



Neutral Citation Number: [2021] EWHC 1445 (QB)

Case No: QB-2020-003587

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28/05/2021

**Before :**

**MASTER DAVID COOK**

**Between :**

**REZQ ALLAH KORO**  
**- and -**  
**SECRETARY OF STATE FOR JUSTICE**

**Claimant**

**Defendant**

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**Dr Abdul-Haq Al-Ani** (instructed by **Direct Access**) for the **Claimant**  
**Saara Idelbi** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 12 March 2021

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER DAVID COOK

**MASTER COOK: :**

1. On 12 October 2020 the Claimant issued a Part 8 claim setting out the following details of claim;

“1. The Claimant believes that Part 8 CPR applies to this Application for the following reasons.

2. Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, was adopted on 25 October 2012 and ought to have been fully transposed by 16 November 2015.

3. The Claimant is a victim as defined under Article 2 of the Directive having initiated one private prosecution and is in the process of initiating a second as outlined in the attached Witness Statement.

4. The Claimant, as a private prosecutor, is a participant in the criminal proceeding as defined in Recital 20 of the Directive and asserted by the CJEU at [3] in Case C—38/18 - 29 July 2019.

5. Among the rights created by the Directive are Right to Legal Aid under Articles 13 and Right to reimbursement of expenses under Article 14.

6. The Claimant is also entitled to legal aid by reason of Article 47 of the European Charter.

7. Mr Justice Green interpreted the meaning of entitlement to the rights under the Directive when he stated in his judgment at [87] in *R v HMRC* [2014] EWHC 1475, that: .... As such HMRC would, once the Council directive is required to be implemented, prima facie be duty bound to respond; it would not simply have a power so to do.”

8. The Secretary of State for Justice (SSJ) has failed to transpose Articles 13 and 14 into LASPO 2012 or any other legislation.

9. The Claimant is entitled to rely on the direct effect of the Directive disapplying any provision that denies him legal aid.”

2. The Claimant sought the following relief:

“i. A declaration that the Secretary of State has failed to transpose Articles 13 and 14 into UK domestic law;”

ii An order that the Claimant be granted his rights for legal aid and reimbursement under Articles 13 and 14 of the Directive for his private prosecution in respect of the prosecution taken over

by the CPS and a prospective application (for a voluntary bill of indictment); and

iii A declaration that the failure of the Defendant to ensure the Claimant's entitlement to legal aid is a breach of the Victim's rights under Article 6(1) of the ECHR."

3. The Part 8 claim form contained no particulars of claim but was accompanied by a witness statement of the Claimant dated 26 September 2020.
4. This is the hearing of the Defendant's application to strike out the claim pursuant to CPR r 3.4(2)(a) or (b). I heard the application remotely using Microsoft Teams. The hearing was listed for 1.5 hours, however it took over 2 hours for counsel to complete submissions leaving me no time to deliver a reasoned judgment. I was also referred to the case of *Menjou v Secretary of State for Justice* which was heard on 25 February 2021 by Mrs Justice Eady which concerned similar issues. At that time there was no transcript of the judgment. A copy of the judgment is now available with a neutral citation [2021] EWCA 1231 (QB). It is clear the time estimate submitted by the parties was woefully inadequate as might have been foreseen when a 40 page skeleton argument was served on behalf of the Claimant. All of these factors have delayed finalisation of this judgment.
5. The background to the claim can be derived from the Claimant's witness statement of 26 September 2020. The Claimant is an Iraqi refugee who has been present in the United Kingdom since March 2015. He states that prior to arriving in this country he had business dealings with a Mr Elias Zakaria which ended in litigation. In the course of the litigation the Claimant asserts he discovered that Mr Zakaria had committed criminal offences. For reasons which are not disclosed the Claimant decided to commence a private prosecution and he applied to Ealing Magistrates Court to issue a summons against Mr Zakaria in respect of an offence under the Theft Act 1968 alleged to have occurred in October 1987 and an offence under the Fraud Act 2006 alleged to have occurred in April 2007.
6. Following a hearing before a District Judge a summons was issued returnable on 25 March 2019 in respect of the two charges. On 25<sup>th</sup> March 2019 Mr Zakaria appeared and elected to be tried in the Crown Court.
7. The Claimant then requested the CPS to take over the prosecution because he asserts he could not afford to instruct counsel to prosecute the case.
8. The Claimant complains that the CPS decided to discontinue the prosecution and, contrary to his wishes and despite the evidence he had presented to the District Judge, offered no evidence in accordance with section 17 of the Criminal Justice Act 1967.
9. The Claimant sought to challenge the decision of the CPS by issuing an application for judicial review. Permission was refused by Mrs Justice Cheema Grubb on 18 March 2020. There is no appeal from this decision.
10. The Claimant states in his witness statement that he is impecunious by reason of his dealings with Mr Zakaria and he still owes his lawyers for the cost of the private

prosecution. The Claimant goes on to assert that he qualifies as a Victim as defined by Article 2 of the Directive which provides;

*“victim means:*

*(i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence”*

11. The Claimant asserts that by reason of his status as a victim he is entitled to legal aid and reimbursement of expenses in accordance with Articles 13 and 14 of the Directive.

12. Article 13 of the Directive provides:

*“Right to legal aid*

*Member States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings. The conditions or procedural rules under which victims have access to legal aid shall be determined by national law.”*

13. Article 14 of the Directive provides:

*“Right to reimbursement of expenses*

*Member States shall afford victims who participate in criminal proceedings, the possibility of reimbursement of expenses incurred as a result of their active participation in criminal proceedings, in accordance with their role in the relevant criminal justice system. The conditions or procedural rules under which victims may be reimbursed shall be determined by national law.”*

14. The Claimant asserts that the requirement of his being a party to and of participation in criminal proceedings in his role of a private prosecutor is satisfied by Recital 20 of the Directive.

15. Recital 20 of the Directive provides:

*“The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more of the following criteria: whether the national system provides for a legal status as a party to criminal proceedings; whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings. Member States should determine which of those criteria apply to determine the scope of rights set*

*out in this Directive where there are references to the role of the victim in the relevant criminal justice system.”*

16. The Claimant also prays in aid Article 47 of the European Charter of Fundamental Rights which provides:

*“Right to an effective remedy and to a fair trial*

*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by and independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”*

17. The Claimant concludes his witness statement by inviting the court *“to order that the Defendant should pay me the legal aid and imbursement of my expenses which I am entitled to in my actions as a private prosecutor in both proceedings – the one terminated by the CPS and the one I intend to initiate for a voluntary bill of indictment.”*
18. On behalf of the Defendant Ms Idelbi submits that the claim advanced has no real prospect of success and that the claim constitutes an abuse of the Court’s process both because the Claimant has used the wrong procedure, Part 8 rather than Part 54 and because the Claimant is attempting to re-litigate an issue raised in his Judicial Review proceedings.

### **The power to strike out**

19. CPR 3.4(2) provides:

*“(2) The court may strike out a statement of case if it appears to the court –*

*(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*

*(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or*

*(c) that there has been a failure to comply with a rule, practice direction or court order.”*

20. Practice Direction 3A para 4.1 provides:

“The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):

- (1) those which set out no facts indicating what the claim is about, for example ‘Money owed £5000’,
- (2) those which are incoherent and make no sense,
- (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.”

21. When exercising the power to strike out a statement of case I must be certain the case will fail, see *Farah v British Airways* [1999] WLUK 155.
22. Where a statement of case is found to be defective I should consider whether the defect may be cured by amendment and allow a party an opportunity to amend, see *Kim v Park* [2011] EWHC 1781 (QB) Tugendhat J at paragraphs 40 to 41.

### **The use of Part 8 procedure**

23. CPR r 8.2(b)(ii) requires a claimant using Part 8 procedure to specify not only the remedy which the claimant is seeking but also “*the legal basis for the claim to that remedy*”. It cannot seriously be argued that the claim form, in its current form, sets out the legal basis for the remedy claimed, indeed Dr Al-Ani was forced to concede as much in the course of argument. The claim form simply contains a list of remedies and it is necessary to refer to the attached witness statement to properly understand the legal basis for the remedies claimed. It has been said by many judges on numerous occasions and I repeat; witness statements should be confined to relevant facts and are not appropriate vehicles for making legal submissions. In the circumstances the claim form is liable to be struck out for failure to comply with CPR r 8.2(b)(ii) on the basis that it discloses no reasonable grounds for bringing the claim.
24. I accept, were this the only defect, the statement of case would be susceptible to amendment in which case I should permit the Claimant the opportunity to amend.
25. However there is a more fundamental objection to the Claimant’s use of Part 8 procedure in this case. It has long been recognised that it is an abuse of process to bring by ordinary claim, proceedings which should be brought by judicial review, thus evading the provisions which are designed to protect public authorities, see *O’Reilly v Mackman* [1983] 2 AC 237. This is known as the “exclusivity principle”. As the note at 54.3.2 of the White Book states the precise scope of the rule in *O’Reilly v Mackman* is still a matter of debate following the decision of the House of Lords in *Roy v Kensington and Chelsea FPC* [1992] 1 AC 624, with two main approaches being canvassed in the case law.
26. The first approach is that the rule does not apply to claims which are brought to vindicate private law rights even though they involve a challenge to a public law decision and may involve determining a matter of public law. In the case of *Roy* a general practitioner commenced an ordinary action against his family practitioner

committee, seeking payments he alleged were due to him and which had been withheld following the committee's decision that he had devoted sufficient time to general practice as required by the Statement of Fees and Allowances published under regulation 24 of the National Health Service. The judge at first instance struck out the claim as an abuse of process on the ground that the committee's finding had been a public law decision which could only be challenged by judicial review. The Court of Appeal allowed the general practitioner's appeal and the House of Lords upheld the decision of the Court of Appeal on the basis that a litigant possessed of a private law right could seek to enforce that right by ordinary action notwithstanding that the proceedings would involve a challenge to a public law act or decision; that general practitioner's relationship with the committee, whether contractual or statutory, conferred on him private law rights to remuneration in accordance with his statutory terms of service; and that, accordingly, the bringing of an ordinary action to enforce the right to receive that remuneration did not constitute an abuse.

27. Another example of this approach is the case of *Trim v North Dorset DC* [2010] EWCA Civ 1446. In this case the claimant sought to challenge a notice alleging breach of a condition attached to the grant of a planning permission. It was held that such a challenge raised only public law issues and the challenge should have been made by judicial review. At paragraph [27] of the judgment Carnwath LJ said:

“Public action does not lose its public character merely because it involves, as most public action does, interference with private rights and freedoms. It is only where there is an overlap with private law principles (such as contract or tort), that procedural exclusivity may become difficult to maintain.”

28. The second approach is that, subject to well recognised exceptions, the rule applies to all cases where the claim involves a challenge to a public law decision or action or involves determining issues of public law whether or not the ultimate aim of proceedings is to vindicate a private law right. In the case of *Roy* the House of Lords indicated a preference for the first approach without actually deciding the matter. In my judgment the issue should be decided according to the first approach, which gives more latitude to the Claimant and seems more consistent with the subsequent case law.
29. Dr Al-Ani submitted that his client was attempting to rely on private law rights in order to bring this claim. As I understood his submission the private law rights he relied on arose by giving direct effect to the relevant provisions of Articles 13 and 14 of the Directive relating to the grant of legal aid and the re-imbursment of expenses.
30. In my judgment this argument is unsustainable. I accept that the court should not apply an overly restrictive approach to the exclusivity principle and that the case law now supports a more nuanced approach, however the claim as presented is clearly a public law claim. Ms Idelbi's submission, that the Directive is concerned with matters of procedure and that its purpose is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings, is patently correct. This is reinforced by the terms of recital (20) of the Directive and the empowering provision of the Treaty on the Functioning of the European Union which provide:

“Recital (20)

The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more of the following criteria: whether the national system provides for a legal status as a party to criminal proceedings; whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings. Member States should determine which of those criteria apply to determine the scope of rights set out in this Directive where there are references to the role of the victim in the relevant criminal justice system.” (Emphasis added.)

Article 82(2) TFEU

“To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.” (Emphasis added.)

31. It is therefore apparent that the Directive concerns matters of criminal procedure, that it should be utilised in a manner which takes into account the differences in the legal traditions and systems of Member States and that Member States should determine which criteria apply in order to set out the scope of the rights set out in the Directive.
32. Looked at in this context the claim for a declaration for failure to transpose Articles 13 and 14 into the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is clearly a public law claim, there is simply no free standing private law right in play.
33. Further, one of the remedies sought by the Claimant is a mandatory order requiring him to be granted legal aid and reimbursement of the costs of his private prosecution. CPR



r 54.2 provides that the judicial review procedure must be used in a claim for judicial review where the claimant is seeking a mandatory order.

34. It will also be recalled that the Claimant sought to challenge the decision of the CPS to discontinue his criminal proceedings by way of judicial review. By reason of the Senior Courts Act 1981 Pt II s 18(1) the Court of Appeal has no jurisdiction to hear an appeal against the refusal of permission by Mrs Justice Cheema Grubb. In the context of that application the Claimant sought a declaration that LASPO 2012 was incompatible with Article 13 of the Directive because it failed to transpose a right to legal aid for victims of crime into that Act. In the circumstances the use of Part 8 procedure in this claim circumvents both the restriction on the right of appeal and the time limits imposed by Part 54 for bringing claims for judicial review.
35. I am therefore satisfied that the Claimant has failed to identify any sufficient private law interest which could justify the use of Part 8 procedure and that the claim should be struck out as an abuse of the court's procedure.
36. I have come to this conclusion without having to consider the underlying merits of the claim at any great length. However it is right I should say something about the underlying merits as they were argued before me at some length and were relied on by Dr Al-Ani in support of his submission that the Claimant should be given permission to amend his claim and proceed by way of a Part 54 claim for judicial review.
37. The central argument advanced on behalf of the Claimant relates to the alleged failure to transpose Articles 13 and 14 into the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which is said to require the payment of the Claimant's expenses in relation to the attempted private prosecution. In my judgment this argument faces a number of insurmountable hurdles.
38. Firstly, I consider that it is not reasonably arguable that a victim has party status in criminal proceedings. Under section 6 of the Prosecution of Offences Act 1985 any person may bring a private prosecution this is not a role confined to victims. As I have already noted the purpose of the Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. There is nothing in either Article 13 or the Directive which enshrines a right to legal aid for the purpose of bringing a private prosecution or for payment after the prosecution is concluded. Mrs Justice Eady reached the same conclusion in *Menjou*, see paragraph 57 of her judgment:

“57. Article 13, and the Directive generally, does not enshrine any right to legal aid for the purposes of bringing a private prosecution, still less does it require the payment of legal aid in relation to proceedings in respect of a crime that domestic law does not recognise. The same is true in respect of the right to reimbursement of expenses in Article 14. In both respects the Directive is limited to the conditions of procedural rules as determined by national law.”
39. Secondly, as Article 13 makes explicit the conditions under which victims have access to legal aid are to be determined by national law. In England and Wales, there is no provision for legal aid for victims. As Ms Idelbi submitted, even if the Directive had

direct effect it would not entitle the Claimant to legal aid. As matters stand today the Directive is not retained EU law within the meaning of the European Union (Withdrawal) Act 2018.

40. Thirdly, section 17 (5) of the Prosecution of Offences Act would have enabled the Claimant to have applied for his costs and expenses to be paid up to the point where the CPS took over the prosecution. The Claimant's evidence entirely avoids the question of whether he made any such application.
41. Dr Al-Ani made a number of submissions relying upon general points of EU law, in particular reference to Article 47 of the Charter and Article 6 ECHR. In my judgment none of these arguments have prospects of success in the absence of a specific Directive being identified which confers identifiable rights on the Claimant.
42. In the circumstances Dr Al-Ani has failed to identify any argument which could successfully support an application to amend the Part 8 statement of case to claim under CPR r 54. However the abusive elements I have already identified particularly with regard to time limits and rights of appeal would make it inappropriate for such permission to be given even if the arguments he advanced had some prospect of success.
43. Following the conclusion of oral submissions Dr Al-Ani sent a further written submission to the effect that I did not have jurisdiction to hear this application. He submitted that the Part 8 claim invited the court to make a declaration of incompatibility under section 4 of the Human Rights Act 1998 and drew the court's attention to PD 2B para 7A which provides;

“Human Rights

7A A deputy High Court Judge, a Master or District Judge may not try –

(1) a case in a claim made in respect of a judicial act under the Human Rights Act 1998, or

(2) a claim for a declaration of incompatibility in accordance with section 4 of the Human Rights Act 1998. ”
44. The short answer to this point is that my consideration of an application to strike out the claim invokes the court's case management powers under CPR r 3 and does not amount to me trying the claim. CPR r 2.4 enables a Master to exercise the jurisdiction of the High Court except where otherwise provided in an enactment, rule or practice direction.
45. I would ask that the parties agree a form of order and any necessary consequential directions.