MODERN SLAVERY & HUMAN RIGHTS | POLICY & EVIDENCE CENTRE
Led by the Bingham Centre

UNIVERSITY OF HULL | WILBERFORCE INSTITUTE

Evidence Review of Section 45 of the Modern Slavery Act: Appendices

April 2022

Appendix 1

The Burden of Proof

In the cases of MK v R and Gega v R, the appellants were both Albanian nationals who claimed to be victims of human trafficking and sought to raise the defence of Section 45 during their trials. MK looked to use the defence to appeal her conviction for conspiracy to supply a Class A drug and being in possession of an identity document with improper intention. Gega looked to use the defence to appeal her conviction for being in possession of an identity document with improper intention. The trial judges in both cases had made rulings based on what they believed to be the correct implementation of the defence, particularly in relation to where the burden of proof should lie. These judges held that the most appropriate approach would be the same as that initially stated by the CPS, that:

1. The defendant should hold the burden of evidence that they are a victim of trafficking or modern slavery
2. Once the defendant has done this, the prosecution must prove beyond reasonable doubt that the defendant was not a victim of trafficking or modern slavery
3. If the prosecution succeeds here, then the defence will fail
4. If the prosecution fails to prove beyond reasonable doubt that the defendant was not a victim of trafficking or modern slavery then the burden reverts to the defendant to prove – on the balance of probabilities – that:
    a) They were compelled to commit the offence
    b) That this compulsion directly resulted from their slavery or trafficking experience, and
    c) That a reasonable person in the same situation and with their relevant characteristics would have no realistic alternative (or if it was a case relating to a child, that another reasonable person in the same situation with relevant characteristics would have also committed the act).

In their appeals, the applicants submitted that the trial judge in each case misdirected the jury as to the burden and standard of proof. Some of the key arguments put forward for their appeal were that:

> *iii. It would be odd to interpret a provision aimed at furthering protection for trafficked individuals as more onerous than the existing common law defence of duress, to which it bears a close resemblance.*

iv. The finding that the burden ought to rest upon a trafficking victim because she/he is best placed to provide evidence of her/his personal situation rests on a fundamental misunderstanding of such situations.

v. Reversal of the burden of proof is contrary to the clear intention expressed in parliamentary debates.
(Mennim & Wake 2018:283)

Appendix 2

Determining Victimhood

In the Case of R v DS, DS was a 17-year-old who claimed to be a victim of modern slavery in the form of county lines, and he feared violence. His evidence of being a victim of modern slavery was a National Referral Mechanism (NRM) positive conclusive grounds decision which indicated that the Single Competent Authority believed DS to be a victim of modern slavery.

For context, the NRM is the system for identifying and supporting victims of modern slavery and human trafficking in the UK. The system involves a two-tier decision-making process by a Competent Authority in which a reasonable grounds decision determines that 'from the information available so far I believe but cannot prove' that the person referred is a potential victim of trafficking or modern slavery. If the reasonable grounds decision is positive, then additional information is gathered on the case in order for the Competent Authority to make a conclusive grounds decision that on the balance of probabilities 'it is more likely than not' that the individual is a victim of human trafficking or modern slavery.

This positive NRM decision led to the defence arguing that the prosecution should not continue in prosecuting DS for the criminal offences, as to do so, they claimed, would be an abuse of process. The trial judge agreed, stopped the trial and stayed proceedings. This led to an appeal by the CPS who opposed being prevented from continuing proceedings. The CPS challenged the decision at the Court of Appeal (R v DS), stating that 'the evidential bar to be designated as a victim of modern slavery, often made before any evidence is heard or tested, was a low one and can be untested, self-serving, and based on hearsay evidence' (CPS, 2020). The claim here was that an NRM decision that an individual is a victim of modern slavery has a lower standard of proof than a criminal test: it does not prove beyond reasonable doubt that the individual is a victim, and nor does it prove that their criminal actions were undertaken as a direct consequence of their exploitation.

> *That decision did not mean that the CPS will always challenge claims that someone is a victim of modern slavery. But the judgment did confirm that prosecutors should assess and make their own judgment about NRM decisions, and are allowed to proceed with a prosecution where other evidence showed the defendant may not be a victim of modern slavery, or that their victimhood was not relevant to the crime they committed.*
> (CPS, 2020)

At the point of R v DS, NRM conclusive grounds decisions could be used in Section 45 cases as evidence that the defendant is a victim of modern slavery or human trafficking. Later in 2020, the applicability of these NRM decisions to criminal proceedings relating to Section 45 was considered – an issue that had not been considered by the Court of Appeal or High Court before. DPP v M (2020), a case of child criminal exploitation, led to a ruling on the admissibility of NRM conclusive grounds decisions and expert evidence in relation to the Section 45 defence.

In a court case, the findings of the Competent Authority are recorded and provided to the defence as a 'decision minute'. If a positive conclusive grounds decision is received, then the CPS will refer to their own policies to determine whether to continue with the proceedings (as defined in R v DS, having a positive conclusive grounds decision to indicate that a defendant was a victim of modern slavery does not automatically mean that any criminal offences are defensible under Section 45, either if the criminal act was not a direct consequence of the slavery or trafficking situation, or if the

offence is one of those listed in Schedule 4 whereby the defence cannot be used). The case of DPP v M was brought to the High Court to consider two aspects:

- Whether the decision minute of the Competent Authority is admissible in criminal proceedings
- What evidential weight that decision has

M had been arrested and charged for the possession of a bladed article and for possession of cocaine and heroin. He was referred into the NRM and received a positive conclusive grounds decision (i.e. the Competent Authority believed that it is more likely than not that M was a victim) which determined that he had been recruited, harboured and transported for the purposes of criminal exploitation. The Competent Authority's decision was then admitted to evidence – this was the evidence used to determine that M was a victim of modern slavery or human trafficking. However, the prosecution appealed. The Crown argued that the decision minute (i.e. the Competent Authority's positive conclusive grounds decision) was simply a non-expert opinion and this drew attention to the fact that there was no clear guidance around admissibility of these decisions. The determination from this case was that the NRM decision is admissible by way of Section 10 admission ('Section 10 provides for proof by formal admission in criminal trials…an admission under Section 10 is conclusive evidence.' CPS, 1967), but that the weight of this decision was a matter for the court to decide.

In this case:

> *The High Court in M concluded that the SCA (NRM) decision is admissible in criminal proceedings on the basis of the following:*
>
> *The decision maker had expertise in relation to the issues;*
>
> *The decision was based on a proper evidential foundation;*
>
> *The decision could be considered against other evidence and the tribunal would make a decision as to weight – not admissibility.*
> (DPP v M, 2020)

The High Court in this case concluded that the NRM decision, when combined with other independent evidence about M, was enough to meet the evidential burden on the part of the defendant. As such, it was on the prosecution to prove beyond reasonable doubt that the offences M committed were not a direct consequence of his exploitation. This case is of particular importance regarding the implementation of Section 45, as it paved the way for NRM decisions to be considered as meeting the evidential burden on the defendant to evidence that they were a victim of modern slavery or human trafficking and that this can be used alongside other independent information as evidence of the link between that exploitation and the criminal actions.

R v Brecani was a case in which a 17 year old boy was convicted of conspiracy to supply cocaine, a Class A drug, and sentenced to three years in detention. He raised the Section 45 defence with the claim that he committed the offence as a direct result of his experience of modern slavery. The defendant received a positive conclusive grounds decision while the trial was in progress, with the Competent Authority acknowledging that he had been a victim of forced criminality.

However, the prosecution gathered significant evidence from the appellant's phone which was not available to those making the conclusive grounds decision. This evidence appeared to undermine his claims of having been trafficked, indicating that, instead, he was a willing co-conspirator. As a result, the case held that a positive conclusive grounds decision is not admissible in evidence at a criminal court, because the decision is made by individuals who are not experts, and decisions may be made on partial evidence, as appeared to be the case here. This is reflective of the comments made by the CPS in R v DS regarding the conclusive grounds decision, that 'the evidential bar to be designated as a victim of modern slavery, often made before any evidence is heard or tested, was a low one and can be untested, self-serving, and based on hearsay evidence' (CPS, 2020).

As a result of R v Brecani, NRM decisions are still acceptable as a method of indicating that a person may have been a victim of modern slavery or human trafficking, but they are not deemed robust enough to be relied upon as *proof* of modern slavery or trafficking. In summary, it means that a conclusive grounds decision from the NRM is admissible in court, but is not weighted as expert evidence because of the flaws in the decision making process highlighted by this case.

Appendix 3

International Standards

V.C.L. and A.N. v the United Kingdom is a case from 2009, well before the Modern Slavery Act or the statutory defence were established.

The case relates to two applicants – both Vietnamese children – who were found by police to be working in cannabis factories and charged with drug-related offences. One of the defendants had received an NRM decision which determined that he was a victim of trafficking and the European Court of Human Rights deemed that there was credible suspicion to indicate that the other defendant had also been trafficked. The CPS disagreed with this information and pursued the prosecutions. Both defendants pled guilty, were convicted, and both later unsuccessfully appealed.

This is the first case where The European Court of Human Rights had considered the relationship between Article 4 of the European Convention on Human Rights (freedom from slavery and forced labour) and the prosecution of trafficking victims. The Court deemed that this case constituted a violation of both Article 4 and Article 6 (right to a fair trial) of the European Convention on Human Rights in relation to failure to investigate the applicants' status as potential trafficking victims affecting overall fairness of criminal proceedings. It stated that by prosecuting despite credible suspicion the defendants were victims of trafficking, the domestic authorities failed to take operational measures in line with international standards to protect minors and the UK government was ordered to pay €25,000 euros to each applicant in damages.

> *In dismissing the appeals by both applicants the Court of Appeal made it clear that a defendant is provided with one opportunity to give his instructions to his legal advisers and that it would only be "in the most exceptional cases" that the court would consider it appropriate to allow the defendant to advance fresh instructions about the facts for the purposes of an appeal against conviction.*
>
> *In the [ECtHR]'s view, such an approach would in effect penalise victims of trafficking for not initially identifying themselves as such and allow the authorities to rely on their own failure to fulfil their duty under article 4 of the convention to take operational measures to protect them.*

Appendix 4

2016 Review of the Modern Slavery Act

The summary of actions that were carried out for Haughey's 2016 review of the Modern Slavery Act are listed as follows:

> *(i) A review of the current data held in the NRM and how it was recorded*
> *(ii) A review of documentary material provided by various Police Forces in England and Wales in response to questions asked of them in writing*
> *(iii) A review of material obtained from the office of Chief Constable Shaun Sawyer National Police Lead on Slavery and Trafficking*
> *(iv) Consultation with police forces across England and Wales both at Strategic and Tactical Levels*
> *(v) Consultation with other investigative agencies including UK Border Force*
> *(vi) Consultation with external stake holders including defence solicitors and the Salvation Army*
> *(vii) Consultation with the Crown Prosecution Service*
> *(viii) Consultation with members of the Criminal Bar who have conducted cases in Slavery and Human Trafficking*
> *(ix) Consultation with HM Circuit Court and High Court Judiciary*
> *(x) Consultation with the Solicitor General*
> *(xi) Consultation with Trafficking Commissioner Kevin Hyland OBE.*
> *(xii) Consultation with the Ministry of Justice*
> *(xiii) Consultation with HM Court Service*
> *(xiv) Consultation with GLA* [now GLAA]
> *(xv) Consultation with the NCA and UKHTC*
> *(xvi) Consultation with the Northern Ireland Attorney General's Office*
> *(xvii) Consultation with the Northern Ireland Public Prosecutors Office*
> *(xviii) Consultation with the PSNI*
> *(xix) Consultation with Police Scotland*

(Haughey, 2016:33)

Appendix 5

2019 Review of the Modern Slavery Act

In the foreword of this review, Frank Field MP makes note of the lack of data collection regarding the implementation of the Modern Slavery Act, which therefore indicates that quantitative data did not play a leading role in informing the review (other than reference to NRM statistics which are made within the report, but which are not directly attributable to the Act). The reviewers appointed a team of nine experts who consulted with stakeholder groups and sector interests. These experts were: Vernon Coaker MP (consulting with parliamentarians), Rt Revd Dr Alastair Redfern (consulting with faith groups), Baroness Young of Hornsey OBE and John Studzinski CBE (consulting with business), Anthony Steen CBE (consulting with civil society), Christian Guy (consulting on commonwealth and international issues), Professor Ravi Kohli (consulting on child trafficking), Peter Carter QC and Caroline Haughey QC (consulting on the criminal justice system). It is positive to note here that, unlike the 2016 review of the Act, the 2019 review incorporated an independent academic expert, using Professor Ravi Kohli's academic insights and connections in order to consult with stakeholder groups regarding the trafficking of children.

The review mentions that this team of experts gathered evidence from their relevant stakeholder groups and drafted reports on their findings. Helpfully there is a very comprehensive list of all the organisations that contributed to the review along with the interest group that they represented provided within a 14 page annex at the end of the review. However, while the review also offers a link as to where these individual reports can be accessed, the link does not lead to a relevant webpage (www.independentmsareview.co.uk). During the research and writing of this evidence review, this link sometimes led to a page relating to Universal Credit, and other times simply did not work.

In addition to the team of experts, a secretariat was seconded from the Home Office to assist with the review, offering support and providing relevant information. A former House of Commons Clerk was also brought in to assist on the report, providing support and advice relating to the drafting of interim reports as well as the final report.

Appendix 6

Independent Anti-Slavery Commissioner's Call for Evidence on Section 45

Dame Sara Thornton, the UK's current Independent Anti-Slavery Commissioner, ran a call for evidence which led to the publication of a report in October 2020. The report uses evidence collected from over 100 responses relating to over 200 cases of the use of Section 45 of the Modern Slavery Act.

A key difference to note between this report and the 2016 and 2019 reviews of the Modern Slavery Act is that this report was undertaken directly in response to the Independent Anti-Slavery Commissioner's strategic plan, by members of her team.

This call for evidence led to 107 responses relating to 224 individual case studies of the use of Section 45 of the Modern Slavery Act. Additionally, 12 legal and non-governmental organisations provided their observations on the use of Section 45, including the challenges of using it but simultaneously emphasising the importance that it exists. Three academics working on issues of human trafficking and victim care also provided their insights.

On page 15 of the report, the authors provide a list of all the organisations who responded to the call for evidence as well as a helpful breakdown of the police forces that provided insights. In addition to the call for evidence, two round table discussions were hosted 'bringing together subject matter experts from the Home Office, policing, the criminal justice system, modern slavery support provision and NGOs to share and consider the emerging issues uncovered by the review' (2020:15-16).

This differs from the methodologies employed in the 2016 and 2019 reviews which conducted consultations with pre-identified organisations. While this means that the Independent Anti-Slavery Commissioner's Office report had the chance to incorporate findings from organisations that had not been considered in the previous reviews, using a call for evidence meant that it was reliant on organisations firstly seeing the call for evidence, and secondly having the time and capacity to be able to respond before the deadline.

References

Bristow, J. & Lomas, H. (2020) The Modern Slavery Act 2015 Statutory Defence: A Call for Evidence. Available online: https://www.antislaverycommissioner.co.uk/media/1478/the-modern-slavery-act-2015-statutory-defence-call-for-evidence.pdf [Accessed 10/02/2021]. Office of the Independent Anti-Slavery Commissioner.

Burland, P. (2015) The responses to trafficked adults in the United Kingdom: rights, rhetoric and reality. PhD: University of the West of England.

Burland, P. (2017) Villains not Victims? An Examination of the Punishment of Vietnamese Nationals Trafficked for Cannabis Cultivation in the United Kingdom. *Paper presented and discussed during session 6 on 'States and Categorizations in Mixed Migration' at the International Seminar on Mixed Migration in Southeast Asia.* Available online: http://un-act.org/publication/villains-not-victims-examination-punishment-vietnamese-nationals-trafficked-cannabis-cultivation-united-kingdom/ [Accessed 23/3/21].

Burland, P. (2019) Still Punishing the Wrong People: The Criminalisation of Potential Trafficked Cannabis Gardeners. In Craig, G., Balch, A., Lewis, H & Waite, L. *The Modern Slavery Agenda*. Pp 167-86. Bristol University Press.

Christie, N. (1986) The ideal victim. In Fattah, E. (ed) *From crime policy to victim policy: reorienting the justice system.* Basingstoke: Palgrave Macmillan, 17-30.

CPS (1967) Admitting Evidence Under Sections 9 and 10 Criminal Justice Act 1967. Legal Guidance. Updated 2018. Available online: https://www.cps.gov.uk/legal-guidance/admitting-evidence-under-sections-9-and-10-criminal-justice-act-1967 [Accessed 11/02/21].

CPS (2020) Modern Slavery: News, International and Organised Crime. 9th October. Available online: https://www.cps.gov.uk/cps/news/modern-slavery [Accessed 11/02/21].

Council of Europe (2022) Communication from the United Kingdom Concerning the Case of V.C.L. and A.N. v. the United Kingdom. Available online: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2022)39E%22]} [Accessed 14/3/22].

DPP v M (2020) High Court of Justice Queen's Bench Division Administrative Court Divisional Court [2020] EWHC 3422 (Admin), 2020 WL 07356619.

Gadd, D. & Broad, R. (2018) Troubling Recognitions in British Responses to Modern Slavery. *British Journal of Criminology* 58:1440-1461.

V.C.L. and A.N. v. THE UNITED KINGDOM (2021) The European Court of Human Rights (Fourth Section). Available online: https://hudoc.echr.coe.int/eng?i=002-13143#{%22itemid%22:[%22002-13143%22]} [Accessed 16/4/21].

Field, F., Miller, M., Butler-Sloss, E. (2019) Independent Review of the Modern Slavery Act 2015: Final Report. Available online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf [Accessed 11/02/21].

Haughey, C. (2016) The Modern Slavery Act Review. Available online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/542047/2016_07_31_Haughey_Review_of_Modern_Slavery_Act_-_final_1.0.pdf [Accessed 11/02/21].

Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) (2017) *Stolen Freedom: The Policing Response to Modern Slavery and Human Trafficking.* Available online: www.justiceinspectorates.gov.uk/hmicfrs [Accessed 22/3/21].

Home Office (2018) Modern Slavery Act 2015. Available online: https://www.gov.uk/government/collections/modern-slavery-bill [Accessed 22/01/21].

Independent Anti-Slavery Commissioner (2022) IASC says Home Office should be stripped of responsibility for modern slavery victims. Available online: https://www.antislaverycommissioner.co.uk/news-insights/iasc-says-home-officeshould-be-stripped-of-responsibility-for-modern-slavery-victims/ [Accessed 4/3/22].

Jovanovic, M. (2017) The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance. *Journal of Trafficking and Human Exploitation* 1(1):41-76.

Mennim, S. (2019) Defining the Line Between Victim and Offender: Trafficked Victims and Prosecutorial Discretion. *The Journal of Criminal Law* 83(5):410-415.

Mennim, S. & Wake, N. (2018) Court of Appeal: Burden of Proof in Trafficking and Modern Slavery Cases: R v MK; R v Gega [2018] Crim 667. *The Journal of Criminal Law.* 82(4):282-286.
Modern Slavery Act (2015) Chapter 30. Norwich: The Stationery Office.

Muraszkiewicz, J. (2019) Protecting Victims of Human Trafficking from Liability: An Evaluation of Section 45 of the Modern Slavery Act. *The Journal of Criminal Law*. 83(5):394-405.
OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (2013) Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking. Available online: https://www.osce.org/secretariat/101002 [Accessed 22/3/21].
Piotrowicz, R. W. & Sorrentine, L. (2016) Human Trafficking and the Emergence of the Non-Punishment Principle. *Human Rights Law Review.* 16:669-699.
R v Brecani (2021) In the Court of Appeal (Criminal Division) on Appeal from the Crown Court at Woolwich. EWCA Crim 731.
R v DS (2020) In the Court of Appeal (Criminal Division) on Appeal from the Maidstone Crown Court. EWCA Crim 285.
Wake, N. (2017) Human Trafficking and Modern Day Slavery: When Victims Kill. *Criminal Law Review* 9:658-677

This review was produced by the Wilberforce Institute at the University for Hull as part of the Modern Slavery PEC's Partner Work Strand, which utilises the existing expertise within the Modern Slavery PEC Consortium partners.

The Modern Slavery and Human Rights Policy and Evidence Centre was created by the investment of public funding to enhance understanding of modern slavery and transform the effectiveness of law and policies designed to overcome it. The Centre is a consortium of six academic organisations led by the Bingham Centre for the Rule of Law and is funded by the Art and Humanities Research Council on behalf of UK Research and Innovation (UKRI).

The Modern Slavery and Human Rights Policy and Evidence Centre is funded and actively supported by the Arts and Humanities Research Council (AHRC), part of UK Research and Innovation (UKRI), from the Strategic Priorities Fund.