

GARDEN COURT



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CHAMBERS



Refugee  
Week

# Criminalising cross-channel crossings: Penalties, Rescue & Refugee Convention Compliance



5.30 pm - 7pm



Thursday 29 June 2023

# Sonali Naik KC

*Garden Court Chambers*



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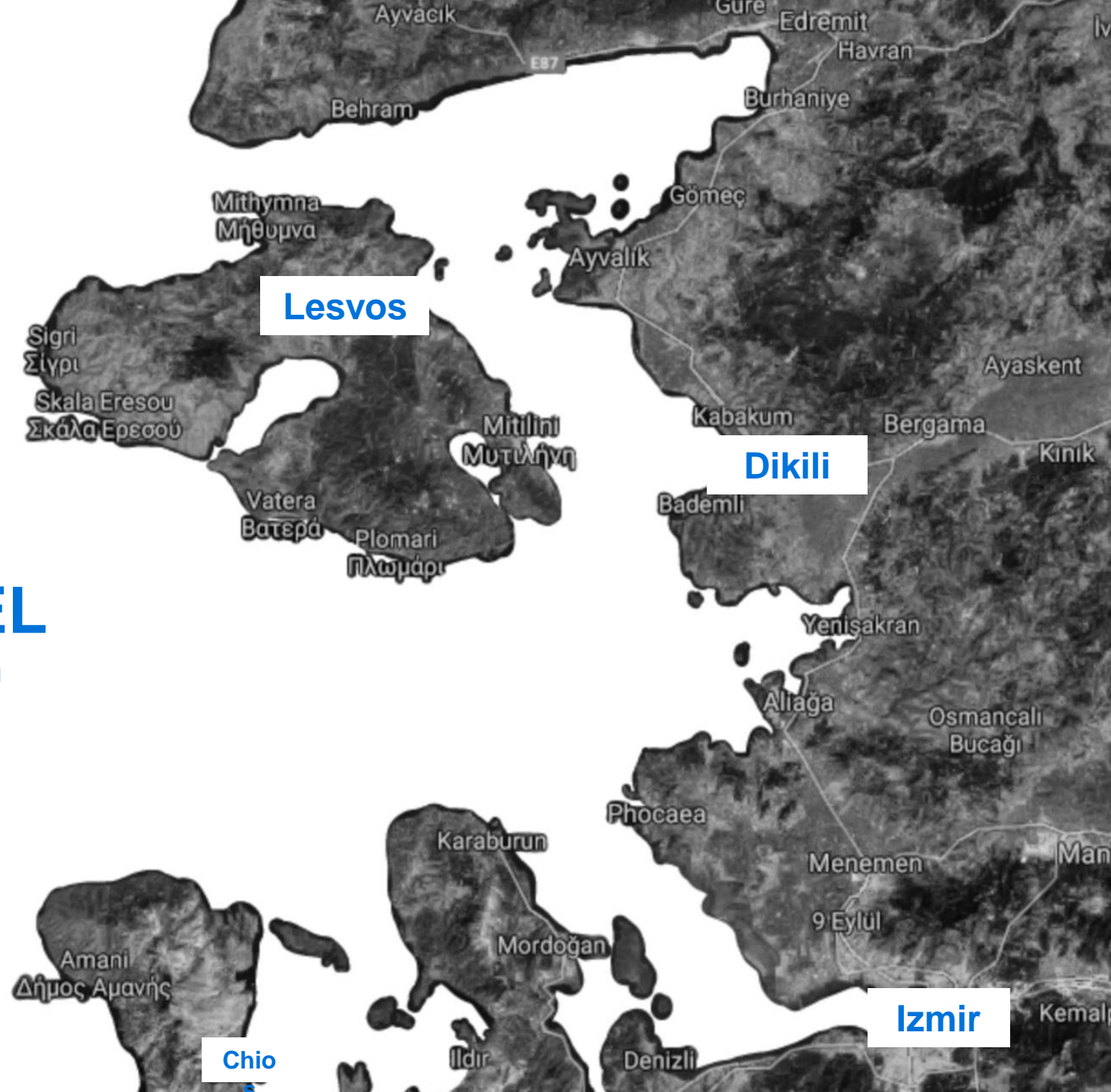
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# FREE HUMANITARIANS



## THE “GREEK” MODEL

Humanitarianism vs Securitisation

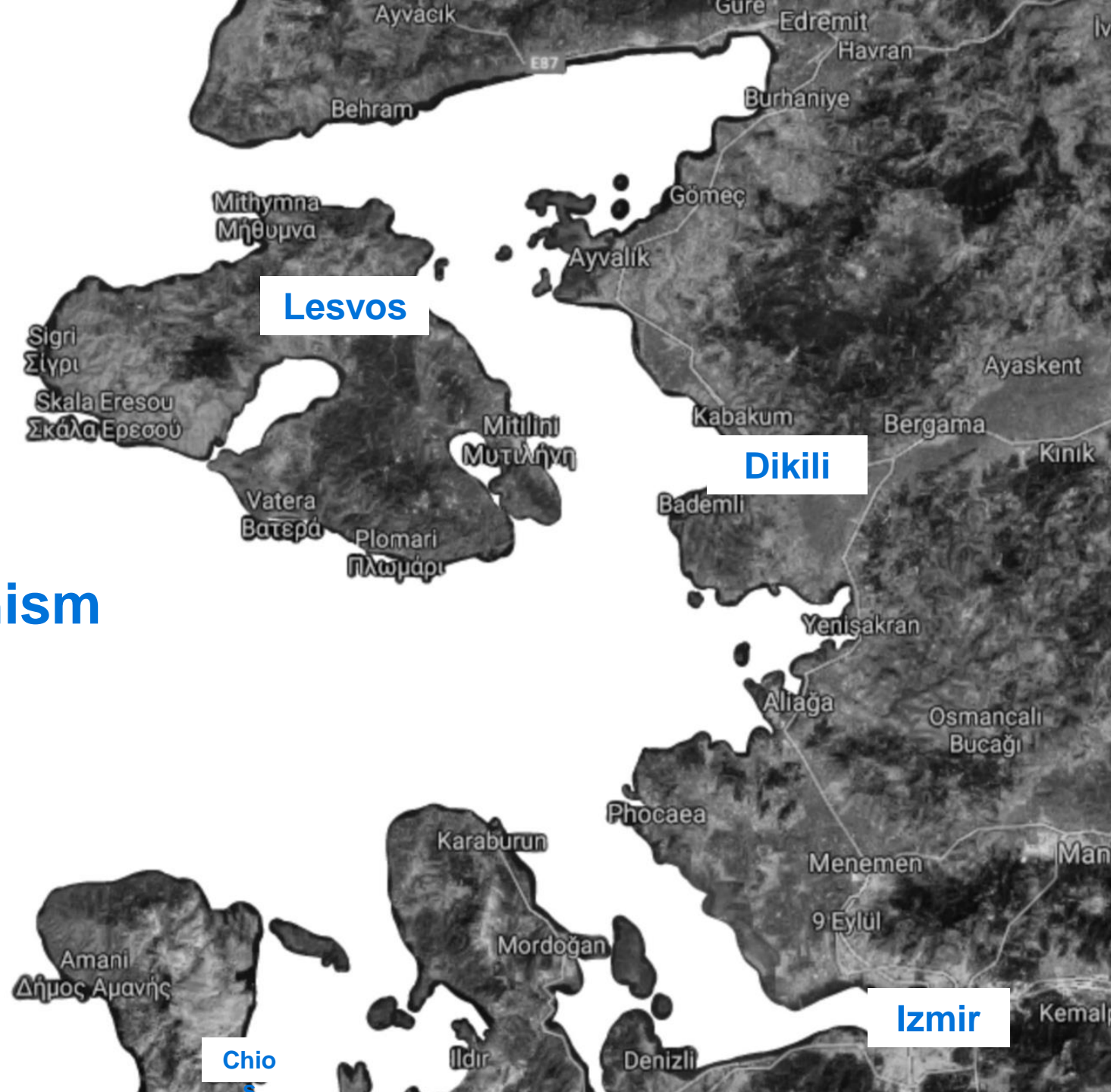


# FREE HUMANITARIANS



## Criminalising Migration & Humanitarianism

- Human rights derogating
- Self-defeating





Mytilini

LESVOS

3.5 months in pre-trial detention

+5 years of trials and delays

Facing 20 years in prison

Greece/EU

Turkey



## Search and Rescuer vs Smuggler

Forger

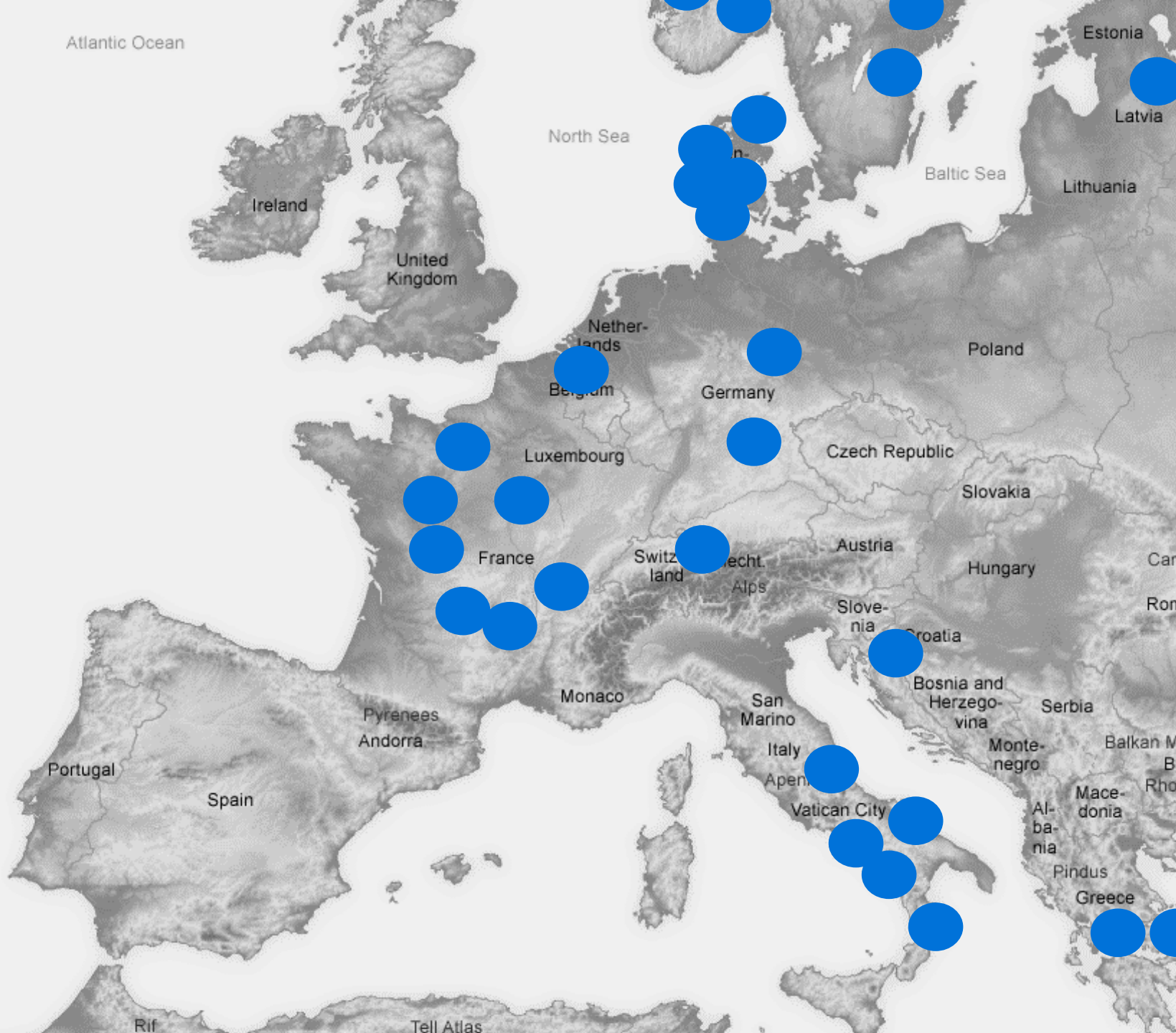
Illegal listener of radio frequencies

Money launderer

Member of a criminal organisation

Spy





## Criminalisation of Humanitarianism in Europe

180 individuals prosecuted in 13 countries (currently documented) throughout Europe\*

Many more cases of tension with authorities

..ours is not an isolated case!

\*ReSOMA 2020  
Fekete, 2017



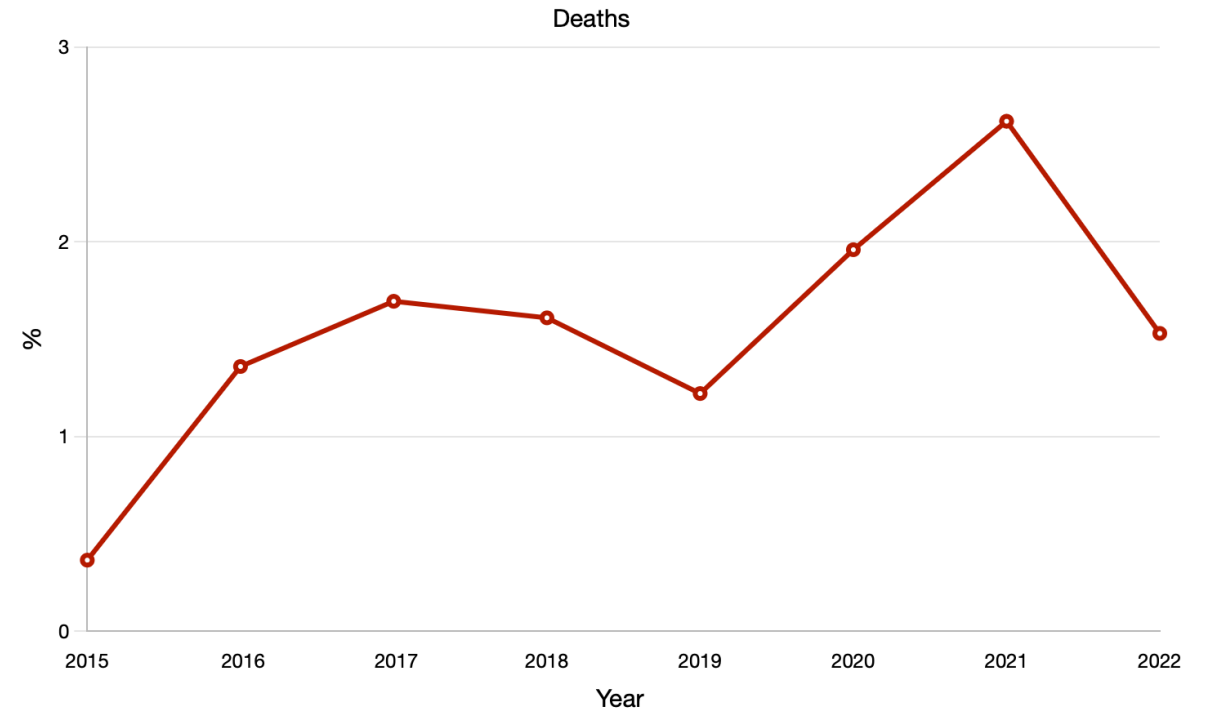
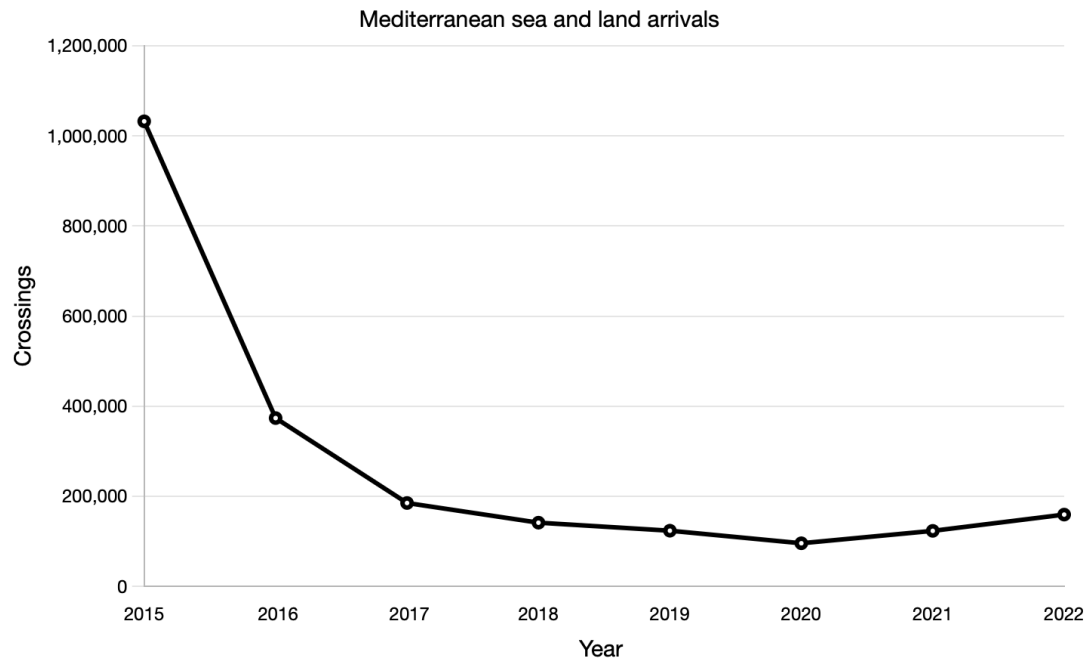
## “Pull Factor” unsupported by data

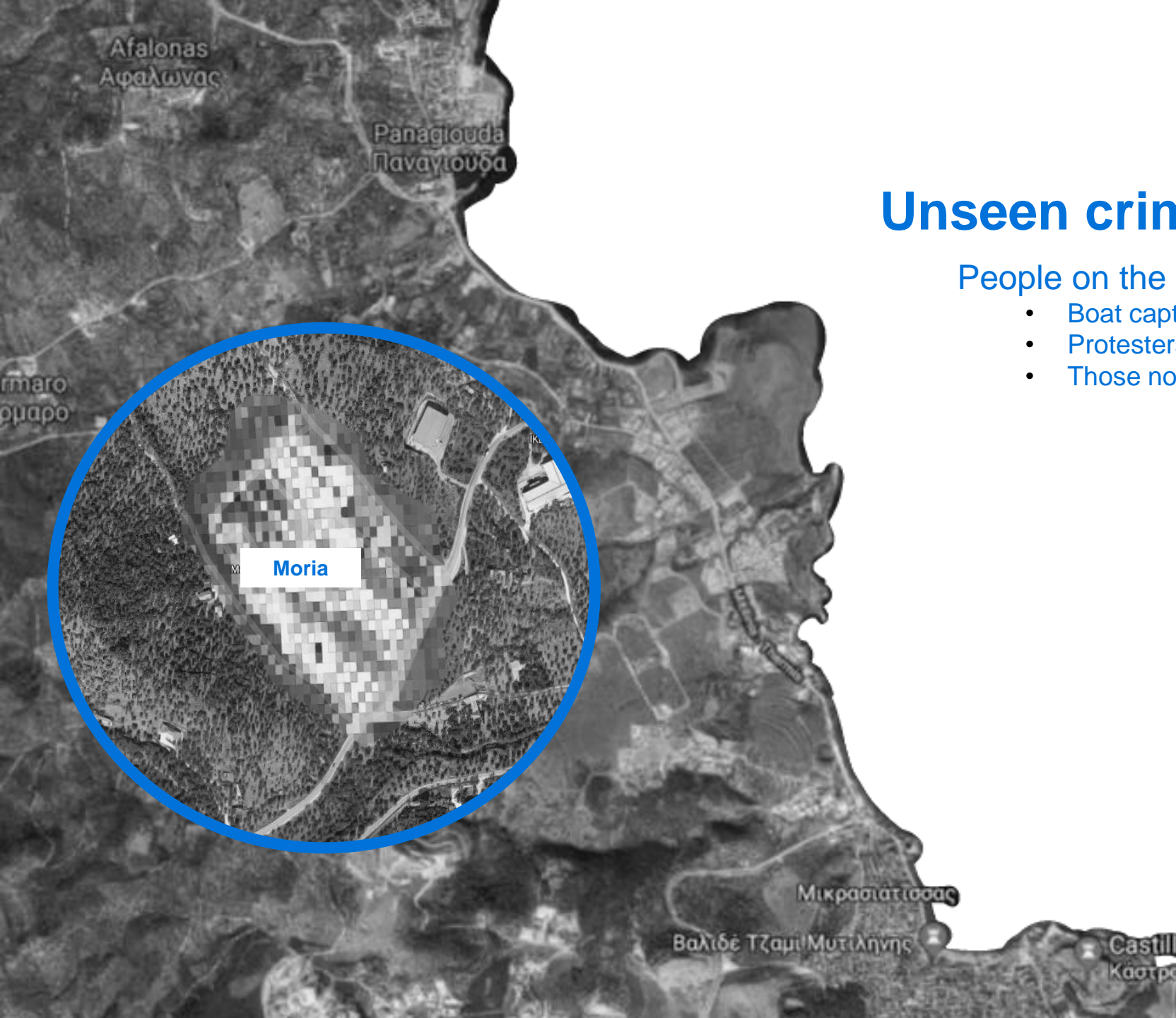
- Neither positive nor negative correlation between SAR NGOs and the number refugees trying to reach Europe according to all independent research\*
- Important: Refugees are survivors, vast majority completed the journey by themselves



# “Safety Factor” According to the data

- Research: SAR NGOs do not make saving lives at sea more difficult\*
- **More SAR = fewer drownings**
- Criminalisation, Securitisation and “pull factor” = Decline in Civilian SAR





## Unseen criminalisation

### People on the move

- Boat captains
- Protesters
- Those not granted protection

“Conditions create and exacerbate mental health problems”

“Women may be returned to their tent after child birth, even after C-section”

100s people per shower & per toilet

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# Natasha Dailiani

*Lesvos Legal Centre*



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# Thank you

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# **Legal Frameworks: Criminalisation of Cross-channel Crossings**

Georgie Rea, Garden Court Chambers

29 June 2023



# Domestic framework pre-NABA

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- **Immigration Act 1971**
  - s. 24 criminalised knowingly entering without leave
  - s. 25 criminalised assisting illegal entry
  - s. 25A criminalised assisting asylum seekers
- **Immigration and Asylum Act 1999, s. 31 – protection from prosecution**
- **New policy of prosecuting ‘hand on tiller’ cases**





## Article 31(1) Refugee Convention

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*”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”.*

(emphasis added)



## Article 31(1) [*continued*]

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Article 31(1) prohibits penalizing refugees for their unlawful entry or presence if they come directly from a country where their life or freedom was threatened, present themselves to the authorities without delay, and show good cause for their unlawful entry or presence.

The article is intended to address the situation of refugees who are often unable to secure the necessary authorization to enter a country.

The exemption cannot however be claimed by those who are lawfully settled, temporarily or permanently, in another country and have already found protection there and then decide to move on irregularly for reasons unrelated to their need for international protection.

**However**, any penalties must not undermine the right to seek and enjoy asylum or be at variance with other provisions of the 1951 Convention, and in particular must not exclude refugees from the benefit of entitlements under the Convention or other IHR instruments.



# Case Law

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- Legal fiction of arrival ≠ entry: *R v Kakaei* [2021] EWCA Crim 503
- Common law abuse of process protection:
  - *Ex p Adimi* [1999] EWHC Admin 765
  - *R v Asfaw* [2008] UKHL 31

Benchmarks for ‘coming directly’ from *Adimi* (p. 773):

1. The length of stay in the intermediate country;
2. The reason for the delay;
3. Whether or not the refugee sought or found protection *de jure* or *de facto*



# Nationality and Borders Act 2022

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- **After...**

***Immigration Act 1971, s. 24:***

***“A person who –***

***(a) requires entry clearance under the immigration rules, and  
(b) knowingly arrives in the United Kingdom without a valid  
entry clearance, commits an offence”***



# Nationality and Borders Act 2022

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- Immigration Act 1971, s. 25 remains the same
- Immigration Act 1971, s. 25A modified to remove ‘for gain’ requirement
- New section 25BA added to provide defence **if**
  - Coastguard or similar, e.g. RNLI **or**
  - Providing assistance to person in distress at sea if UK closest place of safety.
- See also – lengthened maximum sentences: s. 24 max now 4 years; s. 25 max now life imprisonment.



# Refugee Convention and the Courts

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- Domestic spin added to “coming directly” element of Refugee Convention by section 37 of NABA 2022
- If “stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country”



## *R v Mohammed & Ors* [2023] EWCA Crim 211

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Appeal first of its kind since NABA 2022 came into force on 28 June 2022 and held, in sum, that asylum seekers can be prosecuted for arriving in the UK without valid entry clearance and that individuals can be prosecuted for helping to facilitate unlawful immigration.



# But you can't prosecute everyone?

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CPS accepts that it is not in the public interest to prosecute everyone who falls into this wide category of people. For the time being, charges only being brought in cases with 'aggravating' factors:

- (1) Those who have re-entered the UK or whose fingerprints are already registered due to a deportation order or re-entry ban.
- (2) People where there is evidence of 'hand on the tiller', i.e., the alleged 'captain' or 'pilot'.

Interesting research from Border Criminologies at the University of Oxford. Court observation suggests:

- February-June 2023 – likely that over 185 people have been charged under ss. 24/25 (87 for piloting).
- No official sentencing guidelines – ad hoc interpretation of new legislation by Judges, Magistrates, interpreters, lawyers and 'defendants'.
- Potential defences being shut down
- Many advised to plea guilty early for 25% credit
- Bail routinely denied





# Is it compatible with the Refugee Convention?

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- Issue = Refugee Convention is not incorporated into domestic law (see *R v Mohammed*).
- [UNHCR position](#) however:

*“In UNHCR’s view, refugees who leave a country in contravention of exit rules and who are present without authorization may be protected from penalization under Article 31(1) of the 1951 Convention, particularly when they are transiting en route elsewhere to claim asylum, and despite the fact that they have not presented themselves to the authorities without delay when entering...”*

The definition of ‘coming directly’ under NABA is *“inconsistent with Article 31(1) of the Convention unless it continues to be interpreted in line with the current UK jurisprudence”* (a comment which pre-dated *R v Mohammed*).



# Thank you

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# Criminalisation of Cross-Channel Crossing

Jennifer Twite, Garden Court Chambers

29<sup>th</sup> June 2023



# Nationality and Borders Act 2022, s40

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- Section 40 NABA 2022 inserted a number of new offences under section 24 Immigration Act 1971
- It also amended section 25 Immigration Act 1971 (assisting unlawful migration) added the words “or arrive in” after “enter”
- This came into effect from 28 June 2022
- Was in response to Court of Appeal judgments of *R v Kakaei* (Fouad) [2021] EWCA Crim 503 and *R v Bani* (Samyar Ahmadii) [2021] EWCA Crim 1958



# New Section 25 Immigration Act 1971

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## Assisting unlawful immigration to member State or the United Kingdom

(1) A person commits an offence if he—

(a) does an act which facilitates the commission of a breach or attempted breach of immigration law by an individual who is not a national of the United Kingdom,

(b) knows or has reasonable cause for believing that the act facilitates the commission of a breach or attempted breach of immigration law by the individual, and

(c) knows or has reasonable cause for believing that the individual is not a national of the United Kingdom.

(2) In subsection (1) “immigration law” means a law which has effect in a member State or the United Kingdom and which controls, in respect of some or all persons who are not nationals of the State or, as the case may be, of the United Kingdom, entitlement to—

(a) enter **or arrive in** the State or the United Kingdom,

(b) transit across the State or the United Kingdom, or

(c) be in the State or the United Kingdom.



# New section 24 (D1) Immigration Act 1971

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*“(D1)A person who—*

*(a)requires entry clearance under the immigration rules, and*

*(b)knowingly arrives in the United Kingdom without a valid entry clearance,*

*commits an offence.”*

Ruling by Mr Justice Cavanagh 21 Dec 22

<https://www.judiciary.uk/judgments/r-v-mohamed-and-others/>

Court of Appeal: R v Mohammed and Others, [2023] EWCA Crim 311



## Who is being Prosecuted?

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*“The Crown Prosecution Service considers each case and then determines whether it will be in the public interest to charge and to proceed to trial. In practice, criminal proceedings under section 24(D1) and/or section 25 are taken against only a small proportion of the migrants. In cases in which the individual is believed to have been piloting the boat, it is more likely, though not certain, that he (it is almost always a he) will be charged with an offence under section 24(D1) and/or section 25. The section 25 offence is the more serious offence. There are other circumstances in which a migrant might be charged, for example, if it is believed that he is one of the organisers of a trafficking operation, or if it is believed that the migrant is attempting to return to the UK having already been deported after a previous attempt to enter.”*

Paragraph 5 of Cavanagh Judgement



# Sentencing Remarks of HHJ James: 28 September 2022

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Offences under section 24 (D1)

There is public concern about channel crossings

Most Defendants will be seeking asylum

They should usually expect 12 months after trial

It will usually be a sentence of immediate custody

If they plead guilty, that will be “substantial mitigation” and they will usually stay in the Magistrates’ Court. (Is that still true, now Magistrates Court sentences are reduced?)





# Compatibility with the Refugee Convention

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Article 31(1) of the Refugee Convention provides:

*“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”*

Section 31 of the Immigration and Asylum Act 1999 provides for defences for certain offences (s31(3)) based on Article 31.

Section 31(10) grants a power to the Secretary of State by order to add offences to the list in section 31(3). It does not include s24 or 25 IA 1971



# Compatibility with the Refugee Convention

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*“it is not necessary, in order to ensure that the United Kingdom complied with its international obligations in the Refugee Convention, to identify a provision in NABA 2022 which creates a new statutory defence, applicable to section 24(D1), which replicates Article 31 of the Convention. This is because there is a different mechanism for giving effect to the United Kingdom’s obligations. This is done by means of the guidance given to prosecutors in the CPS Policy Guidance, set out above.”*

Para 119  
Cavanagh Judgement



## Compatibility with Refugee Convention

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*“The clear combined effect of rule 24 read with rule 6.2 is that visa nationals, such as a citizen of Sudan, require entry clearance before arrival in the UK for any purpose. That is so irrespective of whether they have an intention to claim asylum on arrival. That is hardly surprising. Ultimately it may be decided that a migrant does not fall within the definition of a refugee for one or more reasons and their claim for asylum rejected quite properly. For example, it may be decided that a claimant could reasonably have been expected to have sought protection under the Refugee Convention in another country in which he stopped before arriving in the UK. Alternatively, the claim for asylum may not be based upon a genuine ground falling within the Convention or may be fabricated.”*

Paragraph 58 Court of Appeal Judgment



# Relevance of Human Rights Act

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Para 13 of the Cavanagh judgement – the court declined to express a view on whether the legislation is compatible with the HRA, as the Crown Court has no jurisdiction to make a declaration of incompatibility.

Articles 6,7,8 and 14 ECHR were raised.



# Prosecutorial Discretion

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*“Even though section 31 of the 1999 Act does not apply to offences under sections 24 and 25 of the IA 1999, it is accepted that it would not be appropriate to impose penalties on refugees for committing offences under section 24 or 25, if to do so would breach the United Kingdom’s obligations under Article 31(1) of the Refugee Convention. This is dealt with primarily by the application of a “public interest” test to prosecutorial decisions by the CPS”.*

Paragraph 52 of Cavanagh Judgement



# CPS Policy on Article 31 Refugee Convention

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*“In cases where there is no statutory defence, prosecutors should have regard to circumstances which are relevant to Article 31 of the Refugee Convention when considering the public interest stage.”*



# Challenging Decisions to Prosecute

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## ***Abuse of Process:***

*“However, there is a further backstop protection for Defendants, in that the court has jurisdiction to stay proceedings under 24(D1) if the judge takes the view that, in light of Article 31 of the Refugee Convention, it would be an abuse of process for the case to proceed to trial.”*

Paragraph 122 of the Cavanagh judgement

*R v AAD* [2022] 1 WLR, paras 120 onwards, and in particular para 142

## **Judicial Review**

Paragraph 123 of the Cavanagh Judgment

Should be used “in exceptional cases” (*R v AAD*)

Section 6 HRA:“(1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”



# Thank you

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