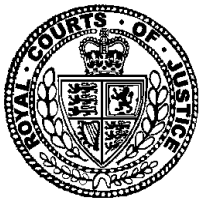

Neutral Citation Number: [2022] EWCA Crim 1483

Case No: 202201108 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
Her Honour Judge Canavan

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 November 2022

Before :

LORD JUSTICE POPPLEWELL
MR JUSTICE JOHNSON
and
HIS HONOUR JUDGE PICTON

- -

Between:

R	**Respondent**
- and -	
BXR	**Appellant**

- -
- -

Benjamin Douglas-Jones KC (instructed by **Birds Solicitors**) for the **Appellant**
Andrew Johnson (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 20 October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 10 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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An anonymity order has been made in respect of the appellant who is referred to as BXR, which will remain in place throughout his lifetime. During that period no report may be published which may lead to his identification.

Lord Justice Popplewell:

Introduction

1. The applicant renews his application for an extension of time for permission to appeal against conviction. The Single Judge said that he was granting permission to appeal but would leave it to this court to consider an extension of time. We will grant the extension and refer to the applicant as the appellant.

2. The appellant is of Nigerian origin and came to this country in April 2007 when aged 33. He entered on a visitor's visa permitting him to stay for 6 months. He remained after the leave to remain expired on 12 December 2007.

3. On 1 October 2012 he started working in a factory in East London where noodles were made and stored. In order to do so, he presented to the employer a passport, which was in a false name, and had a false stamp which purported to evidence that the holder had been granted indefinite leave to remain, so as to be eligible for employment. The appellant's evidence is that it was a photocopy of the passport, not the original, and that it was presented to an employment agency run by a man ('AB') rather than directly to the employer.

4. In April 2017 he was still working at the factory some 4 ½ years later. Following a visit there by immigration officers, the existence and use of the false passport was uncovered. He was cautioned and initially claimed to have been granted indefinite leave to remain in 2000. When interviewed he answered no comment to all questions.

5. He was charged with four offences arising out of the use of the false passport to gain employment. Counts 1 and 2 on the indictment charged possession of a false identity document with an improper intention contrary to s. 4(1) and 4(2) of the Identity Documents Act 2010. Count 1 related to the false name and Count 2 to the false stamp. Count 3 charged Fraud contrary to s. 1 of the Fraud Act 2006 in using the false passport to obtain employment and the benefits therefrom. In addition he pleaded guilty to a summary offence of illegal working contrary to s. 24B of the Immigration Act 1971 on the understanding that it had been sent for trial as a related offence by the magistrates under s. 51 Crime and Disorder Act 1998.

6. On 23 May 2017, in the Crown Court at Snaresbrook, he pleaded guilty to the three indictment offences. Due to an error, the summary offence, to which he also pleaded guilty, was not that sent by the magistrates but an offence of remaining in the country after the expiry of temporary leave to remain, contrary to s. 24(1)(b) of the Immigration Act 1971. On the same day he was sentenced by Her Honour Judge Canavan to 9 months imprisonment on the indictment offences and three months on the summary offence, all sentences to run concurrently.

7. The grounds of appeal advanced in writing were that s. 45 of the Modern Slavery Act 2015 provided the appellant with a defence, of which he was not advised, and which would probably have succeeded; and that furthermore, had the prosecution known of the appellant's trafficking circumstances, it might well not have prosecuted him; and that accordingly his convictions are unsafe.

8. Although the offences were indicted as having taken place between 1 October 2012 and 21 April 2017, following clarification at the beginning of the hearing, it was agreed by Mr Douglas-Jones KC on the appellant's behalf and by Mr Johnson on behalf of the Crown that the offences were complete before the defence introduced by s. 45 of the 2015 Act came into force on 31 July 2015. Accordingly the grounds advanced orally were directed to the law in force some three years earlier when the passport was used to gain employment and the offences committed. We are not concerned with whether there was a defence under s. 45, or the jurisprudence which addresses the setting aside of convictions by guilty pleas where a defence is available.

9. The evidence of the appellant being trafficked came in three statements made by him since the Crown Court proceedings, together with further written material to which we refer. The appellant also gave evidence before us and was cross examined. We considered this evidence *de bene esse* in order to consider whether it should be admitted as fresh evidence.

10. Prior to pleas and sentencing, the appellant did not say anything to his counsel or solicitors of the circumstances of trafficking set out in the fresh evidence. Mr Douglas-Jones submitted that those legal advisers were on notice of the possibility and should have asked the appellant questions to discover the true position at the time. We disagree. As far as those advisers could be aware, this was simply a case of a man who had used a false passport to get a job, many years after he had entered the country legally but overstayed. Those circumstances were not such as to put the legal advisers on inquiry that there might have been trafficking which was not volunteered by their client. The absence of fault on the part of legal advisers is, however, no bar to a successful application to set aside convictions in a case of this kind: see for example *R v O* [2011] EWCA Crim 2226.

The law

11. The development the law applicable to setting aside convictions where it is alleged that the offences were committed by a victim of trafficking, prior to the 2015 Act coming into force, has been set out in a number of guideline cases in this court, including *R v M(L)* [2010] EWCA Crim 2327, [2011] 1 Cr App R 12; *R v N and L* [2012] 1 Cr App R 35 [2013] QB 379; *R v THN & L(C)* [2013] EWCA Crim 991, [2013] 2 Cr App R 23; *R v Joseph (Verna)* [2017] EWCA Crim 36, [2017] 1 Cr App R 33; *R v L & N* [2017] EWCA Crim 2129; *R v S(G)* [2018] EWCA Crim 1824, [2019] 1 Cr App R 7; and *R v AAD* [2022] EWCA Crim 106. Two very recent decisions applying this jurisprudence are *R v AGM* [2022] EWCA Crim 920 and *R v BYA* [2022] EWCA Crim 1326. We identify the following as the most important principles applicable to the present appeal.

12. Until the 2015 Act provided a defence, there was no statutory provision transposing into domestic law the UK's international obligations towards victims of trafficking who commit crimes in this country. The international obligations derive from various instruments, including article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings 2005 (CETS No.197), ratified by the UK on 17 December 2008, which obliges the UK 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". Article 4 defines trafficking, and so far as relevant to the present case provides:

> "For the purposes of this convention-
>
> (a) 'trafficking in human beings' shall mean the recruitment, transportation, transfer …. of persons by means of forms of coercion, …. of deception, of the abuse of power or of 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, …. forced labour or services, slavery or practices similar to slavery, servitude…."

13. In England and Wales the UK gave effect to its international obligations through the decision made by the Crown Prosecution Service ("the CPS") whether to prosecute, and the Court's jurisdiction to supervise prosecutions so as to prevent what is most conveniently labelled as "abuse of process".

14. The final CPS guidance before the coming into force of the 2015 Act was published on 29 August 2013 ("the 2013 Guidance"). The 2013 Guidance calls for a "three-stage approach" to the prosecution decision in respect of victims of trafficking:

> "In addition to applying the Full Code Test in the Code for Crown Prosecutors, prosecutors should adopt the following three stage assessment:
>
> (1) is there a reason to believe that the person has been trafficked? if so,
>
> (2) if there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds; but
>
> (3) even where there is not clear evidence of duress, but the offence has been committed as a result of compulsion arising from trafficking, prosecutors should consider the public interest in proceeding to prosecute."

15. The 2013 Guidance continues by working its way through the three-stage approach. With regard to compulsion falling short of duress, it says this:

> "The means of trafficking used in an individual case may not be sufficient to give rise to a defence of duress, but how the person was trafficked will be relevant when considering whether the public interest is met in deciding to prosecute or proceed with a prosecution. In assessing whether the victim was compelled to commit the offence, prosecutors should consider whether:
>
> (1) the offence committed was a direct consequence of, or in the course of trafficking and
>
> (2) whether the criminality is significantly diminished or effectively extinguished because no realistic alternative was available but to comply with the dominant force of another.

> Where a victim has been compelled to commit the offence, but not to a degree where duress is made out, it will generally not be in the public interest to prosecute unless the offence is so serious or there are other aggravating factors."

16. Where the prosecutor has considered whether to prosecute and applied the published CPS guidance, the court will only intervene on well recognised public law grounds. Where, however, the evidence of trafficking was not before the CPS and the question is whether to set aside a conviction based on evidence of trafficking which subsequently emerges, the ultimate question is whether the conviction is unsafe. For these purposes a conviction is unsafe if (1) the Crown would not, or might well not have prosecuted had it known the true facts or (2) such a prosecution would have been stayed as an abuse. Each turns on whether prosecution would be in the public interest.

17. The mere fact that a convicted defendant has been the victim of trafficking is not in itself sufficient to set aside the conviction. In such cases, the first important task is to assess the nexus between the offending and the trafficking, that is to say to assess the degree of compulsion to commit the offence exerted on the offender by the circumstances of trafficking. This is a sensitive and fact specific inquiry in each case. Where there is no reasonable nexus, generally the conviction should not be set aside. At the other end of the scale, where the nexus is such that in reality culpability is extinguished, the conviction should normally be set aside. In between these examples at either end of the scale are cases in which there is a degree of causative connection between the trafficking and the offending. Whether it is sufficient to make it contrary to the public interest to prosecute will depend upon the extent to which it reduces the defendant's culpability for the offending.

18. Nexus is not however the only factor: other factors which engage the public interest are the gravity of the offence, and alternatives reasonably open to the defendant, although the latter will often be an aspect of the nexus of compulsion between the trafficking and the offence. There may also be particular features of the defendant in question, including his history, and of the particular crime and the seriousness of the defendant's participation in it, which increase or decrease the public interest in prosecution.

Procedural history and evidence

19. On 6 June 2017, the appellant claimed asylum. His asylum claim was rejected by the Secretary of State for the Home Department on 29 January 2018.

20. On 30 September 2019, the appellant was referred through the National Referral Mechanism to the Single Competent Authority ("the SCA"). On 8 November 2019, the SCA found there to be reasonable grounds to suspect that he was a victim of trafficking. That decision was made on the basis of a detailed statement from the appellant dated 30 September 2019 setting out the history of his trafficking.

21. The appellant appealed to the First-tier Tribunal ("FTT") against the refusal of his asylum application by the Secretary of State. The tribunal did not hear oral evidence from the appellant, on the basis that he was considered to be a vulnerable person, but had before it a further detailed statement from him dated 30 December 2019.

22. The essential elements of what the appellant said in the two statements, as amplified in evidence before us, can be summarised as follows.

23. In 2007, he was brutally attacked by a gang of men in his village (in Ogun State, Nigeria) for being in a long-term gay relationship with a man ('LM'). LM was also attacked. After the attack, the couple did not feel safe in the village and left the next day, travelling to Lagos by bus. The appellant then contacted a trader ('CD') he knew in the city whom he sensed might also be gay. The couple moved in with CD and, in lieu of paying rent, the appellant worked for his business doing manual labour.

24. CD began to force him to have sex with men at "secret gatherings". He was made to take unknown substances at these gatherings. While in Lagos, the appellant witnessed what he described as "jungle justice" which included vigilantes burning a man alive in the street for being gay. Both he and LM lived in fear that this "jungle justice" could happen to them.

25. CD told the couple that he knew agents who could help them leave the country. He then arranged their passports, visas and travel plans. The appellant was unaware of where he would be travelling to, and did not take possession of his passport until he boarded the plane. CD became increasingly angry with him as his departure grew nearer. As a result, he was scared of CD. The night before he left Nigeria for the UK, CD forced the appellant to agree to a "Covenant", which included ritualistic elements, instructing him to abide by CD's instructions and the instructions that CD would give via the person with whom the appellant would be staying abroad. The appellant was scared about the consequences of breaking this Covenant.

26. On his arrival in the UK, the appellant was met by a man who took his passport and then drove him to a house with two other men (who had also just arrived from Lagos). One of these men was ('PQ'). He stayed in this house for a couple of years and, during this time, began a sexual relationship with PQ. This house was run by EF. His movements were restricted during this time. During the week, he and PQ were instructed to keep the house clean. On Friday and Saturday nights, parties took place in the house. The appellant was made to prepare the house for these parties and was then forced to have sex with the guests, and forced to take drugs. He was demeaned, threatened and beaten. On some occasions, he was also instructed to have sex with men during the week. He was told that the instructions were authorised by CD. The appellant was not paid during his time in the house. He was told that he owed a huge sum of money to CD and that, by virtue of this debt bondage, he had to stay in the house until this debt was repaid.

27. As the situation in the house worsened, he and PQ resolved to escape. They were occasionally allowed to take short walks in the local area, and one day, they just kept walking. As neither man had any money, they became homeless. They lived on the streets for months until they met a preacher in Stratford ('GH') who offered them accommodation, food and work. First, however, GH insisted that they undergo a process of "deliverance", which involved weeks of fasting and praying away their "evil". In his statement, the appellant described this process as a form of gay conversion therapy.

28. GH then organised for passport photographs to be taken of the appellant and PQ in order to arrange work for the two men. He also organised accommodation for them, in the

appellant's case with a single mother ('JK'). The appellant moved into a very small room in JK's flat, and remained living there, with some breaks, until 2017. He was not given a key to the flat and was largely confined to it when not at work because the door locked automatically if it shut, so that if he left he would have to wait for JK to arrive before he could get back in. He did not feel able to ask for a key because he had been warned to keep quiet and not ask too many questions. He was told by JK that he was expected to work so as to support himself and pay for his accommodation, and to clean the flat and do the laundry for JK and her children.

29. JK told the appellant that GH was making arrangements for him to work. GH told him he was going to work in the noodle factory. JK gave the appellant an envelope with a photocopy document inside, which was a photocopy of a passport. The appellant was never given the passport itself. He was told by JK to take it to AB at an employment agency in East London. In his evidence to us, the appellant said that he was told that if he did not obey, he would be in trouble. AB took the photocopy passport document and gave him the address of the noodle factory in Barking for him to start work immediately.

30. For the first years, the appellant received no wages directly: they were paid to GH and he was given a cash stipend by AB or GH or JK, usually about £50 a week, to pay for his travel, food and living expenses. Statutory terms of employment were prepared in 2014 which recorded that his annual salary was £14,700, which is equivalent to £282.69 per week, although it is impossible to verify whether this was accurate.

31. In due course GH arranged for a bank account to be opened in the appellant's name into which the wages were paid. The appellant was given a bank card by AB to enable him to withdraw money from the account, but he had to give the card back each time after he used it, and had to hand over the bulk of the wages to GH.

32. Most members of the factory workforce spoke Yoruba and a number were in a similar situation to the appellant. It felt like he and the other Africans were made to do the job of two or three people. There were also eastern Europeans who described the Africans as being treated like slaves and were concerned about their treatment. When giving evidence to us the appellant described how AB or his colleagues would come to the factory gates to ensure that the appellant and other African workers were doing what was asked of them.

33. When he was released from prison after his convictions and sentence, the appellant feared becoming homeless again. As a result, he tried to find GH. However, GH did not offer to help because, according to GH, the appellant still owed him money. The appellant was forced to sleep on the streets once again.

34. Despite the time that had passed, the appellant said that he still felt controlled by CD and GH. This, he explained, felt like a physical silencing. He explained that it was only after some time and with the support of a number of organisations including Helen Bamber Foundation, that he finally felt able to be open about his sexuality and feel free from persecution.

35. The FTT also had before it a report dated 19 December 2019 from Amy Chisholm, a clinical psychologist, based on her clinical findings and observations of the appellant. From the outset, Ms Chisholm noted that the appellant struggled to understand

questions, was unable to express himself clearly and had great difficulty recalling timeframes. He scored low marks in testing for cognitive functioning. Ms Chisholm noted that the appellant's relevant GP diagnosis included Post-Traumatic Stress Disorder. She herself diagnosed PTSD and additionally a Major Depressive Disorder in the moderate to severe range. Ms Chisholm concluded that, in her clinical opinion, the appellant did not appear to be feigning or exaggerating his symptoms and there was nothing to suggest a false allegation of mistreatment. In her professional experience, the appellant's report of symptoms and his objective presentation was in keeping with what she would expect to see in a survivor of persecution and violence on account of sexual identity, and in a survivor of trafficking. She concluded that the appellant had a tendency to understate rather than overstate his experiences. Ms Chisholm also concluded that the appellant's psychiatric illness was linked to memory impairment.

36. According to Ms Chisholm, the "voodoo ceremony" conducted by CD had had a profound impact on the appellant. She noted that the appellant still displayed a fear of CD and emphasised the fact that he had only recently begun to understand complex concepts such as trafficking and exploitation.

37. On 19 December 2019, Dr Phyllis Turvill of the Helen Bamber Foundation published a supplementary medico-legal report which agreed with Ms Chisholm's findings. Dr Turvill found scarring on the appellant's body consistent with beatings (many by an instrument such as a whip) and injuries suffered as a result of interpersonal violence.

38. In a decision promulgated on 22 January 2020, the FTT allowed the appellant's appeal against the Secretary of State's refusal to grant asylum. The FTT Judge concluded that the appellant's account would be accepted, although uncorroborated, and that "It is clear from the evidence before me that not only has the appellant been subject to extreme violence and abuse in Nigeria but that he has been trafficked to the United Kingdom and abused whilst in the United Kingdom and has been subject again to sexual violence and forced labour and servitude."

39. On 3 August 2020, the Applicant was granted asylum.

40. On 19 August 2020, the SCA concluded that the Applicant was not a victim of trafficking by reasons of discrepancies or inconsistencies between his account of events at various stages. However, they agreed to reconsider this decision, and having received the medical reports about the appellant, they concluded that it offered a plausible explanation for the inconsistencies in his recollection of events and published a conclusive grounds decision on 29 October 2021 that he was a victim of trafficking. This was confined, however, to his circumstances before he became homeless. The SCA concluded that his time spent with JK and her children and working at the factory did not meet the definition of forced labour because "you were afforded a measure of freedom, you were not working under menace of a penalty, nor were you forced to remain in this situation and you were able to leave of your own free will but you chose to remain out of economic necessity."

41. The appellant gave evidence before us and confirmed the contents of his statements. Mr Johnson made clear to us that the Crown did not challenge anything in the appellant's account of his exploitation up to the point of time when he had met GH, shortly before his employment. In cross-examination he focussed on seeking to undermine the reliability of the appellant's evidence by reference to discrepancies and

inconsistencies in his evidence, and to establish that the employment was simply a matter of economic choice for the appellant. Mr Johnson also relied in particular upon a passage in the statement of one of the immigration officers who recorded that whilst the appellant was being booked into the police station following his arrest at the factory in April 2017, he had said to the immigration officer "I will speak to solicitor to get leave to remain". This, submitted Mr Johnson, showed that he had always been aware that he had an alternative to undertaking unlawful employment.

Conclusions

42. The appellant's cognitive difficulties were apparent in the way he gave evidence. There were some discrepancies and inconsistencies in his account, but we think these are readily explicable by the effect which the unchallenged trafficking and PTSD would have had, in conjunction with his cognitive difficulties. We accept his account of events as truthful.

43. The account of his life when employed at the factory involved trafficking by GH, AB and JK by reason of the conditions at JK's, which would constitute servitude; and the conditions at the factory which would constitute forced labour. It is a reasonable inference that the benefits which GH, AB and JK received were the very reason why he was exploited into taking up employment there. There was a direct link between that trafficking and the offending.

44. The degree of compulsion involved was high. The background trafficking, which is undisputed, was severe and left him traumatised and vulnerable, as the medical evidence reinforces. He had been trained to think that he must do as he was instructed when he was here, reinforced by a voodoo ceremony, and that extended to what GH and AB said without any conscious reasoning that they were connected to CD/EF. The appellant's evidence to us was that he "felt pressure and had to be submissive because of the voodoo ceremony in Lagos and the shouting in church." He had cognitive and language difficulties. He had been sleeping rough for weeks or months. GH befriended him and was a preacher in a church of his faith, and therefore in a position of trust and in a position to exploit his vulnerability. He performed a two week evangelical "deliverance ceremony" which would have reinforced dependence on GH. In his evidence to us he said he was told that he would be in trouble if he did not take the paper to AB.

45. By virtue of these particular circumstances, the appellant would have felt a level of compulsion far greater than that felt by someone without cognitive difficulties who had simply overstayed temporary leave to remain without more. His trafficking background and well-founded fear of persecution if he were to return to Nigeria put him in a different position from that which might apply generally to unlawful immigrants. His experience in Nigeria made it reasonable for him to rule out returning, whereas overstayers generally will have the choice to leave the country as an alternative option.

46. We do not set great weight on the comment to the investigating officer about seeing a solicitor to get leave to remain. Assuming it was said (and the appellant had no recollection of doing so), it is not clear whether he thought that was a realistic outcome even then in 2017; moreover if the factory was exploiting illegal immigrants, he may have become aware of that possibility after the employment had begun and the offences committed. In any event there is no reason to suppose that it would have appeared to

him to be a realistic alternative to the security he was exploited into thinking he was getting by being taken off the streets in 2012 and given shelter and a job.

47. We have concluded that in all the circumstances the degree of compulsion felt by him as a result of his earlier trafficking experiences, and the further trafficking in offering him what was to be exploitative accommodation and work, was very high. This trafficking was responsible for his using the false passport to obtain the exploitative job. The nexus between the trafficking and use of the passport to gain employment is such as to reduce his culpability for the offending to a very low level if not wholly to extinguish it. For those reasons we conclude that it was not in the public interest that he be prosecuted. Had the CPS known the trafficking circumstances responsible for the offences, as we have found them to be, and applied the 2013 Guidance, it would very likely not have prosecuted.

48. Accordingly we admit the fresh evidence and quash the convictions of the offences on the indictment. Pursuant to paragraph 6(9) of Schedule 3 of the Crime and Disorder Act 1988 we also quash the conviction of the summary offence which it was mistakenly thought had been sent by the magistrates under s. 51, and direct that no further proceedings shall be taken in respect of the related summary offence which was in fact sent by the magistrates.

49. An anonymity order has previously been made. We have considered whether it should be continued, and concluded that in the light of our findings it should remain in place for the remainder of the appellant's lifetime, in accordance with the principles set out in *R v L & N* and *R v AAD*.