SWEET & MAXWELL

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Archbold Review

Cases in Brief

Attorney-General's consent—obtained after case sent to Crown Court and preliminary hearing—when proceedings instituted for purpose of consent requirement

CW [2015] EWCA Crim. 906; May 22, 2015

(1) CW was charged with a conspiracy in respect of which the Attorney-General's consent was required because the conspiracy involved elements in Scotland (Criminal Law Act 1977 ss.1A and 4, as amended by the Coroners and Justice Act 2009). Consent was only obtained after CW had been sent to the Crown Court and a preliminary hearing in the Crown Court had taken place. At a preparatory hearing, the judge ruled that, in the absence of the consent, the proceedings were a nullity. The Crown appealed against the ruling. The lack of consent was not "saved" by the Prosecution of Offences Act 1985 s.25, which allowed arrest and remand or bail to take place before consent. *R v Lambert* [2009] EWCA Crim. 700 established that proceedings were instituted for the purposes of consent no later than when a defendant was brought to court following charging and the charge entered onto the court register, under the conditions then obtaining. As a result of procedural changes, there were now three possible occasions upon which proceedings could have been, or were, instituted in CW's case — when the charge was entered in the court register; on sending to the Crown Court; or at the preliminary hearing, when identifying the plea intentions of a defendant were of the essence. The judge had been right to find that consent should have been obtained at an earlier stage (although the Court did not determine when, beyond that).

Attorney-General's consent—when proceedings instituted for purpose of consent requirement—guidance; extension of time in which to seek leave to appeal or renew application

WELSH AND OTHERS [2015] EWCA Crim. 1516; September 15, 2015

W and a large number of others were convicted or pleaded guilty to involvement in conspiracies to supply drugs, from England to Scotland. As in *R v CW* [2015] EWCA Crim. 906 (above), the consent of the Attorney-General to the prosecution was therefore required. That consent was given after the cases had been sent to the Crown Court and preliminary hearings had taken place, but no indictment had been preferred (and before the Plea and Case Management Hearing). In the case of S (who had pleaded not guilty), no consent was ever given. The applicants applied for extensions of time in which to seek leave to appeal, or to renew applications to appeal.

(1) It was accepted that the relevant consents had not been obtained prior to the institution of proceedings against each of them. Nonetheless, although it was not determinative of the appeal, the Court accepted the Attorney-General's invitation to provide guidance as to when proceedings were instituted in respect of indictable offences, in the light of *CW*. The current CPS Guidance (*Consents to Prosecute)* advised that in indictable only cases consent should be obtained either before service of the papers, or if that were not possible, prior to the effective PCMH. This was the guidance which has led to the practice adopted in the instant cases. *CW* has now decided authoritatively that it was wrong. The Court therefore considered the three candidate stages identified in *CW* as arguably amounting to the institution of proceedings — entry on the register, sending to the Crown Court or the preliminary hearing. Entry on the register was now merely an automatic computer-entry. An analysis of its real nature compelled the view that consent/permission need not be obtained before that process was undertaken.

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It was within the scope of s.25(2) in that it was purely part of the administrative process which followed arrest, charging and remand in custody or on bail. But consent was required to be obtained prior to the sending pursuant Crime and Disorder Act 1998 s.51. Whilst entry in the register was within the protection afforded by s.25(2), close analysis of the statutory provisions revealed that a sending under s.51 was not, and proceedings must have been instituted at that stage. It was not possible to distinguish between a Plea Before Venue in respect of offences triable either way and a sending under s.51 in respect of indictable offences on the basis that the latter was purely an administrative step and the other features of a s.51 hearing were governed by the Criminal Procedure Rules and the Consolidated Practice Direction and not the Act.

The Court considered the current s.51 procedure as a whole, and concluded that a Magistrates' Court was required to make decisions, following the mandatory requirement that a defendant be asked if he intended to plead guilty in the Crown Court.

The Court was fortified in this view by the terms of s.52(5), which allowed a Magistrates' Court to adjourn proceedings. If the Attorney had not had a reasonable time in which to make an informed consent, the court was likely to grant an adjournment for the minimum time necessary.

(2) The Court considered the authorities on the extension of time. It was not in truth a "change in law" case, but rather one setting out an improved understanding of the unchanged law. The well-established approach was that an application for an extension of time would not succeed on the basis of a change of law: *v Cottrell, R v Fletcher* [2008] 1 Cr.App.R. 107; *R v Mitchell* [1977] 65 Cr.App. R. 185. In *R v Mitchell* [1977] 65 Cr.App.R. 185 it was said that where a conviction was proper under the law as it stood at trial, leave would be granted only to cure a substantial injustice. In *R v Lambert* [2010] 1 WLR 898 and *CW* the Court conducted an exercise in statutory construction and explained the law, correcting a misapprehension as to the meaning of Criminal Law Act 1977 s.4, Prosecution of Offences Act 1985 s.25 and Crime and Disorder Act 1998 ss.51 and 52. It did not, however, change the law. As was explained in Ramzan, the need to demonstrate substantial injustice to secure an extension of time was not limited to change of law cases.

Where there was a true change in the law, the applicant could do nothing until the law was changed. Where the applicants were able to argue for the law as it had now been declared, their failure to do so counted against them. In these applications, if the point had been taken before conviction it would not have done the applicants any good. The failure to raise or pursue any complaint about the obtaining of consent was therefore entirely understandable. It followed that, to succeed, the applicants must demonstrate substantial injustice, which, it was conceded, they could not do. The applications for extensions of time were therefore refused, except in the case of S. Consent had never been obtained in his case. He had lost the *spes* of a refusal by the Attorney. The Court adjourned his application and invited further submissions.

Prosecution decision making—judicial review of decision to prosecute following review of previous decision not to do so—legality of review policy—test for review decisions—disclosure—likelihood of successful judicial review—review of decision of district judge to send case to Crown Court and not to stay proceedings

R (S) v CPS; R(S) v OXFORD MAGISTARTES' COURT [2015] EWHC 2868 (Admin); October 13, 2015

S sought judicial review of the CPS's decision to reverse an earlier decision not to prosecute him, after the complainant had exercised her right to review under the Victim's Right to Review Scheme; and of the decision of a district judge to send the case to the Crown Court and to refuse to stay the criminal proceedings pending the resolution of the first application for judicial review. Refusing permission to apply for judicial review, the President of the Queen's Bench Division stated that the judgment may be cited as authoritative in relation to the proper approach to the Guidance on the Victim's Right to Review (see below) and to claims made in respect of decisions to charge where the original decision was not to charge.

(1) The fact that the CPS Guidance (effective from June 5, 2013) provided that a suspect was not to be made aware of the victim's request for a review (and thus was unable to make representations) was not unlawful. The reviewer was required to only take account of the material available at the time of the original decision. Natural justice did not require a decision maker assessing only pre-existing material and prohibited from taking into account new information from the party seeking the review to invite a response from a third party who may be affected by the result. Neither was it necessary for the review to enquire of S whether he had acted to his detriment. If S (contrary to the evidence) had so acted after an unequivocal representation was made that he would not be prosecuted, that could provide him with grounds to argue an abuse of process before the trial judge; failure to establish that position did not provide a basis for challenging the charging decision.

(2) It was not incumbent on the CPS reviewer to only reverse a decision not to prosecute on the basis that it were proved to the criminal standard that the first decision was *Wednesbury* unreasonable. The submission was misconceived. The practical effect would be to impose on the CPS a duty to prove its case in judicial review proceedings whereas the function of the review was to provide a mechanism for a fresh reconsideration of the facts. The inevitable satellite litigation which S's approach would generate was wholly inappropriate both to the concept and the proper approach. The policy was lawful, faithfully reflecting Directive 2012/29/EU, Art.11 and the approach set down in *R v Killick* [2012] 1 Cr.App.R. 10. The decision of the reviewer was to be taken afresh, and thus the question for the court was whether the reviewer's decision was one open to a reasonable prosecutor.

(3) The Court rejected S's argument, based on *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, that disclosure of all documents relating to the original decision and any communications between the complainant and the CPS should have been ordered. *Tweed* primarily concerned the proper extent of disclosure in judicial review proceedings where proportionality was in issue in relation to a convention right, in which the court may be required to assess the balance which the decision maker has struck and not simply whether the decision was within the range of rational decisions (and even then, disclosure would be exceptional: [56]). Where the issue was whether

the decision was one open to a reasonable prosecutor and the decision maker has provided evidence of the basis for the decision, the interests of justice did not require further disclosure.
(4) *L v DPP* [2013] EWHC 1752 (Admin) made the point in the context of a challenge to a decision *not* to prosecute that the likelihood of successfully challenging a charging decision would be "very, very small" [16]. In that context an application for judicial review would be the only possible remedy available to the party aggrieved. In this case the review had led to the opposite conclusion, that there would be a prosecution, giving rise to very different considerations. Whatever the personal impact of the decision, the trial process provided the protection that the law afforded to those charged with crime. If it were alleged that the prosecution was an abuse of process, the trial judge would determine it. Deficiencies in the evidence could be exposed either at dismissal proceedings or at the close of the prosecution case.The Court thus found it difficult to conceive any circumstance in which the type of decision made in this case might be subject to successful judicial review.
(5) The district judge was not wrong to refuse to send the case to the Crown Court, and not to stay proceedings: Crime and Disorder Act 1998 s.51(1) was expressed in mandatory terms (subject to the power to adjourn contained in s.52(5) of the Act), and the district judge correctly concluded that sending the case did not prejudice the proposed application for judicial review and could not affect it. If the threat of judicial review necessarily required magistrates to adjourn in all cases, both delay and unnecessary additional hearings would result. If the circumstances were such that there was particular prejudice in the criminal case proceeding pending judicial review, an application should be made in the judicial review proceedings for such relief.

Health and Safety—materiality of risk—whether "material" where risk was an accepted incidence of everyday life
C-T AVIATION SOLUTIONS LTD [[2015] EWCA Crim. 1620; October 13, 2015
C-T was convicted of failures to discharge duties to ensure the safety of the public (Health and Safety at Work Act 1974 s.3(1) and 33(1)(a); Construction (Design and Management) Regulations 2007 reg.11(3) and s.33(1)(c) of the 1974 Act) in its design of traffic management arrangements at an airport. The prosecution had arisen as a result of an investigation following a fatal accident at a pedestrian crossing of an access road, and while other failures were also alleged, the case concentrated on the risks at the crossing. The judge had been right to decline a submission of no case to answer. C-T's case was that the prosecution had failed to show that the relevant risks were "material" (*R v Porter* [2008] ICR 1259; *R v Chargot* [2009] 1 WLR 1). The statutory test required that the source of the risk to safety must be the undertaking conducted by the employer, and the risk must be a material one, in that it must be real, as opposed to trivial, fanciful or hypothetical. C-T, adopting a formulation in *R v Porter*, [18], argued that pedestrians crossing the road and colliding with vehicles was an incidence of everyday life that was tolerated by society; and in the absence of evidence that this ordinary risk was increased for a particular reason (relating to location for example), it could not be a *material* risk for the purposes of s.3 of the 1974 Act. It was, however, plain that when the judgment was read as a whole, the court in *Porter* was not purporting to depart from the statutory test or to put a gloss on it. Further, the facts of *Porter* (in which a child had fallen on some normal steps) was very far from C-T's case. Whilst it was open to the defence to contend that the fact that pedestrians crossing the road may collide with vehicles was an incidence of everyday life, and that the crossing was no different to many others, the issue in the case was whether *this* crossing, in *this* location, designed by the appellant with the particular features it had (and did not have) did or did not expose pedestrians to a material risk to their health and safety. Further, there was considerable force in the Crown's submission that if the fact that similar risks to those prosecuted existed outside an employer's undertaking was a complete answer to a prosecution under s.3, it would impermissibly rewrite the statutory test and lead to a "race to the bottom".

SENTENCING CASE

Criminal Behaviour Orders
DPP v BULMER [2015] EWHC 2323 (Admin); July 31, 2015
The Director of Public Prosecutions appealed by way of case stated in respect of a district judge's decision not to make a Criminal Behaviour Order pursuant to s.22 of the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act") in respect of the respondent, a chronic alcoholic, who had been convicted of breaching an Anti-Social Behaviour Order. In answering questions submitted by the district judge, the Court considered the two preconditions for such an order contained in ss.22 (3) and (4) of the 2014 Act: "that the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person", and "that the court considers that making the order will help in preventing the offender from engaging in such behaviour". On the facts, the first of these was clearly met. As to the second, the Court gave the following guidance. Section 22(4) does not expressly impose any burden of proof upon the prosecution. Satisfaction to the criminal standard is not required in what is an evaluative exercise. It is not a matter of "pure discretion", but the court hearing an appeal should not interfere with a decision unless the judge making it has plainly erred. Where the evidence shows that a positive requirement would help prevent a person from engaging in anti-social conduct, the absence of such a requirement from the proposed order can be taken into account in deciding whether to refuse it. But, since there has been no change in the emphasis of the legislation from "necessity and protection" to "help and prevention", it is impermissible to regard the absence of such a requirement as dispositive. The fact that a person has not responded to orders and other disposals in the past is a relevant factor but is not in itself a reason for refusing to make an order. It may however be a reason for varying the order or imposing a new one with different prohibitions and, if applicable, requirements. A judge considering whether to vary the order or to make a new order can consider the power of the police to arrest the person subject to the order where they have reasonable grounds to suspect that the person

had committed the offence of breaching the order, or is about to commit the offence. The judge should, however, also consider that the orders need to empower the police to take action before the anti-social behaviour they are designed to prevent takes place, and the need for orders to be clear and certain. The ordinary power of the police to arrest on reasonable suspicion may be insufficient to provide pre-emptive protection from a person with a history of anti-social behaviour to those who are or are likely to be affected by the behaviour.

Allowing the appeal, the Court held that the court below had erred in focusing on the fact that the proposed Order did not contain a positive requirement that would seek to tackle the respondent's difficulty with alcohol, and on the fear that it would merely relocate her drink-related misbehaviour and not help her to avoid it. Nor should the court have considered the power under s.27 of the Violent Crime Reduction Act 2006 to require a person to leave a particular locality for a limited period, because this had been repealed.

Sentencing Guidelines: theft

On October 6 2015, the Sentencing Council issued a definitive sentencing guideline for use on theft offences. The new guideline will apply all offenders aged 18 or over who are sentenced on or after February 1, 2016. A full analysis of the guideline may be found in *Criminal Law Week*, issue 36/2015.

Case in Depth

R v Yasain – delineating the re-opening of appeals

By H.M. Skudra[1]

Recently, in *R v Yasain*[2], the powers and jurisdiction of the Court of Appeal (Criminal Division) to re-open and revise a concluded appeal were examined. The case is also factually interesting and suggested work needs to be done in formulating rules of both procedure and practice in the recording of court orders.

Yasain was convicted by a jury of four offences, receiving seven and a half years' imprisonment in all. His co-defendant was convicted of those same offences and a fifth separate offence. This was all accurately recorded on the CREST system, on which court clerks note important points and details of hearings.

Yasain appealed against both conviction and sentence. The single judge initially found no arguable grounds, but noted that no verdict had apparently been taken on the kidnapping count as far as Yasain was concerned. The transcript of the sound recording of the proceedings revealed the apparent omission, albeit that his co-defendant's kidnapping conviction was apparent in the audio transcript. Permission to appeal was therefore granted. In due course Yasain's conviction for kidnapping was deleted from the court record and his consecutive sentence for kidnapping quashed — purportedly Yasain had not been convicted of kidnapping[3].

No one, however, had checked the Crown Court audio transcript's accuracy. When the trial judge received the transcript of the Court of Appeal's judgment, he made enquiries. These revealed that the sound recording had been mis-transcribed and so the audio transcript was wrong. In fact, a guilty verdict had been pronounced and taken after all on Yasain's kidnapping count.

The Court of Appeal was therefore faced with correcting a criminal appeal which had already been determined.

In such a case, the first question to be asked is whether the Court of Appeal's order has been properly recorded in the relevant record. If the answer to that question is "no", then the Court of Appeal may revise the order. However if the answer is "yes", then the basic rule is that further action by the Court of Appeal is only possible in one or other of two situations: (i) where the order is a nullity, and (ii) where there has been a defect in the procedure which may have led to a real injustice.

It follows, the Court said, that the first step is to determine if the order in question was properly recorded in the relevant record. In the context of a criminal law appeal, this is specifically when a Crown Court officer amends the Crown Court record pursuant to the order(s) made by the Court of Appeal. This means the updating of CREST and the marking of the court record sheet with the date and result of the appeal[4]. If the order has been so recorded, the Court of Appeal is *functus officio* so its power to revise that order is severely restricted.

Should the order be a nullity, despite having been properly recorded, then it is deemed in law never to have existed and no appeal has been heard. The Court of Appeal has no power to revise but may go on to hear a "first" appeal. If the order has been properly recorded and it is not a nullity, then it must be considered whether there has been a defect in procedure which may have led to a real injustice. This was the situation in the present case.

In dealing with this position, the Court of Appeal stated that the preceding case-law failed fully to explain the scope of the exception to the basic rule outlined above and that the time had come to take a new approach.

It based its new approach on the Civil Division's approach to re-opening concluded appeals, delineated in *Taylor v Lawrence*[5]. There the Court of Appeal (Civil Division) held that it had implicit but not inherent jurisdiction to so do derived from, "the residual jurisdiction…vested in a court of appeal to avoid real injustice in exceptional

1 Henry Skudra is a pupil barrister at Citadel Chambers.
2 [2015] EWCA Crim. 1277.
3 The appeal judgment is found at [2014] EWCA Crim. 1416.
4 Following the processes set out at section 26 of the Crown Court Manual—*Appeals to the Court of Appeal Criminal Division and the High Court: Action upon receipt of notification of the result of an appeal*.
5 [2003] Q.B. 528.

circumstances". Further, the Court of Appeal had, "two principal objectives…(1) correcting wrong decisions so as to ensure justice between the litigants…(2) a public objective to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents."
Predictably, the Court found in *Yasain* that a broadly similar jurisdiction existed in the Criminal Division, though it warned that the exercise of the implicit jurisdiction did not necessarily have to be in a like manner. Instead, it was, "probably confined to procedural errors" — the rationale being that there are alternative remedies such as going through the C.C.R.C.
In the present case the Court held, "real injustice would result if the order could not be re-opened and corrected" and set aside the previous Court of Appeal order. Therefore, uncontroversially, Yasain's conviction was now recorded. His quashed consecutive sentence was also re-instated.
In so deciding the Court also made two practical suggestions[6]. The first was that the Criminal Procedure Rule Committee should formulate a rule setting out the factors and circumstances for re-opening a concluded appeal. The Committee, it suggested, could consider whether the principles espoused in *Yasain* apply to all criminal appeals or should be modified for different types of appeal, differentiating between appeals to the Court of Appeal itself, to a divisional court by way of case stated, or extradition appeals to a divisional court. The second was that rules be made clarifying the recording of orders of all trial and appellate courts. This was found wanting both in the Crown Court and the Court of Appeal. The need to ensure that criminal records are accurately stated was also reinforced, particularly given the modern digitised and networked age in which the criminal justice system attempts to operate.
Given the rarity of re-opening appeals and of recording mistakes, whether the changes will be made and subsequently implemented remains to be seen.

6 *Ibid* n.2, at paras [42]-[44].

Comment

What is a Preliminary Reference? And why should I care?

By Helen Malcolm QC, 3 Raymond Buildings, Gray's Inn

As Jodie Blackstock and Alex Tinsley explained in the last issue of this journal,[1] the UK has now formally accepted the jurisdiction of the Court of Justice of the European Union (CJEU) in Luxembourg in criminal justice matters deriving from EU law measures. In practical terms this could take one or other of two forms. One is infringement proceedings brought by the Commission against the UK if it fails to implement an EU criminal justice measure. The second is that our criminal courts can now make preliminary references (PRs) to the CJEU on the validity and interpretation of EU law: a sort of European version of case stated.
The CJEU regards the PR procedure as an aspect of the fundamental right to effective judicial protection (a right now reinforced by Art.47 of the EU Charter of Fundamental Rights). It is also seen as an essential form of partnership, co-operation and interaction between the European Court judges and national judges. The procedure places the initiative on the national court and depends entirely on the national court's own assessment as to whether a reference is appropriate and necessary. That assessment does not depend on the parties agreeing to it or even on them raising the possibility in the first place. Either side can ask the national court to make a reference, but — unlike with case stated — neither side is entitled to insist upon it.

1 "The arrival of EU law in criminal proceedings", *Archbold Review* Issue 8, 5-6.

The preliminary reference procedure: why, what, and how it works

EU law in the criminal field normally takes the form of Directives. In the UK, as generally elsewhere, they need to be transposed into domestic legislation. Directives include a date by which transposition must have occurred in all Member States (MS) (generally two or three years ahead). Once transposed, MS need to implement the law. In all cases, the process involves due regard for the general principles of EU law (e.g. equality and non-discrimination) and the EU Charter of Fundamental Rights, together with the case-law of the European Court of Human Rights and any relevant international standards developed by the United Nations and the Council of Europe.
Thus, for instance, Art.27 of the EU Victims Directive[2] provides that MS must bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by November 16, 2015. In the first instance each MS will assess its existing procedures to see if they comply with the Directive; and if not, to choose whether to transpose by means of an amendment to existing laws, or the creation of a new one. Further, MS will have to decide how to ensure practical assistance to victims, including general and specific support services. In other words every MS, each with a different criminal justice system, must assess each Article of the Directive to determine the most suitable instrument

2 Directive 2012/29/EU of the European Parliament and of the Council of October 25 2012 establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime.

of transposition in order to achieve the different objectives of the EU provision. Thereafter the national courts will apply their (amended) domestic law in the usual way.

The interpretation of the underlying EU law however remains within the sole remit of the CJEU in accordance with the two principal EU treaties, viz. the Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU). Article 267 of the TFEU and Article 19(3)(b) of the TEU allow any domestic court to ask the CJEU for assistance in interpreting EU law.

Such interpretation is necessary, not only for the obvious and familiar reasons of statutory interpretation; but also because EU law may be drafted in general (even somewhat opaque) terms. The process of gaining the agreement of 28 Member States to measures which impinge on domestic law can be complex; some would say tortuous. It is not only the UK that guards its various jurisdictions jealously. Thus political agreement is from time to time achieved by compromise; and compromise can result in language which is less clear than judges and lawyers would like. The intention and effect of the PR process is both to promote co-operation between the national courts and the CJEU; and to provide a uniform application of EU laws across Europe. A PR, once ruled upon, is binding on all MS. However, it is important also to point out that a PR is not a decision on the facts. Both the findings of fact and the application of the law (once clarified) to those particular facts remain the responsibility of the national court.

Any party to ongoing proceedings can request a court to make a preliminary ruling, but as stated, the ultimate decision remains with the national court. Guidance in the form of "Recommendations to national courts in relation to the initiation of preliminary ruling proceedings" has been published.[3] No court fee is required at Luxembourg, although the parties may wish to be represented, with an inevitable consequence in costs. Some legal aid is available. The CJEU will not rule on any question of costs before the referring national court; that remains a matter for that national court.

So when should a national court refer? First, there is an obligation in law for any court of final instance to refer, in a case of uncertainty of interpretation; all other courts have a discretion to refer. There are advantages in having certainty in the law, on a European just as much as a national level. There are also advantages, and issues of fairness, in a uniform interpretation of laws affecting citizens wherever they may live in the EU. The CJEU has reaffirmed its belief that national courts and tribunals should make use of the PR procedure, particularly in new areas of EU law.

The procedure itself allows for written observations (interventions) from all MS as well as EU institutions, thus allowing for engagement at various levels. And finally, a national court which fails to make a reference in a case where it should, can face legal consequences including infringement proceedings initiated by the Commission; adverse comment in the CJEU; an adverse ruling domestically (i.e. ruling the lower court's refusal invalid under Community law); an action for damages based on EU law for a failure to refer; or the failure to refer being considered by the ECtHR to be contrary to Art.6 of the ECHR if it appears arbitrary.[4]

If a national court agrees to refer a question to the CJEU, the effect is to stay the domestic proceedings pending a response. Like all courts, the CJEU is overburdened and has a considerable backlog of cases. It also operates in 23 official languages. However in the area of freedom, security and justice (i.e. in criminal cases) the CJEU has a fast-track procedure known as PPU (from the French *Procédure Préjudicielle d'Urgence*) which limits the number of parties that can submit observations, and can bypass the written stage altogether. The procedure can be used, for example, where a defendant is remanded in custody. To date all PPUs have been answered in under three months, which compares not unfavourably with interlocutory appeals in this country.

The main stages of the PR procedure are usually: (1) order for a reference made by the national "referring court"; (2) submissions from the parties/other interested parties; (3) Opinion drafted and circulated by an Advocate General at the CJEU, appointed to that case; (4) oral hearing; (5) ruling/judgment; followed by completion by the national referring court of the main proceedings.

In many cases, and perhaps particularly in the criminal field, the law in England and Wales complies with, and indeed often exceeds, the minimum requirements of EU law. Where provisions are well-known and well-used, it is unlikely that UK courts will require the assistance of Luxembourg to interpret them. However that is not always the case. In the context of VAT fraud (before the VAT Tribunal) for instance, practitioners will be familiar with the *Kittel* case[5] which established the test of knowledge required to be proved by tax authorities including HMRC, before a trader in an alleged VAT carousel lost the right to reclaim his VAT.

Why should I care?

European criminal law is no longer the province only of those practising extradition, although the European Arrest Warrant remains the best known instrument to date. We are gradually becoming more familiar with a range of EU institutions that are of assistance in criminal work: Europol, Eurojust, the European Judicial Network and so on. It is now relatively easy, swiftly to obtain the previous convictions of an EU national in admissible form for a bail application; or to set up a video link with another MS for a witness to give evidence; or to obtain evidence, or freeze assets in the EU.

However, what provisions might be the subject of a reference?

Following the adoption of Luxembourg's jurisdiction last December[6], either side may now ask a Magistrates' Court or Crown Court to refer a question to the CJEU on a range of commonly encountered topics deriving from EU instruments (apart from the European Arrest Warrant), including on victims' rights,[7] defence safeguards,[8] "Euro-bail"[9], and people-trafficking[10]. As the UK opts in to further measures, the list grows longer. Criminal judges and practitioners have thus been handed a whole new jurisdiction, indeed a whole new world.

3 Official Journal C 338 of November 6, 2012.

4 As to which see, e.g. *John v Germany* [2007] 45 EHRR SE4.

5 *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL*, C439-04 and C440-04, July 6, 2006.

6 See Blackstock and Tinsley, above n 1.

7 Above n 2.

8 Directive 2010/64/EU of the European Parliament and of the Council of October 20 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of October 20, 2010 on the right to information in criminal proceedings.

9 As described by Blackstock and Tinsley, above n 1.

10 See Southwell and Bird, page 7 below.

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Feature

Does the new "Slavery" Defence Offer Victims of Trafficking any Greater Protection?

By Steven Bird and Philippa Southwell, Birds Solicitors

The Lord Chief Justice of England and Wales described human trafficking and forced criminality as a "*vile trade in people (which) has different manifestations. Women and children, usually girls, are trafficked into prostitution: others, usually teenage boys, but sometimes young adults, are trafficked into cannabis farming: yet others are trafficked to commit a wide range of further offences……..Whether trafficked from home or overseas, they are all victims of crime. That is how they must be treated….*"[1] .

As HHJ Edmunds pointed out in his recent article,[2] it seems that victims of human trafficking have been regularly prosecuted and convicted for offences committed as a direct result of their trafficked status, contrary to the UK's existing obligations. These cases are genuine and serious miscarriages of justice and risk bringing the UK criminal justice system into disrepute.

From July 31 2015, s.45 of the Modern Slavery Act 2015 provides a new but limited statutory defence to victims of human trafficking and slavery who have committed certain criminal offences, if the offence is attributable to their exploitation. This article examines the new defence and comments on its likely impact.

A brief history

The Council of Europe Convention against Trafficking in Human Beings of 2005 built on the earlier 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime (known as the Palermo Protocol). It was ratified by the UK on December 17 2008[3].

The purposes of the 2005 Convention include, besides the suppression of trafficking, the provision of help for those who are its victims. Article 26 obliges States to "*provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.*" In 2011 the European Union adopted a Directive on trafficking in human beings[4] and in July of that year the UK opted into it. Article 8 contains non-punishment provisions similar to those in Article 26 of the earlier Convention. Member States must ensure that their legal systems make it possible to avoid prosecuting or punishing victims of trafficking for their involvement in criminal activities which they have been compelled to commit as a direct consequence of their trafficked status.

It follows that there are good reasons in both EU and public international law[5] why the UK should not be prosecuting individuals for criminal offences committed under compulsion resulting from trafficking and exploitation. It is implicit that such victims are vulnerable and have no real alternative to submit to the abuse inflicted upon them.

In addition to this, the Council of Europe Convention also places the State under an obligation to identify victims of trafficking (Art.10) and to ensure that trained and qualified individuals are involved in identifying such victims, including children. Indeed the State is required to ensure that different authorities collaborate with each other and with the relevant support organisations to ensure that victims can be identified and that such procedure takes account of the special situation of children. Similarly, the EU Directive also imposes a duty to investigate human trafficking, and to do so irrespective of any report by the victim. The rights of victims extend to being "provided with assistance and support as soon as there is a reasonable grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness[6]."

Such support should continue while decisions are taken as to whether rights to remain in the country are considered and "for an appropriate period after the criminal proceedings have ended, for example if medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim's statements in those criminal proceedings[7]."

Existing arrangements in the UK

The UK runs an identification mechanism known as the National Referral Mechanism ("NRM"). No consent to be referred into the NRM is required for a potential child victim of trafficking in accordance with child protection procedures. The NRM triggers an investigation into any trafficking indicators and requires multi-agency co-operation and input during the investigation. Investigating authorities and prosecutors should be alert to trafficking indicators and make the appropriate report where necessary.

Paragraph 3.5 of the *Code for Crown Prosecutors* requires prosecutors not to "allow a prosecution to start or continue where to do so would be seen by the courts as oppressive or unfair so as to amount to an abuse of process of the court"[8].

More specific guidance can be found in the updated Crown Prosecution guidance *Human Trafficking, Smuggling and Slavery: Suspects in a criminal case who might be victims of trafficking or slavery.* Prosecutors should be alert to particular circumstances and offences where a suspect may also be a victim. The guidance provides a list of offences where this

1 *R v L & Ors* [2013] EWCA Crim 991; [2013] 2 Cr. App.R.23.
2 [2015] *Archbold Review,* Issue 3, 5-6.
3 In *LM, MB, DG, BT and YT v R* [2012] EWCA Crim 2327. it was held that the State must refrain from acts which would defeat its objects and purposes.
4 Directive 2011/36/EU of the European Parliament and of the Council of April 5, 2011 on preventing and combating trafficking inhuman beings and protecting its victims (etc.) OJ L 101/1.
5 It should also be noted that Art.4 of the ECHR prohibits slavery of forced labour.
6 Preamble, Article 18.
7 *Ibid.*
8 The principle of abuse of process was reaffirmed in *R v L & Ors* [2013] EWCA Crim 991; [2013] 2 Cr App R 23.

situation most frequently arises, including pickpocketing, cannabis cultivation, immigration document offences and controlling prostitution offences. When reviewing any such cases, prosecutors should be aware of their obligations under the European Conventions and Directive. If there is a reason to believe that the suspect has been trafficked, and there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds. However, even where there is no clear evidence of duress but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not[9].

In *R v O*[10] the Court of Appeal held that it is the duty of the prosecutor to be proactive in causing enquiries to be made about the suspect and the circumstances in which they were apprehended. The Court highlighted that both Prosecutors and Defence lawyers should "make proper enquiries" in criminal prosecutions involving individuals who may be victims of trafficking.

Thus mechanisms have been in place for some time to prevent the prosecution of vulnerable victims of trafficking for offences committed as a direct result of their trafficked status. But unfortunately there are cases where the system has not worked.

The new statutory defence

The new defence does not — and indeed could not — replace the UK obligations under the Convention and the Directive. It is additional to the safeguards against prosecution for victims of trafficking that already exist and exactly the same considerations must apply to the decision to prosecute individuals in such circumstances. The defence is, however, a further matter for the Crown to consider in reaching a decision to prosecute.

The defence is set out at s.45 of the Modern Slavery Act 2015, which is as follows.

(1) A person is not guilty of an offence if—

(a) the person is aged 18 or over when the person does the act which constitutes the offence,

(b) the person does that act because the person is compelled to do it,

(c) the compulsion is attributable to slavery or to relevant exploitation, and

(d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.

(2) A person may be compelled to do something by another person or by the person's circumstances.

(3) Compulsion is attributable to slavery or to relevant exploitation only if—

(a) it is, or is part of, conduct which constitutes an offence under s.1 or conduct which constitutes relevant exploitation, or

(b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.

(4) A person is not guilty of an offence if—

(a) the person is under the age of 18 when the person does the act which constitutes the offence,

(b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and

(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.

(5) For the purposes of this section—
"relevant characteristics" means age, sex and any physical or mental illness or disability;
"relevant exploitation" is exploitation (within the meaning of s.3) that is attributable to the exploited person being, or having been, a victim of human trafficking.

(6) In this section references to an act include an omission.

(7) Subsections (1) and (4) do not apply to an offence listed in Sch.4.

(8) The Secretary of State may by regulations amend Sch.4.

By this provision adult defendants are not guilty of an offence if they commit the act because they have been compelled to do so, the compulsion is attributable to slavery or to "relevant exploitation", and a reasonable person in the same situation and with the same relevant characteristics would have no realistic alternative to doing that act. A person may be compelled to do something by another person or by their own circumstances. Compulsion is attributable to slavery or to relevant exploitation only if it is, or is part of, conduct which constitutes an offence under s.1 of the Act or conduct which constitutes relevant exploitation, or it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.

Similar but slightly less exacting considerations apply to those under the age of 18 at the time of committing the criminal act. Such a person is not guilty of an offence if the act is done as a direct consequence of being, or having been, a victim of slavery or a victim of relevant exploitation, and a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act; there is no requirement of "compulsion".

The complex nature of the defence reveals the fact that it was controversial, and did not reach the statute book without difficulty. From the initial draft Bill in 2013 it was significantly absent and a version of it reached the final Bill as belated acknowledgement that the existing arrangements did not adequately protect victims from prosecution, nor did the defence of duress recognise the complexities of human trafficking.

The Bill as introduced by the Government included the compulsion element for those under or over 18, effectively drawing no distinction as a result of age. During the passage of the Bill through Parliament the element of compulsion was removed for those aged under 18, seemingly to take account of the distinction drawn between children and adult victims in the Directive and to provide more protection to child victims of trafficking by removing the unnecessary burden on a child defendant to prove that they were compelled to commit a crime. A child should not have to prove compulsion to achieve protection because they are in a position of particular vulnerability and cannot consent to the exploitation. However, it could be that, in reality, the element of compulsion effectively remains for child victims in consequence of the "reasonable person" test — which is further discussed below.

The offences in s.1 are in themselves complicated. Under that section a person commits an offence if he holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or requires another person to

9 See the judgment in *LM & Ors* [2010] EWCA Crim 2327.
10 [2008] EWCA Crim 283.

perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour. This raises issues such as the special vulnerability of certain classes of individuals and the issue of consent which specifically "*does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour*" (s.1(5) MSA 2015).

"Exploitation" is defined in s.3 of the Act as only including slavery, servitude and forced or compulsory labour, sexual exploitation, the "removal of organs etc", securing services etc by force, threats or deception, and securing services etc from children and vulnerable persons. Each of these terms is defined within the section. Such exploitation becomes "relevant exploitation" for the purposes of the defence only if it is attributable to the exploited person being, or having been, a victim of human trafficking.

A jury or magistrates will have to be led through the minefield of these varying definitions if the defence is raised and then consider whether "*a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act*". The "relevant characteristics" are defined as "age, sex and any physical or mental illness or disability".

However, the defence also raises the issue of the reasonable person being in the "same situation" as the defendant in the case. It is most likely that if the tribunal of fact is considering this part of the defence they have already found that the defendant was compelled to do the act as a direct consequence of their slavery or exploitation as a trafficked individual. Therefore the fact that the defendant is a trafficked individual must become relevant as to how a reasonable person in his situation (i.e. trafficked and compelled to commit a crime) would have acted. In effect the reasonable person becomes the reasonable trafficking victim.

It is expected that once the defence is raised, it will be a matter for the Crown to disprove it. Nonetheless in raising the defence, it will be necessary for the defence to call evidence about it and that evidence is most likely to include evidence from expert witnesses (experts in trafficking, the culture of certain countries and races, psychiatrists etc). There are many complexities surrounding trafficked and exploited people, particularly children, including *inter alia* debt bondage, juju, cultural issues and religious beliefs, none of which are likely to be easily understandable by an ordinary jury member without expert assistance.

In the authors' view this reasonable person test is unnecessary and could lead to further miscarriages of justice. It places a burden on the defendant, including children, which goes beyond that envisaged by the Convention or the Directive. In particular it is surely most disturbing that the reasonable person test is retained where the defendant is a child. The reasonable person test implies an element of compulsion as the defendant is likely to have to demonstrate that in their specific circumstances there was no other option but to commit the act.

There is a further worrying restriction on the use of the defence. The defence is specifically excluded if the offence committed is one of the hundred or so listed in Schedule 4 of the Act. Although it may be understandable that the defence is not available in relation to certain offences such as murder, some of the offences are relatively minor. The nature and volume of excluded offences is, surely, dubiously compatible with the UK's obligations under the Directive and Convention.

It is important to note that, particularly with trafficking for sexual exploitation, it is very common that a trafficked individual will be moved into a more controlling position by their trafficker. As a result of the exclusion of various offences at Schedule 4, a trafficked victim who, while still under the control of their own trafficker, is used to groom others into sexual exploitation cannot raise the defence, even where their offending is committed as a direct result of their own exploitation. This situation runs through other common areas of forced criminal activity such as pickpocket rings, drug smuggling and drug cultivation or production. It is not uncommon for younger members of an exploited group to graduate over time into positions within an organisation where they are exerting more dominance over others while still acting under the control of their own trafficker.

Conclusion

Trafficking in human beings, forced labour and other exploitation remains a very serious concern in the UK and world-wide. If the new defence causes closer attention to be paid to people trafficking that is to be welcomed. The concern, however, is that investigators and prosecutors might prosecute individuals with less regard for their obligations under the Convention and Directive if they know that a statutory defence is available at trial as a "safety net". If this were to be the result, it will have been counter-productive. Furthermore the defence itself appears to require more of the trafficked defendant than the Convention and Directive would require.

The Modern Slavery Act aims to combat modern day slavery, to punish perpetrators of this vile trade and to protect those victims who have been exploited and abused. But it must be questionable whether the new defence gives victims any significant additional protections from prosecution.

Law Commission sentencing project – By Paul Humpherson (Law Commission)

The Law Commission has published its next consultation document in the project for the creation of a New Sentencing Code. This aims to be a complete statement of the current primary legislation governing sentencing, with extracts from common law and other guidance (guidelines, practice directions etc.) where particularly important. Unsurprisingly, perhaps, this document exceeds a thousand pages – thereby demonstrating the problem of the scale of the current law.

Consultees' views are now sought on three key questions: i) Is the document comprehensive? Have we missed anything which should be in the New Sentencing Code? ii) Is it over-inclusive? (iii) Are there errors, e.g. provisions which have been repealed or amended? Few consultees are likely to have time to engage in detail with it in its entirety. However, we do encourage all those interested in sentencing to look over the index (which is fully electronically navigable) and at any sections in which they have a particular interest or expertise. Please note, this is just a statement of the present law – we hope that the New Sentencing Code will be shorter, simpler and less cumbersome! ("Sentencing Law in England and Wales: Legislation currently in force" is available at: http://www.lawcom.gov.uk/project/sentencing-procedure/. The Consultation is open until April 9, 2016, and responses should be sent to: sentencing@lawcommission.gsi.gov.)

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