

**THE HIGH COURT
JUDICIAL REVIEW**

[2002/546JR]

BETWEEN**NICOLETA SOFINETI****APPLICANT**

**AND
JUDGE DAVID ANDERSON,
DIRECTOR OF PUBLIC PROSECUTIONS AND THE
MINISTER FOR JUSTICE EQUALITY AND LAW REFORM**

RESPONDENTS**Judgment of O'Higgins J. delivered on the 18th day of November 2004.**

1. On the 30th August, 2002, by order of the High Court (McKechnie J.) the applicant was given leave to seek by way of judicial review certain orders set out in the statement dated the 30th August, on the grounds set out in paragraph 5 of the said statement. Subsequently, an application was made to amend the grounds which now read as follows:-

- A) An order for prohibition and/or injunction (including an *interim* injunction) restraining the 1st named respondent from hearing or proceeding with a prosecution pursuant to s. 26 and s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001.
- B) An order for prohibition and/or injunction (including an *interim* injunction) restraining the 2nd named respondent from prosecuting or proceeding with a prosecution of the applicant under s.26 and s.18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, or any further or other prosecution of charges pursuant to the said Act arising out of or in connection with the applicant's arrival in this State seeking asylum and a declaration of refugee status and her entry into this State for that purpose.
- C) An order of *certiorari* quashing the decision of the 2nd named respondent to prosecute the applicant as aforesaid.
- D) In the alternative an order directing a permanent stay on any such prosecutions as aforesaid.
- E) In the further alternative, an order quashing the charges in charge sheet No.'s 103820 and 103989, Garda Station, Dublin Airport.
- F) A declaration that the decision of the 2nd named respondent to prosecute the applicant as aforesaid and in particular the use of s.26 and s.18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, is ultra vires the Refugee Act 1996, (Article 31 of the Geneva Convention 1951) and an abuse of process.
- G) A declaration that the treatment of the applicant by the 3rd named respondent was an infringement of the applicant's right to bodily integrity and that of her unborn child and in breach of her right to fair procedures and constitutional justice.
- H) An order of *mandamus* directing the 3rd named respondent to process the applicant's application for a declaration of refugee status in accordance with the Refugee Act 1996.
- I) An order pursuant to Order of the Rules of the Superior Courts O.84, r.20 (7) staying proceedings in the District Court pursuant to the charges under s.26 and s.18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, until the determination of this application.

2. The grounds on which relief is sought are as follows:

- 1) The decision to prosecute under the ordinary criminal law and in particular the use of s.26 and s.18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, is contrary to the provisions of Article 31 of the Geneva Convention 1951.
- 2) The decision to prosecute as aforesaid is an abuse of process.
- 3) The applicant is entitled to immunity from prosecution under the ordinary criminal law as an applicant for a declaration of refugee status arriving at the frontier of the State.
- 4) The decision to prosecute as aforesaid will prejudice the applicant's application for a declaration of refugee status in that any such prosecution will damage the applicant's credibility.
- 5) The applicant has a legitimate expectation that the 3rd named respondent will apply the provisions of Article 31 of the Geneva Convention 1951 and ss. 8 and 9 of the Refugee Act 1996 only. (Section 9 of the Act was relied on in argument).
- 6) That since the applicant presented at Dublin Airport, a passport which the Immigration Officer knew was not genuine, the ingredients for an offence under s.26 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, did not exist and there was no basis on which to ground a charge.
- 7) The ingredients for an offence under s.18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, did not exist and there is no basis on which to ground such a charge. Grounds 6 and 7 were not pursued in court.
- 8) That the 3rd named respondent is obliged to accept and process the applicant's application for refugee status and the presentation of a false passport does not obviate this obligation.
- 9) Any decision to prosecute in these circumstances should be taken by the Minister for Justice, Equality and Law Reform rather than the Director of Public Prosecutions.
- 10) The applicant is entitled to the relief sought under Article 31 of the Geneva Convention 1951.

11) The detention and treatment of the applicant is inconsistent with the State's obligations under the Refugee Act 1996.

12) The treatment of the applicant while in custody was contrary to her right to bodily integrity and that of her unborn child and contrary to fair procedures and constitutional justice, as required by Article 40.3 of the Constitution of Ireland. This ground was not pursued in court.

13) The decision of the 2nd named respondent to prosecute on a further charge under s.18 Criminal Justice (Theft and Fraud Offences) Act 2001, is a further abuse of process compounding the earlier abuse of process.

14) The decision of the 2nd named respondent to prosecute pursuant to s.18 and s.26 Criminal Justice (Theft and Fraud Offences) Act 2001, is an unlawful interference with the applicant's right to make an application for refugee status.

3. The order for mandamus is not being pursued because the case of the applicant is being processed. The grounds, based on the treatment of the applicant, have not been pursued in this court.

The Facts

4. On the 25th April, 2002, a flight arrived from Milan at pier C in Dublin Airport. The authorities became concerned in relation to an Irish passport which was presented on behalf of the applicant. The Irish passport was in the name of Adele Kerr with the date of birth given as the 15th April, 1980. The authorities believed that the passport was a photo substitute and made enquires of the applicant. She stated that she was Romanian and she was refused leave to land as she was not in possession of any passport or travel documents which established her identity and nationality. Following the applicant being refused leave to land, arrangements were made to return her to Milan. Two efforts were made to return her to Milan by airplane. These were unsuccessful. The captain of the aircraft refused to allow her to journey back to Milan. There is disagreement as to the circumstances in which the refusal took place. The applicant was brought to Santry Garda Station and was charged with an offence under s. 26 of the Criminal Justice (Theft and Fraud Offences) Act 2001. That case appeared before the District Court on a number of occasions and she was remanded on a number of occasions. On the 26th November, she was charged with a further offence contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and further remanded.

5. On the 26th August, the day after her arrival, the applicant completed an application form pursuant to s. 8 of the Refugee Act 1996, for a declaration of refugee status. The applicant's version of events is set out in the affidavit of her solicitor Mr. Sheerin sworn on the 30th August, 2002, and a subsequent affidavit sworn on the 10th September, 2002. Affidavits have been filed on behalf of the applicants by Garda Michael McGarry of Santry Garda Station, Adele Kerr, Sgt. James Murphy, Garda Jackie Carey, Garda Valerie Brennan, Garda Patricia McGarrity, Garda Emmett McRaghnaill, Garda David McCarthy all of Santry Garda Station, Garda Ray Jackman of the Garda Technical Bureau, Garda Pat Conroy, Garda Bred Gale of the Immigration Unit, Dublin Airport, Garda Eileen Clarke, D. Garda Carmel Henry and D. Garda Eoin Brady all of the Garda National Immigration Bureau, Harcourt Square. A subsequent affidavit was sworn by Mr. Sheerin on the 13th December, 2002, and the applicant swore an affidavit on the 18th January, 2003. Garda Henry furnished supplemental affidavits as did Garda Gale. The applicant swore a supplemental affidavit on the 9th May, 2003.

6. The applicant's arguments may be summarised as follows:-

(1) Article 31 of the Geneva Convention 1951 has been incorporated into Irish law and it is submitted that the applicant is entitled to its protection and should not be subject to criminal charges.

(2) The applicant has a legitimate expectation that she will be afforded the protection of Article 31 of the Geneva Convention 1951.

(3) The provisions of ss. 9 and 10 of the Refugee Act 1996, set out procedures for dealing with persons such as the applicant. Those procedures are different to those set out under the criminal law and preclude the operation of the criminal law against those entitled to such procedures. The applicant's arguments were confined to s. 9 of the Act.

7. I will deal with these matters *seriatim*.

(1) Is Article 31 of the Geneva Convention 1951 part of Irish domestic law?

8. The applicant relies on Article 31(1) of the Geneva Convention of 1951 as amended, which reads as follows:- 1-

"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"

9. The applicant contends that the Convention was incorporated into Irish law by the Refugee Act 1996.

10. The applicant relied on passages from Bennion, *Statutory Interpretation*, (3rd ed., London, 1997) and in particular s. 241, at pp. 554 and 555, concerning schedules to legislation:-

"Reason for schedules It is often found convenient to incorporate part of the operative provisions of an Act in the form of a Schedule. The Schedule is often used to hive off provisions which are too long or detailed to be put in the body of the Act. This does not mean they are unimportantAnother use of the Schedule is to set out in it some document, such as a treaty or convention, which is referred to in the body of the Act. Example 241.2 The Carriage of Goods by Sea Act 1971 s.1(2) states: 'The provisions of the [Hague-Visby Rules], as set out in the Schedule to this Act shall have the force of law'.

Inducing words A Schedule is attached to the body of the Act by appropriate words in one of the sections (known as inducing words). In the margin at the head of the Schedule the inducing section or sections are specified. Occasionally an error is made in doing this, but that does not affect the validity of the Schedule....

It was formerly the practice for the inducing words to say that the Schedule was to be construed and to have effect as part of the Act. This is no longer done, being regarded as unnecessary. If by mischance the inducing words were omitted, the Schedule would still form part of the Act if that was the apparent intention

Interpretation of Schedules Whether material is put into a section or a Schedule is usually a mere matter of convenience.

Little significance should therefore be attached to it. 'A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much part of the statute, and is as much an enactment as any other part'" [A.G. v. *Lamplough* (1878) 3 Ex.D. 214, per Brett L.J. at p. 229].

11. The applicant, relying on the passages above, submits that Article 31 of the Convention has been incorporated into Irish law by being scheduled to the Refugee Act 1996, notwithstanding the absence of any words stating that it is to be part of Irish law. It is argued that there is a 'clear intention' to incorporate the Convention into domestic law. The applicant submits that such intention is evidenced by the long title of the Act which states that its purpose is "to give effect to the Convention related to the status of refugees done at Geneva".

12. I cannot agree with this submission. There is, in my view, a clear distinction between "giving effect" to the provisions of a convention by legislation and incorporating that convention in its entirety. The provisions of the Refugee Act 1996 were the way in which the legislature chose to give effect to the Geneva Convention 1951. There is nothing to suggest an intention to incorporate the Convention in its entirety.

13. Section 1(1) of the Refugee Act 1996 provides *inter alia* as follows:-

"`the Geneva Convention' means the Convention relating to the Status of Refugees ... (the text of which, in the English language, is, for convenience of reference, set out in the Third Schedule to this Act)".

14. It is thus clear that the purpose of including the provisions of the Geneva Convention 1951 in a schedule to the Act was, as stated "for convenience of reference" and not to incorporate all the provisions into law.

15. In contrast with other recent legislation dealing with international agreements, there is nowhere to be found in the Refugee Act, 1996, any statement that the Convention is to have the force of law. Counsel for the Director of Public Prosecutions referred me to:-

1. The Europol Act 1997, (s. 2);
2. Merchant Shipping (Liability of Ship Owners and Others) Act 1996 (ss. 7 and 19);
3. European Communities (Amendment) Act 1993;
4. Child Abduction and Enforcement of Custody Orders Act 1991, (s. 6);
5. Contractual Obligations (Applicable Law) Act 1991, (s. 2);
6. International Carriage of Goods by Road Act 1990, (s. 2);
7. Jurisdiction of Courts (Maritime Conventions) Act 1989, (s. 4);
8. Air Navigation and Transport (International Conventions) Act 2004, (s.4);
9. Diplomatic Relations and Immunities Act 1967, (ss. 5 and 6);
10. Air Navigation and Transport Act 1965, (s. 2); all of which incorporate the provisions of international convention agreements, protocols or treatments.

16. All of these pieces of legislation provide specifically that the relevant international agreements shall have "the force of law in the State" unlike the Refugee Act 1996, where no such words appear.

17. The applicant also relies on a passage in the judgment of McGuinness J. in the case of *V.Z. v. Minister for Justice Equality and Law Reform and Ors.* [2002] 2 I.R. 135 where she said at pp. 145 and 146: "Ireland is a signatory to the United Nations Convention on the Status of Refugees and Stateless Persons, 1951 and the Protocol of 1967 thereto (the Geneva Convention). The provisions of the Geneva Convention have now been brought into effect in Irish domestic law by the Refugee Act, 1996, as amended."

18. The observation of McGuinness J. that the provisions of the Geneva Convention 1951 have now "been brought into effect" in Irish domestic law by the Refugee Act 1996, as amended, does not state, or imply, that all its provisions have been brought into effect in Irish domestic law. Nor is it authority for the proposition that the inclusion of the text of the Convention in a schedule to the Act incorporated all its terms, in particular Article 31(1), into domestic law.

19. In my view, therefore, neither the fact that it is possible to incorporate legislative provisions by means of including them in a schedule, nor the reference in the long title to the Refugee Act 1996, to giving "effect to" the Convention, nor the observations of McGuinness J., already referred to, are indicative that Article 31 of the Convention has been incorporated into domestic law. On the other hand the very existence of specific statutory provisions in the Refugee Act 1996, which give effect to the Convention, is evidence that such (rather than incorporation by scheduling) was the method chosen by the legislature.

20. This view is reinforced by the reference in the interpretation section to the Convention being scheduled for 'convenience of reference', as it is to be expected that if the Act was scheduled for any other reason it would be so stated. (See The Protection of Children (Hague Convention) Act 2000, s. 2 to which I was referred, where the Convention is scheduled for 'convenience of reference' but there is also a provision, that the convention 'shall have the force of law in the State').

21. I therefore reject the applicant's contention that the Geneva Convention 1951 forms part of Irish law.

(2) Legitimate Expectation

22. The applicant invokes the doctrine of legitimate expectation and contends that because Ireland is a signatory to the Geneva Convention 1951 the respondent had a legitimate expectation that the protection of Article 31 of the Convention would be afforded to her, and that she would not be subject to a penalty i.e. criminal prosecution. It is submitted that the charging of the applicant with criminal offences constitutes a penalty. The respondent relies heavily on the decision in *R. v. Uxbridge Magistrates Court and another ex parte Adimi* [2001] Q.B. 667 where at p. 686 Simon Browne L.J. states:-

"Second, the applicants contend that the United Kingdom's ratification of the Convention itself created a legitimate

expectation that its provisions would be followed. In this connection they pray in aid the Court of Appeal's decision in *R v. Secretary of State for the Home Department, Ex p Ahmed* [1998] I.N.L.R. 570, 583, where Lord Woolf MR said: 'I will accept that the entering into a Treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely. Subject to any indication to the contrary, it could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the Treaty. This legitimate expectation could give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which this country had undertaken'.

I would accept this argument".

23. The applicant also seeks to place reliance on *Nwole v. Minister for Justice Equality and Law Reform* (Unreported, High Court, Finlay Geoghegan J., 31st October, 2003) in which Finlay Geoghegan J. granted leave to apply for judicial review. In the course of her judgment she stated at pp.12 and 13:

"The provisions of the Act of 1996 must be construed, and its operation applied by the authorities in accordance with the Convention on the Rights of the Child which has been ratified by Ireland. Article 12 of that Convention entitles children, capable of forming their own views to 'the right to express those views freely in all matters affecting the child'.... It also provides that '...the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.

This would appear to require, at minimum, an inquiry by or on behalf of the respondent in respect of any minor applicant for a declaration of refugee status as to the capacity of the minor and the appropriateness of conducting an interview with him or her".

24. I accept that the courts must interpret a statute in light of a convention which the State has ratified as Finlay Geoghegan J. did in the *Nwole* case. However it does not support the applicant's arguments based on the doctrine of legitimate expectation. The provisions of a convention which, although ratified was not incorporated into domestic law, cannot be imported into the legislation by reliance on the canon of construction referred to in the *Nwole* case. Section 9 of the Refugee Act, 1996, does not pose difficulties in interpretation so as to require recourse to the Geneva Convention 1951 to understand it.

25. The applicant also relies on a passage in the case of *The Minister for Immigration and Ethnic Affairs v. Teoh* [1995] 183 C.L.R. 273 concerning the applicability of an international law instrument (the UN Convention on the Rights of the Child) which, although ratified had not been incorporated into Australian domestic law. Mason C.J. and Dean J. in the course of their judgments said at paragraph 27:

"If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations."

and at paragraph 34:

"[R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention ..."

26. This case was considered by Fennelly J. in the case of *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97, to which I will later refer.

27. The respondents submit that a legitimate expectation of a particular course of action cannot arise where legislation clearly provides for a different course of action. They maintain that the Director of Public Prosecutions is charged by law with certain functions and that there can be no reliance on the doctrine of legitimate expectation to prevent him from discharging those functions. They also maintain that the doctrine of legitimate expectation cannot be used to import the provisions of Article 31 of the Geneva Convention 1951 into Irish law in the absence of legislation because of the provisions of Article 29.6 of the Constitution.

28. In considering the applicants submissions concerning a legitimate expectation it is important to note that in the case of *R. (European Roma Rights) v. Prague Immigration Officer at Prague Airport (CA)* [2004] 2 W.L.R. 147, Simon Browne L.J. appeared to resile from his views as expressed in *Adimi*, upon which the applicant strongly relies, when he said at paragraph 51:-

"For present purposes I wish to say no more than that, in the light of the extensive arguments developed before us both orally and in writing, I now recognise that the views I expressed in the Divisional Court in *Adimi Ex p.* [2001] Q.B. 667, 685 – 686 in particular in reliance on *R v. Secretary of State for the Home Department ex parte Ahmed* [1998] INLR 570, are to be regarded as at best superficial, and that the conclusion I reached there, with regard to the legitimate expectations of asylum seekers to the benefits of article 31, is suspect."

29. In the same case Laws L.J. said at paragraph 99:-

"The claimants are therefore, as I see the matter, driven to assert that the 1951 Convention has distinct and enforceable effects in the domestic law of England which transcend the reach of its incorporation by Parliament. But that is a constitutional solecism."

30. Mr. Goldberg for the applicant sought to distinguish the Roma case from the application herein firstly on the basis that the 1951 Convention is not incorporated into UK domestic law. For reasons I have already stated I do not consider that it has been incorporated into Irish law either. He also argues that the case can be distinguished because of the difficulties inherent in relying on Article 31 protection in circumstances where the impugned action took place outside the borders of the UK. In my view that fact does not change the rationale of the decision.

31. The observations of Fennelly J. in the case of *Kavanagh v Governor of Mountjoy Prison and Ors* [2002] 3 I.R. 97, are of particular relevance to the topic of legitimate expectation. Having reviewed the authorities, he considered the *Teoh* case relied on by the

applicant and said at p.124:-

"[T]he joint judgment of Mason C.J. and Dean J. treads a careful line between giving direct effect in Australian law to an international agreement that had not been legislatively adopted and the duty of administrative authorities to respect expectations legitimately entertained that Australia would act in accordance with international obligations freely entered into. The judgment contains the following at page 291: '... ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of children as 'a primary consideration'.

At page 302 Toohey J. said as follows:

'It follows that while Australia's ratification of the Convention does not go so far as to incorporate it into domestic law, it does have consequences for agencies of the executive government of the Commonwealth. It results in an expectation that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the persons affected an opportunity to argue against such a course. It may be said that such a view of ratification will have undue consequences for decision makers. But it is important to bear in mind that we are not concerned with enforceable obligations, but with legitimate expectations, and that there can be no legitimate expectation if the actions of the legislature or the executive are inconsistent with such an expectation.'

32. Fennelly J. observed:

'Earlier in the joint judgment of Mason C.J. and Dean J., reference was made to the fact (at p. 287) that, while the treaty making power fell within the province of the executive, 'the making and the alteration of law falls within the province of Parliament, not the Executive'. It continued:

'So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.'

33. Fennelly J. went on to say:

'While Australia, as a common law country, operates the general dualist approach to the domestic effect of international agreements, it does not appear from the judgments of the High Court that Australian law replicates that rule with anything quite like the constitutional rigour with which it is embodied in Article 29.6 of the Constitution:- 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.

34. Discussing the relevance of Article 29 of the Constitution and in relation to legitimate expectation Fennelly J. said at page 129:

'At this point, the clear terms of Article 29 of the Constitution return to the picture. How, one might ask, could the provisions of an international agreement which has not been adopted into Irish law or the views expressed by a Committee established thereunder prevail over the legal effect of a conviction by a duly constituted Irish court? Once again the joint judgment of Mason C.J. and Dean J. is instructive. The judges observed that to allow the doctrine of legitimate expectation to compel a decision-maker to act in a particular way "incorporates", i.e., would incorporate 'the unincorporated Convention into our municipal law by the back door'. It seems clear beyond argument that what could not be achieved directly through the mechanism of Article 29.3 could not be achieved indirectly by invoking the doctrine of legitimate expectations'.

35. The Constitution establishes an unmistakable distinction between domestic and international law. The Government has the exclusive prerogative of entering into agreements with other States. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. The Government may ask the Oireachtas to pass the necessary legislation where it wishes the terms of an international agreement to have effect in domestic law. If this does not happen, Article 29.6 applies. I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to effect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution.

36. The judgment of Maguire C.J. in *In re O'Leighleis* [1960] I.R. 93, at p.125, is also of relevance:

'The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law. No argument can prevail against the express command of section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws. The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. Nor can the Court accede to the view that in the domestic forum the Executive is in any way estopped from relying on the domestic law. It may be that such estoppel might operate as between the High Contracting Parties to the Convention, or in the Court contemplated by Section IV of the Convention if it comes into existence, but it cannot operate in a domestic Court administering domestic law'.

37. It is clear from the above passages that both Fennelly J. and Maguire C.J. were expounding on the important practical effects of Article 29.6 of the Constitution.

38. Article 29.6 of the Constitution states as follows:-

"No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

39. It is thus clear from the terms of the Constitution itself, that international agreements are not part of domestic law unless they are made so by the Oireachtas. It follows from that that if Article 31 of the Geneva Convention 1951 is not part of domestic law there

can be no legitimate expectation that its provisions can be successfully invoked to oust the right of the Director of Public Prosecutions to perform his duty.

40. In Ireland the prosecution of offences is provided for in Article 30.3 of the Constitution which reads as follows:-

"All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

41. The Director of Public Prosecution is authorised and charged with that function by the Prosecution of Offences Act 1974. As stated in *Eviston v. DIRECTOR OF PUBLIC PROSECUTIONS* [2002] 3 I.R. 260, at p.290, per Keane C.J.:-

"[T]he decision to initiate a prosecution and the subsequent conduct of that prosecution are functions exclusively assigned (with limited exceptions) to the [Director of Public Prosecutions] under the Constitution and the relevant statutory provisions."

42. To allow the doctrine to enable the applicant a legitimate expectation to avail of Article 31 of the Geneva Convention 1951 would be, in my view, a usurpation by the courts of the power of the legislature. It would clearly amount to incorporating the provisions of "the unincorporated convention into our municipal law by the back door".

43. I am strengthened in that view by certain other authorities upon which the respondent relies, such as the remarks of Murray J. in the case of *Doherty v. Governor of Portlaoise Prison* [2002] 2 I.R. 252. In that case the applicant claimed to be a qualifying prisoner under the provisions of the Criminal Justice (Release of Prisoners) Act 1998, which was enacted in order to give effect to the State's obligations in relation to prisoners, which arose out of the agreement reached in the multi-party talks; a part of the agreement generally known as the 'Good Friday Agreement' of the 10th April, 1998. In rejecting the application Murray J. stated at p. 265:-

"There is no provision in the Act of 1998, which enacts or purports to enact any of the provisions of the Multi-Party Agreement as part of our legislation. The agreement represents engagements and commitments solemnly entered into by the parties to the agreement. As is usual in such agreements, the obligations are inter partes. It does not confer rights on particular individuals which may be invoked before the courts."

44. Similarly, in default of legislation enacting the provisions of Article 31 of the Geneva Convention 1951 into Irish law the ratification of the Convention does not confer rights on the applicants which may be invoked before the courts, at least to deprive the Director of Public Prosecutions of his functions as laid down by law.

45. I was also referred to passages in the case of *R. (on the application of Pepushi) v. Crown Prosecution Service* [2004] E.W.H.C. 798. At paragraph 33 of the judgment Thomas J. referred to the fact that the court had reached a clear conclusion that the defence available to the claimant was set out in the provision enacted by Parliament and not in Article 31 of the Convention:

"Parliament has decided to give effect to the international obligations of the UK in a narrower way, but that is, on the authorities that are binding on us, the law which must be applied in the UK. The decision on the first issue in *Adimi* is therefore, in effect, no longer relevant to persons such as the claimant when faced with a criminal prosecution in the UK."

46. The following passage appears at paragraph 37:

"To acknowledge that an international treaty gives rights to legitimate expectations under our domestic law relating to crime on a point where Parliament has expressly legislated would in effect be indirectly circumventing the scope of our domestic law as set out in statute in a way that was bound to give rise to very considerable confusion and uncertainty."

47. At paragraph 38 Thomas J. went onto say:-

"Furthermore the CPS must, as a prosecution service independent of the Executive, apply the domestic law of England and Wales where Parliament had enacted the provisions of an international Convention; there can be no legitimate expectation that the CPS could do otherwise; the principle is the same as that set out by Lord Bingham of Cornhill C.J. in this court in *R. (ex parte Kebilene) v. Director of Public Prosecutions* [2000] 2 AC 326."

48. The principle set out in *ex parte Kebilene* states as follows:-

In the speech to the House of Lords Lord Bingham of Cornhill C.J., at p.339, said:-

"Statements by ministers concerning the future conduct of themselves and their officials can found no legitimate expectation concerning the future decisions of the Director since he, like the law officers, acts wholly independently of the executive when making decisions on the conduct of criminal proceedings. It is his public duty and responsibility to exercise his own independent judgment. He cannot be bound by any statement made on behalf of the executive, and no reasonable person alert to his constitutional role could expect him to be so bound."

49. In the light of Article 29.6 of the Constitution taken in conjunction with the duties imposed on the Director of Public Prosecutions by the Constitution and the Prosecution of Offences Act 1974, there can be no legitimate expectation in the applicant's submission that Article 31 of the Convention could be successfully invoked by her so as to prevent the Director of Public Prosecutions prosecuting her and maintaining such prosecution.

(3) Are ss. 9 and 10 of the Refugee Act 1996, a code to give effect to Article 31 of the Geneva Convention 1951?

50. It is submitted that the provisions of ss. 9 and 10 are designed to give effect, within the State, to the protection against the imposition of penalties; contained in Article 31(1) of the Geneva Convention 1951. For the reasons I have already outlined I have concluded that Article 31 of the Convention is not part of Irish law. However, it is also argued by the applicant that s. 9 of the Refugee Act 1996, establishes a code for dealing with persons who arrive with forged documents and subsequently seek asylum. It is submitted that the provision of the comprehensive scheme under the Refugee Act 1996, as amended, precludes the Director of Public Prosecutions from preferring and/or proceeding with the criminal charges with which the applicant was charged.

51. Article 31(1) of the Geneva Convention 1951 concerns the non-imposition of penalties on account of illegal entry or presence of refugees in certain circumstances and Article 31(2) of the Convention deals with the non-imposition of unnecessary restrictions and

movements on such persons. Section 9 of the Refugee Act, for those who seek refugee status, however, deals with leave to enter and remain in the State. Section 9 is a broad section which covers a granting or refusal of leave to enter and remain in the State and covers a wide range of situations most of them not related to Article 31 at all. Section 9 (8) reads as follows:

"Where an immigration officer or member of the Garda Síochána, with reasonable cause, suspects that an applicant -

- (a) poses a threat to national security or public order in the State,
- (b) has committed a serious non-political crime outside the State,
- (c) has not made reasonable efforts to establish his or her true identity,
- (d) intends to avoid removal from the State in the event of his or her application for asylum being transferred to a convention country pursuant to section 22,
- (e) intends to leave the State and enter another State without lawful authority, or
- (f) without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents, he or she may detain the person in a prescribed place (referred to subsequently in this Act as 'a place of detention')."

52. It is clear from the above that s. 9(8) provides for detention in a range of circumstances simply not covered by Article 31 of the Geneva Convention 1951.

53. Section 9 (8)(f) of the Act of 1996 sets out the statutory framework for dealing with an applicant who:-

"without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents".

54. I do not accept the contention that the system of detention under s. 9 of the Refugee Act which may include apply to an applicant who has destroyed travel documents or is in possession of forged identity documents was intended to implement the provision in Article 31 of the Convention, which provides that no penalty is to be imposed on a refugee in circumstances outlined in that Article.

55. In enacting the Act of 1996 the legislature set up a statutory scheme to deal with applicants who gained entry into the State on foot of forged documents. However the Act does not exclude the possibility of a person who subsequently becomes an applicant within the meaning of the 1996 Act, being dealt with under the provisions of the criminal law, if the documents used for entry go beyond the purpose envisaged under the 1996 Act. It is alleged that the documents in this case were not merely forged but stolen from an Irish citizen. It is alleged that the documents in this case were not merely used for gaining entry for the purposes of an immediate application for asylum but were used to gain unlawful entry into the State by the applicant by passing herself off as an Irish citizen, thus avoiding entirely the statutory scheme as set up by the Refugee Act.

56. The applicant in this case has been charged under s.18 (1) of the Criminal Justice (Theft and Fraud Offences) Act 2001, which provides:-

"A person who, without lawful authority or excuse, possesses stolen property (otherwise than in the course of the stealing), knowing that the property was stolen or being reckless as to whether it was stolen, is guilty of an offence"

57. It therefore deals with possession of stolen property, a topic of which is not dealt with at all in s. 9 (8) of the Act of 1996.

58. Section 26(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001 deals with:-

"A person who uses an instrument which is, and which he or she knows or believes to be, a false instrument, with the intention of inducing another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence."

59. Section 9(8) of the Act of 1996 however, does not deal with circumstances where a person attempts to use forged documents to induce a person to do some act or omission to their prejudice.

60. The procedures set out in s. 9 of the Refugee Act for dealing with applicants for refugee status do not either explicitly, or by implication, preclude the Director of Public Prosecutions from the discharge of his functions.

61. Under the Constitution of Ireland the prosecution of offences is committed to the Executive Branch of the Government and specifically to the Director of Public Prosecutions, in cases of proceedings and indictment. The courts play no role in the prosecution of offences and both the decision to initiate a prosecution and the subsequent conduct of that prosecution are functions exclusively assigned under the Constitution to the Director of Public Prosecutions. As was stated by Denham J. in *K(M) v. Judge Groarke and The Director of Public Prosecutions* (unreported, Supreme Court, 25th June, 2002) at p.11 of the unreported judgment "The decision as to whether or not to prosecute the applicant is a matter for the Director of Public Prosecutions. The Director of Public Prosecutions is independent in the performance of his functions: s. 2(5) Prosecution of Offences Act 1974. The decision to prosecute may be a complex decision involving the balancing of many factors. As was stated in the Annual report for the Director of Public Prosecutions 2000, the office of the Director of Public Prosecutions seeks to provide on behalf of the people of Ireland a prosecution service which is independent, fair and effective. It is not for this or any court to assume the burden of that office".

62. In *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589 at p.603 O'Flaherty J. stated:

"In deciding whether to bring or not to bring a prosecution, the Director is not settling any question or dispute or deciding rights or liabilities; he is simply making a decision on whether it is appropriate to initiate a prosecution. If he does, it is afterwards for the courts to decide whether a conviction may be sustained. The stance taken by the Director of Public Prosecutions is that he should not, in general, give reasons in any individual case as to why he has not brought a prosecution because if he does so in one case he must be expected to do so in all cases. I would uphold this position as

being a correct one."Only in exceptional circumstances will a superior court interfere to prohibit a trial taking place and the applicant seeking prohibition carries the onus of establishing, as a real risk, that he will not receive a trial in due course of law in accordance with Article 38 of the Constitution. This Court is entitled to proceed on the presumption that every judge presiding over a criminal trial will take all necessary and appropriate steps to ensure that the trial is conducted in accordance with the law.

63. The provisions of s. 9(8) of the Refugee Act 1996, do not preclude the possibility of charging people who have broken the criminal law with a criminal offence. It does not preclude the possibility of criminal prosecution, even in respect of persons who have been detained pursuant to s. 9(8) of the Act. There is, in my view, no basis for the contention that, because there is a provision in Irish law which might have allowed the immigration officer or the Garda Síochána to detain the applicant without trial and without charge on the basis of reasonable suspicion; that that implies the exclusion of the operation of the criminal law.

64. The Director of Public Prosecutions contends that the application is not appropriate and that the points made in this court could be more appropriately made at the trial.

65. The respondents also take issue with the applicant and contend that she has not demonstrated that she is a person who would come within the scope of Article 31 of the Geneva Convention 1951. It is also in contention whether charging the applicant with a criminal offence constitutes a penalty.

66. In deference to the arguments of the applicant I deemed it appropriate to deal with the substantive grounds advanced by them. In light of the findings of the court on those substantive issues, it is unnecessary to determine the other matters argued by the applicants.

67. For the reasons stated in this judgment I refuse the reliefs sought by the applicant.