



# Representing Victims of Trafficking in Criminal Proceedings

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# Introduction

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- This is designed to be a practical guide to representing Victims of Trafficking (VsOT) in criminal proceedings, combined with a discussion of the underlying legal principles. This webinar will be broken down into the following sections:
  1. To what degree the State is obliged to provide protection from prosecution/conviction/punishment for VsOT who commit criminal offences;
  2. NRM Referrals;
  3. How did the State provide protection to VsOT before the inception of the Modern Slavery Act 2015 (MSA);
  4. Defences provided by the MSA;
  5. CPS Reviewing Standards post-MSA;
  6. VsOT in the magistrates' courts;
  7. How does the inception of the MSA impact the role played by the State in protecting VsOT: R v DS [2020] EWCA Crim 285?
  8. Issues going forward



# Section One

## The State's obligations to protect Victims of Trafficking (VsOT)

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## Relevant Protocols & Conventions

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- CPS and Courts must take care when dealing with cases involving defendants who may be VsOT because they are bodies of the State and the State has obligations imposed upon it by the following:
  - 1. The Palermo Protocol 2000 to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children;
  - 2. **Council of Europe Convention on Action against Trafficking in Human Beings 2005 (into force in UK 1 April 2009);**
  - 3. **Directive 2011/36/EU of 5<sup>th</sup> April 2011 on preventing and combating trafficking in human beings and protecting its victims (into effect in UK 6<sup>th</sup> April 2013);**
  - 4. ECHR Article 4;
  - 5. International Labour Organisation Convention to Eliminate the Worst Forms of Child Labour (June 1999);
  - 6. UN Convention on the Rights of the Child 1989, articles 32,33.



## Definition of Human Trafficking

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- **Article 3 Palermo Protocol 2000 and Council of Europe Convention on Action against Trafficking in Human Beings 2005 (ECAT) defines trafficking:**
- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.



## Non-Punishment Provision (ECAT)

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- **Council of Europe Convention on Action against Trafficking in Human Beings 2005 (into force 1 April 2009) (ECAT)**
- ARTICLE 26
- Non-punishment provision
- Each Party shall, in accordance with the basic principles of its legal system, 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.



## Non-Punishment Provision (Directive)

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- **Preamble to the Directive 2011/36/EU of 5<sup>th</sup> April 2011 on preventing and combating trafficking in human beings and protecting its victims (into effect in UK 6<sup>th</sup> April 2013)**
- Para 14 ‘Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.’





## Non-Punishment Provision (Directive)

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### **Directive 2011/36/EU of 5<sup>th</sup> April 2011 on preventing and combating trafficking in human beings and protecting its victims (into effect in UK 6<sup>th</sup> April 2013)**

Article 8 Non-prosecution or non-application of penalties to the victim Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.



## Overview of State's Obligations

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- The State is obliged to protect VOT by:
  - 1. Prosecuting and punishing individuals responsible for human trafficking (outside the scope of this webinar);
  - 2. Identifying VsOT;
  - 3. Providing protection and support for VsOT;
  - 4. Providing a mechanism for the non-prosecution or punishment of VsOT who commit criminal offences as a direct consequence of being a VOT



# Section Two

Identifying & Providing Protection & Support to VsOT:  
the National Referral Mechanism

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## National Referral Mechanism (NRM)

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- The NRM was set up in order to comply with the State's obligation to identify VsOT
- **Who can make a referral?** A referral to the Single Competent Authority (SCA) can only be made by a first responder, namely one of the following bodies:
- UK police forces, UK Border Force, UK Visas and Immigration (UKVI), Home Office Immigration Enforcement, Gangmasters and Labour Abuse Authority (GLAA), Local authorities, Local authority children's services, Health and Social Care Trusts (Northern Ireland), Salvation Army, Poppy Project, Migrant Help, Medaille Trust, Kalayaan, Barnardo's, Unseen, TARA Project (Scotland), NSPCC (CTAC), BAWSO, New Pathways, Refugee Council



## NRM continued

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- **Duty to refer**
- Since 1<sup>st</sup> November 2015 specified public bodies (includes the police) are under a duty to notify the Home Office about any potential VsOT
- If the potential VOT is a child (under 18) an NRM referral to the SCA must be done and does not require the individual's consent
- If the potential VOT is an adult, their consent is required to make an NRM referral to the SCA. If consent is not given, a referral will not be made but the Home Office will still be notified



## NRM continued

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- **Reasonable Grounds Decision**

- The SCA will aim to provide a ‘Reasonable Grounds Decision’ (RG) as to whether the individual is a victim of modern slavery within 5 working days.
- **Support during the following 45 day period**
- The individual will have access to appropriate help and support, including legal advice, accommodation, protection and independent emotional and practical help according to gov.uk
- NOTE: Debatable how much support is given in practice!!!

### **Conclusive Grounds Decision**

Thereafter the SCA will aim to provide a ‘Conclusive Grounds Decision’ within a further 45 working days

NOTE: Often the process takes longer than the time estimates suggested!!!

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# Section Three

## Protecting VsOT From Prosecution/punishment Before MSA 2015

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## Protecting VsOT from Prosecution/Punishment Pre-MSA

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- Article 26 ECAT and Article 8, required States to at least provide for the possibility of non-prosecution and/or non-punishment of VsOT who committed offences that were directly related to them being a VOT
- Before MSA 2015 there was no specific defence, so, unless duress arose, a VOT would have no defence
- So it fell to the CPS and/or Courts to ensure justice was done in certain cases through:
  - 1. CPS Charging Standards and Review
  - 2. Abuse of Process & Appellate Jurisdiction





## CPS Charging Standards and Review

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One ‘safeguard’ for VsOT who commit criminal offences, lies in the CPS discretion to discontinue cases on evidential and/or interests of justice grounds.

The pre-MSA cases broadly concern one of two scenarios:

- The Court of Appeal considering whether the Crown Court ought to have stayed proceedings on grounds that the decision of the CPS to prosecute/ continue to prosecute a VOT amounted to an abuse of process;
- An appeal of a D who was convicted at trial but was subsequently- often years later- found to be a VOT. In those cases the Court of Appeal had to decide whether the CPS, properly applying their Charging Standards, would have charged D had they known he/she was a VOT



## Pre-MSA case law

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- Number of cases considered when prosecution of a VOT should/ should not continue:
- R v O (2008) EWCA Crim 2835.
- R v M, B and G (2011) 1 Cr.App.R. 12 p.135.
- R v N; R v Le (2012) 1 Cr.App.R. 35.
- R v Vinh Van Dao (2012) EWCA Crim 1717.
- R v L(C); R v N(HV); R v N(TH); R v T(HD) [2013] 2 Cr.App.R.23.
- R v Okedare [2014] 3 All E.R. 109.
- R v Joseph [2017] 1 Cr.App.R. 33 (2017 appeal, but offences pre-MSA)
- R v S(G) [2019] 1 Cr.App.R. 7



## Principles: No blanket immunity

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- **R v M, B and G (2011) 1 Cr.App.R. 12 p.135.**
- Para 13, [Article 26]“... **does not say that no trafficked victim should be prosecuted, whatever offence has been committed.** It does not say that no trafficked victim should be prosecuted when the offence is in some way connected with or arises out of trafficking. It does not provide a defence which may be advanced before a jury. What it says is no more, but no less, than that **careful consideration must be given to whether public policy calls for a prosecution and punishment when the Respondent is a trafficked victim and the crime has been committed when he or she was in some manner compelled (in the broad sense) to commit it. Article 26 does not require a blanket immunity** from prosecution for trafficked victims” [LM, § 13].



## Principles: Nexus of Compulsion/ Public Interest

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- When should a VOT not be prosecuted?
- *“There is normally no reason not to prosecute, even if the Respondent has previously been a trafficked victim, if the offence appears to have been committed outwith any reasonable nexus of compulsion (in the broad sense) occasioned by the trafficking, and hence is outside Article 26” (para 14(iv))*
- *“A more difficult judgment is involved if the victim has been a trafficked victim and retains some nexus with the trafficking, but has committed an offence which arguably calls, in the public interest, for prosecution in court. ... In such a case, the question which must be actively confronted by the prosecutor is whether or not the offence committed is serious enough, despite any nexus with trafficking, to call for prosecution.” (para 14(v))*



## Principles: Nexus of Compulsion/ Public Interest

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- R v L(C); R v N(HV); R v N(TH); R v T(HD) [2013] 2 Cr.App.R.23- decision after the inception of EU Directive. Previous case law considered.
- *‘The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child Respondent) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals.’ (para 13)*
- *“the distinct question ... is the extent to which the offences with which he is charged ... are integral to or consequent on the exploitation of which he was the victim” (para 33)*



## Principles: Nexus of Compulsion/ Public Interest

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- R v Joseph [2017] 1 Cr.App.R. 33
- *Is there a **nexus** between the crime committed by the Respondent and the trafficking? In the case of adults it is necessary to assess whether the Respondent had been **compelled** to commit the crime by considering whether the offence “was a **direct consequence** of, or **in the course of trafficking/slavery** and whether the criminality is **significantly diminished or effectively extinguished** because no realistic alternative was available but to comply with the dominant force of another” (para 21)*



## Principles: Nexus of Compulsion/ Public Interest

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- In a nutshell, the approach taken by the Courts in these appeals, was to consider the following issues when deciding whether a D should have been prosecuted:
  - 1. Was D a VOT?
  - 2. To what degree was D compelled to commit the offence by virtue of being a VOT? (the Nexus of Compulsion Issue)
  - 3. How serious was the offence committed and to what extent did the public interest in prosecution persist? (the Public Interest issue)



## Pre-MSA Remedy

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- In the pre-MSA cases, where the appellate court, having applied those considerations, concluded that the CPS would or should not have proceeded, appeals were allowed on that basis.

This involved the appellate court acting as a court of review of the decision to prosecute.

The Crown Court were similarly capable of acting as a court of review of the decision to prosecute and, where it concluded the CPS should have discontinued proceedings, was able to exercise the power to stay proceedings on grounds of abuse of process

The following usual principles did not apply to these pre-MSA cases:

- The exercise of Prosecutorial Review is not generally a matter for judicial review;
- Abuse of process only applied in situations where no fair trial was possible or where the prosecuting authority had acted in bad faith





## A different approach to Abuse of Process; a merits test

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- **R v L(C); R v N(HV); R v N(TH); R v T(HD) [2013] 2 Cr.App.R.23 para 17:**
- *‘It may be that the submissions advanced in erroneous reliance on Waya stem from a fear that the court will do no more than review the prosecutor’s decision on traditional Wednesbury grounds and decline to interfere, even though its own conclusion would be that the offences were a manifestation of the exploitation of a victim of trafficking. For the reasons we have already given, no such danger exists. In the context of an abuse of process argument on behalf of an alleged victim of trafficking, the court will reach its own decision on the basis of the material advanced in support of and against the continuation of the prosecution. Where a court considers issues relevant to age, trafficking and exploitation, the prosecution will be stayed if the court disagrees with the decision to prosecute. The fears that the exercise of the jurisdiction to stay will be inadequate are groundless.’*



## Weight given to CG decision

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- Para 28
- *Neither the appellants nor the interveners accept that the conclusive decision of UKBA (or whichever department becomes a competent authority for these purposes) is determinative of the question whether or not an individual has been trafficked. They, of course, are concerned with the impact of a decision adverse to the individual. We are asked to note that the number of concluded decisions in favour of victims of trafficking is relatively low, and it seems unlikely that a prosecutor will challenge or seem to disregard a concluded decision that an individual has been trafficked, but that possibility may arise. 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.*



# Section Four

The MODERN SLAVERY ACT 2015

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## When MSA came into effect

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- MSA came into effect 26<sup>th</sup> March 2015
- Designed to provide the safeguard of a defence for VsOT who committed a criminal offence as a consequence of being a VOT
- No retrospective effect, meaning the pre-MSA case law will still apply to current cases in the following situations:
  - A new prosecution of an offence dated pre-26<sup>th</sup> March 2015;
  - An appeal involving conviction for an offence dated pre-26<sup>th</sup> March 2015. E.g. where D has recently disclosed details that lead to a CG decision being made years after an earlier conviction



# Overview of MSA Defence

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- The elements of the defence are different for children (under 18) than an adult:
  - S45(1) Adults
  - S45(4) Children
- Where does burden lie?
  - Evidential burden on D to raise the defence
  - Burden to disprove to the criminal standard then lies with the Prosecution



## S45 (1) MSA (adults)

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*(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.*



## S45 (1) MSA (adults) continued

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*(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 section 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.*



## S45 (4) MSA (children)

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*(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.*





## Key differences between ss1 & ss4

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### **Nexus between the trafficking and the commission of the offence:**

- Adult: compulsion required
- Child: direct consequence

### **Reasonableness test**

Reasonable person, with similar characteristics in same situation:

- Adult: would have no realistic alternative;
- Child: would do that act



# Section Five

CPS Review

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<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>

## **A four-stage approach to the prosecution decision**

- When applying the Full Code Test in the Code for Crown Prosecutors, Prosecutors should adopt the following four-stage assessment:
  1. Is there a reason to believe that the person is a victim of trafficking or slavery?
    - If yes, move to Question 2.
    - If not, you do not need to consider this assessment further.
  2. Is there clear evidence of a credible common law defence of duress?
    - If yes, then the case should not be charged or should be discontinued on evidential grounds.
    - If not, move to Question 3.



## CPS Review continued

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3. Is there clear evidence of a statutory defence under Section 45 of the Modern Slavery Act 2015?

- If yes, then the case should not be charged or should be discontinued on evidential grounds.
- If not, move to Question 4.

4. Is it in the public interest to prosecute? Even where there is no clear evidence of duress and no clear evidence of a s.45 defence or where s.45 does not apply (because the offence is excluded under Schedule 4) this must be considered. In considering the public interest, Prosecutors should consider all the circumstances of the case, including the seriousness of the offence and any direct or indirect compulsion arising from their trafficking situation; see *R v LM & Ors* [2010] EWCA Crim 2327.”



# Section Six

In the Magistrates' Courts

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## In the magistrates' courts

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Points to consider if the prosecution continue with criminal proceedings against a VOT in the magistrates' courts:

- Timely referral
- Representations (low-level offences)
- Adjournments
- YOUTHS!
- Challenging the decision



## In the magistrates' courts: Jurisdiction

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### ***R v Horseferry Magistrates' Court ex parte Bennett [1994] 1 AC 42***

in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures [...] this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken.



## In the magistrates' courts: Jurisdiction (continued)

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### ***R (Kay) v Leeds Magistrates' Court* [2018] EWHC 1233 (Admin)**

(1) This court and the Magistrates' court, in principle, have concurrent jurisdiction, save for a limited category of cases, identified in *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] AC 42 HL , involving infractions of the rule of law outside the narrow confines of the actual trial or court process – where magistrates do not have such jurisdiction, or should not exercise such jurisdiction.

(2) Thus, the wide category of cases over which the Magistrates' court has jurisdiction includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly – including, since a magistrate has jurisdiction to refuse to issue a summons that is vexatious, the jurisdiction to stay proceedings on such a summons at a later stage.





## In the magistrates' courts: Jurisdiction (continued)

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(3) It is, however, open to magistrates in a case outside the *Bennett* category to require the matter to be pursued in this court.

(4) The fact that the Magistrates' court has a duty to send an indictable only case to the Crown Court "forthwith" may not necessarily preclude it from exercising its abuse of process jurisdiction, but where the point is novel or complex, the Magistrates' court should normally leave it for resolution in the Crown Court, or this court, as appropriate.



# Section Seven

R v DS [2020] EWCA Crim 285

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## R v DS [2020] EWCA Crim 285

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- DS- charged PWITS- raised MSA defence- recruited when a child and homeless and subjected to threats
- Referred NRM- Positive CG decision
- CPS reviewed and decided to proceed
- Abuse of Process Application on basis of principles of R v L
  - CG decision- not any proper basis to contradict
  - CC should follow the finding of SCA and stay proceedings
  - Judge stayed
- Prosecution appealed terminating ruling



- Para 40
- *‘In our judgment, the result of the enactment of the 2015 Act and the section 45 statutory defence is that the responsibility for deciding the facts relevant to the status of DS as a Victim of Trafficking is unquestionably that of the jury. Formerly, there was a lacuna in that regard, which the courts sought to fill by expanding somewhat the notion of abuse of process, which required the Judge to make relevant decisions of fact. That is no longer necessary, and cases to which the 2015 Act applies should proceed on the basis that they will be stayed if, but only if, an abuse of process as conventionally defined is found.’*



## The Decision in DS in a nutshell

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- By enacting the MSA and providing a statutory defence, the State has discharged its obligations under Article 26 ECAT
- There is no longer a need for the Courts to review the decision to prosecute or to employ a special ‘abuse of process’ test
- Abuse of process will only apply in post-MSA cases on traditional terms:
  - Where a fair trial is not possible
  - Where there has been misconduct or mala fides by the prosecuting authorities
- Even where there is a positive CG decision, the CPS can proceed. It will be a matter for the jury



# Section Eight

Issues Going Forward

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## To Refer or not to Refer?

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### Pros

- NRM procedure remains (in fact with children even without consent it is mandatory for police to make referral)
- CPS obliged to review the case and may discontinue following a positive CG decision (para 41)
- SCA's review may unearth helpful admissible evidence/ cause CPS to provide useful unused evidence

### Cons

- SCA's review may unearth unhelpful admissible evidence



## To Adjourn or not to Adjourn?

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- The problem is that there has been a creeping disregard for CG decisions.
- Recent case where an NRM referral was pending and the CPS indicated they would proceed irrespective of the decision AND the Court proceeded with the trial. Beggars the question, whether court proceedings should be delayed pending an NRM referral.
- CPS Guidance:
- ***‘The duty to make proper enquiries and to refer through the National Referral Mechanism (NRM)***
- *In considering whether a suspect might be a victim of trafficking or slavery, as required in the first stage of the assessment, Prosecutors should have regard to their duty to make proper enquiries in criminal prosecutions involving individuals who may be victims of trafficking or slavery.’*





## To Adjourn or not to Adjourn?

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*R v DS para 41:*

- *‘We consider that the CPS Guidance stated above correctly states the law and that if it is properly applied the CPS will comply with its legal obligations. The prosecutor must therefore take a Conclusive Grounds decision by the Single Competent Authority into account in deciding*
  - *whether a defendant is a Victim of Trafficking; and*
  - *whether the offending has a very close nexus with the exploitation.’*
- Begs the question, how can the CPS be faithful to its duties of review by proceeding to trial before having the CG decision?
- The decision in *DS* does not obviate the CPS’s duty of review!!!!



## Joinder/Severance

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- Although the Court has no power to interfere with a CPS decision to prosecute, it does have discretion to order separate trials
- Where CPS apply to join D to a multi-handed indictment that includes the individual(s) said to have trafficked D, you can properly apply for severance
- How could D have a fair trial if he were to be too scared to give evidence of his trafficking because he is sharing the dock with his trafficker(s)?
- Should the Court not protect D from potential re-victimisation by expecting him to share the same dock as his trafficker(s)?



## Is a CG decision admissible?

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- This issue was left unresolved in the case of *R v DS* as it was not an issue properly before them (para 43)
- There is a pending judicial review that is to consider that issue.
- What judicial guidance is there on the issue?



## Is a CG decision admissible? continued

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*R v S(G) [2018] EWCA Crim 1824 para*

- *‘Before us, no question arises as to the admissibility of these materials as such. That is not the case as to their admissibility at trial, where, to put it no higher, the admissibility of both the decisions in question and the underlying reasoning must be regarded as unlikely on what may be broadly (if very loosely) described as Hollington v F Hewthorn & Co Ltd [1943] KB 587 grounds. That said:*



## Is a CG decision admissible? continued

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- *(i) Had the FTT Decision and the CA Minute been available at the time of trial, we regard it as overwhelmingly likely that, in the interests of justice and fairness, the Crown would have been required to make admissions as to their recognition of the applicant as a VOT—so that, in practical terms, any admissibility difficulties at trial would have been resolved.*
- *(ii) Whatever the difficulties of admissibility at trial, we would not regard them as outweighing our conclusion, on the basis of all the other relevant factors for the purposes of section 23 , that the materials comprising the First Part should be admissible before us. We proceed accordingly.'*



## Is a CG decision admissible? continued

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As things stand, it can be argued:

- *R v S(G)* authority for an agreed fact re CG decision. CPS may still agree in certain cases Eg where it is agreed D is a VOT but Prosecution say insufficient level of compulsion/ reasonableness test not met
- Where CPS entirely dispute the CG decision and do not concede an agreed fact, it is still worth making an application to admit CG decision as hearsay s114(1)(d) interests of justice, on basis that the decision maker is giving admissible expert opinion

(rather like police officers who are ascribed specialist knowledge of the mechanics of drug trafficking!)



## Supporting evidence

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- Evidence considered by SCA may itself be admissible even if the CG decision is not;
- Psychiatric evidence may be admissible E.g. a diagnosis of PTSD that is consistent with the traumatic events of D's trafficking



# Thank you

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