Neutral Citation Number: [2013] EWCA Crim 991

Case No: (1) 2012/01106; (2) 2012/04425; (3) 2012/04763; 2012/04966

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM (1) BLACKFRIARS CC; (2) NOTTINGHAM CC; (3) BRISTOL CC; (4) HARROW CC.
(1) HHJ MARRON; (2) HHJ MILMO; (3) HHJ ROACH; (4) HHJ DANGOR
(1) T2011/07118 (2) T2012/0252; T2011/0812; T2009.0438

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2013

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE MOSES
and
MRS JUSTICE THIRLWALL

- -

Between :

(1) L **(2) HVN** **(3) THN** **(4) T**	**Appellant**
- and -	
R	**Respondent**
(1) THE CHILDREN'S COMMISSIONER FOR ENGLAND **(2) EQUALITY AND HUMAN RIGHTS COMMISSION**	**Interveners**

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- -

Miss P Chandran for the **Defendant L**
J Beck for the **Defendant HVN**
H Blaxland QC and Michelle Brewer for the **Defendant THN**
Miss P Chandran for the **Defendant T**
T Owen QC and B Douglas-Jones for the **Crown**
Miss N Finch for **The Children's Commissioner for England**
S Knafler QC and SS Luh for the **Equality and Human Rights Commission**

Hearing dates: 21-23 May 2013

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Approved Judgment

The Lord Chief Justice of England and Wales:

We have all contributed to this judgment of the court.

1. In these appeals we are dealing with the problems raised by four otherwise unconnected cases in which three children and one adult who were trafficked by criminals for their own purposes have been prosecuted and convicted. Unfortunately the criminals who trafficked them have escaped justice.

2. This vile trade in people has different manifestations. Women and children, usually girls, are trafficked into prostitution: others, usually teenage boys, but sometimes young adults, are trafficked into cannabis farming: yet others are trafficked to commit a wide range of further offences. Sometimes they are trafficked into this country from the other side of the world: sometimes they enter into this country unlawfully, and are trafficked after their arrival: sometimes they are trafficked within the towns or cities in this country where they live. Whether trafficked from home or overseas, they are all victims of crime. That is how they must be treated and, in the vast majority of cases they are: but not always. For convenience in this judgment we shall refer to the victim as he or him, although as we have made clear, women and girls as well as men and boys are the victims of trafficking.

3. We understand that the Director of Public Prosecutions is shortly to reconsider his present guidance on the exercise of the prosecutorial discretion in relation to victims of trafficking. The form to be taken by prosecutorial guidance is ultimately his responsibility. Despite suggestions in the submissions to the contrary, the court cannot become involved either in the investigation of the case or the prosecutorial decision whether it is in the public interest for the prosecution to proceed. Nevertheless we propose to offer guidance to courts (not, we emphasise, to the Director of Public Prosecutions) about how the interests of those who are or may be victims of human trafficking, and in particular child victims, who become enmeshed in criminal activities in consequence, should be approached after criminal proceedings against them have begun.

4. Beyond the individual and specific circumstances involved in each of these separate appeals (which were heard together) we have sought assistance on the broader issues to which the appeals give rise. We have examined the decisions of this court in *R v M(L), B(M) and G(D)* [2011] 1 Cr. App. R 12 and *R v N; R v L* [2013] QB 379 in the light of EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, (the EU Directive) which came into effect on 6 April 2013.

5. Recital 8 of the EU Directive underlines:

> "Children are more vulnerable than adults and therefore at greater risk of becoming victims of trafficking in human beings. In the application of this Directive, the child's best interest must be of primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the 1989 United Nations Convention on the Rights of the Child".

6. Recital 14 provides:

> "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 … 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. The safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in."

7. Article 8 makes provision for the non-prosecution or the non-application of penalties to the victim so that:

> "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 human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to (trafficking)".

8. This provision echoes Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings (the Anti-Trafficking Convention) which requires the United Kingdom:

> "In accordance with the basic principles of its legal system, [to] provide for the possibility of not imposing penalties on victims [of trafficking] for their involvement in unlawful activities, to the extent that they have been compelled to do so".

9. These provisions recognise that different Member States have different legal systems for providing the necessary protection for victims of trafficking, and that this may take the form of non-prosecution or the imposition after prosecution and conviction of what in this jurisdiction would be described as a discharge. Whether absolute or conditional, this order does not constitute a penalty. If it arises, it is the end of the process. That issue, however, is not the problem to which the present appeals give rise: we are concerned with the prosecution and conviction of the appellants rather than the sentences imposed after conviction.

10. We have had the advantage of detailed written submissions not only from counsel for the appellants and the prosecution, but also from the Children's Commissioner for England and the Equality and Human Rights Commission. For understandable forensic reasons we have been provided with a multiplicity of reports and papers, protocols and conventions in which, using different language to the same effect, the evils of trafficking, and in particular the evils of trafficking and exploiting children, are simultaneously highlighted and condemned. We shall not repeat them in this judgment, but a complete list of this material is annexed to it. In reality, despite

lengthy repetition, the principles to be applied are not complicated, and we shall endeavour to encapsulate them in this judgment. Henceforth it will rarely be necessary for them, or even a substantial proportion of them, to be copied and repeated in proceedings where these and similar issues arise.

11. The abuse to which victims of trafficking are exposed takes many different forms. At some levels it may amount to "slavery", or not far distant from "slavery", "servitude", or "forced or compulsory labour". Activities of this kind are prohibited by Article 4 of the European Convention of Human Rights, and were criminalised in this jurisdiction by the Asylum and Immigration (Treatment of Claimants) Act 2004, the Gang Masters' Licensing Act 2004, and s.71 of the Coroners and Justice Act 2009. With effect from 6 April 2013 two further offences of trafficking people set out in ss.109 and 110 of the Protection of Freedoms Act 2012 have been brought into force. The first of these offences substitutes a new s.59A in the Sexual Offences Act 2003, directed at covering the trafficking of individuals within and outside the United Kingdom with a view to sexual exploitation, and the second substitutes a new s.4(1A) into the Asylum and Immigration (Treatment of Claimants etc) Act 2004 an offence to cover trafficking within and outside the United Kingdom with a view to exploitation, largely directed at exploitation through labour.

12. We need not further expound the principles. They can be readily found in *Siliadin v France* (Application No 73316/01, 26 October 2004); *Rantsev v Cyprus and Russia* (Application No 25965/05, 10 January 2010); and *R v K(S)* [2013] QB 82 and *R v Connors* [2013] EWCA Crim. 324 where, in effect repeating what had just been said in *R v N; R v L* [2013] QB 379 at paras [2]-[6], the court observed:

> "Every vulnerable victim of exploitation will be protected by the criminal law, … there is no victim, so vulnerable to exploitation, that he or she somehow becomes invisible or unknown to or somehow beyond the protection of the law. Exploitation of fellow human beings … represents deliberate degrading of a fellow human being or human beings".

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.

14. In the context of a prosecution of a defendant aged under 18 years of age, the best interests of the victim are not and cannot be the only relevant consideration, but they represent a primary consideration. These defendants are not safeguarded from prosecution or punishment for offences which were unconnected with the fact that they were being or have been trafficked, although we do not overlook that the fact that they have been trafficked may sometimes provide substantial mitigation. What, however, is required in the context of the prosecutorial decision to proceed is a level of protection from prosecution or punishment for trafficked victims who have been compelled to commit criminal offences. These arrangements should follow the "basic principles" of our legal system. In this jurisdiction that protection is provided by the exercise by the "abuse of process" jurisdiction.

15. It was submitted, particularly, on behalf of L and T, that the courts' obligation to safeguard a trafficked victim's rights was independent of any review of the prosecutor's decision to bring or continue a prosecution. It was argued that the court should afford the protection required by the Directive and Convention by exercising what was described as a "primary role". The submission was based on the Supreme Court's consideration of the need to ensure that confiscation orders are proportionate in order to safeguard a defendant's rights under A1P1 of the ECHR in *R v Waya* [2012] UKSC 51, [2013] 1 AC 294:

> "But the safeguard of the defendant's Convention right under A1P1 not to be the object of a disproportionate order does not, and must not, depend on prosecutorial discretion, nor on the very limited jurisdiction of the High Court to review the exercise of such discretion by way of judicial review" [19].

16. *Waya* is not analogous. In that case the Supreme Court was seeking to ensure that the order of the court adequately protected the rights of a defendant against whom an order of confiscation was sought. The court is the primary decision-maker as to whether a confiscation order should be made. In contrast, the prosecution is and remains responsible for deciding whether to prosecute or not. 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 rights of a victim of trafficking by overseeing the decision of the prosecutor and refusing 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 a party. The role of the court replicates its role in relation to *agents provocateurs.* It stands between the prosecution and the victim of trafficking where the crimes are committed as an aspect of the victim's exploitation (see *R v Loosely A-G's Ref (No.3 of 2000)* [2001] UKHL, [2002] 1 Cr.App.R.29).

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 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.

18. If issues relating to the age of the victim arise, and questions whether the defendant is or was a victim of trafficking, or whether the alleged offences were an aspect of the victim's exploitation, have reached the Crown Court, or a magistrates court, they must be resolved by the exercise of the jurisdiction to stay a prosecution. In accordance with the process endorsed in *M(L)*(15-19) and *N;L*(86) that remains the correct procedure for determining such issues even after the EU Directive 2011/36/EU became directly effective. This provides sufficient vindication for the rights enshrined in the EU Directive as well as the Anti-Trafficking Convention, and indeed in Articles 4, 6 and 8 of the European Convention of Human Rights. In short *Waya* did not provide an additional remedy to the well understood abuse of process remedies or widen the judicial review procedures to encompass situations where a clear remedy is available at or before the criminal trial.

The evidential issues

19. The question whether a potential defendant has indeed been a victim of trafficking, and the extent to which his ability to resist involvement in criminal activities has been undermined is fact specific. Usually, but not always, the starting point is the moment of arrest. When a young person is arrested the police must consider his age, and in the overwhelming majority of cases it is known or can readily be discovered. Arrangements are then made for attendance at a police station by an appropriate adult. After charge the child is brought before the Youth Court or before an Adult Court if no Youth Court is sitting. Difficulties relating to age are most likely to arise where a young person has entered the United Kingdom illegally, and has no genuine passport or similar identifying documents. When a young person without parents comes to the attention of a local authority (often via the United Kingdom Border Agency (UKBA) as an illegal entrant), the Children Act 1989 imposes a duty on the local authority to determine whether he is a child in need. If so, he is entitled to number of services, including the provision of accommodation. However the first step is to establish the person's age. Since 2003 local authorities have assessed age by a process which complies with the principles set out in *R(B) v London Borough of Merton* [2003] EWHC 1689 (Admin). In the case of HVN an age assessment was carried out on the day of arrest and the fact that HVN was a child was established by the time he made his first appearance in court.

20. When the defendant may be a child victim of trafficking, two linked questions must be addressed. First, the defendant's age must be ascertained, and second, the evidence which suggests that he has been trafficked must be assessed. In the vast majority of cases the questions will be investigated by and in the same processes. Assuming that the factual conclusion is that the defendant was a child victim of trafficking, a quite distinct question for consideration is the extent to which the crime alleged against him was consequent on and integral to the exploitation of which he was the victim. That question also arises in the case of an adult victim. In some cases (as in these appeals) the answer to both questions will be that the criminal offence is here, or at least, a manifestation of the exploitation.

21. In a variety of different ways the administration of criminal justice recognises that provisions which relate to adults may have no appropriate application to cases involving individuals under 18 years of age. These are summarised in *R (HC, a child) v Secretary of State for the Home* Department [2013] EWHC 982 (Admin) paras 31-43. Self evidently we are not here dealing with children who are below the statutory age of criminal responsibility. Where questions about the age of a potential defendant arise after the case has been brought to court, the decision whether the defendant is or is not under 18 years old, or was or was not under that age for any relevant purpose, is addressed in statute. The Children's Commissioner has suggested that a thorough, multi-disciplinary approach should be taken to the assessment of the defendant's age, and she has expressed concern that there are too many occasions when the "due inquiry" into the age of the defendant who appears to be a child or young person, as required by s.99(1) of the Children and Young Persons' Act 1933, is overlooked. This provision directs the court to "make due inquiry" about the defendant's age, and "take such evidence as may be forthcoming at the hearing of the case" for this purpose. Similar provisions require the court addressing the age question to consider "any available evidence". (S.150 of the Magistrates Court Act 1980; S.1(6) of the Criminal Justice Act 1982; and S.305(2) of the Criminal Justice Act 2003).

22. When the issue arises, we agree that compliance with these provisions in contemporary society requires much more than superficial observation of the defendant in court or in the dock to enable the judge to make an appropriate age assessment. The facial features of the defendant may provide a clue or two, but experience has shown that this is very soft evidence indeed and liable to mislead. What we do know is that young people mature at different ages, and that their early life experiences can sometimes leave them with a misleading appearance. We also appreciate that young people from an ethnic group with which the court is unfamiliar may seem older, or indeed younger, than those from ethnic groups with which the court has greater experience. Therefore when an age issue arises, the court must be provided with all the relevant evidence which bears on it. Although the court may adjourn proceedings for further investigations to be conducted, these have to be undertaken by one or other or both sides, or by the relevant social services. The court is not vested with any jurisdiction, and is not provided with the resources to conduct its own investigations into the age of a potential defendant until after the investigation has completed its course, and the individual in question is brought before the court.

23. In this context we repeat the observations of this court in *R v Steed* [1990] 12 Cr. App. R(S) 230, where the question of the appellant's age was significant to the different methods of the disposal of the case on sentence, and therefore went to the legality of the sentence,

> "It may often be right, indeed might usually be right, for the matter to be adjourned, if there is any real doubt about it, so that it may be more satisfactorily determined".

More recently, this approach was underlined in *R v O* [2008] EWCA Crim. 2835 where the court emphasised that:

> "(W)here there is doubt about the age of a defendant who is a possible victim of trafficking, proper enquiries must be made, indeed statute so required."

24. The Children's Commissioner invites us to consider the impact of Article 10(3) of the Anti-Trafficking Convention which provides:

> "When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall presume to be a child and shall be accorded special protection measures pending verification of his/her age".

25. The explanatory report to the Anti-Trafficking Convention also refers to a requirement that the parties should "presume that a victim is a child if there are reasons for believing that to be so and if there is uncertainty about their age." In our judgment Article 10(3) addresses evidential issues. Where there are reasons to believe that the defendant is a child, then he should be treated as a child. In other words it is not possible for the court to brush aside evidence which suggest that the defendant may be a child. The issue must be addressed head on. If at the end of an examination of the available evidence, the question remains in doubt, the presumption applies and the defendant must be treated as a child. There is therefore no relevant difference between the approach required by Article 10(3) of the Anti-Trafficking Convention and the Guidance provided by the Director of Public Prosecutions.

26. The National Referral Mechanism (NRM) was set up on 1 April 2009 to give effect in the United Kingdom to Article 10 of the Council of Europe Anti-Trafficking Convention. Enough is now known about people who are trafficked into and within the United Kingdom for all those involved in the criminal justice process to recognise the need to consider at an early stage whether the defendant (child or adult) is in fact a victim of trafficking. The NRM establishes a three stage process for this purpose:

i) An initial referral of a potential victim of trafficking by a first responder to a competent authority. At present there are two competent authorities. They are UKBA and the United Kingdom Human Trafficking Centre (UKHTC), a multi disciplinary organisation led by SOCA (The Serious and Organised Crime Agency). In the present appeals we are concerned only with UKBA because the potentially trafficked individual were subject to immigration control. We note that where the potential victim of trafficking is a child his consent is not necessary before the referral is made, but where he is an adult consent is required.

ii) An UKBA official decides whether the person referred might have been a victim of trafficking. This is known as a "reasonable grounds" decision, for which UKBA have a target of five days. We are told that the average time is nine days. If and when a favourable reasonable grounds decision has been made the first responder is notified, and, in effect that decision allows for a period of forty five days during which the final stage of the NRM process continues, leading to

iii) consideration by UKBA whether the evidence is sufficient to confirm conclusively that the individual has been trafficked.

27. We were informed that the median time now taken for this third stage to be concluded is not short of three months. The delay is unfortunate, but any decision on the trafficking question adverse to the defendant in whose favour a reasonable grounds

decision has already been made, but before the third stage in the process has been completed is liable to be flawed.

28. Neither the appellants nor the interveners accept that the conclusive decision of UKBA (or whichever department becomes a competent authority for these purposes) is determinative of the question whether or not an individual has been trafficked. They, of course, are concerned with the impact of a decision adverse to the individual. We are asked to note that the number of concluded decisions in favour of victims of trafficking is relatively low, and it seems unlikely that a prosecutor will challenge or seem to disregard a concluded decision that an individual has been trafficked, but that possibility may arise. 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.

29. In the final analysis all the relevant evidence bearing on the issue of age, trafficking, exploitation and culpability must be addressed. The Crown is under an obligation to disclose all the material bearing on this issue which is available to it. The defendant is not so obliged, but if any such material exists, it would be remarkably foolish for the investigating authority to be deprived of it. Without any obligation to refer the case to any of the different organisations or experts specialising in this field for their assessments or observations, the court may adjourn as appropriate, for further information on the subject, and indeed may require the assistance of various authorities, such as UKBA, which deal in these issues. However that may be, the ultimate responsibility cannot be abdicated by the court.

30. What these appeals have revealed is that the issue of age in cases involving trafficked victims tends to attract less focus from those who act for the defendant rather than the Crown Prosecution Service which, on the whole appears to pursue the issues relating to age assessment with a measure of determination. Our view is that the professions are less well informed about the importance of these issues in the context of those who are or may be trafficked youngsters than perhaps they should be. Their importance is obvious and underlined by the outcome in each of the present appeals.

31. We suggest that where any issue arises, it should be addressed head on at the first appearance before the court, and that the documentation accompanying the defendant to court should record his date of birth, whether as asserted by him, or as best known to the prosecution, or indeed both. Alternatively, the issues should be raised at the plea and case management hearing and appropriate adaptations should be made to the relevant forms to ensure that potential problems on this question are not overlooked.

32. Indeed it is clear that abundant guidance is available to the various public bodies who may be involved with young people who have been subjected to trafficking, all consistent with our general approach. In particular, such guidance is provided to the Crown Prosecution Service, the Police, and to Social Workers. There is significant co-operation and sharing of information throughout the United Kingdom. Thus, for example, we have read the Guidance provided by the Association of Chief Police Officers to officers investigating offences involving the commercial cultivation of cannabis where children are found on the relevant premises. The availability of detailed informed guidance reinforces the seriousness with which the issue of

trafficking is being taken by the many different authorities into whose responsibility child victims of trafficking may come, long before the court processes begin. No doubt it will be at the heart of the fresh guidance to be issued by the Director of Public Prosecutions.

33. 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. That is the test we have applied in these appeals. In other cases, more likely in the case of a defendant who is no longer a child, culpability may be diminished but nevertheless be significant. For these individuals prosecution may well be appropriate, with due allowance to be made in the sentencing decision for their diminished culpability. In yet other cases, the fact that the defendant was a victim of trafficking will provide no more than a colourable excuse for criminality which is unconnected to and does not arise from their victimisation. In such cases an abuse of process submission would fail.

These appeals

34. The decisions reached in the present appeals are fact specific decisions. In order to ascertain the facts we have admitted as fresh evidence under s.23 of the Criminal Appeal Act 1968 a considerable body of evidence which, for different reasons, was not available to the trial court but which it would be unjust for this court to ignore. Our approach does however provide some broad guidance about the kind of case in which, following a proper investigation of the facts, a prosecution would have been unlikely, and if undertaken, would have culminated in a successful abuse of process argument. What they do, however, underline, is that the investigating and prosecuting authorities, the legal professions, and the courts must be alert to the potential difficulties to which cases involving victims of trafficking can give rise.

R v THN

35. THN was born on 9 September 1994. On 31 January 2012 in the Crown Court at Bristol he pleaded guilty to producing a controlled drug, of class B and was sentenced to a Detention and Training Order for 12 months. He was released on 29 June 2012.

36. The appellant had been removed from the United Kingdom in June 2009 after making two attempts to enter illegally. On 1 September 2011 he was found in a house in Bristol in which a very large quantity of cannabis was being cultivated. He was arrested. He said that he had returned to the United Kingdom in December 2010. He told the arresting officers that he was relieved to see them. He was interviewed in the presence of his solicitor, and an interpreter, and an appropriate adult. He said that he was nearly 17 years old. A prepared statement was produced which indicated that he had been brought into England in a freezer container. He owed money in Vietnam and the deeds to his parents' home had been taken as collateral.

37. On 2 September, at Bristol Youth Court, the CPS indicated that they had referred the case to Bristol City Council for age assessment. On 7 September the police, acting as First Responders, referred THN to the UKBA. So far, so good.

38. On 7 October, it was concluded by those responsible for a full age assessment that the date of birth given to the police by the appellant was correct. He was indeed nearly 17 when he was arrested. He had given the police a different account of the reasons and circumstances behind his departure from Vietnam. He appeared in the Youth Court on 7 and 9 October, where the court concluded that the crime was too grave to be dealt with in the Youth Court.

39. On 18 October the appellant's solicitors wrote to the CPS inviting them not to prosecute THN on the basis that to do so would contravene the CPS Guidance relating to the prosecution of victims of trafficking. By coincidence on 19 October UKBA gave a negative decision at the "reasonable grounds" stage.

40. Two days later the case was committed to the Crown Court, and at the PCMH hearings on 18 November and 9 December the case was adjourned for further enquiries into the appellant's allegation that he was the victim of trafficking, an assertion which was repeated as part of the defence statement.

41. In December counsel for the appellant indicated that there would be an application to stay the indictment as an abuse of process, and the CPS was invited to reconsider the way in which the public interest test had been applied. The CPS responded that the application would be opposed.

42. On 31 January 2012 the case was listed for plea. No abuse of process application was pursued. The appellant pleaded guilty and was sentenced accordingly.

43. While in custody the appellant met the Children's Commissioner. The NSPCC made a further referral to the Competent Authority. On 28 June a positive reasonable grounds decision was made by UKBA. On the following day, on his release from the sentence, the appellant was put into the care of the local authority. He was there assessed as a child in need. On 10 July he went missing. It is believed that he had been re-trafficked. By then he had waived privilege and instructions had been taken from him, and the appeal to this court was pursued in his absence on the basis of those instructions.

44. Until shortly before the hearing of the appeal, the application for permission to appeal was opposed. The respondent's notice listed a number of features of the appellant's case which was said to point away from the conclusion that he had been the victim of trafficking. The Crown also opposed the application to adduce further evidence which included a report on errors made by the UKBA during an initial assessment in 2009 before the appellant's first removal from the United Kingdom in June 2009. The new report contains a constructive account of the operation of debt bondage within Vietnam, and identifies a number of errors in the approach of UKBA when its first decision was adverse to the appellant.

45. In the light of this material the Crown reconsidered its position. Following the reanalysis the Crown accepted that had the evidence which was now available been available at the time when the original decision to prosecute the appellant was made,

on the basis of the public interest test in the context of trafficked children, there would have been no prosecution. Mr Tim Owen QC therefore accepted that he would not seek to support the safety of the convictions. We agree that there is now powerful evidence that the appellant was a trafficked child and that his criminal activities were integral to the circumstances in which he was a victim. On the basis of the evidence now available, if the appellant had been prosecuted, an abuse of process argument would have been likely to succeed. Accordingly this conviction will be quashed.

R v T

46. On 14 April 2010, following his conviction after a retrial at the Crown Court at Harrow, T was sentenced to two years detention in a Young Offenders' Institution for the offence of cultivating cannabis, contrary to s.6(2) of the Misuse of Drugs Act 1971. 305 days spent on remand were directed to count towards sentence.

47. The evidence suggested that T had entered the United Kingdom illegally in 2007. He was arrested and placed in the care of Kent County Council, which treated him as a child in need and provided him with accommodation. Unfortunately he disappeared on the following day. He next came to the attention of the authorities when he was arrested in a house in Harrow on 11 June 2009, where a sophisticated cannabis growing operation was discovered. The Crown's case was that he was responsible for tending the plants and cultivating them. In interview he made no comment but, on the advice of his solicitor, read a prepared statement, in which he denied that he was tending the plants, and asserted that he was just looking after the house while the owner went to a party.

48. At a hearing before the magistrates his age was considered. On the basis of a report by the Youth Offending Team the magistrates decided that he was an adult aged somewhere between 18 and 21 years. In the Crown Court at Harrow in October 2009, before the first trial, the trial judge considered the appellant's age before the jury were sworn. He heard the appellant give evidence, and concluded that he was over 18. The trial proceeded, but the jury could not agree and was discharged.

49. On 23 November 2009 the appellant provided the police with his birth certificate. That showed his date of birth as 20 October 1992. This was sent by the police to Interpol and to UKBA for verification. The retrial was listed for 2 March 2010. Interpol had received no information from Vietnam, and the officer in the case told the judge that in a previous case it had taken a year to obtain information about a birth certificate issued in Vietnam. The judge was provided with a copy of the relevant document. If genuine, it showed that even at the date of retrial, he was still 17 years old. It was said on the appellant's behalf that no issues had been raised by UKBA to contradict the accuracy of this birth certificate.

50. The judge decided to hear evidence from the appellant. He said that he had a passport when he left Vietnam, but it had been taken from him by those responsible for bringing him into the United Kingdom. He said that he had obtained the birth certificate via an uncle. The Crown submitted that the applicant did not have a passport, that the birth certificate may or may not be genuine, and that in addition to considering his evidence the judge should consider the appellant's appearance. Wisely, the judge suggested that this assessment was not always easy, particularly that cusp "17 to 18". The judge gave a short ruling in which she concluded that the

appellant was 18 years old. No questions were asked which related to the issue of trafficking. In evidence the appellant in effect repeated what he had said to the police when he was first arrested, and purported to offer an innocent explanation for the presence of his finger prints on the side of a tub of a product called Bud Blaster, which is used in the cultivation of cannabis. Following conviction the appellant was due to be sentenced on 14 April.

51. In the meantime, while evidence relating to his age was pursued, the appellant changed his legal representation. A Merton compliant age assessment was carried out by the Kent County Council Social Services Department. This gave him the benefit of the doubt. It concluded that the date of birth on the birth certificate was correct, and in their opinion, therefore, the appellant was even then only 18 years old. The NSPCC provided a letter dated 13 April 2010, which indicated that the appellant may have been the victim of trafficking. An application was then made to the judge to reconsider the question of the appellant's age.

52. The judge agreed to do so. She considered the assessment made by the social services department, observing that it was "not unchallengeable". In particular those responsible for the preparation of the assessment had accepted the account given by the appellant without question. Having heard the evidence in the hearing before her, and then during the trial, she did not find him a convincing witness in relation to his age. He was at least 18 years old.

53. During the course of her ruling, she went on to add that throughout the trial, she had suspected that the appellant may have been the victim of trafficking, but as the issue was not raised, she had not voiced her suspicions. In fact the appellant informed his new solicitors that he had been trafficked on the day before the judge gave her latest ruling. Having concluded that the appellant was at least 18 years old, she heard submissions in mitigation and then passed sentence. In her sentencing remarks, significantly for present purposes, she said "you have been a very vulnerable young man, you have been used by others who are more sophisticated than yourself, … you played no part in setting up this sophisticated factory, and you were very low down in the chain of people involved". He was to be sentenced as a gardener.

54. Subsequent events emphasised the difficulties faced by judges sitting in the Crown Court who are called upon to make determinations about age and possible trafficking status. On the information available to the sentencing judge, we see no basis for criticising her conclusions. The reality however, is that, until after conviction no proper consideration was given to the question whether the appellant had been the victim of trafficking. The issue continued to be pursued whilst he was serving his sentence, and indeed after his release. On 28 March 2012 UKBA as the competent authority concluded that the appellant had indeed been a child victim of trafficking. This decision did not reach his solicitors until April 2013, and it was not provided to the Crown by those representing the appellant until 14 April 2013. In addition those then representing the appellant obtained a report from a former police officer with considerable experience in cases involving trafficked victims, including from Vietnam, in the context of their deployment in cannabis factories. His report also concluded that the appellant had been the victim of trafficking.

55. There were a very high number of inconsistencies in the accounts given by the appellant at various stages in the investigation. The Crown was minded to resist this

appeal until shortly before the hearing, but once it was accepted that the appellant had been the victim of trafficking, and that his presence as a gardener in the cannabis factory formed part and parcel of the process in which he was victimised, a series of inconsistencies in the explanations provided by the appellant at different stages could not be determinative of the appellant's age, nor indeed whether he was the victim of trafficking. On the basis of the evidence which was not then available, the Crown accepts that had these facts been known at the time when the decision to prosecute was made, the appellant would not have been prosecuted. To that we should add that if he had been prosecuted, on the basis now available, an abuse of process argument would have been likely to succeed. This appeal will be allowed.

R v HVN

56. On 8 May 2012 at Nottingham Crown Court HVN pleaded guilty to two counts of producing a controlled drug of class B, contrary to s.4(2)(a) of the Misuse of Drugs Act 1971. On 21 May he was sentenced to 8 months detention and training concurrent on each count.

57. Count 1 related to a police raid of a house in Derby in early 2011. Cannabis was being grown on a professional scale, but no one was there. The appellant's finger prints were found on items in this house, but at this stage he was not traced. In the early hours of the morning of 5 March 2012 police officers attended a house in Mansfield. They had been alerted by a number of local residents who had seen the defendant being removed from the house by a group of men. His hands were bound. The police found him nearby, barefoot and apparently frightened. Inside the house a large quantity of cannabis was being grown, as a professional operation. The appellant was arrested. He admitted that he had been in the premises and was looking after the crop. He knew it was cannabis, but initially did not know it was illegal. He worked that out later. In the meantime the finger prints taken from the house in Derby were matched with the finger prints taken from the appellant when he was arrested.

58. The police immediately referred HVN to the social services department of Nottinghamshire County Council. An age assessment interview was conducted. The appellant had provided a date of birth which was accepted by social workers, and it was concluded that he was then just under 17 years old. They also recorded that he "described being locked in a cannabis cultivation house by gang members that recruited him in London. He was driven to Nottinghamshire – an unknown location to him at the time. He was unable to leave the property once he was locked in. He was left with ample food supplies by the gang. They also set out his account of how he had travelled from Vietnam to the United Kingdom. He has in fact given a number of inconsistent accounts about his movements both during his journey to the United Kingdom, and within the United Kingdom itself". At this stage it does not appear that any thought was given by anyone to the fact that the appellant may have been the victim of trafficking.

59. On 6 March the appellant was produced before the District Judge (Youth Court) in Mansfield. He was represented by his solicitor and indicated that he would be pleading guilty. The prosecution submitted that these were not grave crimes, and that the case should be heard in the Youth Court. The District Judge disagreed and directed that committal papers should be prepared. The appellant was remanded in

custody. He was removed to a Wetherby Young Offenders' Institution, which on 22 April, referred the case to the NRM. The NSPCC, acting as first responder under the NRM arrangements, referred the appellant to UKBA as a suspected victim of trafficking. At this stage the system was working as it should.

60. Shortly afterwards, on 23 April, the appellant appeared by way of video link at Nottingham Crown Court. As there was no interpreter, the case was adjourned. Before adjourning the case the judge was told that investigations were being made in to the question whether or not the appellant had been trafficked.

61. Shortly afterwards, on 4 May, UKBA made a reasonable grounds decision that HVN may indeed have been the victim of trafficking. For some reason this was not communicated either to the prosecution or to the defence, and there is nothing to suggest that either the prosecution or the defence thought about contacting UKBA.

62. On 8 May at Nottingham Crown Court HHJ Milmo QC expressed surprised that the case was being dealt with in the Crown Court at all. He also made a direct inquiry whether or not the appellant had been trafficked. No one told him, because no one knew, of the UKBA reasonable grounds decision. The appellant pleaded guilty to the two counts on the indictment, and the case was adjourned for preparation of a pre-sentence report.

63. On 21 May the case came on for sentence before His Honour Judge Sampson. Although it was now over a month old, no one in court appears to have been aware of the UKBA decision. In sentencing the appellant the judge observed "the mitigation is your guilty plea, you are a vulnerable individual who was, to a degree, exploited and significantly, your youth".

64. Thereafter the CPS became aware of the UKBA decision. On 19 July they wrote to the appellant's solicitors informing them of it. On 25 July, out of time, draft grounds of appeal were sent to the Court of Appeal office, now well out of time, and the Crown responded indicating that the application for permission to appeal would be resisted.

65. According to the affidavit of the appellant's representative, after he was sentenced, they were told that a conclusive UKBA decision was imminent, but this did not appear until October 2012. This confirmed the appellant's trafficked status. The file was provided by UKBA to the appellant's solicitors in March 2013, and then passed to the Crown during the course of or immediately after a directions hearing in these appeals before Thirlwall J in April 2013.

66. Amended grounds of appeal were then produced, very shortly before the hearing of the appeals, together, belatedly, with the appropriate Form Ws in support of an application to adduce evidence from the appellant and from his solicitors (whose firm still represented him). The appellant's statement is short and lacking in detail.

67. The Crown's initial response was that the application for permission to appeal against conviction was premature, and that further investigations were needed before the Crown could accept UKBA's conclusion. We have some sympathy with this approach, particularly in a case where the defendant had pleaded guilty and was still represented by the same solicitors who had advised him. However, the practical

realities are that on arrest the appellant was identified as a young person, still under 17 years of age. Notwithstanding the circumstances in which the police were alerted to what was happening to the appellant in Mansfield no thought appears to have been given to the possibility that he was a trafficked child. That arose for consideration after the referral made byNSPCC. The original grounds of appeal drafted by the solicitor reveal a lack of understanding about the nature of child trafficking. The information plainly required consideration (hence the referral under the NRM) but the solicitor concluded that there was "no indication of any issues relating to the possibility that the applicant had been trafficked". This was not because the appellant had not told her of his situation, but rather, we apprehend (but have not thought it necessary to investigate further) because she may have thought that there was a relevant distinction to be drawn between the appellant having been "smuggled" rather than "trafficked" into the United Kingdom. However that may be, a reasonable grounds decision that the appellant had been trafficked was made before he pleaded guilty. Quite where the fault lies, the guilty plea was tendered in ignorance of that important (albeit not conclusive) fact. We have now been provided with UKBA's conclusive decision. On the basis of the evidence now available it is clear, that the appellant would not have been prosecuted, and that if the prosecution had proceeded and the Crown Court was fully informed of the facts now available, the case would have been stopped as an abuse of process. Accordingly the appeal against conviction will be allowed.

R v L

68. This is a very different case. The appellant is a native of Uganda, a woman in her mid thirties.

69. On 16 May 2011 at Blackfriars Crown Court she pleaded guilty and was sentenced to 6 months imprisonment for possession of a false identity document contrary to s.25 of the Identity Cards Act 2006.

70. The facts relating to the offence are straightforward. On 17 January 2011 the appellant attended the Camden Job Centre Plus to apply for a national insurance number. In support of her application she produced a passport issued in Portugal, and gave her true name and date of birth. The passport was checked, and proved to be forged. She was arrested on 2 March 2011.

71. Following arrest she was interviewed. She said that she had been in the United Kingdom for seven years and came from Uganda. She was born in Portugal and she had travelled to the United Kingdom on the promise of finding work as a child minder, using a false passport from Uganda. She said that she had been held captive in the North of England and forced into prostitution for several years. When she had been released by her female trafficker she had been given a Portuguese passport which the appellant believed she was entitled to and believed was genuine. She moved to London some six months before her arrest where a new man controlled her movements.

72. It is clear from the correspondence between her and her solicitor that she was advised to plead not guilty on the basis of an honest belief that the passport she used was genuine, but her solicitor also advised her to report to the police the fact that she had in effect been a prisoner who was misused as a slave. At the time she received this

advice L was in custody in HMP Holloway. However the solicitor's advice contained this warning:

> "If the police conclude that your account is false then you risk being charged with wasting time and/or perverting the course of justice which are, potentially, more serious than the charge you currently face".

No attempt was made to use the NRM. In the light of the advice she received, the appellant's plea of guilty is not difficult to understand.

73. While the appellant was in custody, on 31 May, she was referred by a support group within Holloway Prison to the Poppy Project. Shortly afterwards, on 2 June she was released. In early 2012 the Poppy Project began a detailed investigation of the case. The fresh material includes an affidavit from the appellant dated 18 May 2012, a letter dated 13 March 2012 from a senior support worker at the Poppy Project, a report dated 16 April 2012 from a consultant psychiatrist, Dr Zapata-Bravo and a letter dated 4 July 2012 from UKBA.

74. There is powerful evidence that the appellant fell to be treated as a "victim of international trafficking for sexual exploitation in forced prostitution". She was suffering from complex post-traumatic stress disorder with severe trauma. UKBA found that there were conclusive grounds for believing that she had indeed been trafficked. Having examined the evidence the prosecution concluded that the appellant should indeed be treated as a credible victim of trafficking. Although the Crown was concerned about a possible absence of any link between the offence the appellant had actually committed and any compulsion to commit the offence arising out of the fact that she was a victim of trafficking, the Crown concluded that if the actual facts had been known at the time when the decision to prosecute had been made, the case would not have proceeded. Given the appellant's prolonged exposure to involuntary prostitution and enforced control, the offence she actually committed appears to us to have arisen as a result of her being a victim of trafficking who was provided with a forged passport for her to use as if it were genuine, and the use of it represented a step in a process by which she would escape. On the basis of the facts which are now known, if this appellant had been prosecuted, an abuse of process argument would have been advanced with a realistic prospect of success. The appeal will therefore be allowed.

STATUTORY MATERIALS AND INTERNATIONAL INSTRUMENTS

- Human Rights Act 1998 and schedule
- The Palermo Protocol to prevent, suppress and punish trafficking in persons, especially women and children
- Council of Europe Convention on Action against Trafficking in Human Beings and Explanatory Report
- Directive 2011/36/EU on preventing and combating trafficking on human beings and protecting its victims
- European Convention on Human Rights
- Charter of Fundamental Rights of the European Union
- UN Convention on the Rights of the Child
- Committee on the Rights of the Child's General Comment No 5 (2003)
- ILO Convention 182, Worst forms of Child Labour and IPEC (ILO) definition of trafficking
- Treaty on European Union Article 6(1)

POLICY AND GUIDANCE

- Prosecution of Defendants charged with offences who might be Trafficked Victims 26 March 2009; 5 Novemeber 2009; 20 April 2010
- CPS Policy for Prosecuting Case of Human Trafficking May 2011
- CPS Legal Guidance – Human trafficking and smuggling: Prosecution of Defendants (children and adults) charged with offences who might be trafficked victims (2011)
- CPS Legal Guidance – Youth Offenders

VOLUME III

- Law Society Practice Note 23 March 2010
- Law Society Practice Note 6 October 2011
- Guidance for Competent Authorities 2010 (current)
- OSCE Policy and Legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking, 22 April 2013
- UNODC Guidance Note on abuse of a position of vulnerability
- Association of Chief Police Officers of England, Wales and Northern Ireland – Position from ACP Lead's on Child Protection and Cannabis Cultivation on Children and Young People recovered in Cannabis Farms
- CEOP Child Trafficking Update October 2011
- CEOP Strategic Threat Assessment 2010
- ECPAT UK's Submission to the Joint Committee on Human Rights Inquiry into the human rights of unaccompanied migrant children and young people in the UK (2012)
- First Annual report of the Inter-Departmental Ministerial Group on Victims of Trafficking October 2013
- US Department of State Trafficking in Persons report on the UK, 19 June 2012
- Age Assessment of Separated Young People: Proposal to Develop Practical Guidance for Paediatricians, Royal College of Paediatrics'' and Child Health, December 2012

- Legal opinion in the matter of a proposed amendment to the immigration rules, Nick Blake QC and Charlotte Kilroy, 7 November 2007
- Levelling the playing field. A UNICEF report into provision of services to unaccompanied or separated migrant children in three local authority areas in England, Brownlees and Finch (March 2010)
- Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control. British Medical Buleeton 2010, 102: 17-42 & Dental age assessment – a statistical critique, TJ Cole, Professor of medical statistics, UCL Institute of Child Health 2013
- The fact of age: Review of case law and local authority practice since the Supreme Court judgment in R (A) v Croydon LBC [2009] Children's Commissioner for England, July 2012
- UNCRC's General Comment No 6 on the Treatment of Unaccompanied and separated children outside their country of origin (2005)
- UNCRC's General Comment No 10 on Children's Rights in Juvenile Justice (2007)
- When is a child not a child? Asylum, age disputes and the process of age assessment, Heaven Crawly (ILPA)
- Working with children and young people subject to immigration control: Guidelines for best practice, 2nd Edition, Heaven Crawley

Others

- Report concerning the implementation of Council of European Convention on Action Against Trafficking in Human Beings by the United Kingdom (September 2012)
- The Aire Centre Advice on Individual Rights in Europe (2013)