, are integral to or consequent on the exploitation of which he was the victim. We cannot be prescriptive. In some cases the facts will indeed show that he was under levels of compulsion which mean that, in reality, culpability was extinguished. If so, when such cases are prosecuted, an abuse of process submission is likely to succeed."

70. It is argued that the advice the appellant received and his decision to plead guilty were misconceived and he should have had the opportunity to challenge the negative decision, or, alternatively, to run a defence under section 45. The evidence showed that he had been trafficked for the purpose of exploitation and re-trafficked in the United Kingdom. In those circumstances the authorities should have been alerted as to the possibility that he had been trafficked, in order for a determination to be made. The previous representatives are criticised for failing to demonstrate a proper understanding of the "*nuanced reality of being a victim of trafficking*". It is submitted that the offence was committed as a direct result of trafficking for the purposes of exploitation.

71. It is suggested the delay in establishing his true status as a VOT was the responsibility of the authorities and various errors that were made during this process are highlighted. It is argued that had his status been correctly identified at the right time, it is unlikely that a prosecution would have been considered evidentially viable, or as being in the public interest. It is submitted the failure to identify the appellant as a VOT constitutes a breach of Article 4 of the European Convention on Human Rights.

72. In light of the decision of the European Court of Human Rights on the 16 February 2021 in *VCL & AN v United Kingdom* [application nos 77587/12 and 74603/12], confirmed as final on 5 July 2021, it is submitted that in the absence of a "trafficking assessment made by a qualified person" the prosecution was flawed *ab initio* and the conviction is unsafe because the decision-making process that led to it was inadequate. At [199] in *VCL & AN* the court observed:

> "[…] In the context of Article 4 of the Convention, it is the State which is under a positive obligation both to protect victims of trafficking and to investigate situations of potential trafficking and that positive obligation is triggered by the existence of circumstances giving rise to a credible suspicion that an individual has been trafficked and not by a complaint made by or on behalf of the potential victim […]. The State cannot, therefore, rely on any failings by a legal representative or indeed by the failure of a defendant […] to tell the police or his legal representative that he was a victim of trafficking."

73. The argument is advanced that had there been a conclusive NRM decision it could have founded a defence based on section 45.

74. In light of the decision in *M v DPP* [2020] EWHC 3422 (Admin), it is contended the NRM decision could have been admitted in evidence as an "agreed fact" or under section 10 of the Criminal Justice Act 1967, in order to provide a foundation for the section 45 defence. Similarly, it is submitted it is receivable pursuant to section 23 of the Criminal Appeal Act 1968.

75. The appellant argues his right to a fair trial under Article 6 of the European Convention on Human Rights was breached because the guilty plea was entered based on defective advice and when no enquiry had been made as to his status as a VOT.

76. The respondent suggests that the finding by the Secretary of State does not mean that the defence would necessarily have succeeded. There must be a nexus between the appellant's status as a VOT and the commission of the offence. Whilst the appellant may not have had advance knowledge of the operation, he chose to work for the man instructing him. He was not constrained physically and the telephone traffic revealed he had contact with his family and there were discussions about socialising.

77. Therefore, although the prosecution had been aware that he was trafficked into the United Kingdom, the present offence was not compelled by his trafficking such that a defence of duress or a defence under section 45 was made out. In the circumstances, it is submitted by the Crown that there is an absence of a sufficient connection between the trafficking and the commission of the offence; in particular, the appellant's freedom of movement means that a section 45 defence had no more than a remote prospect of success. It is contended by the respondent that the conclusive grounds decision of 1 February 2019 does not amount to new evidence which renders the conviction unsafe. It is emphasised that a deliberate decision was taken by the appellant at the relevant time not to pursue a section 45 defence. It is argued that the current Crown Prosecution Service ("CPS") guidance would still support the decision to prosecute.

Potential Areas for Guidance by the Court

78. Against the background of the various grounds of appeal advanced by the appellants, as summarised above, the Registrar has invited the Court to consider giving guidance on nine issues that have general and immediate relevance in the conduct of VOT cases. Although we have approached this invitation with caution, the issues identified by the Registrar not only raise important questions as to how aspects of cases in this context are to be handled at first instance and on appeal, but – save for the second and fourth questions – they are directly relevant to the determination of the three appeals. In the circumstances we have considered it appropriate to address these generic issues, including the second and fourth questions which are said to involve areas of immediate importance as regards the conduct of a significant number of pending trials. We are grateful to the Registrar for her formulation of the nine questions. We observe that although our comments as regards the second and fourth questions are *obiter dicta*, they were fully argued before us.

I. Is an SCA conclusive grounds decision admissible on appeal?

79. This question has already been conclusively and clearly answered in earlier decisions. There are numerous examples of cases in which conclusive grounds decisions and other relevant material have been received by this court, see: *R v L(C) and others* at [34]; *R v T(O)* [2013] EWCA Crim 2405 at [13]; *R v Y* [2015] EWCA Crim 123 at [8] and

[12]; *R v L,; R v N* [2017] EWCA Crim 2129 at [31], [44] and [51]; *R v Joseph* [2017] 1 Cr App R 17 at [157] and [160]; *R v EK* [2018] EWCA Crim 2961 at [27] and [45]; *R v GS* [2018] EWCA Crim 1824; [2019] 1 Cr App R at [67]; *R v GB* [2020] EWCA Crim 2 at [35]; *R v S* [2020] EWCA Crim 765 at [11]; *R v AAJ* [2021] EWCA Crim 1278 at [27] and [28]. We note that the approach taken in these cases coincides with a recommendation in a 2013 report by the Organization for Security and Co-operation in Europe ("OSCE") (the Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings), entitled "Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking":

> "26. The right to non-punishment must also be protected in bringing an appeal. Fresh evidence which supports a finding that the victim was trafficked and that the crime was committed in the course of their being trafficked or as a consequence of their having been trafficked should be admissible on appeal, subject to national rules of evidence and procedure."

80. We emphasise the decisions in three additional cases in this regard. In *R v S(G)* [2018] EWCA Crim 1824; [2019] 1 Cr App R 7, Gross LJ explained, in our respectful view correctly, that a decision of the First-Tier Tribunal, a minute from the SCA and a letter from the Home Office could all be admitted applying the test for fresh evidence in section 23 (see [81] below). This court in *Brecani* [2021] EWCA Crim 731; [2021] 1 WLR 5851; [2021] 2 Cr App R 12 expressly referred to this decision in *R v S(G)* and did not doubt the correctness of the approach that had been taken (see [41]). In the subsequent case of *R v AAJ* [2021] EWCA Crim 1278, the appellant had pleaded guilty on 2 November 2015 to two counts of possession with intent to supply class A drugs (crack cocaine and heroin). On 18 January 2016 he pleaded guilty to two further counts of possession with intent to supply class A drugs (crack cocaine and heroin). When convicted and sentenced it had not been recognised that at the material time he may have been a victim of trafficking. A conclusive grounds decision to this effect was reached on 25 February 2019. The SCA accepted that he had been forced into criminality by being given Class A drugs to carry by individuals who had recruited him. The appellant appealed to this court and applied to adduce fresh evidence, namely certain social services records, the positive reasonable grounds decision, the positive conclusive grounds decisions and a clinical psychological report. The court determined this application as follows:

> "28. We grant leave to adduce this fresh evidence. It is necessary and expedient in the interests of justice to do so. To admit the positive reasonable grounds and positive conclusive grounds decisions is not inconsistent with the recent judgment of this court in *R v Brecani* [2021] EWCA Crim 731. Such material can be used as a tool to assess the safety of a person's convictions: see [40] in particular. It is perfectly proper to admit it in evidence as relevant material on this basis. It is not a question of admitting the evidence for the purpose of trial."

81. In our judgment, although the context and the issues will determine whether a conclusive grounds decision should be received in evidence in the CACD, there is no

doubt that such decisions can potentially be adduced on an application for leave or an appeal. Section 23 provides the court with considerable flexibility in this regard:

> "(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case;
>
> (b) order any witness to attend for examination and be examined before the Court, (whether or not he was called in the proceedings from which the appeal lies); and
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
>
> (1A) The power conferred by subsection (1)(a) may be exercised so as to require the production of any document, exhibit or other thing mentioned in that subsection to—
>
> (a) the Court;
>
> (b) the appellant;
>
> (c) the respondent.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—
>
> (a) whether the evidence appears to the Court to be capable of belief;
>
> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.
>
> (3) Subsection (1)(c) above applies to any evidence of a witness (including the appellant) who is competent but not compellable.
> …
>
> […]"

82. Although the CACD will "*have regard to*" whether the evidence would have been admissible in the Crown Court, this is only one of the factors to be taken into

consideration. We observe, moreover, that if the question of the individual's status as a victim of trafficking was a live issue in the Crown Court, this contention will, in all likelihood, have been properly explored in evidence during the trial. In contrast, on an appeal to the CACD if this defence was not investigated properly or at all in the court below, the CACD will need to determine how best to resolve the merits of any application or appeal in this regard. The court may require oral evidence to be given, including from the applicant/appellant in order to substantiate, for instance, the history relied on, and it may order the production of any relevant documents, including reports and the conclusive grounds decision, if in existence. This will be a highly fact-specific judgment and it would be unhelpful to attempt to lay down any guidance as to the circumstances in which the court will resolve an application or appeal solely on the basis of written reports, decisions by bodies such as the SCA and other relevant materials and, conversely, when it will (additionally) require oral evidence.

83. The court in *R v AAJ* observed in this context at [39]:

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

84. This approach mirrored similar observations in *R v L(C)* at [28] and *R v Joseph* at [20(vii)]. We do not disagree with this statement of general approach, but we emphasise that there may be cases when the court will consider that the account given by the applicant/appellant requires testing by way of appropriate questioning. This is necessary to deal, for instance, with reports or decisions that are based on "controversial accounts" (see *Brecani* at [45] and *R v Turner* [1975] QB 834, 840 E to F).

85. It is to be noted in this context that the submissions on behalf of AAD include the contention that the court in *Brecani* gave a global ruling as to the admissibility of conclusive grounds decisions and the accompanying minutes, rendering them in all circumstances inadmissible at trial. Whilst that may well be the practical effect of the decision, absent particular circumstances, it is critical nonetheless to have in mind the salient conclusions reached in *Brecani* in this context, namely that:

    i) Non-expert opinion evidence is inadmissible in a criminal trial, save for limited purposes (see [44]);

    ii) Expert opinion evidence is admissible in criminal proceedings if a) it is relevant to a matter in issue in the proceedings; b) the witness is competent to give that opinion; and c) it is needed to provide the court with information outside the court's own knowledge and experience (see [44]) (but see also *Clare* [1995] 2 Cr App R 333 and *RT* [2020] EWCA Crim 1343; [2021] 1 Cr App R 14 at [29);

    iii) It is necessary to follow the provisions of Part 19 of the Criminal Procedure Rules and the Practice Direction which govern the admissibility of expert evidence (see [46]);

    iv) Case workers in the SCA, who are junior civil servants performing an administrative function, are not experts in human trafficking or modern slavery

and cannot give opinion evidence in a trial on the question of whether an individual was trafficked or exploited (see [54]); (We would add that they may have gained experience, but they are not experts in the sense understood in domestic criminal procedure.)

v) Expert evidence may be relevant to the questions that arise under the 2015 Act, "*which are outside the knowledge of the jury, particularly to provide context of a cultural nature*", but

> "The evidence would have to be truly expert and not a vehicle to enable the expert to stray into the territory of the jury by expressing his or her personal opinion about whether an account is credible or inconsistencies (are) immaterial. […] the conclusion on whether the prosecution has disproved the section 45 defence will call for an assessment of all the relevant evidence which the jury is well-placed to make. In the right case that evidence might include expert evidence of societal and contextual factors outside the ordinary experience of the jury" (see [58]).

vi) Insofar as the conclusive grounds decision is dependent on the various accounts of the defendant, including his or her explanations of inconsistencies, this is hearsay evidence for which a hearsay application would be necessary and – certainly in *Brecani* – such an application would not have been successful (see [61]).

vii) The decision of the jury as to whether the prosecution had negatived the section 45 defence requires the jurors to be sure that the account given by the appellant in his or her evidence in chief (and thus the core account on which the case worker proceeded) was not true. That was not an issue on which the evidence of the case worker could give them any assistance. The jury were well placed (certainly in *Brecani*, given the nature of the evidence in that case) to form their own conclusions without help from the case worker (see [62]).

86. We would add that it does not matter that the members of the jury have not shared the suggested experiences described by the defendant in a human trafficking or modern slavery case. Indeed, this applies in all criminal trials regardless of the nature of the charge. Few jurors will have been subjected, for instance, to duress leading to their participation in an armed robbery or will have found themselves caught up or involved in a city centre riot. This lack of first-hand experience of the circumstances of offences such as these does not require a witness (a case worker or otherwise) to express a view as to whether the account of the defendant is consistent with how someone would behave if placed under duress to commit armed robbery or if caught up in a riot. The jurors will be well placed to form their own conclusions on these questions. It follows that we reject Mr Knight's submission that a trafficking expert can express an opinion in evidence before the jury as to the plausibility and consistency of the defendant's account. Similarly, we disagree with the suggestion that a trafficking expert during a trial can comment on the vulnerability of the defendant. It is equally impermissible for an expert in a trafficking trial to express a view as to whether a given set of facts meets the legal definition of trafficking, acting thereby as an expert on the law of England and Wales. None of these situations come within the well-known exceptions, such as with

diminished responsibility, when an expert is permitted to give evidence on the "ultimate issue" (see *DPP v A & B Chewing Gum* [1968] 1 QB 159 at 164). As observed by the editors of *Phipson on Evidence* (Nineteenth Edition) at [33-12], this is because the expert's opinion is valueless, even unintelligible, if he or she is prohibited from expressing their view merely because the trier of fact will be called upon to decide the same question. In a similar vein, the secondary transfer of cellular material in the context of DNA evidence is an example of when it is necessary for the expert to know and comment on the factual circumstances in question, to enable him or her to give relevant evidence.

87. This is not, we emphasise, to overlook those instances in trafficking cases when there may be discrete issues that properly require explanation by way of expert evidence, for instance as to the defendant's psychiatric or psychological state or the detailed mores of people trafficking gangs operating in countries that are outside the court's own knowledge and experience. We stress that in the latter instance, this does not require any comment by the expert as to the consistency of the account given by the defendant, whereas in the former the psychiatrist or psychologist may express a view as to the detail and content of the defendant's account as a necessary step to reaching a diagnosis.

88. We highlight, furthermore, that the process of resolving an appeal is not to be equated with a criminal trial, and the comments of the court in *R v O* [2019] EWCA Crim 1389 at [17] were directed at the determination of an appeal as opposed to the issue of the admissibility of evidence before a jury (the court referred without demur to the fact that an expert had commented that the experiences of the appellant were, "*not at all unusual, and given the particular area of Nigeria from which she comes, regrettably very usual*").

89. Finally, we reject a linked argument, advanced on behalf of AAH, that the limitation imposed by *Brecani* relates solely to evidence in this context that is not provided by experts. It is suggested that "*the problem*" addressed in *Brecani* can be resolved by instructing an appropriately qualified expert. To the contrary, admissibility is to be resolved by reference to the three-part test set out above at [85 (ii)] for expert evidence, *viz.* a) is the evidence relevant to a matter in issue in the proceedings; b) is the witness is competent to give that opinion; and c) is it needed to provide the court with information outside the court's own knowledge and experience?

II. Is the decision in *Brecani* consistent with previous authorities of the CACD?

90. In this regard, the court's attention is particularly directed at *JXP* [2019] EWCA Crim 1280. It is suggested by Mr Fitzgibbon Q.C. on behalf of AAD that the decision in *Brecani* is inconsistent with the decision in *JXP*, in which latter case the court observed at [54] that the competent authority is "*a specialist authority with particular expertise and knowledge in this area of trafficking*". *JXP* was not cited in *Brecani.* In our judgment, this submission is ill-founded. In *Brecani*, as we have set out above, this court was principally concerned with the admissibility of certain material at trial (particularly, the conclusive grounds decision and the evidence of Mr Barlow (a forensic social worker and criminologist)). However, as we have already set out above at [80], the court did not criticise or seek to depart from the decision in *R v S(G)* admitting on an appeal a decision of the First-Tier Tribunal, a minute from the SCA and a letter from the Home Office, applying the test for fresh evidence in section 23. The decision in *JXP* did not concern the admissibility of evidence at trial, but instead

the Court of Appeal felt able to place reliance on the decision of the SCA because, *inter alia*:

> "54. There is no evidence to contradict what the applicant said. Further, we take account of the fact that the Competent Authority is a specialist authority with particular expertise and knowledge in this area of trafficking. The Minute sets out in considerable detail the applicant's account. It clearly analysed whether that account met the retirements of trafficking and concluded that it did. We accord weight to the decision of this specialist authority."

91. The court additionally attached weight "*to the evidence of an independent psychiatrist and to entries in the applicant's medical records, both as to the development of a depressive illness, symptoms of PTSD and the conditions of hepatitis B and C, which are stated to be consistent with the alleged sexual activity and the taking of heroin. A psychologist in January 2013 reported that the applicant was describing flashbacks regarding his detention and torture in Vietnam. He was experiencing nightmares two or three days a week. He was described as being hypervigilant, unable to trust others and suffering from insomnia. The psychologist concluded that there were evident features of PTSD and severe depression*" (see [55]). There was other extensive medical evidence.

92. In those circumstances, the CACD was able to reach the conclusion that the appellant had been a VOT and the appeal was allowed, without, we note, the need to hear oral evidence during the appeal. That decision is not in any sense in conflict with *Brecani*.

93. Mr Knight on behalf of AAI sought to suggest that the decision in *Brecani* is in conflict with an observation at the end of [28] in the decision of this court in *R v L(C)* [2013] EWCA Crim 991; [2013] 2 Cr App R 23:

> "Whether the concluded decision of the competent authority is favourable or adverse to the individual it will have been made by an authority vested with the responsibility for investigating these issues, and although the court is not bound by the decision, unless there is evidence to contradict it, or significant evidence that was not considered, it is likely that the criminal courts will abide by it."

94. We are unpersuaded by this argument. We have already touched on this issue at [79] above. The court in *L(C)* was not focussing on the admissibility of conclusive grounds decisions during a trial. Instead, in a decision reached before the implementation of the Modern Slavery Act 2015, the court addressed the level of protection from prosecution or punishment for trafficked victims who have been compelled to commit criminal offences, in the context of a prosecutorial decision to proceed with the trial. At the time of the decision in *L(C),* that protection was provided, in the main, by the exercise of the abuse of process jurisdiction. Critically, the court in *L(C)* explained that the judge will

reach his or her decision on this issue on the basis of the material advanced by both sides, to the extent that it is relevant to such questions as age, trafficking and exploitation. It did not, conversely, address whether the same material was admissible before the jury.

95. We were equally unpersuaded by Mr Knight's submission that only **positive** conclusive grounds decisions are admissible during the trial and that, since the burden of proof rests on the prosecution, **negative** decisions should always be excluded. If, contrary to our view, conclusive grounds decisions are admissible, both positive and negative determinations would simply form part of the evidence on which the jury would make their decision, with the legal burden of proof resting on the Crown and the evidential burden of proof resting with the defendant. There is no basis in the law of evidence, or indeed in logic, to exclude otherwise admissible evidence in this context simply because it favours one side rather than the other.

96. Mr Knight suggested that the decision in *Brecani* was in error because the court focussed on the caseworkers as experts and failed to take into consideration the guidance given by the relevant authority which "bestowed" expertise, particularly when combined with the authority's statutory role. In this context, he argued that the decision in *Brecani* is contrary to the decision of the Court of Appeal (Civil Division) in *Rogers v Hoyle* [2014] EWCA (Civ) 257; [2015] QB 265. We disagree. An individual does not become an expert simply because he or she is employed by a particular organisation. As set out in *Brecani* at [52], "*The classic statement of the test of admissibility of expert evidence, which has been followed in England and Wales, is found in* R v Bonython *(1984) 38 S.A.S.R. 45, a decision of the South Australian Supreme Court. King CJ observed*:

> "The […] question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court"."

97. It is not the organisation that is the expert but the proposed witness.

98. The decision in *Rogers v Hoyle* concerned the admissibility of a report by the Air Accident Investigation Branch of the Department of Transport ("the AAIB") which contained evidence of the opinions of experts on technical matters. As explained in the judgments of Leggatt J (at first instance) and Clarke LJ (on appeal), the AAIB use in-house and third-party experts in fields which include aeronautical engineering, wreckage analysis, meteorology, pathology, analysis of flight data and the piloting of aircraft. The opinions of such experts are incorporated in the report. Sometimes the expert's description, without his or her name, was given; sometimes, it was not stated that the opinion on an issue was that of an expert, although it was to be inferred that the opinion would have been that of one or more experienced experts. The conclusions as to the probable causes of the accident were reached on the basis of the AAIB's considerable qualified expertise and experience in investigating such events. Against that background, Clarke LJ observed:

> "51. […] It is open to an expert, that is to say someone who has the appropriate special expertise, to express an opinion based on the facts as he understands, or assumes, them to be, if and in so far as his conclusion is informed by, or a reflection of, that

> expertise. This includes matters such as the causation of an accident. […]
>
> 52. It is not, however, the function of an expert to express opinions on disputed issues of fact which do not require any expert knowledge to evaluate."

99. We therefore agree with the observation in *Brecani* that:

> "54. […] (t)he position of these decision-makers (*viz.* trafficking experts) is far removed, for example, from experts who produce reports into air crashes for the Air Accident Investigation Branch of the Department of Transport which are admissible in evidence in civil proceedings: see *Rogers v Hoyle* […]."

100. *Rogers v Hoyle* nonetheless serves to highlight one of the substantial differences between civil and criminal proceedings, given a professional judge can readily distinguish between weight and admissibility in a manner that would be far more difficult for a jury (see *Rogers v Hoyle* at [52]).

III. Is the decision in *Brecani* consistent with the UK's international obligations and European case law with regard to the protection of VOTs?

101. In this regard the court is particularly invited to consider *VCL & AN* (cited at [72] above).

102. The court in *Brecani* gave some detailed consideration to *VCL & AN*, particularly as follows:

> "64. The Strasbourg Court is not generally concerned with rules of evidence but, in any event, the issues considered by the court (in *VCL*) were different. The first issue was whether there was a breach of article 4 of the European Convention on Human Rights ("ECHR") (the anti-slavery provision) by reason of the way the Vietnamese applicants had been prosecuted for involvement in cannabis farming. The issue for the court arose from the difference of view taken by the CPS from that of the Competent Authority on the question of trafficking in a context where both applicants had originally pleaded guilty but subsequently sought to appeal: [113]. At [156] the court summarised the positive obligations that arise under article 4:
>
> > "It follows from the above that the general framework of positive obligations under Article 4 includes: (1) the duty to put in place a legislative and administrative framework to prohibit and punish trafficking; (2) the duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking; and (3) a procedural obligation to investigate situations of potential trafficking. In general, the first two aspects of the positive obligations can be denoted as substantive, whereas the third

> aspect designates the States' (positive) procedural obligation (see S.M. v. Croatia, cited above, § 306)."

> 65. It continued by emphasising the need for assessments to be made about the question whether someone has been trafficked and, in a passage to which we have already referred, said that a prosecuting authority must consider the conclusions that flowed from those assessments, that the prosecuting authority was not bound by them but needed a good reason to disagree [162]. The Strasbourg Court went on to hold that there had been a breach of the state's positive obligations under article 4 in both cases before it. The critical feature was that the CPS had disagreed with the conclusion of the Competent Authority but for no substantial reason. The court went on to consider various aspects of article 6 and the overall fairness of the relevant proceedings and found them wanting on the factual circumstances that had developed."

103. On behalf of AAH, Ms Gerry submitted that a consequence of the decision in *Brecani* is that the Crown Prosecution Service is failing to instruct suitably qualified individuals ("experts") to prepare a conclusive grounds assessment whenever the issue is raised that the accused is a victim or a potential victim of trafficking. As the court in *VCL & AN* put the matter:

> "162. […] It follows that, as soon as the authorities are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual suspected of having committed a criminal offence may have been trafficked or exploited, he or she should be assessed promptly by individuals trained and qualified to deal with victims of trafficking […]."

104. This submission is, in our judgment, misconceived. We repeat that *Brecani* was concerned with the admissibility of conclusive grounds assessments at trial, and the particular requirement that opinion evidence should not be provided by non-experts. It was not concerned with, and it did not address, the adequacy of such reports as part of the process whereby the prosecution decides whether to prosecute, and whether the individual making the assessment for that specific purpose is suitably qualified. The material that is admissible for the purposes of a criminal trial is not to be equated with information to which the Crown Prosecution Service should have regard when deciding whether to bring a charge. Indeed, the potential adequacy of properly prepared conclusive grounds decisions for purposes other than the proceedings before the jury is demonstrated by cases such as *R v AAJ* when such a decision formed an important element in the decision to quash the conviction, *viz.* "*There is no proper basis on which to depart from the Competent Authority's findings, including that the trafficking was for the purpose of being forced to engage in the supply of controlled drugs. The appellant's offending was a direct consequence of the trafficking*" (see [41]).

IV. Is the court able to give further guidance vis-à-vis the observation in *Brecani* (at [58]) that expert evidence on the question of trafficking and exploitation may be

admissible at trial*, "particularly to provide context of a cultural nature* [...]*"* or "*of societal and contextual factors outside the ordinary experience of the jury"*

105. It is submitted by Mr Fitzgibbon on behalf of AAD that it would be helpful for the court to "explain" the reference in *Brecani* to "*societal and contextual factors*". Moreover, it is suggested that the control methods used by traffickers, and the experience of being trafficked, are bound to be outside the knowledge of members of a jury.

106. We have addressed this issue above, particularly in [86] and [87].

v) When on an appeal might it be appropriate or necessary for witnesses (appellant, expert, trial representative etc.) to be required to attend to give evidence relating to whether the appellant was trafficked in VOT cases?

107. Ms Gerry suggests that AAH is a "*very vulnerable adult*" and that the court should not "*strain to call upon her as a trafficked person to be subjected to cross-examination*". Indeed, it is suggested that to call her to give evidence would be contrary to the "*purpose of protection*". It is submitted there is ample evidence to reach a conclusion as to whether the appellant was trafficked.

108. We have already addressed this issue, at [82] – [84]. We stress that *R v AAJ* demonstrates that there will be appeals when it will be wholly unnecessary for oral evidence to be adduced. However, if the suggested trafficking is based, for instance, on unsatisfactory and untested hearsay evidence from the appellant, the court may express the view that it would be preferable for the appellant to give evidence for the proper resolution of the issues on the appeal, thereby enabling his or her account to be appropriately tested.

vi) When the parties disagree, to what extent and at what stage might the court properly be involved in the question of whether live evidence is to be called?

109. Although the court will pay due regard to the submissions of the parties as to the course the appeal should take, including as to the need for oral evidence to be given, section 23 makes it clear that these are ultimately decisions solely for the court, depending on the view that is reached as to what is "*necessary or expedient in the interests of justice*" (see [81] and [82] above). In particular, the court "*may order any witness to attend for examination and be examined before the court*". Whether it will do so, or when, will depend on all the circumstances of the case. Where the parties are agreed that no oral evidence is needed, they should in good time inform the Criminal Appeal Office accordingly. This will then be notified to the Vice- President or presiding Lord Justice, who can confirm or reject their position. If the parties are not agreed on whether there is to be oral evidence, this likewise should in good time be referred to the Office so that the Vice- President or presiding Lord Justice can give appropriate directions.

vii) Is it still possible to argue on appeal that prosecution of a VOT was an abuse of process

110. Does it remain possible, therefore, following the introduction into law of the defence under section 45 (see [64] above), for a defendant to argue (whether at trial before the judge in the absence of the jury or on appeal) that the prosecution was an abuse of

process by reason of a failure on the part of the prosecution to apply its own policy guidance.

111. The existence of such an abuse jurisdiction prior to the introduction of the 2015 Act in the context of VOT cases is clearly acknowledged in the authorities, the usual basis relied on being that of the second limb of the jurisdiction expounded in cases such as *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42: to the broad effect that it is unfair and oppressive that a defendant should be tried.

112. Thus, in *R v M(L)* [2011] EWCA Crim 2327; [2011] 1 Cr App R 12, Hughes LJ, giving the judgment of the court, and following a full review of the 2005 Convention and of the then applicable CPS Guidance issued to prosecutors in Human Trafficking and Smuggling cases, said this at [10]:

> "10. The effect of that is to require of prosecutors a three-stage exercise of judgment. The first is: (1) is there a reason to believe that the person has been trafficked? If so, then (2) if there is clear evidence of a credible common law defence the case will be discontinued in the ordinary way on evidential grounds, but, importantly, (3) even where there is not, but the offence may have been committed as a result of compulsion arising from the trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not."

And at [14] he said:

> "14. It follows that the application of art.26 is fact-sensitive in every case. We attempt no exhaustive analysis of the factual scenarios which may arise in future. Some general propositions can perhaps be ventured:
>
> (i) if there is evidence on which a common law defence of duress or necessity is likely to succeed, the case will no doubt not be proceeded with on ordinary evidential grounds independent of the Convention, but additionally there are likely to be public policy grounds under the Convention leading to the same conclusion;
>
> (ii) but cases in which it is not in the public interest to prosecute are not limited to these: see above;
>
> (iii) it may be reasonable to prosecute if the defendant's assertion that she was trafficked meets the reasonable grounds test, but has been properly considered and rejected by the Crown for good evidential reason. The fact that a person passes the threshold test as a person of whom there are reasonable grounds to believe she has been trafficked is not conclusive that she has. Conversely, it may well be that in other cases that the real possibility of trafficking and a nexus of compulsion (in the broad sense) means that public policy points against prosecution;

> (iv) there is normally no reason not to prosecute, even if the defendant has previously been a trafficked victim, if the offence appears to have been committed outwith any reasonable nexus of compulsion (in the broad sense) occasioned by the trafficking, and hence is outside art.26;
>
> (v) a more difficult judgment is involved if the victim has been a trafficked victim and retains some nexus with the trafficking, but has committed an offence which arguably calls, in the public interest, for prosecution in court. Some of these may be cases of a cycle of abuse. It is well known that one tool of those in charge of trafficking operations is to turn those who were trafficked and exploited in the past into assistants in the exploitation of others. Such a cycle of abuse is not uncommon in this field, as in other fields, for example that of abuse of children. In such a case, the question which must be actively confronted by the prosecutor is whether or not the offence committed is serious enough, despite any nexus with trafficking, to call for prosecution. That will depend on all the circumstances of the case, and normally no doubt particularly on the gravity of the offence alleged, the degree of continuing compulsion, and the alternatives reasonably available to the defendant. The case of Mihai and others, which we consider below, is an example."

113. Having so stated, Hughes LJ then turned specifically to the issue of stay on the ground of abuse. He observed:

> "15. The availability of the ultimate sanction of a stay of proceedings on grounds of abuse was common ground before us, and is thus accepted by the Director of Public Prosecutions. We do not disagree that it is, in certain limited circumstances, available, but the limitations upon the jurisdiction must be understood. Criminal courts in England and Wales do not decide whether a person ought to be prosecuted or not. They decide whether an offence has been committed. They may, however, also have to decide whether a legal process to which a person is entitled, or to which he has a legitimate expectation, has been neglected to his disadvantage.
>
> […]
>
> "18. It is to be noted that the treaty obligation under the Convention in question in these two cases was an obligation to give immunity (in respect of certain kinds of offence and on certain conditions). The treaty obligation which we are considering under art.26 is not an obligation to grant immunity, but rather an obligation to put in place a means by which active consideration is given to whether it is in the public interest to prosecute. We accept that the power to stay for "abuse" exists as a safety net to ensure that this obligation is not wrongly

> neglected in an individual case to the disadvantage of the defendant.
>
> 19. We make it clear that the occasions for the exercise of this jurisdiction to stay ought to be very limited once the provisions of the Convention are generally known, as by now they should be becoming known. Moreover, the jurisdiction to stay does not mean that the court is entitled to substitute its own view for that of the prosecutor upon the assessment of the public policy question whether a prosecution is justified or not. The power to stay is a power to ensure that the Convention obligation under art.26 is met. The Convention obligation is to provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so. Thus the Convention obligation is that a prosecuting authority must apply its mind conscientiously to the question of public policy and reach an informed decision. If it follows the advice in the earlier version of the guidance, set out above, then it will do so. If however this exercise of judgment has not properly been carried out and would or might well have resulted in a decision not to prosecute, then there will be a breach of the Convention and hence grounds for a stay. Likewise, if a decision has been reached at which no reasonable prosecutor could arrive, there will be grounds for a stay. Thus in effect the role of the court is one of review. The test is akin to that upon judicial review. To the extent that Mr Blaxland QC submitted that there was a different test, derived from the proportionality test to be applied where there is an infringement of the primary requirements of one of the qualified articles of the European Convention on Human Rights (*R. (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 A.C. 532*), we disagree since the question here is not of proportionality in that special sense, but as Lord Steyn observed in that case (at [27]) the two tests will in most cases yield the same result."

114. This approach was endorsed in *N and L* [2012] EWCA Crim 189; [2013] QB 379 where Lord Judge CJ, giving the judgment of the court, stated at [21]:

> "Summarising the essential principles, the implementation of the UK's Convention obligation is normally achieved by the proper exercise of the long established prosecutorial discretion which enables the CPS, however strong the evidence may be, to decide that it would be inappropriate to proceed or to continue with the prosecution of a defendant who is unable to advance duress as a defence but who falls within the protective ambit of article 26. This requires a judgment to be made by the CPS in the individual case in the light of all the available evidence. That responsibility is vested not in the court but in the prosecuting authority. The court may intervene in an individual case if its process is abused by using the "ultimate sanction" of a stay of the proceedings. The

> burden of showing that the process is being or has been abused on the basis of the improper exercise of the prosecutorial discretion rests on the defendant. The limitations on this jurisdiction are clearly underlined in R v M (L). The fact that it arises for consideration in the context of the proper implementation of the UK's Convention obligation does not involve the creation of new principles. Rather, well established principles apply in the specific context of the article 26 obligation, no more, and no less. Apart from the specific jurisdiction to stay proceedings where the process is abused, the court may also, if it thinks appropriate in the exercise of its sentencing responsibilities implement the article 26 obligation in the language of the article itself, by dealing with the defendant in a way which does not constitute punishment, by ordering an absolute or a conditional discharge."

Likewise, in *R v L(C)* Lord Judge said this, among other things, and following a review of the 2011 Directive, at [16]:

> "In any case where it is necessary to do so, whether issues of trafficking or other questions arise, the court reviews the decision to prosecute through the exercise of the jurisdiction to stay. The court protects the right of the victim of trafficking by overseeing the decision of the prosecutor and refuses to countenance any prosecution which fails to acknowledge and address the victim's subservient situation, and the international obligations to which the United Kingdom is party […]."

He went on at [17]:

> 'It may be that the submissions advanced in erroneous reliance on *Waya* stem from a fear that the court will do no more than review the prosecutor's decision on traditional *Wednesbury* grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 K.B. 223*) and decline to interfere, even though its own conclusion would be that the offences were a manifestation of the exploitation of a victim of trafficking. For the reasons we have already given, no such danger exists. In the context of an abuse of process argument on behalf of an alleged victim of trafficking, the court will reach its own decision on the basis of the material advanced in support of and against the continuation of the prosecution. Where a court considers issues relevant to age, trafficking and exploitation, the prosecution will be stayed if the court disagrees with the decision to prosecute. The fears that the exercise of the jurisdiction to stay will be inadequate are groundless."

The availability of a stay jurisdiction for pre-2015 Act cases was further approved by constitutions of this court in *Joseph (Verna)* [2017] EWCA Crim 36; [2017] 1 Cr App R 33 and *S(G)* [2018] EWCA Crim 1824; [2019] 1 Cr App R 7.

115. The question, therefore, is whether this residual jurisdiction (in practice only to be exercised in very limited circumstances, as all the authorities indicate) survives the introduction of the 2015 Act.

116. At first sight, and absent authority to the contrary, it is difficult to see why it should not. Clearly the 2015 Act was designed to improve the position of VOTs (or those claiming to be VOTs) by providing for the opportunity, in certain kinds of cases, to raise a substantive defence: which, if raised on a sufficient evidential basis, it would then be for the prosecution to disprove to the criminal standard. There is, on the face of it, no incompatibility in such a defence being available and there also being available the potential (in an exceptional case) for advancing the abuse of process jurisdiction with regard to a decision to prosecute and pursue to trial. Indeed, to retain the availability of the abuse of process jurisdiction for this purpose would seem better to preserve the obligations in the Convention and Directive, which extend not only to VOTs not being punished but also, in appropriate cases, to not being prosecuted.

117. Moreover, although the abuse of process jurisdiction in this context has sometimes been described as "special" or "unusual" that is, in our judgment, only really so, in substance, just because of the context. (We say this subject to our comments below at [137] on [17] of *L(C)*). After all, any abuse of process argument has to take into account the context: and here such context necessarily includes the international obligations relating to VOTs and to the very sensitive issues arising with regard to VOTs.

118. Such a view in no way would, in our judgment, subvert the provisions of or purpose of the 2015 Act. Rather, it would complement them and supplement them. Nor does the availability of the abuse of process jurisdiction give alleged VOTs carte blanche to circumvent a prosecution. We emphasise: a decision to prosecute is for the CPS, not for the courts. Further, where the facts are in dispute then it is for a jury to determine those facts. It thus will be fruitless for a defendant to seek to avoid prosecution by alleging (truthfully or not) status as a VOT or (even where such status of VOT is admitted) by disputing the asserted lack of nexus between that status and the criminality in question. It will be fruitless just because those matters will be jury matters.

119. It would therefore follow that where the CPS has taken into account the relevant prosecutorial guidance and has taken into account any conclusive grounds decision (and has a rational basis for departing from a conclusive grounds decision if it has been favourable to the prospective defendant) there is simply no basis for an abuse of process challenge at all: since mere asserted disagreement with a decision to prosecute will never of itself suffice. Indeed, it has long been established that a judge may not order a stay of a prosecution simply because the judge personally would not have prosecuted: see, for example, *Connelly v DPP* [1964] AC 1254. Any attempts, therefore, to seek a stay in such circumstances before a Crown Court will be met with short shrift: if needs be, reinforced by a wasted costs order in an appropriate case. As Mr Douglas-Jones also pointed out, citing a number of authorities in support, successful applications to the Administrative Court for a review of a CPS prosecution decision are only entertained in very rare circumstances. The same applies, in our judgment, to any attempt to raise an analogous argument in the Crown Court in a VOT case on an abuse of process application.

120. But what if the CPS has failed unjustifiably to take into account the CPS Guidance or what if it has no rational basis for departing from a favourable conclusive grounds

decision? That of course, given the terms of the current CPS guidance and given the much greater awareness nowadays of the situation concerning VOTs generally, is, or should be, nowadays a highly improbable scenario. But in principle such a scenario would, on ordinary public law grounds, seem to operate to vitiate that prosecution decision: whether by reason of a failure to take a material matter (*viz*. the CPS prosecution guidance) into account or by making a decision to prosecute which is properly to be styled as irrational. Consequently, such a prosecution may, in an appropriate case, be stayed. This aligns with the principle, summarised helpfully in Blackstone's Criminal Practice 2022 at [D2.22] that, generally speaking, a decision to prosecute is not susceptible to judicial review in the Administrative Court because it may be challenged during the trial process itself, most particularly by an application to stay the proceedings on the grounds of abuse of process. As the editors observe, arguments relating to abuse of process may and should be raised in the course of the criminal trial itself save in wholly exceptional circumstances. In *R (Pepushi) v CPS* [2004] EWHC 798 (Admin) Thomas LJ observed:

> "49. In view of the frequency of applications seeking to challenge decisions to prosecute, we wish to make it clear and, in particular, clear to the Legal Services Commission (which funds applications of this kind which seek to challenge the bringing of criminal proceedings), that, save in wholly exceptional circumstances, applications in respect of pending prosecutions that seek to challenge the decision to prosecute should not be made to (the Administrative Court). The proper course to follow, as should have been followed in this case, is to take the point in accordance with the procedures of the Criminal Courts. In the Crown Court that would ordinarily be by way of defence in the Crown Court and if necessary on appeal to the Court of Appeal Criminal Division. The circumstances in which a challenge is made to the bringing of a prosecution should be very rare indeed as the speeches in *Kebilene* ([2002] 2 AC 326) make clear."

121. We were, however, referred to the decisions of constitutions in this court in *DS* [2020] EWCA Crim 285; [2021] 1 WLR 303 and *A* [2020] EWCA Crim 1408. It is said on behalf of the Crown that those decisions provide binding authority to the effect that no "special" category of abuse of process jurisdiction exists in this context following the introduction of the 2015 Act.

122. *DS* was an unusual case on its facts. The decision to prosecute the defendant, a minor at the time, for drugs offences was made before any conclusive grounds decision had been made under the National Referral Mechanism. Subsequently, after charges had been brought, such a decision was made. It was favourable to the defendant. On review, the CPS had regard to the prosecution guidance. It concluded that, notwithstanding the favourable conclusive grounds decision, the case should continue. The Crown Court judge was nevertheless invited to stay the proceedings as an abuse. He did so, in effect exercising his own judgment as to the evidence. In such circumstances the Court of Appeal unsurprisingly allowed the appeal. It said this:

> "40. In our judgment, the result of the enactment of the 2015 Act and the section 45 statutory defence is that the responsibility for

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

123. Having so held, the court went on to make some further observations on (as we read the judgment) an *obiter* basis. Among other things, it stated (uncontroversially in our view) in the course of paragraph 41 that "*if* [the CPS guidance] *is properly applied the CPS will comply with its legal obligations*". But having so stated, the court went on at [42] of the judgment:

> "Under the 2015 Act, the prosecutor is entitled to challenge that conclusive grounds decision before the jury in seeking to rebut the statutory defence and to invite the jury to come to a different decision. If there is a sound evidential basis on which to do this, it will not be an abuse of process to try. If there is not, it will still not be an abuse of process, but the judge will consider any submission that there is no case to answer. Whether or not a child is in fact a victim of trafficking is a matter which the jury is required to consider under section 45(4)(b). This is an issue which they will have to consider on all properly admissible evidence, which may include the evidence of the defendant or, if he does not give evidence, may, if appropriate, include an adverse inference."

124. The court further went on to say, at [44], that its decision in a case to which the 2015 Act applies was that a judge "*has no reason to attempt to evaluate a decision by of* (sic) *the Authority* (sic)*, at least in the absence of some arguable abuse of process properly so called* […]." It also stated that there "*was no room, in the light of s.45 of the 2015 Act, for the abuse of process of jurisdiction to "immunise" the respondent from prosecution*".

125. We have to say, however, that we are, with respect, rather puzzled by some of the observations in [42] of the judgment. We wholly agree with the proposition that if there is a sound evidential basis for the CPS to depart from a conclusive grounds decision, it will not be an abuse of process for the case to be tried. Indeed so. What we find altogether more difficult is the following proposition that "*if there is not, it will still not be an abuse of process but the judge will consider any submission that there is no case to answer*." But there is no necessary logical connection between an application to stay on the basis of limb two abuse and a submission of no case to answer. Indeed, the

application for a stay is essentially on the basis that it is unfair and oppressive for the defendant to be prosecuted and tried *at all*.

126. Moreover, this dictum does not seem fully to reflect the preceding statement (cited above) in [41] of the judgment in *DS* to the effect that if CPS guidance is properly applied the CPS will comply with its legal obligations. The implied corollary surely then must be that if the CPS guidance in a VOT case is *not* properly applied it will *not* comply with its legal obligations. And if that is indeed the scenario, legal redress, in the form of an opportunity at least to make an application for a stay, should be available: which a Crown Court judge can then appraise by way of review on public law grounds. Moreover, so to conclude does not in any way involve a Crown Court judge entering into the arena of making improperly decisions of fact or usurping the functions of CPS and jury.

127. We are also a little wary of the reference in [44] of the judgment in *DS* to an arguable abuse of process "*properly so called*". We accept that abuse of process applications of the kind made in *M(L), L(C)* and *N and L* have their own features. But, as will be gathered, we consider that is essentially so just because of the special context and features of VOT cases and of the international obligations relating to VOTs. The underpinning, however, for such an application to stay remains that of unfairness and oppression and illegality: which is a conventional underpinning for any typical limb two abuse application. And if there has been an unjustified and material failure to have regard to CPS guidance in this kind of context or an irrational and perverse departure from a conclusive grounds decision in this kind of context then an arguable case of unfairness and oppression and illegality would potentially be there. Indeed, in his written arguments Mr Douglas-Jones very fairly accepted that a failure to apply the safeguard of the CPS guidance could give rise to a limb two abuse of process application.

128. We also think that the dictum in [42] of *DS* does not sit at all well with the subsequent decision in 2021 of the ECHR (of which the court in *DS* necessarily could not have been aware) in the case of *VCL & AN* (see above at [72], [101] - [103]). Those applications in fact derive from cases conjoined with the domestic *Joseph* appeals (cited above). The European Court of Human Rights dealt very fully with the VOT points arising in these cases.

129. The court in *VCL & AN* accepted that the prosecution of a VOT was not prohibited under the 2005 Convention or any other international instrument. But the court went on at [159]:

> "Nevertheless, the court considers that the prosecution of victims, or potential victims, of trafficking may, in certain circumstance, be at odds with the state's duty to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked."

The Court further went on to say this at [162] (already cited in part above at [103]):

> "Once a trafficking assessment has been made by a qualified person, any subsequent prosecutorial decision would have to take that assessment into

> account. While the prosecutor might not be bound by the findings made in the course of such a trafficking assessment, the prosecutor would need to have clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention for disagreeing with it."

130. In the actual result, the ECHR allowed the applications, taking the view on the facts (which included the fact that both appellants were minors at the time) that the CPS had had no sufficient reason for departure from the favourable conclusive grounds decisions in each case. But in terms of general approach we consider that the decision of the ECHR is broadly consistent with the approach taken in *M(L)*, *Joseph* and other such cases: to the effect that a prosecution of a VOT will not be allowed to proceed if there is no rational basis (which we would equate with the ECHR's "clear reasons") for departure from a favourable conclusive grounds decision. It is true that the case of *VCL & AN* ante-dated the 2015 Act, to which the ECHR made no reference. But, as we read the judgment, the European Court of Human Rights was talking in entirely general terms in respect of VOT cases. Accordingly, the decision in *VCL & AN* is not really consistent with the dictum in *DS* to which we have referred above.

131. Mr Douglas-Jones, however, placed particular reliance on the decision of a constitution of this court in *A* (cited at [121] above): albeit that too was decided before, and therefore without reference to, the decision of the European Court of Human Rights in *VCL & AN*.

132. In that case, the defendant (18 at the time) had been charged with aggravated burglary. A conclusive grounds decision had, albeit subsequent to his conviction on his plea of guilty, been made in his favour. It was ultimately accepted that he had been a VOT. It was argued on appeal, when fresh evidence to this effect was sought to be advanced, that it had been an abuse of process for him to be prosecuted and that had the CPS guidance been properly applied, on a true appreciation of his status as a VOT, he would not and should not have been prosecuted for aggravated burglary. It was a feature of the case, we observe, that aggravated burglary is an offence listed in Schedule 4 to the 2015 Act; and consequently, by reason of section 45(7), no defence under section 45 would have been available.

133. It was argued on behalf of the appellant in *A* that the abuse of process jurisdiction, as outlined in cases such as *M(L)* and *Joseph*, remained available following the 2015 Act and was particularly important by way of "safety net" where (as in that case) section 45 did not provide a defence at all. On behalf of the Crown it was argued, in reliance on *DS*, that a VOT was in no different position (following the 2015 Act) from any other criminal appellant and there was no "special category" of abuse of process available in VOT cases following the introduction of the 2015 Act: which was, it was said, Parliament's response to the situation of VOTs and to international obligations.

134. In rejecting the appeal, the court among other things said this:

> "61. We start with our conclusion that the 2015 Act has changed the legal landscape in relation to the protection available to victims of trafficking who commit criminal offences. The reason for the development of a special abuse of process jurisdiction in cases of this kind was because there was a lacuna in domestic

> law in relation to the UK's international obligations owed to victims of trafficking. However, Parliament has now considered the position and determined how those obligations in relation to criminal law should be implemented. It has done so by enacting the 2015 Act. In other words, the lacuna has been filled by legislation the scope of which cannot be circumvented.
>
> 62. Parliament's decision to legislate by Schedule 4 of the 2015 Act to limit the scope of the s.45 defence (by excluding its application to serious sexual and violent offences) reflects the balance struck by Parliament between preventing perpetrators of serious criminal offences from evading justice and protecting genuine victims of trafficking from prosecution. An absolute defence for all offences was not required by the UK's international obligations and was not adopted in the domestic legislation introduced. The CPS must, as a prosecution service independent of the executive, apply the domestic law enacted by Parliament and there can be no abuse of process when it does that.
>
> 63. In *DS* the LCJ made clear that the abuse of process jurisdiction is no longer necessary in light of the enactment of the 2015 Act, recognising that there are offences to which the statutory defence in s.45 will not apply. For the reasons we have given, we respectfully agree.
>
> 64. It seems to us that just as this court held in *LM* (at a time well before the enactment of the 2015 Act) that the UK's international obligations were capable of being (and were) fulfilled by non-legislative means that included the then CPS guidance, the same remains true. In serious criminal cases to which Schedule 4 of the 2015 Act applies, the common law defence of duress/necessity and the four stage approach to prosecution decisions set out in the Guidance (that has express regard at stage four for the public interest) provide appropriate safeguards. Cases in which duress and the s.45 defence are not available, but where it would not be in the public interest to prosecute on the basis of a victim of trafficking's status will, we think, be rare. The seriousness of the offence will in such circumstances require an even greater degree of continuing compulsion and the absence of any reasonably available alternatives to the defendant before it is likely to be in the public interest not to prosecute an individual suspected of an offence regarded by Parliament as serious enough to be included in Schedule 4."

135. The court then went on to consider whether, on the facts by then known, in the light of the fresh evidence, the decision to prosecute might have been different in that particular case, given that at the time there had been "*an absence of any consideration of the indicators that the appellant was a victim of trafficking*". It decided that it would not have been, given the facts. We entirely agree in this respect with the observations of the court in *A* that there is no requirement to provide "blanket immunity" from

prosecution for VOTs who commit criminal offences (reflecting the remarks in *DS* that there is no room for the abuse of process jurisdiction to "immunise" the respondent from prosecution).

136. The court in *A* was also however clearly disinclined, in line with *DS*, to accept that there was now, following the 2015 Act, need for the development of a "special" abuse of process jurisdiction by reason of any perceived lacuna in the law. Counsel before us rather struggled, however, to identify what was meant by reference to a "special" abuse of process jurisdiction. As we have already outlined, the jurisdiction is founded on the conventional limb two abuse approach. It is only "special" given the particular context of trafficking and the general background of international obligations. But the core elements of fairness and oppression and illegality inherent in any such abuse of process application remain.

137. Mr Knight suggested that the "special" jurisdiction derived from what was said by the court at paragraph 17 of *L(C)*. We do not agree. It is a clear inference, from the remarks of the court in *DS* itself in [44], that that court had not viewed [17] of *L(C)* as of itself giving rise to a "special" jurisdiction. Moreover, paragraph 17 of *L(C)* does not seem to us to fit well with the court's prior rejection in that case of the argument that the Crown Court had an independent and primary role in assessing the proportionality of a charging decision in a VOT case or with the court's acceptance (clearly correct) that the decision to prosecute was for the CPS. Nor do some of the remarks in [17] of *L(C)* fit well with what is immediately thereafter said in paragraph 18 of the judgment and in the endorsement of cases such as *M(L)*. In our view, the required approach is by reference to public law principles, akin to judicial review, in the context of appraising the decision to prosecute in a VOT case where an abuse of process application is made. We note that a similar approach applies to prosecutions under section 31(1) of the Immigration and Asylum Act 1999, as amended: see in particular the discussion in *ML* [2011] 1 Cr. App. R. 12, at [15] - [19] of the judgment.

138. We also note that the court in *A* had itself expressly, and uncontroversially, stated that the CPS must apply the domestic law as enacted by Parliament and that there could be no abuse of process if it did so. But likewise, as a matter of domestic law, the CPS must apply its own published guidance in its prosecutorial decision-making process in VOT cases. If it does then there can be no abuse of process. But, by parity of reasoning, if without justification it does *not* then there may, depending on the circumstances, be an abuse of process justifying a stay.

139. Moreover, in *A*, there could have been no abuse of process at the time the CPS made and pursued its charging decision in the Crown Court: for at that time it had no factual basis before it to give rise to a belief or credible suspicion that the defendant may have been a VOT. That only emerged following his conviction on his own plea. Even so, it is noteworthy that the Court of Appeal then fully considered the issue of whether the decision to prosecute might have been different had his true status as a VOT been known at the time, in assessing whether or not his conviction, on his plea, was safe.

140. Overall, therefore, we do not, with respect, accept the dictum in *DS* to the effect that there can be no abuse of process even where there is no sound evidential (that is, rational) basis for a prosecutorial departure from a conclusive grounds decision favourable to a defendant. We further consider that the decision in *A* is distinguishable and was not directly concerned with the point raised before us. Further, if it could be

said (contrary to our own view) that *DS* and *A* were otherwise potentially binding in this particular respect as to the lack of availability of the abuse of process jurisdiction then we would in any event depart from that aspect of those decisions, in the light of the subsequent decision of the European Courts of Human Rights in *VCL & AN*: see *(RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 at [66] of the speech of Lord Neuberger.

141. As a matter of procedure, on an application to stay the proceedings, for instance on the basis that the Crown had unjustifiably failed to take into account the CPS Guidance when deciding to prosecute, one option available to the judge prior to making a decision would be to adjourn the application to afford the CPS the opportunity to reconsider/remake its decision in light of its own guidance. This approach may be less appropriate, however, if the contention is that the decision was simply unsustainable or perverse.

142. We draw the threads together. Our conclusions on this ground are as follows:

(1) The limb two abuse of process jurisdiction remains available in principle in all VOT cases following the 2015 Act, and whether or not they are Schedule 4 cases.

(2) Such jurisdiction is "special" only in the sense that it falls to be exercised in the context of a particular sensitivity required to be applied to VOT prosecutions, having regard to international obligations and specific CPS guidance. The core requirements of unfairness and oppression and illegality (inherent in almost every limb two case) remain central to applications for a stay in a VOT context.

(3) Mere disagreement with a decision to prosecute, following due regard given by the prosecution to the CPS guidance and to any conclusive grounds decision, gives no basis whatsoever for an application for a stay. Decisions to prosecute are for the CPS. Decisions on disputed facts or evaluations of fact are for the jury.

(4) If (in what will be likely to be a most exceptional case) there has been a failure to have due regard to CPS guidance or if there has been a lack of rational basis for departure by the prosecution from a conclusive grounds decision then a stay application may be available. It will then be assessed by the court, by way of review on grounds corresponding to public law grounds.

143. Finally, on this issue, we add this. We were told that what became section 45 of the 2015 Act only emerged at committee stage. We were also told that that section was intended to provide further and enhanced protection for VOTs. At all events, nothing in the language of the 2015 Act and nothing in the other materials drawn to our attention gives any indication that the previously established availability of an abuse of process jurisdiction in this context was designed to be removed or significantly curtailed by the 2015 Act. For the reasons we have given, that jurisdiction remains an available additional safeguard, given appropriately exceptional facts. Equally, for the reasons we have given, such a conclusion should give rise to no flood-gates consequences: cases of abuse of process will be (as they always should have been) very rare in this context and can arise in only very limited circumstances.

viii) Is the definition of "*compulsion*" as set out in *VSJ* [2017] EWCA Crim 36 at [21] and section 45 Modern Slavery Act 2015 too narrow?

144. In essence this question is whether the necessary approach ought to be that of "*causation*" rather than "*compulsion*". Ms Gerry on behalf of AAH argues that restricting the protection to "*compulsion*" as a critical element of the defence in section 45 (see [64] above), even when the burden lies on the prosecution, provides the defendant with insufficient protection. It is suggested that the defendant is nonetheless required to raise evidence of exploitation, thereby "*putting that person at risk of harm through state processes because, given the risks, the dominant strategy is to remain silent*". Based in part on the analysis of Bijan Hoshi in "*The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law*" (2013) 1(2) Groningen Journal of International Law 54, it is argued, therefore, that the question should be whether the offence was **caused** by the traffickers, and that the test of **compulsion** should be interpreted accordingly. It is suggested that this is to ensure that it is the trafficker who "*holds criminal responsibility*".

145. We are unable to accept this argument. The starting point is the statutory language which is entirely clear: the terms of the section 45 defence require that the person was "*compelled*" to do the act, that the "*compulsion*" is attributable to slavery or to relevant exploitation and that a reasonable person in the same situation would have had no realistic alternative. The intention of Parliament could not have been clearer: compulsion and causation self-evidently have entirely different meanings and the legislature decided to adopt the approach of the former. Not only is this the express domestic legislative requirement but it coincides with United Kingdom's international obligations. In brief, in 2001, following the UN General Assembly Resolution 55/25 of 15 November 2000, the UN Convention against Transnational Organised Crime was agreed at Palermo in December 2000. Annex II to the Convention was the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, usually called the Palermo Protocol. It was ratified by the UK on 9 February 2006.

146. The Palermo Protocol was complemented by the European Union Framework Decision (2002/629/JHA) ([2002] OJ L203/1) on combatting trafficking in human beings and a Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"), agreed in Warsaw in May 2005. The Convention on Action was ratified by the United Kingdom on 17 December 2008 and came into force domestically on 1 April 2009. It adopted in article 4 the same definition of trafficking in human beings as the Palermo Protocol. Article 26 entitled "Non-punishment provision" provided:

> "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, **to the extent that they have been compelled to do so**." (emphasis added)

147. The Framework Decision [2002] OJ L203/1 was replaced by the 5 April 2011 European Union Directive 2011/36 ([2011] OJ L101/1) on preventing and combatting trafficking in human beings, which had direct effect from 6 April 2013. Recital 14 of the Directive provided:

> "Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. **This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in**." (emphasis added)

148. Article 2 paragraphs 1 – 4 are in the following terms:

> **"Offences concerning trafficking in human beings**
>
> 1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:
>
> The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
>
> 2. **A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.**
>
> 3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.
>
> 4. The consent of the victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used." (emphasis added)

149. Article 8 of the Directive is in the following terms:

> **"Non-prosecution or non-application of penalties to the victim**
>
> Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on

> victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2."

150. On 1 April 2009, when the Council of Europe Convention came into force, the United Kingdom Government set up the National Referral Mechanism: Competent Authorities were given the responsibility for making what are described as conclusive decisions as to whether someone been trafficked for the purposes of exploitation. The Competent Authorities were a unit within the National Crime Agency and units or hubs within the Home Office Immigration and Visa Section. There is now one Single Competent Authority.

151. In 2010 the Strasbourg Court decided in *Rantsev v Cyprus* (2010) 51 EHHR 1 that Article 4 of the European Convention on Human Rights (the ECHR) contained a procedural obligation similar to that in respect of Article 2 and therefore required effective measures be in place in States to provide practical and effective protection of the rights of victims of trafficking (see [282]–[289]). The Crown Prosecution Service has developed and amended over time its policy to give effect to these international obligations. Simultaneously, the Court of Appeal (Criminal Division) has developed a significant jurisprudence that has protected trafficked individuals in this particular context, both before and after the coming into force of the Modern Slavery Act 2015.

152. One of the foundation stones of Ms Gerry' submissions is the suggested trafficking offence as advocated by Bijan Hoshi in his 2013 article (therefore written prior to the implementation of 45 of the Modern Slavery Act 2015), as referred to at [144] above. This suggested defence would be "*a complete defence against criminal liability. In order to establish the defence, it is proposed that the trafficked person would need to establish: first, that they are (or were) a trafficked person; and, secondly, that* ***the offence was committed as a direct consequence of the trafficking*** *situation. If both elements were established, then the trafficked person would have a complete defence*". (emphasis added)

153. Given the clear terms of section 45 which aptly reflect the United Kingdom's international obligations in this context (as summarised above), there is no sustainable foundation for the submission that this legislative provision should be reformulated in the manner suggested, substituting the "compulsion" element of the defence with that of "causation". That would involve the wholesale rewriting of a statutory defence without any, or any material, justification. At least since the Council of Europe Convention came into force domestically on 1 April 2009, the United Kingdom has subscribed to and implemented a binding international approach, now reflected in section 45, which provides a defence to certain crimes for trafficked individuals if the prosecution is unable to make the court sure the "compulsion" defence does not apply. As established in *R v MK* [2018] EWCA Crim 667:

> "45.[…] The burden on a defendant is evidential. It is for the defendant to raise evidence of each of those elements and for the prosecution to disprove one or more of them to the criminal standard in the usual way."

154. This in our view provides appropriate protection for trafficked individuals, with the legal burden resting on the prosecution.

ix) Can a VOT seek to argue that a conviction following a guilty plea is unsafe?

155. The essence of this issue is whether an appellant who pleaded guilty but was subsequently found to have been a VOT can nonetheless appeal against conviction. In this context, our attention is drawn particularly to *Kakaei* [2021] EWCA Crim 503. This court has recently and extensively considered this issue in *R v Tredget* **[2022] EWCA Crim 108.** The court determined that there are three categories of case, albeit this is not a closed list, when a conviction can be overturned following a guilty plea. The first category is as follows:

> "154. First, there may be a variety of circumstances in which the guilty plea is vitiated. An obvious one is where an equivocal or an unintended plea was entered. Similarly, in *R v Swain* 1986 Crim L.R. 480 the appellant's conviction was quashed on the basis of evidence that there was a very real risk that he had been affected by delusion caused by L.S.D. at the time he changed his plea to guilty, and for a short time thereafter. In those circumstances, the court held that the conviction was unsafe and unsatisfactory.
>
> 155. Equally, an appeal may be allowed when "*the plea of guilty was compelled as a matter of law by an adverse (*and, we add, wrong) *ruling by the trial judge which left no arguable defence to be put before the jury*" (see *Asiedu* at paragraph 20, as endorsed in *R v Fouad Kakaei* [2021] EWCA Crim 503 at paragraph 75). This situation is, however, to be contrasted with the position when there is an adverse ruling by the judge which renders the defence being advanced more difficult, even to the point of being near hopeless, as distinct from unarguable: "*A change of plea to guilty in such circumstance would normally be regarded as an acknowledgment of the truth of the facts constituting the offence charged*" (*per* Auld LJ in *R. v Chalkley* [1998] 2 Cr. App. R. 79; [1998] Q.B. 848, at 94 and 864, and see *Asiedu* at paragraph 20). In such a situation a defendant who contests his guilt can plead not guilty and challenge the disputed adverse ruling on appeal, whereas the defendant who has no defence left to put to the jury cannot.
>
> 156. Similarly, a guilty plea might be vitiated by improper pressure, for instance from the judge. In *R v Nightingale* [2013] EWCA Crim 405; [2013] 2 Cr App R 7, Lord Judge CJ at paragraph 16 observed,
>
> > "The question is whether (the intervention) by the judge, and its consequent impact on the defendant after considering the advice given to him by his legal advisers on the basis of their professional understanding of the effect of what the judge has said, had created inappropriate additional pressures on the defendant and narrowed the proper ambit of his freedom of choice."
>
> The court determined that the plea of guilty was, in effect, a nullity. And in *R v Inns* (1974) 60 Cr App R 231, Lawton LJ suggested at page 233 that,

> "When the accused is making a plea of guilty under pressure and threats, he does not make a free plea and the trial starts without there being a proper plea at all. All that follows thereafter […] is a nullity."

157. If it is established that incorrect legal advice had been given, this too can result in the conviction being quashed/treated as a nullity, certainly in the restricted circumstances described by Scott Baker LJ in *R v Saik* [2004] EWCA Crim 2936:

> "57. For an appeal against conviction to succeed on the basis that the plea was tendered following erroneous advice it seems to us that the facts must be so strong as to show that the plea of guilty was not a true acknowledgment of guilt. The advice must go to the heart of the plea, so that […] the plea would not be a free plea and what followed would be a nullity."

158. An appeal can, however, succeed if 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, if its effect was to deprive the defendant of a defence which would probably have succeeded. In *R v Boal* [1992] QB 591, it was decided that if a possible line of defence is overlooked, exceptionally the court will be prepared to intervene, although only if the defence would quite probably have succeeded and the court concludes, therefore, that a clear injustice has been done (see pages 599 and 600). This approach was endorsed in R v *Mohamed (Abdalla) and others* [2010] EWCA Crim 2400; [2011] 1 Cr. App. R. 35 (a case in which a defence under section 31 of the Immigration and Asylum Act 1999 had been overlooked) and in *R v McCarthy* [2015] EWCA Crim 1185. In the latter case, the court was "*far from confident that when the applicant pleaded guilty to the offence of wounding with intent he had a proper understanding of the elements of the offence*" (see [81]). Similarly, in *R v Whatmore* [1999] Crim. L.R. 87 the court quashed the appellant's convictions on the basis that he had received misleading advice on which he relied, rendering the convictions unsafe (he had pleaded guilty to two counts of sexual offences against his daughter, having been led erroneously to understand that those allegations would not, as a consequence, feature as part of the evidence during another trial). Here the pleas were in effect induced by misleading legal advice. Waller LJ indicated at page 9:

> "[…] the defendant had not admitted his guilt and was pleading on the basis that if he pleaded, the daughter's allegations would never become part of the case at all and he was content, in effect, to take a sentence which he had already served in return for pleading to something which he did not admit. In those circumstances, as it seems to us, it cannot be said that the conviction on those pleas are safe."

159. In *R v PK* [2017] EWCA Crim 486 Sir Brian Leveson P. emphasised the approach just described, namely that the Court of Appeal would only intervene on the basis that the conviction was unsafe when it believed the defendant had

been deprived of what was in all likelihood a good defence in law, which would quite probably have succeeded and, as a result, a clear injustice had been done."

156. The second category is as follows:

> "160.There is a distinct category of cases which do not depend on the circumstances in which the plea was entered or indeed upon whether the accused is innocent or guilty, but instead arise when "*there* (is) *a legal obstacle to his being tried for the offence, for instance because the prosecution would be stayed on the grounds that it is offensive to justice to bring him to trial. Such cases are generally described, conveniently if not entirely accurately, as cases of "abuse of process*"; in these circumstances "*a conviction upon a plea of guilty is as unsafe as one following trial*" (see *Asiedu* at paragraph 21). By way of example, entrapment, if made out, can amount to unfairness which would render it an abuse of process to try the defendant (see *Asiedu* at paragraph 25). So, one example of a case coming withing this second category is when an abuse of process is established such that renders it unfair to try the defendant at all. As Lord Woolf CJ observed in *R v Togher & others* [2001] 1 Cr App R 33 at paragraph 31,
>
> > "Certainly, if it would be right to stop a prosecution on the basis that it was an abuse of process, this Court would be most unlikely to conclude that if there was a conviction despite this fact, the conviction should not be set aside".
>
> The court in *Togher* at page 161 G approved what it described as the "*broad*" approach adopted in *R v Mullen* [1999] 2 Cr App R 143; [2000] QB 520, per Rose LJ:
>
> > "... for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe. Indeed the *Oxford Dictionary* gives the legal meaning of 'unsafe' as 'likely to constitute a miscarriage of justice'."
>
> 161.A further type of case within this category is when there is a fundamental breach of the accused's right under article 6 of the European Convention on Human Rights to a fair and public hearing by an independent and impartial tribunal. It is unnecessary for the defendant to establish prejudice in this context (see *R v Ilyas Hanif* [2014] EWCA Crim 1678 and *R v Abdroikov, R v Green, R v Williamson* [2007] UKHL 37, in which latter case Lord Bingham observed at paragraph 27 that "[…] *even a guilty defendant is entitled to be tried by an impartial tribunal* […]")."

157. As to the third category, the court determined:

> "162. In the case of category 1, the ordinary consequences of the public admission of the facts which is constituted by the plea of guilty are displaced by the fact that the plea was vitiated, whether in fact or by reliance on error of law. In the case of category 2, the ordinary consequences of the public plea

> are irrelevant, because the defendant ought not to have been subjected to the trial process (or to that form of trial process) at all. But ordinarily, the plea of guilty, by a defendant who knows what he did or did not do, amounts to a public admission of the facts which itself establishes the safety of the conviction. There remains, however, a small residual third category where this cannot be said. That is where it is established that the appellant did not commit the offence, in other words that the admission made by the plea is a false one."

The Individual Appeals

AAI CONVICTION

158. As set out above, there are two grounds of appeal. **First**, Mr Knight argues that the appellant was a victim of trafficking and should not have been prosecuted. To rehearse, the offence of which he was convicted is that he failed to comply with a notice served on him on 28 December 2007 under section 35 Asylum and Immigration (Treatment of Claimants etc.) Act 2004 requiring him to attend an interview and answer accurately and fully questions put to him at the Sierra Leonean High Commission, with a view to obtaining an ETD. It is contended that the nexus between his exploitation as a victim of trafficking and the commission of the alleged offence has been made out and given the circumstances in which he committed the offence it was not in the public interest to prosecute him.

159. We consider this contention to be unsustainable. His defence at trial was straightforward: that he was not willing to comply because he had already attended the High Commission for an interview and there had been two failed attempts to return him to Sierra Leone, which is a country to where he is fearful of returning. As described above, the appellant's account of being trafficked is beset with credibility problems. It has varied extensively over time and has frequently included descriptions of T as someone who treated him charitably, with kindness and without any form of exploitation or coercion. In the appellant's immigration witness statement, for instance, although he sets out devastating atrocities committed by the SLA rebels, in contrast his description of T and another man associated with him was that they acted entirely philanthropically. We accept in this regard the criticisms made by Mr Bisgrove of the appellant's accounts. Not only are there fundamental inconsistencies as to what the appellant has said about T, but there is also the rank implausibility of his trafficker sending him to England under compulsion having failed to put in place any reception arrangements or any method for monies to be remitted to Sierra Leone. It is improbable in the extreme that T would have paid for the appellant to travel to Europe and to insist only that the appellant telephoned him in Sierra Leone upon arrival. In the circumstances, no sustainable nexus has been established between his suggested exploitation as a VOT and the instant offence. Any suggestion that when he was served with the notice on 28 December 2007 he was in fear of potential reprisals from T is simply not credible. These factors, along with the lack of any contact with T, or anyone on his behalf, since his arrival in the United Kingdom mean that we are satisfied that this first ground of appeal fails. There is no basis for the suggestion that this material indicates that the appellant should not have been prosecuted. This conclusion does not

in any sense undermine the appellant's contention that he will face multiple risks on his return to Sierra Leone; this, however, is an entirely separate consideration from whether there is a sustainable link between human trafficking and the commission of the present offence.

160. **Second**, it is averred that fresh evidence demonstrates that the appellant had a reasonable excuse for failing to comply with the direction under section 35. The appellant contends that the psychiatric evidence now available shows that he was being subjected to extreme psychological suffering by the attempts to remove him to Sierra Leone and he was, as a result, unable to comply with the section 35 notice. These factors, it is argued, provided a reasonable excuse. There are numerous difficulties with this contention. It was not the appellant's case at trial that he was "unable" to participate in the process; it was, instead, that he was "unwilling" to do so. He signed a defence statement which contained the following:

> "8. In essence the defendant's case for refusing to be interviewed is that he had already been interviewed by the High Commission, he had been sent back twice and returned and he feared for his safety if deported to Sierra Leone.
>
> 9. In light of the authority of *R v Tabnak* [2007] EWCA Crim 380; [2007] 1 WLR 1317, it is accepted that this unwillingness would not amount to a reasonable excuse.
>
> 8. However, the defendant's fear of return to Sierra Leone and unwillingness to cooperate may amount to an inability to do so if in fact he is suffering (from) a psychiatric illness.
>
> 9. The defence have therefore instructed a psychiatrist to ascertain whether or not this is the case.
>
> 10. The defence would therefore respectfully request any secondary disclosure that may assist in that regard […]."

161. In this context, we are directed on the appellant's behalf to a passage in *R v Tabnak*, as follows:

> "20. […] It is possible to envisage a situation in which a defendant would, because of apprehension for the consequences of deportation, suffer some psychiatric illness which would prevent compliance. That might be capable of constituting a reasonable excuse for non-compliance, […]."

162. The appellant in *R v Tabnak* stated that he would rather suffer the consequences of not completing a travel document than be sent home to Iran, because his life and freedom would be at risk. In those the circumstances it is helpful to set out the entirety of [20], in which Lord Philips C.J. said:

> "The "reasonable excuse" that the appellant sought to advance in the present case was not an explanation for his inability to comply with the Secretary of State's requirement. It was an

> explanation for his unwillingness to do so. As a matter of law, reasons why a defendant is unwilling to comply with a section 35 requirement with which he is perfectly able to comply cannot constitute a reasonable excuse for non-compliance. When this proposition was put to Mr Benson, he submitted that unwillingness could become inability. The consequences of complying with the requirement might be so dire as to overbear the will of the defendant so that he would be unable to comply and in such circumstances his inability would be a reasonable excuse. It is possible to envisage a situation in which a defendant would, because of apprehension for the consequences of deportation, suffer some psychiatric illness which would prevent compliance. That might be capable of constituting a reasonable excuse for non-compliance, but no such case has been made in this instance. It has been made quite plain that the appellant was exercising a power of choice when he refused to comply with the requirements of the Secretary of State."

163. It is quite clear from the defence statement that the decision of the appellant in the instant case not to cooperate was a matter of his free choice, irrespective of his post-traumatic stress disorder, possible depressive illness and his unwillingness to participate. Although Professor Katona in his report of 5 November 2019 described how the appellant might have "*great difficulty in giving a full account of himself*" in giving evidence in the immigration proceedings, leading to the recommendation that special measures should be put in place for those purposes, there is no suggestion in the four principal psychiatric reports that the appellant would not have been able to exercise free choice as to whether to cooperate in an interview at the Sierra Leonean Embassy. His instructions to his lawyers were not that his will had been overborne such that he was unable to comply: as we have already rehearsed, it was expressly that he was unwilling to do so. He was not, therefore, in the words of Lord Philips C.J. "*(suffering) some psychiatric illness which would prevent compliance*". That is not to ignore, undermine or belittle the consistent diagnosis of post-traumatic stress disorder and the reference to a possible depressive illness.

164. Furthermore, although given the gap in time we do not have details of the precise steps that were taken by the defence in this context, it is clear from the passage in the defence statement set out above that his then lawyers were acutely alive to this issue and that psychiatric evidence was being explored. In the event, no expert evidence was introduced. We consider that it is right to infer in those circumstances that there was no psychiatric evidence available to the effect that he had been suffering from a psychiatric illness that would have prevented him from complying.

165. As to the criticism of the judge's direction, no complaint was made at the time or on appeal by trial counsel and this matter is now incapable of adjudication. We are dependent on an inadequate note made by trial counsel, as set out at [19] above. It is impossible to have confidence that this necessarily reflects what was said by the judge during the summing up. Moreover, given the absence of medical evidence as well as the summing up, we are unable to identify with any confidence what were the live issues in the case at the end of the trial. An insufficient basis has been advanced, therefore, for this aspect of the ground of appeal.

166. We grant leave to appeal to appeal against conviction out of time, given these points were properly arguable, and we dismiss the appeal.

167. We granted leave to introduce the evidence on which the appellant sought to rely, including the conclusive grounds decision (to which the first question relates). We note that we attached no weight to the part of the report of Sally Montier of 12 October 2021 (the "Independent Consultant Human Trafficking and Modern Slavery") in which she expressed her opinion that the account from the appellant of his recruitment and exploitation meets the "trafficking definition". We reiterate that the burden of her report would not have been admissible during a trial.

AAI SENTENCE

168. As helpfully summarised by the editors of Archbold Criminal Pleading Evidence and Practice 2022 at [7-139]:

> "The court will always scrutinise with great care cases where an appellant seeks to rely on psychiatric evidence directed to his mental state at the date of sentence that was not advanced at the time and the decision will be fact specific in each case. Following the admission of such evidence, the court has the power to substitute the sentence which it considers is (and always was) appropriate (*Beatty* [2006] EWCA Crim 2359, *Cleland* [2020] EWCA Crim 906)."

169. We have no doubt that if the judge had been aware of the full factual background along with the contents of the various reports that we have summarised above, especially as regards the appellant's experiences in Sierra Leone and the psychiatric diagnosis, he would have passed a lesser sentence. In our judgment, given the mitigation now available to the appellant based on the psychiatric material, the sentence of 18 months' imprisonment was manifestly excessive, following a trial. We therefore grant leave to appeal against sentence and allow the appeal, in that we quash the term of 18 months' imprisonment and substitute a term of 12 months' imprisonment.

AAI ANONYMITY

170. On 17 September 2020 an anonymity direction was made in respect of the appellant's immigration appeal, under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

171. We have borne in mind the importance of the principle of open justice. We have concluded that such an order should be made as being both necessary and proportionate. In reaching that conclusion we have regard to the appellant's current circumstances as someone who is at risk of trafficking in the future should he return to Sierra Leone and to his ongoing immigration matters which have led to the grant of anonymity in immigration proceedings. Having regard to the considerations identified in the authorities we have concluded that it is necessary in the interests of justice for anonymity to be maintained in all the circumstances of this case.

AAH CONVICTION

172. As we have already described, the appellant's plea to a single count of possession on 28 May 2015 of false identity documents with intent to make a gain for herself or another relates to her possession of a French passport and a French Identification document, neither of which bore her details, in order to obtain work in a care home. It is submitted that the relevant background is that she had been forced to work in this role by her traffickers and that previously she had been forced to provide sexual services to her traffickers as payment. Therefore, her offending was in consequence of and compelled by the trafficking.

173. Applying, *inter alia*, our conclusions on the first question, we grant leave to adduce, first, the fresh evidence of the decision of First-Tier Tribunal Judge Real dated 20 July 2017 in which he accepted the appellant's account as to how she came to the United Kingdom and the events that occurred in this country following her arrival. It was acknowledged that she fears returning to Nigeria, given she is a woman facing forced marriage, gender-based violence and re-trafficking. Second, we give leave to adduce the decision, of 16 August 2017 in which the SCA accepted there were conclusive grounds to believe that the appellant was a potential victim of human trafficking. In our view it is necessary and expedient in the interests of justice to admit this evidence. We did not, applying our decisions on questions five and six, consider it necessary for any oral evidence, including from the appellant, to be given.

174. In light of this material, it is clear the appellant's conviction is unsafe and the appeal must be allowed. There is no proper basis on which to depart from the Competent Authority's findings or that of the First-Tier Tribunal. The judge determined that the appellant was trafficked into the United Kingdom; her offending was a direct consequence of the trafficking; and she was acting under compulsion: he found that she was coerced by reason of her vulnerability, along with her traffickers' insistence that she owed a large sum of money, into sexual exploitation and forced labour (see [29]). We are confident that if these two decisions had been available to the prosecution, in light of our answer to the third question, a decision would have been taken not to prosecute the appellant; alternatively, the appellant would have been able to mount a successful submission of abuse of process on the basis that there are no substantive grounds to dispute that the appellant is a victim of trafficking, that there was sufficient nexus between that status and the offending and that there is uncontradicted evidence of real compulsion (see the answer to the eighth question).

175. As regards the ninth question, we have applied the guidance given in *R v Tredget* concerning the circumstances when an appeal against conviction can be allowed following a guilty plea, and this case comes within the categories when an appeal is possible.

176. In all the circumstances, the appellant's conviction is unsafe, notwithstanding her guilty plea. We grant leave to appeal out of time and we quash the appellant's conviction. It would be against the interests of justice to order a retrial.

AAH ANONYMITY

177. The same broad considerations apply to AAH as they did to AAI, in terms of the anonymity order imposed by the First-Tier Tribunal and the evident risks to the appellant.

AAD CONVICTION

178. The appellant and his co-accused were charged that on 3 October 2017 they produced cannabis, a controlled drug of Class B, in contravention of section 4(1) of the Misuse of Drugs Act 1971. He pleaded guilty, it being accepted by him in the Crown Court that he did not want to rely on the section 45 defence because he accepted that the telephone calls and the arrangements at the house meant that the element of compulsion necessary for that defence were absent.

179. The central contention advanced now on the appellant's behalf is that his conviction for the offence of cultivating cannabis is unsafe because he was acting under compulsion as a VOT and had a viable defence under section 45. It is submitted that his status as a VOT following the Secretary of State's conclusive decision on 1 February 2019 means that the appellant should not and, if the circumstances had then been known, would not have been prosecuted, given there is evidence of a "*reasonable nexus of compulsion*" between the offence and the circumstances of exploitation.

180. It is argued that the advice the appellant received and his decision to plead guilty were misconceived and he should have had the opportunity to challenge the negative decision, or, alternatively, to run a defence under section 45. The evidence showed that he had been trafficked for the purpose of exploitation and re-trafficked in the United Kingdom. In those circumstances the authorities should have been alerted as to the possibility that he had been trafficked, in order for a determination to be made. The previous representatives are criticised for failing to demonstrate a proper understanding of the "*nuanced reality of being a victim of trafficking*". It is submitted that the offence was committed as a direct result of trafficking for the purposes of exploitation.

181. We are unable to accept these contentions. In accordance with our decision on question one, we have considered the conclusive grounds decision. Although the author determined that the appellant had been subjected to forced labour and forced criminality, and that he was unable to leave the house where the cannabis was being grown, we are unpersuaded by critical aspects of those conclusions. Having arrived in London and having been given a mobile telephone, he was then abandoned by those he suggests had trafficked him to this country. It is accepted that he was then, on his own account, at liberty. He claims that at some stage thereafter he made the acquaintance of two Vietnamese men, Binh and A Tu, who in turn organised work for him, which on one occasion was varied when he decided he did not like it (*viz.* building work). Although he suggests he was forced to tend the cannabis plants, he was able to leave the premises (he had a key) and, having decided permanently to leave the property, he did so and only returned because he could not find other people from Vietnam in the locality. He was able to go to the police but decided not to seek their help because he did not have any papers. He was clearly free to make arrangements to go out, and one of the options under discussion in one of the exchanges of messages was a dancing outing in Leeds at a night club. Indeed, the entire contents of the significant number of discussions on Facebook Messenger contradict the suggestion that the appellant was being forced to work against his will. He was able communicate freely with members of his family or friends in Vietnam, without any complaint about his situation.

182. As set out at [145] above, the terms of the section 45 defence require that the person was "*compelled*" to do the act, that the "*compulsion*" is attributable to slavery or to relevant exploitation and that a reasonable person in the same situation would have had no realistic alternative. We refer back to our conclusions on question eight. We are confident that the CPS would have decided to prosecute notwithstanding the conclusive grounds decision, given the lack of a nexus between the offence and the trafficking, along with the indications of a lack of compulsion even bearing in mind the conclusive grounds decision (in this regard, see our approach to question three); similarly, any abuse of process application against the CPS decision, provided the conclusive grounds decision was properly taken into account, would almost certainly have failed (in this regard, see our approach to question seven). It follows we reject the criticisms made of the appellant's legal team in the Crown Court. We did not, applying our conclusions on questions five and six, consider it necessary for any oral evidence, including from the appellant, to be given. The test in accordance with *R v Tredget* following a guilty plea has not been met, by some margin (see [155] *et seq* above).

183. Leave has already been granted to appeal the appellant's conviction out of time. We dismiss the appeal. There is no appeal against sentence.

AAD ANONYMITY

184. As with the other two appellants, we have borne in mind the importance of the principle of open justice. We have concluded that an anonymity order should be made as being both necessary and proportionate. In reaching that conclusion we have regard to the risk of trafficking in the future and to the fact that the appellant is currently subject to deportation proceedings and has an outstanding protection claim under which full consideration will be given to the risks facing him on his return to his home country, taking account of the finding that he is a victim of modern slavery.