ONE PUMP COURT

Barrister

MARGO MUNRO KERR

Email: mmk@onepumpcourt.co.uk

Call: 2020

Specialist in

Crime
Personal Immigration
Prison Law
Public Law
Civil Law
Civil Actions Against Public Authorities
Modern Slavery & Trafficking Team
Direct Access Trained

Experience

Margo is a criminal, immigration, and public law barrister.

“Margo is a pleasure to work with, a fearless and passionate advocate who leaves no stone unturned when defending her clients” – *instructing solicitor.*

*“*Margo’s combination of sharp intellect and a patient, empathic approach have helped us to feel so supported and strengthened during scary court proceedings. My brother is very vulnerable and I do not think any other barrister would have been able to develop the trusting relationship with him that Margo did” – *family member of lay client.*

“I think you did brilliantly. You really cared. I would certainly be proud if I were you” – *lay client.*

Immigration

Margo’s immigration practice encompasses protection and human rights claims, students, and workers.

She is regularly instructed in immigration related Judicial Reviews, including urgent challenges to deportation and unlawful detention, as well as challenges to delay or other unlawful decision making.

Margo advises on citizenship matters and has a developing SIAC practice.

Margo was part of a team that successfully secured interim relief from the European Court of Human Rights against Greece, requiring it to transfer seriously ill individuals from Lesvos to the mainland for medical treatment.

Margo continues to work closely with Hackney Migrant Centre, having previously worked in house.

Civil

Margo’s civil work draws on her knowledge of immigration and criminal procedure. She advises on claims for damages arising from unlawful arrest, detention, or personal injury following contact with the police, prison or immigration authorities.

She acts in inquests, particularly where an individual has died in custody or detention.

Crime

Margo has particular expertise in criminal judicial reviews.

Her Crown Court practice is dominated by matters arising from protest, trafficking, and immigration, although she maintains a general crime practice.

Education

BPTC/LLM, Very Competent with Distinction for the LLM dissertation, City Law School

Graduate Diploma in Law, Commendation, City Law School
BA Oriental Studies (Persian and Turkish), First Class, Wadham College, University of Oxford, including a year abroad at the University of Tehran.

Memberships

Haldane Society of Socialist Lawyers
Criminal Bar Association
Administrative Law Bar Association
Immigration Law Practitioners' Association

Languages

Fluent Persian. Conversational French. Passive Turkish.

Awards

City Law School GDL and BPTC scholarships
Inner Temple Geoffrey Veale pupillage award and exhibition awards for the GDL & BPTC
Wadham College undergraduate scholarship for performance in first year examinations and academic award for performance in final year examinations

CASES

TM v ECO [2024] (FTT (IAC) at Taylor House)

Margo acted for an Iranian couple who had married via a Sigheh-ye Mahram, a religious marriage which is sometimes temporary. One partner had then left Iran and claimed asylum in the UK. The other was forced to marry someone else in Iran, whom she later divorced. Domestic abuse prevented her from contacting her first partner for some time, but when the marriage broke down she was able to contact him again.
The tribunal found that the relationship was genuine and subsisting, despite periods without contact, and allowed the appeal.
Margo was instructed by Melanie Vasselin at RAMFEL.

Area of Law:
Personal Immigration, Asylum, Family and Human Rights
Related Barristers:
Margo Munro Kerr

R v H [2023] (Crown Court at Winchester)

Margo acted for a Defendant who pleaded guilty to s18 wounding with intent to cause GBH shortly

before trial. The Defendant had hit the Complainant with a blunt object causing a skull fracture. Following mitigation, the judge was persuaded that, due to the Defendant's mental health issues and the delay in bringing the proceedings, a 2 year suspended sentence was appropriate.
Margo was instructed by Zachary Whyte of Sperrin Law.
https://www.lawgazette.co.uk/news/playboy-dancer-recruited-by-solicitor-awarded-almost-30000/5118611.article

Area of Law:
Crime, General Crime
Related Barristers:
Margo Munro Kerr

BR v Patel [2023] (Employment Tribunal)

Margo represented a Claimant who worked for several months without pay as a legal secretary, during which time she was harassed and assaulted by her employer.
The tribunal award of damages included £18,000 for injury to feelings.
Margo was instructed by a trade union.
https://www.lawgazette.co.uk/news/playboy-dancer-recruited-by-solicitor-awarded-almost-30000/5118611.article

Area of Law:
Employment
Related Barristers:
Margo Munro Kerr

R (oao AB) v Uxbridge Youth Court [2023] [2023] EWHC 2951 (Admin)

Margo represented a child charged with robbery, arising out of his being trafficked. The CPS had applied the adult test to the decision to prosecute, and in refusing an application to stay proceedings as an abuse of process the Youth Court upheld this error. After a Judicial Review was issued the CPS agreed to remake the decision. Margo was led by Chris Butler KC at an oral hearing to determine whether criminal or civil costs should be available to the Claimant.
https://www.bailii.org/ew/cases/EWHC/Admin/2023/2951.html

Area of Law:
Crime, Appeals, General Crime, Public Law, Criminal Judicial Review, Multidisciplinary, Modern Slavery & Trafficking Team
Related Barristers:
Margo Munro Kerr

R v T [2023] (Crown Court at Croydon)

Margo represented a Defendant charged with five counts of possession with intent to supply a class A drug and one count of possession of a bladed article, running the defence under s45 of the Modern

Slavery Act 2014. Despite a finding by the Home Office's Single Competent Authority that the Defendant was a victim of trafficking, the Crown decided to continue prosecution due to unexplained inconsistencies in the Defendant's account. After 2h 10m of deliberation the jury returned a unanimous Not Guilty verdict.

Area of Law:
Crime, General Crime
Related Barristers:
Margo Munro Kerr

G v SSHD [2023] (Upper Tribunal)

The client applied to join his wife, a student in the UK. He submitted the required evidence, but the Home Office refused his application stating that they were unable to verify his financial circumstances. The client's administrative review of the decision was refused. Margo acted in a judicial review which was settled favourably.

Area of Law:
Personal Immigration, Family and Human Rights, Business Immigration, Workers and Students, Public Law, Immigration
Related Barristers:
Margo Munro Kerr

AC & MH v SSHD [2023] (Upper Tribunal)

The Appellants, a mother and child from Iran, applied to join the Sponsor, a British citizen who had previously had refugee status in the UK. Errors in the marriage certificate (and in a further "corrected" marriage certificate) had led the First Tier Tribunal to twice refuse appeals against refusals of leave to enter. Margo acted in the appeal against the second First Tier Tribunal refusal, successfully arguing that there were insurmountable obstacles to family life continuing outside the UK.
https://tribunalsdecisions.service.gov.uk/utiac/ui-2023-001129-ui-2023-001130
Margo was instructed by Urja Dobe at Ata law.

Area of Law:
Personal Immigration, Family and Human Rights, Immigration
Related Barristers:
Margo Munro Kerr

Z v SSHD [2023] (Upper Tribunal)

Margo acted for a Zimbabwean man with HIV and complex mental health problems facing deportation. Removal was deferred after proceedings were initiated. Permission to apply was allowed on oral renewal, at a hearing covered by Mark Allison. The matter was settled with a consent order allowing the submission of further medical evidence in support of the client's claim under Article 3 ECHR, and costs in favour of the Applicant.

Area of Law:

Personal Immigration, Criminal Judicial Review, Immigration

Related Barristers:

Margo Munro Kerr

R v G [2023] (Crown Court at Ipswich)

Margo persuaded the Crown to offer no evidence against a young woman charged with violent disorder after a fight broke out at a paintballing venue. Two of her co-defendants pleaded guilty to affray and one to s4 of the Public Order Act 1986.

Area of Law:

Crime, General Crime

Related Barristers:

Margo Munro Kerr

R v A [2023] (Highbury Corner Magistrates' Court)

Margo acted for an activist charged with criminal damage. She successfully resisted the Crown's application to vacate the trial to allow a key witness to attend.

Area of Law:

Crime, General Crime, Protest Rights

Related Barristers:

Margo Munro Kerr

S v SSHD [2023] (Upper Tribunal)

Margo obtained permission to apply for judicial review in a challenge to a decision to revoke a client's leave to remain as the partner of a student on the basis that adequate procedural protections were not in place for the marriage interview. The client was allowed to stay in the UK with his wife until he decided to withdraw from the judicial review for personal reasons.

Area of Law:

Personal Immigration, Family and Human Rights, Public Law, Immigration

Related Barristers:

Margo Munro Kerr

A v SSHD [2022] (Upper Tribunal)

Margo acted in a judicial review of a delay to an asylum decision, leading the Secretary of State to agree to a consent order that she decide the claim within a certain period of time and pay the Claimant's legal costs.

Margo has acted in a number of similar delay matters with similar results.

In this case, the Secretary of State subsequently refused the asylum claim. Margo drafted the skeleton argument for the appeal, following which the Secretary of State reviewed the decision and allowed the

claim.
Margo was instructed by Hannah Baynes and Hannah Jandu of Duncan Lewis Solicitors.

Area of Law:
Personal Immigration, Asylum, Public Law, Immigration
Related Barristers:
Margo Munro Kerr

R v M [2022] (Crown Court at Isleworth)

Margo acted for a Defendant accused of failing to return several sums of company money he had collected, and of falsely representing to colleagues that he had permission to collect their takings. The Defendant was acquitted of two counts of fraud and one count of theft. He admitted failing to return one small sum and due to this was convicted of one count of theft only. He received a short community order.

Area of Law:
Crime, General Crime
Related Barristers:
Margo Munro Kerr

R v C [2022] (Stratford Magistrates' Court)

Margo acted for a vulnerable woman accused of malicious communications during a 999 call on the basis of legal argument. The Defendant had said that she "didn't care" whether distress or anxiety was caused; Margo successfully persuaded the judge that the statutory language "purpose" required more than mere recklessness.
Margo was instructed by Christine Thompson of Waterfords Solicitors.

Area of Law:
Crime, General Crime
Related Barristers:
Margo Munro Kerr

S v SSHD [2022] (FTT (IAC) at York House)

Margo persuaded the judge to allow this refugee family reunion appeal outside the rules on the spot.

Area of Law:
Personal Immigration, Asylum, Family and Human Rights
Related Barristers:
Margo Munro Kerr

R v J & anor [2022] (Stratford Magistrates' Court)

Margo acted for a child acquitted of attempted robbery after no PACE compliant identity procedure

was undertaken by the police.

Area of Law:
Crime, General Crime
Related Barristers:
Margo Munro Kerr

R (oao AB) v Willesden Youth Court [2022] (High Court)

Margo acted in judicial review proceedings against Willesden Youth Court when it allowed a CPS application to adjourn her client's trial after failing to warn the correct witness. After being granted urgent interim relief and permission to apply for judicial review at an oral hearing in the High Court, Margo persuaded the CPS to offer no evidence against her client. The client faced a further 3 charges in the Youth Court of which she was later acquitted, with Margo defending.

Area of Law:
Crime, Appeals, General Crime, Public Law, Criminal Judicial Review
Related Barristers:
Margo Munro Kerr

R v Z & ors [2022] (Birmingham Magistrates' Court)

Margo was part of a team of three barristers who represented Palestine Action activists acquitted after a successful application to stay proceedings as an abuse of process. The application was made on the basis that the CPS failed to disclose a key document until the second day of trial.
Margo was instructed by Lydia Dagostino of Kelly's solicitors.

Area of Law:
Crime, General Crime
Related Barristers:
Margo Munro Kerr

PUBLICATIONS

What does DPP v Cuciurean mean for protestors?

In the judgment of *DPP v Cuciurean* [2022] EWHC 736 Admin, handed down on 30 March 2022, the High Court sought to limit to its own facts the judgment in *DPP v Ziegler & ors* [2021] UKSC 23. The judgment in *Ziegler* allowed people facing criminal protest charges to argue that the court should determine whether a criminal conviction would be a proportionate interference with their rights to freedom of expression (Article 10 of the European Convention on Human Rights ("ECHR")) and

freedom of association (Article 11 ECHR). The court in *Cuciurean* found that such an exercise would only have to be conducted for offences, like obstructing a highway but not aggravated tresspass, where it is a defence to have a "lawful excuse". It also suggested that Articles 10 and 11 may only be engaged where the action took place on public land.

The case rests substantially on consideration of Strasbourg caselaw which has – in the view of the authors – been misinterpreted by the High Court. This article will consider avenues to overturn or distinguish the judgment, which may be useful for defence practitioners and protestors facing criminal charges.

The facts

Elliot Cuciurean dug a tunnel at a site designated for the HS2 project before it was bought by HS2. He then occupied it for over two weeks and slept in it for two nights before leaving voluntarily. It cost HS2 around £195,000 to safely remove Elliot Cuciurean and another two protestors, and works were delayed until he left. He was charged with aggravated trespass and tried in the Magistrates' Court. The District Judge undertook a proportionality assessment of the kind required by *Ziegler*, considering whether conviction was a proportionate interference with Mr Cuciurean's Article 10 and 11 rights. She acquitted Mr Cuciurean on that basis. The prosecution appealed by way of case stated (appealing specific legal questions from the trial) to the High Court.

The judgment

The three headline points from the judgment in *Cuciurean* are:

- Statutory offences (i.e. offences created by Acts of Parliament) are to be considered compatible with ECHR rights unless the court is persuaded otherwise (¶70); an analysis of whether a conviction for the offence is proportionate with ECHR rights, as in *Ziegler,* is therefore only necessary for offences which already have a "lawful excuse" defence available;
- Even if the court had made a proportionality assessment, by weighing up the proportionality of a criminal conviction against Mr Cuciurean's Article 10 and 11 rights, as HS2 is a public project which has been authorised by Parliament, Mr Cuciurean's actions caused significant cost and delay, it would have been a proportionate interference with Articles 10 and 11 to convict him of the criminal offence with which he was charged – aggravated trespass contrary to s.68 of the Criminal Justice and Public Order Act 1994.
- Concerningly, the High Court (while not making a decision about it) stated that in their view is arguable that Articles 10 and 11 ECHR are not engaged where a protest takes place on private land or publicly owned land to which there is no right of access (¶¶ 45 & 50).

(1) Lawful excuse – limiting *Ziegler?*

The judgment relies on the cases of *Bauer v DPP (Liberty Intervening)* [2013] 1 WLR 3617 and *James v DPP* [2016] 1 WLR 2118*,* both pre-*Ziegler* judgments from the Divisional Court, to limit the proportionality exercise required by *Ziegler* to offences where it is a defence to have a lawful excuse, as was the offence under examination in *Ziegler*. The reason for this is that it is to be assumed that, for offences where there is no defence of lawful excuse, "proof of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11" [¶ 61].

Leaving aside the obvious issue that *Ziegler* is a Supreme Court judgment post-dating each of those

judgments (with Supreme Court judgments taking precedent over the judgments of lower courts), the court has failed to consider important Strasbourg caselaw on the matter.

In *Perinçek, v Switzerland* [GC], no. 27510/08, ECHR 2015, Do?u Perinçek, of the Turkish Workers' Party had made statements at public events denying the Armenian Genocide. The Switzerland-Armenia Association brought a complaint against him and he was found guilty of violating Article 261 of the Criminal Code – a law against racial or religious discrimination and genocide denial. Mr Perinçek was ordered to pay 3000 Swiss francs or serve 30 days imprisonment, and also to pay 1000 Swiss francs to the Swizerland-Armenia Association.

Mr Perinçek filed an application to the European Court of Human Rights on the basis that the Swiss courts had wrongfully breached his right to freedom of expression.

This point is made in the case of *Perinc?ek v Switzerland* [emphasis added]:

> 272. In two recent cases under Article 10 of the Convention, the Court upheld the proportionality of interferences which consisted in regulatory schemes limiting the technical means through which freedom of expression may be exercised in the public sphere…*By contrast, the form of interference in issue in this case – a criminal conviction that could even result in a term of imprisonment – was much more serious in terms of its consequences for the applicant, and calls for stricter scrutiny.*

Unlike the offence of Aggravated Trespass, contrary to s.68 of the Criminal Justice and Public Order Act 1994, which was made law prior to the writing into law of European Convention Rights with the Human Rights Act 1998, the Swiss law against genocide denial had been introduced.

In particular, in *Perinc?ek v Switzerland* at § 275, the ECtHR held that

"an interference with the right to freedom of expression that takes the form of a criminal conviction inevitably requires detailed judicial assessment of the specific conduct sought to be punished. In this type of case, it is normally not sufficient that the interference was imposed because its subject matter fell within a particular category or was caught by a legal rule formulated in general terms; what is rather required is that it was necessary in the specific circumstances."

(2) The proportionality exercise itself

Despite finding that Articles 10 and 11 may not have been engaged, and that a proportionality exercise was not necessary when convicting an individual of aggravated trespass, the Court nevertheless took 1 side of A4 to find that a conviction would have been a proportionate interference with Articles 10 and 11.

The bulk of that reasoning related to the fact that HS2 is a public project approved by parliament. Space was also given over to reasoning that it was "immaterial" that the costs were miniscule when compared to the total costs of the project, because "that argument could be repeatedly endlessly along the route of a major project such as this." To this it must be answered: of course it could. And at some point the damage would no longer be proportionate. But until that point, it would.

(3) Should proportionality be considered? The distinction between public and private land

At ¶ 41 of the judgment, *Appleby and Others v the United Kingdom,* no. 44306/98, § 47, ECHR 2003-VI is quoted at length to the effect that Articles 10 and 11 do not create any "automatic rights of entry to private property"; although where any bar on access "has the effect of preventing any effective

exercise of freedom of expression" there may be a positive obligation on the State to regulate rights of access to protect Articles 10 and 11.

From this, the conclusion is drawn that there is, in general, no right to freedom of expression and association on private land [¶ 45].

Appleby concerned environmental activists leafletting in a shopping mall. The shopping mall was private land, dominating the town centre, and the owners of the shopping mall refused to allow them to demonstrate in the mall or to distribute leaflets. However, contrary to the interpretation of the High Court in *Cuciurean*, *Appleby* is a case concerning whether it was lawful for demonstrators to be denied access to a shopping mall, not whether it was lawful for them to face criminal convictions. The reasoning in *Appleby* contains a proportionality assessment: there is no *automatic* right of entry, but rather, where a bar on access to the property has effect of preventing any freedom of expression, it would not be a proportionate interference with Articles 10 and 11. *Appleby* is not concerned with criminal conviction. A criminal conviction may not be proportionate where denial of right of access would. There are remedies for the owner of the land being trespassed on through civil law (i.e. trespass rather than aggravated trespass), without protestors facing criminal convictions.

The judgment in *Appleby* prevents Article 10 being used to create positive rights, i.e. 'as a sword', creating an automatic right of entry to private property. That much is clear. But it does not prevent Article 10 being used in a defensive manner, i.e. 'as a shield', where a criminal conviction would not be proportionate.

Conclusion

We hope this article can provide some assistance to protesters facing criminal charges and those representing them. The judgment in *Cuciurean* – in particular the use it has made of *Bauer* and *Ziegler* – is evidence of the fact that "good" judgments should be treated with care. It is hoped that, when Cuciurean is considered in the Attorney General's Reference for the Colston Statue case, the court rejects the framing of the questions by the Attorney General, and finds that an assessment of proportionality (as per *Ziegler*) can and should be considered wherever relevant for all types of offences where Articles 10 and 11 are engaged.

Margo and Hannah are grateful to Blinne Ní Ghrálaigh of Matrix Chambers and counsel in *Ziegler* and *Cuciurean* for her assistance when writing this article.

Related Barristers:

Margo Munro KerrHannah Webb

Ethiopia still not safe for Oromo Liberation Front supporters, country guidance confirms

In AAR (OLF – MB confirmed) Ethiopia CG [2022] UKUT 1 (IAC), the Upper Tribunal has confirmed that the situation in Ethiopia has not changed substantially enough to allow a departure from previous country guidance.

Further Information:

https://freemovement.org.uk/ethiopia-still-not-safe-for-oromo-liberation-front-supporters-country-guidance-confirms/

Area of Law:

Personal ImmigrationAsylumDeportation

Related Barristers:

Margo Munro KerrImogen MellorEmma Turnbull

The Court of Appeal provides guidance on prosecuting victims of trafficking

Stephen Knight appeared on behalf of AAI, and Parosha Chandran appeared on behalf of the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, Intervening. This article was written by One Pump Court pupils Margo Munro Kerr and Sarah-Jane Ewart.

The Court of Appeal has today handed down a lengthy decision which is essential reading for all criminal practitioners. In the linked cases of *R v AAD, AAH, and AAI* [2022] EWCA Crim 106, the Court of Appeal has given guidance on the defences available to victims of trafficking and modern slavery who are accused of criminal offences.

This article assumes prior knowledge of the decision in *R v Brecani* [2021] EWCA Crim 731 (19 May 2021). If you need an explainer or refresher we recommend reading this article first.

??The Court of Appeal has upheld *Brecani* but provided important guidance regarding abuse of process where a decision is made to prosecute a victim of trafficking.

The appeals of AAD, AAH, and AAI were joined so that the Court could provide guidance in a Special Court. All three appellants had been convicted of criminal offences prior to being recognised as victims of trafficking: AAI in 2008, AAH in 2016 (after entering a guilty plea), and AAD in 2018. They appealed on a range of grounds, all with the effect of arguing that had they received the positive conclusive grounds decision prior to trial, or had the fact and extent of their being trafficked been accepted at the time of being charged, or at trial (or in the case of AAH when she was advised to enter a guilty plea), then they would not have been convicted. Permission was granted to AAI and AAH to appeal out of time.

The nine overarching issues

Prior to considering the grounds of appeal, the court considered nine overarching issues relating to trafficking in criminal trials.

(i) Is a Single Competent Authority ("SCA") conclusive grounds decision admissible on appeal? [¶¶ 79 – 89]

The answer to this was a resounding "yes": although not admissible at trial following *Brecani*, it is admissible for the purposes of reviewing whether a conviction is safe.

In *Brecani* the Court had held that SCA decisions were inadmissible at trial. In the course of answering this, the Court considered whether the effect of *Brecani* was that a suitably qualified expert in trafficking could give evidence at trial instead. The Court held that an expert could only be instructed to answer questions outside of the knowledge or remit of the jury, "for instance as to the defendant's psychiatric or psychological state or the detailed mores of people trafficking gangs operating in countries that are outside the court's own knowledge and experience" [¶87]. However, where the expert's evidence strays into questions of fact for the jury to decide, it is inadmissible [¶86]. Examples given are the plausibility and consistency of a defendant's account, the vulnerability of a defendant,

and whether a given set of facts meets the legal definition of trafficking [¶86].

(ii) Is the decision in *Brecani* consistent with the previous authorities of the Court of Appeal Criminal Division ("CACD")? [¶¶90 – 100]

The Court found that *Brecani* was consistent with previous authorities.

The Court was invited to consider *JXP* [2019] EWCA Crim 1280, which was not cited in *Brecani*, and in which the court observed at [¶ 54] that the competent authority is "a specialist authority with particular expertise and knowledge in this area of trafficking". The Court stated that *Brecani* was not inconsistent with *JXP*, finding that in *JXP,* limited weight had been placed on the decision of the SCA, as there were a number of other sources of evidence of trafficking including evidence of an expert psychiatrist and psychologist [¶¶ 90-92].

The Court was further invited to consider *R v L(C)* [2013] EWCA Crim 991; [2013] 2 Cr App R 23, in which it was observed at ¶ 28 that:

"Whether the concluded decision of the competent authority is favourable or adverse to the individual it will have been made by an authority vested with the responsibility for investigating these issues, and although the court is not bound by the decision, unless there is evidence to contradict it, or significant evidence that was not considered, it is likely that the criminal courts will abide by it."

The Court stated that *Brecani* was not in conflict with *LC*, because, whereas in *Brecani* the Court addressed the admissibility of evidence at trial, in *LC*, the Court addressed "the level of protection from prosecution or punishment for trafficked victims who have been compelled to commit criminal offences, in the context of a prosecutorial decision to proceed with the trial" [¶ 94]. In *LC,* a decision reached before the Modern Slavery Act 2015 ("the 2015 Act"), it was stated that the decision of the SCA was admissible in determining whether a decision to prosecute was an abuse of process; no determination was made about its admissibility before a jury.

Finally, the Court was invited to consider whether the decision in *Brecani* was inconsistent with the decision in *Rogers v Hoyle* [2014] EWCA (Civ) 257; [2015] QB 265, a civil case concerning the admissibility of a report by the Air Accident Investigation Branch of the Department of Transport which contained evidence of the opinions of experts on technical matters. The Court drew a distinction between opinions on technical matters and questions of fact. It also observed at ¶ 100 that:

"Rogers v Hoyle nonetheless serves to highlight one of the substantial differences between civil and criminal proceedings, given a professional judge can readily distinguish between weight and admissibility in a manner that would be far more difficult for a jury".

(iii) Is the decision in *Brecani* consistent with the UK's international obligations and European case law with regard to the protection of victims of trafficking? [¶¶ 101-104]

The Court was particularly invited to consider the Strasbourg case *VCL & AN*, App. Nos 77587 and 74603/12, 16 February 2021, which concerned prosecution of trafficked individuals for cannabis farming. The Court distinguished the issue: *Brecani*, it repeated, was about admissibility of evidence *only*, not about the way that the CPS prosecutes. However, it revisited *VCL* when considering whether it was still possible to argue that a prosecution of a victim of trafficking was an abuse of process (see issue 7 below).

(iv) Is the court able to give further guidance vis-à-vis the observation in *Brecani* (at [58]) that expert

evidence on the question of trafficking and exploitation may be admissible at trial, "particularly to provide context of a cultural nature […]" or "of societal and contextual factors outside the ordinary experience of the jury"? [¶¶ 105-106]

The Court said that it had explained this issue above, at ¶¶ 86 and 87.

(v) When on an appeal might it be appropriate or necessary for witnesses (appellant, expert, trial representative etc.) to be required to attend to give evidence relating to whether the appellant was trafficked in victim of trafficking cases? [¶¶ 107-108]

The Court stated that it had already considered the issue at ¶¶ 82 and 84. It did not find that it would necessarily in all cases be contrary to the purpose of protection to call a defendant to give evidence that may be re-traumatising, stating at ¶ 108:

"R v AAJ demonstrates that there will be appeals when it will be wholly unnecessary for oral evidence to be adduced. However, if the suggested trafficking is based, for instance, on unsatisfactory and untested hearsay evidence from the appellant, the court may express the view that it would be preferable for the appellant to give evidence for the proper resolution of the issues on the appeal, thereby enabling his or her account to be appropriately tested."

(vi) When the parties disagree, to what extent and at what stage might the court properly be involved in the question of whether live evidence is to be called? [¶109]

The court answered this briefly: the question of whether live evidence should be called is squarely a matter for the court, with due regard to submissions from the parties, depending on what is "necessary or expedient in the interests of justice."

Parties are instructed to inform the Criminal Appeal Office in good time if they have agreed (or not) on whether oral evidence is not required, so that the court can confirm or reject this, and make directions accordingly.

(vii) Is it still possible to argue on appeal that the prosecution of a victim of trafficking was an abuse of process? [¶¶ 110-143]

This question is reviewed at length by the court and the answer is, emphatically, yes (though in prescribed circumstances).

The Court reiterated the three-stage test for prosecutors arising out of *R v M(L)* [2011] EWCA Crim 2327; [2011] 1 Cr App R 12, and substantively reviewed the pre-2015 authorities on abuse of process in this context [¶¶110-114].

As to whether this residual jurisdiction survives the 2015 Act: "absent any authority to the contrary, it is difficult to see why it should not" [¶116]. The Court set out that the abuse of process jurisdiction complements and supplements the defence under section 45 of the 2015 Act, and went further to say that it may better "preserve the obligations in the Convention and Directive, which extend not only to victims of trafficking not being punished but also, in appropriate cases, to not being prosecuted". If the abuse of process jurisdiction has been described as special or unusual when evoked in a case involving a victim of trafficking, the Court says that can only be because abuse of process applications must take into account the relevant context, which here includes a framework of international obligations [c.f. ¶117].

The uncontroversial principles of abuse of process jurisdiction are variously re-stated: a decision to prosecute is for the CPS, not for the courts; and disputes of fact are for the jury. Where the CPS has

taken into account relevant prosecutorial guidance, and provided a "rational basis" for departing from a positive conclusive grounds decision, there will likely be no successful abuse argument and there may be a wasted costs order.

Helpfully, however, the corollary of that position is stated at ¶120:

"But what if the CPS has failed unjustifiably to take into account the CPS Guidance or what if it has no rational basis for departing from a favourable conclusive grounds decision? […] in principle such a scenario would, on ordinary public law grounds, seem to operate to vitiate that prosecution decision: whether by reason of a failure to take a material matter (viz. the CPS prosecution guidance) into account or by making a decision to prosecute which is properly to be styled as irrational. Consequently, such a prosecution may, in an appropriate case, be stayed."

In reaching this conclusion the Court reviewed, and departed from, the decisions in *DS* [2020] EWCA Crim 285; [2021] 1 WLR 303 and *A* [2020] EWCA Crim 1408. In particular the Court was critical of the observations in *DS* [¶ 42] that if there is no sound evidential basis on which to challenge the conclusive grounds decision, then "it will still not be an abuse of process, but the judge will consider any submission that there is no case to answer". That, the court says, is clearly wrong, and the abuse jurisdiction should be available as legal redress in the event that the CPS fails to follow their own guidance.

Finally, and perhaps decisively, the Court accepted that *DS* and *A* have been superseded by *VCL & AN.* The ECtHR in *VCL & AN* emphasised that, given that the prosecution of victims of trafficking "may be at odds with the state's duty to take operational measures to protect them" [¶ 159], a prosecutor must have "clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention" to depart from a decision by the competent authority [¶ 162]. The Court of Appeal equated the ECtHR's "clear reasons" requirement with the "rational basis" in *M(L)* and *Joseph*, and rejected "the dictum in *DS* to the effect that there can be no abuse of process even where there is no sound evidential (that is, rational) basis for a prosecutorial departure from a conclusive grounds decision favourable to a defendant" [¶ 140].

The various threads on abuse of process are summarised, perhaps most conveniently for practitioners, at [¶ 142] of the judgement.

(viii) Is the definition of "*compulsion*" as set out in *VSJ* [2017] EWCA Crim 36 at [¶ 21] and s. 45 of the 2015 Act too narrow? [¶¶ 144-154]

This issue considered whether the test is currently whether a victim of trafficking has been *compelled* to offend, and if this should be inverted to ask whether the offending was *caused* by the traffickers. The Court rejected this argument, tracing the concept of "compulsion" back through the international instruments [¶¶ 145-152]. The Court found that the legal concepts of *compulsion* and *causation* are too distinct to be reconciled in the way proposed, and suggested that broadening the concept would amount to a wholesale re-writing of the statute. However, the Court did not give further guidance on precisely what "compulsion" means, and a broad reading, which stops should of causation, should still be possible.

(ix) Can a victim of trafficking seek to argue that a conviction following a guilty plea is unsafe? [¶¶ 155-157]

Where a defendant has pleaded guilty and subsequently been found to be a victim of trafficking, the

Court cited the very recent case of *R v Tredget* [2022] EWCA Criminal 108, which identified three non-exhaustive categories of case where a Court may overturn a guilty plea:

1. Where the defendant was deprived of a defence that was good in law. Examples given include: a plea of guilty made after an incorrect ruling that deprived the defendant of an arguable defence; under improper pressure, either from the judge, or as a result of coercion or threats; after incorrect legal advice, including failure to advise on a possible defence; and, interestingly, as a result of a delusion while under the influence of LSD.
2. In cases of abuse of process, where there is an injustice that operates so that it was not just to try the defendant at all. The Court in *Tredget* quoted *Asiedu v R* [2015] EWCA Crim 714 at ¶ 21 to say "a conviction upon a plea of guilty is as unsafe as one following trial". Examples include entrapment, or where it transpires there was not a fair and impartial tribunal (c.f. *R v Abdroikov, R v Green, R v Williamson* [2007] UKHL 37).
3. Where the admission of guilt was not true, and the defendant did not commit the crime at all.

The Court provided no commentary on whether most cases involving victims of trafficking would arise out of the first category, and the subsequent availability of the s. 45 defence; presumably, all three could conceivably arise in a victim of trafficking context. The Court did however consider the question in respect of AAH, whose appeal following a guilty plea was found to be unsafe (see below).

The individual appeals

Following consideration of the nine overarching issues, the Court went on to consider the appeals of AAI, AAH and AAD individually.

The Court allowed AAH's appeal against conviction [¶¶ 172-176], stating:

"We are confident that if these two decisions had been available to the prosecution, in light of our answer to the third question, a decision would have been taken not to prosecute the appellant; alternatively, the appellant would have been able to mount a successful submission of abuse of process on the basis that there are no substantive grounds to dispute that the appellant is a victim of trafficking, that there was sufficient nexus between that status and the offending and that there is uncontradicted evidence of real compulsion" [¶ 174].

However, the Court rejected both AAI's and AAD's appeals against conviction, finding that their accounts of being trafficked were not credible. This led the Court to conclude that the decision to prosecute each was not an abuse of process [¶¶ 158-159 and 179-181]. Moreover, the Court concluded that AAI did not have a reasonable excuse for committing the offence of which he had been convicted [¶¶ 160-167], and that AAD would not have been able to secure an acquittal through the s45 defence, because he was not "compelled" to commit the offence [¶¶ 182-183].

The Court did allow AAI's (but not AAD's) appeal against sentence, reducing the custodial term from 18 months to 12 months [¶¶ 168-169]. However, this is of little help to AAI given that he has already served his sentence, and a 12-month sentence will continue to have adverse consequences for his immigration position.

Conclusion

Overall, this case provides an essential reference for all practitioners considering the prosecution of potential victims of trafficking. The restoration of the abuse of process jurisdiction in these cases fixes

an error in the law, which became apparent as a result of the ECtHR case of VCL & AN. It will hopefully limit the criminalisation of victims of trafficking and help in allowing them to avoid prosecution, and rebuild their lives.

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Small boats: Kakaei, Bani and the Nationality and Borders Bill

This article was written by One Pump Court pupil Margo Munro Kerr

Kakaei and Bani

In order to claim asylum in the UK, you need to be physically in the UK. If you want to enter the UK, you need entry clearance. But, you can arrive in the UK without entering the UK. That is what the Court of Appeal found in two 2021 judgements: *R v Kakaei* [2021] EWCA Crim 503 and *Bani v The Crown* [2021] EWCA Crim 1958.

In both *Kakaei* and *Bani,* the appellants had been convicted of assisting unlawful immigration having steered small boats containing asylum seekers that were apprehended in UK waters and conveyed to a port. The question for the court was whether it could be shown that those in the boat intended to land anywhere other than at a port. At ports there is a designated immigration area. When one has reached that area but gone no further, one has *arrived* in the UK, but not *entered* for immigration purposes. In the designated area it is possible to claim asylum, after which one is granted limited leave to enter as an asylum seeker. *Arrival* without leave to enter is not currently against the law or immigration rules; *entry* is.

In *Kakaei* and *Bani,* the convictions were quashed because it could not be proved that those in the boats were not intending to reach a port or be rescued at sea and be conveyed to a port. It is expected that a number of other appeals against similar convictions will now be launched, and indeed the bench that heard *Bani* is due to reconvene this month to hear several more. The consequences for those convicted will be immense: assisting unlawful immigration currently carries a penalty of up to 14 years in prison; Mr Bani had been sentenced to six years in prison (later reduced on appeal to 5 years).

The Nationality and Borders Bill

What will the Nationality and Borders Bill ("the Bill") mean for cases such as these?

Clause 39 of the Bill (in its current version, published on 9 December 2021) states:

(D1) A person who—

(a) requires entry clearance under the immigration rules, and

(b) knowingly arrives in the United Kingdom without a valid entry clearance,

commits an offence.

This appears to make it a criminal offence *even to arrive* in the UK as an asylum seeker without leave to remain. Indeed, this would accord with the intentions of the Home Secretary, who said in the Bill's second reading in the House of Commons: "Genuine people are being elbowed aside by those who are paying traffickers to come to our country." One of the aims of the Home Secretary in bringing this Bill is to stop small boat crossings. Her method is criminalisation.

If clause 39 of the Bill passes into primary legislation, those in a similar situation to the appellants in *Kakaei* and *Bani* will not be able to avoid conviction for assisting unlawful immigration in future.

Clause 39 of the Bill is contrary to article 31 of the Refugee Convention, which prohibits penalisation of refugees coming directly to the UK from a country of persecution under the definition given in the Convention. Although it is doubtful that France would qualify as such a country for most small boat migrants in the eyes of a UK court, there may well be a situation where an individual flying directly from a qualifying country to the UK without entry clearance in order to claim asylum was penalised under clause 39. But, as clause 39 will be passed into primary legislation if passed, and as the Convention is not directly enforceable in UK law, the Bill (once passed into law) will take precedence over the Convention.

The Bill will present a further alternative charge for prosecutors of asylum seekers. Clause 40 of the Bill amends s 25 of the Immigration Act 1971 ("the Act"), in which the core criminal charges relating to entry without leave are located. At clause 40(3) of the Bill, s 25A(1)(a) of the Act (helping asylum seeker to enter United Kingdom) is amended such that it will no longer be necessary for the prosecutor to prove that the Defendant facilitated the arrival of an asylum seeker *for gain* for the offence to be proved. While *for gain* encompassed not for profit facilitation, for example on a mutual or cost-sharing basis, the offence will be further broadened to apply to those who are not receiving any sort of payment at all.

During the readings of the Bill in the House of Commons, both the Home Secretary and the Shadow Home Secretary professed their desire to clamp down on criminal smuggling networks and to protect genuine asylum seekers. They differed on whether the Bill would be the best way to do it. The shadow Home Secretary is right that the Bill will not do what it sets out to do. Opening up s 25 of the Act in that way to allow prosecution of asylum seekers, whether "genuine" or not, regardless of whether they have received any benefit for assisting others to make the passage to the UK, will criminalise any small boat migrant who touches the tiller, or helps another into the boat. This is, on any standard, horrific.

How to stop people trafficking

Both politicians are wrong to think that migrants can be neatly categorised into genuine asylum seekers, economic migrants, or criminal smugglers. As *Bani* and *Kakaei* highlighted, a genuine asylum seeker can wind up charged with a trafficking offence simply for handling the tiller. More broadly many people in vulnerable situations are forced to work for traffickers in order to pay for their own passage, or in order to be under their protection.

Does this remind you of anything? It reminds me of how people in vulnerable situations are drawn into drug smuggling networks, to pay for their own addiction or in order to have the protection of a particular gang. Trafficking networks exist for the same reason that drug smuggling networks exist: there is a human need not being met through legal routes.

Just as the only way to stop drug trafficking will be through legalising and regulating access to drugs (see Portugal, Switzerland, the Netherlands, Washington State, etc for success stories), the only way to stop people trafficking will be the creation of genuinely safe, legal, and accessible routes to enter and remain.

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Modern slavery after DS and Brecani – what does a Conclusive Grounds Decision mean for a criminal case?

This article was written by One Pump Court pupil Margo Munro Kerr

Section 45 of the Modern Slavery Act 2015 ("the Act") establishes a statutory defence to many offences (save those offences excluded under schedule 4 of the Act) if the person charged is a victim of slavery or trafficking. Until recently, a decision by the Single Competent Authority (part of the Home Office) that an individual was a victim of trafficking or modern slavery was enough to establish the defence, as detailed in *DPP v M* [2020] EWHC 3422 (Admin) (15 December 2020). A suspected victim would be referred to the National Referral Mechanism ("NRM") by the Local Authority, the Youth Offending Team, or the Police, and the Single Competent Authority would first issue them with a Reasonable Grounds Decision, and later with a Conclusive Grounds Decision. The Conclusive Grounds Decision would be admissible as expert evidence in a criminal trial, going to the s 45 defence.

In *Brecani v R* [2021] EWCA Crim 731 (19 May 2021) the Court of Appeal held that Conclusive Grounds Decisions are not admissible as expert evidence because (i) caseworkers in the Single Competent Authority cannot properly be considered experts to the standard required in a criminal trial and (ii) Conclusive Grounds Decisions are not issued in accordance with CrimPR r 19 [¶ 54]. The case may be further appealed in the Supreme Court, but in the meantime practitioners must contend with the new law it has created, which will increase the rates of criminal conviction for victims of Modern Slavery.

Brecani followed *DS* [2020] EWCA Crim 285 (28 February 2020), in which the Court of Appeal held that deciding the facts relevant to the status of an individual as a victim of trafficking is solely and "unquestionably" a matter for the jury [¶ 40], ordering that proceedings which had been stayed as an abuse of process in the Crown Court following a positive Conclusive Grounds Decision be continued.

How can a defence lawyer still use the Conclusive Grounds Decision?

1) The decision to prosecute

A positive Conclusive Grounds Decision *may* be enough to dissuade the CPS from prosecuting. Given that, after *Brecani*, it will not be admissible as expert evidence at trial, it is of paramount importance to wait for the outcome of the NRM referral before proceeding to trial. The CPS legal guidance on Human Trafficking, Smuggling and Slavery states:

"Where there may be consideration of charge and prosecution of vulnerable children or adults, prosecutors should consider applying the statutory defence or CPS policy on the non-prosecution of suspects who may be victims of trafficking".

Prosecutors are instructed to take an NRM decision into account and to place some weight on it, but are not bound by it. The guidance sets out a four-stage approach to making decisions to prosecute, including a mandatory requirement to consider the public interest in prosecution where a question of

slavery or trafficking is raised, including “the seriousness of the offence and any direct or indirect compulsion” and “whether a suspect’s criminality or culpability has been effectively extinguished or diminished to a point where it is not in the public interest to prosecute”.

The ECtHR held in *VCL v United Kingdom* 77587/12 (16 February 2021) at ¶ 161 that “given that an individual’s status as a victim of trafficking may affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so, any decision on whether or not to prosecute a potential victim of trafficking should – insofar as possible – only be taken once a trafficking assessment has been made by a qualified person”.

However, it was held in *DS* that there is no positive obligation not to try victims of trafficking [*DS* ¶ 39].

It may well be necessary to make detailed written representations to the CPS before trial setting out why it should not prosecute, including all relevant incidents and evidence to suggest that the individual is a victim of slavery or trafficking, as well as additional vulnerabilities.

Abuse of process arguments

Following *DS,* it is very difficult to argue that a decision to prosecute despite a positive Conclusive Grounds Decision, or without waiting for the outcome of the NRM process, is an abuse of process. In *DS,* it was held that a stay on grounds of abuse of process is only appropriate if a fair trial is not possible or it would be wrong to try the defendant because of some misconduct by the state in bringing about the prosecution [*DS* ¶ 40]. An abuse of process argument may only be successful if it is possible to show that the CPS failed entirely to take the Conclusive Grounds Decision or the NRM referral into account in making the decision to prosecute, or if, for example, they made errors of fact in relation to the NRM or the decision was Wednesbury unreasonable.

2) Distinguishing the Conclusive Grounds Decision from that used in *Brecani*

According to *Brecani* [¶ 54]*,* caseworkers in the Single Competent Authority cannot automatically be considered experts and so their Conclusive Grounds Decisions will not be considered expert reports.

However, given that in *Brecani* weight was also given to the lack of compliance by the specific Conclusive Grounds Decision with CrimPR r 19, it may be that, if a Conclusive Grounds Decision contains the appropriate detail, it would be possible to distinguish it from the decision examined in *Brecani*. Note the requirements of CrimPR r 19.4 that the Conclusive Grounds Decision must:

(a) give details of the expert’s qualifications, relevant experience and accreditation;

(b) give details of any literature or other information which the expert has relied on in making the report;

(c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;

(d) make clear which of the facts stated in the report are within the expert’s own knowledge;

(e) where the expert has based an opinion or inference on a representation of fact or opinion made by another person for the purposes of criminal proceedings (for example, as to the outcome of an

examination, measurement, test or experiment)—
(i) identify the person who made that representation to the expert,
(ii) give the qualifications, relevant experience and any accreditation of that person, and
(iii) certify that that person had personal knowledge of the matters stated in that representation;
(f) where there is a range of opinion on the matters dealt with in the report—
(i) summarise the range of opinion, and
(ii) give reasons for the expert's own opinion;
(g) if the expert is not able to give an opinion without qualification, state the qualification;
(h) include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence;
(i) contain a summary of the conclusions reached;
(j) contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty; and
(k) contain the same declaration of truth as a witness statement.

A very detailed and CrimPR r 19 compliant Conclusive Grounds Decision might be admissible as fresh evidence for an appeal, or as evidence in trial.

3) Reliance on the material underlying the Conclusive Grounds Decision

While the Conclusive Grounds Decision itself will not be admissible at trial, if the tribunal of fact is presented with the material underlying the Conclusive Grounds Decision, it may well be enough to satisfy the s 45 defence. Similarly, such evidence could be presented as fresh evidence on appeal.

4) Instructing another expert

While evidence from the Single Competent Authority was deemed inadmissible in *Brecani*, it was held at ¶ 58 that "There can be circumstances in which a suitably qualified expert might be able to give evidence relevant to the questions that arise under the 2015 Act, which are outside the knowledge of the jury, particularly to provide context of a cultural nature". This leaves open the question of *who* is a suitably qualified expert. In *Brecani,* reliance was given at ¶ 44 to the words of Lawton LJ in *R v Turner* [1975] QB 834 D to E:

"An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary… The fact that an expert has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful that that of jurors themselves; but there is a danger that they may think it does."

And so, expert opinion is admissible only if it is *relevant* to a matter in issue, the witness is *competent* to give the opinion, and it is needed to provide the court with information *likely to be outside the court's own knowledge and experience* [*Brecani* ¶ 44]. Additionally, it must comply with the formal

requirements of CrimPR r 19.

For the expert to be competent to give the opinion, it is likely that they should have expertise in the specific area of trafficking or slavery suffered by the individual charged with an offence, be that academic expertise or experience working directly with victims of *that kind of* trafficking or slavery. As to what qualifies as information likely to be outside the court's own knowledge and experience, this will likely be quite wide when it comes to trafficking and slavery. The court in *Brecani* specified "context of a cultural nature" but did not exclude the possibility of other aspects. Moreover "context of a cultural nature" is itself wide in scope.

Conclusion

Establishing a defence under s 45 of the Act has been made very difficult by the decisions in *DS* and *Brecani*. Given how much weight is given to the Conclusive Grounds Decision in the immigration context – it is considered, unsurprisingly, *conclusive* – it is surprising that the criminal courts have taken such a different line. This is especially so when in many other ways those charged with criminal offences are afforded much greater protection in accessing a fair trial than those navigating the immigration system – for example, benefitting from much stricter requirements for detention without charge or admissibility of bad character evidence. If *Brecani* reaches the Supreme Court, those appealing the decision will need to contend with the fact that Conclusive Grounds Decisions do not routinely comply with the requirements for expert witness statements in CrimPR r 19. In particular, the writer is not *named* but is a faceless state official. Could the Home Office be persuaded to change the Conclusive Grounds Decision format to comply with CrimPR r 19?

The underlying context is, of course, the use of the s 45 defence and the Conclusive Grounds Decisions in establishing defences for youths involved in drugs, particularly "County Lines" drug smuggling, or other gang related offences – something that certain arms of the state are eager to restrict.

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