Neutral Citation Number: [2025] EWCA Crim 1205

Case No: 202403821 B2

IN THE COURT OF APPEAL, CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT AYLESBURY
HHJ Sheridan
T2022 0009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/09/2025

Before:

LORD JUSTICE HOLROYDE
MRS JUSTICE MCGOWAN
and
MR JUSTICE NICKLIN

- -

Between :

LURDITA BANIULYTE	**Applicant**
(formerly referred to as "ARW")	
- and -	
THE KING	**Respondent**

- -
- -

Paramjit Ahluwalia (assigned by **the Registrar of Criminal Appeals**), and **Philippa Southwell** of **Southwell and Partners**, for the **applicant**
Simon Ray KC (instructed by **CPS Appeals & Review Unit**) for the **respondent**

Hearing dates: 8 May 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holroyde:

1. The applicant was convicted of drugs offences. She seeks an extension of time of more than two years to apply for leave to appeal against her convictions, principally on the grounds that she was a victim of modern slavery and human trafficking ("VMS"/ "VOT") and entitled to put forward the statutory defence under s45 of the Modern Slavery Act 2015 ("MSA 2015"). She also applies to adduce fresh evidence, and she seeks a reporting restriction and/or a withholding order so that she may remain anonymous. Her applications have been referred to the full court by the Registrar.

2. The applications in relation to anonymity raise issues as to the balance between the applicant's rights under Article 8 of the European Convention on Human Rights ("the Convention") and the important principle of open justice. We shall address those issues later in this judgment. At this stage, it suffices to say that, for the reasons which we shall explain, the applications are refused. The applicant is therefore named in this judgment.

3. At the outset, we express our gratitude for the assistance we have received from Ms Ahluwalia for the applicant and Mr Ray KC for the respondent, neither of whom appeared below. The submissions on both sides were of a very high quality.

Summary of the facts:

4. For convenience, and intending no disrespect, we shall for the most part refer to persons by their surnames only.

5. In September 2021, in Aylesbury, the applicant (then aged 27) was seen to supply three wraps of class A drugs to a known drug user. The applicant was arrested as she made her way to a flat which was occupied by Michael Baldwin, an alcoholic, but had been taken over by other persons and used to deal drugs. She was found to be in possession of wraps of heroin and cash. Inside the flat, police found her belongings; 40 wraps of crack cocaine; 22 wraps of heroin; and a mobile phone which was clearly used for drug dealing.

6. When interviewed under caution, the applicant made no comment.

7. In February 2014 the applicant had pleaded guilty to offences of possession with intent to supply of cocaine and heroin, committed when she was aged 19 ("the previous offences").

The criminal proceedings:

8. The applicant was charged with two offences of being concerned in the supply of a controlled drug (crack cocaine – count 1, and diamorphine – count 2), and two offences of possessing a controlled drug of class A with intent (crack cocaine – count 3, and diamorphine – count 4).

9. The applicant was sent for trial at the Crown Court. Her representative in the magistrates' court stated on the Better Case Management form ("the BCM form") that the applicant was:

> "… potentially the victim of modern slavery, there is also a possible duress defence in relation to the supply of drugs. She has been forced to sell drugs to pay off a debt owed to dealers. She has been the victim of serious violence and threats."

10. Another accused, Jamie O'Connor, was charged with offences of being concerned in the supply of drugs from Baldwin's flat, and with an offence of requiring Baldwin to perform forced or compulsory labour, contrary to section 1(1)(b) of the MSA 2015.

11. In November 2021 the applicant filed a defence statement saying that she had acted under duress: she was a drug user, in debt, and believed that threats towards her or her family would be carried out if she did not supply drugs to others. Her statement said that she had been escorted to Baldwin's flat by two men, and the presence of weapons in the flat reinforced her fears.

12. In a written submission in January 2022, the applicant's representatives referred to the charges against O'Connor, and invited the prosecution to review whether the applicant's prosecution was in the public interest.

13. Later that month, the applicant filed a supplementary defence statement referring to Baldwin's account of having been made to do acts against his will. Her counsel again invited the prosecution to review the case, on the ground that the applicant was as much a victim as Baldwin was.

14. O'Connor pleaded guilty to offences of being concerned in the supply of diamorphine and crack cocaine. He maintained his not guilty plea to the charge under s1(1)(b) of the MSA 2015, which was ordered to lie on the file.

15. The applicant did not apply to stay her prosecution as an abuse of the process. In August 2022, she stood trial in the Crown Court at Aylesbury, before HH Judge Sheridan and a jury.

16. The prosecution alleged that the applicant was knowingly involved in the supply of class A drugs. They relied on the 2014 convictions as showing a propensity to become involved in supplying class A drugs to others.

17. Baldwin gave evidence for the prosecution . He stated that the applicant was doing what she was told and seemed "all right with it": she chopped up drugs, and had a say in whether she worked or not.

18. The applicant did not seek to rely on a statutory defence under s45 of the MSA 2015. Her defence at trial was one of duress. She did not dispute the facts alleged against her, and accepted that, but for duress, she would be guilty of the offences charged.

19. The applicant gave evidence to the following effect: born in Lithuania, she came to the United Kingdom when aged 11; began using class A drugs when aged 17 or 18; and committed the offences in 2013 because she was a heroin addict, forced to supply drugs to repay her drug debt. She feared she would be killed, or her family hurt, if she did not comply.

20. As to the present offences, the applicant's evidence was that she had been taken from Bognor Regis to Baldwin's flat in Aylesbury, and made to supply drugs to others, by

men related to those of whom she had been in fear in 2013. She stated that the men had threatened and sexually abused her; they had weapons in the flat, and she feared death or serious injury to herself, her mother and her sister if she did not comply.

21. The judge directed the jury as to the defence of duress, making clear that it was for the prosecution to disprove that defence, and provided a route to verdict which required the jury to consider five questions: (1) was the applicant threatened in the way she said she was? (2) did she do what she did because she genuinely and reasonably believed that if she did not do it, she would be killed or seriously injured either immediately or almost immediately? (3) before the applicant acted as she did, did she have an opportunity to escape from/avoid the threats without death or serious injury to herself which a reasonable person in her situation would have taken? (4) would a reasonable person in the applicant's situation, and believing what the applicant did, have been caused to do what the applicant did? (5) had the applicant voluntarily put herself in a position in which she knew or ought to have known she might be compelled to commit crime by threats of violence made by other people?

22. The judge also directed the jury as to the previous offences, and the applicant's alleged propensity to commit offences of the kind charged.

23. The jury returned guilty verdicts on all counts. At a later hearing, the applicant was sentenced on each count to concurrent terms of 40 months' imprisonment.

24. No appeal was brought at the time. However, the applicant subsequently instructed fresh legal representatives, and the present applications were made.

The grounds of appeal:

25. The grounds of appeal are set out in 14 paragraphs, but can conveniently be summarised as being based on the following five submissions (to which, for convenience, we shall refer as grounds 1-5):

    i) There were clear indicators that the applicant was a VMS, but the police failed to comply with their positive duty under Article 4 of the Convention to investigate and to refer the applicant to the National Referral Mechanism ("NRM").

    ii) In contrast to the position with Baldwin, the Crown Prosecution Service ("CPS") failed to apply and review the public interest test in the applicant's case.

    iii) The applicant's prosecution was an abuse of the process of the court.

    iv) If the statutory defence under s45 of the MSA 2015 had been advanced at trial, it would probably have succeeded: it is separate and distinct from the defence of duress.

    v) The judge's directions as to counts 3 and 4, and as to the issues of bad character and propensity, were insufficient and wrong.

26. The applicant's primary submission is that the above grounds are made out on the evidence and indicators which were available at the trial; but she seeks in addition to

rely on a further statement by herself, and on the following, as fresh evidence in support of her appeal:

i) In a report dated 6 December 2023, a forensic psychologist opined that the applicant met the criteria for a diagnosis of post-traumatic stress disorder ("PTSD"), depressive disorder and anxiety disorder.

ii) On 9 January 2024, the Immigration Enforcement Competent Authority ("IECA") made a conclusive grounds decision in the applicant's favour, that on the balance of probabilities she was a VMS in 2020-21 for the specific purposes of forced criminality.

27. It is relevant to note that on 22 September 2023 the IECA had informed the applicant that, after assessing her case, there were no reasonable grounds to conclude that she was a VMS. The IECA referred to inconsistencies between the account which the applicant had given to them, and her evidence at trial. A month later, however, the IECA made an initial decision that there were reasonable grounds to conclude that she was a VMS. That decision was confirmed on 9 January 2024, after the IECA had been asked to consider the psychologist's report.

The appeal proceedings:

28. In support of her application for an extension of time, the applicant relies on a statement by the solicitor whom she instructed in January 2024. It sets out the action taken, and the delays encountered, since then.

29. Initially, the respondent did not intend to oppose any of the applications. However, at a short hearing on 18 March 2025 the court raised a number of issues in respect of which it wished to receive more detailed submissions, and gave directions in that regard. The parties complied with those directions, and the applicant's representatives made further enquiries of her trial representatives.

30. As a precautionary measure, and pending full argument, the court directed that the applicant's name should be anonymised as "ARW" when listing both that hearing and the subsequent full hearing, and that her true name should not be mentioned in the course of either hearing.

31. At the full hearing on 8 May 2025, the respondent opposed the applications for anonymity. However, whilst recognising that it was for the court to determine whether the convictions were safe, the respondent did not seek to oppose the application for leave, or the appeal, on the merits.

32. We received detailed submissions on all matters. We shall summarise them quite briefly, but we have taken into account all the many points made on each side. Before doing so, however, it is convenient to refer to some relevant statutory provisions and case law.

The legal framework:

33. Article 4 of the Convention, incorporated by the Human Rights Act 1988, provides that:

> "1. No one shall be held in slavery or servitude.
>
> 2. No one shall be required to perform forced or compulsory labour."

34. Article 8 of the Convention provides that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

35. Decisions of the European Court of Human Rights, and of this court, establish that Article 4 entails a procedural obligation to investigate situations of potential trafficking: see *R v AFU* [2023] EWCA Crim 23, [2023] 1 Cr. App. R. 16 at [81], where the court emphasised the importance of early identification of actual or potential VOTs in order to respect their Article 4 rights. In compliance with its duty as a party to the European Convention on Action against Trafficking in Human Beings, the United Kingdom has established the NRM, to which police officers should refer the case of a person whom they suspect may be a VOT.

36. The MSA 2015, s1, provides for the offences of slavery, servitude and forced or compulsory labour. By s1(5):

> "(5) The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour."

37. Section 2 of the MSA 2015 provides for the offence of human trafficking. By s2(1), it is an offence to arrange or facilitate the travel of another person ("V") with a view to V being exploited. By s2(2):

> "It is irrelevant whether V consents to the travel (whether V is an adult or a child)."

38. An offence under s2 of the MSA 2015 is one of the types of offence to which s1 of the Sexual Offences (Amendment) Act 1992, as amended, applies. So far as is material for present purposes, s1 provides:

> "**1 Anonymity of victims of certain offences**
>
> (1) Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter

> relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence has been committed.
>
> (2) Where a person is accused of an offence to which this Act applies, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed ('the complainant') shall during the complainant's lifetime be included in any publication."

39. So far as is material for present purposes, s45 of the MSA 2015 provides:

> "**45 Defence for slavery or trafficking victims who commit an offence**
>
> (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 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 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.
>
> …
>
> (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 section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.
>
> … "

40. This court has in recent years considered a number of appeals in which an appellant has challenged a conviction on the ground that, through incorrect advice or a lack of advice, the statutory defence under s45 of the MSA 2015 was not advanced at trial. In *R v BTE* [2022] EWCA Crim 1597 (a case in which the appellant had pleaded guilty), this court at [24] confirmed earlier decisions to the effect that an appellant must show he or she was:

> "… deprived of a defence that quite probably would have succeeded, such that a clear injustice has been done."

The submissions to this court - the grounds of appeal:

41. We shall summarise the submissions as to the merits by reference to the five grounds set out in paragraph 25 above.

42. **Ground 1:** Ms Ahluwalia submits that the convictions are unsafe because the police failed to comply with their Article 4 duty to investigate the applicant's case and to refer her into the NRM, despite having taken those steps in Baldwin's case and despite having considered O'Connor as a possible perpetrator of modern slavery.

43. Mr Ray realistically accepts that the police should have referred the applicant into the NRM, but failed to do so. He has not been able to identify why that failure occurred.

44. **Ground 2:** Ms Ahluwalia relies on the CPS's published Guidance on Modern Slavery and Human Trafficking, which requires a four-stage approach to the decision whether to prosecute:

> "1. Is there a reason to believe that the person is a VMS? If yes, move to Q2. 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 Q3.
>
> 3. Is there clear evidence of a statutory defence under s45 of the 2015 Act? If yes, then the case should not be charged or should be discontinued on evidential grounds. If not, move to Q4.
>
> 4. Is it in the public interest to prosecute? This must be considered even where there is no clear evidence of duress, or all the elements of the statutory defence under s45, or where the offence is excluded under Schedule 4."

45. Ms Ahluwalia submits that the CPS did not review the applicant's case in relation to the potential statutory defence even though it had been raised in the BCM form and was in any event raised by Baldwin's evidence.

46. Mr Ray, again realistically, accepts that the CPS should have reviewed the case in accordance with its Guidance. Again, he is unable to identify any reason for that failure, which occurred despite the course taken in relation to Baldwin. Mr Ray does not, however, accept that such a review would inevitably have led to decision that it would not be fair to try the applicant: he submits that a reasonable prosecutor, properly applying the Guidance, could have concluded that it remained appropriate to continue the prosecution against her.

Ground 3:

47. Ms Ahluwalia relies on case law which establishes that the availability or potential availability of the statutory defence under s45 of the MSA 2015 does not prevent a defendant from making an application to stay a prosecution as an abuse of the process of the court on one of the two well-established grounds for such an application. The present case, she submits, falls under the second of those grounds: it was not fair for the applicant to be prosecuted, because her offending was directly related to the exploitation of her by those whom she feared. She submits that, if that argument had been raised in the Crown Court, the judge would have stayed the prosecution.

48. From that starting point, Ms Ahluwalia submits that the convictions are unsafe because the applicant was not advised that it was open to her to make an abuse application.

49. Mr Ray submits that an abuse application could not have succeeded: had the issue been raised, the failings of the police and the CPS could have been remedied by a belated review of the applicant's case.

50. **Ground 4:** Ms Ahluwalia submits that if the statutory defence under s45 of the MSA 2015 had been advanced, it would probably have succeeded. She argues that that is so, even though the defence of duress failed before the jury, because the s45 defence is not the same in all respects as the common law defence of duress. In particular, the effect of s1(5) of the MSA 2015 is that the statutory defence may succeed even if the applicant consented to any of the acts said to constitute her forced or compulsory labour. Ms Ahluwalia submits that the fifth of the questions which the judge directed the jury to consider (see paragraph 21 above) would therefore not have been expressed in the same terms in relation to a s45 defence. She submits that the verdicts could have been reached on the basis that the jury answered the first four questions favourably to the applicant, but found that she had voluntarily placed herself in the position she was in. On those findings, it is submitted, the defence of duress failed, but the statutory defence could have succeeded.

51. In his response to the further enquiries made after the hearing on 18 March 2025, trial counsel explained that he took the view that both potential defences would require the jury to consider whether the applicant had acted under compulsion; and if the jury rejected that claim in relation to duress (as, in the event, they did), he felt that they would inevitably have rejected it in relation to the s45 defence. His approach had

therefore been to advise the applicant in relation to duress but not in relation to a s45 defence.

52. Ms Ahluwalia accepts that, if the applicant had been fully advised and had then taken a strategic decision to advance only one of what she knew to be two possible defences, this court would have to take those features into account in considering the abuse argument. But, she submits, the applicant was not advised about the possible s45 defence, and is not now seeking to advance an argument which she knew she could have advanced at an earlier stage. Ms Ahluwalia does not criticise trial counsel for taking the approach he did; but she points to *R v BXR* [2022] EWCA Crim 1483 at [10] as authority that an appeal against conviction in circumstances such as these may succeed even though no fault can be shown on the part of the previous legal representatives.

53. Mr Ray accepts that it is possible for a defence under s45 of the MSA 2015 to succeed even though a defence of duress fails. He also accepts that, as the entry on the BCM form shows, the applicant's case has throughout been that she was compelled through fear to move to Aylesbury, and forced to sell drugs on behalf of an organised crime group. He does not suggest that the applicant herself was at fault in failing to advance a s45 defence.

54. **Ground 5:** Ms Ahluwalia submits that the convictions are unsafe because the judge's directions were deficient in two broad respects. First, she submits that in respect of counts 3 and 4, the judge failed to address the relevance of the applicant's evidence that the ongoing coercion to which she was subject included sexual abuse and rape. Secondly, she submits that a consequence of the failure to advance a defence under s45 of the MSA 2015 was that the jury could not consider whether the 2014 convictions were part of a cycle of re-exploitation rather than evidence of a propensity to supply drugs.

55. Mr Ray suggests that this ground is of less significance than the applicant's other grounds of appeal. He accepts, however, that the judge's directions would have been different, in the two respects identified, if the applicant had advanced a statutory defence as well as the defence of duress.

56. The respondent, having carefully considered the cumulative effect of the applicant's grounds, including the further information provided by the applicant does not oppose the appeal. Mr Ray explains this is because:

    i) the applicant's instructions were arguably sufficient to require consideration of the availability of a s45 defence;

    ii) it does not appear that she was advised that such a defence was available;

    iii) whilst there is an overlap between duress and the s45 defence, they are not the same;

    iv) there are therefore grounds for the court to conclude that the convictions are unsafe.

57. Mr Ray helpfully informs us that, if the appeal is allowed, the respondent will not seek an order for a retrial.

The submissions to this court - anonymity:

58. Ms Ahluwalia submits that publication of the applicant's name would unjustifiably interfere with the applicant's Article 8 right to respect for her private and family life. She applies for an order that the applicant's name be withheld from this judgment, and a reporting restriction order pursuant to s11 of the Contempt of Court Act 1981. That section provides:

> "**11 Publication of matters exempted from disclosure in court**
>
> In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

59. Ms Ahluwalia makes detailed submissions which comprehensively, and very helpfully, address the jurisdiction and recent practice of the court.

60. It is not suggested that the applicant is entitled to the automatic reporting restrictions for which s1 of the Sexual Offences (Amendment) Act 1992 provides. Ms Ahluwalia rightly accepts that the applicant is the accused in these proceedings, and therefore not, for the purposes of that Act, the victim of an alleged sexual offence or human trafficking offence: cf *R v Musharraf* [2022] EWCA Crim 678 at [15].

61. The applications are opposed by Mr Ray, essentially on the ground that the applicant has failed to show that the proposed orders are necessary.

Analysis – the grounds of appeal:

62. We have found this a troubling case, and have hesitated as to whether we are able to accept the submissions on behalf of the applicant as to an extension of time, and as to the merits of the appeal.

63. The statement helpfully provided by the applicant's solicitor provides a clear and sufficient account of the chronology of relevant matters since she was instructed in January 2024. But it is silent as to why the applicant took no action to initiate an appeal until some 17 months after her conviction in August 2022, and silent as to what prompted the applicant to instruct solicitors in January 2024. The applicant herself has provided no explanation.

64. A convicted defendant who wishes to appeal against conviction must give notice of application for leave to appeal (in the prescribed form, "form NG") within 28 days after the conviction: see s18 of the Criminal Appeal Act 1968 and r39.2(1) of the Criminal Procedure Rules. If notice is not given within that period, an application for an extension of time must be served at the same time as the form NG, and reasons

must be given why the extension should be granted: see Crim PR r36.4 and the Guide to Proceedings in the Court of Appeal, Criminal Division paragraph B.4.1.

65. As this court has repeatedly emphasised, a sufficient explanation must be given for the whole of the period which has elapsed between the expiration of the 28-day time limit and the serving of the form NG. This court will always wish to consider the merits of a proposed appeal before refusing an application for an extension of time; but applicants and their advisers must understand that an extension of time may be refused if only part of the relevant period has been sufficiently explained. Here, the applicant has failed to explain her delay until January 2024. Ms Ahluwalia has made submissions, but it is not for the court to make good any deficiency by guessing at possible reasons.

66. The applicant may therefore consider herself fortunate that we are persuaded that the merits of her appeal are sufficiently strong to justify our granting the necessary extension of time.

67. Turning to the merits, the respondent rightly accepts that there was a failure by both the police and the CPS. We are not, however, persuaded that the convictions are unsafe simply because those failures occurred. The effect of the failures was to deprive the applicant of an opportunity for a decision to be taken not to prosecute her, or to discontinue the proceedings against her, on the ground that she was a VOT/VMS. The failures did not, however, deny the applicant any opportunity to advance her case on the basis that she was a VOT/VMS. On the contrary, the information provided by trial counsel shows that he specifically considered whether to do so, although he decided to focus on the defence of duress. There is nothing to suggest that, if the police and the CPS had carried out the reviews which were required of them, they would have produced evidence supportive of the applicant which was not in any event available to her.

68. We consider next whether the failures of the police and the CPS would have provided a strong basis for an application to stay the applicant's prosecution as an abuse of the process, such that the convictions cannot be regarded as safe.

69. It is appropriate to begin with some general observations as to the abuse of process jurisdiction in cases in which a defendant claims to be a VOT/VMS.

70. There are two well-established categories of case in which criminal proceedings may be stayed as an abuse of the process of the court: where the defendant cannot receive a fair trial ("limb 1"); and where it would be unfair to try the defendant ("limb 2"). A stay for abuse is an exceptional remedy, rarely granted. A defendant who applies under limb 2 faces a particularly high hurdle, because the premise of the application is that a fair trial is possible.

71. Prior to the MSA 2015 coming into force, case law had somewhat expanded the abuse jurisdiction to allow a stay of proceedings where a defendant was found to have been a victim of human trafficking. However, in *R v DS* [2020] EWCA Crim 285, [2021] 1 WLR 303 the court explained that such expansion had been designed to fill what was then a lacuna, but that the 2015 Act had ended the need to do so. At [40], Lord Burnett CJ stated unequivocally that:

> "… 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."

72. In *R v AAD* [2022] EWCA Crim 106, [2022] 1 WLR 4042 the court held that it was possible for a defendant who could potentially rely on a defence under s45 to apply for his prosecution to be stayed as an abuse if it was unfair and oppressive for him to be prosecuted and tried at all. At [120] Fulford LJ stated that a case in which the CPS had unjustifiably failed to take into account its own guidance might in appropriate circumstances be stayed. At [127] he stated that the basis of such an application to stay would be unfairness, oppression and illegality, consistent with the conventional limb 2 type of abuse. He continued:

> "And if there has been an unjustified and material failure to have regard to CPS guidance in this kind of context or an irrational and perverse departure from a conclusive grounds decision in this kind of context then an arguable case of unfairness and oppression and illegality would potentially be there."

73. In *R v AFU* [2023] EWCA Crim 23, [2023] 1 Cr. App. R. 16 the court found on the facts that the appellant had been properly advised about the availability of a s45 defence. However, the prosecution was an abuse of the process because the prosecution had failed to follow guidance which would clearly have resulted in the prosecution being discontinued. Carr LJ (as she then was) said at [139] that it was an exceptional case, where there was a clear abuse of process such that the conviction was unsafe, notwithstanding that the appellant had pleaded guilty At [141] she stated that if the prosecution had complied with its duties:

> "the prosecution would not have proceeded in the first place and/or would not have been pursued and/or the applicant would have had a proper opportunity to apply for a stay".

74. The latter two decisions do not depart from Lord Burnett's clear statement that, in cases of this nature, the jurisdiction to apply for a stay is limited to the conventional two categories to which we have referred. Where a limb 2 abuse is alleged, the applicant must show that to allow the prosecution to continue would be an affront to the conscience of the court.

75. In the circumstances of the present case, we accept the respondent's submission that, if an abuse application had been made, it is by no means certain that it would have succeeded. Serious though the failures of the police and the CPS were, they could have been remedied. If the applicant had made an abuse application in the Crown Court, it would have been incumbent upon her legal representatives to notify the court and the respondent of that application at an early stage. The judge would then have been entitled to adjourn the application so that the police and the CPS could carry out, belatedly, the reviews which they had neglected. It could not then be said that the circumstances demanded the exceptional remedy of a stay of proceedings.

76. On the evidence as it stood pre-trial, it is in our view impossible to say that the result of the belated reviews would probably have been a decision not to prosecute; and if

the reviews concluded that it was appropriate to continue the prosecution, then the application to stay the proceedings as an abuse would inevitably have failed. In those circumstances, trial counsel cannot be criticised for not advising the applicant to pursue an abuse application.

77. It follows that the applicant cannot succeed on the basis of her grounds 1 and 2 alone, or on the basis of a combination of her grounds 1, 2 and 3.

78. The strength of the applicant's case lies in the combination of her grounds 1, 2 and 4. The consequence of the failures by the police and the CPS was that arguments and a statutory defence based upon the applicant's being a VOT/VMS would not be considered by the court unless she raised them at trial. Counsel representing a defendant in such circumstances has to consider the tactical emphasis to be given to particular arguments We can understand why trial counsel in this case felt that the question of whether the applicant acted under compulsion would be a difficulty for her whether considered in the context of duress or of the statutory defence. Viewed in that way, the decision to focus only on the defence of duress may be understandable.

79. The key point, however, is that it was not a decision taken by the applicant. The defence of duress and the statutory defence are not identical, and in some circumstances the latter may succeed even though the former fails. The CPS Guidance therefore requires consideration of both. Here, the statutory defence had been raised by the applicant's initial instructions, and had been mentioned in the BCM form when the criminal proceedings began. As is apparent from the information now before this court, the applicant was in a position – had she been asked – to give more detailed instructions about matters which could support that defence. In those circumstances, the possibility of advancing that defence as well as the defence of duress needed careful consideration by the applicant, based on advice from her counsel.

80. We are grateful to trial counsel for his acceptance that he did not advise the applicant about the possibility of advancing a s45 defence. That has enabled us to accept that this appeal is not an attempt by the applicant to put forward on appeal a defence which she had chosen not to rely on at trial. We regard that as a very important point.

81. We are also grateful to Mr Ray for his very fair assessment of the merits of a s45 defence if it had been put forward at trial, and if more detailed instructions had therefore been taken from the applicant in relation to that defence. It does not appear that the respondent would have been able to adduce evidence to rebut any of the points now advanced by Ms Ahluwalia in support of a s45 defence; and the comparison with Baldwin's position would have been a strong jury point in the applicant's favour.

82. In those circumstances, we are persuaded that the failure to advise the applicant about the statutory defence had the effect of denying her the opportunity to put forward a defence which quite probably would have succeeded, and that the applicant thereby suffered a clear injustice. It follows that the appeal must succeed.

83. We do not think that ground 5 adds anything of substance to the applicant's appeal: no substantial criticism is made of the judge's directions in respect of the issues which were before the jury; and it is trite to say that if an additional and different issue had been raised, the appropriate directions of law would necessarily have been different.

84. In reaching our conclusion as to the merits, we have focused on the evidence which was adduced or available at trial. We think it right formally receive the proposed fresh evidence, and have taken it into account as providing support for our conclusion.

85. We turn to the applications in respect of anonymity.

Analysis – anonymity:

86. The importance of the principle of open justice in criminal proceedings is well-established. It is sufficient for present purposes to cite the following passage from the judgment of Sir Igor Judge P (as he then was) in *In re Trinity Mirror plc* [2008] QB 770 at [32]:

> "In our judgment it is impossible to over-emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offices should not be concealed. Uncomfortable though it may frequently be for the defendant that is a normal consequence of his crime. Moreover the principle protects his interests too, by helping to secure the fair trial which, in Lord Bingham of Cornhill's memorable epithet, is the defendant's 'birthright'. From time to time occasions will arise where restrictions on this principle are considered appropriate, but they depend on express legislation, and, where the Court is vested with a discretion to exercise such powers, on the absolute necessity for doing so in the individual case."

87. Consistently with that principle, the general rule is that the name of an accused will be made public in the hearings in open court (both at first instance and on appeal) and in the decisions and orders of the court. There is no exception to that rule merely because an accused might understandably prefer his name and/or the details of the case not to be made public. Ordinarily, as Lord Sumption explained in *Khuja v Times Newspapers Ltd* [2017] UKSC 44, [2019] AC 161 at [34(2)]:

> "… the collateral impact that [the court] process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public."

88. Any derogation from, or restriction upon, open justice is exceptional and must be based on strict necessity. The derogation or restriction must be shown by "clear and cogent evidence" to fulfil a legitimate aim and to be both necessary and proportionate: see *R v Sarker* [2018] 1 WLR 6023 at [29]; *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645 at [21]; and *R (Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin), [2023] 2 Cr. App. R. 15 at [16].

89. Both the Article 8 right to private and family life, and the Article 10 right to freedom of expression, are qualified rights under the Convention. In *Abbasi v Newcastle upon*

Tyne Hospitals NHS Foundation Trust [2025] UKSC 15, [2025] 2 WLR 815, a very recent decision cited to us by Ms Ahluwalia, the Supreme Court was concerned with issues arising in the context of decisions of the High Court as to whether life-sustaining medical treatment should be withdrawn from a gravely ill child, and in particular as to whether injunctions should be granted to prohibit revelation of the identities of the child, hospital and clinical team. The context of those issues was therefore very different from the context of the present case; but at [128] – [130] the Supreme Court gave guidance which is applicable to cases, such as the present, in which a derogation from the principle of open justice is sought on the basis of the qualified right under Article 8.

90. The Supreme Court identified, at [128], a structured approach in three stages. The court must ask, first, whether there is an interference with a right prescribed by law; secondly, whether the interference pursues a legitimate aim, i.e. an aim which can be justified by reference to one or more of the matters mentioned in Article 8(2) or Article 10(2); and thirdly, whether the interference is necessary in a democratic society.

91. Where the derogation from open justice is sought, based on an argued interference with another qualified Convention right (typically Article 8), the task of the Court was stated by Lord Steyn in *In re S* [2005] 1 AC 593 at [17]:

> "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test…" (emphasis in original)

92. In *Tickle v BBC* [2025] Fam 105 [49] (and in a recent decision of the Civil Division of the Court of Appeal: *PMC v Cwm Taf Morgannwg University Health Board* [2025] EWCA Civ 1126 at [91]), the Master of the Rolls approved what Nicklin J had said about the nature of the *Re S* balance in the context of derogations from open justice in *PMC v A Local Health Board* [2024] EWHC 2969 (KB) at [41]:

> "Whilst, in a very broad sense, in assessing the engaged convention rights on any application for a derogation from open justice, the Court is carrying out a 'balance' between them, the scales do not start evenly balanced. The Court must start from the position that very substantial weight must be accorded to open justice. Any balance starts with a very clear presumption in favour of open justice unless and until that is displaced and outweighed by a sufficiently countervailing justification. That is not to give a presumptive priority to Article 10 (or open justice), it is simply a recognition of the context in which the *Re S* 'balance' is being carried out."

93. In circumstances such as those with which we are concerned, conflicting rights are engaged: the accused seeks a withholding order and reporting restriction order on the

basis that it is necessary to protect his or her Article 8 rights; but the court must also consider the Article 10 rights of others. At [182(16)] the Supreme Court summarised the correct approach to the third question as follows:

> "In answering the last of those questions in relation to article 10, the need for any restriction of freedom of expression must be established convincingly. It must be justified by a pressing social need, and must be proportionate to the legitimate aim pursued. This consideration applies with particular force to preventive restraints on publication, and is reflected in section 12(3) and (4) of the Human Rights Act."

94. The application of that approach requires that, as was said in *Marandi* at [43]:

> "[The] question is not to be answered on the basis of 'rival generalities' but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case."

95. In conducting that close examination, the court must give very substantial weight to the importance of open justice. Criminal proceedings in open court are a matter of legitimate public concern, and there is therefore an important public interest in the reporting of them.

96. The court's decision whether to grant or refuse a derogation from open justice will be determined by the court's assessment of the competing rights: it is not, once that assessment has been made, a matter of discretion.

97. When an application is made to depart from the principle of open justice by granting anonymity to an accused, it is important to distinguish (as Ms Ahluwalia did) between two different types of order: a withholding order (i.e. an order which permits or directs the withholding of the name of the accused and its replacement with a cipher such as "ARW"); and a reporting restriction order (i.e. an order prohibiting publication of the withheld name or any other information that would be likely to identify the person whom the court has directed should be anonymised). It is also important to emphasise that a withholding order is not, in itself, a reporting restriction order.

98. A withholding order is part of the general common law power of a court to regulate its proceedings. It may only be made if the court is satisfied that, if a name were to be mentioned in open court, it would frustrate the administration of justice, and further satisfied that the order is necessary taking into account the public interest in open justice. In practice, it is very rare for an order to be made that the name of an accused be withheld during proceedings in the Crown Court. Usually, such an order is only likely to be justified if there is credible evidence that the accused's life would be at risk if he were identified.

99. A withholding order will prevent the accused's name from being made public as a result of the proceedings, but will not in itself prevent the accused being publicly identified if his or her identity is already known or can be discovered. An application

for a withholding order is therefore usually coupled with an application for a reporting restriction order.

100. It is always necessary for an accused who applies for such orders to identify the precise jurisdictional basis on which the court is invited to make a withholding order and/or a reporting restriction order.

101. Both *Abbasi* and *PMC v Cwm Taf Morgannwg University Health Board* provide authority that, in civil and family proceedings at first instance, the High Court has an inherent power to derogate from the principle of open justice by making both a withholding order and a reporting restriction order where such an order is strictly necessary in the interests of justice.

102. So far as concerns the criminal courts, however, in *Khuja* at [18] Lord Sumption held that:

> "The inherent power of the court at common law to sit in private or anonymise material deployed in open court has never extended to imposing reporting restrictions on what happens in open court. Any power to do that must be found in legislation: *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2005] 1 AC 190."

103. In criminal proceedings, the principal statutory provision under which a reporting restriction can be imposed to enforce the anonymisation of an accused is s11 of the Contempt of Court Act 1981 (quoted at paragraph 58 above). It is important to emphasise two points about that provision. First, the power only arises in support of the prior exercise by the court of a power to withhold the accused's name from the public: it is only when the court, having power to do so, has ordered that the name be withheld that s11 permits the making of an ancillary order to prevent the publication of the name. Secondly, a reporting restriction order under s11 is not retrospective. It follows that, if the court has not made a prior order withholding the name during proceedings in open court, it may well be too late to impose a reporting restriction: see *In re Trinity Mirror plc* at [19]; *R (Press Association) v Cambridge Crown Court* [2013] 1 WLR 1979 at [14]; and *R v Arundel Justices ex parte Westminster Press Ltd* [1985] 1 WLR 708 at pp710H-711C.

104. In the present case, we are concerned with the powers of this court on appeal. Ms Ahluwalia did not suggest that the Crown Court could or should have made orders similar to those which she now seeks.

105. The applicant's name was not withheld during the Crown Court proceedings. Of itself, that fact does not deprive this court of its jurisdiction to make a withholding order in respect of these appeal proceedings: having considered helpful submissions on the point, we are satisfied that the phrase "a court (having power to do so)" in s11 refers specifically to the court presently seised of the proceedings, and not to any court which has heard the case at an earlier stage. As we have indicated in paragraph 30 above, this court has withheld the applicant's name, and so in principle we have preserved the power to make reporting restrictions under s11.

106. However, in deciding whether to exercise that power, it is important to take into account the fact that the applicant's name was not anonymised in the Crown Court. Any court asked to impose reporting restrictions should consider the impact of any order on future reporting of the proceedings, having regard to any previous reporting of the identity of the accused; and the effect of past lawful reporting of the name of the accused may mean it is too late to seek anonymity in appeal proceedings. Among the potential consequences which need to be considered are the effect on past lawful reporting of the proceedings in the Crown Court if an order for anonymity and a reporting restriction order is made by this court (would there, for example, be a risk of "jigsaw identification" from a combination of facts and circumstances recorded in the judgment of this court, and the effect on future reporting if the outcome of an appeal to this court were an order for a retrial (for example, could the accused be named at the retrial if a withholding order had been made in this court; and if the retrial jury were told that there had been a previous trial, would the press nonetheless be unable to refer to reports of the first trial because to do so would identify the accused?)..

107. In appeals of this kind, an applicant for anonymity often relies on the fact that he or she has been granted anonymity in other proceedings, such as immigration and asylum proceedings before a tribunal. That fact is of course always relevant, and may often provide powerful support for the application in this court, particularly if a refusal to grant anonymity would frustrate the order made in other proceedings. Even here, however, the granting of anonymity by this court should not be treated as a matter of routine. This court must consider whether some lesser derogation from open justice will avoid any risk of "jigsaw identification" of the applicant in this court as being person who was anonymised in the other proceedings. By way of example, it may be possible to avoid that risk by omitting from the judgment in this court any mention of particular facts and circumstances which would enable a link to be made to the other proceedings.

108. In the present case, in contrast to many cases involving VOT/VMSs, the applicant has not claimed asylum, and there are no current or past proceedings before an immigration tribunal. This is not, therefore, a case in which the applicant can submit that refusal of her application for anonymity in these proceedings would frustrate an existing order. Ms Ahluwalia submits, however, that this court generally does grant anonymity in human trafficking/modern slavery cases. She has helpfully taken us to a number of previous decisions of this court, and relies on what she submits has become a recognised practice.

109. Having reviewed those previous decisions, we accept that anonymity has often been granted by this court when hearing applications and appeals in such cases. In many of the cases, the issue has been addressed very briefly. Reference has often been made to the unreported decision in *R v L and N* [2017] EWCA Crim 2129, which may have come to be regarded as providing general guidance. It is therefore important to note that the court in *L and N* at [15] expressly declined an invitation to give general guidance, and made clear that it was deciding the anonymity applications in the two cases before it on a fact-specific basis. It follows that the anonymity orders which the court there made in each of the cases did not imply any presumption in favour of such an order: the evidence in each case satisfied the court that anonymisation was strictly necessary.

110. An example of the appropriate fact-specific approach is provided by one of the cases cited to us, *R v CS* [2021] EWCA Crim 134. The court there considered two unconnected cases, and concluded that one applicant was exposed to a risk which justified anonymity, whilst the other had provided no evidence that revealing his name would expose him to any risk.

111. We do not think anything will be gained by an exegesis of the decisions in the cases cited. We hope it will be helpful to judges and practitioners to summarise the approach which, in accordance with the principles to which we have referred, should be taken when an accused person, who is or may be a VOT/VMS, appeals to this court and requests anonymisation:

i) Although issues as to anonymity arise more frequently in such cases than in other applications and appeals, a VOT/VMS has no automatic right to anonymity, and no statutory provision imposes automatic reporting restrictions in favour of an adult accused who puts forward a defence under s45 of the MSA 2015. An order derogating from open justice should therefore not be made on a routine basis. As in any other case, a person seeking anonymity bears the burden of demonstrating by cogent evidence why a derogation is strictly necessary.

ii) Any application for anonymity must be made when the application for leave to appeal is lodged. The Criminal Appeal Office can then arrange for the applicant's name to be replaced by a cipher for listing and other purposes: that will be a convenient safeguard, but does not imply that the court will necessarily grant the application.

iii) The application must set out the order that is sought, the jurisdiction under which it can be made, and why it is strictly necessary for the order to be granted. With effect from 6 October 2025, a revised Criminal Procedure Rule 6.4 will apply to applications for reporting restrictions and other applications to derogate from open justice. It sets out what is required of an applicant.

iv) Any application for an anonymity order (and reporting restrictions) must be supported by evidence which establishes convincingly the need for the derogation(s) sought. Where it is contended that, if anonymity is not granted, there is a credible risk of physical harm or death, the nature of the threat and why an order for anonymity would avoid or reduce that risk must be explained.

v) If anonymity is sought on the grounds that the applicant has been anonymised in other proceedings, full details of those proceedings, and a copy of the order granting anonymity, must be provided. If it is contended that there is a risk of 'jigsaw identification' if an anonymity order is not granted, the nature of that risk and how it arises must be explained and demonstrated.

vi) The evidence submitted in support of the application must explain the extent to which there has been reporting of the identity of the person seeking anonymity and reporting restrictions as a result of the proceedings at first instance. Such evidence is necessary to assist this court to decide whether it is too late to impose an anonymity order.

vii) When the case comes before this court for hearing, it will generally be appropriate to address the issue of anonymisation at the outset. The court may often think it right to make a withholding order and a reporting restriction order on a temporary basis, pending judgment or further order.

viii) The court must make a fact-specific assessment of the competing rights which are in issue, and determine whether the applicant has established that it is strictly necessary to derogate from open justice.

ix) The court should ensure that any withholding order and/or reporting restrictions are clearly stated in the orders made, and explained (at least briefly) in the judgment. When approving its judgment for publication, the court should similarly ensure that the frontispiece is endorsed with a clear warning as to any relevant order which has been made.

112. We return to the applications made in the present case.

113. The applicant relies on the proposed fresh evidence referred to in paragraph 26 above. None of that evidence specifically explains why the orders sought are necessary in the context of this appeal. Ms Ahluwalia submits, however, that it is self-evident, particularly having regard to the psychologist's report, that disclosing the applicant's identity would seriously interfere with her Article 8 rights; whereas, she submits, disclosing the applicant's identity would not add significantly to the public's understanding of this case. In those circumstances, she submits, anonymisation is necessary and proportionate.

114. In support of her submissions, Ms Ahluwalia points to a passage in *AAD* at [3] in which the court said that the United Kingdom's international obligations under various instruments aimed:

> "…to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings."

115. Mr Ray submits that the applicant has not satisfied the burden of establishing, by clear and cogent evidence, that it is necessary to derogate from open justice. He points out that the applicant has not sought asylum; has not been involved in immigration proceedings in which an order has been made for her anonymity; is not at risk of re-trafficking; and does not assert that refusal of her application would put her at risk of harm.

116. Even accepting that the applicant is a VOT/VMS, the points made by Mr Ray are in our view compelling. This is not a case in which the applicant suggests that there is evidence of a threat which would engage her rights under Articles 2 (right to life) or 3 (prohibition of torture and of inhuman or degrading treatment) of the Convention. In contrast to the facts of some of the cases cited to us, there is here no evidence that identification of the applicant by this court would expose her to risk of reprisals by those whom she feared. She made her allegations against those persons at her trial three years ago, when she was not anonymised, and her identity has in any event been known to the men concerned for several years. In those circumstances, granting her

anonymity in these proceedings could not provide her with any meaningful additional protection.

117. Similarly, we are not persuaded that identifying the applicant as a victim of trafficking and sexual violence would be so serious a breach of her Article 8 rights as to necessitate a derogation from open justice. We recognise, of course, that it is distressing for the applicant to have such matters discussed in a public court; but that is often an unhappy but inevitable consequence of criminal proceedings, and there is no evidence that reference by this court to personal matters which she has already disclosed at her trial would have adverse consequences for her mental health.

118. Further, whilst Ms Ahluwalia may be correct to say that identification of the applicant would not significantly enhance public understanding of this case, that is not the test. In accordance with the principles which we have explained, a person seeking a derogation from open justice must put forward cogent evidence as to why the derogation is necessary. We are satisfied that the applicant has not been able to do so.

Conclusions:

119. For the reasons we have given, we grant the application for the necessary extension of time; we grant leave to appeal; we formally receive the fresh evidence; and we allow the appeal and quash the convictions. We refuse the applications for a withholding order and for reporting restrictions, with the consequence that this judgment is not subject to any reporting restrictions.