Neutral Citation Number: [2012] EWCA Crim 189
Case No: 2011/01252B3 AND 2010/06660D1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2012

Before :

LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE ROYCE
and
MR JUSTICE GLOBE

- -

Between :

R	**Appellant**
- v -	
N	**Respondents**
R	
- v-	
LE	

- -
- -

P Carter QC and P Chandran for **N**
D Bunting for **LE**
Tim Owen QC and B Douglas-Jones for the **Crown**
(None of whom appeared below)

Hearing dates : 22nd and 23rd November 2011

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Judgment

The Lord Chief Justice of England and Wales:

1. These otherwise unconnected appeals require consideration of the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 (CETS No 197), (the Convention) ratified by the United Kingdom in December 2008 in the context of appeals against conviction.

Trafficking in human beings

2. No one doubts that trafficking in human beings is abhorrent and that those who do so have committed or are committing very serious crimes. The explanatory report which accompanies the Convention explains why:

> "Trafficking human beings, with the entrapment of its victims, is the modern form of the old world wide slave trade. It treats human beings as a commodity to be bought and sold, and to be put to forced labour, usually in the sex industry but also, for example in … declared or undeclared sweat shops, for a pittance or nothing at all. Most identified victims of trafficking are women … many of the victims are young, sometimes children. All are desperate to make a meagre living, only to have their lives ruined by exploitation and rapacity."

3. For the purposes of the Convention Article 4 provides that:

> "…
>
> (a) Trafficking in human beings shall mean the recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, …
>
> (b) The consent of a victim of trafficking in human beings to the intended exploitation … shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used.
>
> (d) The recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered "trafficking in human beings" …"

Any person aged under 18 years is a "child" for the purposes of the Convention, a provision which equates with section 107 of the Children and Young Person Act 1933.

4. Given the evil which the Convention is seeking to address, it is hardly surprising that trafficking in human beings falls within the scope of the prohibitions on slavery, servitude and forced or compulsory labour contained in Article 4 of the European Convention of Human Rights. (*Rantsev v Cyprus and Russia* [2010] 51 E.H.R.R. 1).

5. In *R v SK* [2011] EWCA Crim. 1691 the appellant successfully appealed her conviction of trafficking a complainant into the United Kingdom for the purposes of exploitation, contrary to section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The core elements of Article 4 formed what the court in its judgment identified as a hierarchy of denial of personal autonomy encapsulated in the concept of trafficking. "Slavery" involved treating someone as belonging to oneself, rather as an animal or object; "servitude" involved an obligation enforced by coercion to provide services for another person; and "force or compulsory labour" involved work under the threat of penalty and performed against the will of the person concerned. The three concepts were not necessarily mutually exclusive. The common denominator between them was that the victim was subject to enforced control.

6. In essence, for a human being to be treated as property is an affront to human dignity. The evil of trafficking in human beings is an international problem which is condemned throughout the civilised world.

The present appeals

7. These appeals arise not from the crime of trafficking in human beings, but rather the conviction and sentencing of two defendants who themselves may have been (and it is contended, were) the victims of trafficking and consequent exploitation, who pleaded guilty to offences involving the production of cannabis. The appellants were sentenced on separate occasions in September 2009 and January 2010.

8. The appeals are well out of time. Indeed the sentences of imprisonment imposed on the appellants have been served. This is said to be the first occasion when this court has considered the problem of child trafficking for labour exploitation. It has not previously been subject to any close analysis following the coming into force of the Convention. However, cases involving the trafficking of children or young persons into demeaning and virtually inescapable servitude raise similar considerations to those raised in any of the many different forms which the exploitation of the vulnerable may take. Accordingly we granted extensions of time to enable these issues to be argued. Permission to appeal was granted in both cases, in Le this was prior to the commencement of the appeal hearing, in N permission was granted on the first day of the appeal hearing.

9. We must emphasise at the outset that in this court we are concerned with the single question, whether, in each case, the conviction is safe.

10. At the risk of failing to do justice to carefully developed submissions, advanced by Mr Carter QC for N, with increasing refinement, and supported by Mr Bunting for LE, the argument in summary is that neither appellant should have been prosecuted at all, and that if the facts had been properly investigated, there would have been, or now following proper investigation after conviction, it has become apparent that there should never have been a prosecution. If there had been no prosecution there would

have been no conviction. In contravention of the United Kingdom's Treaty obligations the processes of the court which culminated in these convictions were misused. In essence, everyone has missed the point, that the appellants fell within the wide ambit of the critical provision at the heart of the appeals, Article 26 of the Convention.

11. Article 26 forms part of chapter 4(IV), which deals with the substantive criminal law. The main provisions require that trafficking in human beings must be criminalised. Supplementary provisions are directed to specific aspects of trafficking and exploitation and circumstances which provide aggravating features of trafficking offences are identified. Article 26 is different. It makes provision for "Non-punishment". Its effect is to require 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".

12. As the argument developed it seemed to us that care had to be taken not to allow the protection against trafficking and exploitation required by the Convention to be elided with appropriate processes when the victim of trafficking appeared to have become involved in criminal activities. Although expressly disavowed it was difficult to avoid the impression that one of the themes implicit in the submissions, and indeed in the substantial body of post conviction evidence produced on behalf of the appellants, was the proposition rejected by this court in *R v LM and Others* [2010] EWCA Crim. 2327 that once it is demonstrated that an individual has been or may have been trafficked, then he or she should not be prosecuted for crimes committed within that context. The logical conclusion of such elision would be to create a new form of immunity (albeit under a different name) or to extend the defence of duress by removing the limitations inherent in it. Whatever form of trafficking is under consideration, that approach to these problems, as both Mr Carter and Mr Bunting accepted, would be fallacious.

13. The language of Article 26 is directed at the sentencing decision rather than the decision to prosecute. It does not provide that penalties should not be imposed on victims of trafficking in a broad general way; the possibility of not imposing penalties is related to criminal activities in which the victims of trafficking have been compelled to participate in circumstances in which the defence of duress is not available.

14. Its ambit has already been considered in this court. In *R v O* [2008] EWCA Crim. 2835 the appeal was not opposed. A girl in her mid teens who, according to her account had entered the country two months before her arrest. She had entered the country lawfully, in possession of a passport and a visa. She came to the UK in order to escape from her father's threat to kill her for refusing to submit to a forced marriage to a much older man who already had five wives. She was told on her arrival in the UK that payment for the trip was to be made by her prostitution. She was raped and forced into prostitution. She managed to escape and was provided with false identity documents by someone she met. On 29th February 2008 she was

arrested in Dover seeking to leave the UK. Her possession of the false identity documents in order to leave the UK formed the subject matter of the indictment. In the Crown Court, just over 2 weeks later, without any pre-sentence report, a sentence of imprisonment was (in view of her age, wrongly) imposed. In this unseemly haste the facts were never examined until after her conviction when a report from the Poppy Project assessed her as having been trafficked. The overall effect of a "shameful" concatenation of circumstances was so extreme that the conviction was quashed on the basis that a fair trial had not taken place. The decision was of immense value in highlighting the general scandal of trafficked children, but the facts were too specific for the decision to be treated as providing guidance of general application to the approach of this court to the exercise of the well known prosecutorial discretion.

15. This was made available in *R v LM and Others* [2010] EWCA Crim. 2327. In October 2010 this court considered three distinct cases concerned with asserted failures to implement Article 26. *LM, MB* and *DG* were in day to day care of two linked brothels. The CPS recorded that the police believed that they had probably been trafficked into the United Kingdom themselves. The allegation was that they had been violent and abusive towards the women in the brothels for which they were responsible. Long before trial it became apparent that the defendants adamantly denied these allegations. On the basis of the evidence available to the Crown, the prosecution was entitled to proceed. Shortly before trial however the defendants decided to plead guilty on what became an agreed basis of plea. The agreed basis was that they had been trafficked and compelled into prostitution themselves and into the control of the prostitution of the two complainants and further, they themselves had not been responsible for any violence or coercion of the complainants. The pleas were accepted. No further thought was given by the Crown to the impact of acceptance of this basis of plea on the Article 26 question. On appeal counsel for the Crown accepted that the Article 26 issue should have been readdressed, and that if it had been addressed, the prosecution of these women would have been abandoned. The view of the court was if the duty under Article 26 had been discharged, the Crown should have offered no evidence, or that an application for a stay of the proceedings would have succeeded. The appeals were allowed.

16. *Tabot* pleaded guilty to possessing a false identity document with criminal intent. On entering the country she presented a false identity card which, in interview, she said she had found in the street in France shortly before her journey. By the time she appeared in the Crown Court she had written to the judge that she had been tricked into leaving the Cameroon to go to France where she had been forced to work as a prostitute for nearly three years by a man who brought her to London to continue work as a prostitute. She told the judge that her involvement in the false document "was a desperate measure to escape to safety". The letter was shown to her representatives at the Crown Court. The issue was examined by her counsel. Tabot's instructions were profoundly unsatisfactory. She pleaded guilty. After her conviction a number of different bodies, including the Home Office, concluded that she had been trafficked. Those findings were made in ignorance of the account she had given to counsel, following a waiver of privilege. In other words they were based on untested assertions. The court examined them, and satisfied itself that they were not credible. The appeal was dismissed.

17. *Tijina* pleaded guilty to using a false identity document and fraud by producing a false National Insurance card. On arrest she said that she had come to this country from Nigeria using a valid passport. She had lived in London for two years. She had been left with the false documents. Her account to her solicitors was that she had run away from Nigeria, leaving her two children there, in order to escape from domestic abuse. She then described how she had been imprisoned and forced to prostitute herself, and subjected to serious sexual abuse. She was assessed as a credible victim of trafficking by the well known Poppy Project. Her solicitor considered the possibility of applying to the court for the prosecution to be discontinued in accordance with Article 6 but he concluded and advised her that this would not be appropriate because her false passport was not in the hands of a trafficker but in her own hands. Although the court decided that of itself that would not remove the case from the ambit of Article 26 if the defendant had committed the offence as a result of the trafficking and under compulsion, the Crown suggested that her account was not credible. The court concluded that, whatever the truth about the underlying assertion of trafficking, the defendant had been entirely free of any form of exploitation in the months before the offences were committed. It could not be said that the offences were committed "in any effort to escape her trafficked exploitation … the reality is that she committed the offences because she wished to continue to live, unlawfully, in this country and to work here when she was not entitled to do so". Notwithstanding some procedural irregularities, the application for leave to appeal against conviction was not arguable. Sentence was reduced to allow for the "real possibility" that the defendant had been the victim of trafficking at an earlier stage in the history.

18. Broad principles were identified. Article 26

> "… does not say that no trafficked victim should be prosecuted when the offence is in some way connected with or arising out of trafficking. It does not provide a defence which may be advanced before a jury. What it says is no more, but no less, than that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled (in the broad sense) to commit it. Article 26 does not require a blanket immunity from prosecution for trafficked victims."

19. Further guidance offered in *R v LM*, reminds us that:

> "The availability of the ultimate sanction of a stay of proceedings on the grounds of abuse was common ground before us … we do not disagree that it is, in certain limited circumstances, available, but the limitations upon the jurisdiction must be understood. Criminal courts in England and Wales do not decide whether a person ought to be prosecuted or not. They decide whether an offence has been committed. They may, however, also have to decide whether a legal process to which a person is entitled, or to which he has a legitimate expectation, has been neglected to his disadvantage".

Hughes LJ continued later in the judgment:

> "The occasions for the exercise of this jurisdiction to stay ought to be very limited once the provisions of the convention are generally known, as by now they should be becoming known … . The convention obligation is that a prosecuting authority must apply its mind conscientiously to the question of public policy and reach an informed decision. If it follows the advice in the earlier versions of the Guidance, set out above, then it will do so. If however this exercise of judgment has not properly been carried out and would or might well have resulted in a decision not to prosecute, then there will be a breach of the convention and hence grounds for a stay. Likewise, if a decision has been reached at which no reasonable prosecutor could arrive, there will be grounds for a stay. Thus in effect the role of the court is one of review. The test is akin to that upon judicial review".

20. Notwithstanding the reference to judicial review, to avoid any uncertainty, we emphasise that the remedy available to the appellants in these cases is not judicial review. Following a conviction the remedy, if any, would be a successful appeal against conviction on the grounds that it is unsafe.

21. Summarising the essential principles, the implementation of the United Kingdom's Convention obligation is normally achieved by the proper exercise of the long established prosecutorial discretion which enables the Crown Prosecution Service, however strong the evidence may be, to decide that it would be inappropriate to proceed or to continue with the prosecution of a defendant who is unable to advance duress as a defence but who falls within the protective ambit of Article 26. This requires a judgment to be made by the CPS in the individual case in the light of all the available evidence. That responsibility is vested not in the court but in the prosecuting authority. The court may intervene in an individual case if its process is abused by using the "ultimate sanction" of a stay of the proceedings. The burden of showing that the process is being or has been abused on the basis of the improper exercise of the prosecutorial discretion rests on the defendant. The limitations on this jurisdiction are clearly underlined in *R v LM*. The fact that it arises for consideration in the context of the proper implementation of the United Kingdom's Convention obligation does not involve the creation of new principles. Rather, well established principles apply in the specific context of the Article 26 obligation, no more, and no less. Apart from the specific jurisdiction to stay proceedings where the process is abused, the court may also, if it thinks appropriate in the exercise of its sentencing responsibilities implement the Article 26 obligation in the language of the article itself, by dealing with the defendant in a way which does not constitute punishment, by ordering an absolute or a conditional discharge.

22. The issue in these appeals is whether the process of the court was abused by the decision of the prosecuting authority to prosecute. Throughout the judgment when we refer to abuse of process, we are referring specifically to the alleged abuse of process in the context of the Article 26 obligation.

Publications

23. N was convicted on 9 July 2009 and sentenced in September: LE was convicted on 20 August 2009 and sentenced in January 2010. We have been provided with a very substantial body of published material in the form of guidance and protocols and Codes of Practice which address the problem of trafficking. The publications were not always in chronological order, and many of them post-dated the appellants' convictions. We shall first note the most important of the relevant publications available at the dates when the appellants were convicted and sentenced, on the basis that they provided the foundations for the suggestion that the prosecuting authority had failed in each case properly to evaluate and assess and ultimately conclude that a prosecution of these defendants was mis-conceived.

Publications – pre-sentence

24. Among the relevant guidance and advice which addressed the trafficking issues, in 2007, the Government's publication *Safeguarding Children who may have been Trafficked*, was published. The problem was examined in depth. Although attention was drawn to some cases involving UK born children who were victims of trafficking within the UK, the document did not direct anything like the same level of attention to this problem as it did to child trafficking into this country. Indeed most of the focus was directed at child prostitution. However definitions were provided:

> "The most common terms used for the illegal movement of people – "smuggling" and "trafficking" – had very different meanings. In human smuggling, immigrants and asylum seekers pay people to help them enter the country illegally, after which there is no longer a relationship. Trafficked victims are coerced or deceived by the person arranging their relocation. On arrival in the country of destination, the trafficked victim is forced into exploitation by the trafficker or the person into whose control they are delivered or sold.
>
> It is perhaps worth emphasising that this distinction between those who were "smuggled" into the UK and those who were "trafficked" into the UK remained one of the constant features of guidance about these issues for some years."

25. The publication drew attention to the Code for Crown Prosecutors which was then current. Children coerced into criminal activity were victims of abuse and should not be criminalised. Even when the defence of duress would not be available, the decision whether it was in the public interest for the child to be prosecuted was directly engaged.

26. We turn now to the CPS Guidance on Human Trafficking and Smuggling "last updated on 31 January 2008". This Guidance was focused on the steady accumulation of legislation dealing with trafficking in human beings, and at that stage culminating in the criminal offence of trafficking people for exploitation under section 4 Asylum and Immigration (Treatment of Claimants etc) Act 2004. The definition emphasised the importance of understanding

> "that there is a difference between persons who are smuggled and those who are trafficked. It is equally clear that in some cases the distinction between a smuggled and trafficked person will be blurred and both definitions could easily be applied.
>
> Smuggling is normally defined as the facilitation of entry to the UK either secretly or by deception (whether for profit or otherwise) the immigrants concerned are normally complicit in the offence so that they can remain in the UK illegally. There is normally little coercion/violence involved or required from those assisting in the smuggling.
>
> Trafficking involves the transportation of persons in the UK in order to exploit them by the use of deception, intimidation or coercion. The form of exploitation includes commercial sexual and bonded labour exploitation. …"

27. The Guidance ended by recognising that victims of human trafficking may commit offences while under coercion. If investigating officers have reason to believe that the individual has been a victim of trafficking, he (or she) is then described as a "credible" trafficked victim. This requires prosecutors considering whether to proceed, or continue with criminal proceedings, to reflect again on the public interest.

28. The Guidance was updated on 4 February 2009. This was the relevant Guidance in force when both these appellants were defendants in the Crown Court. It was directed at the same issue, that is criminal offences committed by those who traffic and smuggle persons into this country. The distinction between those who are trafficked and those who are smuggled was unchanged, and remained the primary feature of the Guidance. However specific attention is directed to the defendants who might be victims of human trafficking. A variety of different offences connected with immigration offences is identified. Where the victim has committed offences or been involved in the commission of an immigration offence, and is a credible trafficked victim, the public interest in any prosecution will arise for consideration. The factors bearing on the decision include the use of "violence, threats or coercion" on the trafficked victim to procure the commission of the offence, that is the immigration offence. The Guidance goes on to identify a special category of those who are described as "young defendants", who may be "trafficked" victims whose offences were committed under coercion. The Guidance describes how there "may be instances" where child trafficked victims are involved in the cultivation of cannabis plants. Such young offenders may "actually be a victim of trafficking". If so they fall within the ambit of child care legislation.

29. Mr Carter drew particular attention to the reference in the Guidance to recent cases which highlighted the offence of cultivation of cannabis plants as one likely to be committed by children who were victims of trafficking and suggested that prosecutors should be alert to the possibilities. The Guidance continues:

> "Where there is clear evidence that the youth has a credible defence of duress, the case should be discontinued on evidential grounds. Where the information concerning coercion is less certain, further details should be sought from the police and

> youth offender teams, so that the public interest in continuing a prosecution can be considered carefully … Any youth who might be a trafficked victim should be afforded the protection of our childcare legislation if there are concerns that they have been working under duress or if their well being has been threatened."

The primary focus remained the victim who was trafficked into this country.

30. On 1st April 2009, simultaneously with the Convention itself, the National Referral Mechanism, which enabled individuals who might be victims of trafficking to be identified and provided with appropriate protection and support, came into operation. Among others, the Crown Prosecution Service and the police were enabled to refer individuals who may be "evidencing signs of being a victim of human trafficking" for assessment. Within 5 days the question whether there were reasonable grounds for considering the defendant to be a victim of trafficking would be considered. This was a temporary arrangement. Thereafter, within 45 days, a "conclusive" decision would be reached. In the case of the appellant N, this process had not started and indeed did not start until after he was convicted and sentenced.

31. On 22nd April 2009, that is the date on which the appellant N was interviewed by the police on the basis that he said he was born in 1972, the Child Exploitation and On Line Protection Centre representing ACPO issued its analysis of the threat of child trafficking in the United Kingdom. It is a very detailed report. It identifies the number of minors from Vietnam who enter the United Kingdom undetected. The number was greater than previously understood, and one form of exploitation, among many others, was forced labour in the cultivation of cannabis. On the basis of this study, Mr Carter suggested that the officers responsible for arresting the appellant and his co-accused should have been aware of the link between Vietnamese immigrants and cannabis farming, and once it had been appreciated that the investigation covered a cannabis producing factory, the police should have been alerted to the risk that trafficking might be involved.

32. The United Kingdom Government "Trafficking Toolkit" was published in October 2009. Referring to the definition of trafficking to be found in Article 4 of the Convention, it underlined the difference between trafficking and smuggling, both by reference to the nature of the crime and the relationship between the person organising the entry of and the migrant himself, and the length of their relationship. Specific attention is drawn to the Convention and the measures designed to protect victims of trafficking which include "the possibility of not imposing penalties on victims for their involvement in unlawful activities, if they were compelled to do so by their situation". The distinction between those who were trafficked and those who were smuggled continued.

33. Attention is drawn to the then current Code for Crown Prosecutors, that is the relevant CPS Guidance. Children who have been coerced into criminal activity are victims of abuse. They should not be inappropriately criminalised. Even if the defence of duress is not available, the decision whether it is in the public interest for the child to be prosecuted is directly engaged. This was the latest publication before the proceedings against the appellant LE, were concluded which we should highlight.

R v N

34. On 25th September 2009, following his guilty plea to one count in being concerned in the production of a controlled drug of Class B (cannabis) the appellant was sentenced by Her Honour Judge Karu to a detention and training order for 18 months. Appropriate orders relating to the forfeiture and destruction of the relevant drugs and paraphernalia were also made.

35. There were three co-accused, Hung van Nguyen Van Ho and Khanh Vo, all three defendants were sentenced to 18 months detention and training order.

36. The essential facts are very straightforward. On 21st April 2009 police officers attended factory premises in London E6 following reports of a suspected burglary. They discovered a cannabis factory, a crop of some 6000 cannabis plants, together with all the necessary paraphernalia for the successful and profitable cultivation of cannabis. The police were informed that a large body of men had been seen in the gardens to the rear of residential premises, forcing their way into the cannabis factory premises, presumably to take over the factory, or to discourage those within the factory from continuing the cultivation of cannabis.

37. On investigation, the factory had been set up in a very sophisticated way. The necessary horticultural principles involved in the cultivation of cannabis plants were plainly well understood. A very significant financial outlay would have been necessary to equip the premises with the paraphernalia for the cultivation of cannabis, including high intensity lighting units, ducting assisted by fans to aid ventilation, horticultural chemicals, time switches and water butts. The estimated annual yield from the plants was just under 450 kilograms, with a potential street value of between £500,000 and £1m.

38. The factory also provided accommodation, in that the appellant slept on the floor and was provided with meals. The appellant and his co-accused were all Vietnamese nationals found close to the premises, hiding from the marauders. They were arrested. They had entered the United Kingdom illegally. Dealing with it generally, in interview they had said that they had been employed to cultivate the cannabis and the Crown later accepted that they should be categorised as “gardeners”.

39. On arrest £70 in cash was found on the appellant. With the assistance of an interpreter, he was interviewed at a police station. On arrest asserted that his date of birth was April 1972, so he was treated as an adult. Two police interviews, conducted with interpreters, took place on 22nd April. By then he was asserting that he was born in 1992. According to the unchallenged account, the appellant admitted that he had left Vietnam and travelled via the Czech Republic to the United Kingdom. He said that he had been recruited by a Vietnamese man in his 30’s called Ha soon after his arrival in the United Kingdom, and that Ha had housed and fed him. At this stage he was told that he was not allowed to leave, but not physically detained or restrained against his will. After a few days Ha offered him a job and transported him to the factory. He gave a description of the factory. The windows were bricked up. The only door was locked from the outside and he also believed that it was guarded. To begin with he did not appreciate that he had been dealing with illegal plants, but when he did, he said that he had become frightened and did not want to work in the factory and wished to leave. He ate, slept and worked in the factory, and he was unpaid. On

one occasion he left the factory with others, and stayed away for 3 days. While absent, in the course of a telephone call he informed Ha that he did not wish to work in the factory anymore. According to his account, he was threatened that if he or any of the other factory workers stopped working they might be killed. He took the threat seriously. He and the others were picked up and returned to the factory and continued to work as a gardener.

40. Subsequently during a hearing before the magistrates on 30th April 2009, he said that his date of birth was April 1992. If true, this meant that he was a young person/child of 17 years. The case thereafter was approached on the basis that he was arrested on his 17th birthday. On this basis he was a "child" for the purposes of the Convention.

41. The prosecution conducted a file review on 1st June 2009. The full Code test was not applied. It appeared that the appellant had been smuggled into this country on the basis that his parents had funded his journey to what was hoped would be a life with better prospects. The appellant himself had never suggested that he had been trafficked into this country. The separate question, whether he might have been the victim of forced labour after he entered the country, was not specifically addressed, but even at this stage of the investigation, it appeared that the period of labour in the factory had been relatively brief, and that there had been a break of 3 days when the appellant had left it. Moreover when arrested he was in possession of cash.

42. No representations were made to the prosecution that the defendant was or should be investigated as a trafficked victim.

43. The case was prepared for trial. Legal aid was granted to the appellant. There is a note in the instructions to counsel that he stated that he had been "trafficked into the UK". The source of that entry has not been traced. The appellant has accepted in his later affidavit that he never used that term. He says he did not then know what it meant. It is in fact wholly inconsistent with what the appellant had said in his police interviews, and what he was to say to counsel who took instructions for him, and to the person responsible for the preparation of the pre-sentence report.

44. Counsel saw the appellant in conference on 1 July. With the assistance of an interpreter she received instructions directly from the appellant. In summary he stated that he had fled his home in Vietnam and had come to the United Kingdom illegally, via the Czech Republic. He never suggested that he had been "trafficked" here and when he arrived he had a home to go to. He had stayed with a cousin in London and then, while looking for work, he met Vietnamese people in the street, and they introduced him to the man Ha. Ha provided accommodation and food and money, and employment. "He was then taken to work in a factory which he thought/he was told was producing herbal medicine. He was unhappy working there as he was mainly locked in and unable to go out. For approximately 10 days, when he believed that the plants were herbal medicine, he did not have a problem working there". Then he discovered that the plants were cannabis and asked to leave. The request was refused. He was threatened that if he left he could or would be killed. He attempted to escape from the factory one day with two co-workers and went to one of the co-worker's relative's home. Ha rang them. As a result of further threats they returned to the factory.

45. Counsel investigated a possible duress defence. She asked the appellant if he could have phoned the police or run away when he was away when he was at Khanh's relative's home, and the appellant accepted that he could have run away from that house. She therefore advised him that duress would be unlikely to succeed. As to whether or not there was a defence on the basis that the appellant had not appreciated that the plants were cannabis and illegal, she advised that it would be difficult to persuade the jury of that fact. The appellant endorsed trial counsel's notebook to confirm that he had had the defences explained to him and that he wished to plead guilty. No written basis of plea was drafted. The prosecutor indicated that the appellant and the others should be dealt with on the basis that they were all gardeners.

46. From the appellant's instructions counsel did not believe that issues of trafficking or forced labour would arise, but she was later, and unsurprisingly, to mitigate on the basis that owing to his age and illegal status in the United Kingdom he was both vulnerable and susceptible to the influence of older peers, and that he felt trapped and fearful of trying to escape.

47. The appellant's solicitor has provided an affidavit. It describes a visit to the appellant while he was in custody on 19th June 2009. The appellant confirmed that he had arrived illegally into the United Kingdom approximately 2 months earlier as a result of his mother arranging the journey via an agent, who was paid $20,000. In his proof he explained that the £70 found on him had been given to him by Ha before he went into the factory. He was told that the factory was kept locked because he was in the United Kingdom illegally and if he was caught, he would be sent back. This was "supposed to be" for his own benefit. He did the job for about 2 weeks before he was arrested. The appellant never stated that he had been a victim of trafficking, and as a result his proof did not mention that he had been trafficked into the United Kingdom. The issue was not explored further, and no instructions were given to counsel to pursue any possible issue relating to trafficking.

48. Following the appellant's guilty plea in early July 2009, a pre-sentence report was prepared by a member of the Youth Offending Team. This is a detailed, impressive report. The writer saw the appellant while he was in custody. She conducted a home visit to his cousin. She liaised with his allocated worker from the Refugee Council, and his case worker at the Young Offender Institution. She examined the relevant entries in the police national computer system and the Youth Offending Team files. She had access to the Crown Prosecution papers.

49. Her report recorded the facts of the offence, and summarised the police interview. She recorded his explanation to her that he arrived in England in the back of a lorry in April 2009, saying that his parents "had paid an agent for him to be taken to England for a better life" and that he himself "wanted to gain an independent life and earn money". The arrangements with the agent, and the travel arrangements in an overcrowded and unpleasant lorry were fully described.

50. The appellant expressed regret at his decision to accept the offer of a job in the factory, and that he recognised the seriousness of his actions. He accepted that his motivation to act was "financial gain" which, upon reflection, he said was not acceptable or justifiable. "He accepted responsibility for his decision to act and displayed a level of remorse … he said that he had recently arrived in England from Vietnam and despite residing with his cousin, he said that he wanted to earn a living

and saw this as a good opportunity. He denied any knowledge of what he would be expected to do prior to arriving at the factory and said that "he was prevented from leaving the premises once he arrived".

51. It also emerged that after his arrest he had made regular telephone contact with his parents who resided in Vietnam and that he had also made telephone contact with the cousin who lived in England. During the writer's visit to the appellant's cousin, she believed that the appellant had travelled to England due to his father demonstrating against the Government with consequent concerns about the appellant's safety. The cousin did not know why the appellant had chosen to accept a job from a stranger and did not condone his behaviour. Although she recognised the seriousness of the offence she said that she was willing to accommodate and support him, and to prevent further offending. She intended to attend the court hearing.

52. At the sentencing hearing, the pre-sentence report was, of course, before the judge and indeed available to the prosecution. Counsel on behalf of the appellant relied very heavily on it. She described the circumstances in which the appellant left his home town in North Vietnam, due to fears his family had about his personal safety because of his father's political activities. He had arrived here in very difficult and traumatic circumstances. That provided significant mitigation for someone of his age, who found himself in the position of taking up the offer of work. He was more vulnerable and susceptible to the influence of older peers. He had been naïve about the situation he had found himself in, and in the conditions in which he was working, he often "felt trapped and that he did not really have any route of escape". She referred, among other features, to the fact that the appellant had made a claim for asylum, and that his cousin would provide him with a home on his release.

53. In her sentencing remarks the judge observed that Hung van Nguyen, Khanh Vo and the appellant were "gardeners". She understood that they were all victims of other unscrupulous people who took advantage of their youth and the fact that they were illegal immigrants to use them as workers in the production of cannabis. She did not ignore any of their personal backgrounds, and the fact that each of them was attempting to try and make a better life for himself by leaving his home country. She acknowledged that the appellant had made "excellent progress" while in custody. These sentencing observations were properly based on the respective cases presented by the prosecution and the defence. The sentence was 18 months detention and training order.

54. In essence, the argument in support of the contention that the conviction is unsafe was, at any rate to begin with, based on the stark proposition that everyone involved in the case missed the real point, that the appellant fell squarely within the provisions of Article 26 of the Convention, and that he had been trafficked into the country. Mr Carter argued that the Crown Prosecution Service should have carried out a much greater investigation into the question whether the appellant had been trafficked into this country and exploited in the cannabis factory; that those who acted for the appellant should have alerted the Crown Prosecution Service to the same problem and invited them to conduct further investigations; and indeed at one stage that the judge herself had been remiss in failing to recognise the problem and requiring its further investigation.

55. Mr Carter advanced sustained submissions critical of the process of which the sentence was the culmination. In part he relied on the contemporaneous Guidance and Codes of Practice which form part of the publications noted earlier in the judgment. On close analysis his submissions appeared to mean the many thousands of individuals who might, in the course of their duties, become involved in the investigation and prosecution of offences should be deemed to know and fully appreciate the ambit and potential impact of every single publication offering guidance or advice whenever an individual who may possibly fall within the Convention is arrested. This is somewhat unrealistic. Although there must, inevitably, be broad understanding of the way in which different bodies vested with these responsibilities are operating, the CPS, or ACPO, or indeed each other responsible body, cannot immediately appreciate every item of guidance or advice issued by every other body. In this particular case, for example, the Child Exploitation and On Line Protection Centre representing ACPO issued its report on the very day on which N himself was interviewed after his arrest. In any event, it appears to us that in the initial stages after the implementation of the Convention the primary focus of attention was the distinction between those who were "smuggled" into the country and those who were "trafficked" into it. But, more important, the criticisms ignore the facts, and in particular the impact of the appellant's accounts in interview, to his lawyers, and the writer of the Pre-sentence Report about the circumstances in which he became an immigrant into this country and worked in the cannabis factory. These accounts were, it must be emphasised, the instructions and the explanations provided by the appellant himself. The evidence available to those who were acting for him, that he had been "smuggled" as a volunteer, was unanswerable. Moreover it appeared that he made the choice to start working with Ha rather than find work at or near the safe home provided by his cousin, and that he chose to work, at first without apparent difficulty. Thereafter the appellant's period of work in the cannabis factory before his arrest was very short lived. It had been interrupted by a not insignificant break. He was in possession of cash. After his arrest he had continued in communication with his family in Vietnam and his cousin in England, without suggesting that he had made any complaint or expressed any concern.

56. Despite Mr Carter's efforts to persuade us to the contrary view, at this date there was no evidence before the Crown Court, or for that matter the CPS or indeed the defence, which suggested that the appellant had been trafficked into this country, or that he fell within the protective ambit of Article 26. Rather the effect of the evidence was that he was a volunteer, "smuggled" into this country to make a better life for himself and that he had a home with a family member to which he could have gone and where he would have been welcome. The essential point in mitigation, correctly taken on the basis of the appellant's instructions, was that he was very young, and in a vulnerable position as an illegal immigrant, and that in his short time working in the cannabis factory, like his co-defendants, he had been exploited by others. That provided real mitigation, but in the light of the facts as they appeared to be, and on the basis of the Guidance to Prosecutors then current, the decision to prosecute rather than to conduct further investigations did not involve any misapplication of the prosecutorial discretion sufficient to justify the conclusion that this prosecution constituted an abuse of process on the basis of a breach of Article 26 of the Convention.

Subsequent events

Publications – post sentence

57. On the face of it, post conviction material offering further guidance and advice, or underlining what we shall describe as "best practice" is irrelevant to the prosecutorial decision which pre-dated these publications. However Mr Carter invited to examine it as it supported his contention that the appellant should never have been prosecuted, and we have done so.

58. By mid-August 2010 the ACPO Child Protection and Abuse Investigation Group were warning police officers to be "alert to the possibility" that children and young people were being trafficked into the United Kingdom and exploited in cannabis farms. Greater awareness of the potential problem was required.

59. Shortly afterwards, in December 2010, a further paper was issued by the Child Exploitation and On-line Protection Centre entitled the Police Response to Recovering a Child or Young Person from a Cannabis Farm. The overview began with the assertion that "any child, identified in a cannabis farm is likely to be a victim of trafficking … sometimes young people are not identified as victims … this is contrary to police child protection responsibilities when a child or young person has been identified as a victim of crime". The paper recognises the need to treat each case individually, with the relevant Chief Constable responsible for the decision to investigate an alleged criminal offence, and the Crown Prosecution Service deciding whether or not an individual case should be prosecuted. The paper also accepts that this is what was described as a "contentious area for officers, particularly when it comes to establishing the true age of some of the victims". Nevertheless there was what was described as a "general lack of awareness amongst officers on how to recognise child victims of trafficking".

60. In May 2011 the CPS policy for prosecuting cases of human trafficking was revised, not by any suggested diminution in the seriousness of trafficking of human beings, but by acknowledging that it remained likely that "labour exploitation" was a "relatively under-detected" aspect of the problem of combating trafficking. Nevertheless the Guidance continues that "Trafficking of human beings should not be confused with "smuggling" of human beings", and it continues to explain some of the differences between the two, identifying some of the features which would help "distinguish between the victim of trafficking and the individual who has been smuggled into the country."

61. The Guidance recognises that there are cases in which the distinction between a smuggled and a trafficked individual will be "blurred", and that an individual who may have been smuggled into the country, may become a victim of trafficking. There is increasing and much more detailed focus on the need for "greater awareness" of the problem of trafficking for the purposes of forced labour and domestic servitude. For example, reference is made to the newly enacted provisions in section 71 of The Coroners and Justice Act 2009, and the protection created for those who may be victims of forced labour or servitude who were not trafficked into the United Kingdom at all. In the context of prosecuting a suspect who might be a trafficked victim, attention is drawn to the decision of this court in *R v O* [2008] EWCA Crim. 2835, which is said to highlight the need for all reasonable steps to be taken to identify victims of trafficking, and the need to be proactive in the process. It also points out that prosecutors can only take appropriate steps if they have information

from the police or other sources that the suspect might be a victim of trafficking. In particular even after a conclusive grounds decision by the National Referral Mechanism this is not decisive. It must however be taken into account when deciding whether to proceed.

62. We note for the purposes of this judgment that the CPS policy on prosecuting cases of human trafficking was reissued as amended in May 2011 and that the CPS Legal Guidance on the prosecution of defendants who might be trafficked victims was updated in May 2011.

63. The final paper requiring specific notice was produced in June 2011 by the Organisation for Security and Co-operation in Europe suggesting a community policing approach. The introduction identifies the continuing problem that a number of authorities were familiar with the basic characteristic of cross-border trafficking in human beings for sexual exploitation, but suggested that their experience of trafficked victims exposed to other forms of exploitation was "limited". The paper was directed to improvements in the process of identifying the victims of human trafficking.

64. We have no reason to doubt that the CPS, as the responsible prosecuting authority, will continue to examine individual cases in the light of developing knowledge and understanding of the issues of trafficking.

Post sentence "fresh" material

65. In November 2009, while the appellant was serving his sentence, his case was referred to new solicitors. It is perhaps worth noting, that without implying the slightest criticism of anyone, notwithstanding the dedication and commitment of so many of those who became involved in this case, the investigations which introduced the material now put before us as "fresh" evidence took a great deal of time and effort before it was believed to be adequate to present to the court in support of the present appeal. It underlines something of the difficulty of establishing the facts which it is now suggested should have emerged from a more thorough pre-sentence investigation of N's case.

66. On examination a substantial proportion of "new" material is derived from or depends on post-sentence accounts given by the appellant himself.

67. We have also considered a substantial body of expert evidence. However it is addressed, the conclusions of the experts are significantly dependent on the post conviction accounts of events, and history provided by the appellant. The explanation for his earlier accounts is that they were or might have been or should be treated as the product of fear or misunderstanding of the investigative and judicial processes in which he had become involved. The question to be addressed, however, is whether this post conviction material may help to support the contention that the conviction is unsafe, not on the basis that there is any reason to doubt that the appellant committed the crime to which he pleaded guilty, but because the prosecutorial decision to prosecute and the process culminating in the conviction was flawed.

68. On 9th April 2010 the NSPCC National Child Trafficking Advice and Information Line (CTAIL) was asked to consider the case. The case summary referred to the appellant's involvement in a demonstration against the Government in Vietnam, when

his friends were arrested and he was assaulted. He fled to the home of his aunt and hid there. Due to the death of a "previous relative" in a Vietnamese prison, his aunt arranged for an agent to bring him to the United Kingdom and find him a job. He was not aware whether the agent was paid or not. He left Vietnam in September 2008. He flew to the Czech Republic. From there he was transported to the United Kingdom. When he arrived he went to stay with his sister-in-law for one night. On the following day he met the man called Ha. He understood that Ha knew people who had transported him to the Czech Republic. Ha said that he would help find the appellant a job so that he could support himself in the UK. He spent two nights in Ha's home in London. He was then transported to what was described as "the final house". He saw a lot of plants. He became suspicious and asked what they were, but he was told not to worry. He must water the plants and he would earn money. While he was in the house he and others were locked into it, and there were a number of security guards. On one night he and two others managed to escape. But on the next morning Ha and the security guards tracked them down to their location and forced them to return to their house. Ha told him that if he tried to leave again the security guards would come and find and kill him.

69. The case was investigated by Imogen Chapman, qualified social worker, employed at CTAIL. She saw the appellant on 23rd April and 5th May 2010, with an interpreter. In her first report she summarised his account of events. The critical feature is that he said that when he was 16, in about November 2008, he took part in an anti-Government protest in Hanoi. During the demonstration he held a banner while his friend threw a petrol bomb at the police. As a result one police officer hit him with a baton in the back of the head and his forehead near his eyes, and knocked him to the ground. The police tried to grab him and take him away but people behind him started to push the police and fought with them. He fell back to the ground, and a woman helped him to her home where she gave him first aid. When he returned home his mother was extremely concerned that he would be arrested and told him to leave and go and hide. The general belief in the family was that the police would have photographs of him. So he hid on his aunt's private land for 4 months, living in a hut next to her fishery. Then his family told him to leave Vietnam for his own safety. If he stayed in Vietnam he would die. He needed to leave the country as soon as possible, and so he left Vietnam in March 2009. His aunt took him to Hanoi. Arrangements were made for him to pass through immigration controls. He flew out of Vietnam to the Czech Republic. He was met in accordance with the arrangements described to him. He stayed in accommodation some 4 to 5 hours away from the airport for about 2 weeks. To begin with it was thought that he would remain in the Czech Republic working there. Thereafter, effectively out of the blue, he was taken by car to a garage and eventually placed in the back of a lorry, which arrived in England. He himself had understood that his final destination was the Czech Republic. However when he arrived in England he was taken to the home of some women who said they would help him find work. He then remembered that he had a cousin in England. Quite whether she was a cousin, as we understand it, or a sister-in-law, was unclear, but there was no doubt that he regarded her as family. He was allowed to telephone his mother, and when he called his cousin she sounded very surprised to hear him. Nevertheless she spoke to the woman in charge of the house, and it all started to make sense to her. Arrangements were made for him to meet his cousin. She told him he could stay as long as he wished, but as he didn't know her husband, he felt uncomfortable about intruding on her life. In the meantime the

women had told him that they could arrange for him to find work, so after his cousin had left her home early in the morning, he left it and never returned. When he met up with the two women a Vietnamese man approached them and told him about a job. If he wanted work, the man would provide it. He decided to go with him. He did not want to return to his cousin because he did not want to be a burden to her. He simply thought that it would be work, and that with work he would earn a living.

70. The man was called Ha. He stayed with him for 2 days. He wasn't allowed to leave. He was then taken to a street where he was put into a van. He was then taken to a house where the cannabis was growing. He did not appreciate that the plants were cannabis, or illegal, but he gradually became suspicious. The windows were blocked, the front door was always locked, and western security guards with guns patrolled it. He described conditions. His main duty was to cook, clean and tidy, but as he knew nothing about the plants, he was not allowed to look after them. He telephoned Ha. He got permission to go out with a driver. He went with the man to visit his family/friends. From then he telephoned Ha again to say he did not want to go back. Ha said that he had to, and that if he did not, the owners of the business would track him down and kill him. He was urged to calm down and work hard, and told that later he might be paid for his work. As he was afraid he returned to the house. About a week later the police arrived. He said he was never paid for his work.

71. The report from Imogen Chapman acknowledged that according to his account the appellant consented both to his journey to the UK and to the work in the cannabis factory. Although she suggested that under the Home Office Guidance of 2007 these facts are irrelevant, they are not, as it seems to us, an insignificant consideration in the context of the prosecutorial decision.

72. She explained that there were reasonable grounds for considering him to be a victim of child trafficking from Vietnam to the United Kingdom, and grounds for believing that he was a victim of international child trafficking, trafficked from Vietnam to the UK for exploitative work in a cannabis farm. On release from custody he was at risk of being retrafficked internally. He would be happy to stay with his cousin in the UK who had visited him in custody. In reaching her conclusion she had not seen the record of the appellant's police interview, or the note of his instructions to his original solicitors, or the Pre-Sentence Report. However in November 2011, on reconsideration of these matters, she did not propose to change her opinion, providing an explanation of how the pattern of inconsistencies might itself be in effect, a manifestation of the situation in which he found himself after his arrest.

73. We have considered a later report from Dr Eileen Walsh, chartered clinical psychologist, dated 25th March 2011. She interviewed the appellant on 27th November 2010 in his accommodation at Dover.

74. In his account to her of the family history, he explained how his father had been arrested and imprisoned, and then as a result of being beaten and tortured had died about a year later. His aunt told him what had happened. He was afraid of the authorities in Vietnam. He went to a protest. The police were there. He ran away. He was very frightened that he might be arrested and then beaten, particularly in view of what had happened to his father. He went to stay at his aunt's house, very fearful, and his family arranged with agents for his departure from Vietnam.

75. He was not asked about all his experiences, and the writer relied on his account to the NSPCC for these matters. However he did say that conditions were bad. The door was always locked and he was frightened. He gradually realised something was wrong. He wanted to get out. Although he left the factory, and then telephoned to say that he would not return, he was threatened that if he did not return, he would be killed. He was frightened. While he was in the factory he was not physically assaulted and did not see any other violence.

76. When he was arrested he felt very frightened. When he was arrested he remembered that the police in Vietnam had hit him, so he was frightened of the police. He was not beaten or tortured, and he understood the questions he was asked and was able to answer them. However he was also "scared, angry and did not know what was going on". He was very angry because he had been tricked, and very angry that he had been to prison. At the Young Offenders Institute he was treated very well.

77. Dr Walsh noted that there were "a few inconsistencies" between his interviews on arrest, detention and conviction, when compared with his interview with the NSPCC. She refers to the first set of police interviews directly and suggests that he had difficulty in providing a fully accurate account during the first set of interviews. The inconsistencies appear to be within the context of his trafficking experiences, and consist of minor details which could be considered as peripheral. At the time he suffered from, and indeed continues to suffer post traumatic stress disorder.

78. There is a supplementary psychological report dated 2 November 2011. Dr Walsh addressed inconsistencies in the appellant's account in relation to the person with whom he stayed on the first night in the United Kingdom, the roles he was "forced to perform in his conditions of forced labour exploitation in the cannabis factory, the timing of his knowledge that his labour related to the production of illegal substances, the circumstances of a trip away from the cannabis factory mid exploitation, the length of time spent in the cannabis factory, and the circumstances of being threatened by members of the criminal gang." None of this caused her to change her mind. She stood by the opinions expressed in her first report.

79. Returning to the appellant himself, in his affidavit dated 6th April 2011 the appellant addressed some of these inconsistencies. For example, where the Pre-Sentence Report referred to his father, he says that should have been a reference to his step-father. Although in his police interview he had said that he stayed at Mr Khanh's house for 3 days, he says that in fact he was only there for one night. As to what was said to counsel acting for him, there were a number of matters which he was no longer able to remember.

80. In the meantime, after the sentence was started, the National Referral Mechanism process was followed in the appellant's case and on 16th November 2010, long after his sentence had been completed and he was no longer in custody, the relevant section of the UK Borders Agency found that the appellant had been trafficked. Mr Carter naturally relied very heavily on this finding. However neither the detailed pre-sentence report, nor the transcript of the hearing before the Crown Court, nor any of the material relating to the appellant's instructions to his legal advisors, nor any input from the legal advisors themselves, was examined. Even without that material, UKBA's analysis identified a number of features of the evidence which undermined

the appellant's credibility. However, having reflected on the "credibility issues", it decided that on the balance of probabilities the claimant was a victim of trafficking.

81. Self-evidently, in making the decision to prosecute in this case, the CPS did not have the advantage of the findings after conviction by UKBA. However even if those findings had been available, the CPS would not have been bound by them, whether they supported or did not support the appellant. Assuming in the present case that the UKBA report had been available before conviction, the CPS would have noted and would have been justified in noting first, that UKBA itself entertained reservations about "credibility" issues, and second, that its conclusion ignored (because it was unaware of it) the more or less contemporaneous material available for consideration by the CPS when making its decision.

82. In reality, UKBA and CPS are exercising different responsibilities. Neither can bind the other. What is essential is that if at all possible in the relatively constricted timetable, that each should be provided with all the material made available to the other and that both should approach the exercise of their responsibilities on the basis of mutual respect and comity.

83. We have reflected on the UKBA decision together with a vast body of additional evidence, most of it coming into existence long after the appellant was sentenced, and much of it dependent on his post sentence account of events, de bene esse.

84. Something of the difficulty of admitting the vast bundle of new material as evidence intended to undermine the prosecutorial decision which culminated in the appellant's conviction, is illustrated by the decision of the CPS, to examine all the material, and respond with an ex post facto review. This was carried out specifically for the purposes of the present appeal, in the light of the post sentence material and in particular the UKBA findings. The Review concluded that the initial accounts given by the appellant during 2009 continued to provide the most likely approximation to the truth and that these accounts made clear that he was "smuggled" and not trafficked into the United Kingdom. "There is not a credible suspicion that (the appellant) was a victim of "trafficking". Accordingly, it was contended by the Crown that the entire basis for this appeal is undermined.

85. This conclusion is criticised by Mr Carter on the basis that it failed sufficiently to comprehend the true impact of the fresh evidence, but in any event, it effectively confined itself to addressing the circumstances in which the appellant arrived in the United Kingdom. The criticism tends to overlook the issues which the Review was seeking to address, but whether justified as a criticism or not, it is fairly suggested that the Review did not directly address the question whether the appellant was in servitude and a victim of forced labour after he had been smuggled into the country. However this dispute about the qualities of the Review which took place in the light of the evidence which had become available a couple or years or so after the appellant's conviction, reveals something of the artificiality which has overtaken the proceedings. Even if the latest CPS Review were flawed in the way suggested by Mr Carter, the criticisms do not provide the answer to the question whether the decision to prosecute made in 2009 constituted an abuse of process.

Conclusion

86. Just because the issues in cases which involve Article 26 of the Convention are often extremely sensitive, we have examined a vast bundle of post conviction evidence, much of which is, on analysis, repetitive. We have also examined numerous publications and considered all the expert evidence. In the context of fresh evidence we shall identify a series of considerations of broad general effect.

a) It is possible to envisage circumstances in which fresh evidence may emerge which may support the argument that the defendant was convicted after or in consequence of an abuse of process. The pre-eminent example where a conviction was quashed, notwithstanding a guilty plea, on this ground is *R v Mullen* [2000] QB 520.

b) We underline that in future the only publication likely to be relevant to an inquiry into an alleged abuse of process in the context of Convention obligations is the CPS Guidance in force at the time when the relevant decisions were made. It should normally be assumed that the contemporaneous CPS Guidance will have taken account of all the relevant material to be found in all the guidance offered by different authorities with responsibilities in this area, and indeed that it will be updated in the light of any new information. Unless it is to be argued that the CPS Guidance itself is inadequate and open to question because it has failed to keep itself regularly updated in the light of developing knowledge, for the purposes of the court considering an abuse of process for which the prosecutorial authority is responsible, it is the CPS Guidance which should be the starting point, and in the overwhelming majority of cases, the finishing point for any argument of alleged non-compliance with Article 26.

c) We entertain great reservations about the value of expert evidence which is said to bear on the abuse of process issue. This is not, as we emphasise, to impugn the good faith of the expert evidence put before us, or indeed the experience and knowledge of the expert witnesses. However, as we have already explained, much of what they have to say depends on the appellant's accounts of events. The conclusions of the experts are significantly dependent on him. In relation to conviction, however, the decision remains the correctness, or otherwise, of the decision to prosecute. On this issue the expert evidence did not assist, and we should perhaps emphasise, that in making its decisions in future, save to the extent that its own Guidance may make provision for it, we do not anticipate that the CPS would normally be required to seek evidence of the expert nature deployed in these appeals.

d) It has been made plain in numerous decisions of this court, that a defendant is provided with one opportunity to give his or her instructions to his legal advisors. His defence is then considered and advanced and he is advised about his plea in the light of those instructions. It is only in the most exceptional cases that the court would consider it appropriate to allow a defendant to advance what in effect would amount to fresh instructions about the facts for the

purposes of an appeal against conviction. There is no special category of exceptionality which arises in the context of Article 26.

e) Finally, turning directly to the present appeals, an abuse of process argument in the context of the Convention which is advanced long after conviction is most unlikely to succeed on the basis that subsequent events show that if the decision to prosecute were to be taken at this later stage, the result might be different from the decision actually taken in the light of contemporary standards and guidance as they existed when it was taken.

87. None of the pre-sentence evidence, and none of the fresh material, begins to suggest bad faith or improper motivation on the part of any investigating police officer or the CPS, or even deliberate, or neglectful, or innocent concealment of relevant material from the court either when the original decision was made that he should be prosecuted or indeed subsequently. This fresh material does not lead us to conclude that the CPS blinded itself or allowed itself to be blinded to significant facts emerging since N's conviction, which should reasonably have been revealed before the conviction (or for that matter the sentence), or that the circumstances of the process for which the defence as well as the prosecution is responsible fairly merits the description applied by this court to the combination of circumstances revealed in *R v O*. The facts are far distant from those shambolic events. In our judgment the conclusion that the appellant was "smuggled" rather than trafficked into the United Kingdom was one which it was, or perhaps more accurately, would have been open to the CPS to reach. Moreover, if the decision to prosecute was confined to answering the question whether the appellant was "smuggled" or "trafficked", the decision reached by the ex post facto Review would not have been open to serious question, and certainly would not have been so unreasonable that this court should interfere with it on the basis of a misconceived prosecutorial decision. At the date of N's conviction and sentence it appears that in the light of contemporary understanding of the issues, the forensic decisions were approached in a sensible practical manner. The decision to prosecute the appellant on the basis that he was smuggled rather than trafficked could not and cannot be impugned. The appellant was not the victim of incompetent legal representation. There was no reason for the judge to interfere and in effect invite either the prosecution or the defence to reconsider its position.

88. During the course of the hearing, rather greater attention was focused on the circumstances in which he was working in the cannabis factory after his arrival in England than the pre-reading of the papers caused us to anticipate. We therefore closely examined this aspect of the case.

89. The fresh material adds very little to the facts which are said to support the contention that the decision to prosecute was flawed on the basis that the appellant was a victim of forced labour. The value of the new material is that it highlights the problem of the exploitation of the vulnerable, and in particular the young, which in some cases reduces them to base servitude which, although often extending over national boundaries, is sometimes prevalent within them, both for those who are born here, and for those who have been smuggled into the country. We emphasise that the protective ambit of the Convention is not limited to those who have, by whatever means, crossed international boundaries. Sometimes those born and brought up in this country fall within the ambit of the trafficking in human beings prohibited by the Convention, and

sometimes those who have not been trafficked into the country become victims of trafficking after their arrival here. The Convention applies to them equally as it does to those who have been trafficked into this country for the purposes of exploitation.

90. We have therefore examined the question whether the circumstances in which this appellant was working at the time of his arrest represented a level of coercion and compulsion which should have led to a decision that he should not be prosecuted.

91. Closely examined, the fresh material adds very little to the facts which are said to support the contention that the appellant was indeed a victim of forced labour. The expert evidence is ultimately dependent on the appellant's accounts of these matters. The post sentence accounts themselves suggest, as Imogen Chapman herself acknowledged, that the appellant chose to work in the factory when a perfectly safe home with a member of his family was available to him after his arrival in this country. As a matter of fact, he chose to ignore this opportunity. Even on the best available construction of the evidence, his period of work in the cannabis factory was very brief. This was obviously not a pleasant or comfortable job, nor a decent environment in which to work. However on his own account, to begin with at any rate, he was untroubled by the conditions or the work. Having considered all the fresh material, the evidence which suggests that the appellant was, in the word used in Article 26 "compelled" to work in these conditions is, at best from his point of view, nebulous. It is possible, and we can take it no further, that if he had worked for a much longer period, and had never after the initial night or three nights away, left the premises, or been able to leave them, and had been shut off from communication with his family here and abroad, the case might well have been very different. And, if those facts had obtained, the CPS would have concentrated not only on the issue of "smuggled" or "trafficked", but on the forced labour issue which then would have required serious consideration. However in the case of this appellant, the evidence on this issue does not lead to the conclusion that the conviction is unsafe on the basis that the prosecution constituted an abuse of process and violated the United Kingdom's Convention obligations.

92. The appeal against conviction is dismissed.

93. The sentence imposed by the judge at the Crown Court accorded with the broad levels of sentencing imposed on those who were found to be "gardeners" in an efficiently run cannabis factory. In the absence of the further information with which we have been provided, we should have been disinclined to interfere with the sentence imposed on N. However it is addressed, the production of cannabis on an industrial scale has been and continues to be a serious problem, a feature recognised by the new Sentencing Guidelines which will relate to sentences to be imposed after 27 February 2012. However in the case of N we entertain reservations whether the sentence imposed sufficiently reflected the age and circumstances of the appellant when he was involved in the work, that is, virtually 17, but still only 16 years old, including the very short period during which he worked in the factory, as well as his guilty plea. Allowing for the size of the criminal enterprise in which he was involved, an immediate custodial sentence was appropriate. We should however have reduced it to 4 months DTO. The order will be varied accordingly.

R v Vinh Cong Le

94. On 19th January 2010, following his guilty plea to one count of producing a controlled drug of Class B (cannabis) at an earlier hearing in the Crown Court at Peterborough before His Honour Judge Coleman, the appellant was sentenced to 20 months detention in a Young Offender Institution. Appropriate orders under section 240 of the Criminal Justice Act 2003 were made. The appellant has now been discharged from custody and his sentence has been completed.

95. The appellant was one of a substantial group of defendants charged with offences arising from the production of cannabis following the execution of a drug warrant at an address in Milton Road, Cambridge on 6th May 2009. Hung Duong, Thinh Duc Le and Cu Tran pleaded guilty to conspiracy to produce cannabis. They were sentenced to 6 years imprisonment, 5 years imprisonment and 5 years imprisonment respectively. Hung Thi Ho, Khanh Phuong Niguyn, Hanh V Bui and Dung Tran pleaded guilty to producing cannabis. They were sentenced to 2 years imprisonment, 21 months imprisonment, 21 months imprisonment, and 30 months imprisonment concurrently.

96. The address in Milton Road, Cambridge was a 4 bed roomed house which had been converted into a cannabis factory. Two of the rooms were used as bedrooms. By contrast with the accommodation in N, the house had not been converted or secured in any way that would have prevented the appellant from leaving it. Four hundred and twenty cannabis plants, with a street value in excess of £130,000 were seized. The factory had been set up in a sophisticated way. Electricity had been abstracted to distribute power to a variety of electrical equipment, including sodium lights. Paraphernalia needed for the purpose of growing cannabis was found. The appellant's finger prints were discovered on light bulbs in two rooms at the property. There was unchallenged evidence that on arrest he was found to be in possession of a mobile telephone, with credit, and £100 in cash.

97. The crown's case was that the appellant's role was that of a "gardener".

98. When interviewed the appellant was accompanied by a legal representative and an appropriate adult. He said he was 15 years old. He gave a prepared statement to the effect that he had been smuggled into the United Kingdom by his adoptive father, but thereafter he had lost his contact details. He wandered the streets before encountering two Vietnamese nationals who said they would help him find his adoptive father. They took him to their address. He realised that cannabis plants were being grown, but did not realise that the growing of cannabis was illegal. He was provided with groceries on a weekly basis. Thereafter he declined to answer further questions. This account was effectively repeated to his solicitors and then to counsel.

99. There was some difficulty discovering the appellant's true age. Suffolk Social Services were not prepared to accept his claim that he was 15 years old. The assessment concluded that he would attain the age of 18 in January 2010. The Crown Prosecution Service ensured that the appropriate procedure was followed in the Magistrates' Court, where a finding of fact was made by the District Judge that the appellant was at least 17 years old. The case was sent to the Crown Court for a preliminary hearing. The appellant was remanded in custody.

100. On 21st May at a preliminary hearing before Judge Coleman, the case was adjourned for P.C.M.H. on 7th August. A few days later Refugee and Migrant Justice informed

the appellant's then representatives of concerns that the defendant may be the victim of human trafficking, and that the point had been "flagged" up by social services. At the P.C.M.H. hearing, the remaining defendants pleaded guilty. The appellant was not produced. On 13 August he had a conference with counsel. Shortly afterwards the Court was informed that he would plead guilty, and on 20th August he did. His instructions to his legal advisors remained consistent with what he had said in his police interview.

101. On 4th September counsel advised the appellant in unequivocal terms that he could apply for leave to vacate his guilty plea on the ground that he had been trafficked and subjected to forced labour. The appellant gave repeated instructions to the effect that he was not in fear of the alleged traffickers. Nevertheless counsel applied for an adjournment to await receipt of a report from social services to see whether he was deemed to be the victim of trafficking. Judge Coleman wisely agreed to adjourn sentence to enable a trafficking assessment to be carried out and for the defence to consider further whether the guilty plea had been properly entered.

102. The case was listed for sentence on 16th October. On 14th October the case was reviewed by the reviewing lawyer from the Central Unit of the CPS in conference with counsel. The Trafficking Assessment Report was considered. The conclusion was reached that there was no credible evidence that the appellant had been trafficked.

103. On 15th October the CPS received a "reasonable grounds" letter from the UK Border Agency which indicated that there were grounds for believing that the appellant might have been trafficked. The letter indicated that he qualified for a 45 day reflection period. On 16th October the issues were raised before Judge Coleman. He was told that the Crown had considered the relevant CPS Guidance, and that on the basis of the information available, the Crown intended to continue with the prosecution and that an application to vacate the guilty plea would be opposed.

104. Judge Coleman examined these questions with great care. He could see aspects of the evidence which were consistent with the Crown's view that the case could properly proceed, including the appellant's possession of a mobile phone, with credit, and cash, the absence of bars on the windows, and his claim to have had a basic education. In response to questions from the judge, prosecuting counsel confirmed that although elements of duress were apparent, the duress defence had no realistic prospect of success. Counsel for the appellant agreed. On instructions he urged the judge to proceed to sentence. However, although its position was clear, the Crown invited the court to allow for the 45 day reflection period in order that the conclusion of the National Research Mechanism should be known, although in the end this would be unlikely to produce any change in the stance of the prosecution. Nevertheless the issue needed examination.

105. Thereafter an application was made by the appellant's present solicitors for legal aid to be transferred to them. The application was refused. On 27th November the appellant's then solicitors were telephoned and notified that UKBA "does think that the defendant has been trafficked". The case was further re-reviewed by the appropriate CPS lawyer on 8th December. At a hearing on 15th December it was recorded that "UK Border Agency have confirmed that he has trafficked but are unable to confirm as yet whether he is eligible for a resident's permit …". The

decision that the case should continue to be prosecuted was confirmed by the Chief Crown Prosecutor.

106. Thereafter there were discussions between the appellant and his legal advisors about whether an application for leave to vacate the plea should be made. On 4th January 2011 the appellant was notified by his solicitor that "at the moment there is not in my possession definite confirmation from the Borders Agency that you are considered to be a trafficked child, as they are still conducting their investigation into you and your status".

107. A further conference took place between the appellant and a representative of his solicitors at which he gave further instructions relating to issues of duress and coercion.

108. The case was listed on 19th January. The appellant decided not to change his plea. The attendance note from his solicitors records that whilst the UKBA had assessed him to be a victim of trafficking, and while the appellant had raised with social services the possibility that he had been forced to commit the offence, that did not mean that the appellant could not be prosecuted. The prosecution had to consider whether it was in the public interest to prosecute. In the light of all the information the prosecution "would not withdraw this prosecution." There was "little we can do about that, only thing is challenge in High Court, on grounds "unreasonable to have made that decision". However this process would take a long time and in any event have little chance of success. The appellant decided that he would not apply to withdraw his guilty plea.

109. The case proceeded. Opening the case for the Crown, counsel focussed on the evidence which suggested that the appellant could not be described as a trafficked person. He was found with cash on him. He was provided with a mobile phone and credit for use with that phone. The house was an ordinary house, far from a make-shift prison, where the defendant said he had been left and provided with groceries at weekly intervals. The account given by the appellant in interview in which he said that he arrived seeking an adoptive father was contrasted with what he said in the Trafficking Assessment. When asked questions to identify who this adoptive father might be, he was unable to provide any comprehensible explanation. His movements about the country after his arrival, and his allegedly accidental presence in Cambridge, when he had simply bumped into two further co-nationals who offered him the opportunity of going to Cambridge was inconsistent with having been the victim of trafficking. Over the months the account had developed of some "mild pressure or threats" being put to the defendant but the Trafficking Assessment itself provided information that the appellant was clear that his family in Vietnam was not under threat, that there were no debts owed to anyone in Vietnam, and that he had not been abused prior to his arrest. The Crown examined the facts in detail and had come to the conclusion that there was no "reason whatever to revise their initial assessment of the public interest that the appellant" was someone who should be prosecuted.

110. Given the meticulous care and detailed examination of all the relevant evidence made both by counsel for the Prosecution and the Crown Prosecution Service, and the fair and balanced approach taken by Judge Coleman throughout these protracted proceedings, the prospects for this appeal were unpromising.

111. In essence, the argument advanced by Mr Daniel Bunting proceeds on the basis that given the information available to the defence at the time when the case proceeded to sentence, an application should have been made to vacate the guilty plea. However, as he accepts, there was nothing to suggest that the plea could be considered a nullity, or that the theoretical defence of duress would have had any realistic prospect of success. Nevertheless if the application to vacate the plea had been made, and then granted, on the basis of the appellant's youth and the findings in his favour in relation to trafficking, the judge would then have been invited to consider an application to stay the prosecution, and presumably, that if such an application had been made, the judge would have granted it. This is all entirely speculative, and does not address the reality. Even if the judge might have been persuaded to allow the appellant to vacate his plea for the argument in support of an order for the stay of proceedings to be mounted, the inevitable outcome of any such hearing would have been that the decision to continue the prosecution was fully justified. On the facts, the decision to prosecute was amply justified. That would have been the view formed by Judge Coleman, and it is the unhesitating conclusion which we have reached.

112. Accordingly this appeal will be dismissed.

Sentence

113. As with N, the sentence imposed by the judge was consistent with the approach to these issues suggested in earlier decisions of this court. This appellant was older than N when he became involved in the enterprise, his participation was greater and covered a longer period, and he was not exposed to the same level of exploitation as N. These were carefully structured sentencing decisions involving a number of defendants, reflecting their relative involvement and culpability, but given LE's age, and his guilty plea, a 12 month custodial sentence would have been sufficient. The order will be varied accordingly.