

Abuse of Process in Modern Slavery: R v AFU [2023] EWCA Crim 23

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[R v AFU \[2023\] EWCA Crim 23](#)

A recent case and its lessons for defence practitioners

1. In *R v AFU* [2023] EWCA Crim 23; [2023] 1 Cr. App. R. 16, the Court of Appeal has reviewed the authorities on abuse of process applications in trafficking and modern slavery cases.

Facts

2. The appellant appealed against his conviction for conspiracy to produce a Class B drug (cannabis), for which he received a custodial sentence of 22 months.
3. The appellant was Vietnamese. His family had come to owe a debt to a gang. He was kidnapped and told he had to help pay it off. He was trafficked to the UK and forced to work in a cannabis house. After a number of months, police arrested him during a search. Following his release on bail, he was taken to another cannabis house and made to work there. He was then arrested a second time. A referral was made via the National Referral Mechanism (NRM). Despite a positive reasonable grounds decision, he was held in detention. He was moved to accommodation near to where he had been trafficked, despite concerns raised by his solicitors, and was again kidnapped and taken to a new cannabis house.
4. In his absence, the Home Office refused his claim for asylum. A fresh application was made later, which was again refused on the basis that while he may have been a victim of trafficking and modern slavery *in the UK*, he would be safe returning to Vietnam. On appeal to the First Tier Tribunal, the Home Office decision was overturned and asylum was granted.

Appeal

5. In the criminal proceedings, the appellant had raised the issue of his exploitation from the start, in his police interview. The records kept by trial counsel indicated that although the modern slavery defence was discussed at length, the appellant had not given him the full story. After being advised of weaknesses in his case, the appellant pleaded guilty.
6. The appeal was brought on two grounds:
 - a. The appellant's legal team had failed to advise him adequately about the modern slavery defence, meaning his plea of guilty should be vitiated.
 - b. The prosecution was an abuse of process, because the police and prosecution had failed to take adequate steps to protect him as a victim of trafficking.
7. The Court dismissed the first ground, preferring the evidence of the appellant's counsel to his own. However, granting the appeal on the second ground, the Court took the opportunity to clarify the law on abuse of process and set out the obligations of prosecutors when dealing with suspected victims of trafficking [105-119]. The judgment is also applicable to modern slavery cases.

Abuse of process: clarification of the law

8. The Court summarised the relevant legal principles from paragraph 81. The UK is bound by international treaties to protect victims of trafficking. This includes a requirement to provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities. The defence provided by section 45 of the Modern Slavery Act 2015 is now the primary means of fulfilling this obligation.
9. Prior to the enactment of s.45, the only response to criminal prosecution was to argue abuse of process. In *R v AAD* [2022] EWCA Crim 106, the Court of Appeal confirmed that the abuse of process jurisdiction was still available, even in cases to which the s.45 defence would apply, as an "*additional safeguard, given appropriately exceptional facts*" [40]. Such applications would be assessed "*by way of review on grounds corresponding to public law grounds*" [142].
10. It was argued by the Respondent in *AFU* that the post-Act abuse of process jurisdiction was more restrictive than its pre-Act equivalent, but the Court rejected the contention that *AAD* somehow promoted "*a fundamentally different approach*" [119]. The

principles remained essentially the same as outlined in the leading pre-Act case, *R v S(G)* [2018] EWCA Crim 1824, where it was held (at [76(v)]) that proceedings would be stayed where either:

- a. The dominant force of compulsion, in the context of a very serious offence, was sufficient to reduce the defendant's criminality or culpability to or below a point where it was not in the public interest for them to be prosecuted.

OR

- b. The defendant would not have been, or might well not have been, prosecuted in the public interest.

Obligations of prosecutors

11. At paragraph [113], the Court made the following observations:

"The authorities emphasise that the decision to prosecute is ultimately for the prosecution, and not the court. Where the prosecution has applied its mind to the relevant questions in accordance with the applicable CPS guidance, it will not generally be an abuse of process to prosecute unless the decision to do so is "clearly flawed" (see AGM at [12] and R. v BYA [2022] EWCA Crim 1326 at [20]). The court does not intervene merely because it disagrees with the ultimate decision to prosecute: see AAD at [119]. However, if CPS guidance has been disregarded, such that the question of whether to prosecute has not been properly considered (or considered at all), the court can intervene more readily: see AGM at [13] and [56]. It will then be open to the court to consider the public interest question without trespassing on ground which has been appropriately considered by the prosecution authorities."

12. The CPS has a published policy on Suspects in a Criminal Case who might be Victims of Trafficking or Slavery. When making a charging decision, prosecutors must apply a 4-stage test:

- a. Is there a reason to believe that the person is a VOT or VOS? (If not, you do not need to consider this assessment further.)
- b. Is there clear evidence of a credible common law defence of duress? (If yes, then the case should not be charged or should be discontinued on evidential grounds.)

- c. Is there clear evidence of a statutory defence under Section 45 of the 2015 Act? (If yes, then the case should not be charged or should be discontinued on evidential grounds.)
 - d. Is it in the public interest to prosecute? (This must be considered even where there is no clear evidence of duress and no clear evidence of all of the elements of a section 45 defence or where section 45 does not apply (because the offence is excluded under Schedule 4). Prosecutors should consider all the circumstances of the case, including the seriousness of the offence and any direct or indirect compulsion arising from their trafficking situation; see *R v LM Ors* [2010] EWCA Crim 2327; *R v VSJ* [2017] EWCA Crim 36.)
13. The first stage requires that the police be advised of their duty to investigate the possibility of trafficking or modern slavery, including by making a referral via the NRM. The duty of review continues throughout the duration of the case.
14. In short, the prosecution in *AFU* did not follow the guidance:
- “There is no evidence that any review of the applicant's position as a potential VOT was carried out at any stage.”* [134]
- “It is clear that the police failed to discharge their duty as first responders and that the prosecution failed to comply with the Guidance.”* [135]
15. Had the prosecution made proper enquiries, the Court was “*confident*” that the case would have been discontinued at the second (evidential) stage of the 4-part test, or alternatively that a court would have stayed the case for abuse of process [137].

Lessons for practitioners

16. This is a helpful case for defence practitioners.
17. It confirms that the police must take proactive steps to investigate a suspect's trafficking or slavery status, and in particular consider making an NRM referral. While a positive conclusive grounds decision does not prevent the prosecution from proceeding, the Court in *AAD* has already held that it will be an abuse of process to make “*an irrational and perverse departure from a conclusive grounds decision*” [127].

18. Taking this point at an early stage could result in discontinuation of the case, after a proper investigation of the defendant's circumstances. Alternatively, if the prosecution does not discharge its duties, then there may be scope for a successful abuse of process argument. The defence statement could request a summary of the prosecution's efforts to review the case, in accordance with its guidance. The request should include detailed questions, in particular (a) whether an NRM referral has been, and if not then why (b) if there is a positive conclusive grounds decision, on what basis the Crown has chosen to proceed regardless.
19. Should such disclosure be refused, it may be possible to argue that the burden lies on the prosecution to prove that they have complied with the guidance. In granting the appeal, the Court in *AFU* spoke of there being "*no evidence*" that any review was carried out [134].
20. Arguments that the modern slavery defence is an issue for the jury should be resisted. The decision makes clear that the s.45 defence does not relieve the Crown of its obligation to keep cases under review. This requires consideration of both the strength of any s.45 defence, and whether a prosecution is really in the public interest regardless.

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