



CROWN OFFICE
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SCOTLAND'S PROSECUTION SERVICE

CROWN OFFICE & PROCURATOR FISCAL SERVICE

POLICY ON APPLICATION OF SECTION 31 OF IMMIGRATION AND ASYLUM ACT 1999 IN RESPECT OF REFUGEES OR PRESUMPTIVE REFUGEES.

CONTENTS

INTRODUCTION	01
PRINCIPLES TO BE APPLIED BY PROSECUTORS IN SCOTLAND	03
DEFENCE IN TERMS OF SECTION 31 OF THE IMMIGRATION AND ASYLUM ACT 1999: BACKGROUND TO THE DEFENCE	03
DETAILED CONSIDERATIONS FOR PROSECUTORS	04
DETAILED FACTORS THAT SHOULD BE TAKEN INTO ACCOUNT	06
THE OFFENCES THAT SECTION 31 APPLIES TO	08
PUBLIC INTEREST CONSIDERATIONS WHEN DETERMINING WHETHER TO RAISE PROCEEDINGS	09
REQUIREMENT FOR POLICE OR HOME OFFICE TO PROVIDE ALL RELEVANT INFORMATION TO COPFS RE- A POSSIBLE S.31 DEFENCE	10
APPLICATION OF THE POLICY TO PERSONS OTHER THAN REFUGEES/ ASYLUM SEEKERS	10
REPORTING TO CROWN COUNSEL	10
BURDEN AND STANDARD OF PROOF	11
CASE LAW	11

REFUGEE POLICY

COPFS GUIDANCE ON THE APPLICATION OF THE DEFENCE IN SECTION 31 OF THE IMMIGRATION ACT 1999 WHICH PROVIDES PROTECTION FOR REFUGEES AND PRESUMPTIVE REFUGEES.

Introduction

1 The United Kingdom is a signatory to the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention).

2 The Refugee Convention is the key legal document defining who is a refugee, their rights and the legal obligation of states. It is grounded in Article 14 of the Universal Declaration of Human Rights 1948 which recognises the right of persons to seek asylum from persecution in other countries.

3 The Refugee Convention further states that, subject to specific exceptions, refugees should not be penalised for their illegal entry or stay and recognizes that the seeking of asylum can require refugees to breach immigration rules. This is contained in Article 31 of the Refugee Convention which states

“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.”

4 In the case *R v Asfaw* [2008] UKHL 31 at para 9 Lord Bingham of Cornhill stated-

“It was recognised in 1950, and has since become even clearer, that those fleeing from persecution or threatened persecution in countries where persecution of minorities is practised may have to resort to deceptions of various kinds such as possession and use of false papers, forgery and misrepresentation in order to make good their escape.”

5 In the case of *R v Uxbridge Magistrates’ Court and Another ex parte Adimi* [2001] QB 667 (*Adimi*), Simon Brown LJ identified the broad intended purpose as being- “To provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law”

6 The defence applies not only to refugees but also those who have claimed asylum, who are known as presumptive refugees.

7 A refugee is defined in Article 1 (A) of the Refugee Convention as follows:

“[any person who]...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

8 The Adimi judgement also confirmed that Article 31 protection applies to both those seeking asylum, known as “presumptive refugees” and those recognised as refugees-

“That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt. ”

9 The protection of Article 31 is presumed to apply to asylum- seekers until a final decision on their claim for international protection has been refused.

Principles to be applied by Prosecutors in Scotland

10 The broad principle for Scottish prosecutors is that those who are refugees or presumptive refugees who require to commit offences to gain entry to a country, shall not be penalised by virtue of that fact, if three conditions are met. The person must:

- (i) Come directly from another territory where their life or freedom was threatened
- (ii) Present themselves to the authorities without delay and
- (iii) Show good cause for their unlawful entry or presence.

This guidance provides prosecutors with the factors that they should consider when applying the principle behind Article 31 of the Refugee Convention, when considering reports of offences committed by refugees and presumptive refugees when entering the country and applying the law laid down in section 31 of the Immigration and Asylum Act 1999.

11 There are three key principles which Prosecutors must apply -

- (i) Prosecutors must actively consider the defence when making decisions in cases in which it may apply. This is whether or not it has been raised by the reporting agency or defence solicitor and seek appropriate information.
- (ii) Prosecutors should take a purposive and not a prescriptive approach to the application of the defence in section 31 of the 1999 Act looking at the basis of Article 31 of the Refugee Convention. We must take account of the reasons why refugees and presumptive refugees may not fit exactly within the terms of the defence but why the defence may still be applicable.
- (iii) Decisions to prosecute, not least for offences under the general criminal law rather than under Pt III of the Immigration Act, should be made only in the clearest of cases and where the offence itself appeared manifestly unrelated to a genuine quest for asylum. (Admini Judgement)

Defence in terms of Section 31 of the Immigration and Asylum Act 1999:

Background to the Defence

12 Section 31 of the Act provides a defence to refugees and presumptive refugees who commit offences to enable their access to the country in which they are claiming asylum. This defence is based on the wording of Article 31 of the Refugee Convention.

13 Where cases are reported, it is the responsibility of the Crown to determine whether there is sufficient evidence, whether the defence applies and whether prosecution is in the public interest.

14 The full terms of the defence are attached at Annex A.

15 Under section 31(1) of the Immigration and Asylum Act 1999 it is a defence for a refugee charged with an offence to which the section applies to show that a person has come to the United Kingdom directly from a country where his life or freedom were threatened (within the meaning of the Refugee Convention) and that the person has:

- (i) Presented themselves to UK authorities without delay
- (ii) Showed good cause for their illegal entry or presence and
- (iii) Made a claim for asylum as soon as was reasonably practicable after arrival in the UK.

16 Section 31(2) provides that if, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the UK, then subsection (1) will only apply if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.

17 The legislation outlines the offences to which section 31(4) will apply in Scotland. These are -

- Fraud,
- Uttering a forged document,
- Section 4 or 6 of the Identity Documents Act 2010],
- Section 24A of the Immigration Act 1971 Act (deception), or
- Section 26(1)(d) of the Immigration Act 1971 Act (falsification of documents), and
- Any attempt to commit any of those offences.

However a broader approach is to be taken and the defence will be applied to other offences committed to facilitate entry to the UK by a refugee- see paragraph 25 for further guidance.

18 Under section 31(5) any refugee who has made a claim for asylum is not entitled to this defence in relation to any offence committed by him after making that claim.

19 Under section 31(6) "Refugee" has the same meaning as it has for the purposes of the Refugee Convention as outlined in paragraph 7.

20 Section 31(9) makes this statutory defence retrospective in its application. So a person who was convicted of an offence in Scotland to which this section applies prior to the coming into force of the section but at no time during the proceedings for that offence argued that he had a defence based on Article 31(1), may apply to the Scottish Criminal Cases Review Commission. (See R v AM, MV, RM and MN [2010 EWCA Crim 2400]). A person who was convicted of an offence in England, Wales or Northern Ireland will have recourse to the Criminal Cases Review Commission.

Detailed considerations for Prosecutors

21 When considering the defence the prosecutor must consider all the factors required to be met as outlined in the defence. There are six factors in total:

(i) The person has come to the UK directly from a country where their life or freedom was threatened within the meaning of the Refugee Convention;

(ii) The person presented themselves to the authorities in the United Kingdom without delay;

(iii) The person had good cause for their illegal entry or presence;

(iv) The person has made a claim for asylum as soon as reasonably practicable after arrival in the United Kingdom;

(v) If the person stopped in another country outside the UK having left the country where their life or freedom was threatened, that they could not reasonably have expected to be given protection under the 1951 Convention in that country; and...

and

(vi) The person claimed asylum after having committed the offence from which he seeks protection from conviction.

22 Here is the detailed guidance on how each of these factors should be considered.

(i) The person has come to the UK directly from a country where their life or freedom was threatened within the meaning of the Refugee Convention

What should prosecutors consider?

- This provision is intended to exclude only those who had been recognised as refugees in other countries or who have been granted some other form of protection. Prosecutors should have regard here to the judgment in *R v Asfaw* [2008] UKHL 31 in which the majority of the court indicated that 'coming directly' should be interpreted in such a way that the provision is given a liberal interpretation so that a person may travel through several countries whilst they are still in flight until they eventually apply for asylum.
- It is not important if the person came via a country or the number of countries the person has transited through. What is important is whether the person was able to obtain protection from persecution in the country in question. This includes those who are transiting through the UK to reach another country in which they intend to claim asylum.
- No strict time limit for the passage through or the stop in another country can be applied to the concept of "coming directly" and each case must be judged on its own merits. The defence also applies to transit cases, where refugees are committing the offences to leave the UK – see *Adimi* and *R v Asfaw* [2008] UK HL 31.

This can be complex as a person may have transited many countries prior to arrival in the UK. That does not mean that the defence cannot apply- consideration needs to be given to the facts and circumstances of each case and the purpose of the defence.

Detailed factors that should be taken into account.

This is a list of some of the factors which should be taken into account when consideration is being given to whether someone came directly to this country.
Information should be obtained from the Home Office on these considerations.

- Consideration should be given to the states through which the person has travelled. There may be good reason why asylum was not sought until the person reached the UK. For instance Turkey applies a geographical limitation on the application of the Refugee Convention and does not recognise refugees from outside Europe within the Refugee Convention. Therefore a refugee may stop in Turkey in transit to another country and have no ability to obtain refugee status under the Refugee Convention.

- Could the person obtain proper protection under the asylum systems which exist in the country they have travelled from? Consideration should be given to the current circumstances of the state or states the person has transited- for instance whilst the country may have ratified the Convention, it may be in the midst of a civil war and not able to grant protection.
- What is the actual practice of the state in terms of offering protection? For instance the Court of Appeal in England and Wales has recognised that refugees may not be able to obtain protection from persecution in Greece. (R v Mateta and others [2013] EWCA Crim 1372 and R v Jaddi [2012] EWCA Crim 2565.)
- What is the state's willingness and actual practice in accepting asylum seekers and considering their asylum claims in a fair and efficient manner, including on grounds which would be recognised in the destination country? What is the State's record of compliance with its obligations under refugee and human rights instruments, in particular the prohibition on refoulement- (the expulsion of persons who have the right to be recognised as refugees- Article 33(1) of the Refugee Convention)?
- The availability of effective protection in the country, including the country's adherence to international standards of treatment for asylum-seekers and refugees
- The right to stay in the territory throughout the procedure and upon recognition as a person in need of international protection and access to durable solutions
- Consideration should be given to the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought and found protection "de jure" or "de facto" from the persecution from which he or she was seeking to escape. (R v Mohammed Abdalla [2011] 1 Cr App R 35 at para 9.) There is no strict time limit that can be applied to the time for passage through or stop in another country

(ii) The person presented themselves to the authorities in the United Kingdom without delay

Without delay is a matter of fact and degree; it depends on the circumstances of the case. It must be interpreted broadly so-

- Consideration must be given to the special situation of asylum seekers and the reasons for delay. Reasons for delay can include
 - o the effect of trauma,
 - o language problems,
 - o lack of information in relation to the law,
 - o past experience resulting in suspicion of authority,
 - o feelings of insecurity,
 - o cultural issues and
 - o whether the person was acting under instruction from an agent.

These factors can vary enormously from one asylum seeker to another.

- Consideration should be given to whether the person has had access to appropriate legal advice or advice from appropriate voluntary organisations that have knowledge of this area of law in determining the reasonableness of delay in claiming asylum or presenting to authorities.

- The mischief to be avoided is where a refugee has stayed in the country for a long period of time but on learning they have been discovered the person gives themselves up, or only claims asylum on being arrested. However consideration should always be given to the facts and circumstances, and no assumptions should be made. It is intended to cover those persons who took no steps to regularise their position.

(iii) The person had good cause for their illegal entry or presence

- This condition has a limited role to play and will be satisfied by a genuine refugee showing that he or she was reasonably travelling on false papers. (Cases of R v Mateta at para 20 and Adimi at 679H)

(iv) The person has made a claim for asylum as soon as reasonably practicable after arrival in the United Kingdom

This is linked to the presentation to the authorities without undue delay outlined in paragraph 22(ii), and the same considerations apply.

- This is not defined in the Act but does not necessarily mean at the earliest possible moment. (R v Mohammed Abdalla [2011] 1Cr App R 35 at paragraph 9)
- Reasonably practicable contains both an objective and subjective element. An objective view should be taken on what was subjectively reasonably practicable. For example, someone who is fit in mind, body and spirit would be in a different position from someone who had been tortured or who fears torture. Other factors such as age should also be considered- see R v MMH [2008] EWCA Crim 3117

(v) If the person stopped in another country outside the UK having left the country where their life or freedom was threatened, that they could not reasonably have expected to be given protection under the 1951 Convention in that country

and

(vi) The person claimed asylum after having committed the offence from which he seeks protection from conviction.

- A person who enters the country either clandestinely or legally, claims asylum, and then obtains false documents for use in attempting to travel to another country, would be outside the scope of section 31. However there may be circumstances in which a broad interpretation should be adopted. For example if a person was refused refugee status and tried to exit the country on false papers, and subsequently was granted the refugee status.

23 If any of these criteria have not been met, but there is a credible reason put forward as to why this was not the case, then consideration should be given as to whether it is in the public interest to prosecute such a case given the overarching consideration is whether the offences were necessarily committed in order to escape persecution and seek asylum.

The offences that Section 31 applies to

24 Although section 31 applies to certain prescribed offences set out in section 31(4) at paragraph 17 other offences may well be covered by the defence if committed to facilitate entry to the United Kingdom in connection with a flight from persecution. So even if there are other charges reported at the same time as the offence mentioned in section 31(4) consideration must be given to whether the defence applies to the other offences or whether it is in the public interest to proceed with those other charges.

25 Offences covered by section 31(4) are

- Fraud,
- Uttering a forged document,
- Section 4 or 6 of the Identity Documents Act 2010],
- Section 24A of the Immigration Act 1971 Act (deception), or
- Section 26(1)(d) of the Immigration Act 1971 Act (falsification of documents), and

any attempt to commit any of those offences.

26 Other offences which would be covered include for example:

- Charges involving giving false details to facilitate entry such as attempting to pervert the course of justice.
- Section 2 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (the 2004 Act.) This section criminalises the failure to produce a passport or other travel document. It contains a reasonable excuse defence. Whilst this section is not included within the section 31 defence, in *R v Mohammed and Osman* [2007] EWCA Crim 2332, the Court of Appeal stated the statutory framework of section 2 “represents the current stage in the process by which the United Kingdom gives effect to the obligations created in Article 31(1) of the 1951 Convention and Protocols relating to the Status of Refugees”.
- Section 35 of the 2004 Act which criminalises the failure to co-operate in your own deportation.
- Section 24 of the Immigration Act 1971- offences connected with illegal entry into the UK.

Public interest considerations when determining whether to raise proceedings

26 Even when the criteria of section 31 are not strictly met, prosecutors must, as with every case, assess the public interest in raising proceedings.

27 If the facts and circumstances are not sufficient to found the defence in law, information regarding the personal circumstances or characteristics of the accused - for example, their age or the state of their physical or mental health, may be relevant factors when deciding if a prosecution is required in the public interest.

28 There may be particular vulnerabilities such as the person showing signs of fear or anxiety; exhibiting distrust of the authorities; evidence of violence or threats of violence towards them; evidence or claims of torture or other trauma; signs or information that the individual's movements are being or have been controlled by an agent or that they are taking or have taken instructions from an agent.

29 Such vulnerabilities and factors will be brought to the attention of COPFS in any report submitted for consideration of prosecution.

Requirement for Police or Home Office to provide all relevant information to COPFS re-a possible s.31 defence

30 Prosecutors will receive cases either from the Police or the Home Office.

31 Prosecutors must actively consider the defence in any case where a person is reported for an offence which is committed to facilitate their entry into the United Kingdom.

32 Prosecutors will rely on the Reporting Agency, for information and evidence to be submitted relevant to any assessment of whether a defence under section 31 may apply.

33 All cases involving criminal investigations for alleged offending must be reported to COPFS for consideration of prosecution. The only exception is where the Home Office have determined that the suspect is a refugee and has a defence in terms of s.31 as the person fulfils all the criteria.

34 Prosecutors will require full and detailed information relevant to an assessment of whether a section 31 defence may apply and reporting agencies should detail within the Standard Prosecution Report (SPR):

- Any evidence that the suspect has a section 31 defence available to him. This should cover all the elements of the defence set out above including whether he is a refugee (within the meaning of the Refugee Convention) and the outcome of any application for asylum.
- If there is no such evidence, an explanation in the remarks section of the SPR as to why the Reporting Officer has taken the view that the suspect is not entitled to the protection afforded by the section 31 defence, with any evidence to support that view.
- Where the potential accused has claimed refugee status, there is a strong presumption against commencing criminal proceedings until there is confirmation the potential accused is either (a) not an asylum seeker or (b) is an asylum-seeker whose circumstances fall outwith the protection of section 31. If there is an issue of timebar then an update of when it is considered that the potential accused's refugee status will be determined should be obtained from Home Office and the case reported for Crown Counsel's Instructions before proceedings are raised.
- Where proceedings have been raised prior to the accused claiming refugee status, then the proceedings can be continued, but no trial should take place until the person's refugee status has been determined. The Court should be advised of the reason for the request for the continuation without fixing a trial

Application of the Policy to persons other than refugees/asylum seekers

35 Even if a person is not granted refugee status, there are other protections that they can be given and it is appropriate that if the person committed an offence to facilitate their entry into the UK or whilst in transit and was given some protection here that they should be given the protection of the section 31 defence.

36 Prosecutors should consider whether the protection afforded in the defence should apply to those who are not refugees or asylum seekers. This would include:

- Those who are granted humanitarian protection (allowed leave to remain on humanitarian grounds)
- Those who claim asylum and would have been recognised as refugees had their applications been decided prior to the situation in their country changing by the time of the asylum claim and they are now not eligible for asylum. The decision should be based on the facts that existed at the time of the claim and consideration as to why the claim for asylum was denied
- Those who are not refugees but cannot be returned for human rights considerations- for instance torture, or persecution on grounds of sexuality, religion.
- Those who are stateless and who may therefore be forced to use false documents or deception- they have no other means of entering the country.

Reporting to Crown Counsel

37 These cases are sensitive and potentially complex given the balance that prosecutors must strike between consideration of offences which in ordinary circumstances would be considered serious (e.g. use of fraudulent immigration documents) and respecting the rights of refugees and the underlying principles of the Convention.

38 In the circumstances it will be necessary for Crown Counsel's Instructions to be sought in respect of any case involving a person who claims to have, or may have, a potential defence in terms of s.31 of the 1999 Act prior to any final marking decision being made. Crown Counsel are the senior prosecutors within COPFS, who will make the final decision on these cases based on the recommendation of the local prosecutor.

Burden and standard of proof

39 Where it is considered that a prosecution is in the public interest, the following principles apply when the case proceeds to trial:

40 In order to substantiate the section 31 defence, an accused will need:

- To adduce evidence to raise the issue of whether he or she was a refugee within the meaning of the 1951 Refugee Convention (a refugee being "a person who has left his own country owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion") see *R v Liliane Makuwa* [2006] EWCA Crim 175 and *R v Mateta* [2013] EWCA Crim 1372. Subject to section 31(7), which states that if the Secretary of State has refused to grant a claim for asylum made by a person who claims the defence under the section, that person is not to be taken to be a refugee unless he shows that he is. It will then be for the Crown to prove beyond reasonable doubt that he was not a refugee, if this is not accepted. In general the prosecutor whilst not accepting the claim will not seek to establish that the person is not a refugee.
- To prove on a balance of probabilities that he or she did not stop in any country in transit to the United Kingdom or alternatively, that he or she could not reasonably have expected to be given protection under the Refugee Convention in the countries outside the United Kingdom in which he or she stopped; and if so
- To prove on a balance of probabilities that the person presented themselves to the authorities in the United Kingdom.
- To show good cause on the balance of probabilities for the person's illegal entry or presence and
- To prove on the balance of probabilities that a claim for asylum was made as soon as reasonably practicable after arrival in the UK.

Case Law

41 The case law is attached at Annex B.



Annex A

Section 31 of the Immigration and Asylum Act 1999

31 Defences based on Article 31(1) of the Refugee Convention.

(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—

- (a) presented himself to the authorities in the United Kingdom without delay;
- (b) showed good cause for his illegal entry or presence; and
- (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

(2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.

(3) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under—

- (a) Part I of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);
- (b) section 24A of the 1971 Act (deception); or
- (c) section 26(1)(d) of the 1971 Act (falsification of documents).

(4) In Scotland, the offences to which this section applies are those—

- (a) of fraud,
 - (b) of uttering a forged document,
 - (c) under section 24A of the 1971 Act (deception), or
 - (d) under section 26(1)(d) of the 1971 Act (falsification of documents),
- and any attempt to commit any of those offences.



(5) A refugee who has made a claim for asylum is not entitled to the defence provided by subsection (1) in relation to any offence committed by him after making that claim.

(6) "Refugee" has the same meaning as it has for the purposes of the Refugee Convention.

(7) If the Secretary of State has refused to grant a claim for asylum made by a person who claims that he has a defence under subsection (1), that person is to be taken not to be a refugee unless he shows that he is.

(8) A person who—

(a) was convicted in England and Wales or Northern Ireland of an offence to which this section applies before the commencement of this section, but

(b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1),

may apply to the Criminal Cases Review Commission with a view to his case being referred to the Court of Appeal by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(9) A person who—

(a) was convicted in Scotland of an offence to which this section applies before the commencement of this section, but

(b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1),

may apply to the Scottish Criminal Cases Review Commission with a view to his case being referred to the High Court of Justiciary by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(10) The Secretary of State may by order amend—

(a) subsection (3), or

(b) subsection (4),

by adding offences to those for the time being listed there.

(11) Before making an order under subsection (10)(b), the Secretary of State must consult the Scottish Ministers.

Crown Office & Procurator
Fiscal Service head office:

Crown Office
25 Chambers Street
Edinburgh
EH1 1LA

Email: enquiry@copfs.gov.uk

Telephone: 01389 739 557

Calls can be made through RNID Tynetalk.
Please prefix our telephone number with 18001

Deaf sign language users should text on
07825 280346, specifying if you would prefer
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