R. v. LM and others [2010] All ER (D) 202 (Oct); [2010] EWCA Crim 2327

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Prosecution

People Trafficking

In R. v. LM and others [2010] All ER (D) 202 (Oct), judgment delivered October 21, 2010, the Court of Appeal, Criminal Division, allowed three appeals against conviction of offences of controlling prostitution for gain in circumstances where the defendants had themselves been the victims of people trafficking where the duty to decide whether to continue with a prosecution under art.26 of the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 had not been addressed when the factual basis of the case had changed.

Consideration was given to the issue of whether persons thought to be trafficked should be prosecuted for crimes committed as a result of the trafficking. Five cases were heard together because they shared common issues, namely people trafficking and the UK's obligations under the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 (the Convention . Pursuant to art.26 of that Convention, "each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so."

Accordingly, there was a requirement to consider whether it was in the public interest to prosecute defendants who were "trafficked persons" and who had committed offences. Failure to do so would be in breach of art.26. The first, second and third defendants, LM, DG and MB, who were female, had been convicted of offences of controlling prostitution for the gain of themselves or another, contrary to s.53 of the Sexual Offences Act 2003. The prosecution case against them was that although they had originally been trafficked victims, they had assumed the role of controllers of prostitution of others. There was evidence that they had taken a leading part in introducing the complainants to the industry and that they had used threats, violence and sexual abuse to secure compliance. Their guilty pleas were accepted by the prosecution on a new factual basis than that initially charged, namely, that there had been no violence, threats or sexual abuse, that they themselves had been trafficked, beaten and coerced into prostitution, and that any act of trafficking had been done under duress. At that stage, the question of whether there was a public interest in continuing prosecution was not considered. The

fourth defendant, T, was convicted after pleading guilty to an offence of possessing a false identity document with intent, contrary to s.25 of the Identity Cards Act 2006. She had written a letter to the Judge in the Crown Court stating that she had been tricked into being brought from Cameroon to France and made to work as a prostitute under threats, that she had been beaten and that she had committed the offence in an attempt to escape. There was no evidence that anyone representing T had referred to the possible application of the Convention. There were inconsistencies in her account and she had been unable to provide a circumstantial

history of events or one that was plausible. She had not given details of her alleged trafficking to counsel who had represented her. The fifth defendant, TI, pleaded guilty to two offences, using a false identity document and fraud by producing a false national insurance card. She had given an account in interview which had differed from her account at court that she had left Nigeria to escape an abusive husband, and that she had eventually been the victim of trafficking. Her solicitor had advised her that discontinuance under the Convention was not available to her as she had been in possession of the passport and not the alleged trafficker. TI had, for some months prior to committing the offences, been living free of any exploitation. The first, second and third defendants appealed against conviction. The fourth and fifth defendants sought leave to appeal, inter alia, against conviction. It was submitted by all five defendants that their convictions were unsafe in the light of the failure to consider whether it was in the public interest to prosecute them as required under art.26 of the Convention. Consideration was given to R. v. O [2008] EWCA Crim 2835, and the obligations arising under art.26 of the Convention. The appeals against conviction would be allowed in respect of LM, MB and DG. Leave to appeal conviction would be refused in the case of T and TI. The application of art.26 of the Convention was fact sensitive in every case. R. v. O [2008] EWCA Crim 2835, was not authority for the broad proposition that a person thought to be trafficked should not be prosecuted for crimes committed as a result of the trafficking. The following general propositions couldbe ventured: if there was evidence on which a common law defence of duress or necessity was likely to succeed, the case would no doubt be proceeded with on ordinary evidential grounds independent of the Convention, but additionally, there were likely to be public policy grounds under the Convention leading to the same conclusion. However, cases in which it was not in the public interest to prosecute were not limited to those. It might be reasonable to prosecute if the defendant's assertion that she was trafficked met the reasonable threshold test, but had been properly considered and rejected by the prosecution for good evidential reason. The fact that a person passed the threshold test as a person of whom there were reasonable rounds to believe she had been trafficked was not conclusive that she had. It might well be that in other cases the real possibility of trafficking and a nexus of compulsion meant that public policy pointed against prosecution. There was normally no reason not to prosecute, even if the defendant had previously been a trafficked victim, if the offence appeared to have been committed outwith any real possibility of trafficking and a nexus of compulsion in the broad sense occasioned by the trafficking, and hence was outside art.26. A more difficult judgment was involved if the victim had been a trafficked victim and retained some nexus with the trafficking, but had committed an offence which arguably called, in the public interest, for prosecution in court. A question which had to be actively confronted by the prosecutor was whether or not the offence committed was serious enough, despite any nexus with trafficking, to call for prosecution. That would depend on all the circumstances of the case and on the gravity of the offence

alleged, the degree of continuing compulsion, and the alternatives reasonably available to the defendant. The obligation under art.26 was not an obligation to grant immunity, but an obligation to put in place a means by which active consideration was given to whether it was in the public interest to prosecute. The power to stay for abuse of process existed as a safety net to ensure that the Convention obligation was not wrongly neglected in an individual case to the disadvantage of a defendant. However, the occasions for the exercise of that jurisdiction to stay ought to be very limited once the provisions of the Convention were generally known. In respect of the first three defendants, on the facts of the instant case, when the new factual basis had been accepted, there could only have been one conclusion, the prosecution should have been abandoned by the offering of no evidence, or an application for a stay of proceedings ought to have succeeded on the grounds that any prosecution decision to proceed was one which no reasonable prosecutor could make. In the case of T, on an examination of her assertion, the court was satisfied that it was not credible. In the case of TI, it was clearly fatal to any reliance on the Convention that for some months before committing the offences she had been entirely free of any exploitation. The offences had not been committed under the necessary nexus of compulsion. Accordingly, there were no arguable grounds for challenging the convictions. The convictions in the case of LM, MB and DG would be guashed.