Hilary Term

[2017] UKSC 30

On appeal from: [2014] EWCA Civ 90

JUDGMENT

SXH (Appellant) v The Crown Prosecution Service (Respondent)

before

Lord Mance

Lord Kerr

Lord Reed

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

11 April 2017

Heard on 19 July 2016

Appellant	Respondent
Richard Hermer QC	Philip Havers QC
Richard Thomas	Neil Sheldon
Edward Craven	
(Instructed by Bhatt Murphy Solicitors)	(Instructed by The Government Legal Department)

Intervener (U
Nations H
Commission
Refugee
Raza Husai
Paul Luckh
Jason Pob
(Instructed
Baker & McK
LLP)

LORD TOULSON: (with whom Lord Mance, Lord Reed and Lord Hughes agree)

1.
Does a decision by a public prosecutor to bring criminal proceedings against a person fall potentially within the scope of article 8 of the European Convention on Human Rights in circumstances where a) the prosecutor has reasonable cause to believe the person to be guilty of the offence with which they are charged and b) the law relating to the offence is compatible with article 8? That is the primary question raised by this appeal and it is one of general importance.

2.
If that question is answered in the affirmative, the question arises whether in the present case the decision by the respondent ("the CPS") to charge the appellant with the offence of possessing a false document under section 25(1) of the Identity Cards Act 2006 was a violation of her article 8 rights.

Prosecution of offences

3.
Different states who are parties to the Convention have different institutions and processes for the investigation and prosecution of offences. The CPS was established by the Prosecution of Offences Act 1985, section 1. Its essential functions are to advise the police and others, including immigration officers, on the institution of criminal proceedings and to take over the conduct of such proceedings: section 3(2)(a)(aa)(e) and (ec). The head of the CPS is the Director of Public Prosecutions ("DPP"). Under section 10 the DPP is required to issue a Code for Crown Prosecutors. The code requires prosecutors to apply a two-stage test in deciding whether a person should be prosecuted for an offence. The first stage involves considering whether there is enough evidence to provide a realistic prospect of conviction. If that requirement is satisfied, the second stage involves deciding whether a prosecution would be in the public interest, which may entail weighing a wide variety of considerations.

4.
The CPS is a body independent of the investigating authority, whether it be the police or immigration or other authority, and also independent of the court before which any prosecution may be brought.

Identity Cards Act 2006

5.
Under section 25(1) of the Identity Cards Act 2006 (now substantially re-enacted by section 4 of the Identity Documents Act 2010), it was an offence punishable with up to ten years' imprisonment for a person to be in possession of an identity card relating to somebody else, with the intention of using it to establish his identity as that person's identity. But it has long been recognised that those fleeing persecution may have to resort to deceptions such as possession and use of false papers in order to make good their escape: R v Asfaw (United Nations High Commissioner for Refugees intervening) [2008] 1 AC 1061, para 9, per Lord Bingham. Article 31(1) of the 1951 Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906) ("the Refugee Convention") prohibits contracting states from imposing penalties, on account of their illegal entry or presence, on refugees coming directly from a territory where their life or freedom was threatened, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

6.

Article 31 of the Refugee Convention has been given effect in domestic law by section 31 of the Immigration and Asylum Act 1999, which applies to offences including those under section 25 of the Identity Cards Act 2006. Section 31(1) of the 1999 Act provides:

“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 -

i)
presented himself to the authorities in the United Kingdom without delay;

ii)
showed good cause for his illegal entry or presence; and

iii)
made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.”

7.
Although on a literal reading the defence might not be thought to apply to a person who stopped over in an intermediate country en route from the country of persecution to their country of intended refuge, in Asfaw the House of Lords held that article 31 of the Refugee Convention and section 31 of the 1999 Act were to be given a purposive interpretation consistent with their humanitarian aims, and that the protection given by them was not excluded by a short-term stopover in an intermediate country.

Facts

8.
The appellant was born on an island in Somalia on 26 December 1991. She is a member of a minority clan. She and her family suffered severe violence from majority clans over many years. The violence included the murder of her father in 1995 and, two years later, the rape of the appellant herself in front of her disabled mother. After that attack she and her mother moved to the mainland, but in 2008 another militant gang murdered her mother and beat the appellant senseless with a rifle.

9.
In December 2008 the appellant fled from Somalia with a friend and she spent the next year living in Yemen. On 25 December 2009 the appellant left Yemen with an agent and flew to an unknown destination in Europe, from where she travelled to Eindhoven in Holland. On 27 December she flew from Eindhoven to the UK on a false passport provided to her by an agent.

10.
On arrival at Stansted Airport on the evening of 27 December the appellant attempted to pass through immigration control using a British passport. She was stopped and challenged by immigration officers from the United Kingdom Border Agency (UKBA), part of the Home Office. She immediately claimed asylum and gave her true name and date of birth. She was detained overnight.

11.
On 28 December the appellant had an initial asylum screening interview in which she described how she had left Somalia and come to the UK. She explained her reasons in summary and said that she was in fear of her life if she were to return home. Later that day the appellant was told by an

immigration officer, IO Webb, that she could return to Holland and, if so, she would not be prosecuted. The appellant declined to return to Holland and maintained her claim for asylum. Thereafter she was arrested on suspicion of committing an offence under section 25(1) of the 2006 Act.

12.
On the same day the appellant was interviewed at Stansted Airport Police Station by IO Webb. The appellant was represented at that stage by a duty solicitor. Her account of her movements and her personal circumstances was consistent with her earlier account. When asked why she had not claimed asylum in Holland, she said that she knew nothing about Holland and had been advised to travel to the UK to claim asylum.

13.
On the evening of 28 December a CPS lawyer, Ms Jo Golding, reviewed the file. She applied the full code test under the Code for Crown Prosecutors and concluded that both the evidential test and the public interest test were satisfied.

14.
It was accepted on the appellant's behalf in the courts below that the CPS was reasonably entitled to consider that the evidential test was satisfied at the time when the decision to prosecute was taken.

15.
On 29 December the appellant appeared before a magistrates' court and was remanded by the court in custody. On 11 January 2010 she attended a preliminary hearing at Chelmsford Crown Court and was again remanded in custody.

16.
On 28 January another CPS lawyer, Ms Charlotte Davison, conducted a full review of the case. She raised a question about what consideration UKBA had given to the availability of a defence under section 31. On 22 February a Plea and Case Management Hearing took place at the Crown Court. The appellant's counsel served the CPS with a skeleton argument that the proceedings should be dismissed because her case fell within the scope of the section 31 defence. It appears from the Crown Court minute sheet that the prosecution had not received the skeleton argument in advance and it was agreed that the application should be adjourned.

17.
After further exchanges between the CPS and UKBA, Ms Davison's view was that the period of a year spent by the appellant in Yemen took her outside the scope of section 31 and that she was minded to proceed with the prosecution.

18.
On 26 May the appellant's full asylum interview took place. Six days later, on 1 June, the appellant appeared before Chelmsford Crown Court. The CPS was on this occasion represented by a CPS advocate, Ms Lesli Sternberg. At the hearing IO Webb told Ms Sternberg that a decision on the appellant's asylum application was expected shortly and that it was likely to be granted. In those circumstances the appellant's application to dismiss the proceedings was adjourned until 14 June.

19.
After the hearing Ms Sternberg researched the position of Somali refugees in Yemen. Although Yemen was party to the Refugee Convention it appeared that the procedure for bringing it into effect was

poor. Ms Sternberg's view was that, subject to confirmation of the grant of asylum, the prosecution should not continue because it would not be in the public interest.

20.
On 10 June the appellant was granted asylum. On the next day the prosecution offered no evidence at a mention hearing at the Crown Court. The appellant was found not guilty and released from custody.

The proceedings

21.
On 22 December 2010 the appellant issued proceedings against the CPS, the Home Office and the police for damages on various grounds including breach of her rights under article 8. The claims against the Home Office and the police were not pursued.

22.
On 1 February 2013 Irwin J dismissed the claim. On the facts, he accepted that the appellant was very vulnerable and already suffering anxiety and depression before the decision to prosecute her and her incarceration, and that her arrest and remand in custody had added to the psychological impact. He accepted too that if the CPS had learned more from UKBA at an early stage about conditions in Somalia and the Yemen, it would probably not have begun a prosecution before the outcome of her asylum application. However, he held that the decision to prosecute was not capable of engaging article 8. He said that in presenting false papers to an immigration officer the appellant was not engaged in an activity which was part of her private life, but was self-evidently a matter affecting the business of the state. He accepted that the consequences of the decision to prosecute could affect her enjoyment of a private life, but he rejected the consequentialist argument as a basis for applying article 8 to the decision to prosecute. Otherwise, he said, article 8 would apply to every decision to prosecute for any offence, at least where there was a possibility of a custodial sentence or a remand in custody. He held that a decision to prosecute could only engage article 8 if the prosecution targeted an activity which could credibly claim to be an exercise of an article 8 right. If, however, article 8 was engaged, Irwin J concluded that the CPS's decision was justified on the material which it had.

23.
Irwin J's dismissal of the appellant's claim was upheld by the Court of Appeal on 6 February 2014 in a decision which is reported at [2014] 1 WLR 3238. The leading judgment was given by Pitchford LJ, with whom the other members of the court agreed. After reviewing the authorities he accepted that article 8 could apply to a law criminalising behaviour which itself amounted to the exercise of a right protected by article 8, but he held that section 25 of the 2006 Act did not interfere with rights protected by that article. It did not impede the appellant's ability to claim asylum, and the possession of false identity documentation with intent to deceive at the point of border control was not an expression of personal autonomy. Pitchford LJ also accepted that a decision to prosecute for an offence under section 25 might fall within article 8 if, for example, the prosecutor knew that there was no proper basis for the prosecution. But he held that article 8 was not engaged by a decision to prosecute for a Convention-compliant offence in the absence of extreme circumstances. If, however, article 8 was engaged, the concession made that the appellant's case passed the evidential test meant that in the absence of compelling circumstances personal to the appellant the public interest in prosecution was obvious. The outcome would be a matter for judicial decision and it was not for the prosecutor, when deciding to prosecute, to concern herself with questions of remand or likely sentence, which would be for the court to determine. He concluded therefore that if article 8 was engaged, there was no breach.

Did article 8 apply to the decision to prosecute?

24.
Mr Richard Hermer QC argued that article 8 applied to the decision to prosecute for two reasons: it "targeted" conduct which was itself protected by article 8, and its consequences were to interfere with the enjoyment of the appellant's private life.

25.
Mr Hermer submitted that the range of article 8 is broad, that the threshold for it to apply is low, and that it is almost inevitable that the decisions of the CPS, as a public body, will impact on the private life of the defendant and so engage article 8. He said that anything done by a public body which has the consequence of affecting someone's private life in a more than minimal way involves interference with respect for it within the meaning of article 8.

26.
Broad as article 8 undoubtedly is, the consequentialist argument advanced by Mr Hermer is far too broad. To take an example far removed from the present case, if a highway authority closes a road for roadworks, or introduces a partial closure, there may be a more than minimal effect on how long it takes residents to get to work, but that cannot be enough to make article 8 applicable. Such matters are part of the ordinary incidents of daily life in a community and involve no lack of respect for personal autonomy of the kind which article 8 is designed to protect.

27.
Questions about the possible application of article 8 to a prosecutorial decision were considered by the House of Lords and the European Court of Human Rights in the case reported as R v G [2009] 1 AC 92 and G v United Kingdom (2011) 53 EHRR SE 237. The appellant aged 15, had sexual intercourse with a girl aged 12. He pleaded guilty to a charge of rape of a child under 13, contrary to section 5 of the Sexual Offences Act 2003, on the written basis that the intercourse was consensual in fact (although by reason of her age the girl was incapable of giving legal consent) and that he believed her to be aged 15 because she had told him so. The prosecution accepted his basis of plea and he received a custodial sentence. He appealed to the Court of Appeal against conviction and sentence. It was argued that his conduct amounted to a less serious offence under section 13, aimed specifically at a person under 18 who had sexual intercourse with a child under 13, and that on the accepted facts it was a disproportionate interference with his private life, contrary to article 8, to proceed on the more serious charge, which had the consequence of giving him a criminal record as a rapist. The Court of Appeal dismissed his appeal against conviction but substituted a non-custodial sentence.

28.
The House of Lords upheld the Court of Appeal's decision by a three to two majority. Lord Hoffmann said that article 8 confers a qualified right protecting a person's private or family life, but if the state is justified in treating the person's conduct as unlawful that is the end of the matter. Lady Hale also considered that article 8 did not apply, because a rule which prevented a child under 13 from giving legally recognised consent to sexual activity and a statute which treated penile penetration as a most serious form of such activity did not amount to a lack of respect for the private life of the penetrating male. If, however, article 8 applied, Lady Hale considered that the interference was justified and proportionate in the pursuit of the legitimate aims of the protection of health and morals and of the rights and freedoms of others. Lord Hope and Lord Carswell disagreed. They considered that prosecutorial choices must be exercised compatibly with the Convention, and that the decision to proceed against G under section 5, rather than section 13, was disproportionate. Lord Mance did not

expressly state whether article 8 applied but he agreed with Lord Hoffmann and Lady Hale that it was not breached.

29.
G took his case to Strasbourg, but the court held that his complaint was inadmissible. On the question whether article 8 applied, the court said that not every sexual activity behind closed doors would necessarily fall within its scope, but, in the circumstances that both parties in fact consented and that G reasonably believed the girl to be the same age as himself, it was “prepared to accept” that the sexual activities at issue fell within the meaning of private life. However, it held that the state’s margin of appreciation regarding the means of protecting children from sexual exploitation was wide and that the complaint must be rejected as manifestly ill founded.

30.
The focus of the reasoning of the Strasbourg court is significant. It focused on the nature of G’s conduct. The court was prepared to accept that uncoerced sexual behaviour of a 15-year old boy with a girl whom he believed to be the same age could fairly be seen as falling within the meaning of private life. Perhaps because it was an admissibility decision and the court was satisfied that the complaint of a breach of article 8 was manifestly ill founded, it did not directly address Lord Hoffmann’s and Lady Hale’s reasons for holding that the article did not apply.

31.
There is no support in the Strasbourg authorities for the argument that even if the conduct for which a person is prosecuted was not within the range of article 8, the article may apply to a decision to prosecute because of the attendant consequences.

32.
By commencing a criminal prosecution the CPS places the matter before a court. In other Convention countries the court is itself in charge of deciding whether a person should be treated as an accused in a criminal case. There is a striking absence of any reported case in which it has been held that the institution of criminal proceedings for a matter which is properly the subject of the criminal law may be open to challenge on article 8 grounds (as Munby LJ observed in R (E) v Director of Public Prosecutions [2012] 1 Cr App R 66, paras 72-75). It would be illogical; for if the matter is properly the subject of the criminal law, it is a matter for the processes of the criminal law. The criminalisation of conduct may amount to interference with article 8 rights; and that will depend on the nature of the conduct. If the criminalisation does not amount to an unjustifiable interference with respect for an activity protected by article 8, no more does a decision to prosecute for that conduct. The consequences will be matters for the determination of the court. Article 6 protects the defendant’s right to a fair hearing within a reasonable time by an independent and impartial tribunal.

33.
Turning to the argument that the prosecution targeted conduct which was protected by article 8, Mr Hermer submitted that the courts below wrongly concentrated too much on the moment when the appellant tried to pass through immigration control on a false passport and should have looked at her conduct in the wider context of a vulnerable young person who had suffered grievously and was trying to escape by the only means available to her. He submitted that proper investigation should have led the CPS to realise at an early stage that she had a defence under section 31 and in any event that a prosecution was not in the public interest.

34.

The decision which is challenged is the initial decision to prosecute. (The issues listed in the agreed statement of facts and issues all focus on that decision, although in the course of his oral argument Mr Hermer sought to extend the challenge to include the conduct of the CPS throughout the period from the decision to prosecute up to the decision to offer no evidence. I refer to this in the postscript below.) The difficulty for the appellant in advancing the claim that the decision to prosecute her was a violation of her human rights is that it is accepted that the offence under section 25 is compliant with her Convention rights, and it was conceded in the courts below that the CPS was reasonably entitled to conclude at the time of the decision to prosecute that the evidential test was satisfied. It is difficult to envisage circumstances in which the initiation of a prosecution against a person reasonably suspected of committing a criminal offence could itself be a breach of that person's human rights. It is true that the CPS is not bound to prosecute in every case, depending on its view of the public interest, but I do not see that the fact that in this jurisdiction a prosecution is not obligatory makes a difference. Whether it is in the public interest to prosecute is not the same as whether a prosecution would unjustifiably interfere with a right protected by article 8.

35.
I agree with Irwin J and the Court of Appeal on the question of the applicability of article 8 to the decision to prosecute.

36.
However, if article 8 was applicable, I agree also that there was no breach. Things could have been done better and it is regrettable that the claimant, a vulnerable young woman, spent the time that she did in custody. Criticism can be made of the CPS for the length of time it took to investigate the position regarding the Yemen and to conclude that the appellant was likely to succeed in the section 31 defence, but that is far from there being a breach of article 8 in the decision to prosecute. Indeed, even if the original decision to prosecute was an error of judgment by the CPS, it would not in my view have involved a breach of article 8. It would be a different thing if the state deliberately trumped up false charges against someone as a form of harassment. In terms of domestic law, that would involve the torts of malicious prosecution or misfeasance in public office or both, to which article 8 would add nothing; but no duty of care is owed by the police towards a suspect (Calveley v Chief Constable of the Merseyside Police [1989] AC 1228), and the same applies to the CPS.

37.
In Elguzouli-Daf v Comr of Police of the Metropolis [1995] QB 335 (cited with approval in Brooks v Comr of Police of the Metropolis [2005] 1 WLR 1495, Van Colle v Chief Constable of the Hertfordshire Police [2009] 1 AC 225 and Michael v Chief Constable of South Wales Police [2015] AC 1732) two claimants were arrested, charged and remanded in custody for some weeks before the CPS discontinued proceedings against them. In the first case the claimant contended that the CPS was negligent in failing to act with due diligence in obtaining the results of forensic evidence which showed him to be innocent. In the second case the claimant contended that it should not have taken the CPS three months to conclude that the prosecution was bound to fail. In both cases the Court of Appeal upheld decisions striking out the statements of claim against the CPS. Steyn LJ in the leading judgment said that a citizen who is aggrieved by a prosecutor's decision has potentially extensive remedies for a deliberate abuse of power, but the court rejected the argument that the CPS should owe a duty of care towards those it decided to prosecute.

38.
The duty of the CPS is to the public, not to the victim or to the suspect, who have separate interests. To recognise a duty of care towards victims or suspects or both, would put the CPS in positions of

potential conflict, and would also open the door to collateral interlocutory civil proceedings and trials, which would not be conducive to the best operation of the criminal justice system. Similar considerations are relevant when considering the applicability of article 8 in the context of a decision to prosecute. A decision to prosecute does not of itself involve a lack of respect for the autonomy of the defendant but places the question of determining his or her guilt before the court, which will itself be responsible for deciding ancillary questions of bail or remand in custody and the like.

Postscript

39.
As mentioned above, Mr Hermer sought during the course of his oral argument to advance an additional argument that the prosecution of the appellant was a breach of her article 8 rights in its continuation, if not in its commencement. This was not how the case had been presented in the lower courts or in the appellant's written case or in the statement of facts and issues. In those circumstances Mr Havers QC properly objected to this court being asked to conduct its own factual examination of the CPS's alleged shortcomings during the course of the prosecution. If this had been a live issue, it would have been necessary to consider whether (and, if so, in what circumstances) article 8 may become applicable to the CPS in the continuation of a prosecution, if it was not applicable at the time of its commencement. The court did not hear argument on that question, about which it would therefore not be appropriate to express a concluded view. It may be that a defendant's right to a prompt and fair disposal of criminal proceedings, which have been properly commenced, lies in the particular provision of article 6 rather than in the general language of article 8, but without the benefit of considered argument it is better to say no more.

Conclusion

40.
I would dismiss the appeal.

LORD KERR:

41.
At para 75 of the Court of Appeal's judgment [2014] 1 WLR 3238 Pitchford LJ said:

"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 ... 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 on herself the judgment 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 processor 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." (emphasis supplied)

42.
These observations must be viewed in light of a later judgment of the Court of Appeal in Zenati v Metropolitan Police Comr [2015] EWCA Civ 80; [2015] QB 758. In that case a police officer, suspecting that the claimant's passport might be counterfeit, charged him with offences under the Identity Cards Act 2006. The claimant was remanded in custody on 10 December 2010. On the same day, the Crown Prosecution Service asked the officer in the case to arrange a more comprehensive examination of the passport to be carried out by the National Document Fraud Unit by 24 December. The request was not forwarded to the officer until 31 December. On 19 January the officer was informed that the passport was genuine. At a plea and management hearing on 4 February, the CPS informed the judge that they needed to obtain a statement from immigration authorities to confirm that the passport was a forgery. The judge allowed 14 days for this to be done. As a consequence, the claimant was detained for more than three weeks after the CPS should have been informed that the passport was genuine. The Court of Appeal found that this was capable of amounting to a breach of article 5(1)(c) and article 5(3). At para 44 Lord Dyson MR said:

"… if the investigating authorities fail to bring to the attention of the court material information of which the court should be made aware when reviewing a detention, this may have the effect of causing a decision by the court to refuse bail to be in breach of article 5(3). The investigating authorities must not prevent the court from discharging its duty of reviewing the lawfulness of the detention fairly and with a proper appreciation of all the relevant facts of which the authorities should make the court aware. Unless this is done, there is a risk that the court will make decisions which lead to arbitrary detention in breach of article 5(3)."

43.
The propriety of continuing a prosecution must be kept under review by prosecuting authorities, not least for the reason which the Master of the Rolls articulated. In this case, the possibility of a defence under section 31 of the 1999 Act was in play (or should have been) from the earliest stages. The view taken by Ms Davison that the period which the appellant had spent in Yemen precluded such a defence was misconceived for the reasons given by Lord Toulson. Although it did not feature in the case, there is, therefore, a real issue as to whether the appellant's detention beyond the time that it should have been recognised that she had an unanswerable defence under section 31, constituted a violation of her article 5 rights.

44.
If a decision to prosecute resulting in detention is capable of amounting to a breach of article 5, it is capable of interfering with article 8. In Norris v Government of the United States of America (No 2) [2010] 2 AC 487 Lord Phillips said this at para 52:

"… It is instructive to consider the approach of the Convention to dealing with criminals or suspected criminals in the domestic context. Article 5 includes in the exceptions to the right to liberty (i) the arrest of a suspect, (ii) his detention, where necessary, pending trial, and (iii) his detention while serving his sentence if convicted. Such detention will necessarily interfere drastically with family and private life. In theory a question of proportionality could arise under article 8(2). In practice it is only in the most exceptional circumstances that a defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment: see R (P) v Secretary of State of the Home Department [2001] 1 WLR 2002, para 79, for discussion of such circumstances. Normally it is

treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate."

45.
This passage is important in the present context for its implicit acceptance that detention for the purpose of prosecuting a criminal offence is at least capable of engaging article 8. That is not an extravagant proposition. If prosecuting authorities are aware - or ought to have become aware - that the basis for a proposed prosecution no longer obtains, or that there is a defence available to the defendant which will provide a complete answer to the crime charged, and if they fail to act on that information in order to secure the defendant's release, that is an obvious instance of a failure to have respect for the defendant's right to a private life. The responsibility of the prosecuting authorities cannot be shirked because the court has a duty to inquire into the basis on which someone continues to be held in custody pending trial. That is a relevant circumstance but it does not relieve the prosecution of its duty to act on a change in circumstances which makes detention no longer justified. This is particularly so where the court, as in this case, was dependent on information which it was the prosecution's obligation to supply which bore on the question of whether the appellant should continue to be detained.

46.
A decision to prosecute someone against whom there is evidence that they have committed a criminal offence does not automatically constitute a failure to have respect for that person's private life. Respect may be forfeit by engaging in criminal activity which justifies prosecution, although measures taken to identify an individual suspected of criminal activity may not involve forfeiture of the right - see JR38's application [2015] UKSC 42; [2016] AC 1131. In that case there was disagreement between the members of the court as to whether steps taken to identify a minor by publishing photographs of him engaging in criminal behaviour engaged article 8. That debate is not relevant in the present case for it has been accepted that there was an evidential basis for prosecuting the appellant at the time that the prosecution was initiated.

47.
On that basis I agree that this appeal must be dismissed. As Lord Toulson has pointed out, the focus of the appellant's case has always been that the decision to prosecute constituted the breach of article 8. It was simply not possible to allow a late entry into the field of argument that continuing to prosecute involved such a violation. The respondents had not produced evidence germane to that case and it would not have been fair (even if it had been feasible) to require them to do so.

48.
I reach the decision that the appellant must fail in her appeal with regret. This woman, in her short life, has had to endure experiences of the most horrific nature. They have been described in Lord Toulson's judgment. It is not in the least surprising that she had resort to the subterfuge of false papers in order to secure the measure of safety which she believed that this country would afford her. It is sad that her terrible circumstances were compounded by her incarceration at a time when she was vulnerable and defenceless.