11 April 2017

PRESS SUMMARY

SXH (Appellant) v The Crown Prosecution Service (Respondent) [2017] UKSC 30
On appeal from: [2014] EWCA Civ 90

JUSTICES: Lord Mance, Lord Kerr, Lord Reed, Lord Hughes and Lord Toulson

BACKGROUND TO THE APPEAL

In deciding whether to institute criminal proceedings, the Crown Prosecution Service ("CPS") is required to apply a two stage test. They must first consider whether there is enough evidence to provide a realistic prospect of conviction and, if that is satisfied, decide whether the prosecution would be in the public interest **[3]**.

Under section 25(1) of the Identity Cards Act 2006 ("2006 Act") it was an offence for a person to be in possession of an identity card relating to someone else, with the intention of using it to establish his or her identity as that person's identity. However, it is recognised that individuals fleeing persecution may have to resort to the use of false papers to make good their escape. Therefore, under section 31 of the Immigration and Asylum Act 1999 ("section 31") (which gives effect to Article 31(1) of the 1951 Convention and Protocol Relating to the Status of Refugees (the "Refugee Convention")) it is a defence for a refugee charged under section 25 of the 2006 Act if he came to the UK directly from a country where his life or freedom was threatened and *inter alia* made a claim for asylum as soon as was reasonably practicable. "Directly" has been given a purposive interpretation, so that the defence is not excluded by a short-term stopover in an intermediate country **[5-7]**.

The appellant was born in Somalia. She is the member of a minority clan. She and her family suffered severe violence from majority clans over the years; both her mother and father were murdered and the appellant was raped and severely beaten. In December 2008, the appellant fled Somalia to Yemen. A year later she left Yemen and travelled to Holland. On 27 December, she flew from Holland to the UK on a false passport. She was challenged by the UK Border Agency on arrival and immediately claimed asylum. The following day, after an initial asylum screening interview, she was arrested on suspicion of committing an offence under section 25(1) of the 2006 Act. The CPS concluded that both the evidential and public interest tests were satisfied. The appellant was remanded in custody. During this time, another CPS lawyer reviewed the appellant's case. She considered the section 31 defence but decided it was not available to the appellant because of the year the appellant had spent in Yemen. On 1 June 2010, the appellant appeared before the Crown Court. However, the proceedings were adjourned as a decision on the appellant's asylum application was expected shortly and was thought likely to be granted. After the hearing the CPS advocate researched the position of Somali refugees in Yemen and found that although Yemen is a party to the Refugee Convention its procedure for bringing it into effect was poor. The CPS advocate concluded that, subject to the grant of asylum, the prosecution of the appellant should not continue as it was not in the public interest. On 10 June 2010, the appellant was granted asylum. The following day the prosecution offered no evidence at a mention hearing at the Crown Court. The appellant was found not guilty and released from custody **[8-20]**.

The appellant brought proceedings against the CPS, the Home Office and the police for damages on various grounds including a breach of her rights under article 8 of the European Convention on Human Rights (the "Convention"). The claims against the Home Office and the police were not

pursued. The High Court dismissed the appellant's claim against the CPS. The 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. Presenting an immigration officer with false papers was not an activity that formed part of the appellant's private life **[22]**. The Court of Appeal upheld the High Court's decision **[23]**.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Toulson, with whom Lord Mance, Lord Reed and Lord Hughes agree, gives the lead judgment. Lord Kerr gives a concurring judgment.

REASONS FOR THE JUDGMENT

Although article 8 is broad, it is not so broad as to encompass everything done by a public authority which has the consequence of affecting someone's private life in a more than minimal way **[25-26]**. Neither the Strasbourg authorities nor domestic case law supports the contention that the institution of criminal proceedings, for a matter which is properly the subject of the criminal law and for which there is sufficient evidence, may be open to challenge on article 8 grounds. 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 an interference with article 8 rights. However, if it does not amount to an unjustifiable interference, then neither does the decision to prosecute for that conduct **[31-32]**.

In this case the decision which is challenged is the initial decision to prosecute. However, it is accepted that the offence under section 25 of the 2006 Act is compliant with Convention rights and it was conceded 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. 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 does not matter that prosecution is not obligatory in the UK; whether it is in the public interest to prosecute is not the same as whether a prosecution would breach an individual's article 8 rights **[34]**. Article 8 is therefore not applicable to the decision to prosecute **[35]**.

The CPS can be criticised regarding the length of time taken to conclude that the appellant's section 31 defence would succeed. However, even if article 8 was applicable, this would not amount to a breach in the decision to prosecute. Even if the original decision to prosecute was an error of judgment by the CPS this would not have breached article 8. It would be different if the the state had deliberately trumped up false charges. However, this would involve the torts of malicious prosecution and/or misfeasance in public office, to which article 8 would add nothing **[36]**. A decision to prosecute does not 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 **[38]**.

Lord Kerr raises the possibility that the continuation of the decision to prosecute beyond the time that it should have been recognised that the appellant had an answerable defence under section 31 constituted an interference with the appellant's freedom of liberty under article 5 of the Convention and article 8 rights **[41-46]**. However, argument was not heard on these questions. Lord Kerr therefore also dismisses the appeal. The decision to prosecute did not amount to a breach of article 8 in circumstances where it was accepted there was an evidential basis for prosecuting the appellant at the time of that decision **[47]**.

References in square brackets are to paragraphs in the judgment