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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY MITRA SHAHRIYARI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Mr Larkin KC with Mr McNicholl (instructed by Emmet J Kelly Solicitors) for the Applicant
Mr Philip Henry KC with Mr O'Hara (instructed by the Public Prosecution Service) for the Crown
Mr McGleenan KC with Mr McAteer (instructed by the Crown Solicitor's Office) for the Notice Party, the Home Secretary

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Before: Keegan LCJ, McCloskey LJ and Humphreys J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an application for leave to apply for judicial review of a Public Prosecution Service ("PPS") decision to prosecute the applicant for various offences. There was no issue, as is usual in this type of application, with the court convening as a Divisional Court as this is a criminal cause or matter. The challenge is based upon an Amended Amended Order 53 statement dated 13 January 2025. The third party participating in the proceedings is the Secretary of State for the Home Department ("SSHD").

[2] In brief, the applicant is an Iranian asylum seeker. She entered Northern Ireland, crossing the border from the Republic of Ireland and was

subsequently arrested and charged to appear before Craigavon Magistrates' Court on 24 April 2024. Two charges were proffered against the applicant, namely:

(i) Illegal entry into the United Kingdom, contrary to section 24(b)(i) of the Immigration Act 1971.

(ii) Possession of a false identity document, contrary to section 6 of the Identify Documents Act 2010.

[3] The PPS made a formal decision on 29 July 2024 to proceed with the prosecution. This decision was subsequently reviewed and maintained in a decision of 25 November 2024. That is the effective decision which is impugned. The background history is set out in two affidavits which have been filed and now sworn before this court. It is not necessary for us to recite the history stated therein save to record that the applicant was granted bail before the magistrates' court on 3 May 2024 which she perfected in early July. She remains an asylum applicant in Northern Ireland, whose asylum claim is pending.

The nature of this challenge

[4] The Amended Amended Order 53 statement referred to above pleads several grounds of challenge as follows.

[5] First, there is an alleged "breach of the Windsor Framework." This is presented as a valid claim on the basis that the decisions of the PPS breached the applicant's rights enshrined in article 2(1) of the Agreement between the United Kingdom and the European Union ("EU"), known as the Windsor Framework ("the WF"). Article 2(1) of the WF provides:

> "The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union."

[6] The applicant maintains that asylum claimants fall within the categories of rights protected by diminution by article 2(1) based on the decision of *JR295* [2024] NIKB 35.

[7] Under the rubric of this first aspect of claim, the applicant relies on a number of EU Directives, namely Directive 2005/85/EU on minimum standards and procedures in Member States for granting and withdrawing, refugee status ("the Procedures Directive"); Directive 2004/83/EC on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees who otherwise need international protection in the content of the protection granted ("the Qualification Directive"); and Regulation EU 604/2013 establishing the criteria and

mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the member states by a third country national or stateless person ("The Dublin III Regulation (Recast)").

[8] In addition, the applicant relies on the Charter Fundamental Rights of the European Union ("CFR"), in particular article 18 which establishes that the right to asylum shall be guaranteed with due respect for the Rules of the Geneva Convention of 28 July 1951 (viz the Refugee Convention).

[9] The applicant argues that article 78(1) of the Treaty of the Functioning EU ("TFEU") requires, *inter alia*, that EU policy on asylum "must be in accordance with the Refugee Convention and its Protocol of 31 January 1967." References were made to the 1951 Refugee Convention and specifically article 31 of that Convention, which provides as follows:

> "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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

[10] The second broad ground of challenge relies on alleged breach of rights under the European Convention on Human Rights ("ECHR"). The applicant contends that the decision of the PPS and her resulting lengthy period of detention in prison, represents a disproportionate breach of her rights under articles 3, 5, 6, 8 and 14 ECHR and is, therefore, unlawful pursuant to section 6 of the Human Rights Act 1998 ("HRA").

[11] Third, the applicant contends that the decision of the respondent is "contrary to the longstanding agreement between the Republic of Ireland and the United Kingdom known as the common travel area and to which effect has been given by article 3 of the WF." Under this heading the applicant contends that the effect of article 3 of the WF is to prevent the United Kingdom from taking action against asylum claimants with respect to the border with the Republic of Ireland if that same action could not be taken by Ireland in accordance with Union law. Accordingly, the applicant advances the argument that as a prosecution of this nature would be prohibited in Ireland by virtue of European Union ("EU") law, articles 3(1) and (2) render this action against the applicant unlawful in Northern Ireland.

[12] Finally, the applicant claims that the impugned decision is irrational in the *Wednesbury* sense in that no reasonable decision-maker could have arrived at it. This aspect of the challenge distilled into a claim that the decision was unlawful by virtue of the provisions of article 31 of the Refugee Convention. Building on this, an argument raised by Mr Larkin for the very first time during the hearing was that a

provision of primary domestic legislation (para [18] *infra*) is incompatible with EU law and the ECHR.

The test for leave

[13] In *Sharma v Browne-Antoine* [2006] UKPC 57 at para [14](iv) Lord Bingham suggested that it was now the ordinary rule that the court would refuse leave to apply for judicial review "unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy."

[14] This is the formulation that has been applied consistently in our jurisdiction, exemplified in *Re Ni Chuinneagain's Application* [2021] NIQB 79 and [2022] NICA 56. Pursuant to the Rules of the Court of Judicature and Order 53 rule 3(10) it is the almost invariable practice of the court to invite the applicant and proposed respondent to attend any leave hearing and make submissions as in this jurisdiction leave cannot be refused without the opportunity of an applicant being heard.

[15] The case of *Jaiwantie Ramdass v Minister of Finance and another Trinidad and Tobago* [2025] UKPC 4, which has been drawn to our attention, requires brief mention. To our mind, this decision does not change the aforementioned well-established practice in the judicial review courts in Northern Ireland. We note para [5] of the said decision where the court stated:

> "The threshold for the grant of leave to apply for judicial review is low. Leave will be granted where there is an arguable ground for judicial review with a realistic prospect of success that is not subject to a discretionary bar or other knockout blow. Moreover, as the appellants accept, once leave has been granted, there is a correspondingly high threshold for overturning such a decision on appeal. Unless the Board is satisfied that leave should plainly not have been granted, the case should proceed to a hearing of the judicial review."

[16] The above formulation is indistinguishable from that of Lord Bingham in *Sharma*. Thus, there has been no alteration of previous established practice. The potential presence of a point of general public importance is not a freestanding ground to establish leave but is obviously something to consider in determining whether leave should be granted.

Relevant statutory provisions

[17] Notwithstanding the plethora of legal argument put before us, the core statutory provision that is relevant to this decision is section 31 of the Immigration and Asylum Act 1999 (as amended by the Nationality and Borders Act 2020 with the

replacement words highlighted in bold below) entitled "Defences based on Article 31(1) of the Refugee Convention."

[18] We set out this section, as amended:

> "31.–(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 **be expected to have sought** protection under the Refugee Convention in that other country.
>
> (3) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under –
>
> (a) Part 1 of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);
>
> (aa) Section 4 or 6 of the Identity Documents Act 2010;
>
> (b) Section 24A of the 1971 Act (deception); or
>
> (c) Section 26(1)(d) of the 1971 Act (falsification of documents).
>
> **(4)(A) But this section does not apply to an offence committed by a refugee in the course of an attempt to leave the United Kingdom.**

(5) A refugee who has made a claim for asylum is not entitled to the defence provided by subsection (1) in relation to any offence committed by him after making that claim.

(6) 'Refugee' has the same meaning as it has for the purposes of the Refugee Convention.

(7) 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.

(8) A person who –

(a) Was convicted in England and Wales or Northern Ireland of an offence to which this section applies before the commencement of this section, but

(b) At no time during the proceedings for that offence argued that he had a defence based on article 31(1), may apply to the Criminal Cases Review Commission with a view to his case being referred to the Court of Appeal by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(10) The Secretary of State may by order amend –

(a) subsection (3); or

(b) subsection (4)

by adding offences to those for the time being listed there."

Relevant jurisprudence

[20] First, is the decision in *R v Uxbridge Magistrates' Court, ex p Adimi* [2001] QB 667. This was a decision of a Divisional Court preceding the introduction of the statutory defence. In brief, the court clearly considered the provisions of article 31(1) of the Refugee Convention and found that the purpose of article 31(1), broadly construed in the light of the Convention as a whole, was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching domestic law; that where illegal entry, use of false documents or delay could be attributed to a bona fide desire to seek asylum, whether in the United Kingdom or elsewhere, that conduct

should be covered by article 31(1); that the requirements to come directly and to present himself without delay did not preclude a refugee from exercising some element of choice as to where and when he claimed asylum and the exercise of such choice was not to be characterised as forum shopping; and that, accordingly, neither a short term stopover en route to such intended sanctuary, nor a failure to present his claim immediately upon arrival, should justify a refugee's forfeiting the protection of article 31 where good cause was made out.

[21] The court also noted that in the absence of incorporation of article 31(1) of the Convention into domestic law, the United Kingdom's succession to the Convention nevertheless created a legitimate expectation in the minds of asylum claimants that they would be accorded the immunity from penalty conferred by article 31(1) in the circumstances indicated and that that obligation fell on SSHD representing the executive arm of the state.

[22] Reaction to this decision was swift by way of legislation establishing a defence and as such the progress is set out on this by the House of Lords in the case of *R v Asfaw (United Nations High Commissioner for Refugees Intervening)* [2008] UKHL 31. This was a case where a prosecution did take place, but the House had to consider the effect of the defence which did not cover all of the charges in the case.

[23] The House held by a majority that:

(i) The Refugee Convention must be given a purposive construction consistent with its humanitarian aims, which included the protection of refugees from the imposition of criminal penalties for infractions of the law reasonably or necessarily committed in the course of their flight from persecution given effect to in article 31.

(ii) Section 31 of the Immigration and Asylum Act 1999 was intended to give effect to article 31(1) of the Convention and should not be read as limited to offences attributable to illegal entry or presence in the United Kingdom, but should provide immunity if the other conditions of the section were satisfied, from the imposition of criminal penalties for offences attributable to a refugee's attempt to leave the country in the continuing course of a flight from persecution, even where there was a short stopover in transit.

[24] The House of Lords further held that the jury, having found that the conditions in section 31 were satisfied, had been entitled to acquit the appellant on the first count since the offence charged was listed in section 31 as one to which immunity applied and that while the offence in the second count was not so listed, fairness required that the judge should have stayed its prosecution until after the verdict on the first count and that once the appellant had been acquitted on that count, which was factually indistinguishable from the second count, it had been an abuse of process to prosecute her to conviction on the latter count.

[25] More recently, the statutory defence has been considered several times by the English courts as the PPS counsel, Mr Henry, sets out in his written argument. In particular, he refers to *R v AUS* [2024] EWCA Crim 322. Para [23] is as follows:

> "23. As this court confirmed in *R v Ordu* [2017] EWCA Crim 4, that decision of the House of Lords was a change of law in relation to the proper construction of the section 31 defence. The operation of the section 31 defence, and the effect of earlier case law, was explained as follows by Leveson LJ (as he then was) in *R v Mateta* [2013] EWCA Crim 1372; [2014] 1 WLR 1516 at [21]:
>
> > 'To summarise, the main elements of the operation of this defence are as follows:
> >
> > (i) The defendant must provide sufficient evidence in support of his claim to refugee status to raise the issue and thereafter the burden falls on the prosecution to prove to the criminal standard that he is not a refugee (section 31 Immigration and Asylum Act 1999 and *Makuwa* [26]) unless an application by the defendant for asylum has been refused by the Secretary of State, when the legal burden rests on him to establish on a balance of probabilities that he is a refugee (section 31(7) of the Asylum and Immigration Act 1999 and *Sadighpour* [38]-[40]).
> >
> > (ii) If the Crown fails to disprove that the defendant was a refugee (or if the defendant proves on a balance of probabilities he is a refugee following the Secretary of State's refusal of his application for asylum), it then falls to a defendant to prove on the balance of probabilities that:
> >
> > (a) he did not stop in any country in transit to the United Kingdom for more than a short stopover (which, on the facts, was explicable, see (iv) below) or, alternatively, that he could not reasonably have expected to be given protection under the Refugee Convention in countries outside the United Kingdom in which he stopped; and, if so:

(b) he presented himself to the authorities in the UK 'without delay', unless (again, depending on the facts) it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum;

(c) he had good cause for his illegal entry or presence in the UK; and

(d) he made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom, unless (once again, depending on the facts) it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum. (section 31(1); *Sadighpour* [18] and [38]–[40]; *Jaddi* [16] and [30]).

(iii) The requirement that the claim for asylum must be made as soon as was reasonably practicable does not necessarily mean at the earliest possible moment (*Asfaw* [16]; *R v MA* [9]).

(iv) It follows that the fact a refugee stopped in a third country in transit is not necessarily fatal and may be explicable: the refugee has some choice as to where he might properly claim asylum. The main touchstones by which exclusion from protection should be judged are the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape (*Asfaw* [26]; *R v MA* [9]).

(v) The requirement that the refugee demonstrates 'good cause' for his illegal entry

> or presence in the United Kingdom will be satisfied by him showing he was reasonably travelling on false papers (*ex parte Adimi* at 679H)."

The prosecution decision

[26] This is well explained by Mr Henry in his written argument by reference to three stages. First, as the opening line of section 31(1) makes clear, the defence is only available to refugees. If a defendant's asylum claim has been refused, the burden falls on him or her to prove on balance that he or she is, a refugee. If an asylum claim has been made and is still pending, a defendant need only prove sufficient evidence to raise the issue of being a refugee and, if he or she has been able to do so, it is then for the prosecution to prove to the criminal standard that he or she is not a refugee. In this regard, Mr Henry points out that section 31(7) is relevant.

[27] Second, a defendant must establish on balance that he or she came directly from a territory in which his or her life and/or freedom was threatened. That is by virtue of section 31(1). Or, if the defendant stopped in one or more countries en route to the United Kingdom from that territory that he or she could not reasonably have expected to be given protection under the Refugee Convention in those other countries (section 31(2)).

[28] Third, a defendant must establish each of the remaining components listed in section 31(1)(a)-(c) on the balance of probabilities.

[29] Mr Henry also clarified that whilst the PPS position was initially categorised as an "undertaking", as the applicant's asylum claim is still pending, the prosecution will not seek to prove that the applicant was not a refugee at the relevant time. This means that the applicant effectively obtains the benefit of the doubt in relation to this first part of the test under the defence. However, the applicant still has to establish the other aspects of the defence on the balance of probabilities and the prosecution maintain that the applicant, in effect, will have difficulty in doing so, with the result that the prosecution is a viable one.

[30] By letter dated 25 November 2024, the PPS stated its position in the following clear terms.

> "In the circumstances of this case, the PPS will not be seeking to positively prove whether the defendant is or is not a refugee. The CPS guidance makes it clear that an undetermined asylum claim is not a barrier to prosecution."

[31] Some further elements of this letter are material. It considers the applicant's own evidence. The PPS expressed itself satisfied that the evidential limb of the test for prosecution was met. The PPS also considered the fact that the section 31 statutory defence only applies to one of the two offences faced by the defendant, namely the false document offence, but not the offence of illegal entry. In answering this part of the claim, the letter states:

> "The prosecution will invite the court to deal with the false document charge first. If the defence is made out, the prosecution undertakes not to proceed to a verdict on the illegal entry charge: see *R v Asfaw (United Nations High Commissioner for Refugees Intervening)* [2008] UKHL 1 AC 1061.
>
> Thirdly, the prosecution considers deferral of the decision on the criminal prosecution until the defendant's asylum claim has been determined and decided that is not appropriate for the following core reason:
>
> > 'as explained at (i) above, the status of the defendant is just one of several factors to be considered as part of the section 31 defence. Even if the defendant were successful in her claim for asylum, I do not think there would be a reasonable prospect of her being able to successfully rely on this statutory defence.'"

[33] Importantly, the letter also considered the public interest aspect of the test for prosecution in these terms:

> "Even if there were a positive asylum determination, I would still consider prosecution to be in the public interest bearing in mind the opportunities that the applicant had to seek protection under the Refugee Convention in one or more safe third countries before entering the UK illegally in possession of a fraudulent passport."

[32] The above conclusion was reached after an enquiry had been made by SSHD as to when a decision was likely to be made on the asylum claim and the answer given was that it was not possible to provide a timescale. Finally, this decision-making letter responded to other arguments under the WF and HRA as follows:

> "I have considered the submissions within the applicant's skeleton argument in respect of the Windsor Framework and the Human Rights Act 1998. However, it is not accepted that there has been a diminution of her rights

> arising from the United Kingdom's withdrawal from the European Union, nor does this prosecution give rise to a breach of the defendant's Convention rights."

[33] It follows from the discussion above that there are two core questions to be answered in this challenge. The first is whether this is satellite litigation given the criminal court's seizure of the matter applying the authority of *R v DPP ex parte Kebeline* [2000] 2 AC 326. The second is whether there has been a breach of EU law. Mr Henry dealt with the first issue and Mr McGleenan with the second and we will provide our conclusions in that sequence having set out the relevant decision-making rationale and the relevant law.

Satellite litigation?

[34] The well-known authority of *Kebeline* makes clear that the preferrable forum for disputes in extant prosecutions is the criminal court concerned. It is settled law that absent dishonesty, mala fides or other highly exceptional circumstances, a decision to prosecute is not amenable to judicial review. The applicant in her skeleton argument accepts that "ordinarily, challenges to a defendant's criminal prosecution should be addressed within the criminal process itself. It is only when the trial process will be ill-equipped in dealing with the issues missed by the defendant should an application for judicial review of the prosecutorial decision be entertained." In this jurisdiction the Divisional Court in a series of cases regarding criminal complaints has reiterated this point.

[35] At para [65] of *McKay and Bryson's Application* [2021] NIQB 110, the Divisional Court said this:

> "[65] Whilst we have considered the merits of the arguments made in the foregoing paragraphs, we come back to the fact that the *Kebeline* principle is clearly engaged in this case. Any complaints or substantive arguments made in relation to the adequacy of the evidence and/or Convention rights can very well be accommodated within the criminal trial process. This court considers that a collateral challenge such as this brought to the Divisional Court is not appropriate when other options are clearly available. This court is a court of last resort. The specialist criminal framework is better suited to determination of these types of issues. The applicants are not prejudiced by this outcome because they can bring pre-trial applications for No Bill or applications at trial including abuse of process and thereafter there are appeal rights embedded in the criminal law process. Also, there is nothing stopping the applicants raising any points of law in the Crown Court."

[36] Utilising the authorities in this area, the very simple point made by Mr Henry is that the trial process can deal with all of the applicant's complaints. That is by virtue of a criminal defence to these complaints comprised in section 31 which is discussed above. Whilst one offence is captured by this defence and the other offence is not, Mr Henry makes the point that the PPS have specifically acknowledged that an abuse of process application by the applicant will follow if there is an acquittal on the basis of the section 31 defence.

[37] Therefore, the argument is validly raised that the criminal courts should be mandated to consider this case rather than the Divisional Court. We find strength in this argument which does not belong to unusual or unknown territory. Plainly, given that Parliament has decided to provide a statutory defence in this type of prosecution, there is no reason why, on the facts of this case as presented to us, the Divisional Court should be the appropriate forum for the applicant's challenge. We, therefore, conclude that on the freestanding basis of the *Kebeline* principle this challenge is misconceived.

[38] Incidentally, we asked for details of the number of prosecutions in this area over the last five or so years. We are grateful to the PPS for providing same as follows:

> "PPS records indicate that there have been 64 prosecutions (seven indictable prosecutions and 54 summary prosecutions) for the offence of illegal entry to the United Kingdom, contrary to section 24(1)(a) or section 24(b)(i) of the Immigration Act 1971, since 1 January 2020. PPS records indicate that there have been 117 prosecutions (28 indictable prosecutions and 89 summary prosecutions) for the offence of possession of a false identity document, contrary to section 6(1)(a), 6(1)(b) or 6(1)(c) of the Identity Documents Act 2010 since 1 January 2020.
>
> The PPS do not hold statistics on the number of occasions statutory defence was raised."

Breach of EU law?

[39] There is one final aspect of this case which has, on its face, created an aura of the complicated, namely the suggested breach of EU law, to which we now turn.

[40] Firstly, in dealing with this argument, as has been pointed out on paper and in oral submissions, the criminal offences with which the applicant has been charged existed on or before the UK's exit from the European Union ie 31 December 2020.

[41] Whilst Mr McGleenan was prepared to accept that there was potentially an arguable case as to whether article 2(1) of the WF applied, he compellingly made the

point that this made no material difference in the instant case. That is simply because there is no diminution of rights apparent in this case as the applicant's current situation is the same that it would have been on or before 31 December 2020. She has not identified any change in UK or Northern Ireland law since that date which has led to a diminution in any right she would previously have enjoyed.

[42] The following simple and uncontentious analysis readily yields the conclusion that this element of the applicant's challenge is devoid of merit. The applicant was detained as she had been charged with criminal offences. Those offences existed whilst the UK was an EU Member State. They have always applied to asylum claimants and have always therefore meant that asylum claimants may be detained on remand where they have been charged with such offences. This is a simple and rather obvious answer to this discrete challenge which Mr Larkin, despite his attempts, could not rebut. There has been no diminution of rights in this case as a result of EU exit or at all. The WF analysis is therefore entirely misconceived and, hence, manifestly unarguable.

[43] The same analysis applies to the article 3 point in relation to the breach of the Common Travel Area ("CTA") provisions. This argument is similarly misconceived. It is argued that article 3 of the WF prevented and prevents any prosecution being undertaken or continued with respect to the applicant arising out of her entry to Northern Ireland from the Republic of Ireland.

[44] The above argument belies the purpose of the CTA regime which was an arrangement which predated the entry of the UK and Ireland into the European Economic Community ("EEC") in 1972. It operates as an inter-state permissive arrangement and does not confer substantive rights and obligations. The CTA Memorandum of Understanding ("MOU"), signed by the two governments on 8 May 2019, makes this plain. Para [5] of the MOU states:

> "The CTA and associated reciprocal rights and privileges existed long before either the UK or Ireland were members of the European Union ("EU"). The CTA and the associated reciprocal rights and privileges which British and Irish citizens enjoy are separate from, and therefore not dependent on, EU citizenship or EU membership. In the context of the UK's withdrawal from the EU and recognising the strong and enduring people to people ties, and long tradition of migration between the UK and Ireland, the Participants consider it desirable to provide a contemporary articulation of these longstanding CTA arrangements, and to reaffirm that such arrangements are to continue."

[45] The above passage from the MOU clearly articulates the rationale for article 3 of the WF. Article 3 WF does not contain any non-discrimination rule. The CTA is

not part of EU law. It operates independently of the EU Withdrawal Agreement (including the WF) and cannot be relied upon to obliquely import obligations under the CFR. The CTA arrangements are of no application to the applicant as she is not a British or Irish citizen. She derives no rights thereunder. Accordingly, there has been no breach of article 3 WF in the impugned prosecutorial decision. This ground is also unarguable in consequence.

Other ancillary grounds of challenge

[46] We deal with remaining matters for completeness sake. First, we note that the applicant originally relied on EU Directives that were not actually opted into by the UK. This was corrected in the amended claim based upon applicable directives namely the 2005 Procedures Directive, the 2004 Qualification Directive, and the 2013 Dublin III Regulation. The applicant relied upon recitals to those directives as well as some substantive provisions. We can deal with these claims in short compass given their inherent fragility.

[47] First, the reliance on recitals. Whilst the UK opted into the 2004, 2005 and 2013 Directives the applicant cannot rely on recitals in those instruments to establish a claim that they are EU law in support of her claim. The CJEU case of *Deutsches Milch-Kontor v Hauptzollamt Hamburg-Jonas* (C-136/04), if authority is required, is clear on this where it states at para [32]:

> "As regards the ninth recital in the preamble to Regulation No.1706/89, it is sufficient to recall that the preamble to a Community Act has no binding legal force."

[48] Furthermore, the reliance on the Dublin III Regulations article 28 is inapposite as it is concerned with detention for the purpose of facilitating a take-back request which is not apparent in this case. None of the other sections of any of the Directives were convincingly drawn in aid by Mr Larkin to support the applicant's case.

[49] Similarly, there is no valid argument to be made based upon the ECHR on the facts of this case. These grounds of challenge were presented in the vaguest of terms in the written arguments. We fail to see how they are substantiated in any event given what we have said in relation to the applicant's ability to defend the prosecution in the criminal court. In *SXH v Crown Prosecution Service* [2017] UKSC 30, the Supreme Court held that a decision to prosecute did not engage any article 8 right, and even if it did, any interference would be lawful under article 8(2). That was in the context of the prosecution of an asylum claimant for possession of a false passport in entering the United Kingdom.

[49] Various other articles of the ECHR were raised in written submissions, including a claim for discrimination. Mr Larkin did not augment any of these arguments in oral submissions, which is unsurprising as none of them have any basis

whatsoever. Plainly, there is no arguable case established of the basis of the ECHR which has any application to the facts of this case.

[50] Mr Larkin suggested at one point during the hearing that the fact that the applicant was subject to bail conditions as a result of a criminal prosecution could be a penalty under the Refugee Convention and, by analogy, presumably a breach of her ECHR rights. This is plainly unsustainable given that, as the court pointed out, the applicant would inevitably, if not on police bail, be subject to immigration bail whilst an asylum application was pending.

[51] Furthermore, we are entirely unpersuaded that the facts of this case satisfy the high hurdle of *Wednesbury* unreasonableness. The decision-making letter of November 2024 is comprehensive in its content and carefully and cogently composed. This simple analysis provides an absolute answer to the claim of irrationality.

[52] There was one final claim made during the hearing which we must address notwithstanding the fact that it was not pleaded. This is in relation to the statutory amendment to the section 31 defence set out at para [18] above. Firstly, this argument suffers the same fate as many of the other subsidiary claims made by the applicant in that it was not pleaded notwithstanding three iterations of the Order 53 statement. Nor did it feature in the applicant's skeleton argument. It follows that there is no structured basis upon which we can adjudicate. Counsel should not assume that the court will entertain arguments of this nature. It is unfair to the other parties and unfair to the court. In any event, we find the argument to be entirely without substance given the legitimate Parliamentary process which was followed which resulted in the law.

Concluding remarks

[53] Properly analysed, this case was much simpler than the convoluted argument put before us. In truth, it concerns the application of a statutory defence in domestic law. This case has been unnecessarily complicated by arguments made under the guise of the WF which have clouded and over-complicated the real issues. The WF does not apply to every situation in immigration law or, indeed, in any other area. Practitioners must carefully think about any WF arguments before they are raised, otherwise cases will become unnecessarily protracted and costly for no purpose. The courts may have to consider costs penalties *in extremis*.

[54] Returning to the basic facts of this case, we summarise our conclusions. The PPS have adopted an approach which is in keeping with the decision of the House of Lords in *Asfaw*. There is nothing remotely unlawful about that. There is no public interest in protracting this case to a full hearing. Furthermore, the applicant has adequate and proper protections available to her in the criminal court where she can raise any further legal argument and defend the charges.

Overall conclusion

[55] The application for leave to apply for judicial review is refused on all grounds for the reasons elaborated above.