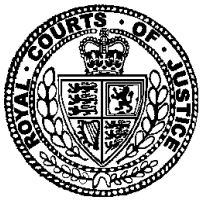

Neutral Citation Number: [2024] EWCA Crim 1353

Case No: 201404491 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT HARROW
HHJ ARRAN
T201447109

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2024

Before :

LORD JUSTICE JEREMY BAKER
MRS JUSTICE FARBEY
and
THE RECORDER OF LEEDS (HIS HONOUR JUDGE KEARL KC)
(SITTING AS JUDGE OF THE CACD)

- -

Between :

FGH	**Applicant**
- and -	
REX	**Respondent**

- -
- -

Mr J Robottom (instructed by **Southwell & Partners Solicitors**) for the **Applicant**
Mr A Johnson (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 18 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 12:00 pm on 6 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MRS JUSTICE FARBEY:

ANONYMITY: We make an anonymity order in this case in order to protect the interests of the proper administration of justice. We bear in mind that the normal rule is open justice, but the applicant has been found to be a victim of trafficking and our order is consistent with and does not risk undermining anonymity orders in other proceedings. The applicant shall be known as FGH and there shall be no reporting of his name.

Introduction

1. On 22 August 2014 in the Crown Court at Harrow before HHJ Arran, the applicant was convicted by a jury of one count of possessing a firearm with intent to endanger life. On 17 October 2014, he was sentenced by the judge to 7 years' imprisonment. His trial representatives filed grounds of appeal against conviction. Leave to appeal was refused by the single judge on 12 January 2015. By notice of renewal dated 16 January 2024, his present representatives (who did not appear at trial) filed fresh grounds of appeal. He seeks an extension of time of approximately 9 years in which to renew his application for leave to appeal against conviction. In addition, he seeks leave to adduce fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968.

2. Leave to appeal is sought on three grounds. Under Ground 1, it is submitted that the applicant's criminality was extinguished by virtue of his intellectual disability and status as a victim of trafficking ("VOT"). It is contended that, had the prosecution been aware that he was a VOT at the time of the trial, the charge would or might well not have been maintained. It is submitted that, in light of his status as a VOT, his prosecution was not in the public interest and was an abuse of process. Under Ground 2, it is submitted that the failure of the applicant's representatives to apply at trial for a defence intermediary meant that he was unable to participate sufficiently in the trial process to protect his right to a fair trial. Under Ground 3, the applicant submits that the judge's legal directions to the jury on the defence of duress were flawed because the judge failed to sum up the evidence relating to the applicant's learning disability at the same time as giving the directions.

Facts

3. On the evening of 5 March 2014, the applicant was travelling in the rear of a Honda Prius in Kilburn in convoy with a second car. The others in the Prius were Richard Hanson (the driver), Ronic Clarke (the front seat passenger) and Justin Edwards (also in the rear). The Prius, which was under surveillance, was stopped by armed police officers. When the applicant was searched, the police found a firearm containing five rounds of ammunition concealed in a sock in the waistband of the applicant's trousers. The firearm was a revolver manufactured historically in the United States of America.

4. The applicant was arrested and cautioned to which he replied: "I found it." In interview, he answered "no comment" to all questions. Forensic testing revealed his DNA on the smooth external areas and sides of the cylinder of the firearm. His fingerprint was found on the internal surface of the tape which was wrapped around the handle.

5. The applicant stood trial with Hanson, Clarke and Edwards. In his defence case statement, he denied that he was aware that he was carrying a firearm and said that he

had no intention to endanger life. He said that an object had been given to him shortly before his arrest and was thrust down the front of his trousers. He claimed that he was too scared to name the person who carried the object.

6. In an addendum defence case statement, the applicant said that a person called Littles had threatened him, frightened him and given him an object. Littles had been in the second car of the convoy. The applicant had not previously provided this information as he was scared. He was being pressurised in prison.

7. At the close of the prosecution case, Hanson, Clarke and Edwards made successful submissions of no case to answer and were discharged. The case against the applicant continued and he gave evidence.

8. Owing to the passage of time, it has not been possible to obtain a transcript of his evidence. There is, however, a transcript of the judge's summing up. The accuracy of the transcript has not been challenged. It shows that the applicant told the jury that he had gone to Littles' house where there were three to four other people. A decision was taken to visit a brothel. Littles was wearing gloves. He put a gun on a table and ordered the applicant to tape it up. The applicant was told to take the gun or the other men would hurt him and his family. He was frightened but could not run away because he was surrounded by the others.

9. The applicant told the jury that Littles put the gun in a sock and shoved it down the applicant's waist. The applicant got in a car with three others. The car drove to a petrol station with Littles following in a second car. After getting petrol, the two cars set off again. The applicant did not know where they were going. The car in which he was travelling was stopped by police. He told police that he had found the gun because he was too scared to say that Littles had given it to him. He knew Edwards because their mothers were friends. He knew Littles through Edwards.

10. The applicant relied on the defence of duress. In support of this defence, he relied on the evidence of a consultant psychiatrist, Dr Shokhar, who had carried out an assessment of his mental health and gave evidence to the jury. In summing up the case to the jury, the judge gave legal directions about the elements of duress but initially omitted to mention Dr Shokhar's evidence. When trial counsel pointed out his error at the end of the summing up, the judge summarised Dr Shokhar's evidence as follows:

> "He found the defendant had an IQ of between 52 and 60 which indicated a mild degree of learning disability, but there was no enduring mental illness. And this is the important part of the doctor's evidence: 'He demonstrated a high degree of vulnerability and he could easily be manipulated or exploited, but he had a reasonable degree of judgement.'"

11. By their verdict, the jury rejected the applicant's defence and found that he had the gun with the intention of endangering life. He was convicted and sentenced as we have already described. He was nearly 27 years old at the date of conviction.

Fresh evidence

12. We turn to the fresh evidence on which the applicant seeks to rely, which we consider de bene esse. At the time of the offence, the applicant had the benefit of indefinite leave to remain ("ILR") in the United Kingdom, which had been granted by the Secretary of State on 28 August 2007. As a result of his conviction, his ILR was revoked and a deportation order was made. Although the First-tier Tribunal allowed an appeal against deportation, its decision was subsequently overturned by the Upper Tribunal (Edis J presiding) in 2018. The applicant has subsequently been detained for deportation, but then released on immigration bail, on a number of occasions.

13. In May 2022, Dr Lisa Davies, a forensic psychologist, assessed the applicant using the Ravens Standard Progressive Matrices measure of intellectual capacity. His performance placed him in the "Intellectually Impaired" range of functioning which was consistent with a "global learning disability." Applying the Gudjonnson Suggestibility Scale, Dr Davies found that the applicant is in the 95th percentile of the general population for suggestibility and that he "has an above average tendency to give in to leading questions."

14. Dr Davies concluded that the applicant was a VOT and so he was referred through the National Referral Mechanism ("NRM") to the Single Competent Authority ("SCA") within the Home Office. In a statement dated 16 January 2023, produced for his trafficking claim, the applicant described his trafficking experience as follows:

> "I do not remember much from the day I got arrested in 2014, everything that happened was a shock and so it has been hard to remember the details. I know that I was with Justin, he and some other people picked me up and we went off in a car and when the police came I had a gun on me. I had never seen the gun before that day, and I had never been around guns before. I am not interested in that sort of thing, I would never choose to use or even carry a weapon…
>
> I had a hard time in prison, some of the other inmates were unkind to me and bullied me, like when I was younger."

15. In March 2023, the applicant was charged with possession of a bladed article. He appeared at Croydon Magistrates' Court. Dr Davies assessed the applicant again and concluded (in a report dated 7 August 2023):

> "The finding of a global learning disability has implications for Mr. [FGH] giving evidence before the Tribunal. It is noted that he has considerable difficulties with his verbal comprehension, and with his working memory. He has a speech impediment and has deficits in his expressive speech and language abilities.
>
> I recommend that if Mr. [FGH] is required to give evidence before the tribunal, it would be essential that he was supported by a registered intermediary. Mr. [FGH] has been assessed to have mild dysmorphism, associated with his learning disability and has identified deficits in his expressive language abilities."

16. On 27 September 2023, the SCA concluded that the applicant was a VOT in relation to the events that led to his 2014 arrest (the "conclusive grounds decision").

17. An intermediary report dated 23 September 2023, produced for the Croydon proceedings, concluded that the applicant's cognitive difficulties were such that he would need the assistance of an intermediary for the duration of his trial. The applicant was also assessed for the purposes of the Croydon proceedings by Dr Nuwan Galappathie, a consultant forensic psychiatrist. His report stated:

> "[The applicant] presented as an individual with a mild learning disability. He had difficulty understanding questions. He needed information to be explained using simplified language. He became frustrated when he could not understand information."

18. In addition to a mild learning disability, Dr Galappathie concluded that the applicant was suffering from severe depression, anxiety and PTSD. He observed that the term "mild" is "misleading." A mild learning disability "is actually a significant disorder which is often associated with difficulty understanding information and problems with executive function."

19. Dr Galappathie's conclusions were broadly consistent with Dr Davies' views. He did not, however, take an account from the applicant of the incident with the firearm because the applicant told Dr Galappathie that he did not want to discuss his past offences in any further detail.

20. In an addendum report dated 17 April 2024, Dr Galappathie explained:

> "In my opinion, he suffers from a mild disorder of intellectual development also known as mild learning disability. This is indicated by his past history and ongoing presentation which is consistent with an individual who has experienced lifelong problems with intelligence and difficulty learning new information. He has required help and support from his mother and family members throughout his life. He has not been able to live independently and has required support from his mother in relation to activities such as shopping, cooking, managing his finances and attending hospital appointments. Whilst he is able to manage his activities of daily living by himself, he requires a lot of help and support with day-to-day activities consistent with an individual with mild learning disability."

21. We have also considered the Pre-sentence Report produced for the sentencing hearing before the judge. The report writer stated:

> "Mr [FGH] is assessed as having moderate learning disabilities. He has communication difficulties and is unable to speak clearly and in long sentences. From documents made available to me by his Social Worker, it is the conclusion of a Speech and Language Therapist that Mr [FGH] has limited independent life skills; limited reasoning and social networks; and vulnerability in the community. Mr [FGH's] mother reports that he is very

> vulnerable as he easily gets misled by people and follows people without reasoning about the impact of his actions. At the time he was assessed, there were concerns as regards his ability to function in the community when on his own."

22. We have been provided with other, older evidence relating to the applicant's mental health and, in particular, his cognitive abilities. To the extent that the older evidence pre-dates the conviction under challenge, it could have been adduced at the trial and ought to have been available to Dr Shokhar when he assessed the applicant. We have however considered it de bene esse, along with the rest of the evidence, as it formed the background against which Dr Davies and Dr Galappathie made their assessments. The older evidence seems to us to show that the applicant has been consistently identified by mental health professionals as having a mild learning disability.

23. Further reports – by Dr Davies, Dr Galappathie and others – appear to have been produced either for the applicant's immigration proceedings or his trafficking claim; alternatively, they are specifically directed to issues in the Croydon proceedings. They do not deal with the issues that are material in a criminal appeal. We have not been assisted by them.

SCA's decision

24. The conclusive grounds decision states:

> "You state that on 05/03/2014, there was an occasion when you were picked up in a car by your friend Justin, and his two friends, Harvey and another; you had no idea what they were planning.
>
> You were riding in the back seat of a convoy consisting of two cars when they were stopped by the police.
>
> It is noted that you have given a generally thorough, plausible, and relatively consistent account in your NRM referral, Further Representations, Witness Statement, and Witness Statement 1 in relation to your claimed exploitation. You have detailed how you entered the exploitation; that you were passed a bag by one of the people in the car who forced you to hold and hide a loaded firearm; you hid it in the waistband of your trousers, for this you received a seven-year sentence.
>
> You did not know the firearm was in the car, until that day, you had never even seen a gun. You and Justin ended up going to the same prison. Whilst in prison, Justin began telling other inmates to harass and beat you, you feared for your life in there. There have been no recognised inconsistencies within your account therefore, your claim has not been undermined.
>
> Furthermore, it is considered that your account is also consistent with external information from the US State Department Trafficking in Persons Report for 2023 in relation to the United Kingdom.

> Based on the information provided it is considered that you were recruited by your friend, Justin, in the UK, after you were picked up in a car. You were then transported in the car somewhere unknown to you…Furthermore, you were forced by someone in the car to hide a loaded firearm, after the police stopped the car…[You have] recognised vulnerabilities [and]…did not know what the initial plans were, and…you were harassed and threatened whilst in and after prison… Lastly you were forced to hide a loaded gun against your will…
>
> Overall, there are no significant credibility issues in your account. By analysing the available evidence, it has been considered that your account has met the required threshold, namely 'on the balance of probabilities' it is more likely than not to have occurred."

Ground 3: Duress

25. It is convenient to deal with Ground 3 before the other grounds of appeal. On behalf of the applicant, Mr Robottom submitted that the judge made a significant and material error in directing the jury in relation to duress because he did not incorporate the psychiatric evidence into his legal directions but summarised it at the end when reminded to do so. He submitted that, given the evidence of the applicant's learning disability and corresponding pliability and susceptibility to exploitation, the judge's direction ought to have been crafted in such a way as to highlight to the jury the legal relevance of the evidence of Dr Shokhar. That had not happened.

26. There is no substance to this ground. As Mr Johnson submitted on behalf of the respondent, the judge indicated to the jury, when giving his directions on duress, that the applicant's characteristics might be significant and that he would come in due course to what "the doctor said about the defendant's character." In context, this can only refer to the psychiatric evidence which the judge went on to summarise before the jury retired. Any omission was rectified. It is not arguable that the judge's approach to directing the jury on duress makes the conviction unsafe.

Ground 1: Abuse of process

The applicant's submissions

27. Mr Robottom submitted that the court should treat the applicant as a VOT. There was no reason to depart from the conclusive grounds decision which was supported by all the evidence before us including the fresh evidence. There were indications at trial that the applicant was the victim of exploitation. The judge himself had in his sentencing remarks accepted – on the basis of the evidence adduced at trial – that the applicant "may have been exploited by one or others, who were part of what was plainly a criminal enterprise."

28. Mr Robottom submitted that, given the indications of trafficking at trial, the applicant's trial representatives had been under a duty to arrange a referral to the SCA or to advise him in relation to the protections open to him in the criminal process as a VOT. The trial representatives' failure to take either course of action made the conviction arguably

unsafe. The prosecution had failed to recognise that the applicant was a VOT and had breached its duty to refer him to the SCA and to consider whether it was in the public interest for his prosecution to continue.

29. Mr Robottom submitted that the applicant's intellectual disability rendered him acutely vulnerable to exploitation by others. His vulnerability, as recognised in the fresh evidence, combined with the threats made to his family at the time of the offence, reduced his culpability such that it was not in the public interest to prosecute him. The prosecution had arguably amounted to an abuse of process and was arguably unsafe.

The respondent's submissions

30. Mr Johnson was willing to concede that, if the applicant's account of being transported in the car under threat from others was true, he would qualify as a VOT under the international definition in article 3 of the 2000 Palermo Protocol and article 4 of the 2005 Convention on Action against Trafficking in Human Beings. Given this concession, we need not consider the various different elements of the definition contained in those instruments.

31. However, Mr Johnson submitted that the applicant's account had been squarely rejected by the jury who had been sure that he had formed the requisite intent. Mr Johnson submitted that there was no material difference (whether in terms of expert evidence or in terms of the account of events advanced by the applicant) between the case presented to the jury and the case put forward in the present appeal. He submitted that the applicant was asking this court to accept what the jury had rejected, which was not the purpose of an appeal. He submitted that it had unarguably been in the public interest to prosecute the applicant for such a serious offence. There had been no arguable abuse of process and the conviction was not arguably unsafe.

Discussion

32. The applicant's offence pre-dated the provisions of section 45 of the Modern Slavery Act 2015 which came into force on 31 July 2015 and which provides a defence for slavery or trafficking victims who would otherwise commit an offence. Section 45 does not have retrospective effect (*CS and LE* [2021] EWCA Crim 134, paras 54-72). The question under Ground 1 is therefore whether the trial court should have stayed the proceedings as an abuse of process had an application been made. In *R v S(G)* [2018] EWCA Crim 1824, [2019] 1 Cr App R 7, [2018] 4 WLR 167, para 76(v), Gross LJ set out the test for abuse of process in trafficking cases as follows:

> "As always, the question for this court goes to the safety of the conviction. However, in the present context, that inquiry translates into a question of whether in the light of the law as it now is (this being a rare change in law case) and the facts now known as to the applicant (having regard to the admission of fresh evidence) the trial court should have stayed the proceedings as an abuse of process had an application been made. This question can be formulated indistinguishably in one of two ways which emerge from the authorities: was this a case where either: (1) the dominant force of compulsion, in the context of a very serious offence, was sufficient to reduce the

> applicant's criminality or culpability to or below a point where it was not in the public interest for her to be prosecuted? or (2) the applicant would or might well not have been prosecuted in the public interest? If yes, then the proper course would be to quash the conviction …"

33. The test as formulated by Gross LJ was cited with approval in *R v AFU* [2023] EWCA Crim 23, [2023] 1 Cr App R 16, para 107. It was common ground before us that it applies to the present case.

34. As regards the duties of the prosecution, our attention was drawn to relevant passages of the CPS Guidance to prosecutors in force at the material time ("the Guidance"). In relation to potential VOTs, the Guidance stipulated that, in addition to applying the Full Code for Crown Prosecutors, the following three-stage assessment should be made:

> "(1) Is there a reason to believe that the person has been trafficked? if so,
>
> (2) If there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds; but
>
> (3) Even where there is not clear evidence of duress, but the offence has been committed as a result of compulsion arising from trafficking, prosecutors should consider the public interest in proceeding to prosecute."

35. There was no suggestion that the Guidance was inconsistent with the approach of the court in *GS*. It is sufficient therefore for us to consider the Guidance which in its third stage is materially the same as the approach in *GS*.

36. Turning to the first of the three stages, Mr Robottom urged us not to depart from the conclusive grounds decision. Mr Johnson did not accept that the applicant's account supported the proposition that he was a VOT and criticised the conclusive grounds decision as superficial. However, given the difficulties of winding back the clock to the situation that would have confronted a prosecutor at the first stage of the test, Mr Johnson emphasised the second and third stages.

37. We shall adopt Mr Johnson's approach and focus on the second and third stages of the test in the Guidance. In doing so, we are not bound to accept the conclusive grounds decision (*AFU*, para 88). There is good reason not to do so because the decision did not deal with the course of the criminal trial. We have the benefit of information from the criminal proceedings and are able to analyse what happened at the trial for ourselves.

38. The conclusive grounds decision stated that there were no "recognised inconsistencies" in the applicant's account which was said to raise no "significant credibility issues." In the criminal proceedings, the applicant gave inconsistent accounts of when and where he had been forced to take the revolver. He said in his defence case statement that an object had been thrust into his trousers shortly before the car was stopped but he told the jury that he was forced to take the gun in a house where he was ordered to tape it

up. We have seen nothing in the medical and other evidence which could arguably explain why the applicant did not give a consistent account of this key (and straightforward) part of his defence.

39. The conclusive grounds decision did not deal with the outcome of the trial. The court is able to take into consideration that the defence of duress was disproved and that the jury was sure that the applicant was in possession of a revolver with the intention of endangering life. By contrast, the conclusive grounds decision did not analyse the implications flowing from the conviction.

40. Under the second stage of the test in the Guidance, the prosecution needed to consider whether there was clear evidence of a credible defence of duress; if there was, the case should have been discontinued on evidential grounds. The applicant gave evidence to the jury and had the benefit of independent psychiatric evidence to support his claim of vulnerability of the sort that would make him the target of exploitation. He had ample opportunity to make all the points that he wished to make in support of his defence. As we have already concluded, the jury was properly directed by the judge. Nevertheless, the defence of duress was disproved. It is therefore difficult to conceive how this court could conclude that the case against the applicant ought to have been discontinued on evidential grounds.

41. The third stage under the Guidance was whether, even in the absence of duress, the applicant would or might well not have been prosecuted in the public interest. The defence of duress having failed, the applicant was convicted of having a gun with the intention of putting life at risk. The seriousness of the offence cried out for the prosecution to continue. He cannot arguably contend that it was not in the public interest to prosecute him.

42. Mr Robottom relied on article 4 of the European Convention on Human Rights (prohibition of slavery and forced labour) to argue that the applicant's prosecution breached the State's procedural obligation to investigate situations of potential trafficking. We are not persuaded that there was any arguable breach of article 4. In any event, this line of argument adds nothing of substance to the other submissions advanced on the applicant's behalf. For these reasons, Ground 1 is not arguable.

Ground 2: Intermediary

43. Mr Robottom submitted that, at a minimum, the applicant's trial representatives should have taken steps to ensure that an intermediary was available during the trial process. In support of this submission, Mr Robottom emphasised that the applicant suffered from a learning disability and that his medical records made clear that he was both suggestible and required modifications to the trial process. Mr Robottom did not suggest that the applicant should have had an intermediary for the whole of his trial but maintained that, as his defence turned upon his ability to give evidence as to the extent to which he was coerced and upon convincing the jury that he did not have the requisite intention to endanger life, it was imperative that he should have had the services of an intermediary during the course of his evidence. In the absence of an intermediary, the trial was arguably unfair and the conviction was arguably unsafe.

44. Mr Johnson submitted that the applicant's learning disability and his low IQ were known to his legal representatives at trial. He had had every opportunity to raise any

points about modifications to the trial process, including the need for a defence intermediary. Mr Johnson submitted that, even accepting that an intermediary may have been able to provide some assistance to the applicant at trial, the question for the court on appeal would be whether the absence of an intermediary had such an effect on the trial process as to render the applicant's conviction unsafe. That test had not even arguably been met.

45. As we have mentioned above, the intermediary report produced in 2023 for the Croydon proceedings concluded that the applicant would need the assistance of an intermediary for the duration of his trial. The report writer concluded that:

> "Mr [FGH] is a very vulnerable individual and he has significant communication difficulties, which directly stem from his diagnosis of learning disabilities and his mental health issues.
>
> Mr [FGH's] conditions have a significant impact on both his expressive (how he is understood by others) and receptive (how others understand him) communication, which are further impaired in highly stressful situations like court hearings.
>
> Mr [FGH's] full scale IQ fell in the range of 52-60, which is at the lower end of the learning disability range. This means that he finds it difficult to process and understand complex information. Mr [FGH's] oral language is also affected in such a way that he cannot access vocabulary efficiently."

46. This court has emphasised that intermediaries should not be appointed unless there are compelling reasons to do so, in circumstances where all other adaptations to the trial process will not sufficiently meet the defendant's needs to ensure his or her effective participation in the trial (*R v Thomas (Dean)* [2020] EWCA Crim 117, [2020] 2 Cr App R 12, para 37). Even taking the applicant's difficulties at their highest, we are not persuaded that the appointment of an intermediary was necessary, even for the duration of the applicant's evidence to the jury. There is nothing to suggest that other steps (such as modified ways of framing questions to the applicant and regular breaks) would not have been effective.

47. In light of the passing of time, it is no longer possible to know whether modifications to the trial process were raised with the judge by the applicant's trial counsel. However, irrespective of the approach of the applicant's lawyers, the judge was under a duty to ensure that the trial was fair and to take such steps as necessary to modify the trial process in order to ensure the applicant's effective participation. There is no reason to suppose that the judge failed in this duty. There is no arguable basis for contending that the absence of an intermediary made the trial unfair. This ground of appeal is not arguable.

Conclusion

48. As the grounds of appeal are not reasonably arguable, we refuse an extension of time which would serve no purpose. We would refuse to admit the fresh evidence and would refuse leave to appeal.