



Neutral Citation Number: [2022] EWCA Crim 920

Case No: 202103054

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2022

Before:

LORD JUSTICE MALES
MRS JUSTICE MCGOWAN
and
HIS HONOUR JUDGE MICHAEL CHAMBERS QC
(RECORDER OF WOLVERHAMPTON)

Between:

REGINA
- and -
AGM

Respondent

Appellant

Benjamin Newton (instructed by **Birds Solicitors**) for the **Appellant**
Andrew Johnson (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 29 June 2022

Approved Judgment

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

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

Lord Justice Males:

1. On 8th October 2014, in the Crown Court at Bournemouth before His Honour Judge Johnson, the applicant, a Vietnamese national then aged 40, pleaded guilty to being concerned in the production of cannabis. On 15th December 2014 she was sentenced to 18 months' imprisonment. Her application for an extension of time (2,514 days) in which to seek leave to appeal against conviction and leave to call fresh evidence has been referred to the full court by the Registrar.
2. The ground of appeal is that the applicant's conviction on her own plea is unsafe because, if it had been known that she was a victim of trafficking, either she would not have been prosecuted or the proceedings (which took place before the passing of the Modern Slavery Act 2015) would have been stayed as an abuse of process.
3. There is now a conclusive grounds decision dated 3rd September 2018, in which the Home Office, as the competent authority under the 2005 Council of Europe Convention on Action against Trafficking, determined that the applicant is a victim of modern slavery. It appears that she did not claim to be a victim of trafficking during the criminal proceedings and that this question was not referred to the Home Office for consideration. When it was first referred, after the applicant made an asylum claim on 1st April 2015, the Home Office did not accept her claim. A negative reasonable grounds decision was made on 8th May 2015 and it was only after proceedings in the First tier and Upper Tribunal Immigration and Asylum Chamber that the applicant's claim to be a victim of trafficking was finally accepted.
4. In the light of the Home Office's acceptance that the applicant is a victim of trafficking, and having regard to the principles summarised in *R v L; R v N* [2017] EWCA Crim 2129 at [7] to [13], it is appropriate to grant the applicant anonymity, as ordered provisionally by the Registrar. We direct that she be referred to as "AGM".

The abuse of process jurisdiction

5. Section 45 of the Modern Slavery Act 2015 came into force with effect from 31st July 2015. It provides a substantive defence for victims of slavery or trafficking who commit certain offences under compulsion attributable to slavery or relevant exploitation. Before the coming into force of this section, the United Kingdom sought to comply with its obligations under the Convention in cases where the common law defence of duress was not available by a combination of (1) Crown Prosecution Service guidance as to the circumstances in which victims of trafficking should be prosecuted and (2) the court's power to stay a prosecution as an abuse of process. *R v Joseph* [2017] EWCA Crim 36, [2017] 1 WLR 3153 confirmed that this remains the applicable regime for cases heard at first instance before the coming into force of section 45. More recently *R v AAD* [2022] EWCA Crim 106 at [110] to [143] has held that the abuse of process jurisdiction remains available in principle in all victim of trafficking cases following the 2015 Act, while emphasising the exceptional nature of such applications in cases to which the Act applies (i.e. where in principle the section 45 defence is available).
6. *AAD* emphasised also at [144] to [154] that, under section 45, it is not enough that a defendant is a victim of trafficking. It must also be shown (or more accurately, an issue must be raised, which it is then for the prosecution to disprove: *R v MK* [2018] EWCA Crim 667, [2019] QB 86) that an adult defendant is compelled to do the act which

constitutes the offence and that this compulsion is attributable to (i.e. is directly caused by) slavery or relevant exploitation. This was in part the result of interpreting the statutory language, which refers expressly to compulsion, but was also held to coincide with the United Kingdom's international obligations under (among other things) the 2005 Convention. Consistently with this view, CPS guidance and the pre-Act cases referred to the need for "compulsion arising from the trafficking" and for "a nexus of compulsion" (e.g. *R v M(L)* [2011] EWCA Crim 2327, [2011] 1 Cr App R 12 at [10] and [14]).

7. The courts' approach to appeals against conviction in trafficking cases on the ground that the proceedings were an abuse of process was developed in a series of cases before the coming into force of the 2015 Act. In *R v LM* [2010] EWCA Crim 2327, [2011] 1 Cr App R 12 and again in *R v N* [2012] EWCA Crim 189, [2013] QB 379 at [12] this court rejected any proposition that once it is demonstrated that an individual has been or may have been trafficked, he or she should not be prosecuted for crimes committed within that context. There is no "blanket immunity" for victims of trafficking. Rather, there was an obligation on the prosecuting authority to apply its mind conscientiously to "the question whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled (in the broad sense) to commit it". Lord Judge CJ summarised the essential principles in *N* as follows:

"21. Summarising the essential principles, the implementation of the United Kingdom's Convention obligation is normally achieved by the proper exercise of the long established prosecutorial discretion which enables the Crown Prosecution Service, 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 LM*. The fact that it arises for consideration in the context of the proper implementation of the United Kingdom'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."

8. It is apparent, therefore, that in accordance with well established principles, there may be cases where it is not in the public interest for a prosecution to take place even where the evidence against the defendant is strong, so that there would be good prospects of securing a conviction; and that these principles may apply in trafficking cases.
9. The approach to be taken and the way in which trafficking may affect culpability were discussed further by Lord Judge in *R v L(C)* [2013] EWCA Crim 991, [2013] 2 Cr App R 23:

“13. It is surely elementary that every court, whether a Crown Court or magistrates’ court, understands the abhorrence with which trafficking in human beings of any age is regarded both in the United Kingdom and throughout the civilised world. It has not, however, and could not have, been argued that if and when victims of trafficking participate or become involved in criminal activities, a trafficked individual should be given some kind of immunity from prosecution, just because he or she was or has been trafficked, nor for that reason alone, that a substantive defence to a criminal charge is available to a victim of trafficking. What, however, is clearly established, and numerous different papers, reports and decided cases have demonstrated, is that, when there is evidence that victims of trafficking have been involved in criminal activities, the investigation and the decision whether there should be a prosecution, and, if so, any subsequent proceedings, require to be approached with the greatest sensitivity. The reasoning is not always spelled out, and perhaps we should do so now. The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals.”

10. More recently, the applicable principles were summarised by Lord Justice Gross in *R v GS* [2018] EWCA Crim 1824, [2018] 4 WLR 167 at [76]. They include the need for “the careful and fact sensitive exercise by prosecutors of their discretion as to whether it is in the public interest to prosecute a VOT” and the relevance of “a reasonable nexus” between the crime and the trafficking:

“There is no closed list of factors bearing on the prosecutor’s discretion to proceed against a VOT. Generalisation is best avoided. That said, factors obviously impacting on the discretion to prosecute go to the nexus between the crime committed by the defendant and the trafficking. If there is no reasonable nexus between the offence and the trafficking then, generally, there is no reason why (on trafficking grounds) the prosecution should not proceed. If there is a nexus, in some cases the levels of compulsion will be such that it will not be in the public interest for the prosecution to proceed. In other cases, it will be necessary

to consider whether the compulsion was continuing and what, if any, reasonable alternatives were available to the VOT.”

11. Lord Justice Gross described the question for this court in the following terms at [76(v)]:

“As always, the question for this court goes to the safety of the conviction. However, in the present context, that inquiry translates into a question of whether in the light of the law as it now is (this being a rare change in law case) and the facts now known as to the applicant (having regard to the admission of fresh evidence) the trial court should have stayed the proceedings as an abuse of process had an application been made. This question can be formulated indistinguishably in one of two ways which emerge from the authorities: was this a case where either: (1) the dominant force of compulsion, in the context of a very serious offence, was sufficient to reduce the applicant’s criminality or culpability to or below a point where it was not in the public interest for her to be prosecuted? or (2) the applicant would or might well not have been prosecuted in the public interest? If yes, then the proper course would be to quash the conviction ...”

12. It is apparent from these and other authorities that, when dealing with victims of trafficking, the existence and extent of any nexus between the offence in question and the trafficking and exploitation to which the defendant has been subject will always be an important consideration. However, if the prosecution authorities have applied their minds to the relevant questions in accordance with the applicable CPS guidance, it will not generally be an abuse of process to prosecute unless the decision to do so is clearly flawed. The courts will be reluctant to intervene in such circumstances as the decision whether to prosecute is for the CPS and not the court.
13. Conversely, if the question whether a defendant is a victim of trafficking has not been considered by the prosecution at all, the courts will be readier to intervene. Again, the existence and extent of any nexus between the offence and the trafficking and exploitation in question will be an important consideration, albeit not necessarily decisive in every case. Depending on the facts, it may be necessary to consider broader questions such as whether it was in the public interest to prosecute this particular defendant for this particular crime. Much may depend upon the circumstances and history of the defendant and the seriousness of the defendant’s participation in the crime in question.
14. It is therefore possible to envisage circumstances where an abuse of process argument in a pre-Act case may succeed even though, if the Act had applied, a defence under section 45 would have failed for insufficient evidence of compulsion directly caused by slavery or exploitation as required by the section. That is because it may still be relevant to consider whether, even if a prosecution could have succeeded, it is in the public interest for the prosecution to be brought. Indeed *AAD* expressly recognised the continuing existence of the abuse of process jurisdiction even in a case to which section 45 of the 2015 Act applies. The court distinguished at [119] and [120] between (1) cases “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)”, in which case “there is simply no basis for an abuse of process challenge at all”; and (2) cases where “the CPS has failed unjustifiably to take into account the CPS Guidance or ... has no rational basis for departing from a favourable conclusive grounds decision”, in which case there is scope to stay a prosecution on the ground of abuse of process.

15. That the prosecution was an abuse of process is one of the categories of case in which it is no bar to a successful appeal that the defendant pleaded guilty, as held in *T* [2022] EWCA Crim 108 at [160] and affirmed in *AAD* at [156].

CPS Guidance

16. The CPS Guidance on human trafficking, smuggling and slavery as at 9th September 2011 (which was current at the time of the proceedings below) drew attention to the frequency of trafficking in (among other cases) cultivation of cannabis plants. It required prosecutors to be alert to the possibility that a suspect may be a victim of trafficking and to take steps to ensure that appropriate enquiries were made when there was a credible suspicion or realistic possibility that a suspect had been trafficked; prosecutors were required to advise the police to consider a reference through the national referral mechanism to the Home Office as the competent authority under the 2005 Convention. If evidence or information obtained supported the fact that the suspect had been trafficked and committed the offence while they were coerced, prosecutors were instructed to consider whether it was in the public interest to continue prosecution. The guidance emphasised the duty of the prosecutor to be proactive in causing enquiries to be made, in accordance with the judgment of this court in *R v O* [2008] EWCA Crim 2835. Factors bearing on the public interest were identified, including:

- is there a credible suspicion that the suspect might be a trafficked victim?
- the role the suspect has in the criminal offence?
- was the criminal offence committed as a direct consequence of their traffic situation?
- were violence, threats or coercion used on the trafficked victim to procure the commission of the offence?
- was the victim in a vulnerable situation or put in considerable fear?

The basic facts

17. On 30th May 2014 police officers searched a house at an address in Poole and discovered a cannabis factory. A neighbouring property was also searched and over 800 cannabis plants were recovered from the two properties. The applicant and her co-accused, a Vietnamese man called Tran, were arrested nearby.

The proceedings

18. In interview, the applicant initially relied on a prepared statement in which she stated that she had been in the property for less than a week. She had been given a cleaning job that involved living and sleeping in the property. When she took the job, she was unaware that she would be working in a cannabis factory. She had watered the plants on two occasions, but they did not belong to her and she received no money.
19. During the interview the applicant interrupted the reading of the prepared statement and, after a break to receive legal advice, she decided to answer police questions. She said that she arrived in the United Kingdom by lorry in 2009. She still owed money to the people responsible for bringing her into the country. She was taken to the house by “the boss of the boat” approximately six days before her arrest, but had not known that it was a cannabis factory. Two men were present. She did not want to stay, because the house was very dirty, but was told to be patient. They offered her £200 per week to clean, which would be used to pay off her debt. She had not received any money and had not been threatened by the two men. She cleaned the house and watered the plants on two occasions. She did not know they were cannabis. Tran had arrived approximately four days before their arrest. She did not talk to him about the plants. It was his job to water them.
20. Initially the applicant pleaded not guilty. However, she then indicated that she would plead guilty on the basis that (1) she entered the United Kingdom in 2009 as an illegal immigrant, (2) she owed her smugglers £20,000, (3) she had worked for them to reduce her debt, (4) she was in a sexual relationship with Tran, who asked her to come to the property that she learned on arrival was a cannabis factory, and (5) she helped water the plants and clean up discarded soil. The plants had already been harvested when she arrived.
21. This basis of plea was not accepted by the prosecution. The issue was not whether the applicant was a victim of trafficking (it was not suggested on her behalf that she was), but whether she was motivated by financial gain, specifically whether she was paid to work knowing the property to be a cannabis factory. The significance of that issue was whether, as the prosecution contended, she had for sentencing purposes a significant role, or whether, as was contended on her behalf given her basis of plea, she had only a lesser role.
22. Accordingly a *Newton* hearing was held. The applicant gave evidence through an interpreter and was cross examined. She said that she was from a small village in Vietnam. She came to the United Kingdom in a lorry and incurred £20,000 in debt, of which £6,000 remained outstanding. She had worked as a childminder and cleaner and her income was used to pay her debt. She met Tran two years before her arrest and had started a sexual relationship with him approximately three months before her arrest. One of her friends, whom she described as “the boss of the boat”, took her to the house five days before her arrest and Tran arrived two days later. She believed that she would be a cleaner and did not know about the cannabis. She only learned that the plants were cannabis when Tran told her. She wanted to leave, but was told that she must stay a week, at which point she would be taken somewhere else. In cross-examination, she accepted that she was not controlled by Tran and that she watered the plants, but that was only as a favour rather than as part of her job.

23. On the basis of her evidence, the applicant's counsel disclaimed any suggestion of trafficking. He said that she was an economic migrant who "was not trafficked in any way because she obviously consented to come and consents to stay". He submitted that she should be sentenced on the basis of having had a lesser role.
24. The judge did not accept the applicant's account. He concluded that the applicant was "slightly more culpable than Tran" (who had also pleaded guilty), but he did accept that she played a lesser role in a substantial commercial enterprise. She was subject to "some degree of pressure", but had been trusted by the owners of the plants (the house key had been found in her bag). He sentenced her to two years' imprisonment.
25. The solicitors and counsel representing the applicant in the criminal proceedings have been unable to shed any light at all on why it was conceded that no question of trafficking arose.

The applicant's account of being trafficked

26. Following her release from prison in February 2015, the applicant was transferred to immigration detention. In March 2015 she claimed that she was a victim of human trafficking and in April 2015 claimed asylum.
27. In support of her claim she made a statement in which she gave the following account.
28. The applicant was born in Vietnam and entered into an arranged marriage when she was 18. She was very poor and a victim of domestic violence from her husband. She had three children with him. Neighbours put her in contact with people who said that they could help her to find a job in the United Kingdom, where she would work in a restaurant and earn good money to support her family. She was told that this would cost her £20,000. Her mother-in-law handed over the deeds to their house as security for the loan. She understood that these creditors had since taken over the house, but that £6,000 remained outstanding and her family were constantly being harassed to pay it.
29. She left Vietnam in 2006, thinking that she would come directly to the United Kingdom. In fact her passport was taken from her and she travelled through several countries before arriving in Germany. She claimed asylum on the instruction of her traffickers, and was told by them what to say. She was too scared to disregard their instructions. Her claim for asylum was refused, but she remained in Germany for what felt like a long time. She was threatened that she would be killed if she disobeyed the traffickers, so she never attempted to escape them. She was taken to various places, always accompanied and under their control, and was made to work as a prostitute in a brothel.
30. She was then taken to France and kept in a remote place, where she was forced to have sex with different men, sometimes with a group of men at once. When she tried to resist, she was beaten or punched. On one occasion her face was burned by what she believed to be acid thrown in her face, which left a scar. Her nipples were burnt by cigarette butts by men with whom she was forced to have sex.
31. She had not mentioned any of this sexual abuse before, because she was so ashamed of what she had been forced to do.

32. Eventually she was put in a lorry to come to the United Kingdom. She was put in a bin bag where she nearly suffocated. When the lorry stopped, two men travelling with her ran off. She jumped off the lorry, but was stopped by the police. She was interviewed at a police station, but was too scared to say anything. She gave a false name and false date of birth, as she had been instructed to do. She was released the next day and left on the streets, but felt that she had no choice but to stay with the two men who had been arrested and released with her. The men took her to a house where she was forced to have sex with them and with another Vietnamese man. She stayed at this house for approximately a year. When the men went out, she was locked in.
33. After about a year she was permitted to contact her family with a mobile phone, but only under supervision. She was so ashamed that she did not want to tell her family what she had been through. The only time she was allowed to leave the house was when she was taken to different houses to clean and look after children for Vietnamese families.
34. At the end of 2012, the applicant was taken to a brothel and was kept there for approximately three months. She was forced to have sex several times a day. Again she was told that if she tried to escape, she would be killed. However, she did try to escape, trying doors and windows whenever she got the chance. One day, at the time of Chinese New Year, the back door to the basement where the applicant was being kept was left unlocked and, when she discovered this, she decided to take the risk of escaping as she could no longer cope with living in the way she was forced to. She found a police officer, who took her to a Vietnamese family, who gave her a room for the night.
35. Having been taken in by this Vietnamese family, the applicant met Tran, who came from the same part of Vietnam. Initially they spoke on the telephone, but eventually she met Tran in Birmingham. After a while they started a consensual sexual relationship. Tran would ask her if she was working and, when she said that she was not, offered her a job cleaning at his house and looking after some plants. She was told that she would be paid £200 at the end of the week, and did not ask questions. Tran's friend picked her up and took her to the house. She arrived on a Sunday evening and was arrested on the following Friday, Tran having arrived in the meanwhile.
36. When she was arrested, the applicant had a key to the house in her bag, together with £250. She said that Tran had told her to put the house key in her bag and that he had given her £100 of the money which she had, the rest being money she had saved. She said that Tran had told her to plead guilty in order to get a shorter sentence.

The psychological report

37. In May 2015, while the applicant was in immigration detention, a Rule 35 Report by Dr Rebecca Ward concluded that the applicant might be a victim of trafficking and that she demonstrated expressive language difficulties, comprehension difficulties, PTSD and associated memory problems. She was seen by Dr Laura Kemmis, a clinical psychologist, who diagnosed her as suffering from PTSD and Major Depressive Disorder, which would have significantly impacted upon her ability to understand and give a comprehensive account in her asylum interview.

The conclusive grounds decision

38. When the applicant made her asylum claim the Home Office did not accept that she was a victim of trafficking. On 8th May 2015 a negative reasonable grounds decision was issued and her asylum claim was refused. The applicant appealed to the First tier Tribunal and a hearing was held on 30th January 2017. As a result of psychological evidence it was decided that the applicant would not give oral evidence. Instead she relied on a written statement to the effect summarised above.
39. The First tier Tribunal allowed the appeal, finding the applicant to be a refugee and also allowing her appeal under Article 3 ECHR. Her appeal against deportation was also allowed. The Tribunal Judge observed that there was a very solid body of medical evidence and no evidence to suggest that her cognitive problems resulted from anything other than severe PTSD. The First tier decision was unsuccessfully appealed to the Upper Tribunal, but the Upper Tribunal's decision of 8th March 2018 was set aside by the Court of Appeal on 2nd January 2019 and remitted to the Upper Tribunal. On 5th August 2020 the Official Solicitor was appointed as the applicant's litigation friend. Eventually, on 3rd September 2020, the decision of the First tier Tribunal was confirmed.
40. Meanwhile the Home Office determined that the applicant was a victim of trafficking. She received a positive reasonable grounds decision on 3rd March 2018 and a conclusive grounds decision on 3rd September 2018. On 9th October 2019 she was granted five years' limited leave to remain.

The application for an extension of time

41. With some hesitation, we are prepared to grant the necessary extension of time, despite the length of time involved. It is understandable that this application could not be made until after the positive conclusive grounds decision made in September 2018, at which time the immigration and asylum proceedings were still continuing. The applicant's current solicitors were not instructed until May 2020, after which there was much work to be done and matters proceeded with reasonable dispatch, but it is not altogether apparent why this application could not have been made earlier. Nevertheless, having regard to the issues involved, we are persuaded that it is in the interests of justice to grant the necessary extension of time.

The application to adduce new evidence

42. The applicant seeks to adduce new evidence on appeal, namely:
- (1) the applicant's statements dated 27th January and 2nd August 2016;
 - (2) documents leading up to and including the 2018 positive conclusive grounds decision;
 - (3) the judgments of the First tier and Upper Tribunal; and
 - (4) the applicant's medical records and psychological report.
43. The criteria for the admission of new evidence on appeal are set out in section 23 of the Criminal Appeal Act 1968. The test is whether it is necessary or expedient in the interests of justice to receive such evidence. In considering that evidence it is necessary to have regard to whether the evidence appears to be capable of belief, whether it

appears that it may afford any ground for allowing the appeal, whether it would have been admissible in the proceedings below, and whether there is a reasonable explanation for the failure to adduce the evidence below. In the context of trafficking cases, it is established that a conclusive grounds decision is admissible on appeal (always assuming that it is necessary or expedient to receive such evidence) notwithstanding that such a decision would not be admissible at trial (see *R v Breconi* [2021] EWCA Crim 731, [2021] 1 WLR 5851, and *AAD* at [79] to [82] and cases there cited).

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

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

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

46. In the present case we are satisfied that it is necessary to admit the new evidence. Understandably, the prosecution has not sought to cross examine the applicant on the account given in her latest statements as summarised above. The prosecution does not necessarily accept all of what is said, but broadly speaking the statements appear to be capable of belief. They tell a story which, although horrifying, is sadly all too familiar.

Submissions

47. Mr Benjamin Newton for the applicant submitted that there was a failure by the police and CPS to consider whether the applicant was a victim of trafficking and that, if the prosecution had been aware of the applicant’s full history, it is inevitable that she would not have been prosecuted; or, if she had been, the judge would have been obliged to stay the proceedings as an abuse of process. He submitted, adopting the formulation in *GS* at [78], that this was a case where either (1) the dominant force of compulsion was sufficient to reduce the applicant’s culpability to a point where it was not in the public interest for her to be prosecuted, or (2) she would or might well not have been prosecuted in the public interest. Accordingly her conviction is unsafe.

48. Mr Newton relied in particular on the applicant’s account in interview and in the *Newton* hearing to the effect that she had been taken to the cannabis factory by “the boss of the boat” and that she had been told that the £200 per week which she would be paid would be used to pay off her debt. He submitted that this demonstrated that the applicant was still acting under compulsion and was still in debt bondage and under the control of her traffickers. But, recognising that this was not the account given in the applicant’s 2016 statements made for the purpose of her asylum claim, he submitted also that it would not have been in the public interest to prosecute the applicant as there was in any event a sufficient nexus between the conduct which constituted the offence and the trafficking and exploitation to which she had been subjected.

49. Mr Andrew Johnson for the prosecution submitted that the conviction is safe. The prosecution did not seek to challenge the finding that the applicant was trafficked, but

submitted (also echoing *GS* at [78]) that her account does not reveal “a nexus of compulsion such that culpability for the offending was effectively extinguished or substantially diminished to the point that she should not have been prosecuted”. On her account, there was no nexus between her trafficking and her offending. Mr Johnson pointed out that this case is unusual because the applicant’s account had been tested and rejected in the *Newton* hearing. There was no reason to doubt the findings of the judge in the Crown Court which, on the issue of compulsion, were not affected by any of the later evidence.

Victim of trafficking

50. We accept, having considered the applicant’s evidence for ourselves and following the approach described in *AAJ* at [39] and approved in *AAD* at [83] of respecting the decision of the competent authority unless there is reason not to do so, that the applicant is more likely than not to be a victim of trafficking. That, however, is only the first step.

Acting under compulsion

51. It remains to consider whether or to what extent the applicant was acting under compulsion when she carried out the conduct which constituted the offence of being concerned in the production of cannabis and, if so, whether there was a sufficient nexus between that conduct and the slavery or exploitation to which she had been subjected.
52. We consider first the applicant’s account given in the course of the criminal proceedings. It is true that she referred to being in debt and to being offered the opportunity to earn money to pay off her debt, but she also said that she had not been threatened. She referred to “the boss of the boat”, but she also described him as a friend. She accepted that she was not controlled by Tran, and that a key to the house had been found in her bag. This evidence contained some indications (principally continuing debt bondage to her original traffickers) that the applicant was a victim of trafficking acting under compulsion, but falls somewhat short of showing that she was acting under compulsion as a direct consequence of having been a victim of slavery or relevant exploitation. It is of some note, moreover, that the applicant’s account was not accepted by the judge. That has been a troubling feature of this case, but we also bear in mind that the judge did not have anything like the full account of the applicant’s circumstances which we now have and that issues of trafficking and abuse of process were not raised before him, the question being how the applicant’s role should be characterised for the purpose of the sentencing guidelines.
53. Turning to the applicant’s later evidence in her 2016 statements, there is no evidence there that she was acting under compulsion. On the basis of that account, this appears to have been a period in her life when she was not under the control of the traffickers who had brought her to this country and forced her to work in a brothel. Rather, she had managed to escape and was in a consensual relationship with her boyfriend, Tran. She went willingly with him to the house in Poole, which turned out to be a cannabis factory. She was not physically abused, threatened or compelled to stay there. She cleaned the house and looked after the plants essentially as a favour to her boyfriend and in order to earn some money. Mr Newton submitted that it was not surprising that there is no mention in the statements of acting under compulsion or of “the boss of the boat”, as these statements were prepared for a different purpose, namely the applicant’s asylum claim. We cannot accept this. Such matters would have been highly relevant.

54. Considering the evidence now before us as a whole, we conclude that if the Modern Slavery Act 2015 had applied, the applicant would have been unable to make good (or strictly, the prosecution would have been able to disprove) any defence under section 45. On the facts of this case, that defence would not have been available unless the applicant was acting under compulsion which was (in the terms of subsection (3)(b)) “a direct consequence” of having been a victim of slavery or relevant exploitation. That was not the position here. It appears that the applicant was tricked and exploited by her boyfriend Tran, but there was not a direct causal nexus between the fact that she had previously been a victim of slavery and exploitation and the commission of the offence. The fact that the Act would not have afforded the applicant a defence is not necessarily critical, because the Act did not apply, but it is in our judgment a relevant consideration when applying the criteria for an abuse of process argument.

Abuse of process

55. Accordingly the question whether it would have been in the public interest to prosecute the applicant if what is now known had been known at the time must be approached on the basis that, if the applicant were to be prosecuted, she would in all probability be convicted as her offending was not directly attributable to her previous abuse, albeit that (as the judge found) she was subject to “some degree of pressure” when looking after the cannabis plants.
56. In the present case it appears that the question whether the applicant was a victim of trafficking and, if so, how that affected the further question whether it was in the public interest to prosecute her for this offence, was not considered. If it was considered at all, there was no referral to the Home Office under the national referral mechanism and any consideration was without the benefit of what is now known about the applicant’s history, the abuse to which she had been subjected and the effect which it had on her. Accordingly it is open to this court to consider the public interest question without trespassing on ground which has been appropriately considered by the prosecution authorities.
57. Even though the applicant’s position as a victim of trafficking, including the sexual slavery and physical violence to which she had been subjected over a period of years, would not have afforded her a substantive defence, it was a highly relevant consideration. This was a woman who had been subjected to horrific abuse over a period of years, who was severely traumatised by her experiences, and who was suffering from PTSD and Major Depressive Disorder. Inevitably she was extremely vulnerable to further exploitation and that vulnerability had been exploited. She spoke no English and was therefore isolated, with limited if any realistic options for seeking help. Her family was still vulnerable to the threats of their creditors in Vietnam and her debts had not gone away. In these circumstances if the question of compulsion is considered “in the broad sense” (see *N* at [12], referred to at [7] above), the conclusion that there was “a reasonable nexus” (*GS* at [76], referred to at [9] above) between the crime and the trafficking is almost inevitable. This goes a considerable way to diminish, if not to extinguish, the applicant’s culpability.
58. The offence, being concerned in the production of cannabis, was a serious matter and this was production on a large scale, but the applicant had played only a limited role, and for a short time. She had no previous convictions and there was no evidence of any previous unlawful activity.

59. Whether it would have been in the public interest to prosecute this defendant for this particular offence if the full circumstances had been known is inevitably a fact sensitive question. It needs to be approached, as Lord Judge said in *L(C)*, “with the greatest sensitivity”. On the facts here, we conclude that it would or might well have been concluded that prosecution was not in the public interest.

Conclusion

60. Accordingly, applying the principles which we have described, the applicant’s conviction is unsafe. We grant leave to appeal and allow the appeal. The conviction is quashed.