



Neutral Citation Number: [2020] EWCA Crim 2

Case No: 201900801 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES

HHJ Brown DL

T20087249

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2020

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION

MR JUSTICE SWEENEY

and

MRS JUSTICE JEFFORD

Between :

GB

Appellant

- and -

R

Respondent

Henry Blaxland QC and Irena Sabic (instructed by Duncan Lewis & Co, Solicitors) for the
Appellant

Benjamin Douglas-Jones QC and Andrew Johnson (instructed by Crown Prosecution
Appeals Unit) for the Respondent

Hearing dates : 22 October 2019

Approved Judgment

Dame Victoria Sharp P.

Introduction

1. On 19 May 2008 at the Crown Court at Lewes, before His Honour Judge Brown DL, the appellant, GB, pleaded guilty to Possession of False Identity Documents with Intent, contrary to Section 25(1)(a) of the Identity Cards Act 2006 (the offence) and was sentenced to 12 months' imprisonment, a sentence she has long since served, with a recommendation for her deportation.
2. In 2010, the Competent Authority, the UK Border Agency, determined there were no reasonable grounds for giving the appellant 'victim of trafficking' status. Her applications for leave to appeal out of time against her conviction, and for asylum, both of which were centred on her status as a victim of trafficking, were refused in 2012; and in 2013 an order for her deportation was made. However, in December 2015, the First-tier Tribunal (Judge Keane) subsequently concluded that the appellant's claim to be a victim of trafficking was a credible one, and allowed her appeal (the December 2015 decision) against the order for deportation on asylum grounds and on the ground that deportation would infringe her rights under article 3 of the European Convention on Human Rights and Fundamental Freedoms (the Convention). On 21 May 2016, the appellant was granted five years' leave to remain on asylum grounds.
3. On 28 February 2019, the appellant's conviction was referred to this Court by the Criminal Cases Review Commission (the CCRC) under section 9 of the Criminal Appeal Act 1995 (the 1995 Act) on the ground that the Court of Appeal would now find that a substantial injustice would flow from upholding her conviction, following changes of law identified in *R v S(G)* [2018] EWCA Crim 1824; [2019] 1 Cr. App. R. 7, to the regime for not prosecuting a victim of trafficking who commits a criminal offence.
4. We announced at the conclusion of the hearing that this appeal would be allowed. The primary ground of appeal before us (Ground 1) reflected the CCRC's statement of reasons and has been determinative of the appeal. It has not been necessary therefore for us to reach any conclusion on the appellant's second ground of appeal, which did not form part of the reference made by the CCRC, and in which it was asserted that she was not advised of a meritorious defence to the offence under section 31 of the Immigration and Asylum Act 1999 (the 1999 Act).

The background facts

5. On 3 May 2008, the appellant, who was then 31 years old and 6 months pregnant, travelled to the United Kingdom from Italy. On the following day, 4 May 2008, she presented a false United Kingdom passport to an Immigration Officer at Gatwick Airport whilst attempting to check in for a flight to Montreal in Canada. She told the Immigration Officer that she was born in London and was travelling to Canada to visit her sister. She was arrested, interviewed under caution and charged with possessing a false identity document with intent. In her interview under caution, and in the presence of agents for the duty solicitor, the appellant admitted the offence. She claimed she was Sudanese and had left Sudan for Ethiopia in 2006 where she was offered employment in Italy. Her travel was arranged by her putative employers, but once she arrived in Italy she was told she would have to work as a prostitute. In late

2007 she became pregnant and wanted to leave, but was beaten. A kindly client, who had befriended her, offered to help her escape, and subsequently arranged for her travel to Canada where he had contacts. She travelled to Heathrow the day before her arrest, accompanied by an agent who provided her with \$200, her travel documentation and tickets. The appellant confirmed that she knew the United Kingdom passport was false and that she had never held a genuine Sudanese passport.

6. The notes of her legal representative record that the appellant was fully co-operative at the police station, that she was advised to answer questions in interview as the evidence was strong, but she had substantial mitigation and wanted to co-operate. A letter from the duty solicitors of 6 May 2008 to the solicitors who represented her at the Crown Court said that *"[The appellant] has a long and complex story to tell and indicates that she wishes to apply for Political Asylum and requests advice from yourselves on the same."* At the sentencing hearing, two weeks later, the prosecution opening included the appellant's account of leaving Italy. *"She said she was beaten, that [she] was now 26 weeks pregnant, that she was offered help to escape and travelled to Heathrow...and that the agent who accompanied her gave her the passport, the travel documents and some 200 dollars in cash"*. The judge's sentencing remarks made no reference to the appellant's mitigation, other than to observe that he had listened with care to counsel and did not require a pre-sentence report. The appellant was sentenced to 12 months' imprisonment with a recommendation for deportation. The appellant gave birth to a daughter on 18 July 2008, whilst serving her custodial sentence.
7. There is no record of any advice given to the appellant as to her plea, as the solicitors' original file has been destroyed. It appears however that the appellant received no advice at any stage during this period about section 31 of the 1999 Act, or the (legal) implications of her situation as a trafficked person.
8. Following the appellant's conviction, the UK Border Agency wrote to her asking her to give reasons why she should not be deported to the Sudan. In June 2008, with the assistance of the Refugee Legal Centre the appellant then made a claim for asylum, as a refugee from the Sudan. The Refugee Legal Centre also notified the UK Border Agency that the appellant was a victim of trafficking. The appellant's initial asylum interview took place in October 2008. By August 2009, the appellant had been referred to the Helen Bamber Foundation. With the assistance of that Foundation, two expert reports were then obtained: one on the appellant's psychiatric condition from Professor Cornelius Katona, a consultant psychiatrist, dated 29 September 2008 and one from Dr Saima Ahsan, dated 7 October 2009, to consider whether scarring on her body was consistent with her account. Professor Katona concluded her account was plausible. Dr Ahsan concluded her scars were highly consistent with her history. The appellant's current legal representatives were instructed on 30 November 2009. A second asylum interview took place in 2010.
9. In a letter of 23 May 2012, the UK Border Agency determined there were no reasonable grounds for giving the appellant 'victim of trafficking' status. The letter gave detailed reasons for concluding that the appellant's account lacked credibility, as did her claim to be a victim of trafficking. Amongst other matters, the letter referred to two applications the appellant had apparently made for leave to visit the United Kingdom, the first in 2004 and the second in 2005, as a citizen of Nigeria. On each

occasion, a Nigerian passport had been presented in support. The second application was linked with an application for leave to visit the United Kingdom by a Mr Omede, described in that application as the appellant's spouse.

10. In June 2012 the appellant applied for leave to appeal against conviction. The principal argument advanced on her behalf was that though she had admitted knowingly using a false passport, she had a defence to that charge, pursuant to section 31 of the 1999 Act, of which she was not advised before pleading guilty; alternatively that she acted under duress. Her application for an extension of time of approximately 3 years and 8 months and for leave to appeal against her conviction was refused by the single judge on 6 September 2012 and by this Court (Rix LJ, Mackay and Underhill JJ) on 11 December 2012: see *R v GB* [2012] EWCA Crim 2895.
11. At that stage, the Court had available the expert reports from Professor Katona and Dr Ahsan to which we have referred, and a witness statement from the appellant dated the 15 February 2012, made in support of her application for asylum. Rix LJ, who gave the judgment of the Court described the application for leave as “*but one incident in the ongoing struggle or debate between [the appellant] and the immigration authorities as to her status in this country.*” (para 20). The appellant had argued that a meritorious section 31 defence had been overlooked, and that the prosecution was an abuse of the process by virtue of the appellant's status as a victim of trafficking. The Court of Appeal held that the appellant would have had real difficulty in establishing a section 31 defence because of the requirement to have “*come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention)*” and because of the hurdles she would have faced in proving section 31(1)(a) and (c) of the 1999 Act: see paras 11 to 16. As for duress, abuse of process and the application for an extension of time, the Court essentially took the view that it was not in a position on the material before it to go behind the closely reasoned decision of the UK Border Agency that the appellant was not a victim of trafficking. The Court noted that there were gaps in the Court's knowledge and that if the appellant's claim to be a victim of trafficking was substantiated, it did not follow there was any abuse of process. It concluded that the interests of justice did not warrant the grant of leave in the absence of a good reason for the delay in making the application: see paras 16 to 21.
12. On 1 March 2013, the appellant's asylum claim was refused and the Secretary of State for the Home Department (the SSHD) made a deportation order pursuant to section 32(5) of the UK Borders Act 2007. On 4 March 2013, the SSHD made a decision to make a deportation order in respect of the appellant's daughter by reference to section 3(5)(b) of the Immigration Act 1971 (as amended). The SSHD did not accept that the appellant was a Sudanese citizen and proposed to remove her to Nigeria. The appellant's appeal (and that of her daughter) against that decision to the First-tier Tribunal was dismissed on 24 September 2014. The Upper Tribunal allowed her appeal on 1 May 2015 and remitted her case for a new hearing before the First-tier Tribunal. The new hearing took place on 5 November 2015. On 23 December 2015, the First-tier Tribunal (Judge Keane) allowed the appellant's appeal against the deportation order on asylum grounds and on the ground that deportation would infringe her rights under article 3 of the Convention.

13. In addition to the material that had been placed before the Court of Appeal, the First-tier Tribunal had before it a witness statement from the appellant dated 6 December 2013 prepared for that hearing and a further (very comprehensive) psychiatric report from Professor Katona dated 8 July 2013. This report diagnosed the appellant as suffering from post-traumatic stress disorder (PTSD) among other mental vulnerabilities. In Professor Katona's opinion, the PTSD was caused by "the succession of traumatic experiences [the appellant] has had both in the Sudan and more recently in Italy". The depression he found was caused by those traumas and the appellant's "subsequent separation from her country and prolonged immigration". Professor Katona also provided a possible explanation for inconsistencies in the appellant's account, which had been highlighted in the refusal of her application for asylum, namely that people with PTSD experience difficulty in dealing with the sort of direct questioning that occurs in the 'asylum interview setting'.
14. The First-tier Tribunal heard oral evidence from the appellant. The presenting officer for the SSHD declined to test her evidence in cross-examination and also confirmed that he would not have cross-examined Professor Katona on his second report, albeit Professor Katona had been unable to attend to give evidence on the day the hearing took place.
15. The appellant's account in her asylum interviews, in her witness statements and in her oral evidence was broadly consistent. In her first statement, she said she was a Sudanese national and fled from there in 1995 because of persecution. She travelled to Chad and then Nigeria where she remained until 2005. She was introduced to someone called Joseph who offered her work in Italy. She initially declined, but after he mother's death she agreed. Joseph arranged (forged) travel documentation and the appellant travelled to Italy via the United Kingdom. After arriving in Italy, she was taken to a restaurant. She lost consciousness and assumed she had been drugged. She was taken to a house with a number of 'girls'. A person calling himself 'manager' said he had paid for her to be brought to Italy. She had to work as a prostitute to pay him 10,000 euros which he said she owed him. Men were brought to her "day after day, at all times of the day or night". The appellant initially resisted but the men were stronger than her. Once she stopped resisting she was no longer locked in the house. She did not leave because she was scared. She told one of the other girls that if she was ever permitted to leave the house, she would run away. The girl told the manager who threatened her and said if she left him, he would find her and kill her. He had Mafia links. In November 2007 the appellant became pregnant. The father was a client. The manager became aware and threatened to kill her if she did not have an abortion. He attacked her and injured her. Another client saw the injuries and was sympathetic. He helped her to escape. He took her to Naples and introduced her to 'Laune' who would help her leave the country. On 3 May 2008 she travelled with Laune to the United Kingdom by train. On 4 May 2008 Laune took her to Gatwick. He provided her with a passport, ticket and contact details for an organisation in Canada.
16. The appellant said she misunderstood certain matters when arrested. She had not explained herself properly. She had pleaded guilty on her solicitor's advice to obtain a more lenient sentence. During her sentence she suffered from both PTSD and depression.

17. The First-tier Tribunal considered the grounds on which the respondent disputed the appellant's claim to be a victim of trafficking in considerable detail. These included the various inconsistencies, as they were said to be, between the accounts she had given or omissions from them, which had been highlighted when the SSHD refused her application for asylum. The First-tier Tribunal ultimately concluded that the appellant was a credible witness and that her account of her experiences was credible; that the appellant was a refugee and victim of trafficking, and could not be returned to Nigeria as she would face a real risk of re-trafficking.
18. In a note made by the presenting officer on 5 November 2015, after the hearing had taken place, it was recorded that the case was difficult to defend in the face of evidence that (i) all the issues raised in the 2013 refusal and determination had now been addressed by experts in supplementary reports; (ii) the appellant was trafficked; (iii) the Home Office had not followed its own guidelines and (iv) the appellant suffered from PTSD.
19. On 21 May 2016, the Home Office granted the appellant and her daughter leave to remain for a period of 5 years on asylum grounds. Her leave will expire on 21 May 2021.
20. The Minute of the Home Office's decision to grant asylum, dated 17 April 2016, recorded that the officer in the specialist appeals unit saw no material error in the December 2015 decision, which was described as comprehensive and cogent and recommended the appellant's case be signed off as 'no further action'. The Minute referred to the fact that the evidence had changed since the refusal of asylum. In particular, the appellant's representatives had put before the First-tier Tribunal an expert report on trafficking and the second psychiatric report (from Professor Katona) which, the Minute said, addressed the issues raised in the 2013 asylum refusal.
21. On 27 November 2017 the appellant's solicitors submitted an application on her behalf to the CCRC and this was followed by the CCRC's referral of the appellant's conviction to this Court of 28 February 2019. As already indicated, the CCRC said that following the decision of this court in *S(G)* there was a real possibility, with the December 2015 decision as fresh evidence, that the Court of Appeal would not uphold the conviction. The CCRC suggested a substantial injustice might be demonstrable due to the change of law in not prosecuting victims of trafficking.

Fresh evidence and the status of the appellant

22. The appellant invited us to admit the following pursuant to section 23 of the Criminal Appeal Act 1968 Act (the 1968 Act) as fresh evidence on the grounds that it would be necessary and expedient in the interests of justice to do so. This evidence, which we considered *de bene esse*, consisted of (i) the December 2015 decision which decided the appellant was credible, a victim of trafficking and a refugee; (ii) the Home Office decision granting leave to remain and asylum, and the Minute of that decision dated 17 April 2016 which said that the reasons given in the December 2015 decision were comprehensive, cogent and contained no material legal error; (iii) the second

psychiatric report from Professor Katona, dated 8 July 2013; (iv) the Home Office note of the second First-tier Tribunal hearing, dated 5 November 2015 and (v) the appellant's further statement, dated 6 December 2013.

The arguments for the parties

23. In the light of this fresh evidence, the appellant invited us to accept that as the First-tier Tribunal had found, she was a victim of trafficking, her conviction was unsafe and this was a change of law case, in which she would suffer a substantial injustice if her conviction was upheld. Mr Blaxland QC for the appellant submitted that the appellant committed the offence as a direct consequence of her experience as a victim of trafficking. The offence was committed because the appellant had no realistic alternative in order to escape from those who had abused or exploited her and the appellant would suffer a substantial injustice if the time in which to apply for leave were not extended.
24. As to that, he submitted the appellant's position was directly analogous to that of the applicant in *S(G)* as her conviction clearly had an effect on her status. In particular, Immigration Rule para 322(1C) (ii) mandates the SSHD to refuse an application for indefinite leave to remain in the United Kingdom if an individual has been sentenced to imprisonment for at least 12 months, unless 15 years has elapsed since the end of the sentence.¹ In the appellant's case, she has leave to remain until May 2021, and were it not for her conviction, she would be entitled to Indefinite Leave to Remain after May 2021. Whilst her conviction subsists, she cannot apply for full citizenship until 2024 and is 'in limbo' until then. Further, her employment opportunities as a carer are affected by her conviction because of the requirement that she disclose her conviction, under the relevant enhanced disclosure rules relating to her chosen occupation.
25. Mr Douglas-Jones QC for the respondent acknowledged in argument that this was, on the facts, a finely balanced case. The respondent's stance, having carefully considered the relevant material, including that sought to be introduced as fresh evidence, was that the appellant was a credible victim of trafficking, and that the circumstances of her exploitation were serious. Nevertheless he submitted that the appellant knew that the United Kingdom was a safe country, and when she reached Gatwick she was removed from the dominant force of compulsion exerted on her by those exploiting her in Italy. Though there are cases where there will be a subsisting dominant force of compulsion notwithstanding the gap in time between the trafficking and the offending, this was not such a case. The appellant could have sought help from the UK authorities. She would not have been removed to Italy and she could have claimed asylum in this jurisdiction as she subsequently did. The facts fell "slightly short" of demonstrating a level of compulsion to commit the offence which meant that "no realistic alternative" was available to her or that her criminality was extinguished

1. ¹ Immigration Rule 322(1C)(ii) is in these terms: "**Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused...**(1C) where the person is seeking indefinite leave to enter or remain:...1. (ii) they have been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a period of 15 years has passed since the end of the sentence;..."

or significantly diminished. Thus, this was not one of those cases where the prosecution would or might well not have prosecuted.

The legal framework

26. Section 45 of the Modern Slavery Act 2015 (the 2015 Act), which was not in force at the time of the appellant's conviction, now provides a defence in cases where criminal acts are committed under compulsion attributable to slavery or certain kinds of exploitation. Before the 2015 Act came into force, there was no statutory provision transposing into domestic law the United Kingdom's international obligations towards victims of human trafficking who commit crimes in this country. Those international obligations derived from various instruments, including the United Nations Palermo Protocol (the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Person, especially Women and Children), the Council of European Convention on Action Against Trafficking in Human Beings 2005 (ECAT), ratified by the United Kingdom on 17 December 2008 (and in force on 1 April 2009) and from the EU Directive 2011/36 on Preventing and Combating Trafficking in Human Beings (the Directive) which came into force in the United Kingdom on 6 April 2013. Article 4 of ECAT and Article 2 of the Directive set out the definition of trafficking: this involves the recruitment, transportation, transfer, harbouring or receipt of persons by various means, including coercion, deception and the abuse of power, for the purposes of exploitation. Article 26 of ECAT and Article 8 of the Directive provide for the non-prosecution of victims of trafficking for offences which they have been compelled to commit by virtue of their position as victims of trafficking.
27. Prior to the enactment of section 45, these various Conventions and Directives were given effect through the common law defences of duress and necessity, through guidance for prosecutors on the exercise of their discretion whether to prosecute and by the power of the court to stay a prosecution for abuse of process. See *R v L, N* [2017] EWCA Crim. 2129; *R v Joseph (Verna) and others* [2017] EWCA Crim 36; 2017 1 Cr App R 33 and *R v VSJ* [2017] 1 Cr. App. R. 33 at para 10, where this Court distilled some of the general principles to be derived from cases such as *R v M(L) and others* [2010] EWCA Crim 2327; [2011] 1 Cr. App. R. 12; *R v N, R v Le* [2012] EWCA Crim. 189 and *R v L* [2013] EWCA Crim. 991.
28. The applicant in *S(G)* was convicted in 2007 after a trial of the fraudulent evasion of the prohibition on the importation of a Class A drug and sentenced to seven years' imprisonment. At her trial, her defence that she had been acting under duress was rejected. Following her release from prison, she claimed asylum and the First-tier Tribunal held she had been trafficked on the occasion when she entered the United Kingdom. More than nine years after her conviction, she sought leave to appeal against her conviction out of time. Her application for leave was ultimately refused because the court concluded, in the context of the importation of Class A drugs, that her conviction was not arguably unsafe as it could not be said that the applicant was under such a level of compulsion that her criminality or culpability was reduced to or below a point where it was not in the public interest for her to be prosecuted: see paras 77 to 82.

29. Materially for present purposes, as the Court in *S(G)* identified (i) ECAT and the Directive demonstrated a very significant change in the approach to victims of trafficking between 2007 and 2013; (ii) this has been reflected in a series of Court of Appeal decisions underlining the power to quash a conviction as an abuse of the process if identification of a person as a victim of trafficking did not occur until after conviction; and (iii) this change in approach represented an intervening change in the law between 2007 and 2017. Meanwhile and in parallel, the CPS Guidance had changed very substantially with regard to victims of trafficking between the first Crown Prosecution Guidance in 2007 and the final Crown Prosecution Guidance before the coming into force of the 2015 Act, which was dated 29th August 2013, to include a specific provision on the non-prosecution of victims of trafficking. It is to be noted that the material changes in law to which the court in *S(G)* referred, all post-dated the appellant's conviction in the present appeal.
30. At paras 61 and following of *S(G)* Gross LJ who gave the judgment of the Court (Gross LJ, McGowan J and Sir Brian Keith) said:

"61. ...The 2013 Guidance provides a detailed and structured approach, in clear contrast to the embryonic (though valuable) observations in the 2007 Guidance.

62. The 2013 Guidance highlights that prosecutors should be alert to the indicators of trafficking. It underlines the prosecutor's obligations in terms of Art. 4, ECHR, Art. 26 of ECAT and Art. 8 of the Directive. It calls for a "three-stage approach" to the prosecution decision:

"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."

63. ...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. "

64. Pulling the threads together and considering substance rather than form, we are entirely satisfied that this is a change of law case – even putting to one side the changes introduced by the 2015 Act, which are not relevant here. First, there has been a material change in the legal recognition of the rights of VOTs between 2007 and now. In 2007, whatever the position ought to have been, there was only very limited awareness of such rights. Secondly, the detailed provisions of Art. 26 of ECAT and Art. 8 of the Directive were not in force in this jurisdiction in 2007. Thirdly, to the extent that CPS Guidance is relevant, the contrast between the 2007 and 2013 Guidance is stark. What has emerged is more than simply a development in the existing law relating to VOTs. It could not seriously be argued that on the law and practice as understood in 2007, it was an abuse of process for the prosecution of the Applicant to proceed. Her application (and any appeal) thus depend on a change in law. It follows that to obtain exceptional leave, it must be shown that to refuse leave would occasion substantial injustice”.

31. As Gross LJ observed, where an application for an extension of time in which to seek leave to appeal is founded upon a change in the law, an extension will only be granted where an applicant can show that a substantial injustice would result if leave was not granted: see *R v Hughes* [2009] EWCA Crim 841 at para 20 and *R v Ordu* [2017] 4 WLR 104 at paras 18 and 21. An appellant whose conviction has been referred to the Court of Appeal, Criminal Division by the CCRC, pursuant to section 9 of the 1995 Act is, in substance, in no different or better position in this regard: see section 16(C) of the 1998 Act.²

² This provides that upon a reference, the Court of Appeal, Criminal Division may dismiss an appeal against conviction if: “the only ground for allowing it would be that there has been a development in the law since the date of the conviction, and...if...the reference had not been made, but...the Appellant had made and had been entitled to make an application for an extension of time within which to seek leave to appeal on the ground of

32. In considering the question of substantial injustice, Gross LJ said this at para 65:

“For our part, this question can be taken shortly. If *but only if*, the Applicant can demonstrate an arguable case as to the unsafety of the conviction,... we would not preclude the Applicant from challenging the conviction. The reason is that, as is not or not seriously in dispute, the Applicant's conviction and sentence to a term of seven years imprisonment impacts on her immigration status. As a refugee, she has been granted Leave to Remain in the UK for 5 years running until late 2020. At that point in time, the Applicant's refugee status and any grant of further Leave to Remain would be at risk by reason of her conviction and sentence of imprisonment for at least 4 years: see Section 32 of the UK Borders Act 2007, and paragraphs 338A, 339AC and 339R of the Immigration Rules. In our judgment, *if* the Applicant is otherwise capable of demonstrating an arguable case as to the unsafety of her conviction, she ought not to fail at the hurdle of obtaining exceptional leave. The risk to her immigration status would constitute a substantial injustice if, in such circumstances, she was precluded from challenging her conviction by reason of the requirement to obtain exceptional leave. For completeness, the facts of the present case are clearly distinguishable from those pertaining in *R v Ordu* [2017] EWCA Crim 4; [2017] 1 Cr App R 21, where the quashing of the conviction would have had no practical consequences. Finally, *if* the Applicant is otherwise able to obtain leave to appeal, then (on balance) we would be satisfied that, in all the circumstances, there has been a sufficient explanation of the delay to warrant an EOT”.

33. The principles relevant to the determination of *S(G)*'s case were then summarised as follows:

“ISSUE III: SAFETY OF THE CONVICTION

75. *The legal framework:* The starting point is to clear the decks. First, as is plain, this is a case where there was no credible common law defence of duress (or necessity). Secondly, this is not a case concerning a defendant under 18 years of age. Thirdly, the defence provided by s.45 of the 2015 Act is inapplicable. Fourthly, this is a case where the FTT and CA have concluded that the Applicant is a VOT [victim of trafficking].

76. Against this background, we venture to summarise below the relevant principles (for present purposes) in the light of the decisions and guidance of this Court in *R v M(L) and others* [2010] EWCA Crim 2327; [2011] 1 Cr App R 12; *R v N(A) and others* [2012] EWCA Crim 189; [2012] 1 Cr App R 35; *R v L(C) and others* [2013] EWCA Crim 991; [2013] 2 Cr App R 23; *R v Joseph (Verna) and others* [2017] EWCA Crim 36; 2017 1 Cr App R 33.

i) Neither Art. 26 of ECAT nor Art. 8 of the Directive confers a blanket immunity from prosecution on VOTs.

ii) Instead, the UK's international obligations require the careful and fact sensitive exercise by prosecutors of their discretion as to whether it is in the public interest to prosecute a VOT. That discretion is vested in the prosecutor, not the Court.

iii) The decisions of the FTT and CA as to whether an individual is a VOT do not bind prosecutors or the Court but will be respected (subject to submissions as to their basis or limitations) unless there is a good reason not to follow them.

iv) There is no closed list of factors bearing on the prosecutor's discretion to proceed against a VOT. Generalisation is best avoided. That said, factors obviously impacting on the discretion to prosecute go to the nexus between the crime committed by the defendant and the trafficking. If there is no reasonable nexus between the offence and the trafficking then, generally, there is no reason why (on trafficking grounds) the prosecution should not proceed. If there is a nexus, in some cases the levels of compulsion will be such that it will not be in the public interest for the prosecution to proceed. In other cases, it will be necessary to consider whether the compulsion was continuing and what, if any, reasonable alternatives were available to the VOT. There will be cases where a decision to prosecute will be justified but due allowance can be made for mitigating factors at the sentencing stage. The matter was most helpfully summarised by Lord Judge CJ, in *LC*, at [33], as follows:

" ...the distinct question for decision, once it is found that the defendant is a victim of trafficking is the extent to which the offences with which he is charged, or of which he has been found guilty are integral to or consequent on the exploitation of which he was the victim. We cannot be prescriptive. In some cases the facts will indeed show that he was under levels of compulsion which mean that, in reality, culpability was extinguished. If so, when such cases are prosecuted, an abuse of process submission is likely to succeed..... In other cases....culpability may be diminished but nevertheless be significant. For these individuals prosecution may well be

appropriate, with due allowance to be made in the sentencing decision for their diminished culpability. In yet other cases, the fact that the defendant was a victim of trafficking will provide no more than a colourable excuse for criminality which is unconnected to and does provide no more than a colourable excuse for criminality which is unconnected to and does not arise from their victimisation. In such cases an abuse of process submission would fail."

v) As always, the question for this Court goes to the safety of the conviction. However, in the present context, that inquiry translates into a question of whether in the light of the law as it now is (this being a rare change in law case) and the facts now known as to the Applicant (having regard to the admission of fresh evidence) the trial court should have stayed the proceedings as an abuse of process had an application been made. This question can be formulated indistinguishably in one of two ways which emerge from the authorities: was this a case where either: (1) the dominant force of compulsion, in the context of a very serious offence, was sufficient to reduce the Applicant's criminality or culpability to or below a point where it was not in the Public Interest for her to be prosecuted? or (2) the Applicant would or might well not have been prosecuted in the Public Interest? If yes, then the proper course would be to quash the conviction. As explained in *Joseph (Verna)* at [20 iii)], the Court's power to stay is "a power to ensure that the State complied with its international obligations and properly applied its mind to the possibility of not imposing penalties on victims".

Discussion

34. After considering the material facts within this legal framework, we reached the following conclusions.
35. First, it was in the interests of justice to admit as fresh evidence, the December 2015 decision and the Home Office documents associated with it, namely the Minute and the Home Office decision. These provide the substance for the conclusion, not now disputed by the respondent, that the appellant was a credible victim of trafficking. The evidence is capable of belief; it may afford a ground for allowing the appeal and post-dates the date of conviction, so could not have been adduced at that time. We take the same view about Professor Katona's second report and the appellant's further witness statement. There was a good reason why that evidence was not obtained at the time of the appellant's plea (in particular, for understandable reasons, no live issue was raised on behalf of the appellant at the time which would have called for such evidence); and in relation to Professor Katona's evidence, this did not stray beyond the proper ambit of an expert medical report, it dealt with issues which were relevant to the appellant's state of mind at the material time and, read together with the other fresh evidence, may afford a ground for allowing the appeal. Professor Katona's evidence did not

therefore suffer from similar defects to that of the expert medical evidence tendered as fresh evidence in *S(G)* which the court in that case declined to admit (see paras 70 to 74). Though, at least in writing, Mr Douglas-Jones expressed some reservations about the admissibility of Professor Katona's second report, in the light of the respondent's acceptance that the appellant was a victim of trafficking, he also accepted, realistically in our view, that the issue was not a productive one to pursue.

36. Secondly, there was no evidence before us contradicting the decision of the Competent Authority, nor any suggestion that significant evidence was not considered, either by the First-tier Tribunal or the Competent Authority in deciding that the appellant was a victim of trafficking. We are therefore content to respect the decision of the First-tier Tribunal and the Competent Authority that the appellant is a victim of trafficking. We would add that on the facts, we do not consider the appellant's guilty plea raised an additional legal hurdle for her to surmount. As Mr Blaxland pointed out, it is a feature of the appeals of many of those claiming to be victims of trafficking, that they pleaded guilty at trial. If however a guilty plea is entered without due consideration of the relevant principles concerning the criminal liability of victims of trafficking, the plea is not regarded as an impediment to the court's consideration of the appeals (it is to be noted for example, this was the position of twelve of the appellants in three of the cases to which we have already referred, namely *R v O*, *R v M(L)* and *ors* and *R v L(C)*).
37. Thirdly, we were satisfied that, as in *S(G)*, this was a change of law case, the effect of which was that the appellant was required to establish that she would suffer a substantial injustice were the appeal to be dismissed. We could see no material distinction in this connection between this case and that of *S(G)*. Equally, we were disposed to approach the issue of extension of time on the basis that permission would be granted if the appellant could demonstrate an arguable case that her conviction was unsafe. See para 65 of *S(G)* set out at para 32 above. The court in *S(G)* accepted that the consequences of the conviction for the applicant – in particular for her immigration status were such that were the conviction unsafe, she would suffer a substantial injustice. The position of the appellant in this case and that of the applicant in *S(G)* are not identical (as the length of their respective sentences brings different parts of the Immigration Rules into play) but they are materially similar. As the CCRC observed in its statement of reasons, the appellant was found to be at continuing risk of being re-trafficked, and her conviction has potential implications for a future Home Office decision on her status. At present she has leave to remain until 21 May 2021. Under Rule 322(1C) of the Immigration Rules however, the Home Office will have grounds for refusing her indefinite leave to remain in the United Kingdom because she was convicted and sentenced to 12 months' imprisonment – and indefinite leave will not be granted to such applicants until a period of at least 15 years has elapsed from the completion of their sentence (which would be not be until the relevant day in May 2024).
38. This was sufficient, in our view, to demonstrate substantial injustice. It is unnecessary therefore for us to express any conclusion on the effect the conviction continues to have on the appellant's employment prospects and her desire to work in the care sector. It might be reasonable to suppose the appellant's conviction, and the standard and enhanced criminal record checks she may have had to undertake, might be an

obstacle to her desired employment and working life or career in general. However, we merely note (albeit we received no submissions about this) that it is asserted in the CCRC's reference that the offence of which the appellant was convicted is not one that would prevent her from working in the care sector. In addition, the offence does not appear on the list of offences that are excluded from filtering under the Disclosure and Barring Service Filtering Rules of 2013 from which it would follow that the appellant would not now be required to disclose her conviction (as a matter of standard or enhanced disclosure) as more than 11 years has elapsed from the date of her conviction.

39. Fourthly, we are satisfied there was a nexus between the appellant's offending and her status as a victim of trafficking such that the commission of the offence was integral to or consequent on the exploitation of which she was a victim. It follows that it was not in the public interest for the appellant to have been prosecuted and her conviction is, in consequence, unsafe.
40. As can be seen from the CPS Guidance on victims of trafficking, and from the cases that come before the courts, immigration document offences are amongst the most common offences committed by victims of trafficking. In this case, there was a clear nexus between the use of the false passport and the appellant's experience as a victim of trafficking. The respondent's opposition to this appeal focused not on the question of nexus as such, but on the associated issue of compulsion. However the submission that the appellant could (and should) have claimed asylum when she arrived in this jurisdiction seems to us to be one that is divorced from the realities of the appellant's position. She was, at the material time, as the respondent now accepts, a victim of serious exploitation and trafficking; she was attempting to travel to Canada from Italy in order to escape from her traffickers when – as a matter of happenchance in one sense – she passed through this jurisdiction. She was six months' pregnant at the time and on the evidence we have seen, including the medical evidence, she was, without doubt, highly vulnerable. She was also, on the account accepted by the First-tier Tribunal, dependent on the agent who had made her travel arrangements and who presented her with the false passport. Further, she did not know what the arrangements were until she was in the United Kingdom and had been taken to Gatwick Airport. Mr Blaxland submitted, with justification in our view, that in all the circumstances, it is not realistic to suppose that the appellant could be expected to have extricated herself from the person helping her to escape or that she would be familiar with the immigration rules and her ability to claim asylum. It is to be noted, in this context, that the First-tier Tribunal accepted that the appellant's previous entry to the United Kingdom (using a visa obtained in a false name) was part of her original trafficking to Italy.
41. We were satisfied therefore, after a careful scrutiny of the facts, that the appellant was under a level of compulsion (in the broad sense) which meant that her culpability was extinguished as a matter of reality, that it was not in the public interest for her to be prosecuted and that her conviction was, in consequence, unsafe. As we were also satisfied that there would be substantial injustice were the appellant's conviction not to be quashed, it followed that we determined that the appellant's conviction should be quashed.

42. Finally, Mr Blaxland invited us to make an order anonymising the proceedings and we made such an order. We had in mind the nature of the appellant's current circumstances, that she had been recognised as a victim of trafficking for sexual exploitation and that she had been granted anonymity in the immigration proceedings before the First-tier Tribunal and in the criminal appeal in 2012. Having regard to the considerations identified in *S(G)* at para 5 and in *R v L* at para 9 in our view it was necessary to make such an order, and for that order to be maintained.