ONE PUMP COURT

Barrister

PAROSHA CHANDRAN

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Call: 1997

Specialist in

Personal Immigration
Civil Actions Against Public Authorities
Modern Slavery & Trafficking Team

Experience

Parosha Chandran is the UK's leading anti-slavery lawyer and she has been practicing at the Bar of England and Wales for 25 years. She is an award-winning human rights barrister and a leader at the Bar in the fields of human rights, human trafficking, forced labour and labour exploitation, immigration, trafficking-related criminal appeals and public law.

Parosha Chandran is a human rights barrister based in London and a world-leading expert on the law relating to human trafficking for the UN, Council of Europe and OSCE. She represents adult and child victims of modern slavery and human trafficking and has set critical legal trafficking precedents in the asylum, slavery, criminal non-punishment, civil and public law contexts. She has contributed to key international legal guidance on trafficking, provides judicial training and has advised on legislation including the Modern Slavery Act 2015.

She has received many honours for her work including the Trafficking in Persons Hero Award 2015 from John Kerry in Washington DC for her work in developing the rule of law on trafficking in the UK and abroad and for her "unparalleled achievements in providing legal services to survivors of modern slavery".

She is a Legal Advisor to Parliament's Modern Slavery Project which supports Commonwealth States in improving their trafficking and modern slavery laws. She is the General Editor of the leading textbook, "Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK" (LexisNexis, 2011). In 2018 she received the distinction of being appointed the first Professor of Modern Slavery Law at King's College London.

She practices in immigration and asylum law (including adult & children's cases, HIV appeals, deportation and EU law). She has appeared in the High Court of England and Wales, the Court of Appeal (both Civil and Criminal divisions), the Privy Council, the Asylum and Immigration Tribunal and Chamber, the Employment Tribunal and she has drafted several successful applications to the European Court of Human Rights (ECtHR).

Parosha has extensive experience in representing the rights of trafficked men, women and children in the UK who have experienced trafficking, sexual exploitation, forced labour, domestic servitude and enforced criminal activity.

She has vast experience in bringing test cases in these areas and many of her cases have impacted upon the development of law and policy in the UK and abroad. She is also a member of the Prison Law team in chambers. She regularly advises international institutions such as the UNODC, the OSCE and the Council of Europe on matters relating to human trafficking, modern slavery and human rights. She has expertise in advising on supply chains compliance with modern slavery assessments. She also advises on and acts in compensation and damages claims against traffickers, whether they are individuals or corporations in the UK and abroad.

Private hourly fee rate available on request

What the directories say

2017 Legal 500

Cited as a leading junior in Immigration (including business immigration):

“She has exemplary expertise in modern slavery cases”

Parosha is ranked in the Chambers and Partners Directory and in the Legal 500. She has received extremely favourable commentaries from the Directories every year since she was first ranked in 2005. For example:

“She has leading expertise in Human Trafficking matters.”

“At the forefront of developing the law in Human Trafficking and Modern Slavery.”

Human Rights:

“Parosha Chandran of 1 Pump Court is… renowned for her intellectual expertise and client sensitive approach.”

“Parosha Chandran …is widely regarded as an expert on human trafficking cases. Her representation of vulnerable individuals in this context prompts one source to observe that “she is just fearless and has the ability to get right to the heart of the matter.”

“[Her] work has important implications…she is praised for her creative thinking and work ethic…”

And:

“Parosha Chandran is renowned for her specialist practice involving victims of human trafficking, “an area she knows inside-out.”… Sources give weight to her client-handling skills, saying: “She can adapt her style to put children and vulnerable claimants at ease without losing the meaning of the message she is trying to get across.” “Incredibly passionate about her work, she always maintains her composure and never loses her professional edge.””

“One source explained: “She inspires confidence – you know you can rely on her to deliver.””

The Times Law Panel 2009 (a list of the 100 most influential lawyers in the UK)

“Parosha Chandran is a barrister specialising in immigration and human rights whose work has led to several advances in the law governing the rights of victims of human trafficking”.

The Law Society Excellence Awards 2008, on presenting Parosha with the Barrister of the Year Award:

“…what a remarkable talent she is”

Trafficking in Persons Hero Award 2015, US Department of State, John Kerry:

Parosha Chandran is “one of the world’s leading practitioners” in trafficking and modern slavery law. She is honoured for “her unparalleled achievement in providing legal services to survivors of modern slavery.”

Education

Qualifications: LLB (Hons.) (University of London); Teacher-training course & certificate in Human Rights (CIEDHU) from the International Centre for the Teaching of Human Rights in Universities, Strasbourg; Diplome in International and Comparative Human Rights and Humanitarian Law, International Institute of Human Rights, Strasbourg; LLM (University of London, UCL); Bar Vocational Course (Inns of Court School of Law). Called to the Bar of England and Wales in 1997.

Internships & human rights work: Volunteer, British Institute of Human Rights (1993-5), Intern, AIRE Centre (1995-6), Intern, European Commission for Human Rights, Strasbourg (1996), UNHCR London (1997); Research Consultant in Human Rights, King's College London (1997); an Independent Legal Advisor to the Lord Chancellor's Department on the Human Rights Bill (1997); United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY), Office of the Prosecutor, The Hague (1999).

Memberships

Member, Presidential Task Force on Human Trafficking (International Bar Association) (2015)
Member, Group of Experts of the United Nations Office on Drugs and Crime (2012-2014)
Expert Consultant, Organisation of Co-Operation and Security in Europe (2012-2013)
Former Member of the Advisory Board of the British Institute of Human Rights (previous posts were as Vice Chair (2008-2010), Trustee (2000-2010), Governor (1998-2000) Volunteer (1993-5))
Co-founder of the Trafficking Law and Policy Forum (2007-); member of The Times Law Panel (2009-)
Member of the Foreign and Commonwealth Office's Pro Bono Lawyers Panel (2003-)
Member of Lincoln's Inn Euro Committee (2005-)

Awards

Trafficking in Persons Hero Award 2015 – Presented to Parosha Chandran by John Kerry, US Secretary of State, 27 July 2015 for her "unparalleled achievement in providing legal services to survivors of modern slavery".
Woman of Achievement (Woman of the Year Awards 2009).
Human Rights Lawyer of the Year Award 2009, Society of Asian Lawyers Annual Awards
Barrister of the Year Award 2008, the Law Society's Excellence Awards
International Diploma in International and Comparative Human Rights and Humanitarian Law 1994 (International Institute of Human Rights, Strasbourg, 3 competitive exams, youngest award-holder).

PUBLICATIONS

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.

Related Barristers:

Margo Munro KerrStephen KnightParosha ChandranSarah-Jane Ewart