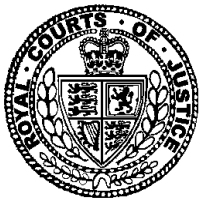

Neutral Citation Number: [2025] EWCA Crim 267

Case No: 202303875 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT STOKE ON TRENT
His Honour Judge Fletcher
T20210012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2025

Before :

LADY JUSTICE MACUR DBE
MRS JUSTICE CHEEMA-GRUBB DBE
and
MR JUSTICE MARTIN SPENCER

- -

Between :

REX	**Respondent**
- and -	
BZP	**Appellant**

- -
- -

James Marsland (instructed by **Crown Prosecution Service**) for the **Respondent**
Hayley Douglas (instructed by **Southwell & Partners**) for the **Appellant**

Hearing dates : 26 February 2025

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 14 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Macur LJ :

ANONYMITY ORDER

1. The applicant applies for an order for anonymity under s11 Contempt of Court Act 1981. Regardless of the outcome of his application for leave to appeal, we are mindful that his successful appeal to the First Tier Tribunal ("FTT") against the Home Office decision refusing him asylum was heard anonymously. We have regard to the concessions made on behalf of the Secretary of State in those proceedings and the findings made regarding his trafficking into the UK, the likelihood of re-trafficking and the position of his family members still residing abroad and thus grant him anonymity.

   Therefore, this case has been listed and will be reported under randomly assigned initials and no publication shall name the applicant or report any detail which may lead to his identification.

CROWN COURT PROCEEDINGS

2. On 8 February 2021 BZP, the applicant (then aged 25) pleaded guilty to producing a controlled drug of class B (cannabis) contrary to s4(1) of the Misuse of Drugs Act 1971 and was sentenced to 16 months' imprisonment.

   He was represented by Mr S. Muldoon, a Solicitor-Advocate.

PRESENT PROCEEDINGS

3. He now applies for an extension of 975 days in which to apply for leave to appeal against conviction. The applications have been referred to the full court by the single judge. Miss Douglas appears on his behalf. Mr Marsland appears for the prosecution.

FACTS

4. On Sunday 10 January 2021, police officers entered a property in Stoke on Trent, after identifying a strong smell of cannabis. The officers found a cannabis factory: in an upstairs backroom approximately 44 plants were hanging from the ceiling, there were 12 transformer plugs and 12 lights. There was a ladder up to the loft, which was split into two separate areas. In one area, there were approximately 41 medium sized cannabis plants, 14 transformer plugs and 13 lights. In the other area, there were approximately 32 small cannabis plants and two lights. A total of approximately 117 cannabis plants were recovered.

5. The applicant was found hiding in the loft and was arrested. He was found in possession of £170 in cash. Keys were found in the locks to both doors and two mobile telephones were seized.

6. He was interviewed under caution. There is no interview transcript, but a summary of the interview provides what was said to be his account of the circumstances in which he came to be found in the property. He said that he had entered the United Kingdom from Vietnam illegally in the back of a lorry two to three years before and had paid £10,000 for his travel arrangements. He stayed in London trying to earn a living but was struggling for money. The friend he was staying with in London had given him the contact details of two men who would pay him money to work. He had contacted them,

and they promised to pay him £1,000 a month for his work as gardener. Therefore, approximately two and a half months before his arrest, he had left London to travel via Manchester to what he subsequently came to know was a cannabis farm. Initially, he did not know that he was acting illegally but when he 'googled' the plants he found that they were cannabis. He continued working although he asked the men to 'let him go'. He said the men threatened to beat him up if he left the property but never physically harmed him. He said he was given around £400 in cash in total. His food was brought in for him. He was not free to leave although he had been out to buy cigarettes and he was in contact by telephone with friends and family in Vietnam, having set up a Facebook page on one of the phones he had been given by his employers.

7. The police sought charging advice from a Crown Prosecutor. In authorising charge, the Crown Prosecutor referred to the CPS policy on suspects who may be victims of trafficking or slavery but nevertheless concluded that the public interest favoured prosecution of the applicant. On 18 January 2021, the applicant was referred by the police through the National Referral Mechanism (NRM) to the Single Competent Authority (SCA) and on 22 January 2021, the SCA determined that there were reasonable grounds to suspect that the applicant was a victim of modern-day slavery (the positive reasonable grounds decision). The "credibility concerns" noted in the minutes at that time were that: "Police state that PV admitted that despite being forced to work and not free to leave he was able to leave the cannabis factory and buy cigarettes." No "other incidents" going to credit were considered.

8. As indicated above, on 8 February 2021 the applicant pleaded guilty to the offence as charged. During the sentencing hearing, Mr Muldoon mitigated in terms:

> "[He] didn't go to the address knowing that what he was going to do was wrong, is what he said in his interview. He was promised work. He knows he can't work legitimately in this country in any event. It's only when he goes to the address that he realises it's cannabis, but, of course, at that point, he remains involved, and that is why he's pleaded guilty. There was, he would argue, some pressure placed on him to remain at the address, but it's clear from the evidence that the keys were on his side of the door, so he could have left the property.… And he did, and he left to buy cigarettes. He was promised £1,000 per month, he actually received over a period of two months or so £400. … Whilst he may have been trafficked into the county, he's not a victim of modern-day slavery. … As far as credit is concerned, no indication was given at the magistrates' court out of an abundance of caution to clarify whether he may be a victim of modern-day slavery. I'd ask your Honour to perhaps, in this case, give him full credit bearing in mind the admissions he made in his interview.
>
> That is the position. He does wish me to stress to your Honour that he didn't deliberately, from the outset, get himself involved in criminal activity, but he accepts that once he knew what it was, he continued…."

9. The judge in his sentencing remarks found that:

> "as far as culpability is concerned, whilst it is clear that you were motivated by financial advantage, it is equally clear that you were performing a limited function under direction from others and there was a degree of pressure and a degree of exploitation…. I have already indicated in your case that there were here, plants and there was a large number and there was a degree of clear understanding by you as to what was happening. Which moves this up in the range. … You do, however, have the advantage of being able to say that a degree of vulnerability of yours was exploited. …"

10. Subsequently, on 26 July 2021 the SCA made a positive conclusive grounds decision:

> "Overall, it is considered that you were recruited whilst in London and transported to the cannabis house where you were harboured thereby meeting part A.
>
> Furthermore, it is considered that you were deceived into believing that you would be employed in gardening work and threats offeree (sic) were used against you should you leave the property thereby meeting part B.
>
> Lastly it is considered that you were forced into the work, cultivating the cannabis, against your free will thereby satisfying part C.
>
> There are no significant credibility issues in the account. Looking at the evidence in the round, it is considered the account has met the required threshold, namely 'on the balance of probabilities' it is more likely than not to have occurred.
>
> DECISION
>
> Applying the standard of proof 'on the balance of probabilities', it is accepted the PV was a victim of modem slavery in the UK during 2020-2021 for the specific purposes of forced criminality."

11. On release from prison the applicant claimed asylum. He was refused by the Secretary of State for the Home Department (SSHD) and appealed to the First Tier Tribunal (FTT) against the refusal of his protection and human rights claim. Judgment was promulgated on 16 October 2023.

12. During the hearing, counsel for the SSHD accepted that the applicant was a victim of trafficking but argued that he would not face a real risk on return to Vietnam. He, "explicitly confirmed that credibility was no longer in issue, as the Respondent accepts the Appellant was trafficked to the United Kingdom and also, separately, subjected to criminal exploitation and forced labour whilst here." Consequent upon that 'concession', the applicant was not called to give evidence, and his statement dated 28 October 2021 was accepted as his evidence. His appeal succeeded.

13. The decision of the FTT did not address the constituent parts of the section 45 defence and there was no need for it to do so.

THE APPLICATION FOR PERMISSION TO APPEAL

14. The applicant now seeks an extension of time and permission to appeal arguing that:

    i) His conviction is unsafe because on the facts as they are now known to be, he had a defence pursuant to s.45 of the Modern Slavery Act 2015 which would have been likely to succeed;

    ii) Further or alternatively, the conviction is unsafe because had his status been known, he would, or might well, not have been prosecuted, or if he had been prosecuted an abuse of process argument would have been likely to succeed.

15. Following '*McCook*' ([2014] EWCA Crim 734) inquiries. Mr Muldoon responded in an email dated 3 October 2023. He said that he attended the applicant at Court on 8 February with a Vietnamese interpreter and advised about "the potential defence of modern-day slavery". He said:

> "During that conference he accepted that he had been communicating with his friends over Facebook, he had left the property on a number of occasions and no threats had been made towards him albeit there was an element of exploitation because he could not work legitimately. He accepted that once he knew that cannabis was being grown at the address, he remained involved because he was paid. He did not wish to rely on the defence of modern-day slavery as he accepted that he had alternative options available to him."

16. The applicant disputed that he had said that once he knew that it was cannabis being grown, "he remained involved because he was paid" and waived privilege. Consequently, a contemporaneous attendance note from the solicitor who attended the applicant at the police interview was produced which states:

> "He provided a good interview, putting forward modern-day slavery until the very end of the interview where he accepted that he had been paid £500 in cash for his services as a gardener, he was provided with two mobile telephones, and he had left the address when he wanted in order to buy cigarettes. Albeit the client speaks no English and therefore may have been fearful of approaching the police, he was in contact with his friends via Facebook throughout his time there and I do not think he was going to be able to say he was trafficked given the payment he was made and his ability to come and go as he pleased."

17. In a further email from Mr Muldoon dated 29 April 2024, he maintained that, based on the applicant's instructions, he did not believe that the defence of modern-day slavery would succeed, however, he was not aware of the reasonable grounds' decision dated 22 January 2021 and had he been aware of it, his advice would have been different.

18. Ms Douglas submits that the applicant's guilty plea is vitiated due to incorrect legal advice, or the failure to advise as to a possible defence that deprived the defendant of a defence that would probably have succeeded: *R v Tredget* [2022] EWCA Crim 108 at [158]. She asserts that if he had received "proper legal advice about the defence, he would have advanced it at trial, and it is highly likely he would have been successful". She says that "The Applicant disagrees that he was given any advice about the Modern Slavery Act defence during his pre-hearing conference with Mr Muldoon" and asks that we note that Mr Muldoon has not provided an attendance note of the pre-hearing conference.

19. Alternatively, she submits that it would have been an abuse of process for the prosecution to proceed: *R v GS* [2018] EWCA Crim 1824. Had the applicant's status been known to the prosecution, "the more likely scenario is that a decision would have been taken not to prosecute him, on an application of either Stage 3 (clear evidence of a statutory defence under s.45) or Stage 4 (not in the public interest) of the CPS Guidance."

20. If the CPS had proceeded with the prosecution, and in so doing departed from the Conclusive Grounds decision, the Applicant would have applied to stay the prosecution as an abuse of process on the grounds that there was no rational basis to dispute that the Applicant is a victim of trafficking:

> "… the dominant force of compulsion was sufficient to reduce the Applicant's criminality or culpability to or below a point where it was not in the public interest for him to be prosecuted, and therefore that any application to stay the prosecution would have succeeded."

21. The prosecution opposes the applications. Mr Marsland asserts that contemporaneous documentation, both internal to the solicitor's firm and external as shared with the prosecution and the court, acknowledged the possibility that the applicant was a victim of modern-day slavery prior to knowledge of the SCA decision in January 2021. The making of the positive grounds' decision did not undermine the advice likely tendered to the applicant or the CPS determination that it was in the public interest to prosecute the applicant. There was a distinction to be drawn between the applicant's initial trafficking into the country and his subsequent criminal activity.

FRESH EVIDENCE

22. The applicant seeks to rely on fresh evidence in support of his application, namely;

    i) The positive reasonable grounds decision & minutes dated 22 January 2021, and the positive conclusive grounds decision & minutes dated 26 July 2021

    ii) The applicant's witness statement prepared for the purpose of his asylum application dated 28 October 2021 and the decision of the First Tier Tribunal dated 16 October 2023

    iii) The applicant's witness statement in support of application for leave to appeal.

23. We have already referred to the substance of the positive reasonable and conclusive grounds decisions and the FTT decision above. The applicant's 'asylum' witness statement dated 28 October 2021 details his journey from Vietnam to the United Kingdom and his initial stay in London with his fellow countryman, DP, of which there is no issue. Of note, in light of other material supplied by his criminal solicitors, he states that when "Duy told me that his friend was looking for employees and that they did not need to have papers or to speak English. I really needed a job, and I had no idea if it was illegal or legal or not."

24. His 'appeal' statement dated 19 October 2023, is described therein as an 'addendum' to the asylum statement. In summary, he said he was not given advice on an NRM referral or a modern-day slavery defence by police or his solicitors. He did give instructions about being paid £500 in cash but in fact the traffickers had said that they would pay him £500-1000 a month but only paid him £400 and nothing further "despite working two and a half months". The traffickers had given him two phones. He used the iPhone to contact his parents and friends. He set up a Facebook account. The traffickers made him change the sim card every few weeks. He bought cigarettes with "the £400 I received <u>when I first started working</u>." (Emphasis provided) He confirmed that he had £170 in cash when arrested. He disagreed that he had told Mr Muldoon, that once he knew cannabis was being grown at the address, he remained involved because he was being paid.

DISCUSSION:

25. We agree with the single judge who referred BZP's applications to the full Court that the real issue in BZP's applications is the "nexus between the trafficking and [his]criminality".

26. As indicated in *VSJ* [2017] EWCA Crim 36, at [38] -[40] "it does not follow from the fact an individual 'fits the profile' of a victim of trafficking that they are necessarily the victim of trafficking" and that "a careful analysis of the facts is required including close examination of the individual's account and proper focus on the evidence on the nexus between the trafficking and the offence with which they are charged".

27. We have little hesitation in rejecting Ms Douglas' contention that the applicant was not advised about a modern-day slavery defence at all. We agree with Mr Marsland, the proliferation of references to the defence both in court records and the solicitors' firm's internal memoranda in contrast to the applicant's stated uncertainty as to whether he was advised on this issue is telling. Far more plausible is the indication that all the applicant was interested to know, after his period spent in custody on remand, was the likely length of his sentence if he entered a plea of guilty. The question for us on ground 1 therefore is whether the applicant was adequately advised of the strength of the prospective defence.

28. Section 45 of the Modern Slavery Act 2015 ('section 45') provides

> "(1) A person is not guilty of an offence if—
>
> (a) the person is aged 18 or over when the person does the act which constitutes the offence,

> (b) the person does that act because the person is compelled to do it, and the compulsion is attributable to slavery or to relevant exploitation, and
>
> …
>
> (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
>
> (2) A person may be compelled to do something by another person or by the person's circumstances.
>
> (3) Compulsion is attributable to slavery or to relevant exploitation only if— (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
>
> (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.
>
> (4) …
>
> (5) For the purposes of this section— "relevant characteristics" means age, sex and any physical or mental illness or disability; "relevant exploitation" is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking."

29. We necessarily focus upon the evidence of compulsion (subsection (1)(b)) and relevant characteristics (subsection (1) (d)). We have had regard to the fresh evidence upon which the applicant seeks to rely de bene esse.

30. We do not consider ourselves bound by the concession made on behalf of the SSHD before the FTT that "credibility was no longer in issue". The applicant did not give oral evidence and the FTT decision was not concerned with the applicant's criminality and section 45 defence. It has no relevance to the issue under consideration.

31. We do not understand why Mr Muldoon indicated that he would have advised differently if he had known of the January SCA decision. The attendance notes prepared by the solicitor attending the applicant in police interview identified the problem in the 'defence'. There was no new information contained within the minutes of the SCA positive reasonable grounds decision. The SCA decision was not admissible at trial; see *Brecani* [2021] EWCA Crim 731. We therefore disregard this statement in his 'McCook' response.

32. The jurisprudence as regards the approach that this Court will take to the SCA positive reasonable and conclusive grounds decisions in well traversed and assimilated within recent authorities .In summary, the decisions of the Single Competent Authority are not binding on this Court, but will be afforded due deference subject to "the cogency of the evidence on which the Competent Authority relied"; see *AFU* [2023] EWCA Crim 23.

33. Although the applicant has been consistent in his account that he was not initially aware that the plants he tended were cannabis, and that when he did become aware he indicated he wished to leave and was threatened with physical violence if he 'escaped', we discern material differences between the applicant's statement filed in the asylum proceedings and his "addendum" statement filed in his application for permission to appeal.

34. We acknowledge that the SCA did not have the same facility to contrast the applicant's statements, but in any event, we consider that the SCA were insufficiently rigorous in examining the anomalies which had been identified in the applicant's account; every response of the applicant was accepted as 'reasonable' although some patently begged further question. What is more, we do not understand the rationale behind the statement: "when you appeared at the Crown Court to face the criminal charges … you pleaded guilty. You had legal representation throughout and therefore no weight is placed on this fact." The fact that he was legally represented throughout and pleaded guilty is certainly a significant issue to investigate before arriving at a conclusion that the applicant was the victim of enforced criminality.

35. We considered that this was a case where it was necessary for the account given by an applicant to be tested before the Court by cross- examination; see *AAD* [2022] EWCA Crim 106. The applicant gave evidence before us, assisted by Mr Viet Tuan Ho, an interpreter.

36. Regardless of the variances between them, Ms Douglas asked that the applicant's witness statements prepared for the FTT and in support of these applications should stand as his evidence in chief. It appears that the witness statements were written down in English after an interpreter had interpreted the questions asked from English to Vietnamese and vice versa, rather than being expressed in Vietnamese script, the applicant's first language, and then translated into English. The obvious advantage in the latter process would be to ensure the capture of appropriate nuance. Nevertheless, BZP was content to 'confirm' that the statements were accurate.

37. In cross examination he said that when he had first been taken to the house, he had not thought anything amiss regarding the gardening arrangements – "they were only small plants". Once he found out that the plants were cannabis, he did not attempt to escape because he believed the men would make good on their threats to do him harm. They could have returned to the house at any time – they lived nearby – or else phoned him, he suggested they would know where to come to find him, that is, the train station, and he would have had to wait for a train to arrive. He agreed that in the first two weeks he was under no compulsion or threat, however, he didn't venture out for he had no money to do so, and the men would bring him food. He said he was only paid the £400 after he had asked to leave.

38. We found the applicant's evidence to be unsatisfactory; it was implausible in parts and inconsistent in material respects. His evidence regarding the Nokia phone, which he said was the means of communication with the drug dealers, changed between his 'asylum' statement and his 'appeal' statement. Initially, he said that DP (his friend) had provided the phone when he first arrived in London, would occasionally 'top it up' and he had used it to contact his family in Vietnam. Subsequently, he said that the drug dealers had provided the Nokia phone and the iPhone. They required him to change the

Sim cards in the Nokia phone on a regular basis. He did not use this phone to contact family or friends.

39. He said in his appeal statement that he had been paid £400 at the outset, but that the remainder of the money he had been promised was not forthcoming. In cross examination, he denied leaving the house in the first two weeks when he was not under compulsion, restraint nor threat because he had not been paid the money until after the threats of physical harm had been issued. We find this sequence of events to be incredible.

40. He attempted to account for the difference in monies found on his person and the £400 he said he had received upon challenge in cross examination that one shopping expedition was unlikely to account for the difference in amount, by claiming that the police had not discovered all the money he had and that he had purchased not just cigarettes but also food stuffs. This appeared to us to be the product of the applicant thinking on his feet to avoid admitting more frequent trips outside.

41. He did not suggest that he did not know where the railway station was or suggest that he would have been unable to purchase a railway ticket. He was au fait with Google translate and could make himself understood. His explanation that he would have to wait on the platform for a train suggested greater familiarity with local transportation links than he was prepared to admit.

42. Consequently, beyond his assertion that he only knowingly acted as a gardener under compulsion, we found no circumstantial evidence to suggest that this was so. He had access to keys; he was in contact with the outside world via internet and his local shopping excursions and he had financial means.

43. We do not ignore the facts or the effect upon the applicant of his illegal and disturbing, albeit willing, trafficking into the UK and his inevitable 'vulnerability' to exploitation arising from his unauthorised status and lack of documentation or money, but there is no evidence that his personal characteristics were otherwise than to enable him to avoid the criminal activity in which he had become involved. He was not subject to the direct influence of the first trafficking gang. He had contacts in London, where he had lived and worked independently in legitimate tasks for two and a half years. He spontaneously referenced the railway station in his oral evidence as a possible means of 'escape'. He had access to the internet and Google Translate. He had realistic alternatives.

44. There was and is little if any realistic prospect that a section 45 defence would succeed in these circumstances. His solicitor advocate was right to advise the applicant on the benefit of a guilty plea upon length of sentence and to focus upon the mitigation that was afforded by his initial trafficking stopping short of a defence to the charge.

45. Our reasoning disposes not only of the first but also the second ground of appeal. The CPS cannot be faulted for determining that, regardless that the applicant should be referred via the NRM as the potential victim of modern-day slavery, nevertheless, it was in the public interest to proceed in prosecution of the offence revealed. Neither the SCA positive grounds decision nor the FTT decision would have provided a proper basis to pursue an abuse of process argument. It was bound to fail.

46. None of the 'new' material affords any ground for allowing the appeal. There is no basis upon which to vitiate the applicant's guilty plea. The draft grounds of appeal are unarguable and application for permission to appeal is refused as is the application for an extension of time in which to make the application.