Stephen Knight

Call: 2011
Specialist in:

- Criminal Law
- Personal Immigration
- Business Immigration
- Prison Law
- Civil Law
- Inquests & Public Inquiries Team
- Civil Actions Against Public Authorities
- Direct Access
- Modern Slavery & Trafficking Team
- Direct Access Trained

Experience

Stephen is a committed criminal defence and public law practitioner. He has been described by his clients as “warm and friendly, but formidable”, “razor-sharp”, and “a relentless advocate”, and by his instructing solicitors as having a “breath-taking ability to condense facts and legal arguments in a terse yet persuasive style” and a “huge heart and ability to empathise with the wrongfully convicted and their families”.

Criminal law

He practises in all areas of criminal law, specialising in protest law and appellate work. Stephen’s crime practice has seen him defending in a wide range of criminal cases including:

- Homicide trials and appeals;
- Protest law;
- Public disorder;
- Serious violence;
- Class A drug supply;

- Slavery and trafficking.

Stephen is currently briefed in a number of long-running cases with the CCRC. He has been instructed in cases in the Crown Court, High Court, and Court of Appeal which have received significant media attention.

Immigration and public law

Stephen is also a member of the Immigration Team. He regularly appears in the Upper Tribunal, High Court, and Court of Appeal on human rights and asylum matters. He has been instructed for Claimants in the majority of “EEA rough sleeper” cases.

Working at the intersection of criminal law and public law, he is well-versed in the law relating to terrorism proscription, modern slavery and trafficking, and criminal deportations.

For his immigration and public law work he has previously been named The Times’ Lawyer of the Week.

Other matters

Stephen is qualified to conduct litigation work and is able to take instructions directly from clients without a solicitor.

In 2020 Stephen was appointed as a Judge of the First-tier Tribunal (Immigration and Asylum Chamber) and as an Employment Judge. In 2023 Stephen was appointed to the Equality and Human Rights Commission’s A Panel.

He is listed as a leading junior tier 4 in the Legal 500 and band 6 in Chambers & Partners.

Stephen is currently undertaking doctoral research on the application of International Humanitarian Law in North and East Syria. This has provided him with a detailed understanding of the current situation on the ground in Syria and Kurdistan. He has presented his research to academic conferences and the Foreign, Commonwealth and Development Office. His research has also been published in Governance of Resistance in North and East Syria The Experience of Rojava. As a result, Stephen is well-placed to undertake immigration cases for Syrian and Kurdish clients.

What the directories say

“Stephen’s attention to detail is unrivalled and his written work is impressive.”

Legal 500 (2024)

“Stephen has an exemplary manner.” “Stephen is extremely knowledgeable and professional when dealing with clients and preparing cases.” “Stephen has a very keen eye to detail and is a strong advocate.”

Chambers & Partners (2024)

Education

University College London, Jurisprudence and Legal Theory LLM (Distinction), 2012

City Law School, Bar Professional Training Course, 2011

University of Sheffield (including a year at the Université Robert Schuman / Université de Strasbourg), Law with French LLB, First Class with distinction in spoken French, 2010

Memberships

Criminal Bar Association

Immigration Law Practitioners’ Association

FDA

Languages

English (native)

French (working knowledge)

Kurmancî Kurdish (working knowledge)

Awards

Harmsworth Scholarship, Middle Temple, 2010.
John Grosse Prize in the Common Law of England, University of Sheffield, 2010.

Cases

R v THR [2026] EWCA Crim 742

Margo Munro Kerr represented the Appellant THR whose conviction for possession of a false identity document with improper intent was quashed by the Court of Appeal.

The Appellant is a Kurdish asylum seeker from Turkey who fled via Greece, Italy and Ireland to the UK. She was apprehended by police officers disembarking from the Belfast ferry at Liverpool and presented a false Polish identity document.

The issues at trial were (1) did she present the Polish ID with an improper intention? (2) did she claim asylum as soon as reasonably practicable on arrival in the UK? (3) could she reasonably have claimed asylum before reaching the UK?

The Appellant gave evidence at trial that she couldn't stay in Greece, Italy, or Ireland because she was scared of refoulement to Turkey. She said she panicked when giving the police officer her ID document in Liverpool. She couldn't remember when she claimed asylum but she thought it might have been a few months later.

At appeal, fresh evidence was relied on including (1) a psychiatric report by Dr Stania Kamara saying that she had complex PTSD, that she would have needed reasonable adjustments at trial, and that her explanation of panicking was clinically plausible (2) a witness statement from barrister Stephen Knight who spoke to the Appellant in a personal capacity while she was in custody and observed her communication to be deteriorating and (3) a report from Marion Bouchetel of the Legal Centre Lesvos supporting the Appellant's account that Greece was routinely refouling Kurdish asylum seekers to Turkey in early 2023. It was also submitted that evidence that the Appellant had claimed asylum the day she arrived was missed by everyone at trial.

Read more about the case here.

Margo Munro was instructed by Ruby Breward and Zachary Whyte at Sperrin Law.

R v Ashenafei Demissie

At the Old Bailey, Stephen successfully defended a cab driver accused of causing death and serious injury by careless driving in a public place.

Stephen's client had parked his car in the private car park beside his home in order to speak to his wife and a family friend. Outside the car were his son and the friend's son. The car suddenly moved forward and struck the two boys, seriously injuring his son and tragically causing the death of the other child.

The prosecution case was that the defendant had inadvertently pressed the accelerator, causing the car to surge forward. However, the defendant said right from the time of the incident that the all-electric car had moved forward on its own, possibly due to a software error. Despite the assertion by a prosecution "expert" witness that an error with the car could be ruled out, his expertise was not as a software engineer, and he could not analyse the car's computer system as it was proprietary software and a trade secret.

Stephen argued that there was no evidence that the defendant had actually pressed the accelerator, and that in any event the car park was not a public place. After 5 hours of deliberations, the jury acquitted the defendant.

During the case, as a result of the significant media attention it received, alongside dedicated work by Stephen's instructing solicitor, Zachary Whyte of Sperrin Law, around a dozen members of the public approached the defence team with their own experiences of electric cars surging forward without driver input. However, the defence were not permitted to rely on this evidence.

Since the reporting of the verdicts and information about other people experiencing the same issue, the case has received interest from other lawyers due to the potential for the case to shed light on possible wider safety issues with the make of car involved.

Stephen was instructed by Zachary Whyte of Sperrin Law.

Case press coverage:

https://news.sky.com/story/drivers-claim-electric-vehicle-moved-of-own-accord-before-it-killed-boy-dismissed-by-crash-expert-13491580

https://www.itv.com/news/london/2026-01-08/ev-driver-who-struck-and-killed-boy-5-tells-of-never-ending-pain

https://www.standard.co.uk/news/crime/boy-killed-electric-vw-car-accelerated-london-bridge-id-4-southwark-b1265124.html

https://www.independent.co.uk/news/uk/crime/electric-vehicle-volkswagen-fareed-amir-b2896026.html

R v TW (Court of Appeal (Criminal Division))

In his first case back from almost 2 years of leave, Stephen Knight secured the quashing of an IPP sentence.

Mr W had been sentenced to Imprisonment for Public Protection in 2009. He was over 14 years over tariff when Stephen took on his case. Stephen represented him at an appeal against sentence in the Court of Appeal, and obtained the quashing of his IPP sentence and its replacement with a determinate sentence of imprisonment, meaning Mr W would be released immediately.

Since the hearing in this case Stephen has been approached by the Registrar of Criminal Appeals directly to take on more appeals against IPP sentences. He remains happy to take on further cases to overturn sentences under the discredited IPP regime.

Stephen was instructed by Gavin Rose of Wells Burcombe Solicitors.

R v BSG

[2023] EWCA Crim 1041

BSG was the victim of “county lines” trafficking for the purposes of forced criminal exploitation. He was failed repeatedly by police, prosecutors, and courts who did not recognise him as a victim of trafficking, leading to his imprisonment and the making of a deportation order against him. As newly-instructed counsel, Stephen secured the quashing of BSG’s conviction in the Court of Appeal. He was instructed by Colin Gregory of Bhatt Murphy Solicitors.

R v RN

[2021] Crown Court at Sheffield

In a multi-handed murder trial, Stephen along with Gul Nawaz Hussain QC secured the sole and unanimous acquittal of a defendant accused of murder in a drive-by shooting. All other defendants were convicted of murder or manslaughter.

The case involved analysis of detailed call data records, cell site data, firearms expert evidence, and psychiatric evidence, and involved the use of an intermediary for the Stephen’s

client.

Manchester City Council v Sky Bibi

[2022] Criminal Cases Review Commission

Manchester City Council had prosecuted the defendant for allegations related to a reduction in council tax that they claimed she should not have received. Following conviction and appeal, the defendant instructed Stephen to apply to the CCRC for a review of the conviction. In light of Stephen's submissions, the CCRC accepted that there was a real prospect that the conviction would be quashed on appeal.

R v RS

[2020] Crown Court at Liverpool

Stephen was instructed on the defence of a man accused of a series of historic sexual offences against a child. The case involved s 28 pre-recorded cross-examination of a vulnerable complainant, as well as cross-examination of other vulnerable witnesses. Stephen also drafted CCRC applications for the defendant, in respect of related matters that were adduced as bad character in the defendant's trial.

R (on the application of Alessio Rutolo) v Secretary of State for the Home Department

[2021] UT(IAC)

The Home Office had unlawfully refused to make a decision on the Applicant's application for Settled Status, under the EU Settlement Scheme. It had wrongly claimed that the Applicant had a relevant criminal record, and failed to comply with its timescales for making a decision. Stephen was instructed on a judicial review of the failure to make a decision. At a hearing to consider expedition of the case, the Home Office conceded that a decision would be made in 14 days. A few days after, they conceded the case entirely, and granted the Applicant his Settled Status.

R v KT

[2021] Crown Court at Sheffield

Junior counsel for the defendant accused of murder by stabbing of her partner. The case

involved consideration of the questions of diminished responsibility and loss of control. The trial received significant local and national media attention.

R v AK

Citation (2020) Court of Appeal (Criminal Division)

The appellant was living in a hostel when the police executed a search warrant and found heroin and cash among his belongings. There was a subsequent delay of 3 years before trial. The prosecution case was that the cash came from the sale of drugs, and that the Appellant intended to supply the heroin for profit. He was interviewed under caution twice by police, during which he admitted to possession of the drugs but denied any intent to supply. He claimed that he had never supplied drugs and stated that they were for personal use. He maintained this defence throughout the course of proceedings.

7 years before the allegations in this case the Appellant had pleaded guilty to attempting to supply heroin to an associate who was in police custody. The previous conviction was adduced in the trial in this case firstly to correct a false impression given by the appellant in police interview, secondly to show that the Appellant had a propensity to commit offences of the kind charged.

The Court of Appeal ruled that evidence of the Appellant's bad character had been wrongly admitted. There was no good reason why the interview could not be edited to correct any false impression, and the circumstances of the previous offending were markedly different to the present case. The prosecution's case at trial was circumstantial and the evidence of the previous conviction may have been prejudicial to the Appellant. The Court additionally ruled that the trial judge had misdirected the jury on adverse inferences arising from the Appellant's decision to answer "no comment" to some questions in interview. Together with the wrongful admission of the previous conviction, this had "tipped the balance", and the conviction was unsafe. The appeal was allowed, and the conviction quashed. No retrial was ordered.

Re M (a minor)

(2019) Criminal Cases Review Commission

M, who was minor at the time of conviction and therefore cannot be identified, pleaded not guilty but was convicted at Youth Court in 2015 on two counts of sexual offences against another minor. M was sentenced to a youth rehabilitation order and a sexual harm prevention order.

M tried to appeal against the conviction but was unsuccessful. They applied to the CCRC for a review of their conviction.

An initial application was made to the CCRC, which resulted in a negative Provisional Statement of Reasons.

Stephen was brought in to draft a response to the Provisional Statement of Reasons. He identified new potential grounds of appeal and challenged the CCRC's interpretation of the relevant law on procedure.

Having reviewed the Response to the Provisional Statement of Reasons, the CCRC decided to refer the conviction for appeal at the Crown Court because it considered there was a real possibility that the appeal will succeed.

When the case was referred back to the appeal court, the CPS offered no evidence, and the conviction was quashed.

R v Mr W

[2019] Crown Court at Aylesbury

The case involved an allegation of rape in a home for vulnerable young people. The defendant had initially lied to police about whether sexual contact had occurred. The case involved disclosure of large amounts of digital evidence, and raised issues of previous sexual history, and bad character. Stephen's careful cross-examination of the vulnerable complainant and meticulous analysis of the evidence secured the defendant's acquittal.

Kamkar v Cope & Cope (2019) County Court at Salisbury

The case arose out of a long-running neighbour dispute between the parties which generated thousands of pages of material that required review. Stephen was instructed on a direct access basis late in the case. The defence was successful, with the judge adopting Stephen's characterisation of the claimant as "an obsessive, vain, and manipulative man". This led to a finding of fundamental dishonesty against the claimant, which displaced

Qualified One-way Costs Shifting ("QOCS"), resulting in the defendants being able to recover their costs.

Stephen's clients described him as follows:

Stephen Knight successfully defended us in what was a complicated and highly emotive case. We were litigants in person, and we instructed Stephen through Direct Access. He was able to grasp a huge quantity of information in a short amount of time, and quickly took control of our defence. Stephen is warm and friendly, but formidable; honest and reassuring, but formidable. At trial he was razor-sharp. He possesses an extraordinary legal and analytical mind. But it is Stephen's attention to detail, his tenacity, commitment and integrity that make him a truly exceptional barrister. He was a relentless advocate for us: we could not have asked for or imagined better counsel.

R (oao Deptka & Sadlowski) v Secretary of State for the Home Department

The Home Office's policy of detaining and removing rough sleepers had previously been found unlawful in the cases of R (on the application of Gureckis, Cielecki, and Perlinski) v Secretary of State for the Home Department.

This case dealt with the first of the contested damages hearings arising out of the Home Office's unlawful detention of over 600 EEA nationals under the policy.

The Home Office was strongly criticised by the Court both for the way in which the Claimants were detained, and for its own conduct of the litigation. Aggravated damages were awarded as a result. Awards totalling nearly £50,000 each were made in relation to each Claimant, for 154 days' detention.

The second Claimant had tragically died shortly before the hearing, requiring a successful late-stage application for the case to be continued notwithstanding the absence of a representative of his estate.

The case was covered by the BBC and the Independent amongst others.

R v Ruth Potts and others (The Stansted 15)

[2018] Crown Court at Chelmsford

The Home Office commissions charter flights to secretly deport hundreds of people from the UK every month, under cover of darkness and far from the ability of members of the public to observe or intervene to prevent the abuse which is endemic to the process. In 2017 the flights included deportations which were unlawful, and which included the removal of accepted survivors of sex trafficking.

In March 2017 15 activists cut through the fence at an isolated part of Stansted Airport, and locked themselves around a chartered plane belonging to Titan Airways, shortly before it was to be loaded with deportees.

The actions of the defendants caused the flight to be cancelled. They were arrested and initially charged with criminal damage, aggravated trespass, and breach of the bylaws at Stansted Airport, all relatively low-level offences.

Shortly before their trial was due to begin the charges were changed to disruption of services at an aerodrome by means of a device or substance in such a way as to endanger safety of persons at the aerodrome or the safe operation of the aerodrome.

After a 10-week trial the defendants were convicted. Their appeals are pending before the Court of Appeal, and Stephen remains instructed.

The case was reported extensively in the media, including The Guardian, BBC News, the Victoria Derbyshire Show, the Independent, the Huffington Post, the Evening Standard, and Sky News. The defendants were declared by Amnesty International to be human rights defenders.

R (oao Gureckis, Cielecki & Perlinski) v Secretary of State for the Home Department

[2017] EWHC 3298 (Admin)

The Home Office had adopted a policy of considering that rough sleeping EEA nationals were “abusing” or “misusing” their Treaty rights, and targeted them for removal. The Home Office carried out co-ordinated round-ups of migrants and paid the homelessness charities St Mungo’s and ThamesReach to unlawfully provide them with details of homeless people to detain.

The legal team established a pro bono legal clinic at a migrant support centre in order to

ensure that individuals affected by the unlawful policy could receive advice and representation.

The policy was eventually declared unlawful as being incompatible with EU and domestic law, discriminatory, and involving unlawful systematic verification of the exercise or abuse of Treaty rights. It was quashed and the collaboration with homelessness charities ceased.

Stephen represented approximately 30 further claimants who had been unlawfully issued with removal decisions based on the policy. Their cases are in the process of being resolved. Further work is also taking place to ensure that individuals who have suffered as a result of the unlawful actions of the Home Office see justice.

Stephen was instructed alongside Marie Demetriou QC, Shanthi Sivakumaran, and Natalie Csengeri by the Public Interest Law Centre.

R v S

[2016] Crown Court at Croydon

Represented a vulnerable survivor of torture experiencing PTSD, charged with theft, who had admitted the offence in interview. As a result of detailed work in the preparation of the case to demonstrate that the admission was unreliable the prosecution offered no evidence.

R (oao HA) v Secretary of State for the Home Department

[2017] QBD (Admin)

Obtained section 4 accommodation for an asylum seeker made street homeless on release from immigration detention.

The Claimant had been released from immigration detention after 20 months to prevent an unlawful detention application being made. However, this rendered him street homeless.

The SSHD failed to make a decision on the Claimant's application for section 4 accommodation and support.

Stephen was instructed on an urgent basis as the client was sleeping rough outside the solicitor's office. Accommodation and support were secured to the client's satisfaction.

R (oao FV) v Secretary of State for the Home Department

[2017] QBD (Admin)

Judicial review of a decision to certify the asylum application of a vulnerable gay Pakistani asylum seeker, and his unlawful detention. Once permission was granted the SSHD conceded the case, agreeing to pay substantial damages.

JS (Sri Lanka) v Secretary of State for the Home Department

[2017] Court of Appeal

JS had been excluded from the Refugee Convention under Article 1F. He had succeeded in appealing this exclusion at every level of the court system, from the First-tier Tribunal to the Supreme Court. The Secretary of State continued unlawfully attempting to exclude him from the Refugee Convention and her final appeal reached the oral permission stage at the Court of Appeal. Stephen secured a refusal of permission to appeal to the Court of Appeal, finally bringing the case to a conclusion after 10 years of litigation.

R (on the application of MA) v Criminal Cases Review Commission

[2017] Court of Appeal (Civil Division)

Stephen is also currently instructed on a direct access basis in a judicial review of the CCRC's consideration of alleged juror bias in a murder case. As a qualified litigator Stephen has been able to assist MA by taking over the litigation of his case whilst MA is in prison.

R (on the application of Michael Luvaglio) v Criminal Cases Review Commission

[2017] QBD (Admin)

Stephen represented Michael Luvaglio in the High Court in his ongoing attempts to overturn his conviction for the One-Armed Bandit Murder. Mr Luvaglio challenged by way of judicial review the refusal by the Criminal Cases Review Commission to refer his case to the Court of Appeal.

R v Edward Conteh; R (oao Edward Conteh) v Secretary of State for

the Home Department

[2017] Criminal Cases Review Commission

Preparation of an application to the Criminal Cases Review Commission for a review of a historic joint enterprise manslaughter conviction. The application followed the judgment of the Supreme Court in Jogee and required further submissions based on R v Johnson. Stephen subsequently represented JENGbA (Joint Enterprise Not Guilty by Association) as an intervener in the deportation proceedings against the Home Secretary.

Rotherham 12

[2016] Crown Court at Sheffield

Stephen was instructed as part of the defence team led by Michael Mansfield QC in the successful defence of the Rotherham 12. The case was covered by Channel 4 and the Guardian among others.

London Action Resource Centre v London Borough of Tower Hamlets

[2016]

Along with Natalie Csengeri undertook pro bono the case of a social centre providing facilities for activist organisations in Whitechapel, which had its exemption from paying non-domestic rates unexpectedly removed. Following successful pre-action communications the defendant council agreed to rescind its original decision.

London Borough of Harrow v Namachchivayam

[2016] Crown Court at Inner London

Successfully defended a local authority prosecution of a woman with limited English skills and learning difficulties accused of housing benefit fraud.

R v X

[2016] Criminal Cases Review Commission

Pro bono case with the London Innocence Project pending before the CCRC, involving a historic conviction for murder. The original application was refused along with further representations. A pre-action protocol letter and grounds for judicial review led the CCRC to

reconsider its position and agree to properly investigate the allegation of a miscarriage of justice in the case.

R v Valujevs and others

[2016] Crown Court at Huntingdon

Acted as junior counsel to Mark McDonald in a multi-handed prosecution lasting approximately 11 weeks. The case arose out of a large-scale police operation targeting allegations of fraud and sham marriages.

R (on the application of G & G) v Royal Borough of Southwark

[2015] QBD (Admin)

Undertook an emergency judicial review under section 17 Children Act 1988 to compel the defendant to accommodate and provide subsistence to a family where there were issues of child endangerment through inappropriate exposure to sexual behaviour. The case settled with the defendant agreeing to accommodate and provide subsistence to the family pending the outcome of a section 17 assessment.

R (on the application of D) v Royal Borough of Greenwich

[2015] QBD (Admin)

Successfully obtained accommodation for a child and their mother (a Zambrano parent) in London, through a judicial review involving an emergency out of hours injunction. The case was eventually settled by a consent order when the defendant agreed to a section 17 Children Act 1988 assessment and the provision of accommodation and subsistence to the family pending the outcome.

R (on the application of Sehwerert) v ECO Cuba

[2015] EWCA Civ 1141

Junior counsel led by Mark McDonald on an intervention by a group of MPs in an entry clearance application at the Court of Appeal, appealing against the decision of the Home Secretary to refuse entry to one of the Cuban Five. The application was successful and established a firm precedent on the value of parliamentarians' Article 10 ECHR rights including their entitlement to have information imparted to them. The Applicant was

represented by Shivani Jegarajah.

R v Robinson

[2015] Crown Court at Leicester

Represented a student protester accused of assaulting a security guard at a university occupation. Successful submission of no case to answer on the basis of the complainant's account being thoroughly undermined in cross-examination.

R v Hashi, Idle, Khalif, and Pirabakaran

[2014] Crown Court at Isleworth then Court of Appeal

Represented two defendants convicted of supplying class A drugs in an application for post-conviction ASBOs, as part of the Metropolitan Police's Operation Zeus targeting over 30 drug dealers. The ASBOs were imposed with substantially less onerous conditions than applied for. Instructed to represent the original defendants and two further clients at the Court of Appeal, and successfully obtained variations in the terms.

R v Jones

[2014] Maidstone Magistrates' Court

Represented a defendant accused of a s 4 public order offence against a police officer at an anti-fascist demonstration. Secured an acquittal after extensive evidence of police violence shown to the court.

R v Atkins and others

[2014] Brighton Magistrates' Court

Represented 5 of 11 protesters on trial for obstructing the highway at the Cuadrilla fracking site in Balcombe. All defendants were acquitted after trial involving detailed legal argument on reasonable use of the highway and proportionality of prosecution. Stephen also appeared in 6 other cases arising out of the same fracking protests.

R v Q

[2013] Hammersmith Magistrates' Court

Represented a defendant suffering from severe paranoid psychosis on allegations of harassment. Obtained a non-conviction disposal without hospital order or guardianship.

Publications

The Trafficking Defence in Criminal Law: Nexus and Compulsion, The Journal of Criminal Law, 2023, online first

The United Kingdom has accepted international obligations under the Palermo Protocol, the Council of Europe Trafficking Convention, and the EU Trafficking Directive, in relation to the non-prosecution and non-punishment of victims of trafficking for offences they commit which are linked to their trafficking. The obligations are given effect by the Crown Prosecution Service (CPS) discretion not to prosecute, the abuse of process jurisdiction, the common law defence of duress, and the statutory defences under s 45 Modern Slavery Act 2015. In relation to adult victims of trafficking, in each case the question arises of whether they were compelled to commit the offence with which they are charged. This article shows how the English & Welsh courts and the CPS have had insufficient regard to the United Kingdom's international obligations in interpreting 'compulsion', and that improvements are necessary to prevent breaches of the United Kingdom's obligations and the re-traumatisation of victims of trafficking.

Read it here: https://journals.sagepub.com/doi/full/10.1177/00220183231151920

The Court of Appeal provides guidance on prosecuting victims of trafficking

Stephen Knight appeared on behalf of AAI, and Parosha Chandran appeared on behalf of the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, Intervening. This article was written by One Pump Court pupils Margo Munro Kerr and Sarah-Jane Ewart.

The Court of Appeal has today handed down a lengthy decision which is essential reading for all criminal practitioners. In the linked cases of *R v AAD, AAH, and AAI* [2022] EWCA Crim 106, the Court of Appeal has given guidance on the defences available to victims of trafficking and modern slavery who are accused of criminal offences.

This article assumes prior knowledge of the decision in *R v Brecani* [2021] EWCA Crim 731

(19 May 2021). If you need an explainer or refresher we recommend reading this article first.

??The Court of Appeal has upheld *Brecani* but provided important guidance regarding abuse of process where a decision is made to prosecute a victim of trafficking.

The appeals of AAD, AAH, and AAI were joined so that the Court could provide guidance in a Special Court. All three appellants had been convicted of criminal offences prior to being recognised as victims of trafficking: AAI in 2008, AAH in 2016 (after entering a guilty plea), and AAD in 2018. They appealed on a range of grounds, all with the effect of arguing that had they received the positive conclusive grounds decision prior to trial, or had the fact and extent of their being trafficked been accepted at the time of being charged, or at trial (or in the case of AAH when she was advised to enter a guilty plea), then they would not have been convicted. Permission was granted to AAI and AAH to appeal out of time.

The nine overarching issues

Prior to considering the grounds of appeal, the court considered nine overarching issues relating to trafficking in criminal trials.

(i) Is a Single Competent Authority ("SCA") conclusive grounds decision admissible on appeal? [¶¶ 79 – 89]

The answer to this was a resounding "yes": although not admissible at trial following *Brecani*, it is admissible for the purposes of reviewing whether a conviction is safe.

In *Brecani* the Court had held that SCA decisions were inadmissible at trial. In the course of answering this, the Court considered whether the effect of *Brecani* was that a suitably qualified expert in trafficking could give evidence at trial instead. The Court held that an expert could only be instructed to answer questions outside of the knowledge or remit of the jury, "for instance as to the defendant's psychiatric or psychological state or the detailed mores of people trafficking gangs operating in countries that are outside the court's own knowledge and experience" [¶87]. However, where the expert's evidence strays into questions of fact for the jury to decide, it is inadmissible [¶86]. Examples given are the plausibility and consistency of a defendant's account, the vulnerability of a defendant, and whether a given set of facts meets the legal definition of trafficking [¶86].

(ii) Is the decision in *Brecani* consistent with the previous authorities of the Court of

Appeal Criminal Division ("CACD")? [¶¶90 – 100]

The Court found that *Brecani* was consistent with previous authorities.

The Court was invited to consider *JXP* [2019] EWCA Crim 1280, which was not cited in *Brecani*, and in which the court observed at [¶ 54] that the competent authority is "a specialist authority with particular expertise and knowledge in this area of trafficking". The Court stated that *Brecani* was not inconsistent with *JXP*, finding that in *JXP,* limited weight had been placed on the decision of the SCA, as there were a number of other sources of evidence of trafficking including evidence of an expert psychiatrist and psychologist [¶¶ 90-92].

The Court was further invited to consider *R v L(C)* [2013] EWCA Crim 991; [2013] 2 Cr App R 23, in which it was observed at ¶ 28 that:

"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."

The Court stated that *Brecani* was not in conflict with *LC*, because, whereas in *Brecani* the Court addressed the admissibility of evidence at trial, in *LC*, the Court addressed "the level of protection from prosecution or punishment for trafficked victims who have been compelled to commit criminal offences, in the context of a prosecutorial decision to proceed with the trial" [¶ 94]. In *LC,* a decision reached before the Modern Slavery Act 2015 ("the 2015 Act"), it was stated that the decision of the SCA was admissible in determining whether a decision to prosecute was an abuse of process; no determination was made about its admissibility before a jury.

Finally, the Court was invited to consider whether the decision in *Brecani* was inconsistent with the decision in *Rogers v Hoyle* [2014] EWCA (Civ) 257; [2015] QB 265, a civil case concerning the admissibility of a report by the Air Accident Investigation Branch of the Department of Transport which contained evidence of the opinions of experts on technical matters. The Court drew a distinction between opinions on technical matters and questions of fact. It also observed at ¶ 100 that:

"Rogers v Hoyle nonetheless serves to highlight one of the substantial differences between

civil and criminal proceedings, given a professional judge can readily distinguish between weight and admissibility in a manner that would be far more difficult for a jury".

(iii) Is the decision in *Brecani* consistent with the UK's international obligations and European case law with regard to the protection of victims of trafficking? [¶¶ 101-104]

The Court was particularly invited to consider the Strasbourg case *VCL & AN*, App. Nos 77587 and 74603/12, 16 February 2021, which concerned prosecution of trafficked individuals for cannabis farming. The Court distinguished the issue: *Brecani*, it repeated, was about admissibility of evidence *only*, not about the way that the CPS prosecutes. However, it revisited *VCL* when considering whether it was still possible to argue that a prosecution of a victim of trafficking was an abuse of process (see issue 7 below).

(iv) Is the court able to give further guidance vis-à-vis the observation in *Brecani* (at [58]) that expert evidence on the question of trafficking and exploitation may be admissible at trial, "particularly to provide context of a cultural nature […]" or "of societal and contextual factors outside the ordinary experience of the jury"? [¶¶ 105-106]

The Court said that it had explained this issue above, at ¶¶ 86 and 87.

(v) When on an appeal might it be appropriate or necessary for witnesses (appellant, expert, trial representative etc.) to be required to attend to give evidence relating to whether the appellant was trafficked in victim of trafficking cases? [¶¶ 107-108]

The Court stated that it had already considered the issue at ¶¶ 82 and 84. It did not find that it would necessarily in all cases be contrary to the purpose of protection to call a defendant to give evidence that may be re-traumatising, stating at ¶ 108:

"R v AAJ demonstrates that there will be appeals when it will be wholly unnecessary for oral evidence to be adduced. However, if the suggested trafficking is based, for instance, on unsatisfactory and untested hearsay evidence from the appellant, the court may express the view that it would be preferable for the appellant to give evidence for the proper resolution of the issues on the appeal, thereby enabling his or her account to be appropriately tested."

(vi) When the parties disagree, to what extent and at what stage might the court properly be involved in the question of whether live evidence is to be called? [¶109]

The court answered this briefly: the question of whether live evidence should be called is squarely a matter for the court, with due regard to submissions from the parties, depending on what is "necessary or expedient in the interests of justice."

Parties are instructed to inform the Criminal Appeal Office in good time if they have agreed (or not) on whether oral evidence is not required, so that the court can confirm or reject this, and make directions accordingly.

(vii) Is it still possible to argue on appeal that the prosecution of a victim of trafficking was an abuse of process? [¶¶ 110-143]

This question is reviewed at length by the court and the answer is, emphatically, yes (though in prescribed circumstances).

The Court reiterated the three-stage test for prosecutors arising out of *R v M(L)* [2011] EWCA Crim 2327; [2011] 1 Cr App R 12, and substantively reviewed the pre-2015 authorities on abuse of process in this context [¶¶110-114].

As to whether this residual jurisdiction survives the 2015 Act: "absent any authority to the contrary, it is difficult to see why it should not" [¶116]. The Court set out that the abuse of process jurisdiction complements and supplements the defence under section 45 of the 2015 Act, and went further to say that it may better "preserve the obligations in the Convention and Directive, which extend not only to victims of trafficking not being punished but also, in appropriate cases, to not being prosecuted". If the abuse of process jurisdiction has been described as special or unusual when evoked in a case involving a victim of trafficking, the Court says that can only be because abuse of process applications must take into account the relevant context, which here includes a framework of international obligations [c.f. ¶117].

The uncontroversial principles of abuse of process jurisdiction are variously re-stated: a decision to prosecute is for the CPS, not for the courts; and disputes of fact are for the jury. Where the CPS has taken into account relevant prosecutorial guidance, and provided a "rational basis" for departing from a positive conclusive grounds decision, there will likely be no successful abuse argument and there may be a wasted costs order.

Helpfully, however, the corollary of that position is stated at ¶120:

"But what if the CPS has failed unjustifiably to take into account the CPS Guidance or what if it has no rational basis for departing from a favourable conclusive grounds decision? […] in principle such a scenario would, on ordinary public law grounds, seem to operate to vitiate that prosecution decision: whether by reason of a failure to take a material matter (viz. the CPS prosecution guidance) into account or by making a decision to prosecute which is properly to be styled as irrational. Consequently, such a prosecution may, in an appropriate

case, be stayed."

In reaching this conclusion the Court reviewed, and departed from, the decisions in *DS* [2020] EWCA Crim 285; [2021] 1 WLR 303 and *A* [2020] EWCA Crim 1408. In particular the Court was critical of the observations in *DS* [¶ 42] that if there is no sound evidential basis on which to challenge the conclusive grounds decision, then "it will still not be an abuse of process, but the judge will consider any submission that there is no case to answer". That, the court says, is clearly wrong, and the abuse jurisdiction should be available as legal redress in the event that the CPS fails to follow their own guidance.

Finally, and perhaps decisively, the Court accepted that *DS* and *A* have been superseded by *VCL & AN.* The ECtHR in *VCL & AN* emphasised that, given that the prosecution of victims of trafficking "may be at odds with the state's duty to take operational measures to protect them" [¶ 159], a prosecutor must have "clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention" to depart from a decision by the competent authority [¶ 162]. The Court of Appeal equated the ECtHR's "clear reasons" requirement with the "rational basis" in *M(L)* and *Joseph*, and rejected "the dictum in *DS* to the effect that there can be no abuse of process even where there is no sound evidential (that is, rational) basis for a prosecutorial departure from a conclusive grounds decision favourable to a defendant" [¶ 140].

The various threads on abuse of process are summarised, perhaps most conveniently for practitioners, at [¶ 142] of the judgement.

(viii) Is the definition of "*compulsion*" as set out in *VSJ* [2017] EWCA Crim 36 at [¶ 21] and s. 45 of the 2015 Act too narrow? [¶¶ 144-154]

This issue considered whether the test is currently whether a victim of trafficking has been *compelled* to offend, and if this should be inverted to ask whether the offending was *caused* by the traffickers.

The Court rejected this argument, tracing the concept of "compulsion" back through the international instruments [¶¶ 145-152]. The Court found that the legal concepts of *compulsion* and *causation* are too distinct to be reconciled in the way proposed, and suggested that broadening the concept would amount to a wholesale re-writing of the statute. However, the Court did not give further guidance on precisely what "compulsion" means, and a broad reading, which stops should of causation, should still be possible.

(ix) Can a victim of trafficking seek to argue that a conviction following a guilty plea is unsafe? [¶¶ 155-157]

Where a defendant has pleaded guilty and subsequently been found to be a victim of trafficking, the Court cited the very recent case of *R v Tredget* [2022] EWCA Criminal 108, which identified three non-exhaustive categories of case where a Court may overturn a guilty plea:

1. Where the defendant was deprived of a defence that was good in law. Examples given include: a plea of guilty made after an incorrect ruling that deprived the defendant of an arguable defence; under improper pressure, either from the judge, or as a result of coercion or threats; after incorrect legal advice, including failure to advise on a possible defence; and, interestingly, as a result of a delusion while under the influence of LSD.
2. In cases of abuse of process, where there is an injustice that operates so that it was not just to try the defendant at all. The Court in *Tredget* quoted *Asiedu v R* [2015] EWCA Crim 714 at ¶ 21 to say "a conviction upon a plea of guilty is as unsafe as one following trial". Examples include entrapment, or where it transpires there was not a fair and impartial tribunal (c.f. *R v Abdroikov, R v Green, R v Williamson* [2007] UKHL 37).
3. Where the admission of guilt was not true, and the defendant did not commit the crime at all.

The Court provided no commentary on whether most cases involving victims of trafficking would arise out of the first category, and the subsequent availability of the s. 45 defence; presumably, all three could conceivably arise in a victim of trafficking context. The Court did however consider the question in respect of AAH, whose appeal following a guilty plea was found to be unsafe (see below).

The individual appeals

Following consideration of the nine overarching issues, the Court went on to consider the appeals of AAI, AAH and AAD individually.

The Court allowed AAH's appeal against conviction [¶¶ 172-176], stating:

"We are confident that if these two decisions had been available to the prosecution, in light of our answer to the third question, a decision would have been taken not to prosecute the appellant; alternatively, the appellant would have been able to mount a successful submission

of abuse of process on the basis that there are no substantive grounds to dispute that the appellant is a victim of trafficking, that there was sufficient nexus between that status and the offending and that there is uncontradicted evidence of real compulsion" [¶ 174].

However, the Court rejected both AAI's and AAD's appeals against conviction, finding that their accounts of being trafficked were not credible. This led the Court to conclude that the decision to prosecute each was not an abuse of process [¶¶ 158-159 and 179-181]. Moreover, the Court concluded that AAI did not have a reasonable excuse for committing the offence of which he had been convicted [¶¶ 160-167], and that AAD would not have been able to secure an acquittal through the s45 defence, because he was not "compelled" to commit the offence [¶¶ 182-183].

The Court did allow AAI's (but not AAD's) appeal against sentence, reducing the custodial term from 18 months to 12 months [¶¶ 168-169]. However, this is of little help to AAI given that he has already served his sentence, and a 12-month sentence will continue to have adverse consequences for his immigration position.

Conclusion

Overall, this case provides an essential reference for all practitioners considering the prosecution of potential victims of trafficking. The restoration of the abuse of process jurisdiction in these cases fixes an error in the law, which became apparent as a result of the ECtHR case of VCL & AN. It will hopefully limit the criminalisation of victims of trafficking and help in allowing them to avoid prosecution, and rebuild their lives.

"A Critique of Law and Legal Education" (invited talk at the Law on Trial series by the Law School at Birkbeck College, University of London, 18 June 2013, and at the Radical Lawyering in Theory and Practice Conference, 13-15 September 2013).

http://backdoorbroadcasting.net/2013/06/legal-education-socialist-survivors/

"Libertarian Critiques of Consent in Sexual Offences", UCL Journal of Law and Jurisprudence, 2012, 1(1) p 137.

This paper critiques the contemporary English law of consent in sexual offences from a libertarian socialist perspective.

“Blasphemy after Jerry Springer – The Effect of R (on the application of Green) v City of Westminster Magistrates Court”

Paper presented at the Lord Mansfield Student Law Society Conference, 29 March 2008