

In the matter of Re C

SUBMISSIONS ON BEHALF OF THE JOINT INTERVENERS

NIA and WOMEN@THEWELL

Introduction

1. The key issue before Mr Justice Hayden (“the Judge”) which resulted in this appeal was *“whether a care plan to facilitate C’s contact with a sex worker could be implemented without the commission of an offence under the Sexual Offences Act 2003”*. The Judge held that a care worker who assisted C, a learning-disabled man, to secure the “services” of a prostitute would not commit a criminal offence under s.39 of the Sexual Offences Act 2003 (“SOA”) and that s.53A SOA has *“little, if any relevance to what [was] being contemplated for C”*. Nia and women@thewell, two charities which work directly with girls and women in prostitution, jointly applied for permission to intervene in the public interest. They were granted permission so that they: *“can give the court assistance with the understanding of the harm women in the sex trade can face in terms of coercive control and physical harm together with the potential difficulties in identifying such a woman or in determining her true age”*.¹
2. On receipt of the Appellant's Skeleton Argument, the interveners amended their intervention application, to focus on a largely evidential submission to avoid duplication of the submissions already made². The Court is respectfully asked to consider the statements submitted alongside these Submissions, which contain important evidence upon which it may wish to rely. The statements provide details of the realities of the sex trade, including: how women and girls enter - a significant proportion of whom have been exploited into doing so before the age of 18; the harm they face within it and after leaving and the barriers they face to exiting. The statements, drawn from the considerable experience and expertise of the interveners, provide a compelling picture of the realities of prostitution and the abuse and exploitation so many have experienced, including relevant statistics from their services, where available.

¹ Order of the Rt Hon Lady Justice King, dated 13 July 2021.

² CWJ has not received the witness statement of Professor De Than.

3. The interveners respectfully agree with and adopt the submissions made in the Appellant's Skeleton Argument, in particular those concerning Article 8 ECHR. The interveners do not consider that Article 8 can be construed as it has been by the Judge, which would, if correct, create a right to pay for sex, as opposed to a simple right to a sex life. Such a finding would plainly have a much wider impact than this case and if upheld, would be likely to have a profound and devastating impact upon women and girls both in, and at risk of, exploitative practices in prostitution by fuelling demand. The statements highlight that exploitation is rife within prostitution.

4. In summary, the interveners respectfully submit the following:

Issue I: An analysis and overview of the rationale of s.53A SOA 2003 is integral to this appeal. It is submitted that the offence was brought into force because the government recognised that many, if not all, prostituted women are subject to coercion and control. To discourage such exploitation, it was necessary to seek to limit demand from "buyers" which is the rationale for enacting s53A as a strict liability offence. This forms part of the general public policy position to seek to reduce prostitution and assist exploited women to exit the sex trade.

Issue II: Empirical research (for which see also under Issue III), as well as the experience of the interveners has identified the prevalence of exploitation in prostitution and the consequent harms caused. This research was not before the Judge who stated that "*not all prostitution is necessarily coercive*" which appears to imply that exploitation is prevalent only in street prostitution, and therefore not relevant to this case because "*nobody considers it appropriate for the contemplated sexual activity to be arranged with a street sex worker.*" The interveners will illustrate that exploitative conduct and control can exist in all forms of prostitution, including that which is advertised online; so-called "high end escort services" and in brothels. C and his care workers need to be readily able to identify "exploitative" conduct in order for them *not* to be at risk of committing an offence pursuant to s.53A SOA. In reality, this is a complex and difficult task: a finding which would allow care workers to facilitate access to a prostituted woman will put them, and those they care for, at substantial risk of committing an offence and prosecution.

Issue III: It is submitted that the sex trade puts the women involved at risk of many types of harm, including violence. This is, in part, why the public policy position is to seek to limit the sex trade as far as possible. Permitting care workers to facilitate access to prostituted women runs counter to that public policy of discouraging prostitution and is likely to have the unintended consequence of driving demand and a burgeoning market. This is very likely to lead

to greater numbers of women and girls being exploited and of being placed at greater risk of extremely serious physical and mental harm.

Issue I: The purpose and analysis of s.53A of the Sexual Offences Act 2003

5. It is respectfully submitted that the Appellant's submissions are correct that the strict liability offence under s.53A SOA would result in C's carers, either alone or jointly with C, committing an offence if the prostituted woman commissioned has been subject to "*exploitative conduct*" (§24-25).

53A Paying for sexual services of a prostitute subjected to force etc.

(1) A person (A) commits an offence if—

(a) A makes or promises payment for the sexual services of a prostitute (B),

(b) a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and

(c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).

(2) The following are irrelevant—

(a) where in the world the sexual services are to be provided and whether those services are provided,

(b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.

(3) C engages in exploitative conduct if—

(a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or

(b) C practises any form of deception.

(4) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.]

6. S53A of the SOA 2003 was inserted by s14 of the Policing and Crime Act 2009. In 2008, the Home Office published a review, which concluded that there was evidence to support the development of an offence to criminalise those paying for sex with a person who is being controlled for someone else's gain. This was predicated on a finding that: "*Those who sell sex are often the victims of serious violence and exploitation; they are often vulnerable to abuse, coercion or control by others, who gain from their involvement. Some individuals are forced to sell sex against their will, and have little say in who or how many people they have sex with*".³

³ <http://data.parliament.uk/DepositedPapers/Files/DEP2008-2766/DEP2008-2766.pdf>

7. The issue of exploitation and control was considered so prevalent within prostitution that tackling it was considered a priority. As a result, it was further recommended that the offence should be one of strict liability, “...to aid prosecution and remove any ambiguity from possible offenders’ minds about the potential consequences of sex with a trafficked or exploited woman.” The offence was debated, passed by Parliament, and came into force in 2010. S53A (c) makes clear that “exploitative conduct” is deliberately wide-ranging and intended to cover any form of coercion, deception and/or force, whether violent or not.
8. In 2011, the government’s strategy on Human Trafficking again set out the importance of offences such as s53A SOA in tackling these crimes stating that, “A key element in disrupting the market for trafficking and reducing its profitability is tackling demand by targeting those that pay for sexual services from trafficked women.”
9. The position that women involved in prostitution may be victims of criminal activity including trafficking, coercion and exploitation, can be seen across many areas of the State’s approach to criminal offences in this area. For example, prostitution is addressed as sexual exploitation within the overall CPS Violence against Women and Girls (VAWG) portfolio (due to its gendered nature). S45 of the Modern Slavery Act 2015 provides a statutory defence for individuals who are compelled to commit crime whilst being exploited – in this instance, a prostitution-related crime such as loitering or an immigration offence – demonstrating the government’s full cognisance of the exploitation and lack of autonomy endemic within prostitution, and modern slavery more widely.
10. Further, in international jurisprudence, the recognition of the exploitation of those within prostitution is reflected in Conventions such as the Palermo Protocol 2000 (which precludes any concept of consent⁴)⁵.
11. It is uncontroversial to recognise that exploitation within prostitution occurs in at least some form, notwithstanding that there is a debate as to how prevalent this exploitation is, and to how many individuals it may apply. However, it is widespread and concerning enough that s.53A

⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol) 2000, Article 3(b): ‘The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used’

⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol) 2000, Article 3(a): ‘“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’

SOA came into force as a strict liability offence, in an attempt to limit such exploitation. Further, it is submitted that such an offence is required to ensure that the State complies with its positive obligations arising under Articles 3 and 4 ECHR, to provide a framework for protecting individuals from such conduct by others and actively deter and prevent such behaviour, see, for example, *M.C. v. Bulgaria* (2005) 40 EHRR 20; *Rantsev v Cyprus and Russia* (2010) IHRL 3632. The interveners' statements demonstrate the significant harm that girls and women in prostitution routinely experience in their everyday lives – rape, domestic abuse, exploitation and trafficking are common, which it is submitted clearly engages Articles 3 and 4.

12. In any circumstance where an individual within prostitution would fall under exploitative conduct due to being trafficked or forced or threatened into prostitution, C or his carer would be committing an offence and could be prosecuted under s.53A SOA. It is submitted that it is of paramount importance that the Court addresses the connection between individuals who fall under that section and that it is a near impossible task to ascertain whether a woman is “consenting” to prostitution, which in turn leaves C and/or his carer open to prosecution. As outlined in the statements, often a woman in prostitution has been subjected to force which *automatically* equates to them not consenting and/or lacking autonomy.⁶
13. The interveners therefore submit that the issue the Court should consider is whether a care plan which includes asking a care worker to assist the person they care for in accessing the sexual services of a prostitute can ever be done in a way that will ensure they are not committing an offence under s53A SOA. From the evidence of the intervener and as set out below, it is submitted that there is no effective way to preclude the possibility that a person in prostitution has been exploited. To require a care worker to find, identify and even pay (cash or otherwise) for the sexual services of a prostitute on behalf of C will improperly put the carer at risk of prosecution under s.53A SOA.

Issue II: The difficulty in recognising if a prostituted woman is a victim of coercion, exploitation or control

14. The evidence submitted by Professor Claire de Than, as outlined in the judgment (§27-36) highlights that prostitution is not considered by everybody to be a matter of exploitation, or a cause of significant harm. Her evidence was heavily relied on by the Judge. He was not provided with any contrary data or viewpoint. The interveners respectfully submit that

⁶ Section 74 SOA 2003.

Professor de Than's evidence presented a sanitised and unrepresentative view of prostitution. In particular, it is submitted that it fails to reflect accurately the prevalence of prostituted individuals who are, or have been, subjected to coercion or other forms of exploitation. Further, the interveners' evidence shows that even where the women in prostitution appears to be acting out of choice as to how they "seek" clients, they may in fact be doing so as a result of the exploitation and control of others.

15. The Judge suggests that a prostituted individual who falls within the ambit of s.53A SOA would not be relevant to the present case (see §27, 31). In part this seems to be based on the view that such women can be easily identified and are (at least in the main) involved in street prostitution. The interveners respectfully disagree. Their evidence demonstrates that many of the women subject to another's control do not always even realise this themselves because coercion and control have been normalised. For example, they may speak of their "boyfriend" who is in reality their pimp, or they may have started being prostituted from such a young age that they do not know any differently. If some victims of exploitative and controlling practices are unable to recognise it themselves, it could not be possible for a care worker to discern that to be the case. If the prostituted individual was found in fact to be under the control of another, then that would still mean the care worker and/or the disabled man was guilty of an offence under s53A and is open to be prosecuted.
16. Both charities have encountered women who move between the three main areas of the sex trade, on-street, indoor (including brothels), and agency/escort work, often at the behest of those who control them. These "separate areas" of the sex trade are in essence a false trichotomy. How the prostituted woman is accessed gives no real indication of whether she is under the control of another. In the statement of Ms Hattersley on behalf of women@thewell she explains: *"Some of those women [we assist] are now involved in street prostitution but will have previously been so-called 'high-class escorts'. Bluntly, they will be seen as having "aged out" of that area of prostitution and had to find a different way to carry on. Even while "high class escorts" we are often informed that the women had pimps who simply move them to a different area of the sex trade to continue exploiting the women making money for them"* (§15).
17. Both charities also have considerable experience in working with victims of trafficking. To avoid repeating large sections of the statements here, the Court is asked to refer to the sections which relate to trafficking (§22-28 of Ms Hattersley's statement and §23-27 of Ms Ingala Smith's). In essence, they make plain that trafficking, both in and around the UK, is not easy to identify. Nia have specific questions and processes that they use to try to establish if a woman has been a victim of trafficking. In an extreme situation, even women@thewell, despite their

expertise around exploitation, were unable to identify that one of their service users had been trafficked into the UK until they had worked with her for 12 years. They explain that like many victims of trafficking she had been “*forced to learn certain skills and mannerisms to fly under the radar to avoid abuse from her traffickers and pimps and to avoid suspicion from authorities*” (§25). It is submitted that if the interveners, with expert knowledge and experience of the sex trade, are not able to immediately discern if a woman may have been trafficked, it would certainly not be possible for a care worker to do so. As s53A SOA is a strict liability offence, the fact that the care worker or P did not know she had been trafficked would not be a defence.

18. It is submitted that the advertising of “sexual services” online through the ‘Outsiders Trust’ or any other agency simply cannot preclude that the woman might be subject to s53A SOA exploitation – be that trafficking or otherwise. As set out in the statements, it is not straightforward to establish if a woman is being exploited or trafficked, or under the control of another but given the prevalence of exploitative conduct it is highly likely they are. If so, it is likely that an offence will be committed, albeit unwittingly. While it is accepted that s53A SOA offences are not often prosecuted, it would still not be lawful or appropriate for a care plan to include conduct which would likely constitute an offence, regardless of the chances of a prosecution and conviction.

Issue III: Permitting the facilitation of prostitution is counter to public policy

19. The realities of the sex trade and the harm caused to those involved would need to be taken into account by the Court, particularly where it may make a judgment counter to public policy which is to limit the practice. A 2018 study by Connelly provides a comprehensive data set of violence-related experiences from which initial analysis can be drawn.⁷ A secondary quantitative data analysis of 2,056 crime reports submitted to *National Ugly Mugs* (NUM) took place,⁸ seeking to understand ‘i) *How do the different sex markets in the UK affect what crimes are reported to NUM?* (and) ii) *What effect do the different sex markets in the UK have on sex workers’ willingness to report victimization to the police?*’⁹. First, the sample size of 2,056 reports is large compared to other similar studies carried out thus it provides a strong foundation for analysing experiences within the UK. Secondly, it offers an insight into the type of crime

⁷ Laura Connelly, Daiga Kamerāde and Teela Sanders, ‘Violent and Nonviolent Crimes Against Sex Workers: The Influence of the Sex Market on Reporting Practices in the United Kingdom’ (2018) *Journal of Interpersonal Violence*.

⁸ National Ugly Mugs are a non-profit organisation ‘*which provides greater access to justice and protection for sex workers who are often targeted by dangerous individuals but are frequently reluctant to report these incidents to the police.* see “About” <<https://uglymugs.org/um/about/>> accessed 13 July 2021

⁹ Connelly (n21)

experienced by victims in the UK including those ‘advertising’ online, which is central to this appeal.

20. The research showed that on average, 46% of *all* prostituted individuals reported experiencing some form of violence;¹⁰ 17.8% reported rape and/or attempted rape;¹¹ and 7.2% reported being sexually assaulted.¹² Connelly describes it as ‘*almost axiomatic*’ that researchers lament the ‘*enduring levels of violence*’¹³ and further studies support this point.
21. Campbell and Stoops found that 80% of those in prostitution in Liverpool had been subjected to physical violence;¹⁴ and a multi-city study of 240 prostituted individuals undertaken by Barnard found that 63% had been subjected to violence over their lifetime, 47% reported being ‘*slapped, kicked, or punched*’, and 28% reported ‘*attempted rape*’.¹⁵
22. The interveners’ statements shows that the women they work with have suffered high levels of harm, including violence. In the statement provided on behalf of Nia, Ms Ingala Smith explains that “...*many women initially said they had not experienced much violence or no more than any other women. Yet in the course of the interview they described rapes, abductions, beatings and a range of injuries and dangerous situations often reflecting it was a hazard of the job. This degree of normalisation, understatement and minimisation masks the scale and extent of violence, coercion and abuse*” (§18). Thus, studies which rely on self-reporting incidents of violence and even national crimes figures, are likely to significantly undercount the violence women in prostitution face.
23. The harm caused is one reason that the public policy position to reduce the sex trade is important. However, the sex trade is thought to be increasing, and with it, levels of exploitation are rising. In July 2020, the Centre for Social Justice found that all types of modern slavery – including sexual exploitation – were increasing.¹⁶ The report found that the most common type of exploitation was sexual exploitation (33%),¹⁷ and during the Covid-19 pandemic there was a 280% increase in the advertising of sexual services online in the West Midlands,¹⁸ with the women being of predominantly Eastern European origin. Online advertising is simply a new

¹⁰ *ibid* p9

¹¹ *ibid* p11

¹² *ibid*

¹³ Connelly (n21)

¹⁴ Rosie Campbell and Shelly Stoops, ‘Taking sex workers seriously: Treating violence as hate crime in Liverpool’ (2010) Research for Sex Work 12

¹⁵ Marina Barnard and others, ‘Violence by clients towards female prostitutes in different work settings: questionnaire survey’ (2001) 322 *British Medical Journal* 524

¹⁶ Centre for Social Justice and Justice & Care, ‘It Still Happens Here: Fighting UK Slavery In The 2020s’(July 2020)<<https://www.justiceandcare.org/wp-content/uploads/2020/07/Justice-and-Care-Centre-for-Social-Justice-It-Still-Happens-Here.pdf>> accessed 13 July 2021

¹⁷ *ibid* p23

¹⁸ *ibid* p65

conduit for *all* types of prostitution and its associated profiteering – and not simply a platform confined to allegedly “consenting individuals”.

24. This must be viewed in the context of the overall prostitution “market size” increasing in recent years. In 2016-17, figures estimated the number of prostituted individuals in the UK at approximately 72,000,¹⁹ an increase from approximately 50,000 in 2014,²⁰ and Ward et al found that the number of SBs had doubled during the decade 1990-2000.²¹
25. A representative from Women’s Aid stated that there had also been an increase in on-street prostitution in Birmingham during the Covid pandemic²² which appears to be accompanied by a rise in violence: research done by Changing Lives found that “*Across the breadth of our services supporting women selling sex and/or experiencing sexual exploitation, there has been a 62% increase in the number of women disclosing that they have experienced sexual violence during the first four months of the pandemic.*”²³ A 2018 APPG report stated that ‘...modern slavery and human trafficking are far more prevalent than previously thought’, and that there were ‘growing reports of organised crime groups sexually exploiting women around the UK in so-called ‘pop-up’ brothels’.²⁴ While prosecution and investigation figures were provided to the inquiry, they concluded that they ‘*represent a small fraction of the true scale of organised sexual exploitation.*’²⁵
26. The Government’s current approach to prostitution is that it should be discouraged, recognising the immense harms inflicted upon those directly affected. Some of those harms are set out in the interveners’ witness statements. Accordingly, it would run counter to public policy to find that a new demographic of individuals namely care workers should be permitted to “source” prostituted individuals for the disabled person. Public policy is clearly engaged with the reduction of the overall prostitution “market” in mind. Evidence demonstrates that where prostitution is encouraged, permitted, or tacitly approved, the market increases. This is because prostitution is known to be demand-driven.

¹⁹ n143

²⁰ Ibid para 16

²¹ H Ward and others, ‘Who Pays for Sex? An Analysis of the Increasing Prevalence of Female Commercial Sex Contacts among Men in Britain’ (2005) 81 Sexually Transmitted Infections 467.

²² ibid p64

²³ <https://www.changing-lives.org.uk/wp-content/uploads/2020/10/Nowhere-To-Turn-FINAL-REPORT.pdf>

²⁴ All-Party Parliamentary Group, *Behind Closed Doors Organised sexual exploitation in England and Wales An inquiry by the All-Party Parliamentary Group on Prostitution and the Global Sex Trade* (APPG 2018) p2

²⁵ Ibid p5

27. Research from across the globe highlights that where demand is encouraged, permitted, or approved – as it effectively would be with a finding that a right to a sex life extends to the right to buy sex and the granting of permission for care workers to facilitate the purchase of sexual access – the prostitution “market” increases in size. Three separate jurisdictions support this argument, Germany (State-regulated legalised prostitution); New Zealand (blanket decriminalisation); and Sweden (buyer criminalisation but decriminalised for those in prostitution²⁶. In respect of Germany, a journal article reported that the prostitution market comprised of approximately 150,000 individuals²⁷. The author, Cho, found that the prostitution market in Germany had increased as a result of an influx of human trafficking victims being trafficked directly into prostitution since legalisation was implemented. In New Zealand, the Prostitution Law Review Committee published their statutorily-required research in 2008 and it stated that there *had* been an increase of individuals entering the sex trade²⁸. In contrast, in Sweden the law changed in 1999 to de-criminalise prostituted individuals and to criminalise buyers of sex. Since then, the market has reduced²⁹. Prior to the criminalisation of prostitution in 1999, there were an estimated 650 women involved in on-street prostitution and fifteen years later, this number had more than halved to c.200-250³⁰. In contrast to New Zealand and Germany, it is generally considered that Sweden has also seen a reduction in trafficking into prostitution as ‘the ban on the purchase of sexual services acts as a barrier to human traffickers and procurers considering establishing themselves in Sweden.’³¹ Whilst the prostitution market is currently expanding in any case in England and Wales, it is submitted that by facilitating – or condoning – increased “purchasing” by care workers on behalf of their clients, this would necessarily increase demand, and therefore contribute to a market increase.

Anthony Metzger QC

Charlotte Proudman

Goldsmith Chambers

19 July 2021

²⁶ Often referred to as the Nordic Model.

²⁷ Cho et al (eo-Young Cho, Axel Dreher and Eric Neumayer, ‘Does Legalized Prostitution Increase Human Trafficking?’ (2013) 41 World Development 67.

²⁸ Prostitution Law Review Committee, ‘Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003’ Prostitution Law Review Committee 2008 <http://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf>

²⁹ Government Offices of Sweden, ‘Förbud mot köp av sexuell tjänst. En utvärdering 1999–2008’ (*Government Offices of Sweden* 2010) translated: The Ban against the Purchase of Sexual Services. An Evaluation 1999–2008 <https://www.government.se/4a4908/contentassets/8f0c2ccaa84e455f8bd2b7e9c557ff3e/english-translation-of-chapter-4-and-5-in-sou-2010-49.pdf>

³⁰ See, Prostitution in Sweden 2014: The extent and development of prostitution in Sweden, <https://www.lansstyrelsen.se/download/18.35db062616a5352a22a1d7a5/1559733783690/Rapport%202015-18%20prostitution%20in%20Sweden%202014.pdf>

³¹ *Ibid* no. 29.