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Number 29 December 2019

Albion Chambers CRIME TEAM NEWSLETTER

When credibility is not the determining factor

An assessment of credibility is an essential element in the determination of nearly every case at all levels of our court and tribunal system. But in *R (on the application of M) v The Secretary of State for the Home Department* [2019] EWHC 2104 (Admin) the Court confirmed that where issues of credibility arise, inconsistencies alone are insufficient to justify a negative reasonable grounds decision.

The case involved judicial review of a National Referral Mechanism (NRM) decision that there were no reasonable grounds to conclude that the applicant was a victim of human trafficking. Challenge was also made to the decision that the Claimant was fit to fly. If the reasonable grounds decision was upheld, there would be no impediment to the applicant being removed from the UK.

The facts

M, a Brazilian national, entered England in the summer of 2018, on a three-month visitor's visa, prohibiting her from undertaking paid employment. The leave was valid until 4 October 2018, but she was arrested on 28 September 2018, having been found working in a restaurant. In interview, she admitted that she had been working for two months and paid £300 a week. She did not mention being exploited or trafficked, nor did she raise any medical problems or that she was taking any medication.

M was subsequently detained at Yarl's Wood Immigration Removal Centre where she was assessed, confirming that she was not taking any medication, had not self-harmed nor attempted suicide in the preceding 12 months, and had no thoughts of doing so.

On 2 October, M disclosed to that she had come to the UK following an offer of marriage but, that when she arrived, the man she believed she was to marry, threatened her. Arrangements were made for her to speak to police and she was served with removal directions. On the same date, she self-harmed and an asylum claim was made two days later. During the screening interview, the basis for the asylum claim was stated as fear for her life from her ex-husband who had threatened to kill her. She confirmed that she had never been exploited nor had reason to believe she would be, however she stated that someone had photos of her which they had threatened to disclose.

M was examined by a GP on 13 October and disclosed that she had been the victim of domestic abuse by her ex-partner in Brazil. Scars were noted, which she said were the result of that abuse.

In an asylum interview, M described 'serious and sustained' domestic violence perpetrated by her ex-partner in Brazil and that she was in fear of KT, the man who had promised to marry her. She stated that KT paid for her ticket to the UK but when she arrived in England, she discovered that he was a serving prisoner who would video call her in the early hours of the morning, and make her take her clothes off to check if she had been with any man.

She confirmed that her accommodation was provided by KT but after they fell out, he refused to pay the rent and told her to work. He then demanded payment for her plane ticket and when she refused to visit him in prison, he threatened to kill her. She stated that she was not fit and well and that if she had to leave the UK, she would 'hang myself in here'. Her asylum application was refused on the basis that it was 'clearly unfounded'.

The Modern Slavery Helpline and Resource Centre referred M to the NRM as a potential victim of human trafficking. On the form she noted, for the first time, that she had been forced to give her salary to one of KT's associates and, in interview, although she repeated the circumstances regarding KT, she confirmed she was allowed to leave the house and to travel freely by herself.

The NRM concluded there were no reasonable grounds for finding that she was a victim of trafficking based upon her failure to disclose any exploitation upon arrest or during her screening interview. As she came to the UK willingly and could move freely whilst in the UK, she hadn't been subjected to an act of transportation, recruitment, harbouring or receipt. KT didn't control her by any of the means set out in the trafficking definition, as she could get a job and move out of the accommodation provided. Discrepancies as to whether all or part of her salary was given to KT did not arise from a failure of recollection as a consequence of a mental health condition.

The Court's decision

The Court found that although the Defendant was entitled to decide that the Claimant was not a victim of human trafficking, there is a requirement to set out 'in detail and with a high standard of reasoning, how and why he arrived at his decision'. Further, the decision letter demonstrated an incorrect approach for

the following reasons:

a) Inconsistencies alone do not justify a negative-reasonable-grounds decision. The Guidance requires all information to be assessed critically and objectively. Recognition must be given for valid reasons for inconsistencies and there had been 'no meaningful attempt to evaluate and identify mitigating factors.'

b) Despite a concession that the Claimant had been trafficked to the UK, a key component of the trafficking definition had failed to be identified in the decision letter, which was an error.

c) Concluding that the Claimant came to the UK willingly, and had freedom of movement within the UK, ignored the Guidance that apparent consent is irrelevant when one or more means, (such as threats) were used to gain consent. Deception, coercion, abuse of position and psychological control should all have been considered.

d) There was a failure to consider sexual exploitation, given the evidence of the video calls.

e) There was no explicit consideration of whether she was working 'under menace of penalty' which could establish forced labour. Inconsistencies are not enough to disregard that possibility and M was 'entitled to know that a full and proper analysis of her claim has been undertaken and that can only be achieved if the decision demonstrates how the general principles have been specifically applied to her claim'.

f) The decision letter was a list of factors undermining her account, not an assessment of the indicators that could establish reasonable grounds. On the basis of the discrepancies and adverse inferences, the Defendant rejected her account and decided her credibility was limited. This was used to decide there were no reasonable grounds to conclude the Claimant was a victim of human trafficking.

The minor consideration of the Claimant's mitigating circumstances and the material omissions in the decision letter amounted to a failure to follow the Guidance, and were an error in law. It was possible that a full assessment may lead to the same outcome, but it was 'irrational in the Wednesbury sense to contend that her evidence cannot lead to' the conclusion that she was a victim of human trafficking. The reasonable grounds decision was quashed and remitted for reconsideration

Lucy Taylor

Editorial

Welcome to the autumn Albion Crime Team Newsletter. Darker evenings and bracing mornings herald this wonderful time of year and this is reflected in the Newsletter which includes articles on a variety of subjects, each having a relevance in these fast-changing times.

In terms of change, we have all quickly become accustomed to the revised PTPH form which came into effect on 29 July 2019. Whether that date was meant to coincide with the summer holidays or not, it at least gave us all time to acquaint ourselves with the additional information now required of us during a relatively quiet time of year.

1 September also saw the first increase in prosecution fees for twenty years, with the implementation of Schedule D. The effect of that, which is the first and an interim step in a much needed wholesale review of prosecution fees, is to increase all fixed fees to the level of the Advocates Graduated Fee Scheme (AGFS) and brings to an end the shame of the £46.50 mention fee. Max Hill QC, the DPP, heralded it as the 'best outcome for prosecutor advocates in twenty years; it is unprecedented.'

Meanwhile the AGFS is itself the subject of further review and representatives from the Ministry of Justice are travelling around the country taking the views of practitioners, with Albion Chambers hosting one of the focus groups on 26 September 2019.

The fee reviews, as welcome as they are, cannot be seen as a cure for what all of us who work within the Criminal Justice System know is a much deeper malaise. Courtrooms remain empty in an attempt to save money, but which has the effect of trials being fixed many months ahead, suspects languish in the ether, having been released under investigation for ever-increasing periods of time, and the fabric of many of the court buildings themselves is falling apart as we try to continue as if everything is alright. That we all do is a testament to our wish to ensure that justice is not only done but done well.

To that end, modern slavery is the hot topic of the moment, with the Government producing a modern-slavery-awareness booklet and the National Crime Agency making it a priority, rescuing a potential 136 victims in the year 2017/18. Although it is impossible to know exact numbers of victims, what is known is that modern slavery is on the increase. Many victims work in the construction industry, in agriculture, in the sex industry, and in places like nail bars, car washes, and cannabis farms. Children are found working in all of these situations, as well as in sexual slavery. Many victims have been trafficked from overseas, frequently from Eastern Europe, Southeast Asia, and Africa and their exploitation often begins en-route. British victims tend to be those who have fallen on difficult times, making them vulnerable to the lure of well-paid work complete with decent accommodation, something which all to soon proves to be a cruel lie. Lucy Taylor's article demonstrates the pitfalls that a tribunal can fall into by assuming that an inconsistent witness must be a dishonest witness, something that should be common sense when dealing with someone who may have been the subject of exploitation and deception.

Kannan Siva writes about the inferences that can be drawn from a failure to comment in interview, and is a timely reminder of just how tightly drawn the legislation is and how an inference can be avoided.

I suspect that no one relishes a Proceeds of Crime Act application, but Richard Shepherd's article highlights a case due before the Supreme Court in the near future, which provides assistance for the unwary practitioner.

Finally, I have written an article on the developments in respect of consent under the Sexual Offences Act 2003 and, in particular, the issue of deception as to the nature or purpose of the sexual act. There has been a lot of press coverage of the gender deception cases with many fearing that the legislation will be used against those who transition from one gender to another. However, although the roots of the criminal law may at times make its application appear antiquated and out of touch, when applied correctly, this aspect of the law has in fact kept pace with change.

Sarah Regan, Head of the Albion Crime Team

No comment

Silence in interview but talk to the judge

The direction given to the jury when a defendant chooses to answer 'no comment' when being asked questions in interview, has never been straightforward. The Court of Appeal in *R v Green* [2019] EWCA Crim 411 provided some guidance and reiterated the importance of carefully discussing legal directions with the trial judge, whenever there is a potential issue of the jury drawing inferences from silence in interview, in accordance with section 34 of the Criminal Justice and Public Order Act 1994.

The first and most important point, is that a s.34 direction only arises in respect of matters in issue. A definition of what is actually in issue was provided in *R v Webber* [2004] UKHL 1; [2004] 1 Cr App R(S) 40. For instance an adverse inference does not arise in respect of presence, causation of injuries and knowledge of the parties if the only issue is self-defence. This should ensure that the vast majority of no comment questions and answers are omitted from interview summaries, where the issues are known at the start of the trial and it would be wise to invite the judge to direct the jury not to hold the defendant's silence against her/him in respect of those parts of the case. However, the judge should give a s.34 direction on self-defence if that is still in issue between the parties.

That means that those representing a suspect in interview, may wish to consider providing a short, prepared statement setting out the core elements of the defence (if for some reason it is thought undesirable to give a full account), as that may militate against the sting of a s.34 direction, in due course. Additionally, that may enable the advocate, in a particular case, to argue that a s.34 direction should not be given at all.

S.34 of the Criminal Justice and Public Order Act 1994 provides as follows:

'(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
(a) at any time before he was charged with the offence, on *being questioned* under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings;
being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
(2) Where this subsection applies—
(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.'

It is worth nothing the two phrases italicised for emphasis, *'on being questioned'*; and *'being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned.'* Because whether or not a defendant 'could reasonably be expected' to mention certain facts 'in the circumstances existing at the time' should be a subject for discussion with the judge.

The appellant in *R v Green* faced an allegation of unlawfully inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861. The victim was a pedestrian who damaged the slow-moving car driven by the appellant. The appellant punched the victim to the ground and, after being struck by a flying bottle from one of the victim's friends, he armed himself with his father's walking stick. There was no dispute that it was a walking stick. The appellant neither used it nor brandished it. The defendant's evidence at trial was that he was acting in defence of his father and to prevent further damage to his car, although he answered 'no comment' in interview. He was arrested on suspicion of having an offensive weapon, namely a metal pole in addition to assault. That was clearly wrong as there was no metal pole. Further, the questioning broadly consisted of the officer's commentary of the CCTV and asking the defendant to comment at the end. He remained silent. When summarising the evidence, the police officer reiterated his misunderstanding that the appellant had picked up a metal pole from the back of his car after punching the victim. However, that misunderstanding did not constitute circumstances where the appellant could not be expected to answer questions. Similarly, the fact that no questions were asked, but simply a commentary on CCTV was provided did not avail the appellant. The Court of Appeal in *R v Green* clarified the following principles:

1. 'If the circumstances are such that he is expressly or by necessary implication, invited to give his account of the matter which has given rise to the interview. It is not necessary that specific questions are asked of him.' [21].
2. The Court also reiterated the importance of examining the circumstances which would give rise to a reasonable expectation to answer questions or give an account, and, furthermore, the level of detail that a suspect is expected to provide. It may be incumbent upon a defence advocate that the bare bones would often suffice.
3. 'It remains a question for the good sense and fairness of the jury whether it is right to do so' in relation to adverse inferences. This should be fertile ground for defence practitioners who may draw a judge's attention to a young defendant who has set out the essence of his case in a prepared statement or felt unable to speak for some other good reason.
4. 'The jury should be directed that they should not convict the defendant wholly or *mainly* because of a failure to mention facts in interview' [25].
5. The strength of the prosecution case cannot be reason for failing to mention any facts. Rather 'no inference can be drawn unless the prosecution case is so strong that it calls for an answer.'

Therefore, it is essential that both prosecution and defence advocates should list the topics on which questions are asked about the matters still in issue before the close of the prosecution case. If the prosecution has not made proper interrogation of the failure to address the matters in issue, then the jury should be invited not to draw any inference at all against

the accused, if the defendant gives evidence at trial: *R v Walton* [2013] EWCA Crim 2536.

The main point to emerge from *R v Green* is always talk it through with the judge. It may be advisable to invite only the shortest of s.34 directions for the jury, if one is even needed, restricting the direction to inferences which can be drawn from a failure to mention the real matters in issue. In all other cases the jury should be directed not to draw any inference against the accused from his silence in interview. The directions are often overcomplicated and do not prevent the prosecution from exploring a reluctance to tell the truth during cross-examination of any defendant.

Kannan Siva

Proceeds of crime

Joint assets and the opportunity to make representations

Lately the Supreme Court has been in the news a little bit. Can't remember why, never mind, it can't be anything important.

But, there is a very important case coming up in in the next few weeks in the Supreme Court for anybody who is interested in PoCA or even, as an extension, matrimonial assets related to PoCA.

On 2 December 2019, the Supreme Court is due to hear the case of *R v Hilton* UKSC 2018/0075.

A potted history

Hilton is all about joint assets in PoCA proceedings, and the scope of opportunity for non-defendants with an interest in joint assets to make representations before confiscation is determined.

The Supreme Court distils the issues to be determined as follows:

"On 22 September 2015 the respondent pleaded guilty to three offences contrary to s 105A Social Security Administration (Northern Ireland) Act 1972. The prosecution sought and was granted a confiscation order. In determining the amount of property owned by the respondent available for confiscation, the court took into account her half share of the matrimonial home, which was jointly owned with her husband. Section 160A (2) of the Proceeds of Crime Act 2002 provides that the court must give any person other than the defendant holding an interest in the property an opportunity to make representations, before exercising the power to determine the extent of the defendant's interest. The Court of Appeal held that the failure of the court to provide this opportunity to the respondent's husband rendered the confiscation order invalid."

The original (Northern Ireland) CoA judgment can be found on Bailii with the following neutral citation *Hilton, R v* [2017] NICA 73 (12 May 2017).

The Issue in the Court of Appeal

The Court of Appeal grappled with the following background and issues:

"…The Crown exercised its right to bring confiscation proceedings against her and these were apparently adjourned on several occasions but ultimately came for hearing before His Honour Judge Millar QC on 20 October 2016 and the learned judge imposed a confiscation order of £10,263.50 which he found to be the recoverable amount within the provisions of the statute…

It is not in contention and it was clear to the judge and to both counsel that this woman could only raise such a sum of money by selling the home in which she lived… The title to that property was before the court and showed that she was the co-owner with her husband. However, her husband was estranged from her and was not living at the property.

… Regrettably, it does not appear that the judge's attention was drawn to the provisions of Section 160A of the Proceeds of Crime Act 2002 which had come into force by the time of his adjudication."

In particular:

"The court must not exercise the power conferred by sub-section 1 unless it gives to anyone who the court thinks is, or may be, a person holding an interest in the property a reasonable opportunity to make representations to it."

To put this NI authority in context, s.160A is the Northern Irish equivalent of England and Wales' s.10A. Therefore, there is no reason to think that the Supreme Court's decision, if it overturns that of the Court of Appeal, wouldn't cross-apply (even in its 'persuasive' form) to the local jurisdiction.

The decision

On the basis that the language used by Parliament in the Act was mandatory ('must'), the Court of Appeal determined that the lower court's failure to afford an opportunity to the third party was "fatal to the decision". Strong words.

The Supreme Court case

The grounds relied upon to challenge the CoA decision are not readily discernible. The 'must' within the Act, as determined by the Court of Appeal NI, would appear to be mandatory.

Further, it wouldn't ordinarily be within the scope of the Supreme Court to determine different facts. For instance, 'must' in the Act is later qualified by a 'reasonable' opportunity to make such representations, but within the CoA decision, it does not appear to have been advanced that such a reasonable opportunity was afforded to the third party (as just one example).

And that is why this case is interesting.

The Supreme Court's gatekeepers are pretty fierce, most cases aren't able to bypass them, despite canny drafted grounds of appeal, and, therefore, it can (possibly) be divined that the arguments being raised may be quite interesting.

It's one to watch…

Richard Shepherd

Love is blind

In recent years there have been a number of convictions for sexual offences based upon a deception as to the identity or gender of the rapist. The most well-known is that of Gail Newland who deceived a friend of hers called 'Chloe' into having sex with her on a number of occasions.

Newland established contact with Chloe on Facebook, using a male alter ego

Kye Fortune and, over the course of a year, the two exchanged messages and photos online. Kye provided various excuses for why they couldn't meet, including that he had been badly injured, that he was being treated for a brain tumour and that he was in intensive care following a seizure.

He also told Chloe that he had a friend called Gail, who was also studying at the same University, which enabled Newland and Chloe to meet and become close friends. Eventually, Kye agreed to meet Chloe at a hotel in Chester, having first provided a series of ground rules for that and every subsequent meeting. Those were that Chloe was to remain blindfolded throughout, that Kye would be bandaged around his chest, that he would wear a hat because of scarring and a bodysuit during sex.

That arrangement continued for four months until Chloe removed her blindfold to find that Kye was in fact her friend Gail Newland, wearing a prosthetic penis.

At trial, Newland stated that Chloe knew all along that she was having sex with her, while the prosecution case was that Newland had deceived Chloe into believing that she was having sex with a male.

And although bizarre, there have been a number of similar cases in recent years. In 2012, Gemma Barker was convicted of sexual assault after disguising herself as a male in order to sexually assault a number of her female friends and, in 2013, Justine McNally was convicted of six counts of assault by penetration using a similar method to that used by Newland.

The question for a jury in all of those cases, was not whether sexual activity took place but whether the victim consented to that activity. S.74 of the Sexual Offences Act 2003 provides that a person consents if he or she agrees by choice and has the freedom and capacity to make that choice. In gender deception cases such as those of Newland, McNally and Barker, the issue is whether a free choice has actually been made.

In McNally, the Court of Appeal confirmed that 'deception as to gender can vitiate consent' on the basis that the sexual act is different to the one the Complainant had anticipated; she chose to have sex with a male and so her freedom to consent to have sex with a woman was removed.

They also confirmed that the lack of freedom of choice is dependent upon the deception being an active, purposeful intention to deceive and not simply an initial mistake about gender that remains uncorrected. That is very different from the lies told every single day in order to get others to sleep with them, such as that they are single, wealthy or that they will buy an expensive gift in exchange for sex. Those lies, although they may make the liar more sexually attractive to the recipient than they otherwise might be, don't deceive him or her as to the nature or purpose of the sexual act or to the identity or gender of the person they agree to have sex with.

In a case I recently prosecuted, the issue, though one of deceit, was complicated not by issues of gender or identification but by the fact that the Complainant knew the person she was to have sex with was her ex-boyfriend, and that she went to his home on 15 occasions for the sole purpose of engaging in vaginal and oral sex with him.

However, just like in Newland and McNally, the Defendant went to elaborate lengths to set up Instagram accounts, complete with profile pictures, for a male and female alter ego and obtained anonymous telephone numbers in order to contact the Complainant. Using those alter egos, he then bombarded the victim over the course of three months, threatening her that sexually explicit images would have her name printed on them and then posted around her home and place of work, that evidence existed of her drink-driving that would be given to the police, that the Defendant was being held prisoner and beaten, and even that he and the female alter ego had been raped by another of those who was sending messages to the Complainant. She was also told that the only way to save the Defendant from further harm was for her to have sex with him, and so she visited his home and had sexual intercourse with him. After the first time, during which not only had she cried but the Defendant also cried, pretending that he was also being forced, against his will to have sex with her, she received messages saying that the sexual encounter had been filmed and would be posted on the Internet unless she had sex with the Defendant again.

The messages in that case numbered over 15,500 with the Complainant often contacted by the Defendant, the female alter ego and the male alter ego within seconds of each other. She was also deceived into believing that her friends were selling information about her.

At trial, the Defendant admitted that he had sent all of the messages, but said that the Complainant knew he was the author and that it was all part of a sex game to enable them to keep their relationship and meetings secret.

The date and number of occasions of sexual intercourse were determined from the messages themselves, and so the questions the jury had to consider related solely to the issue of consent. If they were sure that the victim was deceived and/or pressured by the Defendant through his use of communication and the threats from the alter egos into believing that the sexual acts were necessary, then she would have been submitting and not consenting to those sexual acts.

Equally, if the jury accepted that the Defendant had deliberately intended to deceive her into believing the false threats in order to get her to submit to sexual intercourse, he would not have had a genuine belief in consent, nor would an ordinary, reasonable person, in those circumstances, have believed that she was consenting.

The jury took a little less than three hours to unanimously convict the Defendant of all 15 counts of rape. Following the second conviction in Newland, many groups raised concern about the issue of deception in sexual cases, and in particular, that where gender was a crucial feature of the issue of consent, it could cause problems for those transitioning. Those fears, though rightly aired are, however, groundless because it wasn't the gender of the Defendant that was the problem but the deception of the Complainant as to that gender. In all of these cases, it isn't so much as love being blind but of the Complainant, being wilfully blinded.

Sarah Regan

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