Neutral Citation Number: [2014] EWCA Civ 90

Case No: A2/2013/0530

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
MR JUSTICE IRWIN, QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2014

Before :

LORD JUSTICE PITCHFORD
LORD JUSTICE BEATSON
and
LADY JUSTICE GLOSTER

- -

Between :

SXH	**Appellant**
- and -	
CROWN PROSECUTION SERVICE	**Respondent**

- -
- -

Richard Hermer QC, Richard Thomas and Edward Craven (instructed by **Bhatt Murphy, Solicitors**) for the **Appellant**
Philip Havers QC, Neil Sheldon and Andrea Lindsay-Strugo (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 8 November 2013

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Judgment

Lord Justice Pitchford :

The appeal

1. On 22 December 2010 the appellant brought an action for damages against the Crown Prosecution Service ("CPS"), relying on section 7 of the Human Rights Act 1998. On 29 December 2009, shortly after her arrival in the United Kingdom from Holland to claim asylum, the appellant was charged with an offence, contrary to section 25(1) of the Identity Cards Act 2006, that she was in possession of a false identity document with the intention of using the document for establishing a registrable fact within the meaning of section 25 (4). On 11 June 2010, at Chelmsford Crown Court, the prosecution offered no evidence and a formal verdict of not guilty was entered. In the meantime the appellant had been remanded in custody to await trial and it was her contention that her mental health had, for that reason, suffered. The appellant claimed that the decision by the respondent to prosecute her constituted an unlawful interference with the right of respect for her private life within the meaning of Article 8 (1) of the European Convention on Human Rights ("ECHR") which entitled her to damages.

2. In his judgment dismissing the claim, handed down on 1 February 2013, Irwin J held that Article 8 was not engaged on the facts of the case; alternatively, if it was, the decision to prosecute was in accordance with the law, necessary in a democratic society and proportionate to the legitimate aim of the prevention of disorder or crime. This appeal from Irwin J's decision raises, in particular, the questions: (1) whether Article 8 is engaged by a decision to prosecute for an offence that is Convention compliant, and (2) if so, whether the decision to prosecute in the appellant's case was proportionate for the purpose of Article 8 (2).

The facts

3. The background facts are fully described by Irwin J in his judgment ([2013] EWHC 71 (QB)) at paragraphs 4-37 and I shall confine my summary to the essentials. The appellant was born on Koyama Island in Somalia on 26 December 1991. She is a member of the Bajuni minority clan. In 2005 her father was killed by members of the Darood clan. Her brother was a fisherman. In 2007 he did not return from fishing during rough weather and has not since been seen. In the same year, the home of the appellant and her disabled mother was again attacked by the Darood clan and the appellant was raped. With assistance from a family friend, Adam, the appellant and her mother fled to Subururu on the mainland where they were given shelter. In 2008 fighting took place between Al-Shabaab and the local Barawa people. During an attack on the house where the appellant was living her mother was killed and the appellant herself was injured by a blow to the head with a rifle butt. The appellant and Adam fled to Yemen in December 2008. Adam arranged for an agent, Abdul Rahim, to accompany the appellant to the United Kingdom. They embarked in a plane to Europe and transferred to a train. They arrived in Holland on Christmas Day 2009 where Abdul Rahim supplied the appellant with a false refugee travel document of British origin (false in that it had been issued to another person). The appellant flew from Eindhoven to Stanstead on 27 December 2009, the day after her 18th birthday. Her travel document was examined by Immigration Officer Brennen. Neither the name nor the photograph matched the appellant. The appellant claimed asylum.

4. The appellant's screening interview took place at 12.35 pm the following day, 28 December. She told Immigration Officer Evans that she had come from Somalia for her safety. There was a war in Somalia and she belonged to a minority clan who were attacked by the Darood. The appellant was told by Immigration Officer Webb that she could return to Holland if she wished. If she did not do so she would be arrested. The appellant declined to return to Holland and at 2.15 pm she was arrested on suspicion of attempting to enter the United Kingdom in possession of a false document contrary to section 25 of the Identity Cards Act 2006. The appellant was interviewed under caution at 6.52 pm. She said that she had fled from Somalia to Yemen in December 2008 and had travelled to Europe in December 2009. She was asked to look at the travel document she had produced on arrival. She said that the agent had given it to her. She claimed that the agent had taken her to a place where her photograph was taken but she could not say whether the photograph in the document was hers, nor whether the document had been issued in her name. Asked why she had not claimed asylum in Holland, the appellant said she knew nothing about Holland and had been advised to come to the UK. She was subsequently charged and later remanded in custody by the magistrates court.

5. The police referred the circumstances of the appellant's case to the CPS. Between 7.35 pm and 8.00 pm on 28 December Ms Jo Golding reviewed the case under the Code for Crown Prosecutors. The police were advised that the evidential criteria were met. As to the public interest criteria Ms Golding advised that the offence was serious, it was likely to result in a "significant" sentence and that "prosecution would have [a] positive impact on community confidence". As a result the appellant was charged with the section 25 offence.

6. On 28 January 2010 the case was reviewed by Ms Charlotte Davison, a barrister employed by the CPS, specifically upon the question whether the statutory defence under section 31 of the Immigration and Asylum Act 1999 applied to the appellant. As to the appellant's journey from Yemen and Eindhoven, Ms Davison drew attention to the decision of the House of Lords in *R v Asfaw (UN High Commission for Refugees Intervening)* [2008] UKHL 31, [2008] 1 AC 1061 which held that a genuine refugee was not to be deprived of the section 31 defence merely because she was in transit in the UK to the country in which asylum would be sought. Ms Davison requested information from UKBA as to whether the section 31 defence was available to the appellant.

7. No response had been received from UKBA by 22 February 2010 when the appellant appeared at Chelmsford Crown Court for a plea and case management hearing. Ms Helen Booth, who appeared for the appellant, submitted a skeleton argument in which it was asserted that the appellant was a refugee entitled to rely on the section 31 defence. On 28 April 2010 Ms Davison, by email, sought specific information from UKBA as to the appellant's stay in Yemen. She enquired whether the transcript of interview, which recorded the date of her departure from Somalia as December 2008, was accurate. On the following day it was confirmed that the appellant had remained in Yemen for a year before making her journey to Holland. She was wrongly informed, however, that Yemen was not a signatory to the Refugee Convention. On 4 May Ms Davison advised that the CPS was minded to proceed with the prosecution. No explanation had been given as to why the appellant had not claimed asylum in Yemen.

8. The appellant's asylum interview took place on 26 May 2010. At some time between 1 June and 8 June, the CPS advocate, Ms Leslie Sternberg, was informed by Immigration Officer Webb of the difficulties encountered by Somalis living in Yemen. In Ms Sternberg's view the appellant would, as a result, satisfy the requirements of section 31(2). The appellant could not reasonably be expected to have been given protection under the Refugee Convention in Yemen. On 10 June the appellant was granted asylum. On 11 June the appellant's case was listed for mention at the Crown Court when the prosecution offered no evidence and the appellant was released from custody.

The statutory and Convention provisions

9. Section 6 of the Human Rights Act 1998 provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes—
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

By section 8 a court may in civil proceedings award damages against a public authority which has acted unlawfully in relation to the claimant. Section 7, so far as is relevant, provides:

> "7 **Proceedings.**
>
> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6 (1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding."

10. Article 5 ECHR states in its relevant parts:

"5 **Right to liberty and security**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) .....

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) ...

(e) ...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Article 8 ECHR states:

"8 **Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

11. Section 25 of the Identity Cards Act 2006 provides in its relevant parts as follows:

> "25 (1) It is an offence for a person with the requisite intention to have in his possession of under his control –
>
> (a) an identity document that is false and that he knows or believes to be false;
>
> (b) an identity document that was improperly obtained and that he knows or believes to have been improperly obtained; or
>
> (c) an identity document that relates to someone else.
>
> (2) The requisite intention for the purposes of sub-section (1) is –
>
> (a) the intention of using the document for establishing registrable facts about himself …
>
> (6) A person found guilty of a offence under sub-section (1) … shall be liable, on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine or both …"

12. Section 31(3)(aa) of the Immigration and Asylum Act 1999 provides a defence to a charge under section 25 of the 2006 Act as follows:

> "31 **Defences based on Article 31(1) of the Refugee Convention**
>
> (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he –
>
> (a) presented himself to the authorities in the United Kingdom without delay;
>
> (b) showed good cause for his illegal entry or presence; and
>
> (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

> (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country …"

13. The Asylum and Immigration (Treatment of Claimants, etc) Act 2004, section 2, creates an offence of failing to produce an immigration document at a leave or asylum interview as follows:

> "2 **Entering United Kingdom without a passport etc.**
>
> (1) A person commits an offence if at a leave or asylum interview he does not have with him an immigration documents which –
>
> (a) is in force, and
>
> (b) satisfactorily establishes his identity and nationality and citizenship. …
>
> (3) But a person does not commit an offence under sub-section (1) … if –
>
> (a) the interview referred to in the sub-section takes place after the person has entered the United Kingdom, and
>
> (b) within the period of three days beginning with the date of the interview the person provides to an immigration officer or to the Secretary of State a document of the kind referred to in that sub-section.
>
> (4) It is a defence for a person charged with an offence under sub section (1) –
>
> (a) …
>
> (b) …
>
> (c) to prove that he had a reasonable excuse for not being in possession of a document of the kind specified in sub-section (1) …"

14. Article 31(1) of the Convention and Protocol Relating to the Status of Refugees (1951) and (1967) states:

> "The contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present

> themselves without delay to the authorities and show good cause for their illegal entry or presence."

Interpretation of the section 31 defence

15. Before the introduction of the statutory defence in domestic legislation, the Divisional Court (Simon Brown LJ and Newman J) considered the United Kingdom's obligations under Article 31(1) in *R v Uxbridge Magistrates' Court (Ex parte Adimi)* [2001] QB 667 (DC), in relation to appellants who had entered the United Kingdom as asylum seekers in 1997 and been charged with offences under the Forgery and Counterfeiting Act 1981 arising from their possession of false travel documents. The court decided that the appellants were entitled to rely upon Article 31(1) in defence of the charges brought against them since, on the facts, it was the United Kingdom's obligation to ensure that they were not subjected to penalties. In the case of Mr Adimi who had travelled from Algeria via Italy and France, and was subsequently granted asylum by the United Kingdom, the court held that he was entitled to exemption from penalty under Article 31. At paragraph 15 Simon Brown LJ said:

> "15. What, then, was the broad purpose sought to be achieved by Article 31? Self-evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. In the course of argument my Lord suggested the following formulation: "Where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum, whether here or elsewhere, that conduct should be covered by Article 31." That seems to me helpful."

16. Following the court's judgment in *Adimi*, the Government introduced section 31 of the Immigration and Asylum Act 1999. In *R v Asfaw* [2008] UKHL 31, [2008] 1 AC 1061, the House of Lords considered the application of section 31 to the case of an Ethiopian national who had entered the United Kingdom in February 2005 and passed through immigration control to book an onward flight to Washington DC, where she intended to claim asylum. At immigration control in the United Kingdom and at check-in for her onward flight she presented a false Italian passport. She was charged with using a false instrument with intent, contrary to section 3 of the Forgery and Counterfeiting Act 1981 (count 1) and dishonestly attempting to obtain air transportation services by deception contrary to section 1 (1) of the Criminal Attempts Act 1981 (count 2). The section 31 defence undoubtedly applied to a charge under section 3 of the Forgery and Counterfeiting Act 1981. However, section 31(3) of the 1999 Act did not provide that section 31(1) was a defence to the charge in count 2. The jury acquitted the defendant on the first count and, having received the judge's direction that the defence did not apply to count 2, returned a verdict of guilty upon that count. The issue on appeal was whether the section 31 defence applied to asylum seekers in transit and, if so, whether it applied to the offence charged in count 2. At paragraph 24 of his speech Lord Bingham of Cornhill summarised the genesis of section 31, referring to the statements to Parliament made by the then Attorney General, Lord Williams of Mostyn QC, and addressed the question whether, as enacted, section 31 fully implemented in domestic law the United Kingdom's obligations under Article 31(1) of the Convention:

> "24. When the bill which became the 1999 Act was before Parliament, the Divisional Court judgment in *Adimi* [2001] QB 607 loomed largely in the

discussion … A number of statements made by the Attorney General on behalf of the Government were relied on in argument. The Government wanted an outcome which properly accommodated Article 31(1), asylum seekers and the difficulties raised by Simon Brown LJ (18 October, col 857). It was hoped to achieve this and avoid inappropriate prosecutions by giving administrative guidance to the prosecuting authorities (18 October, cols 855, 856) but if such prosecutions did occur the defence would exist (18 October, col 857). This was an appropriate and generous response and solution to difficult problems (18 October, col 857). On 2 November 1999, when the clause which became section 31 was (before amendment) introduced, the Attorney General said (col 784) that the purpose of the amendment was to ensure that someone who came within Article 31(1) of the Convention was properly protected and did not have a penalty imposed on him on account of his illegal entry or presence. He referred again to the administrative steps taken to identify Article 31(1) issues at an early stage. In relevant cases therefore the matter would never come to court. Sometimes the administrative procedures would fail, and the defence was a further safeguard. He acknowledged as an addition the requirement in sub-section (1) that a person would have applied for asylum as soon as was reasonably practical, which he considered a fair addition. This was a narrower definition than that adopted by the Divisional Court, but he thought the Government was entitled to take its own view and it had taken a different view. This did not mean (col 785) that every refugee that passes through a third country would be prosecuted, which did not and would not happen. There should be a limit on "forum shopping", deciding to accept an offer of safety in country B or C, but not in country A. The definition of "coming directly" was a generous one. There had to come a time when an individual stopped running away, the Article 31 situation, and started to travel towards a preferred destination. The Attorney General believed that the Government had got it right, but if the list of offences in sub-sections (3) and (4) needed to be added to, this could be done by Order.

25. It is clear that in one respect, expressed in section 31(2), it was intended to depart from *Adimi*. Whether that sub-section is consistent with the Convention, interpreted in the light of the travaux, maybe open to question, but it is not a question which arises in this case, since it has never been suggested that in coming from Ethiopia the appellant stopped in any country outside the UK where she could reasonably have been expected to be given protection under the law of that country. Sub-section (2) apart, no indication was given of an intention to depart from *Adimi*. More importantly, no indication was given of an intention to derogate from the international obligation of the UK as fully expounded in *Adimi*, as would be expected if that was the legislative intention. The indication was, rather, of an intention to reflect in statute the obligations undertaken by the UK in the Convention.

26. I am of opinion that section 31 of the 1999 Act should not be read (as the respondent contends) as limited to offences attributable to a refugee's entry into or presence in this country, but should provide immunity, if the other conditions are fulfilled, from the imposition of criminal penalties for

> offences attributable to the attempt of a refugee to leave the country in the continuing course of a flight from persecution even after a short stopover in transit. This interpretation is consistent with the Convention jurisprudence to which I have referred, consistent with the judgment in *Adimi,* consistent with the absence of any indication that it was intended to depart in the 1999 Act from the Convention or (subject to the exception already noted) *Adimi,* and consistent with the humanitarian purpose of the Convention. It follows that the jury in the present case, on finding the conditions in section 31 to be met, were fully entitled to acquit the appellant on count 1, as the respondent then accepted, even though the offence was committed when the appellant was trying to leave the country after a short stopover in transit."

17. Lord Bingham concluded that once the jury had returned a verdict of not guilty upon count 1 there was no legitimate aim to be served by seeking a guilty verdict upon count 2 the prosecution of which should, accordingly, have been stayed. The minority disagreed, holding that Article 31(1) did not serve to protect those who, having entered the United Kingdom, then sought to leave by using false documents to deceive the relevant authorities or airline.

18. In the present case the appellant fled from Somalia to Yemen where she remained for about one year. She then travelled to Holland when, after a stay of two days, she embarked on a plane to the United Kingdom. Upon an application of *Adimi* and *Asfaw,* the appellant was not to be disqualified from relying on the statutory defence in consequence of her short stop-over in Holland. Further, by the terms of section 31(2) the appellant could rely on the statutory defence notwithstanding her period of residence in Yemen, provided that "[s]he shows that [s]he could not reasonably have expected to be given protection under the Refugee Convention in that other country".

19. In *Makuwa* [2006] EWCA Crim 175, [2006] 1 WLR 2755 the Court of Appeal, Criminal Division, considered the burden and standard of proof applying to the section 31 defence. First, the Court held that although there was an evidential burden upon the defendant to raise the issue that she was a "refugee" within the meaning of the section 31(1) defence, the legal burden was on the prosecution to prove that she was not. At paragraph 25 Moore-Bick LJ, giving the judgment of the court, said:

> "25. In the present case section 31 provides a defence to charges made under various statutory provisions relating to the use of false documents, but in view of the specific nature of that defence, the particular mischief which Parliament had in mind when enacting that section must have been the use of false passports or other identity papers to obtain entry to this country. As to the practical considerations relating to the ease or difficulty of establishing refugee status, the defendant is in the best position to know whether he is afraid of persecution in the country of his nationality or former habitual residence, but it may be difficult for him to show that his fear of persecution for a Convention reason is objectively well-founded because he is unlikely to have access to the wider country information relevant to that question. Moreover on the face of it the language of subsection (1) draws a distinction between the defendant's status as a refugee and what, as a refugee, he has to show. Further support for the appellant's position can be gained from subsection (7) which provides as follows:

> "If the Secretary of State has refused to grant a claim for asylum made by a person who claims that he has a defence under subsection (1), that person is to be taken not to be a refugee unless he shows that he is."
>
> The fact that the statute casts a burden on the defendant under these circumstances to show that he is a refugee tends to support the conclusion that he does not bear that burden under other circumstances.
>
> 26. In the light of these matters we have come to the conclusion that, as in the case of other more commonly raised defences, such as self-defence or alibi, provided that the defendant can adduce sufficient evidence in support of his claim to refugee status to raise the issue, the prosecution bears the burden of proving to the usual standard that he is not in fact a refugee."

20. In respect of the matters that must be established under section 31(1)(a), (b) and (c), however, the defendant bears the legal burden of proving them on a balance of probability. The same must apply to section 31(2).

CPS policy guidance

21. The CPS policy guidance on section 31 was updated in October 2009, shortly before the appellant's arrival in the United Kingdom. At page 15 of the guidance it is stated:

> "It is a defence for a refugee to show that he has come directly from the country where his life or freedom was threatened, within the meaning of the Refugee Convention; presented himself to UK authorities without delay; showed good cause for entry or presence and made a claim for asylum as soon as practicable …
>
> Nevertheless, the court and more to the point, the CPS, in deciding whether to continue the prosecution, is necessarily obliged to have regard to the terms of the statute as laying down authoritatively the nature of this country's obligations under Article 31.
>
> It remains the case that the CPS is reliant upon the UK Border Agency for information and evidence relevant to an assessment of whether a defence under section 31 may apply. This should include information about the current status of any application for asylum. However, the fact that the defendant's application for asylum remains undetermined should not of itself prevent or delay prosecution or conviction.
>
> In this regard, prosecutors should also be aware where a suspect's refugee status remains to be determined by the Home Office or is the subject of an appeal to the Immigration Appellant Authority, yet the suspect has complied with all the conditions set out in sub-sections 31(1) and (2) it would normally be appropriate to await the outcome of the asylum proceedings before commencing a prosecution."

22. The guidance makes extensive reference to the decision of the House of Lords in *Asfaw.* Relevant to the present appeal is the following:

> "(iii) The term "coming directly" is to be interpreted in such a way that it does not impose an obligation solely on countries adjacent to countries of persecution. In practice the provisions of Article 31 are given a liberal interpretation, so that a person may actually travel through several countries until he eventually applies for asylum and recognition as a refugee in a country more or less of his choice, and may still get the benefit of those provisions. The implication is that if the refugee ends his journey in any of the transit countries, he would be able to invoke Article 31(1) there, too."

23. I conclude that in the appellant's case it was highly improbable that a stop-over of two days in Holland would have disentitled the appellant to the statutory defence. A more difficult issue was whether the appellant could bring herself within the exemption provided by section 31(2) having regard to her stay of 12 months in Yemen.

The grant of asylum

24. The decision letter issued by UKBA on 10 June 2010, in which the reasons for the grant of asylum to the appellant were set out, contained a close analysis of her circumstances and the objective country evidence occupying some twenty pages of typescript. The decision-maker concluded that the appellant was likely to suffer persecution in Somalia. As to the appellant's situation in Yemen, it was noted that Yemen had displayed "extraordinary generosity towards Somalis, granting all of them prima facie refugee status because of the conflict raging in their country". All Somalis received, upon request, government issued identification documents that accorded them the right to live and work in Yemen. UNHCR had registered some 150,000 Somalis living in Yemen (Human Right's Watch Report "Hostile shores: abuse and refoulement of asylum seekers and refugees in Yemen", 2009). However, in a report of 10 April 2008, Refugee International reported that most Somalis did not approach UNHCR for registration. They were either unaware of their options or worried about being identified by the Government and possibly repatriated. In 2010 the Interior Ministry had announced that those not registered before 17 March 2010 would be deported.

25. The author of the decision letter considered objective evidence of generally "appalling" conditions in Yemen for Somali refugees in 2009 and concluded:

> "In light of all the objective information quoted above it is considered that conditions for Somalis who migrate to Yemen are very harsh. Therefore, it is considered reasonable to expect the claimant to attempt to make her way from Yemen to a country where the conditions are less desperate."

The judge's findings of fact

26. Irwin J found (paragraphs 43-45) that at the material times the appellant could not have obtained valid travel documents in Somalia; that the CPS was wrongly informed at the outset of the prosecution that Yemen was not a signatory to the Refugee Convention (the true position being that, although Yemen was a signatory, in general a refugee from Somalia could not be expected to seek its protection); and that it was

not the common practice of the CPS to prosecute Somali asylum seekers for document offences, nor for the UKBA to keep them in immigration detention. The judge concluded that had the UKBA made full disclosure at the outset of the information that emerged at the asylum interview, the decision there and then to prosecute might well have been different.

The judge's judgment on liability

27. Upon the issue of liability the judge posed at paragraph 2 of his judgment the following questions for his consideration:

> "(i) Is Article 8 capable of being engaged by a decision to prosecute?
>
> (ii) If yes, is Article 8 engaged on the facts of this case?
>
> (iii) If yes, can the defendant justify the prosecution in the terms of Article 8(2)?"

28. As to the first question, the judge acknowledged the broad scope of "private life" for which respect must be afforded under Article 8(1). However, he concluded that Article 8(1) may apply to a decision to prosecute "but only in very specific circumstances … where … [the decision] represents an interference with an activity which is, or at least can reliably claim to be, an exercise of an Article 8 right" (judgment paragraph 75).

29. As to the second question, the judge held that when she presented a false identification document to the immigration officer, the appellant could not be said, even arguably, to have been pursuing any aspect of her private life (judgment paragraph 78). It was true that a decision to prosecute would have consequences that interfered with the appellant's private life, including perhaps deprivation of liberty, but in the judge's view those possible consequences did not elevate a decision to prosecute to an interference with private life. As the judge put it at paragraph 79 of his judgment:

> "I fully accept that the question of consequences of prosecution arises often, and perhaps freely, when considering the justification for interference with our Article 8 rights. But there cannot be an Article 8(1) right to be considered by reason of the consequences of this prosecution. If there were, then such a right would need to be addressed in every decision to prosecute for any offence, at least where there was a potential for a custodial sentence or full remand in custody. I do not accept that is the law. Nor is it good sense. It would introduce a spongy and uncertain relativism into the criminal law."

30. As to the third question, the judge said that, while the UKBA could have been more helpful to the CPS, he could not conclude that the CPS failed adequately to assess the public interest in prosecution. A burden was upon the appellant to establish the statutory defence. As soon as the prosecutor became aware that the statutory defence would be established she abandoned the prosecution. The policy in place was adequate for the assessment of the public interest. The judge accepted that had the

CPS been told at the outset that no Somali could obtain genuine travel documents and that "it was practically impossible to seek asylum in the Yemen" a decision to defer prosecution would have been taken, but that information was not available to the CPS when the decision to prosecute was made (judgment paragraphs 83-92).

The arguments:

Is Article 8(1) engaged?

31. The appellant did not argue that section 25 of the Identity Cards Act 2006, of itself, created an interference with the private life of the citizen. Her case is that the application of section 25 to a Somali asylum seeker in her position was an interference with her private life. The appellant's first proposition is that the judge was wrong to characterise her activity as nothing more than the presentation of false identification papers. She was fleeing from persecution in Somalia and seeking asylum by the only practicable means available to her. Hers was an attempt to protect and advance her moral, physical and psychological integrity, her sexual autonomy and personal and psychological space. Thus viewed, core aspects of the appellant's private life, as contemplated by Article 8(1), were engaged. Without false identification documents the appellant could not exercise her right, internationally recognised, to seek asylum. Accordingly, the decision to prosecute was an interference with her right to respect for her private life.

32. Secondly, it is argued that the judge was wrong to discount from the analysis the risk that consequences of prosecution would engage Article 8. It is commonplace for courts to assess whether the action contemplated would place convention rights at risk (see *R (Razgar) v SSHD* [2004] 2 AC 368 at paragraph 9). Remand in custody was an obvious risk which of itself engaged Article 8(1). Other adverse consequences likely to follow on conviction included a sentence of imprisonment, a more uncertain immigration status, and an adverse effect upon the appellant's ability to obtain citizenship.

33. The appellant relies upon the respondent's own Code for Crown Prosecutors published in 2004. The Code includes the following statements:

> "2.6 The Crown Prosecution Service is a public authority for the purposes of the Human Rights Act 1998. Crown Prosecutors must apply the principles of the European Convention on Human Rights in accordance with the Act …..
>
> 3.1 In most cases, Crown Prosecutors are responsible for deciding whether the person should be charged with a criminal offence, and if so, what that offence should be. Crown Prosecutors make this decision in accordance with this Code and the Director's guidance on charging. In those cases where the police determine the charge, which are usually more minor and routine cases, they apply the same provisions …..
>
> 5.8 Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that

> can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better."

34. The Code states that among the common public interest factors favouring a decision to prosecute are that the more serious the offence the more likely it is that a prosecution will be needed in the public interest. Among the factors that may indicate a decision not to prosecute is that the prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence. The Code makes clear that deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors will need to decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

35. The appellant draws attention to the CPS Legal Guidance on Human Rights and Criminal Prosecutions which states:

> "Claims under the HRA can be used to challenge the decisions of prosecutors or to seek compensatory awards for breaches of rights guaranteed under the Convention".

36. Crown Prosecutors are told that when they review a file they must consider which Convention rights of victims, witnesses and defendants might be engaged. In the case of a qualified right the reviewer must consider whether any interference is prescribed by law and proportionate. In Annex B to the Guidance is a step-by-step approach which applies to both the evidential and public interest stages of the Code. Commencing at Question 3:

> "**Question 3: Will prosecution engage anyone's convention rights?**
>
> Answer – No. There is no need to continue with this check list.
>
> Answer – Yes. Then go to Question 4.
>
> **Question 4: Will prosecution result in the restriction of a convention right?**
>
> Answer – No. There is no need to continue with this check list.
>
> Answer – Yes. Then go to Question 5.
>
> **Question 5: Is the right an absolute right?**
>
> Answer – No. Then go to Question 6.
>
> Answer – Yes. The prosecution is NOT likely to be human rights compliant.
>
> **Question 6: Is the right a qualified right?**

> Answer – No. The prosecution is NOT likely to be human rights compliant.
>
> Answer – Yes. Then go to Question 7.
>
> **Question 7: If the prosecution goes ahead will the right be limited or restricted only to extent set out in the relevant article of the ECHR? Ask:**
>
> Is there a legal basis for the restriction? AND
>
> Does the restriction have a legitimate aim? AND
>
> Is the restriction necessary in a democratic society? AND
>
> Is the restriction proportionate to the legitimate aim to the achieved?
>
> Answer – No. The prosecution is NOT likely to be human rights compliant.
>
> Answer – Yes. The prosecution IS likely to be human rights compliant."

37. The appellant argues that the current stance of the CPS in resisting her claim on the ground that the decision to prosecute did not engage Article 8 is contrary to the advice given both in the Code and the legal guidance. She acknowledges that while, as she argues, the threshold for engagement of Article 8 in decisions to prosecute may be a low one, the public interest will, in the vast majority of cases, be afforded considerable weight in favour of prosecution and, for that reason, the decision to prosecute will be proportionate in pursuit of the legitimate aim.

38. The respondent identifies a striking lack of Strasbourg authority for the propositions being advanced. The only exceptions were consideration of the impact of Article 8 upon a decision to prosecute by the Fourth Section of the ECtHR in *G v United Kingdom* [2011] 53 EHRR 237 and the court in *Ülke v Turkey* [2009] 48 EHRR 48 (which concerned breach of Article 3 by repeated convictions for the same continuing offence). In general it is the duty of national courts to keep pace with Strasbourg jurisprudence, "no more, no less" (*R (Ullah) v Special Adjudicator* [2004] 2 AC 323, at paragraph 20); to similar effect *R (Al Skeini & Others) v Secretary of State for Defence* [2008] 1 AC 153 at paragraphs 105-106, *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] 1 WLR 2435, at paragraphs 19-20, 86, *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719 at paragraph 141); compare, however, *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 at paragraph 112.) The respondent further relies upon the reluctance of the courts to interfere with the prosecutor's decision at common law (see *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 at page 371G, *R (Corner House Research & Others) v Director of Serious Fraud Office* [2009] 1 AC 756 at paragraph 31, *Gujra v CPS* [2012] 1 WLR 254 at paragraph 41, approved on appeal to the Supreme Court [2012] UKSC 52 and *R (Pepushi) v CPS* [2004] EWHC 798 (Admin) at para 49.)

39. The respondent argues that the reach of Article 8 is only to those aspects of the appellant's private life that are worthy of respect or in respect of which she has a reasonable expectation of privacy. In *Kinlock v HM Advocate* [2013] 2 WLR 141 (SC), in which the appellant sought unsuccessfully to challenge evidence of surveillance of his movements in a public place, the Supreme Court held that the appellant had no reasonable expectation of privacy while he was in public view. The criminal aspect of his conduct, if established, was not entitled to privacy. In the respondent's submission the appellant's attempt to circumvent immigration control by the use of a false travel document was self-evidently not the performance of any aspect of the appellant's private life. As Irwin J put it at paragraph 78 of his judgment, it "can by no stretch of the imagination be considered part of private life". It was the opposite of conduct in respect of which the appellant could reasonably expect to be left alone. The decision to prosecute had no impact upon the appellant's right to claim asylum. She exercised that right and was successful. The penal or other possible consequences of prosecution were immaterial. Bail was for the court; if the offence was proved, sentencing considerations followed but this was a matter for the sentencing judge; immigration matters were for the Secretary of State and the Tribunal.

40. The high water mark of the respondent's argument is that section 25 of the Identity Cards Act 2006, subject to the statutory defence in section 31 of the Immigration and Nationality Act 1999, creates a criminal offence. Once conduct is criminalised by a statutory provision that is compliant with Article 8 that conduct is undeserving of respect and the decision to prosecute the appellant for it will not attract the protection of Article 8 (see also paragraph 58 below).

Article 8 (2)

41. The appellant submits that the judge did not confront the necessary Article 8(2) questions:

    i) Was the interference in accordance with the law?

    ii) Did the interference pursue a legitimate aim?

    iii) Was the interference necessary and proportionate?

42. Mr Hermer QC argued before the judge that the interference was not in accordance with the law because the decision whether to prosecute was determined entirely by the chance whether the decision-maker was aware of the personal circumstances of the asylum seeker and the relevance of those circumstances to the section 31 defence. In the present case the decision-maker was ignorant of material facts that should have been in her possession.

43. The respondent submits that the appellant has confused the requirement that the decision should be made in accordance with the law with the performance of the decision-maker's assessment of the public interest. The decision was to be made upon a consideration whether the evidential threshold was passed and the public interest required prosecution. The policy that governed the decision-making process was

clearly stated. Later acquired knowledge by the prosecutor that affected the evidential and public interest considerations did not render the original decision contrary to law.

44. The appellant contends that it is not a legitimate aim to prosecute a genuine asylum seeker who could not have accessed genuine travel documents for the purpose of making her claim even if she had wanted to. She could have avoided committing the section 25 offence by destroying or disposing of the false document between disembarkation and passport control. If she did she would have had a defence to a prosecution under section 2(1) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (for not having an immigration document establishing identity and nationality or citizenship) because she had a reasonable excuse for not being in possession of a genuine document under section 2(4)(c) (see *Thet v Director of Public Prosecutions* [2006] EWHC 2701 (Admin), [2007] 2 All ER 425 at paragraph 24).

45. The respondent argues that the points made by the appellant do not address the Article 8(2) question which is simply whether the interference pursues the legitimate aim stated in paragraph (2) of the Article and, if so, whether the prosecution for the offence was proportionate. The purpose of section 31 of the 1999 Act was, the onus being on the defendant, to define the circumstances in which the defendant would be acquitted of criminal responsibility for the use of false documents. That there should be, subject to the statutory defence, a prosecution for an offence of using false identity documents was manifestly in pursuit of the legitimate aim of the prevention of disorder or crime. By incorporating into domestic law Parliament's understanding of the United Kingdom's obligations under Article 31 of the Refugee Convention, the *legitimate* aim is abundantly established.

46. The appellant contends that the judge did not engage with her argument that, on well established principle, once Article 8 applied to the decision to prosecute, the onus was upon CPS to justify that interference. There had been no relevant change in the appellant's circumstances between her arrest and the discontinuance of the prosecution. The public interest had at all times been the same. The appellant was a genuine asylum seeker without genuine travel documents. There was no public interest in her prosecution and never had been. The prosecution was launched without regard or adequate regard to the appellant's circumstances which the respondent had a duty to ascertain and consider in the course of ensuring that the decision to prosecute was proportionate. It was no answer that UKBA could have provided but did not provide the necessary information to the respondent. What matters is not the process by which the decision is reached but whether the decision reached is lawful.

47. The respondent submits that the test of proportionality has not been accurately identified in the appellant's grounds. The question is whether it is proportionate to the legitimate aim to prosecute the appellant when the outcome may be that she would be acquitted, having established a statutory defence in her favour. The evidence from Ms Pam Bowen, Senior Policy Advisor at the CPS, was that it would be impracticable to await the outcome of asylum claims before deciding whether to prosecute under section 25. Notoriously, some asylum claims take years to resolve. A policy of not prosecuting until the asylum claim was resolved would undermine the purpose of maintaining effective border control. In the respondent's submission the policy worked as it should. The appellant had on the face of it committed an offence. It was not for the CPS to carry out an investigation parallel with that of the UKBA. As soon

as UKBA completed its investigation and informed the CPS of its result the prosecution was discontinued. There was nothing disproportionate in the decision to prosecute or in the handling thereafter of the prosecution.

Discussion

48. Conceptually, there is a gulf between the parties upon the question whether the decision to prosecute engaged the appellant's right to respect for her private life.

What is "private life"?

49. In *R (Countryside Alliance & Others)*, paragraph 116, Baroness Hale identified two categories of expression or enjoyment of private life, the first embracing the privacy of the home and personal communications, and the second, the personal and psychological space in which the individual develops her sense of self and makes relationships with other people. Laws LJ recognised the reach of Article 8 in his dissenting judgment (with which, on this point, the other members of the court agreed) in *R (Wood) v Commissioner of Police* [2009] EWCA 414, [2010] 1 WLR 123, at paragraph 21, when he said:

> "21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction" (the *Von Hannover* case, 40 EHRR 1, para 50) between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the state shows an objective justification for doing so."

50. At paragraph 22, Laws LJ identified three qualifications to the individual's ability to identify lack of respect for private life:

> "22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if Article 8 is to be engaged) attain "a certain level of seriousness". Secondly, the touchstone of Article 8(1)'s engagement is whether the

> claimant enjoys on the facts a "reasonable expectation of privacy" (in any of the senses of privacy accepted in the cases). Absence such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to Article 8(2) …"

Laws LJ proceeded to identify the sources of the safeguards he had identified. I would identify, for example, *Halford v United Kingdom* [1997] 24 EHRR 523 at para 45, *PG and JH v United Kingdom* [2001] 46 EHRR 1272 at para 56, *Campbell v MGN* [2004] 2 AC 45 at para 21, *Von Hannover v Germany* [2005] 40 EHRR 1 at para 51 and, more recently, *Kinlock v HM Advocate* at para 21.

Does Article 8 apply to the prosecutor's decision?

51. The researches of counsel have produced only two domestic authorities in which the argument has been deployed that a decision to prosecute engaged the right of the defendant to respect for private life. In *R v G (Secretary of State for the Home Department Intervening)* [2009] 1 AC 92 the appellant, aged 15, had been charged with the 'rape of a girl under the age of 13 years', contrary to section 5 of the Sexual Offences Act 2003. The maximum sentence for such an offence is custody for life. It is the law of England and Wales that a person under the age of 16 cannot give consent to sexual activity. Further, it is no defence under the 2003 Act that the defendant reasonably believed that a complainant under the age of 13 was consenting. At the time of charge it was the understanding of the prosecution, on justifiable grounds, that the complainant had not given even ostensible consent to sexual activity. Following representations made on behalf of the appellant the girl was re-interviewed. Although the issue of ostensible consent was not resolved satisfactorily, the complainant was unwilling to give evidence upon that issue in a *Newton* hearing. As a result, the prosecution accepted a plea of guilty to the section 5 offence upon a basis of plea that the complainant had in fact consented and that the appellant had reasonably believed her to be aged 15 years, both factors that were relevant to culpability and therefore sentence. Section 9 of the 2003 Act created an offence of sexual activity by a person over 18 years with a child under the age of 16. For this purpose sexual activity includes penetration of the vagina by the penis. It is a defence to the section 9 offence that he reasonably believed the complainant to be aged 16 or over. Section 13 of the 2003 Act created a further offence in respect of a defendant who was under the age of 18 years at the time of the act and, but for the defendant's age, would have committed an offence under sections 9 to 12. The maximum sentence for a section 13 offence was 5 years custody. It followed that the appellant could have been but was not charged and convicted of an offence under section 13.

52. Notwithstanding that no such representation was made to the Crown Court at the time of conviction or sentence, the appellant appealed against conviction to the Court of Appeal, Criminal Division, on the ground that, being under 18, he was guilty of the lesser alternative offence under section 13 of the 2003 Act and should not have been convicted of 'rape'. He challenged his conviction both under Article 6(2) and Article 8. Art 6(2) provides:

> "Everyone charged with a criminal offence shall be presumed to be innocent until proved guilty according to law."

The appellant's argument under Article 6(2) was founded upon the decision of the European Court of Human Rights ("ECtHR") in *Salabiaku v France* [1988] 13 EHRR 379 at paragraphs 27 and 28. The appellant asserted that the ECtHR was laying down limits for the creation of strict liability offences: strict liability offences were permissible in principle provided that they were kept within reasonable limits and struck a balance between the public interest and the rights of the defence, which must include the right not to be convicted of a criminal offence in the absence of blameworthy conduct.

53. In the Court of Appeal ([2006] 1 WLR 2052) Lord Phillips CJ extracted the following principles from the judgment in *Salabiaku*:

> "31. *Salabiaku* was decided, in accordance with the practice of the Strasbourg Court, on its own particular facts. In so far as principles can be deduced from the decision, they might seem to be as follows:
>
> i) A provision of law imposing strict liability will not infringe article 6.1 or 6.2.
>
> ii) An evidential presumption that a criminal offence has been committed may infringe article 6.1 or 6.2.
>
> iii) An evidential presumption is more likely to infringe article 6.1 and 6.2 if it is irrebuttable than if it is rebuttable".

The Court declined to accept that the ECtHR was opening up strict liability offences for attack on the grounds that they offended Article 6(2). There was an important distinction to be made between the creation of a strict liability offence on the one hand and proof of its commission on the other. At paragraph 40 Lord Phillips drew attention to the judgment of Dyson LJ in *Gemmell* (CA):

> "40. In *R v Gemmell* [2002] EWCA Crim 1992; [2003] Cr App R 23 this court dismissed the argument that a direction that, for the purposes of recklessness, two boys were to be judged by the standard of the reasonable man, infringed Article 6. Dyson LJ held, at paragraph 33:
>
> > 'The position is quite clear. So far as Article 6 is concerned, the fairness of the provisions of the substantive law of the Contracting States is not a matter for investigation. The content and interpretation of domestic substantive law is not engaged by Article 6. It may, however, be engaged by other articles of the ECHR.'"

54. The Court of Appeal dismissed the appeal against conviction. The appellant, G, had been in custody for a period of five months until released on bail by the single judge who gave leave to appeal against conviction and sentence under section 31 of the Criminal Appeal Act 1968. The full court concluded that the appropriate course was to allow the appeal against sentence and impose a conditional discharge.

55. The House of Lords were unanimous (although Lord Carswell made no express reference to the Article 6(2) argument) in their endorsement of Dyson LJ's statement

in *Gemmell* and rejected the Article 6 ground. The import of Dyson LJ's reference to "other articles of the ECHR" I shall consider later in my judgment.

56. Secondly, the appellant argued in the Court of Appeal and the House of Lords that a conviction for the more serious offence under section 5 constituted a breach of his entitlement to respect for his private life. The conviction under section 5 carried with it the stigma of a conviction for rape that would not have attended a conviction under section 13. In the House of Lords the majority held that there had been no breach of the appellant's right to respect for his private life. There was, however, a difference of expression among the majority as to the principled basis for rejection of the submission that Article 8 was engaged by the prosecutor's decision to proceed under section 5 rather than section 13.

57. At paragraph 8, Lord Hoffmann observed that the appellant was not seeking to argue that sexual intercourse with children under 13, even in the privacy of the defendant's home, ought not to be prohibited by the criminal law. What was under attack was the prosecution's decision to prosecute to conviction under section 5 when there could have been a conviction for the lesser offence under section 13. He continued at paragraphs 9 - 11:

> "9. Assuming this to be right, the case has in my opinion nothing to do with article 8 or human rights. Article 8 confers a qualified right that the state shall not interfere with what you do in your private or family life. Any interference with your conduct by the state must be necessary and proportionate for one of the purposes mentioned in article 8.2. But you either have such a right or you do not. If the state is justified in treating your conduct as unlawful, for example, because you are beating your wife or sexually abusing children, article 8 does not generate an additional right that the state shall not be too hard on you for whatever you have done because it happens to have been done at home.
>
> 10. Prosecutorial policy and sentencing do not fall under article 8. If the offence in question is a justifiable interference with private life, that is an end of the matter. If the prosecution has been unduly heavy handed, that may be unfair and unjust, but not an infringement of human rights. It is a matter for the ordinary system of criminal justice. It would be remarkable if article 8 gave Strasbourg jurisdiction over sentencing for all offences which happen to have been committed at home. This case is another example of the regrettable tendency to try to convert the whole system of justice into questions of human rights.
>
> 11. It is true that in *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39 (the sado-masochism case) the Strasbourg court, in deciding whether prosecution was a proportionate interference with indulgence in such practices in private, noted (at para 49) that "reduced sentences were imposed on appeal". And in *KA and AD v Belgium* (Application Nos 42758/98 and 45558/99) (unreported 17 February 2005, BAILII: [2005] ECHR 110), a similar case from Belgium, the court also noted that the sentences were not disproportionate. But the issue in both cases was whether such activities

> should be criminalised at all. The judgments contain no explanation of why the sentences were thought to be relevant."

58. At paragraph 40 above I ventured the opinion that the high water mark of the respondent's argument was the assertion that, once conduct had been prohibited by a criminal statute which was itself compliant with Article 8, it was not possible to argue that a decision to prosecute such conduct engaged the appellant's Article 8 right of respect for her private life. The foundation for this argument is to be seen in Lord Hoffmann's reasoning. The antecedent question is whether the offence itself is Convention compliant, not under Article 6 which is not engaged by the question (see Dyson LJ in *Gemmell*) but under, for example, Articles 8, 9 or 10. If, therefore, the offence does not constitute an interference with the individual's private life or, if it does, it represents a legitimate interference with private life, the requirements of Article 8 are met. There is no supplementary issue under Article 8 as to whether the prosecution of the individual is proportionate to the legitimate aim. That bridge has already been crossed. Addressing Mr Hermer QC's second argument that *consequences* of the decision to prosecute will engage an individual's private life (paragraph 32 above), Lord Hoffmann's short answer was that consequences are a matter for the criminal justice system and Article 8 does not apply. I expand upon this aspect of Lord Hoffmann's speech at paragraph 75 below.

59. At paragraph 46, Baroness Hale, speaking of the criminalisation of the act with which the appellant G was charged, said:

> "46. Thus there is not strict liability in relation to the conduct involved ... There is nothing unjust or irrational about a law which says that if he chooses to put his penis inside a child who turns out to be under 13 he has committed an offence (although the state of his mind may again be relevant to sentence). He also commits an offence if he behaves in the same way towards a child of 13 but under 16, albeit only if he does not reasonably believe that the child is 16 or over. So in principle sex with a child under 16 is not allowed. When the child is under 13, three years younger than that, he takes the risk that she may be younger than he thinks she is. The object is to make him take responsibility for what he chooses to do with what is capable of being, not only an instrument of great pleasure, but also a weapon of great danger. ...
>
> 48. What difference can it make that the possessor of the penis is himself under 16? There was a great deal of anxiety in Parliament about criminalising precocious sexual activity between children. The offences covered by section 13 in combination with section 9 cover any sort of sexual touching however mild and however truly consensual. As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted. Indeed, section 9 expressly contemplates that the person penetrated may be the offender. Obviously, therefore, there will be wide variations in the blameworthiness of the behaviour caught by sections 9 and 13. Both prosecutors and sentencers will have to make careful judgments about who should be prosecuted and what punishment, if any, is appropriate. In many cases, there will be no reason to take any official action at all. In others, protective action by the children's services, whether in respect of the

> perpetrator or the victim or both, may be more appropriate. But the message of sections 9 and 13 is that any sort of sexual activity with a child under 16 is an offence, unless in the case of a child who has reached 13 the perpetrator reasonably believed that the child was aged 16 or over. There are many good policy reasons for the law to convey that message, not only to adults but also to the children themselves."

60. Baroness Hale noted that there was no complaint that the respondent decided to continue with the prosecution. In effect the real complaint was that the offence of which the appellant had been convicted was called "rape". She continued:

> "54....In my view this does not engage the article 8 rights of the appellant at all, but if it does, it is entirely justified. The concept of private life "covers the physical and moral integrity of the person, including his or her sexual life" (*X and Y v The Netherlands*, para 22). This does not mean that every sexual relationship, however brief or unsymmetrical, is worthy of respect, nor is every sexual act which a person wishes to perform. It does mean that the physical and moral integrity of the complainant, vulnerable by reason of her age if nothing else, was worthy of respect. The state would have been open to criticism if it did not provide her with adequate protection. This it attempts to do by a clear rule that children under 13 are incapable of giving any sort of consent to sexual activity and treating penile penetration as a most serious form of such activity. This does not in my view amount to a lack of respect for the private life of the penetrating male.
>
> 55. Even supposing that it did, it cannot be an unjustified interference with that right to label the offence which he has committed "rape". The word "rape" does indeed connote a lack of consent. But the law has disabled children under 13 from giving their consent. So there was no consent. In view of all the dangers resulting from under age sexual activity, it cannot be wrong for the law to apply that label even if it cannot be proved that the child was in fact unwilling. The fact that the appellant was under 16 is obviously relevant to his relative blameworthiness and has been reflected in the second most lenient disposal available to a criminal court. But it does not alter the fact of what he did or the fact that he should not have done it. In my view the prosecution, conviction and sentence were both rational and proportionate in the pursuit of the legitimate aims of the protection of health and morals and of the rights and freedoms of others."

61. At paragraph 54 Baroness Hale appears to have been addressing the legitimate objectives of the Sexual Offences Act 2003. She concluded that the creation of a legal presumption that a child under 13 cannot give "any form of consent" to sexual activity and a law to treat penile penetration as the most serious form of such activity did not amount to lack of respect for private life. At paragraph 55, Baroness Hale supposed that Article 8 was engaged. If so, the justification for the creation of the offence was the protection of children under the age of 13 from sexual attention even from those aged under 18 years. The appellant's reduced blameworthiness could properly be and was reflected in the penalty imposed. In other words, the creation of the offence under section 5 for persons such as the appellant was Article 8 compliant. Since the appellant was not complaining that he had been prosecuted, Article 8 was not engaged

at all (paragraph 54). In her last sentence at paragraph 55, Baroness Hale expresses the judgment that if, contrary to her view, Article 8 was engaged, the *prosecution, conviction and sentence* were "rational and proportionate in the pursuit of the legitimate aims of the protection of health and morals and of the rights and freedoms of others".

62. As it seems to me, reading these paragraphs in their interrelated context, Baroness Hale's primary conclusion was that Article 8 was not engaged by the prosecution because the offence created by section 5 did not constitute a lack of respect for the appellant's private life properly so called. The act with which he was charged and convicted was not deserving of respect. Lord Hoffmann preferred to rely on the appellant's concession that Parliament was entitled to prohibit sexual activity with a person aged under 13 years, even in the privacy of his own home. Implicitly, Lord Hoffmann found that while the activity was "private" its criminalisation did not amount to a disproportionate interference with the appellant's private life. Thus, the decision to prosecute for the section 5 offence did not engage Article 8.

63. At paragraph 72 Lord Mance compared the appellant's position as it was, having been convicted of "rape" under section 5, and as it would have been had he been convicted of the lesser offence under section 13, and found that neither the statutory scheme, nor the appellant's position was "unjustified or disproportionately prejudicial" to the future development of his personality or of his relationship with others "in any way which could involve a breach of Article 8". Although Lord Mance did not expressly find that Article 8 was not engaged by the prosecutor's decision it seems to me that he was deciding that such interference as the appellant could establish (differentially viewed) was insufficient to amount to a lack of respect for the appellant's private life. As it seems to me, Lord Mance applied a combination of Laws LJ's first two qualifying factors or safeguards in *Wood* (paragraph 50 above), that is the need for a certain level of seriousness and a reasonable expectation of privacy. Lord Mance also expressed the opinion, at paragraph 64 of his speech, that the state was entitled when creating the section 5 offence to take positive steps towards the effective protection of the vulnerable; and, at paragraph 70, that its strictness reflected the protective purpose of the section. Lord Mance did not address the question whether, since the creation of the section 5 offence was itself Convention compliant, Article 8 was or was not engaged by the decision to prosecute. He decided that *in the result* the decision to prosecute under section 5 rather than section 13 did not amount to the minimum interference required to engage Article 8.

64. Lord Hope and Lord Carswell, on the contrary, agreed both that the prosecutor's decision to charge and accept a plea of guilty to "rape" engaged Article 8 and that the conviction was a disproportionate interference with the appellant's right of respect for his private life. Lord Hope said at paragraph 34 that it was unlawful for a prosecutor to act in a way that was inconsistent with a Convention right and where choices are left to the prosecutor they must be exercised compatibly. A teenager had as much right to respect for his private life as did any other individual. On the agreed facts of the case a prosecution for rape was "wholly disproportionate to any legitimate aim sought to be achieved". Lord Hope and Lord Carswell would have quashed the appellant's conviction.

65. G made a subsequent application to the ECtHR: [2011] 43 EHRR SE 25, relying upon both Article 6 and Article 8. As to Article 6, at paragraphs 26 - 30 the Fourth Section said:

> "26. The Court recalls that a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is specifically mentioned in Article 6 § 2 and also forms part of the general notion of a fair hearing under Article 6 § 1 (see *Phillips v. the United Kingdom*, no. 41087/98, § 40, ECHR 2001-VII). The presumption of innocence requires, *inter alia*, that the burden of proving the elements of the offence charged against the accused is on the prosecution. However, the burden of proof may shift to the accused to establish the elements of any defence available under domestic law. Moreover, Article 6 §§ 1 and 2 do not prevent domestic criminal law from providing for presumptions of fact or law to be drawn from elements proved by the prosecution, thereby absolving the prosecution from having to establish separately all the elements of the offence, provided such presumptions remain within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see, by way of example, *Salabiaku v. France*, 7 October 1988, Series A no. 141-A; *Radio France and Others v. France*, no. 53984/00, ECHR 2004-II; *Hardy v. Ireland* (dec.), no. 23456/94, 29 June 1994; see also, *mutatis mutandis, H. v. the United Kingdom* (dec.), no. 15023/89, 4 April 1990).
>
> 27. At the same time, the Court underlines that in principle the Contracting States remain free to apply the criminal law to any act which is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. It is not the Court's role under Article 6 §§ 1 or 2 to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused (see *Salabiaku*, cited above, § 27; see, *mutatis mutandis, Radio France and Others v. France*, no. 53984/00, § 24, ECHR 2004-II; see also, with reference to the content of substantive civil rights and obligations, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 87, ECHR 2001-V).
>
> 28. The Court notes that Parliament created the offence under section 5 of the 2003 Act in order to protect children from sexual abuse. As the domestic courts confirmed, the objective element (*actus reus*) of the offence is penile penetration, by any person old enough for criminal responsibility, of the vagina, anus or mouth of a child aged 12 or under. The subjective element (*mens rea*) is intention to penetrate. Knowledge of, or recklessness as to, the age of the child or as to the child's unwillingness to take part in the sexual activity are not elements of the offence.
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> 29. In the instant case, the prosecution was required to prove all the elements of the offence beyond reasonable doubt. The Court does not consider that Parliament's decision not to make available a defence based on reasonable belief that the complainant was aged 13 or over can give rise to any issue under Article 6 §§ 1 or 2 of the Convention. Section 5 of the 2003

> does not provide for presumptions of fact or law to be drawn from elements proved by the prosecution. The principle considered in *Salabiaku* (cited above) therefore has no application here.
>
> 30. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3(a) and 4 of the Convention".

66. As to the challenge under Article 8, at paragraph 34 the Fourth Section said:

> "34. The Court must first determine whether Article 8 is applicable. It recalls that the concept of "private life" is a broad one and includes an individual's sexual life (see *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *S.L. v. Austria*, no. 45330/99, ECHR 2003-I), although the Court has observed that not every sexual activity carried out behind closed doors would necessarily fall within the scope of Article 8 (see *Laskey, Jaggard and Brown*, cited above, § 36). The concept of private life also covers the physical and moral integrity of the person, respect for which the state may be required to secure through its domestic law (see *X and Y v. the Netherlands*, no. 8978/80, § 22, 26 March 1985)."

Since at the material time the applicant had been aged 15 and the complainant aged 12, since the applicant reasonably believed that the complainant was the same age as he was, and since the complainant had consented to the sexual activity, the Court said, at paragraph 35, that it was prepared to accept that the sexual activities at issue fell within the meaning of "private life". Accordingly, the criminal proceedings against the applicant constituted an interference with his right to respect for private life. Given the public interest in the protection of the young identified by the House of Lords, the Fourth Section concluded, at paragraphs 37 – 39, that the United Kingdom enjoyed a wide margin of appreciation in the "*continued prosecution, conviction and sentencing of the applicant*". That margin was not exceeded "by creating such an offence" which does not allow for a defence based upon apparent consent or a mistaken belief in the age of the child, and, critically for the present appeal:

> "39...Nor does the Court consider that the authorities exceeded their margin of appreciation *by deciding to prosecute* the applicant for this offence, particularly since the legislation permitted for a broad range of sentences and the mitigating circumstances in the appellant's case were taken into consideration by the Court of Appeal." [Emphasis added]

Thus, while the prosecution was an interference with the applicant's right to respect for his private life, the decision to prosecute to conviction for the 'rape' offence was, by reason of the features identified, a proportionate interference necessary in a democratic society.

67. In *R (E) v Director of Public Prosecutions* [2011] EWHC 1465 (Admin) [2012] 1 Cr App R 6, a 14 year old girl was charged with sexual offences committed against her sisters, aged 5 and 4. She sought to challenge the decision to prosecute her on three grounds: (1) inadequate and flawed guidance to prosecutors, (2) a flawed decision making process including a failure to give adequate reasons and (3) a challenge to the

decision under Article 3 and Article 8 ECHR. The claim for judicial review failed upon grounds (1) and (3) and succeeded upon ground (2) because the decision maker appeared to have ignored an important strategy group report which had expressed serious concerns about the effect of the prosecution upon both the perpetrator and the victims. The decision was therefore flawed on *Wednesbury* grounds. The Court (Munby LJ and McCombe J) rejected the third ground because (paragraph 72), although a prosecution may in principle engage Convention rights at various stages (for example, whether conduct should be criminalised at all, whether the trial was fair, and sentencing), the prosecutor's decision to prosecute was properly the subject of the criminal law. The Court was influenced in this regard by the absence of Strasbourg authority in the claimant's favour. The Court's approach, at paragraphs 74 and 78, would appear to adopt the reasoning of Lord Hoffmann, but Munby LJ made plain that the Court had decided to quash the prosecutor's decision to prosecute for the reasons pleaded in ground (2), and it would be better, he said, before reaching a concluded decision on the ground (3) averments, to await a case in which the decision was not otherwise assailable. The Court could not, I note, be referred to *G v United Kingdom*; the Divisional Court handed down their judgments on 10 June 2011 while the decision of the Fourth Section was not published until 30 August 2011.

68. I turn, first, to the question whether this Court should follow the reasoning of any one of the majority in the House of Lords in *R v G* or, in the absence of full agreement among the majority, the approach of the Fourth Section in the admissibility application of *G v UK*. I commence with the conviction that the reluctance of the domestic courts to interfere with a prosecutor's decision to prosecute at common law is not a basis for concluding that the prosecutor's decision is not amenable to challenge under Article 8.

69. I shall commence with the common ground (among the majority) in the House of Lords in *G* that the first issue is whether the criminalisation of the defendant's act is an interference with her private life and, if so, whether the offence created is a proportionate interference in pursuit of the legitimate aim. I accept Mr Hermer's argument that in entering the United Kingdom the appellant was exercising her individual freedom to flee from persecution; I accept also that, in the light of her history, she was protecting her personal and sexual autonomy. However, in my judgment, section 25 of the Identity Cards Act 2006 did nothing that interfered with the appellant's private life. It had no effect whatever on her ability to claim asylum in the United Kingdom. What it did was to make it an offence to possess a false identity document with intent that it should mislead another as to the holder's identity (among other things). Where, however, the prosecution fails to prove so that the jury is sure that the defendant is not a refugee, and the defendant proves, on balance, that she could not reasonably seek protection in another state en route, and that she presented herself to the authorities without delay, and shows good cause for illegal entry or presence, and that she made a claim for asylum as soon as reasonably practicable after arrival, no offence is committed and she is not to be convicted of the offence. It seems to me that possession of a false identity document with intent to mislead at border control is not an expression of personal autonomy, nor is it an expression of the enjoyment of private life for which the defendant could have a reasonable expectation of respect. I conclude that the offence does not engage a defendant's Article 8 right of respect for private life; alternatively, to the extent that it may be engaged in the case of a person who is seeking asylum, the offence constitutes a proportionate

interference with private life in pursuit of the legitimate aim of preventing crime and disorder. As to the latter, maintaining effective border control is one aspect of the legitimate aim of preventing crime and disorder.

70. Secondly, I turn to the issue whether, if the offence itself is Article 8 compliant, any further issue of compliance arises from the prosecutor's decision to prosecute any particular individual. At common law there is no right of action for damages arising from a prosecutor's decision to prosecute save upon proof of malicious prosecution. For the purposes of the Human Rights Act 1998, however, the CPS is a public authority that owes duties to act in a manner which complies with the Convention (see paragraph 9 above).

71. I express the view, diffidently having regard to Lord Hoffmann's contrary finding in *R v G*, that there will be circumstances in which a decision to prosecute engages Article 8 even when the offence with which the defendant is charged does not itself constitute interference with private life. For example, if the prosecutor is aware of *facts* that provide the suspect with an unanswerable statutory defence to the charge it seems to me that a decision to prosecute would not only be perverse but it might also constitute an interference with the suspect's right of respect for her private life. Secondly, a decision to prosecute a dying woman may constitute a disproportionate interference with her private life. The first example may arise upon an assessment of the evidence; the second may arise upon an assessment of the public interest (see paragraphs 33 – 36 above). I see no reason in principle why the decision to prosecute should attract the public law requirement of reasonableness (see for example *R (E) v DPP* at paragraph 67 above) but not engage the Article 8 rights of the defendant. These considerations were not in issue in *R v G* because it was not contended by the appellant that there should have been no prosecution at all, only that he had been over-prosecuted and, to that extent, his Article 8 right had been infringed. However, short of extremes such as those to which I have referred, it is difficult to imagine circumstances in which a decision to prosecute for a Convention compliant offence could be undermined on Article 8 grounds. I see no such circumstances in the present case and I conclude that on the facts Article 8 was not engaged.

72. If I am wrong so to conclude, the final question is whether the decision to prosecute was "in accordance with the law and ... necessary in a democratic society" etc. I hope I do no damage to Mr Hermer's argument upon Article 8(2) by simplifying it as follows. He accepts that at the time of the decision to prosecute the evidential test was met. He also accepts that at the time the decision to prosecute was taken there was no evidence from which the prosecutor should have inferred that the appellant was mentally vulnerable although he submits that further enquiries would have disclosed vulnerability. In my view, this is an important concession because it feeds the assessment of proportionality under Article 8(2). Mr Hermer asserts that the assessment of the public interest in prosecution embraced consideration of the question whether, in the appellant's particular circumstances, it would be disproportionate to prosecute her rather than either (i) to defer prosecution to await the outcome of the asylum interview, or (ii) to make, there and then, the enquiries necessary to establish the facts upon which, in due course, the decision would be made not to prosecute. He observes that the appellant's circumstances were always as they were subsequently found to be following the appellant's asylum interview on 26 May 2010. The state had chosen to prosecute the appellant upon a limited and

incomplete knowledge of the available evidence and, for that reason, had taken a course that was not "necessary" in pursuit of the legitimate aims of preventing crime and disorder.

73. In my judgment, there was no element of "pure chance" whether the appellant would be prosecuted. The appellant had resided in Yemen for a year before she embarked on her journey to the UK. Yemen was a Refugee Convention country which welcomed those fleeing from violence and turmoil in Somalia. For present purposes it is immaterial that the CPS was wrongly informed that Yemen was not a Refugee Convention country because the issue is whether the decision to prosecute was in fact ECHR compliant. Assuming that the appellant had at all times been a genuine asylum seeker, she nonetheless undertook the burden of establishing her defence to a Convention complaint criminal offence that she could not reasonably have been expected to seek protection in Yemen. No explanation had been tendered either in the screening interview (with which the CPS had been mistakenly provided) or in the interview under caution on 28 December 2010, at which the appellant was represented by a solicitor who demonstrated his knowledge of her interests by making interventions on her behalf. The reasons for the appellant's prolonged stay in Yemen required investigation and expert analysis by UKBA. This was a dimension of the appellant's case that took it outside the realm of a simple judgement whether the asylum claim was genuinely made. It is unrealistic, in my judgment, to expect that enquiries into the conditions in which the appellant lived in Yemen should have been completed before the decision to prosecute was made. It was unknown by what date those enquiries would be completed.

74. I shall assume for the purposes of the next part of the analysis that the appellant has established that the decision to prosecute amounted to an interference with the right of respect for her private life and that, accordingly, it is for the CPS to justify it. It seems to me that the CPS, having considered the contents of the screening interview and the interview under caution, acted proportionately by applying its policy that in such circumstances the prosecution should commence (see paragraph 21 above). I do not accept the argument that prosecution was disproportionate because it was not deferred. Nor do I accept that there was no public interest in, or legitimate aim to be served by, commencing the prosecution of a defendant who could not have obtained genuine travel documents in Somalia. Section 25 of the Identity Cards Act 2006 is not aimed only at those who have access to genuine identity documents; it is aimed at all those who use false identity documents. As is conceded by the appellant, it was not necessary for her to present a false document to an immigration officer in order to exercise her right to claim asylum in the UK. She may have conducted herself as directed by her agent, and otherwise through ignorance, but, subject to the application of the statutory defence, that was a matter for mitigation. The concession made that the appellant's case passed the evidential test means that in the absence of compelling circumstances personal to the appellant the public interest in prosecution was obvious. As I have said at paragraph 71, I do not consider that compelling contrary circumstances were present.

75. I do not accept that before a prosecutor decides to prosecute she must anticipate and assess all possible consequences to the defendant of prosecution. Among the hierarchy of Convention rights Article 5 (paragraph 10 above) applies to regulate the defendant's right not to be detained arbitrarily. The state has, in performance of its

responsibilities under Article 5, instituted a system of criminal justice by which a judicial decision is made whether it is necessary to detain the defendant pending trial and, in the event of conviction, whether the defendant should be sentenced to a term of custody. These are matters all within the wide margin of appreciation afforded to member states. It is, in my judgment, not for the prosecutor, when making the decision whether to prosecute, save in exceptional circumstances which did not exist here, to concern herself either with the risk of detention pending trial or with the probable sentence on conviction (save perhaps as to the latter for the purpose of assessing the seriousness of the conduct alleged). The prosecutor would in that event be taking upon herself the judgement it is for the judicial authority to make. She is entitled to have in mind the obligation of the court itself to act in compliance with the law and the Convention. To give practical examples: should the judge conclude that the prosecution is unfair he or she has power to stay the indictment as an abuse of process or to grant bail; should it emerge that the prosecution is oppressive because the defendant is physically or mentally unwell, the judge has power to adjourn the proceedings and/or to grant bail.

76. The same considerations apply to the remoter consequences of prosecution, such as the effect upon an application for leave to remain or, at an even later stage, an application for citizenship. These were matters for the Secretary of State for the Home Department. If these were, contrary to my view, considerations relevant to the assessment of the public interest in prosecution, then I am of the view that they were outweighed by the legitimate purpose of prosecuting those who produce false identity documents at border control.

Conclusion

77. In my judgment, for reasons that are largely but not entirely the same as those explained by Irwin J, I too take the view that no breach of Article 8 has occurred. The judge was right to dismiss the claim. I would dismiss the appeal.

Lord Justice Beatson

78. I agree.

Lady Justice Gloster

79. I also agree. In particular I concur in the view that there may be circumstances in which a decision to prosecute engages Article 8, even when the offence with which the defendant is charged does not itself constitute interference with private life.