matters of control or knowledge of wrongdoing, there is no modern apex court authority on this fundamental doctrine. Admittedly, there are guidelines on judicial expansion of defences in cases like *C v DPP* [1995] 2 All E.R. 43, at [36], which look ominous for the proposed change:

> (1) if the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty.

Ultimately, though, these principles admit the need for some judicial creativity. And the courts' reticence in relation other defences need not carry over to the instant case, which is suited to boldness for at least three reasons. First, the special verdict and the introduction of hospital orders for the guilty mean that a finding of not guilty by reason of insanity poses no additional risk to public safety. Second, the proposed development is limited. It remains consistent with a "cognitive" theory of insanity in *M'Naghten*. Third, Parliament's legislative history cuts both ways. It has willingly left in place rules that are confusing, open-textured and frequently ignored, something that could be read as giving wide latitude to courts rather than committing to the status quo. While comprehensive parliamentary reform of the doctrine would be preferable, this should not preclude the Supreme Court, at least, from mending the law when cases like *Keal* provide the opportunity.

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THE MODERN SLAVERY DEFENCE

IN 2015 the UK Government achieved one of its then key legislative aims when its flagship Modern Slavery Act ("MSA") entered into force. Section 45 of the MSA contained the rarest of things, a new provision for escaping criminal punishment: "the modern slavery defence" ("MSD"). The most closely related pre-existing defence is duress, which Lord Bingham had clarified the meaning of in *R v Hasan* [2005] UKHL 22. Since 2008, by virtue of the UK having ratified the Council of Europe's Convention on Action Against Trafficking in Human Beings ("ECAT"), modern slavery has posed complex legal questions in many criminal appeals. This note considers the current state of the MSD as determined by the Court of

Appeal ("the Court") in *AAD, AAH, AAI v R* [2022] EWCA Crim 106 ("*AAD*"), conjoined appeals raising the issue of how a court should approach the MSD. *AAD* sets new guidance which corrects a regrettable error exposed by the European Court of Human Rights ("the ECtHR") in *VCL and AN v The United Kingdom* [2021] ECHR 132 (("*VCL and AN*"), concerning the UK's obligations to protect against slavery (art. 4, ECHR) and provide a fair trial (art. 6, ECHR)). Unfortunately, *AAD* also adhered to a troubling precedent previously established by the Court itself, a move which ultimately weakens the ability of the MSD to protect against unjust criminal punishment.

AAD rectifies the Court's prior error (made in *R v DS* [2020] EWCA Crim 285 ("*DS*") and *R v A* [2020] EWCA Crim 1408), which was essentially to reject the special status of modern slavery victims. *DS* had overturned [at 40] a line of consistent case law determining the effect of the UK having ratified ECAT, which requires states to "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" (art. 26). ECAT had no direct domestic legal effect, but the Crown Prosecution Service ("CPS") developed guidance which operationalised the requirement for the UK not to impose penalties on human trafficking victims for crimes they were compelled to commit. The CPS was guided to consider: (1) whether a defendant was a victim of trafficking; (2) whether they could successfully rely on duress; and (3) if they could not, whether the public interest required their prosecution to be dropped because their offence was the result of compulsion arising from trafficking. In *LM and Ors v R* [2010] EWCA Crim 2327, the Court had confirmed its special supervisory jurisdiction in this context to prevent miscarriages of justice: if the CPS failed to apply its own guidance or reached an irrational decision, the prosecution could be stayed as an abuse of process; and, on appeal, if a trial court would have ordered a stay had an application been made, then the conviction could be quashed. This approach was approved as more miscarriages of justice appeared before the courts (*L(C) and Ors v R* [2013] EWCA Crim 991 and *R v Joseph & Ors* [2017] EWCA Crim 36). *DS* erroneously overturned this settled position because of the MSD's coming into force. The availability of a defence at trial was deemed to have erased any special need for courts to consider ECAT and to protect victims from being unjustly prosecuted. No longer could a victim seek to have a prosecution stayed or a conviction quashed as an abuse of process due to having been compelled to offend (*DS* [at 40]), even on the narrow terms established previously.

AAD returns the law to its prior position. The Court was influenced here by the ECtHR's scathing judgment in *VCL and AN*, where the UK had prosecuted and imprisoned two children who had been forced to

produce cannabis. Their prosecution breached Article 4 of the ECHR because the Competent Authority (the UK's expert trafficking decision making body) had determined that both children were victims of human trafficking, and yet the CPS had failed to give reasons to counter these decisions. The ECtHR confirmed that the UK had positive obligations in this context [159–162]. The ECtHR explained that, although there is no absolute obligation not to prosecute victims, prosecution will harm them, damage their recovery and risk re-trafficking, and the early identification of victims is accordingly vital. The UK was therefore obliged to ensure, wherever possible, that a decision about whether a person is a victim is made by a competent body before a prosecution decision; and, while the prosecution need not abide by a competent body's decision, it must give clear reasons if departing from it. These decisions are made in the UK by its Competent Authority and are termed "Conclusive Grounds" decisions, which establish on the balance of probabilities whether or not a person was a victim of human trafficking. *AAD* makes clear (at [141]) that *DS* wrongly took away the special supervisory jurisdiction for victims and, even if the Court were bound by *DS*, it would have departed from it in light of the ECtHR's ruling in *VCL and AN*.

The next problematic judgment discussed in *AAD* was *Brecani v R* [2021] EWCA Crim 731, where the Court had held that Conclusive Grounds decisions by the Competent Authority are inadmissible at trial. That this precedent was applied in *AAD* is surprising because Conclusive Grounds decisions clearly have some probative value, and *AAD* confirms (at [141], [81]) that these decisions are admissible on appeal. Indeed, they are of essential value in appeals because the court must have regard to a Conclusive Grounds decision if it is to determine whether the prosecution had any rational basis for departing from it (*VCL and AN* [at 162]). The result of *AAD* is that Conclusive Grounds decisions are essential to courts when assessing the safety of a conviction, or whether a prosecution ought to be stayed, but they cannot be relied on at trial. Such decisions will not be put before the jury to assist in analysing the MSD. The reason for this stance is that the Competent Authority was not thought sufficiently competent to satisfy the criminal courts that its decisions are useful to juries, even though these decisions can assist the courts (*AAD*, at [85]).

The Court fell back on the procedural rules of evidence as the basis to exclude Conclusive Grounds decisions from trial. It found that the context of modern slavery was not sufficiently unique to justify departing from established principles. *AAD* therefore emphasises (at [85]) that non-expert opinion evidence is generally inadmissible, and that Competent Authority case workers are: "junior civil servants performing an administrative function, [and] are not experts in human trafficking or modern slavery". The Court decided that Conclusive Grounds decisions fell into the

category of non-expert evidence and excluded them from trial accordingly, even though the Competent Authority was specifically set up to fulfil the UK's identification and decision-making functions as required by ECAT (art. 10): "Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims". The Court had also previously stated (in *R v Joseph* [2017] EWCA Crim 36, at [20], viii), (though *Joseph* related to appeals and not to trials) that courts would be likely to abide by Conclusive Grounds decisions unless there was credible evidence to counter them. *AAD* nonetheless confirms that these decisions are not useful to juries, and that juries are in fact well-equipped to assess claims of modern slavery (*AAD*, at [86]): "it does not matter that the members of the jury have not shared the suggested experiences described by the defendant in a human trafficking or modern slavery case. Indeed, this applies in all criminal trials regardless of the nature of the charge. Few jurors will have been subjected, for instance, to duress."

This is contentious. Modern slavery is an extreme abuse engaging Article 4 of the ECHR, and human trafficking is the subject of its own human rights-related Convention (ECAT). Such abuses may be evident in some cases of duress, but the Court's approach wrongly implies equivalence between the two. In fact, modern slavery ought to be treated differently from duress. *AAD* recognises on the one hand that modern slavery provides a special context requiring increased judicial protection for victims, but on the other hand it is not considered sufficiently special for the jury to be assisted by Conclusive Grounds decisions. If, as *AAD* concludes, juries are sufficiently well placed to assess the inevitable complexities of a MSD case, then it is also fair to assume that they have sufficient ability to assess the appropriate weight to be given to a Conclusive Grounds decision. These decisions take many months (often more than a year) to be concluded and are the product of anxious scrutiny by trained and qualified professionals applying a balance of probabilities test. If a person has obtained a positive decision, it ought to be put before a jury to give that person adequate protection against unjust punishment. As things stand, a Conclusive Grounds decision may, very appropriately, form the basis for a successful appeal, but it will not help a victim to argue their case before a jury. The ruling in *AAD* is therefore highly dubious in a context where victim protection is, or ought to be, a priority, and where the courts have already seen many miscarriages of justice.

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