

Court of Appeal Guidance on Victims of Trafficking

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Ben Douglas-Jones QC and Andrew Johnson appeared for the Crown in *R v AAD, AAH and AAI* [2022] EWCA Crim 106

In this important case concerning victims of human trafficking who commit criminal offences, the Vice-President of the Court of Appeal (Criminal Division) has given guidance on a number of topics:

Anonymity in appeals against convictions of alleged victims of trafficking who commit criminal acts is to be decided as per Hallett LJ's approach in *R v L*; *R v N* [2017] EWCA Crim 2129; i.e. in principle, it is 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, bearing in mind (1) the United Kingdom's international obligations and aim to safeguard the human rights of victims, to avoid further victimisation and to encourage them to

act as witnesses in criminal proceedings; but also (2) other important issues, such as the principle of open justice in criminal trials and appeals, and that anonymity orders should only be granted when they are strictly necessary.

The Registrar invited the Court to give guidance. It proceeded to do so as follows:

1. Single competent authority conclusive grounds decisions (which are not admissible in Magistrates' Courts or the Crown Court following *R v Breani* [2021] EWCA Crim 731 may potentially be "adduced" on an application for leave or an appeal in the CACD. The context and issues will determine whether they should be received in evidence.
2. *Breani* is consistent with previous authority of the CACD.
3. *Breani* is consistent with the UK's international obligations and European case law with regard to the protection of victims of trafficking.
4. As to the admissibility of expert evidence on the question of trafficking and exploitation at trial:
 - (1) 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. Jurors will be well placed to form their own conclusions without expert evidence.
 - (2) Evidence is inadmissible to show whether a given set of facts meets the legal definition of trafficking.
5. On appeal it may be necessary to hear oral evidence, including from the applicant/appellant to substantiate, for instance, the history relied on if the suggested trafficking is based, for instance, on unsatisfactory and untested hearsay evidence from the appellant so that his/her account may be appropriately tested. The Court may order the production of any relevant documents, including reports such as a conclusive grounds decision. This will be a highly fact-specific judgment.
6. If the parties are not agreed on whether there is to be oral evidence, this should be referred to the Criminal Appeal Office so that the Vice- President or presiding Lord Justice can give appropriate directions.
7. The residual jurisdiction of abuse of process (in practice only to be exercised in very limited circumstances) survives the introduction of the Modern Slavery Act 2015. The Court was "rather puzzled" by the judgment of the Lord Chief Justice in *DS* [2020] EWCA Crim 285; [2021] 1 WLR 303. It found *A* [2020] EWCA Crim 1408 to be obiter. The Court was not bound by those decisions but would depart from those decisions in any event in light of *VCL* and *AN v UK* [77587/12 and 74603/12]. The Court proceeded to hold: "if the CPS guidance in a [victim of trafficking] case is not properly applied it will not comply with its legal obligations ... 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.”

8. The definition of “compulsion” in VSJ [2017] EWCA Crim 36 at [21] and section 45 Modern Slavery Act 2015 was not too narrow and it was not appropriate to adopt a “causation” based approach, rather than a “compulsion” based approach.

9. A victim of trafficking may appeal against a conviction following a guilty plea in the narrow circumstances set out in R v Tredget [2022] EWCA Crim [to be handed down on 7 February].