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

**Annex B of the Section 31 Immigration & asylum Act 1999****Case Law**

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## 1. R v Asfaw [2008] UKHL 31

### R v Asfaw

Criminal law – Trial – Stay of proceedings – Abuse of process – Using a false instrument – Attempting to obtain services by deception – Defendant refugee seeking to fly to United States to seek asylum – Defendant having statutory defence in relation to using false instrument – Prosecution seeking to prosecute defendant in relation to attempt to obtain air travel – Whether prosecution of second offence amounting to abuse of process – Immigration and Asylum Act 1999, s 31(3)

[2008] UKHL 31, (Transcript)

HOUSE OF LORDS

LORDS, BINGHAM, HOPE, RODGER, CARSWELL, MANCE

18, 19, 20 FEBRUARY, 21 MAY 2008

21 MAY 2008

E Fitzgerald QC, R Husain and R Thomas for the Appellants

C Montgomery QC and J Knowles for the Respondents

M Fordham QC and S Fatima for the Intervener

Moss & Co; Crown Prosecution Service; Baker & McKenzie LLP

LORD BINGHAM:

MY LORDS,

[1] The Criminal Division of the Court of Appeal (Lord Phillips of Worth Matravers CJ, McCombe and Gross JJ: [2006] EWCA Crim 707) certified the following point of law of general public importance as involved in its decision now under appeal:

“If a Defendant is charged with an offence not specified in section 31(3) of the Immigration and Asylum Act 1999, to what extent is he entitled to rely on the protections afforded by article 31 of the 1951 United Nations Convention Relating to the Status of Refugees?”

Differently expressed, the question is whether, to the extent that the protection given to a Defendant by s 31(3) of the 1999 Act does not match that which the United Kingdom is bound in international law to give by art 31 of the Refugee Convention, our domestic law gives a Defendant any remedy. The formulation of the question clearly assumes that the offence charged against the Defendant is not within the scope of s 31(3) of the 1999 Act but is within the scope of art 31 of the Convention.

[2] According to her evidence, the Appellant is an Ethiopian national who had been imprisoned, tortured and raped in Ethiopia on account of her alleged support for student activism. Her father also was persecuted and died in police custody. She decided to leave Ethiopia and travel to the United States to claim asylum. With the help of an agent she left

Ethiopia by air, travelling on a false Ethiopian passport. They stopped in an unknown Middle Eastern country and remained in the airport for about three hours. They arrived in the UK on 14 February 2005 at Heathrow Airport and passed through immigration control, with the agent presenting the passport on her behalf. The agent then left her in the airport for about an hour, after which he returned and gave her a false Italian passport, in the name of Hanams Gebrele, a false driving licence in the same name and a ticket to Washington DC. He then left.

[3] It is agreed that on 14 February 2005 the Appellant (then aged 28) checked in for a Virgin Atlantic flight from Heathrow to Washington. She presented the false Italian passport. She said she was Ethiopian. The official on the desk (Mohammed Hussan) recognised the passport as false and informed the police, but said nothing to the Appellant and allowed her to check in. When she attempted to board the aircraft at the departure gate she was stopped. Her passport was examined and found to be false. She was arrested and taken to the police station. There she was questioned but gave no answers. Through an interpreter she told her legal representative at the police station that she wished to claim asylum and he gave evidence that he communicated this claim to the police at 5.00pm on the day of her arrival. On 11 April 2007 the Appellant was formally recognised by the Home Secretary as a refugee.

[4] The Appellant was charged with two offences on which she was later indicted and stood trial at Isleworth Crown Court before His Honour Judge Lowen and a jury. Count 1 charged her with using a false instrument with intent contrary to s 3 of the Forgery and Counterfeiting Act 1981, the particulars being that on 14 February 2005 she used an Italian passport which she knew to be false, with the intention of inducing another (identified as Mohammed Hussan, the official on the check-in desk) to accept it as genuine. In count 2 the Appellant was charged with attempting to obtain services by deception, contrary to s 1(1) of the Criminal Attempts Act 1981. The particulars were that she had dishonestly attempted to obtain air transport services from Virgin Atlantic by falsely representing that she was authorised to use the Italian passport in the name of Hana (sic) Gebrele. Both these counts related to the Appellant's attempt to leave this country on a Virgin Atlantic flight to Washington, and both, it seems, were based on presentation of the false Italian passport at the check-in desk.

[5] The Appellant pleaded not guilty to count 1 and relied on the defence provided by s 31 of the Act. Directing the jury, His Honour Judge Lowen, said:

“There is available a defence to such a charge [as count 1] which the law has provided for persons who genuinely seek asylum. Because the law recognises that refugees may inevitably have to commit such offences as a means of seeking safe refuge. It would, you may think, be quite unjust for genuine refugees to be faced with the prospect of inevitable conviction of crime in relation to the process by which they seek to enter a safe haven. And that is why the law recognises that common sense proposition and that is why the law provides that if a person, on the balance of probability, fulfils the criteria provided for in law, then the law says they have a complete defence to a charge of this kind.”

In the light of the evidence at trial, prosecuting counsel accepted that the Appellant was a refugee, but disputed that the other requirements of s 31 were met. The jury, however, acquitted, and must therefore have found that they were.

[6] Before the trial began, counsel for the Appellant (Mr Richard Thomas) resisted further prosecution of count 2 on the ground that the offence charged, although not within s 31 of the Act, was within art 31 of the Convention. The judge rejected the submission. He ruled:

“The prosecution have decided to proceed in this case and take the view that those offences, catered for in section 31, are all offences which a refugee may commit involving the process of entering a safe haven. Once within the United Kingdom a person who then goes on to commit a further offence should not have a defence available to protect him or her from prosecution and conviction. That is the justification for the prosecution proceeding in this case. The logical distinction is clear.”

He went on to refer to:

“the real distinction between offences which are necessary and reasonable in the quest for asylum on the one hand and those which arise as a matter of choice or convenience and it is into the latter category that the prosecution put this offence of obtaining or attempting to obtain services by deception.”

In response to this ruling the Appellant pleaded guilty. After her acquittal on count 1, the judge sentenced the Appellant to nine months' imprisonment (most of which she had already served) on count 2. He said that offences of this kind undermined the whole system of immigration control and were so prevalent as to call for deterrent sentences. It is not clear what factual (as opposed to legal) difference the judge saw between the two counts.

[7] The Appellant appealed against conviction and sentence on count 2. In the Court of Appeal prosecuting counsel did not question the correctness of the Appellant's acquittal on count 1, and implicitly accepted its correctness. He accepted that on the facts of this case art 31 required that the Appellant should have a defence, even if charged with attempting to obtain the service of the airline by deception (see [2006] EWCA Crim 707, para 21). He accepted that both art 31 and s 31 could apply to an asylum seeker seeking to use this country as a transit post in a journey to a preferred place of refuge (para 21). He accepted that the Appellant's attempt to fly to Washington in order to seek asylum should attract no punishment if the UK were fully to comply with art 31 (para 26). He accepted that he could not support the reasoning which led the judge to impose the custodial sentence he did (para 27). Thus the issue in the Court of Appeal was a narrow one. Counsel for the Appellant submitted that it was improper for a different charge, not falling within s 31, to be brought in respect of precisely the same facts (para 20). The Crown's reply was that s 31 listed the offences to which the statutory defence should apply, that the list did not include attempted deception, and the duty of the Crown Prosecution Service was to apply the law (para 21). The court expressed its concern about some aspects of the case. It considered that if the second count had been added in the interests of immigration control, in order to prevent the asylum seeker from invoking the defence that s 31 would otherwise provide, there would be strong grounds for contending that the practice would be an abuse of process (para 24). The court dismissed the Appellant's appeal against conviction, but allowed her appeal against sentence, quashed the sentence of imprisonment and ordered that the Appellant should be

absolutely discharged. The certified question set out in para 1 above relates, of course, to the legal issue which then fell for decision. In the House, however, the Respondent contended, for the first time, that the offences allegedly committed by the Appellant fell outside both art 31 of the Convention and s 31 of the Act because they were committed in the course of trying to leave the country and not in the course of entering it or as a result of the Appellant's illegal presence here. Thus the central issue now is whether these offences, or either of them, fell within the scope, first, of art 31 and, secondly, of s 31.

## ARTICLE 31

[8] During the 1920s and 1930s the League of Nations sought to address the problems caused internationally by refugees from Russia, Armenia, Germany and elsewhere. The ending of the Second World War gave the problem a new urgency and importance. Thus the Constitution of the International Refugee Organization was adopted in 1946, the Statute of the Office of the United Nations High Commissioner for Refugees was adopted in 1950 and in 1950-1951 the 1951 Refugee Convention was negotiated.

[9] The Refugee Convention had three broad humanitarian aims. The first was to ensure that states acceding to the Convention would afford a safe refuge to those genuinely fleeing from their home countries to escape persecution or threatened persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion. Such refugees were not to be returned to their home countries. The second aim was to ensure reasonable treatment of refugees in their countries of refuge, an aim to which most of the articles in the Convention were addressed. The third aim, broadly expressed, was to protect refugees from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution. 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 (possession and use of false papers, forgery, misrepresentation, etc) in order to make good their escape.

[10] Effect was given to this third aim in art 31, which (referring to the very familiar definition of "refugee" in art 1), provides:

### "REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE

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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

The Respondent to this appeal submits that this article should be interpreted as meaning exactly what it says, and attaches particular importance to the words “on account of their illegal entry or presence” and “good cause for their illegal entry or presence”. These words, it is said, show that the immunity of a refugee is limited to offences of entering and being illegally in a country, thus excluding offences committed when leaving an intermediate country in order to seek asylum elsewhere.

[11] It is of course true that in construing any document the literal meaning of the words used must be the starting point. But the words must be construed in context, and an instrument such as the Refugee Convention must be given a purposive construction consistent with its humanitarian aims. The Convention was negotiated against the background of then recent events, particularly in Europe. Hence the reference in the original definition of “refugee” in art 1 A(2) to “As a result of events occurring before 1 January 1951” and hence the original option for acceding states to adopt an interpretation of that expression as meaning “events occurring in Europe before 1 January 1951”. Consideration of the travaux préparatoires of the Convention shows that the focus of discussion was on clandestine crossing of land frontiers. There was little or no discussion of air transportation, doubtless because air transport had not become a means of escape used by any considerable number of refugees, and there was accordingly no consideration of the position of refugees changing planes in the course of escape to a country of intended asylum. The travaux show that what became art 31 went through a number of drafts and the words “coming directly from a territory where their life or freedom was threatened in the sense of art 1” did not appear in the original texts. They were inserted at the instance of the French delegate (M Rochefort), who was concerned that there were large numbers of refugees living in countries bordering on France where their lives were not threatened, and whom, if they crossed into France, the French government would wish to penalise and return: see Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalisation, detention, and protection” in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), p 192. There was resistance to the notion that a refugee who had settled temporarily in one country should be free to enter another for reasons of mere personal convenience: Weis, *The Refugee Convention 1951: Travaux Préparatoires*, p 298. The UK representative favoured a certain amount of flexibility in the case of refugees coming through intermediary countries: *ibid*, p 301. The “good cause” requirement was also, it seems, intended to exclude refugees who wished to change their country of asylum for purely personal reasons from the immunity provided by art 31: Grahl-Madsen, *Commentary on the Refugee Convention 1951 (1962-63)*, para (8).

[12] With the passage of time and the growth of air transport the application of art 31 to refugees in transit came to attract attention. In *The Status of Refugees in International Law*, vol II (1972), pp 206-207, Grahl-Madsen distinguished between different cases, the first being “A refugee who only passes through the first country of refuge, without any delay or with only a minimum of delay”. Of this class of case he wrote:

“With respect to the first category, it is important to note that the practice of States is more lenient than would be expected on the background of Mr Rochefort's above-quoted statements. Thus, refugees who pass through Austria into the Federal Republic of Germany are not penalized in the latter country on account of their illegal entry. In Belgium it is an established practice to consider a refugee as 'coming directly' if he arrives in Belgium within

a fortnight after his departure from his country of origin. And in France each case is considered on its merits, emphasis apparently being placed on the final proviso of article 31(1), that is to say: whether the refugee can 'show good cause for [his] illegal entry or presence'. It seems to be the opinion of the Office of the United Nations High Commissioner for Refugees that the term 'coming directly' is to be interpreted in such a way that it does not impose an obligation solely on countries adjacent to countries of persecution, or – more precisely – that any person who had no factual residence in an intermediary country should be considered coming directly from a country of persecution. On this basis it appears justified to conclude that a refugee belonging to the first category may normally claim the benefit of article 31 in the country where he finally arrives.”

He had addressed the meaning of “country of refuge” in volume I of the same work (1966), in which (para 108, p 301) he had written:

“As we see it, the 'country of refuge' (pays d'accueil), being the opposite of a 'country of persecution', corresponds on the whole with the territory where Article 31(1) of the Convention may be invoked. In other words, the 'country of refuge' will normally be the country into which a refugee is 'coming directly from a territory where [his] life or freedom was threatened in the sense of article 1' (or in which he becomes a refugee sur place).

However, in practice the provisions of Article 31 are given a liberal interpretation, so that a person may actually travel through several countries until he eventually applies for asylum and recognition as a refugee in a country more or less of his choice, and may still get the benefit of those provisions. The implication is that if the refugee had ended his journey in any of the transit countries, he would have been able to invoke Article 31(1) there, too.”

[13] The opinion of the Office of the UNHCR to which Grahl-Madsen refers in the first of these quoted extracts is a matter of some significance, since by art 35 of the Convention member states undertake to co-operate with the Office in the exercise of its functions, and are bound to facilitate its duty of supervising the application of the provisions of the Convention. In 1992 the UNHCR in its Handbook on Procedures and Criteria for determining Refugee Status published guidelines with regard to the detention of asylum seekers, quoted by Simon Brown LJ in *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667, 678, [1999] 4 All ER 520, [2000] 3 WLR 434. These guidelines, re-published without alteration of this provision in February 1999, included the following passage:

“The expression 'coming directly' in article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its merits.”

[14] The judgment of the Queen's Bench Divisional Court (Simon Brown LJ and Newman J) in *Adimi* related to three Applicants for judicial review, two of whom were in transit through this country and one of whom (Mr Sorani) was in a factual position legally indistinguishable from that of the Appellant. The court noted (pp 676, 677) that until the point was raised on behalf of Mr Adimi (p 674) the immunity required by art 31 had never been the subject of consideration by the Secretary of State for the Home Department, the Director of Public



Prosecutions, the Crown Prosecution Service, the police or, it seems, anyone else. But that group of cases called for it to be considered, with reference in two of the cases to refugees, or potential refugees, in transit.

[15] In his leading judgment Simon Brown LJ first considered the requirement that, to qualify for immunity under art 31, a person must be “coming directly” from the country of persecution. The Secretary of State and the Director contended that art 31 allowed the refugee no element of choice as to where he should claim asylum. Having considered the conclusions of the UNHCR's executive committee and the academic literature, Simon Brown LJ rejected that contention. He held (p 678) that some element of choice was open to refugees as to where they might properly claim asylum and concluded that any merely short-term stopover en route to such intended sanctuary could not deprive the refugee of the protection of art 31. He went on to say that the main touchstones by which exclusion from protection should be judged were the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found there protection de jure or de facto from the persecution which the refugee was seeking to escape. These latter considerations have been said (Hathaway, *The Rights of Refugees under International Law*, (2005), p 399, fn 539) to be more properly relevant to “good cause”, but they are clearly relevant to the applicability of art 31.

[16] Simon Brown LJ then considered (p 679) the requirement that refugees should present themselves “without delay”. The Respondents contended that Mr Adimi fell outside art 31 because he had not claimed asylum on reaching passport control. This argument was rejected (p 679): if Mr Adimi's intention was to claim asylum within a short time of his arrival even if he had successfully secured entry on false documents, he was not in breach of this condition.

[17] The “good cause” condition was agreed by all counsel (p 679) to be satisfied by a genuine refugee showing that he was reasonably travelling on false papers.

[18] Simon Brown LJ considered the two Applicants who had been in transit at p 687 of his judgment:

“I propose to deal with these two Applicants together since both were arrested as transit passengers embarking for Canada and, in my judgment, no material distinction can be drawn between them. I use the term transit passenger here not in a technical sense to mean only passengers who throughout have remained airside of United Kingdom immigration control (even then, if discovered with false documents, they will be brought landside for that reason) but rather to mean passengers who have been in the United Kingdom for a limited time only and are on the way to seek asylum elsewhere. I understand the Respondents to argue that such passengers can never be entitled to article 31 immunity because, having been apprehended whilst attempting to leave the United Kingdom rather than enter it, it follows that they never intended to present themselves, least of all without delay, to the immigration authorities here. Mr Kovats further submits that, having chosen not to claim asylum here despite the United Kingdom clearly being a safe country for the purpose, these passengers will in addition be unable to satisfy the coming directly condition.

Neither of these arguments are in my judgment sustainable. If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum, and that a short term

stopover en route in a country where the traveller's status is in no way regularised will not break the requisite directness of flight, then it must follow that these Applicants would have been entitled to the benefit of article 31 had they reached Canada and made their asylum claims there. If article 31 would have availed them in Canada, then logically its protection cannot be denied to them here merely because they have been apprehended en route.”

Newman J (p 688) agreed with Simon Brown LJ's interpretation of the scope of art 31(1) of the Convention. Neither the Secretary of State nor the Director argued that art 31 was inapplicable to offences committed by a refugee seeking to leave the country as distinct from entering or being here.

[19] On 8-9 November 2001 an expert round-table conference was held in Geneva, attended by representatives of different countries and disciplines, including six governmental members, to discuss art 31. For this Professor Goodwin-Gill wrote the paper cited in para 11 above, in which he described Simon Brown LJ's judgment in *Adimi* as (p 203) “one of the most thorough examinations of the scope of art 31 and the protection due”. He drew on an extensive survey of state practice (p 206). On p 216 he opined:

“Although States may and do agree on the allocation of responsibility to determine claims, at the present stage of legal development, no duty is imposed on the asylum seeker travelling irregularly or with false travel documents to lodge an asylum application at any particular stage of the flight from danger.”

He concluded (p 218) that:

“Refugees are not required to have come directly from their country of origin. Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection in the first country or countries to which they flee, or who have 'good cause' for not applying in such country or countries.”

In its “Summary of Conclusions” (Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Feller, Türk and Nicholson (eds), 3.2, p 255) the expert round-table listed a number of specific considerations which included the following:

“10 In relation to Article 31(1):

(a) Article 31(1) requires that refugees shall not be penalized solely by reason of unlawful entry or because, being in need of refuge and protection, they remain illegally in a country.

(b) Refugees are not required to have come directly from territories where their life or freedom was threatened.

(c) Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country. The mere fact of UNHCR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country.”

[20] In his recent work *The Rights of Refugees under International Law* (2005), Professor Hathaway comments adversely (p 372, fn 412) on the UK's prosecution of asylum-seekers transiting through the country en route to North America, and expresses the opinion (p 406) that international law provides no sanction for the UK's policy of pursuing criminal charges against refugees found to have used false papers to pass through its territory. He quotes with implicit approval (p 406, fn 566) Simon Brown LJ's observation in *Adimi* (pp 684-685) that the "Respondents' argument provides no justification whatever for prosecuting refugees in transit."

[21] In a memorandum submitted to the House of Commons Select Committee dated 1 December 2005 the UNHCR submitted (para 13):

"In granting this protection from penalization, Article 31(1) recognises, inter alia, that departure and entry into host countries by irregular means may be a method used by refugees fleeing persecution to reach safety as refugees are often forced to flee their own country in fear of their lives. In UNHCR's view, a purposive interpretation of Article 31 will also include situations where a person seeking international protection arrives in the UK by irregular means without a valid travel document; whether with a false passport, a passport he/she is not entitled to or without a passport. Refugees and asylum seekers in transit to a final destination country could equally benefit from Article 31 of the 1951 Convention, if all the conditions of Article 31 are met."

[22] On 14 February 2005, when the Appellant presented a false Italian passport to Mohammed Hussan at the check-in desk she was a refugee within the Convention definition, as accepted at the criminal trial and now recognised by the Secretary of State. It has never been questioned, despite her brief stopover somewhere in the Middle East, that she was coming directly from the country where she had been persecuted. The jury accepted that she had, when challenged, presented herself to the authorities and that she had good cause for resorting to forgery and deception in the course of her flight from persecution. It seems to me that *Adimi* is fully supported by such authority as there is, both before and since, and was rightly decided. The UNHCR, who has intervened in this appeal and made most valuable submissions, strongly so submits. On the facts of this case, as now established, the Appellant should not in my opinion, consistently with art 31, have been subjected to any criminal penalty on either count of the indictment preferred against her.

## SECTION 31

[23] The decision in *Adimi* exposed a serious lacuna in our domestic law, which failed to give any immunity against criminal penalties in accordance with art 31. Steps were hastily taken to make good the omission, by enactment of s 31 of the Immigration and Asylum Act 1999. This section as amended now provides:

### "DEFENCES BASED ON ARTICLE 31(1) OF THE REFUGEE CONVENTION

31(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, sub-section (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 1 of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);
  - (aa) Section 25(1) or (5) of the Identity Cards Act 2006;
  - (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,
  - (ba) under section 25(1) or (5) of the Identity Cards Act 2006,
  - (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 sub-section (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 sub-section (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) sub-section (3), or

(b) sub-section (4),

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

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

[24] When the Bill which became the 1999 Act was before Parliament, the Divisional Court judgment in *Adimi* loomed largely in the discussion (see Hansard, HL, 18 October 1999, cols 844, 845, 848, 849, 850, 851, 852, 856, 857, 2 November 1999, col 784). A number of statements made by the Attorney General on behalf of the Government were relied on in argument. The Government wanted an outcome which properly accommodated art 31(1) asylum seekers and the difficulties raised by *Simon Brown LJ* (18 October, col 855). It was hoped to achieve this and avoid inappropriate prosecutions by giving administrative guidance to the prosecuting authorities (18 October, cols 855, 856) but if such prosecutions did occur the defence would exist (18 October, col 857). This was an appropriate and generous response and solution to difficult problems (18 October, col 857). On 2 November 1999, when the clause which became s 31 was (before amendment) introduced, the Attorney General said (col 784) that the purpose of the clause was to ensure that someone who came within art 31(1) of the Convention was properly protected and did not have a penalty imposed on him on account of his illegal entry or presence. He referred again to the administrative steps taken to identify art 31(1) issues at an early stage. In relevant cases therefore the matter would never come to court. Sometimes the administrative procedures would fail, and the defence was a further safeguard. He acknowledged as an addition the requirement in sub-s (1) that a person should have applied for asylum as soon as was reasonably practicable, which he considered a fair addition. This was a narrower definition than that adopted by the Divisional Court, but he thought the Government was entitled to take its own view, and it had taken a different view. This did not mean (col 785) that every refugee who passed through a third country would be prosecuted, which did not and would not happen. There should be a limit on “forum shopping”, deciding to accept an offer of

safety in country B or C, but not in country A. The definition of “coming directly” was a generous one. There had to come a time when an individual stopped running away, the art 31 situation, and started to travel towards a preferred destination. The Attorney General believed that the Government had got it right, but if the list of offences in sub-ss (3) and (4) needed to be added to, this could be done by order.

[25] It is clear that in one respect, expressed in s 31(2), it was intended to depart from Adimi. Whether that subsection is consistent with the Convention, interpreted in the light of the travaux, may be open to question, but it is not a question which arises in this case, since it has never been suggested that in coming from Ethiopia the Appellant stopped in any country outside the UK where she could reasonably have been expected to be given protection under the law of that country. Sub-section (2) apart, no indication was given of an intention to depart from Adimi. More importantly, no indication was given of an intention to derogate from the international obligations of the UK as fully expounded in Adimi, as would be expected if that was the legislative intention. The indication was, rather, of an intention to reflect in statute the obligations undertaken by the UK in the Convention.

[26] I am of opinion that s 31 should not be read (as the Respondent contends) as limited to offences attributable to a refugee's illegal entry into or presence in this country, but should provide immunity, if the other conditions are fulfilled, from the imposition of criminal penalties for offences attributable to the attempt of a refugee to leave the country in the continuing course of a flight from persecution even after a short stopover in transit. This interpretation is consistent with the Convention jurisprudence to which I have referred, consistent with the judgment in Adimi, consistent with the absence of any indication that it was intended to depart in the 1999 Act from the Convention or (subject to the exception already noted) Adimi, and consistent with the humanitarian purpose of the Convention. It follows that the jury in the present case, on finding the conditions in s 31 to be met, were fully entitled to acquit the Appellant on count 1, as the Respondent then accepted, even though the offence was committed when the Appellant was trying to leave the country after a short stopover in transit.

[27] That result follows because the offence in count 1 was charged in Pt 1 of the Forgery and Counterfeiting Act 1981, an offence covered by s 31(3)(a).

[28] The offence in count 2, although within art 31 on my analysis and that accepted by both parties in the Court of Appeal, is not listed expressly in s 31(3). The list in that subsection is in some respects perplexing, since it does not (as one might expect) include an offence of illegal entry contrary to s 24 of the Immigration Act 1971 and there is no close correspondence between the offences listed in sub-s (3), which do not include that charged in count 2, and those listed in sub-s (4) which, as I understand, would cover the substance of that count, had the alleged offence been committed in Scotland. As matters stand, however, there is a disparity between the scope of art 31 and the scope of s 31(1) and (3), and by no legitimate process of interpretation can those subsections be read as including the offence charged in count 2.

[29] The Appellant sought to address this disparity by submitting that the Convention had been incorporated into our domestic law. Reliance was placed on observations of Lord Keith of Kinkel in *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988]

AC 958, 990G, [1988] 1 All ER 193, [1988] 2 WLR 92; Lord Steyn in *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees Intervening)* [2004] UKHL 55, [2005] 2 AC 1, paras 40-42, [2005] 1 All ER 527; s 2 of the Asylum and Immigration Appeals Act 1993; and para 328 of Statement of Changes in Immigration Rules (HC 395). It is plain from these authorities that the British regime for handling applications for asylum has been closely assimilated to the Convention model. But it is also plain (as I think) that the Convention as a whole has never been formally incorporated or given effect in domestic law. While, therefore, one would expect any government intending to legislate inconsistently with an obligation binding on the UK to make its intention very clear, there can on well known authority be no ground in domestic law for failing to give effect to an enactment in terms unambiguously inconsistent with such an obligation.

[30] The Appellant sought to assert that she had a legitimate expectation that the UK would honour its obligation under art 31 of the Convention. But she cannot, at the relevant time, have had any legitimate expectation of being treated otherwise than in accordance with the 1999 Act. Nor can the criminal defence of necessity be stretched to cover this case.

[31] The Appellant also submitted that it was an abuse of the criminal process to prosecute her to conviction under count 2. That submission calls for closer consideration. It was not an abuse to prefer charges under both counts, since the Respondent was entitled to question whether the Appellant was a refugee, and if she was not neither the article nor the section could avail her. It is true that the two counts related to identical conduct and the second count served no obvious purpose, but the court could ensure, on conviction, that no disproportionate penalty was inflicted. If, however, the second count was included in the indictment in order to prevent the Appellant from relying on the defence which s 31 would otherwise provide, I would share the Court of Appeal's view (para 24) that there would be strong grounds for contending that this was an abuse of process. It is not at all clear what legitimate purpose was sought to be served by including the second count, and it must be questioned whether there was any legitimate purpose.

[32] In rejecting the Appellant's objection to count 2 the learned judge was following authority binding on him: see *R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin). But there is an obvious inconsistency between his grounds for rejecting that objection and his direction to the jury (see paras 5 and 6 above). His grounds for dismissing the Appellant's objection was also, in my opinion, wrong, since if the jury were to acquit the Appellant on count 1 in reliance on s 31, it would be both unfair and contrary to the intention of the statute to convict her on count 2. The Attorney General expressly recognised that additional offences might have to be added to s 31(3), and when such offences, requiring addition to the list, arose in individual cases it would plainly be necessary to avoid injustice in those cases. There was in my opinion a clear risk of injustice in this case if the jury were to acquit on count 1 but convict on count 2.

[33] The trial judge cannot of course be criticised for acting in accordance with binding authority, incoherent though (on his interpretation) the outcome was. It is, however, apparent that counsel's preliminary objection to count 2 could only, consistently with art 31 and the intention of s 31, have been fairly met by staying further prosecution of count 2 at that stage. If the jury acquitted the Appellant on count 1, the stay on prosecuting count 2 should have

been maintained. If the jury convicted the Appellant on count 1, rejecting her s 31 defence, there would have been no objection in principle to further prosecution of count 2. But the Appellant would be likely in that situation to have pleaded guilty (as she did in response to the judge's ruling), and the question would arise whether further prosecution of count 2 could be justified: given that the judge had power to sentence the Appellant to imprisonment for ten years on count 1, it could scarcely be suggested that his powers of punishment were inadequate to reflect the Appellant's culpability.

[34] The Court of Appeal expressed its concern about this case by allowing the Appellant's appeal against sentence and ordering that she be absolutely discharged. But in my opinion it was an abuse of process in the circumstances to prosecute her to conviction. On 14 February 2005 the Appellant was, in the Attorney General's expressive phrase, "still running away" from persecution. Once that was established, count 2 being factually indistinguishable from count 1, she should not have been convicted at all. I would accordingly allow the appeal, quash the Appellant's conviction and invite the parties (other than the intervener) to make written submissions on costs within 14 days.

LORD HOPE:

MY LORDS,

[35] The issues raised by this case fall conveniently into two parts. The first is whether the Appellant was entitled to the protection of art 31(1) of the 1951 Convention and Protocol relating to the Status of Refugees. The second is whether she had a defence under s 31 of the Immigration and Asylum Act 1999 to the charge of attempting to obtain services by deception contrary to s 1(1) of the Criminal Attempts Act 1981, notwithstanding the fact that this is not one of the offences specified in s 31(3) of the 1999 Act as those to which a defence under that section is available.

[36] Before I examine these two issues I should like to say something about the circumstances in which the Appellant came to be charged with the offence under s 1(1) of the 1981 Act. It has to be acknowledged at the outset that this is not the type of case that was in the forefront of the minds of the framers of the Convention in 1950 when art 31 was being formulated. Their concern was to protect refugees who were coming to the territory of a contracting state. In this case the fact that the Appellant was travelling on a false Ethiopian passport was not detected when she entered this country at Heathrow Airport. She was detected when she was attempting to leave this country from the same airport with a false Italian passport later the same day. The question which lies at the heart of the first issue is whether she was entitled to the protection of art 31(1) against the imposition of a penalty on account of her attempt to leave the country illegally, not to enter it.

THE FACTS

[37] The current practice is for passengers departing on international flights to be asked to present their passports at the airline's check-in desk when they are checking in for the flight which they intend to take, and for their passports to be examined again at the departure gate. This is because airlines are exposed to substantial penalties if they carry passengers



to a country which they will not be permitted to enter because they have no valid passport or its visa requirements are not satisfied. The Immigration (Carriers' Liability) Act 1987 requires carriers to make payments to the Secretary of State in respect of passengers brought by them by ship or aircraft to the United Kingdom without proper documents, currently amounting to £2,000 per passenger. (The 1987 Act was repealed by the Immigration and Asylum Act 1999, s 169(3) and Sch 16 as from a date to be appointed, and replaced by a new system of carriers' liability under ss 40 and 42. But no date for the taking effect of these provisions has yet been appointed.) Carriers who carry passengers from the United Kingdom without proper documents are exposed to similar sanctions in the countries to which they are travelling.

[38] The Appellant's attempt to leave the country with a false passport was detected when the first opportunity arose for her passport to be examined to avoid incurring this liability, which was at the Virgin Atlantic check-in desk. Information was passed to the police and she was arrested when, after passing through security and passport control, she reached the departure gate. The obstacle which she encountered was one that can be expected to confront all refugees who are in transit by air through Gatwick or Heathrow from a territory where their life or freedom was threatened to the country where they intend to seek asylum.

[39] Heathrow Airport, where this incident took place, is one of the busiest airports in Europe. One of the reasons why it attracts so much business is that it serves so many destinations. Many of the passengers who use it are in the course of travel from places both within and outside Europe to destinations in North America. Usually changing from one flight to another while in transit can be done without having to enter the United Kingdom. But this may not always be possible. Refugees whose movements and documents have been prepared for them by their couriers may not be able to avoid doing so. Even if they can, they will still face the problem of having to present their passports for examination by the airline at the departure gate before they are permitted to board the aircraft. In *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667, 674B-C Simon Brown LJ observed that the combined effect of visa requirements and carriers' liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents. The barrier to onward travel which faces passengers in possession of false passports or other travel documents is one which every refugee is likely to encounter while in transit to North America through any of Europe's principal international airports.

[40] The situation which I have described is unlike that with which the framers of the Convention were familiar in 1950. Transfers from one vehicle to another have, of course, been part of travel from time immemorial. But the journey which the Respondent was taking when she was at Heathrow had some significant features that are the product of more recent developments. Transatlantic travel in the early 1950s was almost always by ship. And it was for the few, before the introduction of suitable aircraft made international air travel over long distances accessible to everyone. The significant increase in air travel that resulted from the use of such aircraft led to the practice of permitting passengers to transfer from one flight to another without requiring them to enter the country in which the airport where the transfer was to take place was situated. Then came the prospect of the imposition of financial penalties under carrier sanctions legislation in the United Kingdom and North America.

[41] In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* (United Nations High Commissioner for Refugees intervening) [2005] 2 AC 1, para 28 Lord Bingham of Cornhill quoted a passage from an article published in 1998 (“United Kingdom: Breaches of art 31 of the 1951 Convention” (1998) 10 Int J Refugee Law 205, 209-210) in which Richard Dunstan, formerly Refugee Officer, Amnesty International United Kingdom, provided this description of the practice that many leading countries have adopted:

“In recent years, and in common with many other western countries, the United Kingdom, Canada and the United States have imposed visa regimes on nationals of practically all significant refugee-producing countries, in an apparent attempt to reduce the number of would-be asylum-seekers from such countries arriving at their borders. These visa regimes have then been enforced by the imposition of heavy financial penalties on those transport operators bringing passengers lacking a valid visa where one is required. For example, under the Immigration (Carriers' Liability) Act 1987, the United Kingdom authorities impose a financial penalty of £2,000 per passenger brought without either a valid passport or a visa where one is required. Introducing this legislation in March 1987, the then Home Secretary, Douglas Hurd, stated that 'the immediate spur to this proposal has been the arrival of over 8,000 people claiming asylum in the three months to the end of February 1987'. Between May 1987 and October 1996, fines totalling £97.6 m were imposed on over 440 airlines and shipping companies. The United Kingdom authorities have also provided training, advice and technical support in respect of the detection of false travel documents to airline staff based at various points of embarkation . . . .

Similarly, in the United States a financial penalty of US\$3,000 per improperly-documented passenger may be imposed under section 273 of the Immigration and Nationality Act 1952, the penalty having been increased from US\$1,000 in 1990. And in Canada a financial penalty of up to CAN\$ 3,200 per improperly-documented passenger may be imposed under the Immigration Act 1976, as amended. As long ago as 1986, a total of 541 airlines were each fined CAN\$1,000 by the Canadian authorities for not demonstrating sufficient vigilance in their checking of passengers' travel documents.”

The practice of imposing liability on carriers has been adopted by most European countries too. A study conducted for the European Council on Refugees and Exiles, “Carriers' Liability: Country up-date on the application of carriers' liability in European States”, published in February 1999, showed that all states parties to the Schengen Convention, plus Norway and Iceland, who had concluded a parallel convention, had introduced a system of carriers' liability.

[42] It can be assumed therefore that the incident at the Virgin Atlantic check-in desk was the product of demands made on the airline by the country of destination, not the country of departure. Formerly passport controls on exit were comparatively relaxed. The emphasis was on controls on entry. Now the controls on exit which are imposed by the carrier are diligently exercised. It is significant that the fact that the Appellant was attempting to travel on a false passport was detected by the airline's security official at the check-in desk. She then passed through passport control to departures apparently without incident before she was stopped by the police, who had been alerted by the security official, at the departure gate.

## ARTICLE 31 OF THE REFUGEE CONVENTION

[43] Article 31 is headed “Refugees unlawfully in the country of refuge”. Its purpose is to exempt illegally entering refugees from penalties. The need for protection of this kind was first observed by the 1950 Ad Hoc Committee on Statelessness and Related Problems which prepared the draft Convention. It noted in its draft report that a refugee, whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry into the country of refuge: Refugee Protection in International Law, ed Feller, Türk and Nicholson (2003), p 190. After further discussion and negotiation art 31(1), which was not among the texts considered by the Ad Hoc Committee, was included in the Convention. It 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 authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

[44] The phrase “on account of their illegal entry or presence” appears to limit the situations to which the protection of the article can apply. As I have already mentioned, the fact that the Appellant was travelling on a false passport was not detected when she entered this country from somewhere in the Middle East. This did not happen until about an hour later when, having been provided by her agent with further travel documents, she presented her false Italian passport at the check-in desk. Her offences were committed while she was still present in this country. But they were not committed with a view to persuading the authorities that she should be allowed to remain here. They were committed with a view to her being permitted by the airline to continue her journey to Washington. The way her agent dealt with her made it necessary for her to pass through passport control on her arrival at Heathrow to check in for her onward flight to Washington. But she was in reality a passenger who was in transit. Her entry to this country was purely incidental to the journey to the United States which she was still engaged in when she was arrested.

[45] There is no indication in the travaux préparatoires that any of the plenipotentiaries who met in Geneva in 1951 had in mind the position of refugees who were still in transit to another country when their illegal presence was detected. The position of refugees passing through intermediate countries to the state of refuge was referred to. But this was in the context of illegal entry to or presence in the country of refuge. The wording of the original version of art 31(1) was amended to meet an objection by the French representative that France could not bind itself as a country of second reception to accept refugees coming through intermediate countries. This objection was met by the French amendment, which addressed the problem of defining what might constitute good cause for their illegal entry into or presence in the country of refuge. There is no indication that it was the intention that refugees should be denied protection if their illegal presence happened not to be detected until they were on the point of departure from the country where, in the event, they decided to seek refuge.

[46] In his commentary on art 31 in *The Refugee Convention 1951 with travaux préparatoires*, p 279, Dr Paul Weis, said that it would be in keeping with the notion of asylum

to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely presented himself as soon as possible to the authorities of the country of asylum and was recognised as a bona fide refugee. The generality of Dr Weis's comment suggests that all refugees escaping persecution who, having crossed the frontier, are still in the country and satisfy this requirement are entitled to the exemption from penalties. But the context for his remark shows that the penalties that he had in mind were those associated with illegal entry, not with illegal exit while in transit to another country.

[47] Your Lordships have not been provided with any evidence that art 31(1) was being interpreted judicially as extending to situations of this kind until *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667. Judgment in that case was delivered on 29 July 1999. Two of the Applicants in that case, Mr Sorani and Mr Kaziu, were in transit when they presented false documents at Heathrow while attempting to board flights to Canada. At p 677H Simon Brown LJ said that he regarded as helpful Newman J's suggestion that the illegal entry or use of false documents which could be attributed to a bona fide desire to seek asylum "whether here or elsewhere" should be covered by the article. At p 687F-G he said that, as the Applicants would have been entitled to the benefit of art 31(1) had they reached Canada, logically its protection could not be denied to them in this country merely because they had been apprehended en route. In *R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), para 15 the Divisional Court said that it seemed to it, in the light of the brief argument that had been addressed to it on this point, that *Adimi* was rightly decided.

[48] In a Memorandum of Good Practice endorsed by the Association of Chief Police Officers, the Immigration and Nationality Directorate, the Crown Prosecution Service and the Law Society representing defence solicitors (third draft, 8 March 2000), it was recognised that criminal offences giving rise to the question whether the protection afforded by art 31(1) was available might be committed by persons entering, departing from or in transit via the United Kingdom: para 3.1. The advice that the defence might be available was put into practice in this case. The Appellant, a transit passenger, was permitted to take advantage of the statutory defence based on art 31(1) in regard to the first count on the indictment without objection from the prosecutor. It was only when the case reached this House that the defence was called into question by the Respondent on the ground that the Appellant's conduct was outside the scope of art 31(1).

[49] Miss Montgomery QC submitted that the analysis in *Adimi* did not give sufficient weight to the restriction that the words "illegal entry or presence" impose on the scope of art 31(1). She said that there was nothing illogical in denying its protection to a person seeking to leave for a foreign state even though, upon arrival in that foreign state, he would be entitled to it. This was because the wording of the article suggests that it is concerned to protect refugees solely against offences arising from conduct involved in their illegal entry or presence in the state where they are detected. Nevertheless, there are indications that Simon Brown LJ's view that refugees are entitled to the protection of art 31(1) while in transit has been welcomed by academics and by the UNHCR as falling within the spirit of the article.

[50] An expert roundtable organised by the UNHCR and the Graduate Institute of International Studies was held in Geneva in November 2001. The discussion was based on a background paper on art 31 by Guy Goodwin-Gill, art 31 of the 1951 Convention relating to

the Status of Refugees: non-penalisation, detention, and Protection, in *Refugee Protection in International Law*, ed Feller, Türk and Nicholson, at pp 185 – 252. The conclusions that were reached are set out at p 253 – 258 in the same volume. They include the following, at p 255:

“10 In relation to Article 31(1) . . .

(c) Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or were settled, temporarily or permanently, in another country. The mere fact of UNCHR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country.

(d) The intention of the asylum seeker to reach a particular country of destination, for instance for family reunification purposes, is a factor to be taken into account when assessing whether s/he transited through or stayed in another country.”

These conclusions support the view that asylum seekers who were in transit when passing through other countries before they reached the country where they have claimed asylum are entitled to the protection of the article. But they do not deal directly with the situation where the offence was committed while the asylum seeker was attempting to leave with a view to claiming asylum somewhere else. Article 2 obliges every refugee to conform to the laws and regulations of the country in which he finds himself. But Miss Montgomery did not suggest that this article deprived asylum seekers who were in transit of the benefit of art 31(1) and I, for my part, do not think that it does.

[51] Comments that are more directly in point are to be found in *The Rights of Refugees under International Law* (2005) by James C Hathaway. At p 406 he said that it was apparent that many refugees needed to cross borders clandestinely in order to access protection. So long as a refugee's failure to present valid travel documents was purely incidental to his or her flight from the risk of being persecuted, he should not be sanctioned for illegal entry. He then added this comment:

“Nor does international law sanction the United Kingdom's policy of pursuing criminal charges against refugees found to have used false documents to pass through its territory. As an English court has observed, the right of refugees to breach migration control laws in search of protection means that the propriety of prosecution for such matters by a transit state is particularly doubtful.”

A footnote to this passage explains that it is based on comments by Simon Brown LJ in *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667, and on a passage in Guy Goodwin-Gill's background paper on art 31 at pp 216-217 where he states that if a state initiates action within its territory to deal generally or internationally with the use of false travel documents, then that state, rather than the state of intended destination, assumes the responsibility of ensuring that the refugee benefits from the provisions of the Convention, such as art 31, which are not dependent upon lawful presence or residence: *Refugee Protection in International Law*, ed Feller, Türk and Nicholson, pp 216-217.

[52] The UNHCR made written submissions in support of the Applicants in Adimi who were arrested as transit passengers while they were attempting to board flights for Canada with the intention of seeking asylum there, Mr Sorani and Mr Kaziu. It said that UNHCR considered that their prosecution for possession of false documents in such a situation constituted prosecution for their illegal presence in the United Kingdom, contrary to art 31(1). In a Memorandum submitted to the Select Committee on Home Affairs dated 1 December 2005, para 13, UNHCR repeated its view that refugees and asylum seekers in transit to a final destination country could equally benefit from art 31 of the Convention if all the conditions of that article were met.

[53] As a general rule it is desirable that international treaties should be interpreted by the courts of all states parties uniformly: *R v Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629, [1999] 2 All ER 545, [1999] 2 WLR 1015, 657B. So if it could be said that a uniform interpretation was to be found in the authorities, it would be appropriate for the courts of this country to follow it. It is plain from the material that is before your Lordships that the situation in this case falls far short of that ideal. The travaux préparatoires are uninformative, and there is an absence of relevant judicial authority other than the dicta in *R v Uxbridge Magistrates' Court, ex parte Adimi*. As for the rest, while weight must be attached to the views of UNHCR in the light of its functions under art 35 of the Convention and to those of academics who specialise in this field, their assertions appear never to have been tested judicially elsewhere in the courts of the states parties.

[54] In this situation, as in *Shah*, I suggest that the best guide is to be found in the evolutionary approach that ought to be taken to international humanitarian agreements. It has long been recognised that human rights treaties have a special character. This distinguishes them from multilateral treaties that are designed to set up reciprocal arrangements between states. Humanitarian agreements of the kind to which the Convention belongs are entered into for a different purpose. Their object is to protect the rights and freedoms of individual human beings generally or falling within a particular description. As Judge Weeramantry said in *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (1996) 115 ILR 1, 57, they represent a commitment of the states parties to certain norms and values recognised by the international community.

[55] In *Shah's* case the problem was whether Pakistani women accused of adultery were a "particular social group" within the meaning of art 1A(2) of the Refugee Convention. Lord Hoffmann said at p 651C-D that the concept was a general one and that its meaning could not be confined to those social groups which the framers of the Convention may have had in mind. In this case a meaning has to be given to the words "on account of their illegal entry or presence" in art 31(1) which identify the type of penalties that the contracting states are not to impose on refugees who satisfy the requirements of the article. I would not confine the meaning of that expression to the particular situations that the framers had in mind in this case either. The overall context is provided by the preamble to the Convention. It refers to the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. It states that "the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms". This is an indication that a generous interpretation should be given to the wording of the articles, in keeping with the humanitarian

purpose that it seeks to achieve and the general principle that the Convention is to be regarded as a living instrument.

[56] The single most important point that emerges from a consideration of the travaux préparatoires is that there was universal acceptance that the mere fact that refugees stopped while in transit ought not deprive them of the benefit of the article. The phrase “coming directly”, if read literally, would have that effect. But, as Dr Weis noted in *The Refugee Convention 1951*, p 310, the UK representative said that these words, which appeared for the first time in his suggested amendment, would allow for a certain amount of flexibility in the case of refugees coming through intermediary countries. They were then incorporated in the French amendment, which was adopted by a large majority. Lord Williams of Mostyn acknowledged this point when he said during the Third Reading in the House of Lords of the Bill which became the 1999 Act that, as he had already observed on Report, the definition of “coming directly” was a generous one: Hansard (HL) 2 November 1999, col 785. It is hard, then, to see why the fact that the refugees are still in transit should be ignored when the question arises whether they are entitled to the protection of the article. Lord Williams said that a time must come when they have stopped running away, which he described as the art 31(1) situation. But, on the facts of this case, the Appellant had not stopped running when she was arrested.

[57] Article 31(1) does not, of course, give the refugee a right to choose the country in which to seek asylum. So the United Kingdom was not in breach of it when the Appellant's wish to travel on to the United States was frustrated by her arrest at the departure gate. But what art 31(1) does deal with is the issue of punishment. It deals with the situation where the question is whether refugees should be punished for offences committed while escaping from persecution by the use of false documents. It recognises that refugees, whose departure from their country of origin is usually a flight, are rarely in a position to comply with the requirements of legal entry to the country of refuge: Dr Weis, *The Refugee Convention 1951*, p 279. It was designed to protect refugees from punishment who resort to the use of false documents while they are still in flight to obtain entry to the country of refuge.

[58] The effect of the liability that the country of destination imposes on the carrier was that the false passport was detected in a country where the Appellant was in transit, not in the country to which she was seeking entry. But it would be artificial in the extreme to deny her the protection to which she would have been entitled had she reached the United States just because she was detected at Heathrow before she boarded her flight to Washington. The situation is one where the United Kingdom, having asserted jurisdiction over her because she was present here, must assume responsibility for affording her the benefit of the article.

[59] For these reasons I consider that the Appellant was entitled to rely on art 31(1) of the Refugee Convention to protect her from prosecution for seeking to use a false passport to leave the United Kingdom while she was still in transit to North America.

#### SECTION 31 OF THE 1999 ACT

[60] The Appellant was charged with two offences. The first was the using of a false instrument with the intention of inducing the security officer at the check-in desk to accept it as genuine, contrary to s 3 of the Forgery and Counterfeiting Act 1981. The second was the offence of attempting to obtain the services of air transportation from Virgin Atlantic by

deception, contrary to s 1(1) of the Criminal Attempts Act 1981. She was permitted to rely at her trial on the defence provided for by s 31 of the 1999 Act in relation to the first charge, and she was acquitted. The judge refused to allow her to rely on the defence in relation to the second charge, whereupon she pleaded guilty and was sentenced to nine months imprisonment. The facts on which these two charges were based were indistinguishable. They arose out of precisely the same incident – the presentation of the false passport at the check-in desk. They were treated differently simply because the offence in count one is one of those listed in s 31(3) of the 1999 Act as those to which the section applies, whereas the offence in count two is not.

[61] The question which then arises is whether the omission from s 31(3) of s 1(1) of the Criminal Attempts Act 1981 was what Parliament intended or whether it was due to an oversight. The section itself provides grounds for thinking that the omission may have been due to an oversight. Section 31(3), which contains the list in question, applies to England and Wales and Northern Ireland. The list is in these terms:

“any offence, and any attempt to commit an offence, under:

- (a) Part 1 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).”

The 1971 Act is the Immigration Act 1971: 1999 Act, s 167(1). Section 31(4), which applies to Scotland, states that the offences to which the section applies are the following:

- “(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.”

[62] The offences of fraud and uttering listed under heads (a) and (b) in s 31(4) are common law crimes in Scotland. Part I of the Forgery and Counterfeiting Act 1981 does not extend to Scotland: s 31(1). The activities that are proscribed by it can be dealt with there under the common law. The Criminal Attempts Act 1981 does not extend to Scotland either: s 11(2). An attempt to commit a common law crime is an offence at common law in Scotland. If the Appellant had been attempting to board a flight from Edinburgh or Glasgow to North America she could not have been charged with either of the offences listed in the indictment against her at Isleworth. Her case would probably have been dealt with on a single charge of attempted fraud by the Scottish prosecutor.

[63] It is often just a matter of convenience whether the charge in cases of this kind is framed in Scotland as one of uttering a forged document or as one of fraud. But in this case, as the Appellant had reached the stage of attempting to obtain services by tendering the false passport, attempted fraud would probably have been regarded as the better alternative:



Gordon, *Criminal Law*, 3rd ed (2001), para 18.35. The important point is that, on either alternative, in Scotland the defence under s 31 would have been available. The exact matching of statutory offences in England and Wales with common law crimes in Scotland is at best very difficult, and more often than not it is virtually impossible. But no sensible reason can be given for thinking that Parliament intended, in this context, that the same conduct on either side of the border should be treated differently.

[64] The Respondent submits however that Parliament cannot be taken to have intended that a defence under s 31 was to be available to a person who is being prosecuted for using false documents in an attempt to leave the United Kingdom. As Miss Montgomery was at pains to emphasise, the offence of dishonestly attempting to obtain air transportation services by deception is an offence that someone commits who is trying to get out of the country, not trying to get into it. Her argument on this point assumed, contrary to her first submission, that art 31(1) applied to passengers who were found to be acting illegally when they were seeking to leave the country while they were still in transit. Even so, she said, Parliament had deliberately narrowed its protection when it was considering how far it was to be available in the United Kingdom. Section 31 of the 1999 Act had been framed in a way that ensured that it would be available to cases of illegal entry or presence, and no more. The omission of s 1(1) of the Criminal Attempts Act 1981 was not to be regarded as an oversight. It was deliberate, because it was never intended that the section should protect acts of that kind.

[65] I cannot accept this argument. Section 31 does appear to have imposed an additional hurdle that refugees must cross before they will be entitled to make use of a defence based on art 31. Section 31(2) deals with the case where the refugee, in coming from the country where his freedom was threatened, stopped in another country outside the United Kingdom before his arrival in this country. The test which he must satisfy is not to be found in those terms in art 31(1). This subsection has narrowed its scope in comparison with what was contemplated in *Adimi*. But the section as a whole indicates that, once the prerequisites are all satisfied, a defence will be available in all cases that are within the reach of the article. Sub-sections (8) and (9) refer to cases where, before the commencement of the section, it was not argued that “a defence based on art 31(1)” was available. This suggests that no restriction on the kind of offences to which a defence under that article would be available was contemplated.

[66] A further indication is to be found in what the Attorney General, Lord Williams of Mostyn, said at Third Reading about the amendment which introduced the clause that was to become s 31: *Hansard* (HL), 2 November 1990, col 784:

“The purpose of the amendment is to ensure that someone who comes within article 31(1) of the United Nations convention of 1951 is properly protected and does not have a penalty imposed on him on account of his illegal entry or presence. As I told your Lordships on an earlier occasion, we have already put in place administrative procedures to identify at an early stage Article 31(1) issues. Ideally, therefore, in relevant cases the matter would never come to court. Sometimes these arrangements will fail. They will fail to identify someone who comes within Article 31(1) and this amendment is therefore a further safeguard. I told your Lordships on Report that sub-section (1) draws on the terms of the article itself.”

On Report he said that the government wanted an outcome which properly accommodated art 31(1) asylum seekers and the difficulties that had been raised by Simon Brown LJ in *Adimi*: Hansard (HL), 18 October 1999, col 855.

[67] These comments seem to me to reinforce the impression given by sub-ss (8) and (9) that, subject only to the limitation which is built in by sub-s (2), it was the intention that someone who comes within art 31(1) should have a defence under s 31. On this view the absence of s 1(1) of the Criminal Attempts Act 1981 must be regarded as an oversight. I do not see it as a deliberate omission from the list, designed to restrict still further the scope of the protection that was contemplated by Simon Brown LJ in *Adimi* when, adopting Newman J's formula, he said at p 677G-H that conduct that could be attributed to a bona fide desire to seek asylum whether here or elsewhere should be covered by art 31.

[68] Mr Fitzgerald QC submitted that the omission of s 1(1) of the 1981 Act from the list of offences in s 31(3) should be made good in one or other of four ways:

(i) by recognising that there was a freestanding defence under art 31(1);

(ii) by reading s 1(1) of the 1981 Act into the list

(iii) by legitimate expectation; or

(iv) by holding that her prosecution under s 1(1) of the 1981 Act was an abuse of process.

[69] I would reject the first three alternatives, essentially for the same reasons as those given by my noble and learned friend Lord Bingham of Cornhill. The giving effect in domestic law to international obligations is primarily a matter for the legislature. It is for Parliament to determine the extent to which those obligations are to be incorporated domestically. That determination having been made, it is the duty of the courts to give effect to it. There can be no free-standing defence, nor can there be any legitimate expectation that one will be provided, where Parliament has chosen in its own words to set out the scope of the defence that is to be available. For the courts to add further offences of their own choosing to the list of those to which Parliament has said s 31 applies in England and Wales and Northern Ireland would not be to interpret the subsection but to legislate. Our constitutional arrangements do not permit this.

[70] There remains the fourth alternative. The margin between declining to add to the list in s 31(3) and declaring that it was an abuse for the Appellant to be required to plead guilty to an offence that is not on the list when she was still being prosecuted for an offence for which the defence under that section is available is a narrow one. But it is not illusory. There is a substantial point to be made here. The brief narrative that is given of the circumstances in each count shows that they arose out of precisely the same incident. The Appellant was accused in the first count of having the intention of inducing Mohammed Hussan to accept the false Italian passport as genuine. He was the security officer at the Virgin Atlantic check-in desk. She was then accused in the second count of dishonestly attempting to obtain air transportation services from Virgin Atlantic by falsely representing that she was authorised to use that passport and that it was genuine. The evidence showed that the person to whom

the representation was made was Mohammed Hussan, the security officer named in the first count.

[71] The offences mentioned in each count are different, and the Complainants named in each of them were different too – the security officer in one case, the airline in the other. But they were two sides of the same coin. As one attracted the s 31 defence and the other did not, the effect was to expose the Appellant to the imposition of a penalty for doing something against which she was entitled to claim protection under that section. It seems to me to be plain that it was an abuse for the prosecutor to undermine the protection in this way. Section 31 must be read in the light of art 31(1) of the Convention, to which it was intended to give effect. There is no room in this context for the formalistic argument that the omission from s 31(3) of s 1(1) of the Criminal Attempts Act 1981 enabled the prosecutor to take this course. He was alleging that the Appellant had committed one of the offences on the list. The fact that it was a listed offence was a sufficient indication that it was the intention of Parliament that she should have the art 31(1) protection against the imposition of a penalty for her illegal act, provided the requirements of ss 31(1) and 31(2) were satisfied. She ought not to have been required to plead to the second count until the jury had delivered its verdict on the first count. As the jury found her not guilty on the first count, holding that the requirements of ss 31(1) and 31(2) had been satisfied, her prosecution on the second count should not have been proceeded with. As it is, the way in which the prosecution was conducted in this case deprived her of the protection and it was an abuse.

## CONCLUSION

[72] For these reasons I would allow the appeal and quash the Appellant's conviction on the second count of the indictment.

LORD RODGER:

MY LORDS,

[73] The Appellant, Ms Fregenet Asfaw, is from Ethiopia. She was granted refugee status by the Home Office on 11 April 2007, almost thirteen months after the decision of the Court of Appeal in the criminal proceedings against her which are the subject of the present appeal.

[74] According to the Appellant's version of events, after she left Ethiopia to avoid further persecution, her plane stopped in an unknown Middle Eastern country. She remained there for about three hours before flying on to London. On arriving at Heathrow on 14 February 2005, the Appellant presented a false Ethiopian passport to the immigration officer on duty and so entered the United Kingdom. Her intention, however, was not to stay in this country, but to travel on to the United States and claim asylum there. So, having passed through immigration control, she waited, for something less than an hour, until an agent who was arranging her journey from Ethiopia brought her a ticket for a Virgin Atlantic flight to New York and a false Italian passport in the name of Hanams Gebrele.

[75] Ms Asfaw then presented the ticket and passport to the official on duty at the Virgin Atlantic check-in desk in Terminal 3. He realised that the passport was a forgery and alerted the police. The Appellant was stopped at the departure gate. She was taken to a police

station where she was questioned. After a private interview with a solicitor, the Appellant claimed asylum. She was eventually charged with using a false instrument with intent to use it as genuine, contrary to s 3 of the Forgery and Counterfeiting Act 1981, and with attempting to obtain services by deception, contrary to s 1(1) of the Criminal Attempts Act 1981.

[76] Article 31(1) of the 1951 Geneva Convention relating to the Status of Refugees (“the Convention”), which is headed “Refugees unlawfully in the country of refuge”, 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 authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

With the aim of complying with the international law obligation imposed on the United Kingdom by this article, Parliament enacted s 31 of the Immigration and Asylum Act 1999 (“the 1999 Act”), which is headed “Defences based on art 31(1) of the Refugee Convention”. Sub-sections (1) to (5) of s 31 provide:

“(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, sub-section (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.”

[77] Two points about s 31 can be made straightaway. First, the offence of entering the United Kingdom unlawfully, contained in s 24 of the Immigration Act 1971, is not listed in s 31(3). Nor is the offence of attempting to obtain services by deception, contrary to s 1(1) of the Criminal Attempts Act 1981. While, for the reasons I shall give, the omission of the second provision is entirely understandable and correct, as presently advised, I am at a loss to understand why the first of these provisions has been omitted from the lists in s 31(3) and (4), since s 24, like s 24A, falls four-square within the terms of art 31. Article 31 is designed indeed for precisely that kind of offence.

[78] Both at first instance and before the Court of Appeal, those representing the prosecution proceeded on the basis that, if the jury accepted the Appellant's version of events, she would have a defence to the first count on the indictment, since the offence in question is included in the list in s 31(3) of the 1999 Act. But the same did not apply to the second count on the indictment, since the relevant offence is not included in that list. HH Judge Lowen upheld the prosecution position on the second count and rejected a defence argument that, despite the limited terms of s 31(3) of the 1999 Act, the Appellant had a free-standing defence to the count by virtue of art 31 of the Convention. The Appellant then pleaded guilty to the second count. After trial, the jury acquitted her of the first count. The judge sentenced the Appellant to nine months' imprisonment on the second count. She appealed against her conviction.

[79] The Court of Appeal criticised the prosecuting authorities for including the second count on the indictment, on the ground that it really covered the same conduct as the first count, but did not afford the Appellant the protection of a defence under s 31 of the 1999 Act. The court disposed of the whole matter on a pragmatic basis, by dismissing her appeal against conviction, giving her leave to appeal against sentence and allowing that appeal and substituting an absolute discharge. Ms Asfaw has appealed to this House against her conviction on the second count, not least because it could cause problems for her if, for instance, she wished to travel to the United States.

[80] Before this House counsel for the prosecuting authorities adopted a different position. Ms Montgomery QC withdrew any concession made below and asserted that art 31 applies only to offences of entering and being present on the territory of a Contracting State and does not apply to offences committed by a refugee, such as the Appellant, who is trying to leave that State and to travel on to settle in another country. Section 31(1) has the same scope. So it did not apply to either of the counts in the indictment against the Appellant. The logic of counsel's position was, accordingly, that, even if the jury accepted the Appellant's version of events, she had no defence under s 31 (or indeed by virtue of art 31) to either count in the indictment. So, although Ms Montgomery naturally stressed that she was not trying to appeal against the Appellant's acquittal on the first count, on her argument, the Appellant should have pleaded guilty to the first, as well as the second, count.

[81] The confusion which has hitherto reigned on the part of the prosecution in these proceedings is remarkable, to say the least. Nevertheless, the House must confront the actual legal issues to which the case gives rise. The fundamental point is the scope of art 31. If that article does not apply to a refugee who is trying to leave a Contracting State which he has entered, then there is no basis for arguing that s 31 of the 1999 Act should apply to such cases. Similarly, a person in the Appellant's position could not have any kind of free-standing defence based on art 31. Finally, unless the indictment were bad for duplicity – which the Appellant has never argued and which was not the basis of the Court of Appeal's criticism of the Crown – there could be no valid criticism of the Crown for prosecuting the Appellant for attempting to obtain services by deception.

[82] My Lords, I should like to think that anyone who simply read the words of art 31, in either of the official languages, would be as surprised as I was to be told that it covered offences committed by a refugee in order to leave the country. On its face, the article is all about entry and presence and says nothing about leaving. And the starting point of any interpretation of the article must indeed be the language itself: *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305, [1998] 2 All ER 453, [1998] 2 WLR 702, per Lord Lloyd of Berwick. As I understood him, however, Mr Fitzgerald QC contended that art 31 must be approached as a living instrument. It fell to be interpreted in the light of the development of air travel, which would not have been in the minds of those drafting the Convention in 1951. The House should accordingly hold that a penalty imposed on refugees on account of their use of a false passport, in an attempt to leave the country and continue their flight from persecution, was imposed on account of their illegal presence in the country. An interpretation to that effect was supported by the decision of the Divisional Court in *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667, which had been approved, indeed welcomed, by commentators on the Convention.

[83] Mr Fordham QC, who appeared for the United Nations High Commissioner for Refugees, argued, in support of the Appellant's position, that art 31 should be interpreted as applying to refugees who presented a false passport when trying to leave the country in order to pursue their flight from persecution.

[84] The fact that commentators and the High Commissioner support the interpretation of art 31 advocated by the Appellant does not excuse your Lordships from the duty of forming a considered view of the proper scope of the article. Indeed, nothing in the relevant passages in the commentaries or other extra-judicial material cited by counsel actually grapples with the text of art 31 or shows how, on the preferred interpretation, art 31 fits into the overall scheme of the Convention. For my part, I have come to the clear conclusion that the interpretation favoured by the Appellant is not only impossible on the language, but is actually at odds with the scheme of the Convention and with its true humanitarian philosophy.

[85] The approach which is to be adopted in construing the terms of the Convention was considered by my noble and learned friend, Lord Bingham of Cornhill, in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1. Having described an impossible contention not advanced by Lord Lester of Herne Hill QC, Lord Bingham continued, at pp 18-19, para 18:

“Instead, Lord Lester urged that the Convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and purpose clearly stated in the Preamble quoted in full in para 6 above. This is, in my opinion, a correct approach to interpretation of a Convention such as this and it gains support, if support be needed, from article 31(1) of the Vienna Convention on the Law of Treaties which, reflecting principles of customary international law, requires a treaty to be interpreted in the light of its object and purpose. But I would make an important caveat. However generous and purposive its approach to interpretation, the court's task remains one of interpreting the written document to which the contracting states have committed themselves. It must interpret what they have agreed. It has no warrant to give effect to what they might, or in an ideal world would, have agreed. This would violate the rule, also expressed in article 31(1) of the Vienna Convention, that a treaty should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context.”

I accept this guidance. In my view, however, it has little to do with the real question in this case.

[86] Nothing in the travaux préparatoires suggests that those who drafted the Convention had commercial air travel in mind. That is not surprising since it was still in its infancy in 1951 and refugees would have been unlikely to be in a position to use it. So the words of the Convention have to be applied to a form of transport which those framing the Convention cannot have had at the forefront of their minds, if they thought of it at all.

[87] As counsel for the Appellant emphasised more than once, a feature of international air travel is that people transfer from one flight to another, and from one airline to another. The Appellant flew into Heathrow and wanted to change on to a Virgin Atlantic flight to Washington. Had she been an ordinary passenger, she might well have been able to do so while remaining airside as a transit passenger, waiting for her Washington flight in a transit lounge and never presenting herself to the United Kingdom immigration authorities for entry into this country. Arrangements of these kinds have been developed in the decades since the Convention was agreed. The Convention has, of course, to be applied in a world where they are a feature. On any view, however, the Appellant did not remain airside. Instead, she entered the United Kingdom on one false passport and then used another false passport to try to board a Virgin Atlantic flight to Washington.

[88] So, when she was stopped, the Appellant was changing planes in the United Kingdom. Changing planes is, simply an example of changing from one conveyance to another in the course of a journey. People in 1951 were more than familiar with changing trains, changing buses, changing from buses to trains or from boats to trains, and any number of other combinations of modes of transport. The Oxford English Dictionary cites a passage from a 1955 novel of Elizabeth Bowen, set during the First World War, for the first use of “transit passenger” in a written publication. Even assuming that she may have been guilty of an anachronism, in all probability she was using a term that was already familiar in spoken English before 1955. Since few refugees would travel first class, and many of them would be anxious to avoid the attention of hostile authorities, their journeys would tend to involve frequent changes and long waits in-between. So the idea that transfers from one aircraft or airline to another would have introduced a novel type of problem, undreamed of in 1951, is

wide of the mark. Such transfers are simply one modern version of a process which would have been well known to anyone concerned with refugees in 1951.

[89] The language of art 31 shows that what cannot be penalised is a refugee's unlawful entry to, or presence in, a state. But the entitlement of refugees to this impunity is subject to the proviso that they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The French text, "et leur exposent", suggests that what is envisaged is that the refugees present themselves to the authorities and, at that stage, show the authorities why they had good cause for entering or being present in the country illegally.

[90] Refugees may cross a border away from a frontier post, or land from a boat, or in a light aircraft, at a spot where there are no immigration officials. Being unauthorised, their entry and presence in the country will be illegal. Alternatively, refugees may arm themselves with false papers and present them to immigration officials. If the papers are accepted as genuine, the refugees will then be given official authorisation to enter the country, but that authorisation will have been obtained by deception. It is common ground that art 31 is apt to cover both types of stratagem: in either event the refugees' entry or presence will be illegal for purposes of the article.

[91] In order to enjoy the protection of art 31, then, the refugees have to present themselves to the authorities without delay and explain to them why they have entered or are present illegally. Of course, as refugees, their most basic need will be that the authorities should not throw them out or return them to the country where they were exposed to persecution. Article 33 ensures that the Contracting State concerned cannot send them back. In this respect, therefore, all refugees who present themselves to the authorities can be thought of as claiming asylum, if not expressly, then at least impliedly. Correspondingly, for the purposes of, inter alia, s 31(1)(c), s 167(1) of the 1999 Act defines a "claim for asylum" broadly, as meaning "a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the Claimant to be removed from, or required to leave, the United Kingdom". So a refugee fulfils the requirement in s 31(1)(c) merely by asking the authorities not to remove him or to require him to leave the United Kingdom in breach of the Convention.

[92] It follows that a refugee makes a claim for asylum, if he asks the authorities in a country not to throw him out or return him to the country of persecution, even though he simultaneously tells them that he does not wish to settle in their country, but wants to go on to another country. He is asking for temporary asylum until he can continue on his way. Indeed, any other interpretation of art 31 would be absurd, since it would force refugees to make a claim to settle in the country as a precondition to obtaining impunity for their illegal entry or presence. Yet, a major concern of those negotiating the 1951 Convention was that their governments would find themselves having to take more refugees than they could handle.

[93] Commentators are agreed that the delegates who inserted the requirement for refugees to present themselves without delay to the authorities regarded it as important. Its purpose was to encourage refugees to come forward and regularise their position, rather than eking out an existence in an unlawful twilight world on the fringes of society.



[94] Indeed, the spirit behind the Convention is one of treating refugees humanely, as people having a recognised place in the legitimate world, not as beings who can exist only on the margins and by committing crimes which Contracting States must then ignore. That is why the Convention deals with a whole range of topics which relate to the position of refugees in society: for example, freedom to practise their religion (art 4), personal status (art 12), property rights (art 13), artistic rights and industrial property (art 14), right of association (art 15), access to the courts (art 16), employment (arts 17 and 18), liberal professions (art 19), housing (art 21), public education (art 22), public relief and assistance (art 23) and social security (art 24). The aim behind including these provisions is to ensure that refugees enjoy a measure of dignity.

[95] It is wholly consistent with this scheme that Contracting States need only overlook the initial offence of entering and being present illegally. After they arrive in a safe country, the refugees are to present themselves to the authorities who must then treat them in accordance with the Convention. In that situation the refugees have no justification for committing further offences to escape persecution and are bound by the criminal law, just like anyone else in the country concerned. That is made clear by art 2 “Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.” Section 31(5) of the 1999 Act is consistent with art 2. As Ms Montgomery put it, the Convention was not designed to create an Alsatia where refugees could commit crimes with impunity. So they cannot avoid punishment if they steal food on the pretext that they need it to feed themselves or their children, or if they break into a house to provide themselves or their children with accommodation, or if they use a forged ticket to travel by bus or train to the docks in order to get a ship to another country, or if, to catch a flight, they take a taxi to the airport and run off without paying the fare. In each and all of these situations, art 31 is quite deliberately silent and art 2 applies.

[96] Equally deliberately, art 31 is silent and art 2 applies if refugees reach the departure gate in the Contracting State and present false documents with the intention of travelling to another country in order to claim asylum and settle there. If they present false passports or visas in order to persuade the airline to carry them, they are practising a deception on the airline which could result in it being subject to severe penalties in the destination country, under the equivalent of s 40 of the 1999 Act. Not only would it require clear language to oblige Contracting States to grant refugees immunity from an offence that could have such potential consequences for a third party, but it would be contrary to the philosophy of the Convention. Refugees who are in a safe country and who want to travel on to another country have no more right than anyone else to use criminal means to do so. To suggest otherwise is to treat them as a breed apart, not as legitimate members of society.

[97] The argument at the hearing tended to focus almost exclusively on art 31 – which is actually a relatively minor, if very worthwhile, provision. Far more significant are arts 27 and 28. Article 27 is headed “Identity Papers” and obliges a Contracting State to issue identity papers to any refugee in their territory who does not possess a valid travel document. This article deals with travel within the State in question and amounts to an obligation to provide an identity card where people in that State require one. Article 28(1) deals with documents for travel outside the State and so is more immediately relevant for present purposes:

“The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.”

Under para 7 of the Schedule to the Convention, the Contracting States undertake to recognise the validity of the documents issued in accordance with the provisions of art 28. The Annex to the Convention sets out, in great detail, the terms of the Specimen Travel Document, which must, in particular, include a provision authorising the holder to return to the issuing country within a certain period.

[98] A Study of Statelessness was published by the United Nations in 1949. Despite being directed at the specific problems of stateless persons, the study did much to prompt the adoption of the 1951 Convention and to determine the range of subjects which it covered. Even a quick glance at the study is enough to show the importance which was attached to travel documents at the time. I refer, for instance, to Pt 1, s I, Ch 1 (International Movement, Sojourn and Settlement), s II, Ch 2 (Travel Documents), and s III, Ch 1(1) (Travel, Right of Entry and Sojourn). As the study explained, experience in the years between the World Wars had proved that, unless a refugee had a travel document which not only authorised him to travel to another country but also authorised him to return to the country which issued the document, countries would be reluctant to admit the refugee. They would do so only if they could be confident that, when appropriate, the refugee would be able to return to the country from which he had come and would, therefore, not be stuck in their territory. Article 28 and para 7 of the Schedule were designed to provide just that kind of travel document.

[99] In *The Rights of Refugees under International Law* (2005), p 846, Professor Hathaway aptly summarises the situation produced by art 28 “The net result is to establish a unified regime for international freedom of movement that exists in parallel to the more general passport-based system.” Refugees who do not have a passport are rescued from the need to resort to forgery and deception: they are to be issued with a Convention travel document which allows them to move from country to country. One of the most particular functions of the travel document is to allow refugees “to seek out opportunities for resettlement in a preferred country of asylum”: Hathaway, *The Rights of Refugees*, p 851.

[100] It is unnecessary for present purposes to enquire who, precisely, count as refugees “lawfully staying” in the territory of a Contracting State and who are therefore entitled to a travel document under art 28. What matters is that, under art 28, by contrast with the equivalent provision in earlier conventions, Contracting States may issue these travel documents even to refugees who are not lawfully in their territory. And the travaux préparatoires show that art 28 was drafted in this way precisely to deal with refugees who had just arrived clandestinely in the initial reception country. Hathaway, *The Rights of Refugees*, p 848, quotes the Danish representative, Mr Larsen, as saying at a meeting in January 1950:

“He took as an example the hypothetical case of a German refugee arriving clandestinely in Denmark, without identity papers, and anxious to travel to the United States for family or other reasons. In accordance with paragraph 1 of article 28 as adopted, Denmark would not issue him travel documents, because he did not reside regularly in that country. If, therefore, the real objective was to protect the interests of refugees effectively, it seemed expedient to make some provision whereby Denmark would be able to grant such a refugee a travel document . . . .

He therefore proposed that article 28 should be so amended that the High Contracting Parties would be able to grant travel documents to all refugees in their territory, whatever their status in the eyes of the law, with the sole stipulation that they should not be regularly resident in another country.”

Mr Larsen continued:

“A refugee who arrived in Denmark, for example, and was immediately granted a travel document, could go for a certain period of time to the country where he intended to settle; while there, he could obtain authorisation to reside there regularly. On the other hand, if such a refugee had no freedom of movement but was confined to Denmark owing to the lack of a travel document, it would be very difficult for him to study the possibility of settling elsewhere.”

Mr Larsen's initiative was warmly supported by the representative of the International Refugee Organisation: Hathaway, *The Rights of Refugees*, p 849 n 601.

[101] It is, accordingly, as plain as it is unsurprising that those who drafted the Convention did not overlook the plight of refugees who found themselves in a safe state but wanted to settle in another safe state. On the contrary, they designed a system that would allow refugees to continue their journey lawfully, even though they had no passport. The very last thing that the representatives would have contemplated was undermining this noble and humanitarian initiative by extending the provisions of art 31 to refugees who ignored the system and resorted to criminal means to achieve the same objective. As would be expected, therefore, none of the legislation of countries implementing art 31, which is set out in *E Feller, V Türk and F Nicholson, Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (2003)*, pp 234 – 252, covers anything other than offences relating to entering and being present in the country in question.

[102] The only authority from any jurisdiction which supports the Appellant's proposed interpretation of art 31 as extending to offences committed by refugees when attempting to move on from a safe country is the decision of the Divisional Court in *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667.

[103] One of the Applicants in that case, Mr Sorani, had fled from the Kurdish safe haven in Iraq to Turkey in 1997. Since it was not safe for him to remain there, he had flown from Istanbul to Heathrow on a false Greek passport and, while in transit there, an agent had supplied him with a false Dutch passport and an airline ticket. While checking-in, the same day, for an onward flight to Canada where he had family, Mr Sorani was stopped. When his documents were found to be false, he was arrested and charged. It is unclear whether or not he applied for asylum. He pleaded guilty to the same offences as those on the indictment

against the present Appellant. Mr Sorani's predicament was essentially the same as the present Appellant's, except that the 1999 Act, including s 31, had not yet been enacted and the Appellant did apply for asylum.

[104] Another of the Applicants was Mr Kaziu, an Albanian who, along with his wife, fled to Greece on false Greek passports in 1998. Three days later, they flew to Gatwick, with the intention of travelling on to Canada where they would claim asylum. They successfully gained entry to the United Kingdom at Gatwick. But, the following day, they were discovered to be holding false passports when they attempted to board the plane for Canada at Heathrow. Mr Kaziu did not ask for asylum. He and his wife pleaded guilty to the same charges as Mr Sorani. Again, Mr Kaziu's case was essentially the same as the present Appellant's, except that s 31 of the 1999 Act had not been enacted and the Appellant did apply for asylum.

[105] Since the 1999 Act had not been enacted at the relevant time, the Applicants had to try to rely on art 31 of the Convention itself. Much of Simon Brown LJ's judgment was therefore devoted to deciding whether art 31 could provide them with a defence to an offence under English domestic law and, if so, what form that defence might take. But, in the cases of Mr Sorani and Mr Kaziu, the Divisional Court had also to decide whether art 31 applied to refugees who, having entered the United Kingdom, used false passports in order to travel on to Canada where they wished to claim asylum. The court held that it did.

[106] The court focused on the requirement that, for art 31 to apply, the refugee must have come "directly" from the country where he was in danger. Referring, in general terms, to the travaux, and to "the writings of well respected academics and commentators", Simon Brown LJ held, [2001] QB 667, 678E-F, that:

"any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing."

He pointed out that the UNHCR Handbook on Procedures and Criteria for determining Refugee Status (1992) commented that "It is understood that this term ['coming directly'] also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there." The basis and scope of that understanding are not explained.

[107] In Adimi the Respondents argued that refugees like Mr Sorani and Mr Kaziu did not fall within the scope of art 31 for two reasons. First, since such refugees had entered the United Kingdom with the intention of leaving it again within a short time, they never intended to present themselves to the United Kingdom authorities, least of all "without delay". Secondly, having chosen not to claim asylum here, despite the United Kingdom being a safe country, they would be unable to satisfy the "coming directly" requirement in art 31.

[108] Simon Brown LJ rejected both of the Respondents' arguments, at p 687E-H:

“Neither of these arguments are in my judgment sustainable. If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum, and that a short term stopover en route in a country where the traveller's status is in no way regularised will not break the requisite directness of flight, then it must follow that these Applicants would have been entitled to the benefit of article 31 had they reached Canada and made their asylum claims there. If article 31 would have availed them in Canada, then logically its protection cannot be denied to them here merely because they have been apprehended en route.

I recognise, of course, that even when arrested, Mr Kaziu did not claim refugee status, and that there is a dispute in Mr Sorani's case as to whether he did either. Both, however, were clearly identifiable as passengers who might be eligible for asylum . . . . It is not suggested, moreover, that the making of a claim would have made any difference to the course of events. In my judgment both should have been recognised as refugees within the meaning of article 31 and both should have been exempt from penalty under it.”

I am respectfully unable to agree with the reasoning in this passage.

[109] Nothing in the Convention gives refugees the right to choose where to claim asylum. Mr Fordham emphasised that point on behalf of the High Commissioner. Indeed, the Dublin Convention of 1990 only works because that is the position. It contains an elaborate system for deciding which member state of the European Community should examine the application of an alien for asylum. With a minor exception in art 9, that Convention treats the wishes of the Applicant as irrelevant. So, here, Ms Asfaw had no right to choose to claim asylum in America or to try to exercise such a right by committing offences in the United Kingdom in breach of her duty under art 2 of the Refugee Convention.

[110] Secondly, I have no doubt that a refugee can spend time en route in an unsafe third country and still be regarded as “coming directly” to the receiving country for the purposes of art 31. In 1944 Mr van Heuven Goedhart – who was later the United Nations High Commissioner when the Convention was being negotiated – left the Netherlands on account of persecution, hid in Belgium for five days where he was still under threat, was helped by the Resistance to cross France, went on to Spain and finally reached Gibraltar. When art 31 was being debated, he rightly considered that it would be very unfortunate if a refugee in similar circumstances were penalised for not having proceeded directly to the country of asylum: P Weis, *The Refugee Convention 1951* (1995), p 297. Those agreeing the final terms of the article must have had such cases well in mind. So, in all probability, Mr Sorani's stop in Turkey would not have affected his position under art 31.

[111] It does not follow, however, that the same applies where a refugee stops in a country where he is safe. In such a situation the refugee is no longer in danger of persecution. Rather, he is in a position to take the necessary steps to regularise his position by presenting himself without delay to the authorities. If he intends to do so, but is caught before he can, then he will not be deprived of the benefit of art 31. But where, as in the case of Mr Sorani, Mr Kaziu and Ms Asfaw, the refugee does not present himself to the authorities and has no intention of doing so, the very terms of art 31 show that it does not apply so as to entitle him to immunity from punishment, even for entering and being present in the country illegally.

[112] Moreover, in terms of art 31, what the refugee has to do when he presents himself to the authorities is to advance a good reason to explain why he entered or was in their territory illegally. Suppose that Mr Sorani or Mr Kaziu had reached Canada, had entered using the false passport, but had subsequently presented himself to the appropriate authorities without delay. Although the points are interrelated, assume for the sake of the argument that he could be said to have gone “directly” to Canada. Nevertheless, in order to be entitled to the protection of art 31 against prosecution for his illegal entry and presence in Canada, he would have had to explain why he had good reason to enter or be present illegally. One relevant question which the Canadian authorities might have asked is: why did you not present yourself to the British authorities and, in due course, ask them for a travel document which would have allowed you to enter Canada lawfully? In other words, even if the Canadian authorities had decided to grant them refugee status, Mr Sorani and Mr Kaziu might still not have fallen within the scope of art 31. Entitlement to refugee status and entitlement to impunity under art 31 are different matters and the relevant criteria are different. In these circumstances it cannot be assumed that Mr Sorani and Mr Kaziu would necessarily have been entitled to rely on art 31 in Canada. So the initial premise of Simon Brown LJ's argument – that they could have invoked art 31 in Canada – is not well founded. The conclusion – that they must therefore have been able to invoke art 31 to cover their offences en route in this country – is accordingly not well founded, either.

[113] Furthermore, the requirement for a refugee to present himself to the relevant authorities without delay is quite specifically designed to ensure that refugees regularise their position and obtain official assistance rather than proceeding by illegal stratagems and using the illegal services of shady agents. So a failure to comply with the requirement cannot be brushed aside on the basis that the refugees would have been eligible for asylum in any event.

[114] I would accordingly overrule this aspect of the decision in Adimi. I would further hold that art 31 of the Convention has no application to a refugee, such as Ms Asfaw, who has entered the United Kingdom unlawfully and who then, very shortly afterwards, uses a forged passport to try to leave, in order to travel to another country where she would like to claim asylum and settle. According to the scheme of the Convention, having entered a safe country which is a party to the Convention, she had to obey the laws of that country. If she wanted to travel on to the United States, she had to ask the British authorities for a travel document and had to try to persuade the United States immigration authorities to admit her. If that approach is regarded as unrealistic or as otherwise inappropriate for the world of today, then the necessary change can only be made by the Contracting States agreeing to amend the Convention and, in particular, art 2 – in a way that would profoundly affect its basic philosophy and have a significant impact on the integrity of the criminal law of the States.

[115] That being the position, in my view, s 31(1), (3) and (4) of the 1999 Act are to be interpreted according to the ordinary meaning of the words in their context. Moreover, there is no reason why s 31(3) should have listed the offence under s 1(1) of the Criminal Attempts Act 1981. On the other hand, as I mentioned in para 77 above, I find it hard to understand why the basic offence, of knowingly entering the United Kingdom without leave, under s 24(1)(a) of the Immigration Act 1971, is not listed in s 31(3) or (4). Since the point does not arise in this appeal and it was not fully argued, I simply draw attention to the question.

[116] The criticism which the Court of Appeal made of the approach of the prosecuting authorities was based on the arguments presented to it. I consider that, when the effect of art 31 of the Convention is properly understood, the basis of those criticisms falls away. It is for the prosecuting authorities, in consultation with the immigration authorities, to decide, in the usual way, whether it is in the public interest to prosecute a person in the position of the Appellant and, if so, what the counts should be. Similarly, if the refugee pleads guilty or is convicted after trial, it is for the judge to decide what sentence is appropriate. The Court of Appeal's disposal by way of an absolute discharge in the Appellant's case was based on a misunderstanding of the legal position and cannot therefore be used as a guide in future cases.

[117] For these reasons I would dismiss the appeal. I need not deal with the various other points argued by counsel, since they would arise only if, contrary to my view art 31 applied. Since preparing this speech, I have had the advantage of considering the speech prepared by Lord Mance. I agree with it and am particularly grateful for his compelling analysis of the travaux préparatoires.

LORD CARSWELL:

MY LORDS,

[118] I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. For the reasons which they give, with which I agree, I would allow the appeal and quash the Appellant's conviction on count 2 in the indictment.

LORD MANCE:

MY LORDS,

[119] I have had the benefit of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Rodger of Earlsferry. I need not repeat their account of the factual and legislative background, but can go straight to the central issue raised before the House. This is whether the Appellant was entitled to the protection of art 31(1) of the Geneva Convention and Protocol relating to the Status of Refugees in respect of her attempt, in order to leave the United Kingdom, to obtain services by deception contrary to s 1(1) of the Criminal Attempts Act 1981. On this, I have reached the same conclusion as Lord Rodger, with whose reasoning I also agree.

[120] Article 31, headed "REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE", provides:

"(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.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”

[121] Article 31 therefore gives refugees freedom from penalties on account of their illegal entry or presence, together with freedom to move within and to leave the country of refuge, in each case within limits. The coupling of these two subjects is significant. The drafters of the Convention contemplated that refugees who unlawfully entered a country where they could claim asylum would do so without delay and would then have their situation regularised. Articles 26 and 28 had addressed the position of refugees lawfully within the territory of a Contracting State – art 26 providing that each Contracting State shall accord to such refugees the right to choose their place of residence and move freely within its territory, and art 28 (set out by Lord Rodger in his para 97) providing for the issue to refugees lawfully staying in such territory of travel documents for the purpose of travel abroad, and further providing that “The Contracting States may issue such a travel document to any other refugee in their territory” and “shall in particular give sympathetic consideration to the issue of such a document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence”. Article 27 also provides that “The Contracting States shall issue travel documents to any refugee in their territory who does not possess a valid travel document.”

[122] Under art 31, refugees are only free from penalties “on account of their illegal entry or presence” within the relevant Contracting State's territory, and then only provided three conditions are satisfied: (i) they must have come “directly from a territory where their life or freedom was threatened in the sense of art 1”, (ii) they must have presented themselves without delay to the authorities and (iii) they must show good cause for their illegal entry or presence.

[123] In the present case, the Appellant, Ms Fregenet Asfaw, according to her account, left Ethiopia to avoid further persecution there, flew to London airport Heathrow on an aeroplane which stopped briefly in an unknown Middle Eastern country and, having entered the United Kingdom at Heathrow on one false passport, intended to leave immediately on another false passport and to fly to and enter the United States (presumably illegally on her second false passport) and there claim asylum. Had she achieved that aim, the questions arising in the United States would have been (i) whether she had come directly from a country where her life or freedom was threatened, (ii) whether she had presented herself without delay to the authorities and (iii) whether she had good cause for her illegal entry or presence. One can assume that she would have satisfied condition (ii), but conditions (i) and (ii), which potentially overlap, raise questions of interpretation as well as application.

[124] Let me assume that, in Ms Asfaw's case, an affirmative answer could have been given to all three questions in the United States after she had entered and passed through at least one intermediate state, the United Kingdom. It remains the case that art 31 is not addressing



freedom from penalties in that intermediate state. It does not need to do so. The refugee has, by definition, arrived at his or her final destination. The intermediate state and any question of penalties are irrelevant. The issue which is before the House only arises under art 31 if a refugee detected when seeking illegally to pass through an intermediate transit state is entitled there to invoke the freedom from penalties provided by art 31. Again, any such entitlement would necessarily depend on his or her being able to satisfy conditions (i), (ii) and (iii) (coming directly, presenting without delay and good cause); conditions (ii) and (iii) would present particular problems for a refugee whose aim was to transit the state without claiming asylum and who did not therefore claim asylum until detected trying to leave that state. But, even if those problems could be overcome (as the jury must in the present case have thought that they could be), the refugee would have also to show that any penalty was being imposed "on account of their illegal entry or presence" in the United Kingdom. Where the charge is one of illegal entry or presence, that will be possible; and in the case of some transit passengers in some states that may be the only charge that could lie. But if, in order to leave an intermediate state, a refugee commits a separate offence such as deceiving or attempting to deceive an airline, the question is whether art 31 offers any immunity. There is nothing on the face of art 31 to suggest that it was addressing this situation at all. The issue is whether it is nonetheless implicit in its aims, scope and language that such conduct should be covered by immunity.

[125] The starting point for the interpretation of an international treaty such as the Geneva Convention is the Vienna Convention on the Law of Treaties 1969. Section 3, Interpretation of Treaties, of Pt III contains these relevant provisions:

"Article 31

#### GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

#### SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”

[126] The primary canon is thus interpretation in accordance with the ordinary meaning in context and in the light of the Convention's object and purpose. There is no suggestion in this case of any relevant agreement of other instrument made between any of the Contracting States in connection with or subsequent to the conclusion of the Convention. Nor was there made to the House any explicit suggestion of subsequent state practice establishing the meaning of the parties regarding the Convention's interpretation, although reference was made to views expressed by the United Nations High Commissioner for Refugees and by certain commentators which mention inter alia the practice of “some states”. In many cases these views follow or are joined with a summary of, or a selection of citations from, the negotiations at the Conference of Plenipotentiaries in 1951 leading to the Convention. Details of these negotiations are available on the High Commissioner's website from which the House was given an extract of the final discussions relating to art 31, which took place at the Plenipotentiaries' 35th meeting. Earlier discussions at the 13th and 14th meetings are also of interest. I set out an analysis of the course and effect of the three meetings in an appendix to this judgment. My noble and learned friends, Lord Bingham and Lord Hope, refer to certain aspects. The discussions are potentially relevant under art 32 of the Vienna Convention as supplementary means of interpretation “in order to confirm the meaning resulting from the application of art 31 [of the Vienna Convention], or to determine the meaning when the interpretation according to art 31: (a) leaves the meaning ambiguous or obscure . . . .”

[127] The analysis in the appendix shows that the final text was drawn in order to cater for a particular category of refugees stopping in an intermediate country, identified by the then High Commissioner for Refugees: that is refugees, moving from a country of origin (country A) where they were at risk of persecution as a result of events occurring before 1 January 1951, reaching another intermediate country (country B) where they also found themselves at risk of persecution as a result of events occurring before 1 January 1951 and proceeding as a result to a final destination (country C) where they claimed asylum. Stoppage in intermediate country B was catered for in such circumstances by replacing the original insertion proposed by France (“coming direct from his country of origin”) with the final text “coming directly from a territory where their life or freedom was threatened in the sense of art 1”.

[128] Where the refugee passes through intermediate country B, the “territory” referred to in the final version is thus that of the intermediate country B, not that of the country of origin A. However, the High Commissioner also identified a second category who he would have wished to see catered for: refugees not at risk of persecution in country B, but nevertheless (and, in the case of a country party to the Geneva Convention, wrongly) refused asylum there. During the 14th meeting, all present including the French representative, M Colemar, were prepared to cater for both categories of refugee identified by the High Commissioner (those at risk of persecution in the intermediate state and those refused asylum there). During the final 35th meeting, the French representative, now M Rochefort, was not, it seems, content that the text of art 31 should offer immunity to the High Commissioner's second category. The United Kingdom's representative, Mr (later Sir Samuel) Hoare believed that the amendment proposed but ultimately withdrawn by the United Kingdom (see appendix para 153) would offer additional flexibility in the case of refugees coming through intermediate countries. This was a flexibility that he also believed would be lost if the French amendment was instead accepted, as it was.

[129] Had the United Kingdom's version been accepted, Mr Hoare clearly thought that the phrase “coming directly from the country of his nationality or of former habitual residence” could be interpreted widely enough to cover movement via intermediate countries in a wide variety of circumstances. But the course of negotiations shows that the actual final phrase “coming directly from a territory where their life or freedom was threatened in the sense of art 1” was chosen with reference only to the first category, that is refugees arriving via an intermediate country B provided that their life or freedom had been there threatened; and under the Convention as originally enacted its application was subject, furthermore, to the condition that any such threat arose from events occurring before 1 January 1951. Since the coming into force of the Protocol relating to the Status of Refugees of 31 January 1967, any restriction by reference to “events occurring before 1 January 1951” has gone. But there is some difficulty, in the light of the discussions at the 35th meeting, about treating the word “territory”, in the final phrase “coming directly from a territory where their life or freedom was threatened in the sense of art 1”, as apt to refer both to any intermediate country for the purpose of assessing whether life or freedom was there threatened and, if no such threat could be shown to exist, to the country of origin (country A) for the purpose of considering whether the stay in the intermediate country was a “short” transit period which should be ignored. The difficulty may, however, be capable of being surmounted by treating the refugee as “coming directly” from the original country of persecution in at least some circumstances where there is no more than a transitory stopover in an intermediate country, making it then irrelevant to consider whether there was a risk of persecution in that intermediate country. Some of the flexibility that Mr Hoare believed would be offered by the United Kingdom proposal would then be transposed to the final text as proposed by France, despite Mr Hoare's (and M Rochefort's) belief that it would not be. Such a solution would appear linguistically possible; it is also one that the delegates at the 14th meeting would, it seems, have been content to take, even though at least some of the delegates at the final 35th meeting appear to have thought that the language that they eventually chose marked a retreat.

[130] Since 1951 the position of refugees travelling via intermediate countries has continued to occupy the attention of Contracting States and commentators. A valuable description of

the early position is contained in Atle Grahl-Madsen's work *The Status of Refugees in International Law*, vol I (1966) p 301, para 108 and vol II (1972), at pp 206-207, cited by my noble and learned friend Lord Bingham in para 12. Grahl-Madsen observes that:

“it is important to note that the practice of States in respect of a refugee 'who only passes through the first country of refuge [where they are not threatened with persecution] without any delay or with only a minimum of delay' is more lenient than would be expected on the background of Mr Rochefort's . . . statements”

at the 35th meeting of Plenipotentiaries. Germany, he says, does not penalise refugees travelling via Austria (presumably originating at that date in a country behind the Iron Curtain or from Yugoslavia). Belgium treats a refugee as coming directly if he arrives within a fortnight of leaving his country of origin. In France each case is treated on its merits, according to whether the refugee can show good cause. The United Nations High Commissioner advocates a test looking at whether the refugee has established residence in an intermediate country. A number of countries also concluded *refoulement* agreements in the 1950 and 1960s prohibiting return to an intermediate country unless the refugee had spent at least a fortnight there. Grahl-Madsen's opinion was thus that a refugee “who only passes through the first country of refuge without any delay or with only a minimum of delay” may normally claim the benefit of art 31 in the country where he finally arrives, that this applies “so that a person may actually travel through several countries until he eventually applies for asylum” and that “The implication is that if the refugee had ended his journey in any of the transit countries, he would have been able to invoke art 31(1) there, too.”

[131] In Ch 3.1 of *Refugee Protection in International Law* edited by Feller, Türk & Nicholson, Professor Goodwin-Gill records (at pp 214-215) two occasions on which the UN High Commission for Refugees considered the phenomenon of “irregular” movements by refugees moving from a country in which they had already found protection. He noted that participating States had, while expressing concern, acknowledged that refugees might have justifiable reasons for such action. However, on the first occasion, Executive Committee Conclusion No 15 (XXX) 1979 said only that the authorities of the second country should “give favourable consideration” to an asylum request made in such circumstances where the refugee has left “his present asylum country due to fear of persecution or because his physical safety or freedom are endangered”; and on the second occasion Executive Committee Conclusion No 58 (XL) 1989, after repeating the same statement, added only that:

“It is recognised that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered. Where no such compelling circumstances exist, the use of fraudulent documentation is unjustified . . . .”

Neither Conclusion therefore supports the claim to immunity in the present case; on the contrary, the terms of each suggest that no such immunity was then conceived as existing.

[132] The High Commissioner for Refugees has continued to support a generous approach to asylum claims made in a final destination by a refugee who has transited an intermediate country, as mentioned by Lord Bingham in para 13. The Guidelines issued by the High Commissioner's Office in 1992 and revised in 1999 state that:

“It is understood that this term ['coming directly'] also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its merits.”

As Lord Rodger observes, the basis and scope of this understanding are not explained. Similarly, in a summary and commentary on the Travaux Préparatoires prepared in the 1990s by Dr Paul Weis who played an active role in the work leading to the preparation of the 1951 conference and served as head of the legal division of the Office of UNHCR until retirement in 1967, Dr Weis stated that:

“The term 'coming directly' refers, of course, to persons who have come directly from their country of origin or a country where their life or freedom was threatened, but also the persons who have been in an intermediate country for a short time without having received asylum there.”

Again, no specific basis for this last statement is given. In the light of what is said by Grahl-Madsen, state practice, relevant under art 31(3)(c) of the Vienna Convention, might have been argued to have a potential role. However, neither Grahl-Madsen nor the High Commissioner's Guidelines nor Dr Weis consider to what if any extent the feasibility of claiming asylum in an intermediate country has any role to play.

[133] Chapter 3.1 in *Refugee Protection in International Law* represents the revised final text of what was originally a background paper on art 31 written by Professor Goodwin-Gill for a UNHCR round-table conference in 2001. At p 194 in the revised text appears this passage:

“Refugees are not required to have come 'directly' from their country of origin. The intention, reflected in the practice of some states, appears to be that, for article 31(1) to apply, other countries or territories passed through should also have constituted actual or potential threats to life or freedom, or that onward flight may have been dictated by the refusal of other countries to grant protection or asylum, or by the operation of exclusionary provisions, such as those on safe third country, safe country of origin, or time limits. The criterion of 'good cause' for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account.”

This passage refers only to the practice of “some states” and the intention which it asserts is hard to reconcile with the course of discussions and the ultimate agreement reached at the Plenipotentiaries' conference. It is clear that the Plenipotentiaries did not intend to leave the treatment of passage via intermediate countries to the criterion of “good cause”. The phrase which they inserted and which begins “coming directly . . .” was intended as a further limitation; and the limitation was focused on the first situation identified by Professor Goodwin-Gill, that is passage via a country or territory where the refugee was also subject to an actual or potential threat to life or freedom. However, even Professor Goodwin-Gill's wider approach concentrates attention on onward flight “dictated” by a risk of persecution in the intermediate country, by the refusal by intermediate countries to grant protection or asylum, or by the operation of exclusionary provisions. To that extent, his approach also requires more than a mere voluntary preference or choice to proceed to another destination.

[134] The round-table conference led to conclusions set out at p 255 of Refugee Protection in International law and quoted by Lord Bingham in para 19. The reference to persons “who are unable to find effective protection in the first country or countries to which they flee” covers those at risk of persecution in the intermediate country (though may have been intended also to invoke the second category of refugee of concern to the High Commissioner at the Plenipotentiaries' conference). The further statements that “The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or were settled, temporarily or permanently, in another country” and that:

“The intention of the asylum seeker to reach a particular country of destination, for instance for family reunification purposes, is a factor to be taken into account when assessing whether s/he transited through or stayed in another country”

seem to me to have been aspirational rather than founded on any actual intention on the part of the drafting conference.

[135] Finally, in *The Rights of Refugees under International Law* (2005) by James Hathaway, the author at pp 397-398 footnote 535 cites Dr Weis's statement quoted above, but identifies a decision of an American court (*Singh v Nelson* 623 F Supp 545 (1985)) where, he says, “a misreading of the drafting history led an American court to precisely the opposite conclusion” and an Austrian Administrative Court decision (VwGH 91/19/0187, Nov 25, 1991) which he describes as “equally inattentive to the contextualised meaning of 'coming directly'”. In each decision the court rejected the application of art 31 where the refugee had transited an intermediate state where he was not at risk of persecution. During the course of the hearing before the House, I suggested that there must be jurisprudence on art 31 in other European jurisdictions. I regret that this area was not investigated, even to the extent of producing the Austrian decision mentioned by Hathaway. The commentary *Ausländerrecht* (2005) by Professor Dr Kay Hailbronner pp 28-29 indicates that German jurisprudence has understood the effect of art 31(1) to be that a refugee using an intermediate third country for transit without breaking his journey there (that is without any unjustifiably delayed stay there) would be regarded as “coming directly” from the persecuting state. But the commentary also states that the language and history of art 31(1) speak for an interpretation according to which a person is not to be treated as “coming directly” from a safe third state where the possibility existed of claiming protection from persecution, and that even a temporary factual transit stop in a safe third state in which there existed that possibility, and the possibility if necessary of seeking a visa for onward transit, would exclude the application of art 31(1).

[136] Against this background, I turn to the only authority directly in point put before the House from any jurisdiction. That is the English Divisional Court decision in *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667 (Simon Brown LJ and Newman J). In oral submissions in that case, the Secretary of State (and it would seem the Director of Public Prosecutions) accepted that “whether a person who has come to the UK via another country has come directly is a question of fact and degree” (p 673C-D), and Simon Brown LJ recited further submissions that this would not be the case if the refugee could reasonably have been expected to claim asylum in the intermediate country or, still more restrictively, that “only considerations of continuing safety would justify impunity for further travel” beyond the intermediate country. Simon Brown LJ and Newman J rejected these submissions on the basis that refugees have an element of choice as to where to seek asylum, that this entitles

them to move via an intermediate safe country to a preferred final destination, and that “where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here [ie in an intermediate safe country] or elsewhere, that conduct should be covered by art 31” (p 677G-H).

[137] That a refugee may have some element of choice is undoubtedly true. There may be a range of countries of refuge to which he or she can travel directly from the country of persecution. But that does not mean that a refugee has any entitlement to travel indirectly via an intermediate safe country to a final country of refuge, and still less, to my mind, does it mean that a refugee has any immunity in the event that she or he seeks to achieve this by breaking the law of the intermediate country in order to leave it. The broad aim of art 31(1), with its requirement of “coming directly from a territory where their life or freedom was threatened in the sense of art 1”, was, as pointed out above, to counter any suggestion that refugees have a right to move voluntarily from one safe intermediate country to another and then claim asylum in the latter.

[138] Simon Brown LJ referred in general terms to the travaux préparatoires and the writings of Grahl-Madsen, Goodwin-Gill, Hathaway and Weis as well as the UNHCR publications for the proposition that some element of choice is open to refugees as to where they can properly claim asylum; he concluded that any merely short term stopover en route cannot exclude the protection of art 31 and that the main touchstones by which exclusion from protection should be judged were:

“the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution from which they were fleeing”.

[139] The reference in this passage to an unsafe intermediate third country seems inappropriate, since art 31 was drafted to cater for such a country as the very country from which refugee would be treated as “coming directly”. The other suggested criteria find equally little resonance in the drafting history, although some, though not all, state practice would support the first. What is absent from the discussion in *Adimi* is reference to any responsibility on the part of the refugee to regularise his or her position in the intermediate state and to seek travel papers there, if he or she wishes to move on to another destination. Mr Sorani had arrived from abroad at Heathrow, entered the United Kingdom on a false Greek passport and then sought to leave for Canada on a false Dutch passport (pp 674F-675C). Mr Kaziu had arrived from abroad at Gatwick, and the next day sought to leave for Canada with false documents (p 675C-G). With respect to their cases, Simon Brown LJ's reasoning was again on the basis that “refugees are ordinarily entitled to choose where to claim asylum” (p 687F). Assuming that their “short term stopover en route” would not break the requisite directness of flight, he said (p 687F-G) that:

“it must follow that these Applicants would have been entitled to the benefit of article 31 had they reached Canada and made their asylum claims there. If article 31 would have availed them in Canada, then logically its protection cannot be denied to them here merely because they have been apprehended en route.”

In my view, the suggested logic does not exist and is not supported by either the drafting history or the final text of the Convention.

[140] Standing back from the detail, I agree with Lord Rodger (para 82) that art 31(1) of the Geneva Convention is not on its face concerned with offences committed in order to leave a safe intermediate country for a preferred final destination. Under art 31 of the Vienna Convention and as a matter of general principle, art 31(1) of the Geneva Convention falls to be read in its context and in the light of the Convention's object and purpose. The Convention's "social and humanitarian" aims reflected the United Nations' endeavours "to assure refugees the widest possible exercise of [the] fundamental rights and freedoms" that human beings should enjoy (see the Preamble to the Convention). The drafters were well aware that refugees might have family or other connections (e.g. cultural or linguistic) with countries other than those where they initially arrived from their country of persecution. Hence, as Lord Rodger has explained in greater detail, the detailed provisions for providing refugees with freedom of movement, identity papers and/or travel documents. At the same time, both the travaux préparatoires and the text of the final Convention demonstrate great concern carefully to limit the immunity granted under art 31(1).

[141] On one view, the only situation in which the drafters accepted that a refugee might transit an intermediate country is where that country itself gives rise to a risk of persecution for the refugee (furthermore, prior to 1967 Protocol, only a risk of such persecution arising as a result of events occurring before 1 January 1951). But that, for reasons which I have already discussed, is likely to be too limited an interpretation of art 31(1) – above all in the light of the previous general acceptance at the 14th meeting of Plenipotentiaries that the text should also cater for the High Commissioner's second category of refugee, that is those proceeding to a final destination after being refused asylum in an intermediate country. In its domestic legislation, the United Kingdom has in fact been prepared to accept that a still more generous, though still limited, interpretation and scope should be given to art 31(1). Section 31(2) of the Immigration and Asylum Act 1999 provides that:

"If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, sub-section (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."

My noble and learned friend Lord Hope quotes Lord Williams of Mostyn in the House of Lords during the committee stage of the Bill leading to this Act, as describing the Bill's definition of "coming directly" as a "generous one". But Lord Williams said that in the context of debate on what became s 31(2) of the Act, and the restricted scope of the generosity involved is indicated by Lord Williams' immediately following words:

"There must come a time when an individual has stopped running away – that is the article 31 situation – and has started travelling towards a preferred destination. We have tried to define this in sub-section (2)."

[142] I can accept that under art 31(1) of the Convention, and perhaps particularly under modern conditions, not every transitory stopover should exclude a refugee from the right to asylum in his or her final destination. It may well be possible, without linguistic distortion, to regard a refugee on an aeroplane stopping at an international airport from which passengers



do not have to disembark as coming directly to the country of final destination (see para 129 above). The same is true of a refugee who is required to disembark and remain in the international side of an airport as a transit passenger. The position is less obvious in the case of a refugee who disembarks and enters the intermediate country, before seeking to board the same (or more probably another) aircraft for an onward flight to the country of final destination. At least in the case where that final destination is the United Kingdom, s 31(2) of the 1999 Act demonstrates a view of art 31(1) narrower than that taken by the Divisional Court in *Adimi*.

[143] But, whatever view is taken of the width of the phrase “coming directly” when considering the position of a refugee who has reached his or her final destination (country C), and even if one goes as far in this respect as the Divisional Court did in *Adimi*, it does not follow that art 31(1) provides immunity if such a refugee is apprehended seeking to leave the intermediate country by using false documents to deceive the relevant authorities or airline. Article 2 of the Geneva Convention provides that:

“Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to the measures taken for the maintenance of public order.”

Article 28 (in the case of refugees lawfully within a country) or art 31(2) (in the case of refugees unlawfully entering or present in a country) entitles such refugees to travel documents or facilities. Article 31(1) gives freedom from penalties on account of illegal entry or presence. That connotes freedom from penalties for use of false documents to enter or stay in a country where asylum could be and was claimed. But nothing in its history or language suggests that its drafters contemplated, or that art 31(1) covers or affords immunity in respect of, the use by refugees of illegal means in an unsuccessful attempt to leave an intermediate country, let alone one where such refugees were free both to claim and obtain asylum.

[144] On the contrary, the Plenipotentiaries' discussions were focused on two situations: one, where a refugee was fleeing from an intermediate country in which his safety was threatened, the other where the intermediate country was refusing to grant him asylum – and so no doubt only too keen to speed his departure. In neither situation would provision for immunity in the intermediate country have seemed or been very realistic, and in any event the Plenipotentiaries were addressing contexts where the refugee had successfully moved to a final destination and were dealing with immunity in respect of illegal entry or presence there. It might be suggested that a refugee who had no option but to use false documents to leave an intermediate country where his or her safety was threatened should, if apprehended while attempting to leave, enjoy immunity there on the ground that he or she had acted under necessity (however unrealistic it might be to think that such a country would in fact recognise such an immunity). But there can be no necessity for implying any such immunity in the present case, and moreover it would seem inconsistent with art 2 of the Geneva Convention to do so.

[145] Unlike art 31(1), s 31(1) of the 1999 Act is not expressly limited to offences committed “on account of . . . illegal entry or presence”. But, construed as a whole and in the light of its clear intention to give effect to art 31(1), it should be so understood. I therefore agree with

Lord Rodger (para 115) there was no reason why s 31(3) should have included s 1(1) of the Criminal Attempts Act 1981 in the list of offences which it contains. On the other hand, as he also points out, it is hard to understand why the basic offence of entering the United Kingdom without leave, under s 24(1)(a) of the Immigration Act 1971 is not listed in s 31(3) and (4).

[146] It follows from the above, first, that I would dismiss this appeal and associate myself with Lord Rodger's further remarks in para 116 of his judgment, and, second, that it is also unnecessary for me to deal with the other points argued by counsel which would only arise if art 31 applied.

## APPENDIX

[147] At the start of the 13th meeting on 10 July 1951, the draft of art 26, as what became art 31 was then numbered, omitted any requirement that the refugee should come direct from anywhere, and included only provisos that "he presents himself without delay to the authorities and shows good cause for his illegal entry or presence". France proposed an amendment to insert the words "coming direct from his country of origin"; M Colemar, the French representative, pointed to the example of a refugee who had found asylum in France, and then tried to make his way unlawfully into Belgium, saying that "It was obviously impossible for the Belgium Government to acquiesce in that illegal entry, since the life and liberty of the refugee would be in no way in danger at the time". The President, Mr Hoeg, speaking as representative of Denmark, countered with the example of a Hungarian refugee living in Germany who "might, without actually being persecuted, feel obliged to seek refuge in another country", and suggesting that it was "reasonable to expect that the Danish authorities would not inflict penalties on him for . . . illegal entry" into Denmark in such a case, provided he could show good cause for it. Mr Hoeg was not explicit about what he meant by "obliged to seek refuge" or "good cause" in such a case, but it is significant that he concluded by saying that, if the French amendment was accepted, it would be necessary to replace the additional phrase suggested by the French delegation by the phrase "coming direct from a territory where his life or freedom was threatened". The French were amenable to this suggestion.

[148] Nevertheless, at the next (14th) meeting, the discussion resumed on the French draft amendment "coming direct from his country of origin", which the United Nations Commissioner for Refugees, himself a former refugee, criticised as too narrow. It would not, he pointed out, cover his own case, as a refugee who "in 1944 . . . had himself left the Netherlands on account of persecution and had hidden in Belgium for five days", and, "as he had run the risk of further persecution in that country, . . . had been helped by the resistance movement to cross into France", from which "he had gone on into Spain, and thence to Gibraltar". He concluded that:

"Thus, before reaching Gibraltar, he had traversed several countries in each of which a threat of persecution had existed. He considered it very unfortunate if a refugee in similar circumstances was penalized for not having proceeded direct to the country of asylum",

and it seems reasonably clear (though the transcript omits some words) that he went on to prefer replacement of the words "coming direct from his country of origin" by words such as Mr Hoeg had suggested. He then raised a second problem, that of refugees who fled from a

country of persecution direct to a country of asylum, where however they were refused the right to settle, although that country was a Contracting State, and to suggest that “Such refugees might possibly be covered if the words 'and shows good cause' were amended to read 'or shows other good cause'.”

[149] M Colemar responded to these points by saying that “France was not absolutely opposed to the illegal entry and residence of certain refugees” and was willing to consider inserting, instead of the phrase it had suggested, words such as “having been unable to find even temporary asylum in a country other than the one in which his life or freedom would be threatened”. He said that “Such a change would meet the points which were causing the High Commissioner concern”. The United Kingdom representative, Mr Hoare, wondered whether the original text “did not allow countries like France, which received refugees in great numbers, sufficient latitude”, while also covering the fact that “as the High Commissioner had pointed out, there might be cases where a refugee could show good cause even though he had not fled direct from a country where his life was endangered”. The French representative insisted that he must press his amendment, referring to the difficulty of defining the reasons which could be regarded as constituting good cause, and saying that it was “precisely on account of that difficulty that it was necessary to make the wording of para 1 more explicit”, and that:

“To admit without any reservation that a refugee who had settled temporarily in a receiving country was free to enter another, would be to grant him a right of immigration which might be exercised for reasons of mere personal convenience. It was normal in such cases that he should apply for a visa to the authorities of the country in question.”

[150] The Belgian representative wondered whether inability to find asylum in an intermediate state would be considered as sufficient alone to constitute “good cause”. The High Commissioner expressed the contrary opinion that the French representative's latest suggestion would protect both the categories of refugee to whom he had referred. The United Kingdom expressed reservations about the onus of proof imposed on a refugee by the French proposal. The Belgian representative asked what was meant by “temporary asylum” and whether a Contracting State would be “able to impose penalties on a refugee who had stayed in another country for a week or a fortnight, and had then been obliged to seek asylum in the territory of the Contracting State in question”, and he later proposed that the French draft be altered by replacing the phrase “having been unable to find” with “being unable to find”, so as not to exclude “any refugee who had managed to find a few days' asylum in any country through which he had passed”. The discussion concluded by voting on and accepting this (with very minor modification) in the form “being unable to find asylum even temporarily in a country other than the one in which his life or freedom would be threatened”.

[151] By the time of the final meeting on this topic on 25 July 1951, the High Commissioner had had second thoughts about this insertion. He observed that:

“Although aware that that provision had been inserted in order to limit exemption from penalties to refugees who came to the receiving country from the country of persecution direct, or through another in which, for one reason, or another, they were unable to stay, he did not feel that the words he had quoted met that requirement. They would place on the

refugee the very unfair onus of proving that he was unable to find even temporary asylum anywhere outside the country or countries in which his life or freedom would be threatened. As there some eighty States in the world, the difficulty of such a task required no emphasis. His personal view was that the words 'show good cause for his illegal entry or presence' covered the point, but since the general feeling of the Conference seemed to be that some specific provision was necessary, he suggested that paragraph 1 [of the original draft] be amended . . ." [ie so as to conclude "and shows good cause for believing that his illegal entry or presence is due to the fact that his life or freedom would otherwise be threatened"].

[152] M Rochefort, now representing France, said that France:

"wished to avoid having to accept any refugee from a neighbouring country who voluntarily decided to move to France, perhaps on the pretext that the neighbouring country concerned would no longer give him permission to reside there".

The United Kingdom and the President supported the High Commissioner's amendment, the latter saying that, as regards:

"the imposition of punishment on refugees for clandestinely crossing the frontier, . . . there he thought there had been no objection to the High Commissioner's interpretation, namely, that the refugee's illegal entry or presence must be proved to be due to the fact that his life [or] freedom would otherwise have been threatened",

an interpretation which the High Commissioner immediately confirmed. At this point, M Rochefort identified a different concern arising from the fact that the Geneva Convention as originally negotiated and agreed was limited to persecution occurring before 1 January 1951. The revised wording would, he observed, bind France to accept a refugee who had left his country of origin for a neighbouring country due to such an event occurring prior to 1 January 1951, and whose life had then been threatened in that neighbouring country by events occurring after 1 January 1951. The Swedish delegate noted that a threat to freedom in the neighbouring country might not involve persecution at all; it might for example be a threat of imprisonment for theft.

[153] To meet the French point, Mr Hoare suggested the insertion of the phrase "coming directly from the country of his nationality or of former habitual residence", those being he noted the words used in para A of art 1. M Rochefort, not surprisingly, observed that this insertion would be almost word for word that which the French amendment had proposed at the 14th meeting, but that An intermediate formula had been suggested, namely "arriving directly from a territory where their life or liberty was threatened"; this he suggested would also be in accordance with art 1 and might be acceptable. The High Commissioner enquired whether the United Kingdom suggestion meant that only a refugee who came direct from his country of nationality or habitual residence would be covered, and that a "refugee who, coming from a country of persecution, entered a country after transit through a second country in which he had succeeded in hiding or which had refused him refuge, would be excluded". In other words, he raised, once again, the two points he had raised at the outset of the 14th meeting. Mr Hoare replied that he had intentionally made his suggestion restrictive. He would have liked to propose one of wider application, but said that:

“since the French representative was unwilling to agree that refugees entering from intermediate countries should be included, he had limited the scope of his text accordingly. He would however be willing to broaden it if that was possible.”

The High Commissioner responded by pointing out that his suggestion had not been to broaden or narrow the article, but to relieve the refugee from the burden of proof that no country in the world was prepared to accept him, and that neither his own text nor the one now before the meeting (ie presumably the United Kingdom's) met the French representative's point (ie regarding events occurring after 1 January 1951). M Rochefort said that the High Commissioner's explanation put the whole problem squarely before the meeting:

“Did the simple fact that a refugee, having left a country in which he had been persecuted, failed to obtain asylum in another, impose upon a third country the obligation of receiving him without having the right to impose penalties? Each country had to accept its frontier responsibilities, but the fact that an intermediate country refused to face its own could not deprive a third country of the right to take precautions against illegal entry.”

He then suggested an insertion reading “coming directly from a territory in which his life or freedom would be threatened within the meaning of art 1, para A, of this Convention”. This, as matters transpired, mirrored in effect, and very closely in wording, the final text of art 31.

[154] There was a further round of discussion before the final text was agreed. The President proposed to put before the meeting the High Commissioner's amendment sponsored by the United Kingdom, followed by the amendment introduced by the French. M Rochefort reiterated that he could not agree to the United Kingdom amendment, but suggested that the French amendment be amended by replacing the words “country of origin” with the words “country in which he is persecuted”. Mr Hoare agreed to withdraw the United Kingdom amendment, although he considered that it amply covered the French representative's difficulties and was:

“more flexible, inasmuch as it left to the Government of the country in question the decision whether the refugee had no alternative to entering the country other than endangering his life and liberty by remaining in the first country. The United Kingdom amendment made it possible to follow the general principle of the article, and at the same time allowed for a certain amount of flexibility in the case of refugees coming through intermediate countries, while still not obliging any State to accept the latter category when there was insufficient cause for their having chosen to enter its territory clandestinely.”

He said that he could not vote for the French amendment, and evidently thought that the definition of refugee already agreed in art 1 covered “a refugee [who] left a country after narrowly escaping persecution, but without having actually been persecuted”. M Rochefort indicated that this point could be met (as it was in the final text), but that:

“As a country of second reception, however, [France] could not bind itself to accept refugees from all the other European countries of first reception. There had to be some limit such as that of events occurring before 1 January 1951.”

The United Kingdom amendment having been withdrawn, a revised version in the form of the final text of art 31(1) was voted on and agreed.

Judgment accordingly.

## 2. R v Uxbridge Magistrates' Court and Another ex parte Adimi [2001] QB 667 (Adimi)

**Regina v Uxbridge Magistrates' Court and Another**  
**Regina v Crown Prosecution Service**  
**Regina v Secretary of State for the Home Department**  
**Regina v Secretary of State for the Home Department and Another**

Queen's Bench Division

29 July 1999

[2000] 3 W.L.R. 434

[2001] Q.B. 667

Simon Brown LJ and Newman J

1999 July 13, 14, 15; 29

*Immigration—Illegal entrant—Application for asylum—Applicants carrying false documents on arrival in United Kingdom—Applicants arriving after third country transit or using United Kingdom as transit to another country—Delay in seeking asylum after arrival in United Kingdom—Applicants prosecuted for possession of false documents—Whether protected from prosecution—Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906), art 31*

The three applicants, A, S and K, came to the United Kingdom at different times as asylum seekers. To evade the restrictions imposed by visa requirements and the consequences of carrier liability on their right to seek asylum, all were in possession of false passports and were prosecuted for possession or use of false documents contrary to section 5 of the Forgery and Counterfeiting Act 1981 or for attempting to obtain air services by deception contrary to section 1(1) of the Criminal Attempts Act 1981. A came via Italy, where he had spent 10 days but he made his application for asylum upon arrival in the United Kingdom. S came directly to the United Kingdom intending to fly on to Canada and (although it was disputed by the Secretary of State) claimed to have applied for asylum on being detained for document irregularities at Heathrow airport. K came to the United Kingdom via Greece, where he had stayed for three days. He also intended to fly on to Canada but was stopped at Heathrow. His claim for asylum was made more than seven weeks after his arrival. A was eventually granted asylum but the claims for asylum of the other applicants remained undetermined. A applied for judicial review of the decision to prosecute him and of a stipendiary magistrate's refusal to grant a temporary stay of his prosecution pending determination of his asylum claim. S and K applied for judicial review of decisions to prosecute in their cases and of the policy of prosecuting the holders of false papers even when they were claiming asylum and, in S's case, of a refusal to allow an asylum claim to be made until after prosecution for the documents offence. In each case, the grounds relied on included the prohibition in article 31(1) of the Convention and Protocol relating to the Status of Refugees<sup>1</sup> on the imposition of penalties against illegal entrants who came directly from a place of persecution, presented themselves without delay to the authorities and showed good cause for their illegal entry or presence.

On the applications—

Held, granting the applications, (1) that the self-evident purpose of article 31(1), broadly construed in the light of the Convention as a whole, was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching domestic law; that where illegal entry, use of false documents or delay could be \*668 attributed to a bona fide desire to seek asylum, whether in the United Kingdom or elsewhere, that conduct should be covered by article 31(1); that the requirements to come directly and to present himself without delay did not preclude a refugee from exercising some element of choice as to where and when he claimed asylum and the exercise of such choice was not to be characterised as forum shopping; and that, accordingly, neither a short term stopover en route to such intended sanctuary, nor a failure to present his claim immediately upon arrival,

should justify a refugee's forfeiting the protection of article 31 where good cause was made out (post, pp 677G-678F, 679C-D, 688B-C).

(2) That, in the absence of incorporation of article 31(1) of the Convention into domestic law, the United Kingdom's accession to the Convention nevertheless created a legitimate expectation in the minds of asylum seekers that they would be accorded the immunity from penalty conferred by article 31(1) in the circumstances indicated; that the obligation of meeting that expectation fell on the Secretary of State for the Home Department as representing the executive arm of state and not on either the Director of Public Prosecutions or the courts; and that, therefore, it was for the Secretary of State to institute a policy appropriate to meet that obligation and against him that relief should be sought in respect of any alleged contravention (post, pp 684A-E, 686C-E, 688B-C, 691D-F, 692D-E).

*R v Secretary of State for the Home Department, Ex p Ahmed* [1998] INLR 570, CA applied. *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, HL(E) considered.

(3) That whether or not A travelled through Italy, and whether he claimed asylum on the night of his arrival or not until the following morning, he satisfied the conditions both of coming directly to the United Kingdom and of presenting himself without delay within the meaning of article 31(1); that, in the cases of S and K, the fact that when found to be in possession of false papers they were transit passengers intending to fly on to Canada and did not intend to present themselves as asylum seekers in the United Kingdom did not preclude them from the benefit of article 31(1); that, therefore, none of the applicants should have been prosecuted; but that in the circumstances, and given the respondents' evident intention of ensuring the future application of article 31(1), it would not be appropriate to grant substantive or declaratory relief (post, pp 686H-687B, 688C-E, 696H-697B).

*Per* Simon Brown LJ. The Secretary of State rather than the Crown Prosecution Service should assume responsibility for deciding when asylum seekers should be prosecuted in this class of case. Decisions should depend more upon considerations arising out of the proper administration and control of immigration and asylum than upon the need to suppress and punish criminal activity generally. Provided that the respondents henceforth recognise the true reach of article 31 and put in place procedures to ensure that those entitled to its protection are not prosecuted, at any rate to conviction, for offences committed in their quest for refugee status, the abuse of process jurisdiction is able to provide a sufficient safety net for those wrongly prosecuted (post, p 684A-E).

*Per* Newman J The protection contemplated by article 31 is, if afforded, in the nature of a pardon or grant of immunity from suit. Such relief lies with the executive to grant and is not within the class of immunity granted by the Director of Public Prosecutions. A legitimate expectation that the executive will consider whether to afford protection requires no request from the refugee for the duty upon the Secretary of State to consider the position to arise. He should do so whenever the facts disclosed to him give rise to an arguable case for consideration. His decision will be capable of challenge by judicial review, but if protection is not accorded, subject only to any defence of necessity or duress, the refugee can only raise the facts in mitigation (post, p 696C-E).

#### **\*669**

The following cases are referred to in the judgments:

- *Adan v Secretary of State for the Home Department* [1999] 1 AC 293; [1998] 2 WLR 702; [1998] 2 All ER 453, HL(E)
- *Attorney General of Trinidad and Tobago v Phillip* [1995] 1 AC 396; [1994] 3 WLR 1134; [1995] 1 All ER 93, PC
- *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273
- *Phillip v Director of Public Prosecutions* [1992] 1 AC 545; [1992] 2 WLR 211; [1992] 1 All ER 665, PC
- *R v Abdul-Hussain* [1999] Crim LR 570, CA
- *R v Boyes* (1861) 1 B & S 311



- *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 ; [1999] 3 WLR 175 ; [1999] 4 All ER 801, DC
- *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42; [1993] 3 WLR 90; [1993] 3 All ER 138, HL(E)
- *R v Ministry of Defence, Ex p Smith* [1996] QB 517; [1996] 2 WLR 305; [1996] 1 All ER 257, CA
- *R v North and East Devon Health Authority, Ex p Coughlan* [2000] QB 213; [2000] 2 WLR 622, CA
- *R v Secretary of State for the Home Department, Ex p Ahmed* [1998] INLR 570, CA
- *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514; [1987] 2 WLR 606; [1987] 1 All ER 940, HL(E)
- *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839; [1997] 3 All ER 961, HL(E)
- *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958; [1988] 2 WLR 92; [1988] 1 All ER 193, HL(E)
- *Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)
- *Rex v Rudd (1775)* 1 Cowp 331
- *Thomas v Baptiste* [2000] 2 AC 1; [1999] 3 WLR 249, PC

The following additional cases were cited in argument:

- *Attorney General's Reference (No 1 of 1990)* [1992] QB 630; [1992] 3 WLR 9; [1992] 3 All ER 169, CA
- *Khaboka v Secretary of State for the Home Department* [1993] Imm AR 484, CA
- *R v Blandford Justices, Ex p G (An Infant)* [1967] 1 QB 82; [1966] 2 WLR 1232; [1966] 1 All ER 1021, DC
- *R v Boal* [1992] QB 591; [1992] 2 WLR 890; [1992] 3 All ER 177, CA
- *R v Chief Constable of Kent, Ex p L* [1993] 1 All ER 756, DC
- *R v Derby Crown Court, Ex p Brooks* (1984) 80 Cr App Rep 164, DC
- *R v Martin (Alan)* [1998] AC 917; [1998] 2 WLR 1; [1998] 1 All ER 193, HL(E)
- *R v Secretary of State for the Home Department, Ex p Jahangeer* [1993] Imm AR 564
- *R v Secretary of State for the Home Department, Ex p Mehari* [1994] QB 474; [1994] 2 WLR 349; [1994] 2 All ER 494
- *R v Secretary of State for the Home Department, Ex p Yassine* [1990] Imm AR 354

The following additional cases, although not cited, were referred to in the skeleton arguments:

- Akram (No 585 of 1993) UNHCR Refworld Database, Court of First Instance, Criminal Cases, Greece
- Appiah v New Zealand Police (unreported) 10 June 1997, High Court, Auckland
- *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; [1947] 2 All ER 680, CA
- Colman v Minister of Foreign Affairs (No 7330) UNHCR Refworld Database, Council of State
- *Foster (P) (Haulage) Ltd v Roberts* [1978] 2 All ER 751, DC \*670
- *Fothergill v Monarch Airlines Ltd* [1981] AC 251; [1980] 3 WLR 209; [1980] 2 All ER 696, HL(E)
- *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; [1981] 3 WLR 906; [1981] 3 All ER 727, HL(E)
- *R v Agar* [1990] 2 All ER 442, CA
- *R v Durham Quarter Sessions, Ex p Virgo* [1952] 2 QB 1; [1952] 1 All ER 466, DC
- *R v Elmbridge Borough Council, Ex p Activeoffice Ltd* The Times, 29 December 1997, DC

- *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629; [1999] 2 WLR 1015; [1999] 2 All ER 545, HL(E)
- *R v Inland Revenue Comrs, Ex p Allen* [1997] STC 1141
- *R v Latif* [1996] 1 WLR 104; [1996] 1 All ER 353, HL(E)
- *R v Naillie* [1993] AC 674; [1993] 2 WLR 927; [1993] 2 All ER 782, HL(E)
- *R v Panel on Take-overs and Mergers, Ex p Fayed* [1992] BCLC 938, CA
- *R v Secretary of State for the Home Department, Ex p Adan* [1999] INLR 362, CA
- *R v Secretary of State for the Home Department, Ex p Akdogan* [1995] Imm AR 176
- *R v Secretary of State for the Home Department, Ex p Cokezici* [1994] Imm AR 224
- *R v Secretary of State for the Home Department, Ex p Lika* (unreported) 20 May 1999, Keene J
- *R v Secretary of State for the Home Department, Ex p Robinson* [1998] QB 929; [1997] 3 WLR 1162; [1997] 4 All ER 210, CA
- *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1990] Imm AR 80
- *R v Secretary of State for the Home Department, Ex p Swati* [1986] 1 WLR 477; [1986] 1 All ER 717, CA
- *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407; [1997] 3 WLR 23; [1997] 3 All ER 97, HL(E)
- *R v Telford Justices, Ex p Badhan* [1991] 2 QB 78; [1991] 2 WLR 866; [1991] 2 All ER 854, DC
- Ryo Kan-ei (6 December 1982), UNHCR Refworld Database, High Court, Tokyo
- Salim (No 233 of 1993) UNHCR Refworld Database, Court of First Instance, Criminal Cases, Greece
- Secretary of State for the Home Department v Thirukumar [1989] Imm AR 402, CA
- Shukri v Provincial Police Headquarters of Rome (31/2/92-103/92) UNHCR Refworld Database, Lazio Regional Administrative Court, Section 1
- *T v Secretary of State for the Home Department* [1996] AC 742; [1996] 2 WLR 766; [1996] 2 All ER 865, HL(E)
- *Vilvarajah v Secretary of State for the Home Department* [1990] Imm AR 457, CA

APPLICATION for judicial review

### **Regina v Uxbridge Magistrates' Court and another, Ex p Adimi**

By an amended notice of application for leave to apply for judicial review dated 25 November 1998 the applicant, Chouki Adimi, applied for judicial review by way of certiorari to quash the decision of Stephen Day, a stipendiary magistrate sitting at Uxbridge Magistrates' Court, to refuse a stay of his prosecution for possession of false documents contrary to section 5(2) of the Forgery and Counterfeiting Act 1981, and to quash the decision of the Crown Prosecution Service to undertake the prosecution. The grounds upon which relief was sought were that the decision to prosecute violated article 31 of the Convention and Protocol relating to the Status of Refugees (1951) and (1967); that the Convention should have been taken account of notwithstanding its incomplete incorporation into English municipal law; that the applicant came to the United Kingdom sufficiently **\*671** directly to benefit from article 31; and that the applicant's claim for asylum not having received adjudication, it was contrary to natural justice to allow criminal proceedings to take precedence over it.

### **Regina v Crown Prosecution Service, Ex p Sorani**

By notice of application for leave to apply for judicial review dated 6 August 1998 the applicant, Dylan Sorani, applied for judicial review by way of certiorari to quash the decision of the Crown Prosecution Service to prosecute the applicant for possessing a false passport with the intention of using it contrary to section 5(1) of the Forgery and Counterfeiting Act 1981 and for attempting to obtain air transport services contrary to section 1(1) of the Criminal Attempts Act 1981. The applicant also claimed declaratory relief. The grounds upon which relief was sought were that the decision to prosecute had been made contrary to article 31 of the Convention relating to the Status of Refugees and that it was contrary to

natural justice for the Crown Prosecution Service, knowing of the applicant's aspiration to obtain asylum, to allow a criminal matter to take precedence over his asylum application.

**Regina v Secretary of State for the Home Department, Ex p Sorani**

By notice of application for leave to apply for judicial review dated 3 August 1998 the applicant, Dylan Sorani, applied for judicial review by way of declarations that the decision of an immigration officer on 16 August 1997, refusing to accept the applicant's asylum application, and the policy of the Secretary of State for the Home Department of prosecuting asylum seekers for carrying false documents, were unlawful. The grounds upon which relief was sought were that by refusing to hear the asylum application the Secretary of State had breached paragraph 328 of the Statement of Changes in Immigration Rules (1994) (HC 395); that the Secretary of State's action and policy were contrary to the Convention relating to the Status of Refugees, and that the immigration officer had acted irrationally and ultra vires.

**Regina v Secretary of State for the Home Department, Ex p Kaziu**

By amended notice of motion, dated 25 May 1999, the applicant, Astrit Kaziu, applied for judicial review by way of certiorari to quash the decision of the Secretary of State for the Home Department not to facilitate the applicant's asylum application and the Secretary of State's policy of not preventing the prosecution of asylum seekers, and to quash the decision of the Crown Prosecution Service to prosecute the applicant for possessing a false passport with the intention of using it contrary to section 5(1) of the Forgery and Counterfeiting Act 1981 and for attempting to obtain air transport services contrary to section 1(1) of the Criminal Attempts Act 1981. The applicant also claimed declaratory relief. The grounds upon which relief was sought were that the purpose of the convention was to offer surrogate protection by declaratory rather than constitutive relief; that the purpose of article 31 of the Convention relating to the Status of Refugees was to ensure that people should not be prosecuted merely for being forced to flee and that, accordingly, the Crown Prosecution Service should take account of the Convention before making their decision as to prosecution.

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The facts of all four applications are stated in the judgment of Simon Brown LJ.

*Frances Webber* for Mr Adimi. The travaux préparatoires and the writings of commentators (see, in particular, Grahl-Madsen, *The Status of Refugees in International Law* (1972), vol II, p 203) show that a restrictive meaning of "coming directly" in article 31 could not have been intended by the signatories of the Refugee Convention. The use of false documents to obtain entry is illegal in the sense of article 31 but is not to be penalised. Because of visa requirements and carriers' liability it makes no sense to treat those with false documents as outside the effect of article 31. The term "without delay" in article 31 is intended to include only those who took no steps to regularise their position: see *Grahl-Madsen*, p 218. Article 31 is to be treated as part of UK law by operation of the doctrine of legitimate expectation: see *R v Secretary of State for the Home Department, Ex p Ahmed* [1998] INLR 570; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 and *R v Director of Public Prosecutions, Ex p Kebilene* [2001] 2 AC 326. The prosecution of Mr Adimi would be an abuse and should be struck out: see *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42; *Attorney General of Trinidad & Tobago v Phillip* [1995] 1 AC 396; *Phillip v Director of Public Prosecutions* [1992] 1 AC 545; *R v Boyes* (1861) 1 B & S 311 and *R v Martin (Alan)* [1998] AC 917.

*Stephanie Harrison* for Mr Sorani. The Convention is to be considered a part of domestic law because of the decision in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958 and should be construed in a broad and purposive manner: see *Adan v Secretary of State for the Home Department* [1999] 1 AC 293.

Article 31 should be treated as operative within the English jurisdiction by warrant of legitimate expectation: see *Thomas v Baptiste* [2000] 2 AC 1. The ordinary criminal code is not sufficient to provide article 31 protection: see *R v Abdul-Hussain* [1999] Crim LR 570.

Prosecution for document irregularity is an abuse of process: see *R v Rudd* [1775] 1 Cowp 331 . Only those whom the law truly intended to punish should be prosecuted for offences: see *R v Boal* [1992] QB 591 .

Notwithstanding that asylum cases are primarily administrative matters for the Secretary of State (see *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514 ) the refusal to entertain an asylum application may be quashed.

*Raza Husain* for Mr Kaziu. The court has jurisdiction to review a decision to prosecute: see *R v Chief Constable of Kent, Ex p L* [1993] 1 All ER 756 . A conviction which contravenes the Convention's provisions is a nullity: see *R v Blandford Justices, Ex p G* [1967] 1 QB 82 . Criminal proceedings should be stayed where the accused would be deprived of a protection afforded by law or where a fair trial is no longer possible: see *R v Derby Crown Court, Ex p Brooks* (1985) 80 Cr App Rep 164 .

The Convention is intended to ensure the protection of those declared to have refugee status: see *Khaboka v Secretary of State for the Home Department* [1993] Imm AR 484 . Mr Kaziu came to Britain sufficiently \*673 directly to be protected by article 31. Greek asylum procedures have been criticised by the UNHCR and he should not be expected to have made his claim in that jurisdiction. The Convention is de facto incorporated into English law. It could not be said of Mr Kaziu that he had failed to present himself without delay since he was a transit passenger waiting to fly on.

*Steven Kovats and Sam Grodzinski* for the Secretary of State. Article 31 of the Convention is not part of English law as it has only been incorporated in part: see *R v Secretary of State for the Home Department, Ex p Mehari* [1994] QB 474 and *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 , 499. In any event, article 31 can only refer to persons who claim asylum in good faith: see *R v Secretary of State for the Home Department, Ex p Jahangeer* [1993] Imm AR 564 .

It is possible that article 31 applies to people who travel with false papers: see *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839 and *R v Ministry of Defence, Ex p Smith* [1996] QB 517 . Whether a person who has come the UK via another country has come directly is a question of fact and degree. Generally, an asylum seeker should satisfy the delay test under article 31 by presenting himself at passport control. [Reference was made to *R v Secretary of State for the Home Department, Ex p Yassine* [1990] Imm AR 354 and *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 .]

*David Perry* for the Director of Public Prosecutions. It is for the accused to show that a particular prosecution is an abuse: see *Attorney General's Reference (No 1 of 1990)* [1992] QB 630 .

Article 31 requires that an asylum seeker should present himself without delay at passport control. If he fails to do so and is then found at passport control with false documents he can be prosecuted. The prosecution of false document cases is not a matter for the Secretary of State, but for the Crown Prosecution Service and the police.

*Cur. adv. vult.*

29 July. The following judgments were handed down. SIMON BROWN LJ

The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. Escapes from persecution have long been characterised by subterfuge and false papers. As was stated in a memorandum from the Secretary-General of the United Nations in 1950:

"A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge."

Thus it was that article 31(1) found its way into the Convention and Protocol relating to the Status of Refugees (1951) and (1967) ("the 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 \*674 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."

The need for article 31 has not diminished. Quite the contrary. Although under the Convention subscribing states must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents. Just when, in these circumstances, will article 31 protect them? The precise ambit of the impunity lies at the heart of these challenges. Each of these three applicants has fled from persecution in his home country. Each has been prosecuted for travelling to, or attempting to travel from, the United Kingdom on false papers. Each now claims to have been wrongly denied the protection conferred by article 31. The following brief summary of the individual cases must suffice.

Mr Adimi is an Algerian aged 31 who on 1 October 1997 fled Algeria in fear of persecution by the GIA, an Islamic terrorist group. On 27 November 1997 he arrived at Heathrow by air from France (having, he says, reached France from Italy on 16 November) with a false Italian passport and identity card. The immigration officer was not deceived by these documents and Mr Adimi was refused leave to enter. He then claimed asylum (whether that night or the following morning is in dispute) but, that notwithstanding, he was arrested and charged. Initially he was charged under section 5(1) of the Forgery and Counterfeiting Act 1981 (possession of false documents with intent, maximum sentence 10 years) but later those charges were replaced by charges under section 5(2) of the Act (simple possession, maximum sentence two years). Unusually, as it appears, perhaps even uniquely, those representing Mr Adimi recognised the possibility of invoking article 31 and on 24 January 1998 his case was adjourned for legal argument. On 15 April 1998, however, the stipendiary magistrate at Uxbridge refused his application for a stay and this challenge followed. Shortly afterwards the Secretary of State recognised Mr Adimi as a refugee and granted him indefinite leave to enter. The Crown Prosecution Service nonetheless propose to continue the prosecution against him.

Mr Sorani is an Iraqi Kurd from the Kurdish safe haven in Northern Iraq. He is a 27-year-old accountant and claims to have been detained and tortured by the Iraqi authorities because of his political opinions. Support for his account is to be found in a report from the Medical Foundation for the Care of Victims of Torture. He says that he fled Iraq for Turkey on 15 June 1997 and, it being unsafe for him to remain there, arranged to travel to Canada where he has family. His case is that on 16 August 1997 he flew from Istanbul to Heathrow on a false Greek passport and, whilst in transit here, was provided by an agent with a false Dutch passport and an airline ticket. This ticket was purchased in the United Kingdom on 14 August and, in large part because of this, the respondents reject the applicant's account and believe that he had spent some time in the United Kingdom rather than flown in on 16 August. At all events, whilst checking in that day for the onward flight to Canada, he was stopped by airline officials and, his documents being found to be false, he was arrested and charged. On \*675 18 August he pleaded guilty at the Uxbridge Magistrates' Court to two offences: possession of the false Dutch passport with intent to use it as genuine, contrary to section 5(1) of the 1981 Act, and attempting to obtain air transport services by deception, contrary to section 1(1) of the Criminal Attempts Act 1981. He was sentenced to two concurrent terms of three months' imprisonment. He claims that as soon as he realised that he would be unable to travel on to Canada he made it plain to an immigration officer that he was an asylum seeker but that the officer refused to entertain his claim. The Secretary of State does not accept this but acknowledges that in any event it is likely the police would still have charged him with a passport offence. Following his release from Wormwood Scrubs on 30 September 1997, the applicant through solicitors made a formal application for asylum. Despite having been interviewed on 22 October 1997, his claim remains undetermined.

Mr Kaziu is a 27-year-old Albanian who, until President Berisha's Democratic Party's fall from power in 1997, was the president's second bodyguard. He says that in September 1998 he discovered that he was wanted by the police for organising a military uprising against the new regime. On 18 December 1998 he and his wife, aged 20, fled to Greece on false Greek passports and then, three days later, came to England. They were intending to travel on to Canada to claim asylum there. On 21 December they successfully gained entry at Gatwick but, the next day, whilst attempting to board an aircraft at Heathrow for the onward flight to Canada, were discovered to be holding false documents and were promptly arrested and charged. On 23 December 1998 each pleaded guilty at Uxbridge Magistrates' Court to the same two charges as Mr Sorani had faced. In their case, however, the sentences imposed were ones of six months' imprisonment. Mr Kaziu accepts that he made no claim for asylum until 15 February 1999. He asserts, however, that the authorities had sufficient information to recognise his eligibility for refugee status, and points out that in any event an immigration officer, Mr Murphy, to whom he spoke on the night of his arrest, has deposed to saying to him that, "he should go to the Home Office after the police and courts had dealt with him. As a Kosovan I assumed he would claim asylum." He was not, of course, a Kosovan but that apparently had been the officer's understanding. At all events, on 9 April 1999, about a fortnight after their release from prison, Mr and Mrs Kaziu submitted through solicitors a self-completion questionnaire in connection with their asylum claim. It remains undetermined. As I understand the essential challenges before the court, they are these: (1) A challenge by Mr Adimi to the Crown Prosecution Service's decision to continue the prosecution against him (a) once it became clear that the Secretary of State had accepted responsibility for determining his asylum claim, and a fortiori (b) now that asylum has been granted. (2) A challenge by Mr Adimi to the magistrate's refusal to grant a temporary stay of the prosecution pending the Secretary of State's determination of his asylum claim. (3) A challenge by Mr Sorani to what he contends was the immigration officer's refusal to allow him to claim asylum until after the prosecution had taken its course. (4) Challenges by Mr Sorani and Mr Kaziu to the Crown Prosecution Service's decisions to prosecute them. (5) Challenges by Mr Sorani and Mr Kaziu (a) to the Secretary of State's \*676 adoption of a policy whereunder refugees are prosecuted in false document cases irrespective of whether they have claimed asylum, alternatively (b) the Secretary of State's failure to adopt a policy preventing such prosecutions, at any rate until refugee status has been determined. (6) I understand the applicants to seek in addition various forms of declaratory relief. At this stage, however, rather than address these specific issues, it seems to me altogether more profitable to stand back from the detail of the individual cases and to look instead at the position in the round. It must be appreciated that these three cases—grouped together for a single hearing because they raise different facets of a wider problem—represent but the tip of an iceberg of aggrieved asylum seekers. In the papers before us are various studies demonstrating clearly that since 1994 there has been a significant increase in the number of refugees arrested whilst seeking transit on forged travel documents through the United Kingdom to the United States or, more commonly, Canada, and this despite there being no apparent rise in the number of passengers stopped. As was noted by Richard Dunstan, previously a refugee officer with Amnesty International, now employed by the Law Society, in a 1998 article, "United Kingdom: breaches of article 31 of the 1951 Refugee Convention" in the *International Journal of Refugee Law*, vol 10, no 1/2 (1998), pp 209-210: "There can be little doubt that this pattern of the criminal conviction and imprisonment of would-be asylum seekers for their use of false travel documents is related to the imposition of financial penalties under 'carrier sanctions' legislation in both the United Kingdom and North America ... Of course, those attempting to flee persecution are often unable to obtain national passports from their own authorities and are, in any case, most unlikely to be able to obtain a valid visa for the destination country (as embassies, consulates and High Commissions will simply not issue a visa to any person revealing or suspected of having an intention to seek asylum). Accordingly, the widespread imposition of visa regimes on nationals of refugee-producing countries has forced such persons to resort to the use of

forged travel documents (including forged visas) and unorthodox means of travel, often involving enforced stopovers of varying duration in one or more transit countries and clandestine means of entry to, and exit from, such countries. Inevitably, such forged travel documents (and associated means of unorthodox travel) have become increasingly available (usually at a considerable price) from criminal profiteers."

In looking at the position in the round I shall consider first the true reach of article 31, second how the protection it is designed to afford to refugees may perhaps best be achieved, and third whether, and if so how, any existing failure to afford the protection is challengeable under domestic law. First, however, I pause to note one striking fact. The respondents acknowledge that, until these challenges were brought, no arm of state, neither the Secretary of State, the Director of Public Prosecutions, nor anyone else, had apparently given the least thought to the United Kingdom's obligations arising under article 31. The Secretary of State's stance is that the responsibility for prosecuting people found in possession of false passports lies not with him or the immigration service but rather with the police and the Crown Prosecution Service. He neither encourages nor instigates such \*677 prosecutions. Generally speaking the immigration service is only involved in so far as an officer may be asked to express an opinion on the validity of particular travel papers. If a passenger claims asylum, then certainly the Immigration Service becomes involved in processing that claim. That, however, is treated as discrete from any criminal prosecution that may be brought for travelling on false documents. So far as the police and Crown Prosecution Service are concerned, no consideration had ever been given to the immunity provided by article 31. Until Mr Adimi's counsel took the point in the magistrates' court, no one involved in the criminal justice system ever addressed their mind to the problem. Plainly this is a most unsatisfactory state of affairs and, indeed, this is apparently now recognised by Mr Perry, who appears for the Director of Public Prosecutions and the Crown Prosecution Service, and Mr Kovats who appears for the Secretary of State. We are told that, once our judgments have been given, a multi-agency group is being convened to examine this whole issue. It will include representatives of the Home Department, the Crown Prosecution Service, the police, the Law Society and magistrates' courts clerks.

#### **The scope of protection under article 31**

I confess to embarking upon this section of the judgment with some trepidation. We have been provided with a great wealth of material bearing on this question, not all of it entirely harmonious. There being, however, no international tribunal able to rule authoritatively on the true construction of the Convention, the task necessarily falls to us. Indeed it is agreed by all parties that we should decide the matter. I begin by reminding myself of Lord Lloyd of Berwick's dictum in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305:

"I return to the argument on construction ... we are here concerned with the meaning of an international Convention. Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel ... It follows that one is more likely to arrive at the true construction of article 1A(2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach. But having said that, the starting point must be the language itself."

What, then, was the broad purpose sought to be achieved by article 31? Self-evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. In the course of argument, Newman J suggested the following formulation: where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by article 31. That seems to me helpful.

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. Nor is it disputed that article 31's protection can apply equally to those using false documents as to those (characteristically the \*678 refugees of earlier times) who enter a country clandestinely. There are, however, within the text of the article certain expressed limitations upon its scope and these clearly require consideration. To enjoy protection the refugee must (a) have come directly from the country of his persecution, (b) present himself to the authorities without delay, and (c) show good cause for his illegal entry or presence. Let me consider each of these conditions in turn.

#### **(a) Coming directly**

The respondents accept that a literal construction of "directly" would contravene the clear purpose of the article and they accordingly accept that this condition can be satisfied even if the refugee passes through intermediate countries on his way to the United Kingdom. But that is only so, they argue, provided that he could not reasonably have been expected to seek protection in any such intermediate country and this will not be the case unless he has actually needed, rather than merely desired, to come to the United Kingdom. In short, it is the respondents' contention that article 31 allows the refugee no element of choice as to where he should claim asylum. He must claim it where first he may: only considerations of continuing safety would justify impunity for further travel. For my part I would reject this argument. Rather, I am persuaded by the applicants' contrary submission, drawing as it does on the travaux préparatoires, various conclusions adopted by UNHCR's executive committee (ExCom), and the writings of well respected academics and commentators (most notably Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis), that some element of choice is indeed open to refugees as to where they may properly claim asylum. I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing.

It is worth quoting in this regard the UNHCR's own guidelines with regard to the detention of asylum seekers (UNHCR Handbook on Procedures and Criteria for determining Refugee Status (1992)):

"The expression 'coming directly' in article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its merits."

Having regard to article 35(1) of the Convention, it seems to me that such guidelines should be accorded considerable weight. Article 35(1) provides:

"The contracting states undertake to co-operate with the office of the United Nations High Commissioner for Refugees ... in the exercise of its \*679 functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

#### **(b) Present themselves without delay**

This time let me start with the UNHCR's guidelines:

"given the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanically applied or associated with the expression 'without delay'."



Again the respondents contend for what seems to me a very narrow construction of this condition. What is required of the refugee, they contend, is a voluntary exonerating act. Generally speaking they submit that an asylum seeker can reasonably be expected to claim asylum as soon as he arrives at passport control. If instead he maintains his deception and is caught presenting false travel documents, there will have been no voluntary exonerating act and the condition will not be fulfilled. It is, indeed, on this basis that the respondents contend that Mr Adimi falls outside the protection of article 31. Again I cannot accept the argument. Although the respondents find their concept of a voluntary exonerating act in a passage in Grahl-Madsen, *The Status of Refugees in International Law* (1972), vol II, p 219, the real mischief against which this particular condition is aimed appears from the very next paragraph:

"exemption from penalties according to article 31(1) may not be claimed if the refugee has chosen to stay in a country of refuge for a protracted period without presenting himself to the authorities. If he eventually learns that he is about to be discovered and for that reason gives himself up, he cannot rely on the provisions of article 31(1)."

On the previous page, however, appears this:

"A person crossing the frontier illegally may have reasons for not giving himself up at the nearest frontier control point or to a local authority in the border zone. If he succeeds in finding his way to the capital or to another major city and presents himself to the authorities there, he must be deemed to have complied with the requirement, and the same ought to apply if he was unsuccessful, but could show that such was his intention."

If Mr Adimi's intention was to claim asylum within a short time of his arrival even had he successfully secured entry on his false documents, then I would not think it right to regard him as having breached this condition.

### **(c) Good cause**

All counsel agree that this condition has only a limited role in the article. It will be satisfied by a genuine refugee showing that he was reasonably travelling on false papers. \*680 *How best to secure article 31?*

In a written submission made to the court in Mr Sorani's case, the UNHCR says of article 31(1):

"This obliges contracting states not to apply the relevant provisions under domestic penal law to refugees and asylum seekers. If necessary, they have to amend domestic penal law or prosecution instructions/practice in order to ensure that no person entitled to benefit from the provisions of article 31 shall run the risk of being convicted ..."

That accords with the comment in Grahl-Madsen, *The Status of Refugees in International Law*, vol II, p 211 that article 31

"obligates the contracting states to amend, if necessary, their penal codes or other penal provisions, to ensure that no person entitled to benefit from the provisions of this paragraph shall run the risk of being found guilty (under municipal law) of an offence."

As already stated, the United Kingdom has done nothing to comply with this obligation. It cannot be suggested—indeed I do not think it is suggested—that compliance is achieved merely by pointing, as the respondents do, to: (a) the possibility on certain facts of raising a substantive defence of necessity or duress of circumstances: see *R v Abdul-Hussain [1999] Crim LR 570*. This defence applies only in cases of imminent peril of death or serious injury to the defendant and is manifestly narrower than that afforded by article 31. (b) The defendant's right to invite the court to stay the prosecution on grounds of abuse of process. To this I shall return. (c) The fact that the Code for Crown Prosecutors, issued by the Director of Public Prosecutions under section 10 of the Prosecution of Offences Act 1985, requires prosecutors to decide, once a case passes the evidential test of realistic prospect of conviction, if a prosecution is needed in the public interest. The history of these prosecutions and others like them suggests that whether the offence was committed in the context of escape from persecution, or whether or not an asylum claim has been made, plays not the

least part in determining the public interest. On the contrary, as appears from the terms in which characteristically these defendants come to be sentenced, the very fact that false documents are presented by refugees in flight appears to count against them. A report by Liz Hales, "Refugees and Criminal Justice" (Cropwood Occasional Papers No 21, Cambridge, 1996) published by the Cambridge Institute of Criminology, cites as a typical comment by magistrates: "This serious offence is becoming too prevalent and it is in the public interest that you are sent to prison." As already indicated, the respondents agree that steps must now be taken to ensure that article 31 protection is accorded its proper place in domestic law and practice. What, then, is the appropriate way forward? The parties before us have advanced widely different contentions as to this. Essentially they are as follows.

### **The applicants**

The applicants submit that in the case of all refugees apprehended with false documents, whether on entry or in transit, there should be no prosecution rising out of the possession or presentation of such papers until the Secretary of State has determined the asylum claim. Immigration \*681 officers, instead of being instructed as at present to minimise their involvement in these cases—their role being confined largely to authenticating documents—should instead be alert to identify all asylum seekers, recognising as such any case "Where it appears to the immigration officer as a result of information given by [the immigrant] that he may be eligible for asylum"—the wording of paragraph 75 of the Statement of Changes in Immigration Rules (1990) (HC 251) (the old rules). Although the new rule, paragraph 327 of the Statement of Changes in Immigration Rules (1994) (HC 395), defines an asylum applicant merely as someone claiming that it would be contrary to the Convention to require him to leave the United Kingdom, the Secretary of State still very properly regards that definition as including cases within the old rule.

Whilst examining the asylum claim, submit the applicants, the Secretary of State should at the same time determine whether article 31 applies to exclude liability for any linked offence. So far from this being inconvenient or requiring immigration officers to carry out inappropriate police functions, as the respondents assert, the applicants point to a very substantial degree of overlap between the considerations which the Secretary of State will need to have in mind when deciding respectively (a) asylum and (b) immunity. Paragraph 5(3) of Schedule 2 to the Asylum and Immigration Appeals Act 1993 (as substituted by section 1 of the Asylum and Immigration Act 1996), which dictates what cases may be subjected to the accelerated special appeals procedure, provides that one such circumstance is where:

"on his arrival in the United Kingdom, the appellant was required by an immigration officer to produce a valid passport and ... (b) he produced a passport which was not in fact valid and failed to inform the officer of that fact."

Rule 341 of HC 395 is yet more closely in point:

"341. In determining an asylum application the Secretary of State will have regard to matters which may damage an asylum applicant's credibility if no reasonable explanation is given. Among such matters are: (i) that the applicant has failed to apply forthwith upon arrival in the United Kingdom ... (ii) that the applicant has made false representations, either orally or in writing ... (v) that the applicant has lodged concurrent applications for asylum in the United Kingdom or in another country."

Accordingly, in the course of deciding an asylum claim, the Secretary of State will necessarily have regard to the very sort of considerations central to the determination of a refugee's entitlement to immunity under article 31. Such an approach, moreover, would guard against the risk that an asylum claim may be rejected precisely because of a conviction from which arguably the asylum seeker should have been immune: Richard Dunstan's article (International Journal of Refugee Law, vol 10, no 1/2 (1998), p 208) quotes a refusal letter which expressly relies upon the complainant's application for asylum having been delayed until after his conviction at Uxbridge Magistrates' Court for the use of a forged passport and deception for which he was sentenced to 21 days' imprisonment. The

Secretary of State, moreover, through his experience in this field, has an altogether greater knowledge of the background material relevant to these cases than the \*682 Crown Prosecution Service (or the magistrates' courts) could reasonably hope to acquire. This is so not only with regard to safe third countries but also in connection with refugees' concerns and practices such as may bear upon the issue of whether they have presented themselves without delay. The applicants, indeed, go so far as to suggest that the Secretary of State's substantive decision on asylum should itself be determinative of whether the article 31 immunity applies. True, they acknowledge, there is not a perfect match between the issues raised on the two matters, but this, they suggest, would be one way of cutting the Gordian knot and little if anything would be lost by deciding not to prosecute in those cases where, despite the eventual recognition of refugee status, the refugee's conduct falls strictly outside the ambit of article 31 protection.

### **The respondents**

The respondents for their part canvas a very different approach. Their proposal is that, following this judgment, written guidance should be given to the Crown Prosecution Service upon the true ambit of article 31; the police should be instructed to bring to the attention of the Crown Prosecution Service any material which may be relevant in any particular case; the Law Society should take steps to ensure that defence solicitors become aware of the position (the duty solicitors instructed respectively by Mr Sorani and Mr Kaziu clearly knew nothing of article 31), and magistrates' courts' clerks will likewise be alerted to possible article 31 implications where a defendant makes an equivocal plea. If, despite future efforts to ensure that only those falling outside the protection are prosecuted, any defendant hereafter claims immunity, the route by which he would do so is an application to stay the prosecution (a permanent stay rather merely than a temporary stay pending the Secretary of State's determination of the asylum claim such as was sought in Mr Adimi's case). It is, submit the respondents, the prosecuting authorities and the judicial authorities hearing criminal proceedings, rather than the Secretary of State, who bear primary responsibility for ensuring the United Kingdom's compliance with article 31. Despite the non-incorporation of article 31 into domestic law, they contend, it would be open to the trial court (and thereafter, if necessary, any appeal court) to ensure that article 31 is honoured. On an abuse of process application for non-compliance, the court would hear the relevant evidence and determine the factual issues. The propriety of criminal proceedings as a forum for determining article 31 immunity is supported by Grahl-Madsen, *The Status of Refugees in International Law*, vol II, pp 210-211:

"By prohibiting the imposition of penalties, article 31 does not prevent a refugee being charged or indicted for illegal frontier crossing or unlawful presence, if one of the purposes of the proceedings is to determine whether article 31(1) is in fact applicable."

### **The problems**

I have to say that certain difficulties seem to me to attend either side's approach. On the applicants' approach, not merely is there some mismatch between the issues, but in certain cases the immunity should surely apply even where asylum is refused—where, for example, the Secretary of State \*683 returns the applicant to a safe third country, or where perhaps the applicant is granted exceptional leave to remain rather than asylum. Their approach would also inevitably delay the bringing of any prosecution—presumably, indeed, in some cases beyond the date of the Secretary of State's decision until any appeals or challenges were disposed of. Unless, moreover, a scheme were devised to allow for some form of final certification by the Secretary of State (binding on the defence as well as the Crown) the Secretary of State's determination might still leave the asylum seeker with a second bite of the cherry, the right to contest his prosecution.

But to my mind there are still greater disadvantages in the respondents' proposed solution. In the first place, it strikes me as surprising that the defendant's sole safeguard against conviction contrary to article 31 should be by way of abuse of process application: an invitation to magistrates, in a case where guilt under United Kingdom law is not disputed, to

confer upon the defendant an immunity required to be accorded only under international law. Mr Perry's suggested analogy with pleas in bar under the State Immunity Act 1978 or as a result of Parliamentary privilege or when contending that a child is below the age of criminal responsibility, I find unconvincing: in all of these, immunity sounds clearly in domestic law. That said, *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, the authority principally relied on by the respondents (and, indeed, by Mr Adimi too, in so far as Miss Webber seeks to challenge the magistrate's refusal of a stay in his case) provides at least an arguable basis for magistrates' assuming an abuse of process jurisdiction in this class of case, providing always that they are to be regarded as an appropriate fact-finding tribunal for the purpose.

The second reason why I am unhappy at the notion of resolving an article 31 dispute by an abuse of process application is that, as the respondents themselves assert, the defendant upon such an application has to establish the abuse on the balance of probabilities. I would prefer article 31 protection to operate by way of a defence: where it is invoked the burden should be upon the prosecution to disprove it. Certainly it would be appropriate to proceed to conviction only in the clearest cases.

Third, I am troubled about the prospect of busy magistrates trying issues as difficult and sensitive as those which arise under article 31. It is suggested that they could acquire the necessary specialist expertise and no doubt with training they could. One wonders, however, whether such duplication of expertise would be worthwhile. Moreover, not only magistrates will need to be trained, so too will the Crown Prosecution Service and duty solicitors.

Fourth, and finally, it would seem to me clearly preferable if possible to avoid any prosecution at all rather merely than look to the remedy of a stay once it appears that immunity may arise under article 31. I do not go so far as to say that the very fact of prosecution must itself be regarded as a penalty under article 31—the passage already cited from Grahl-Madsen, *The Status of Refugees in International Law* strongly argues the contrary. But there is not the least doubt that a conviction constitutes a penalty and that article 31 impunity is not afforded, as at one point Mr Kovats suggested it would be, simply by granting an absolute discharge. The gravity of a conviction for a refugee needs little emphasis: as a UNHCR letter before us notes, their criminal record prevents them from joining their families—mostly in Canada or the United States—in a regular way.

**\*684**

Overall there seem to me strong reasons why the Secretary of State rather than the Crown Prosecution Service should assume responsibility for deciding when asylum seekers should be prosecuted in this class of case. Decisions should depend more upon considerations arising out of the proper administration and control of immigration and asylum than upon the need to suppress and punish criminal activity generally.

Given that the respondents now propose to give full effect to article 31 protection, the court is entitled to ensure that its true scope has been properly understood: see Lord Hope of Craighead's speech in *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839, 867:

"If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention"—there the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) —"which he himself says he took into account, it must surely be right to examine the substance of the argument."

Similarly, it seems to me that were we to conclude that the respondents' proposals themselves fail to satisfy the United Kingdom's obligations under article 31, then we should so declare.

For my part, however, I do not feel able to go this far. Much though I prefer the applicants' proposed solution, it cannot I think be imposed upon the state as the only lawful way forward. Provided that the respondents henceforth recognise the true reach of article 31 as we are declaring it to be, and put in place procedures to ensure that those entitled to its

protection (i.e. travellers recognisable as refugees whether or not they have actually claimed asylum) are not prosecuted, at any rate to conviction, for offences committed in their quest for refugee status, I am inclined to conclude that, even without enacting a substantive defence under English law, the abuse of process jurisdiction is able to provide a sufficient safety net for those wrongly prosecuted.

But, that said, in drawing up the guidance now to be given to the Crown Prosecution Service, the respondents will surely wish to reflect generally upon the wisdom of prosecuting and imprisoning refugees for the use of false travel documents. Is this really a just and sensible policy? One cannot help wondering whether perhaps the increasing incidence of such prosecutions is yet another weapon in the battle to deter refugees from ever seeking asylum in this country. This, however, the respondents deny. They suggest that the deterrent effect they seek is legitimate. Immigration control, they argue, is prejudiced in cases where an intending asylum seeker fails to present himself as such at the frontier. He may thereby escape the attention of the authorities altogether or, even if he presents himself voluntarily later, he may have become better able to present an embellished or false claim (whether substantively or as to the route taken to get here). I find this argument unconvincing. Most asylum seekers who attempt to enter the country before making their claims will do so for the reasons suggested by UNHCR rather than with a view to falsifying their claims with the assistance of friends and contacts here. And the premium placed by the benefit system upon refugees claiming asylum on entry rather than after entry already represents a significant sanction against late claims. In any event, the respondents' **\*685** argument provides no justification whatever for prosecuting refugees in transit.

There are additional considerations too. The almost inevitable outcome of any asylum claim will be either (a) the grant of refugee status (or, if there are compelling reasons other than fear of Convention persecution for not removing the applicant, exceptional leave to remain), or (b) a rejection of the claim, whether substantively or by a refusal to entertain it on safe third country grounds (or under the 1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities), followed routinely by removal. If sanctuary is to be granted, it seems somewhat unwelcoming first to imprison the refugee. If, however, it is to be refused, is it not best simply to remove him without delay. Such an approach, moreover, appears to accord with the Immigration Service's own practice in false document cases. Part III of the Immigration Act 1971 makes full provision for criminal proceedings in this context. Section 24 creates a number of offences including that of illegal entry. Section 26 provides for various general offences including, under subsection (1)(c), that of making a false statement or representation to an immigration officer on examination, and, under subsection (1)(d), an offence where someone "uses for the purposes of this Act, or has in his possession for such use, any passport ... or other document which he knows or has reasonable cause to believe to be false." All these are summary offences punishable with imprisonment for not more than six months. Yet apparently only one prosecution has ever been brought under section 24 for illegal entry and that was before an asylum claim was made, and there have been none under section 26. Why then, one wonders, should it be thought appropriate to resort to the general criminal law (carrying, as it does, altogether heavier penalties) to deal with these cases? Having regard to all these considerations, I would express the earnest hope that decisions to prosecute, not least for offences under the general criminal law rather than under Part III of the Immigration Act, will be made only in the clearest of cases and where the offence itself appears manifestly unrelated to a genuine quest for asylum.

#### **Past failures to give effect to article 31**

The first question to be addressed with regard to the respondents' past failures is whether the prohibition imposed by article 31 upon contracting states is to be regarded as enforceable against them in domestic law. The 1951 Convention (apart from article 33) has not been formally incorporated into English law. Albeit, therefore, the respondents accept that article 31 would have been relevant to a decision to prosecute had it, and facts suggesting its relevance, been drawn to the attention of the Crown Prosecution Service, they

contend that it has not otherwise given rise to enforceable rights under English law. In challenging that contention the applicants rely first upon a passage in Lord Keith of Kinkel's speech in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, 990: "The United Kingdom having acceded to the Convention and Protocol, their provisions have for all practical purposes been incorporated into United Kingdom law." As Lord Keith pointed out, at p 990h, the Rules of 1983 (HC 169) provided by rule 16 that "Where a person is a refugee full account is to be taken of the provisions of the Convention ...". The first **\*686** primary legislation to deal with asylum seekers was the Asylum and Immigration Appeals Act 1993. Section 2 provided that: "Nothing in the Immigration Rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

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] INLR 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. By the time of these applicants' prosecutions, at latest, it seems to me that refugees generally had become entitled to the benefit of article 31 in accordance with the developing doctrine of legitimate expectations: see too in this regard Hobhouse LJ's judgment in *Ex p Ahmed*, at p 591. True it is that section 2 of the 1993 Act is by its terms strictly concerned only with the Immigration Rules. Parliament can hardly have intended, however, that those entitled to claim asylum under the rules should nevertheless still be prosecuted in contravention of the Convention. I return finally, therefore, to the individual cases before us to consider whether these particular applicants were properly entitled to immunity under article 31 and, if so, what if any relief, declaratory or otherwise, should follow.

#### **Mr Adimi**

The respondents contend that Mr Adimi falls outside the protection of article 31 on two grounds, first because he did not come directly to the United Kingdom but instead, on his own case, came via Italy and France, in either of which they say he could and should have sought asylum; second, because he did not present himself as a refugee without delay but instead tried on arrival to pass himself off as an Italian. As to the first, Miss Webber points to the Secretary of State having now granted asylum—which, she suggests, is shown by contemporaneous correspondence to have been because neither Italy nor France recognise as refugees those, like Mr Adimi, in flight from non-State persecution. The Secretary of State, however, disputes this, maintaining that the only reason why Mr Adimi was granted asylum rather than returned to France or Italy under the Dublin Convention was because, given the doubt as to whether he ever entered Italy, both countries would have been entitled to dispute his return. The magistrate, it is said, ruled against a stay simply on the ground that Mr Adimi's journey was not direct. No reasons for his ruling were given. For my part, whether or not Mr Adimi travelled through Italy, I would conclude that he probably satisfied the condition of coming directly to this **\*687** country, as I construe that condition. Certainly it cannot clearly be demonstrated that he did not. As to the requirement that he present himself without delay, I have already said enough to indicate that in my view Mr Adimi probably satisfied this condition too, irrespective of whether he claimed asylum on the night of his arrival or not until the following morning. I would accordingly hold that Mr Adimi should be exempt from penalty under article 31. That being so, it must surely follow that the

prosecution still outstanding against him will be discontinued. I cannot think that any other orders are required in his case. Least of all is it necessary to address the difficult question raised as to whether it may be appropriate in a case like this to quash the decision of the Crown Prosecution Service to institute or continue the prosecution.

### **Mr Sorani and Mr Kaziu**

I propose to deal with these two applicants together since both were arrested as transit passengers embarking for Canada and, in my judgment, no material distinction can be drawn between them. I use the term transit passenger here not in a technical sense to mean only passengers who throughout have remained airside of United Kingdom immigration control (even then, if discovered with false documents, they will be brought landside for that reason) but rather to mean passengers who have been in the United Kingdom for a limited time only and are on the way to seek asylum elsewhere. I understand the respondents to argue that such passengers can never be entitled to article 31 immunity because, having been apprehended whilst attempting to leave the United Kingdom rather than enter it, it follows that they never intended to present themselves, least of all without delay, to the immigration authorities here. Mr Kovats further submits that, having chosen not to claim asylum here despite the United Kingdom clearly being a safe country for the purpose, these passengers will in addition be unable to satisfy the coming directly condition.

Neither of these arguments are in my judgment sustainable. If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum, and that a short term stopover en route in a country where the traveller's status is in no way regularised will not break the requisite directness of flight, then it must follow that these applicants would have been entitled to the benefit of article 31 had they reached Canada and made their asylum claims there. If article 31 would have availed them in Canada, then logically its protection cannot be denied to them here merely because they have been apprehended en route. I recognise, of course, that even when arrested, Mr Kaziu did not claim refugee status, and that there is a dispute in Mr Sorani's case as to whether he did either. Both, however, were clearly identifiable as passengers who might be eligible for asylum (see paragraph 75 of HC 251, paragraph 327 of HC 395, above). It is not suggested, moreover, that the making of a claim would have made any difference to the course of events. In my judgment both should have been recognised as refugees within the meaning of article 31 and both should have been exempt from penalty under it. In their cases, however, it is too late to avoid penalty: both have already been convicted and served their sentences. What, then, should be done? It is not suggested that this court can properly quash the convictions. (Mr Sorani, I should note, has an appeal against conviction outstanding in the Isleworth \*688 Crown Court, leave for which was granted by the Crown Court out of time on 20 January 1999.) Nor, in my judgment, is it appropriate for this court, following the convictions, now to quash the Crown Prosecution Service's decision to prosecute—even assuming, which I have already said is a difficult question, it would otherwise be appropriate to do so. As for the broader challenges advanced by these applicants to the Secretary of State's adoption of a wrongful policy (or failure to adopt a proper policy) towards these cases, I would decline to grant any form of declaratory relief. Rather I would let our judgments speak for themselves, with a view to ensuring that the mistakes of the past are not repeated in future. It must be hoped that these challenges will mark a turning point in the Crown's approach to the prosecution of refugees for travelling on false passports. Article 31 must henceforth be honoured.

NEWMAN J I agree with Simon Brown LJ's interpretation of the scope of article 31(1) of the Convention. A strict linguistic interpretation points to the character of the illegality being the fact of presence or entry without authorisation. On this interpretation the illegality of the means, whereby entry or presence without authorisation had been achieved, would be outside it. No one contends for such a limited interpretation. The Convention is a living instrument, changing and developing with the times so as to be relevant and to afford meaningful protection to refugees in the conditions in which they currently seek asylum. Apart from the current necessity to use false documents, another current reality and advance, occurring since 1951, is the development of a readily accessible and worldwide

network of air travel. As a result there is a choice of refuge beyond the first safe territory by land or sea. There have been distinctive and differing state responses to requests for asylum. Thus there exists a rational basis for exercising choice where to seek asylum. I am unable to accept that to recognise it is to legitimise forum shopping.

As to the other considerations identified by Simon Brown LJ's judgment, (a) the question of future protection and (b) whether any failure to afford protection to the applicants has been established, I propose to defer stating my conclusions until I have set out my views on the matters of principle to which the applications give rise. To confront the issues, I consider the key question to be: which arm of state has responsibility for securing that effect is given to article 31(1) of the Convention? No one has submitted that it can be disregarded. The applicants have advanced three routes to it being accorded status in domestic law: (1) incorporation, (2) legitimate expectation and (3) the informing of the exercise of a relevant discretion. The respondents did not accept there had been incorporation, made no submissions about legitimate expectation and submitted that the exercise of discretion by the Director of Public Prosecutions whether to prosecute could, in limited circumstances, be informed by it. Otherwise it was for the courts.

### **Incorporation**

It is submitted that the United Kingdom, having acceded to the Convention and Protocol, the provisions have for all practical purposes been incorporated into United Kingdom law.

Reliance is placed on the dicta of Lord Keith of Kinkel in *R v Secretary of State for the Home Department Secretary, Ex p Sivakumaran [1988] AC 958*. In that case, the House of Lords were concerned with the correct test to be applied in determining whether asylum seekers are entitled to the status of refugee. That in turn gave rise to an issue, turning upon the proper interpretation of article 1.A(2) of the Convention, which provides that the term "refugee" applies to 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 ... is unable or, owing to such fear, is unwilling to return to it ..."

Lord Keith stated: "The United Kingdom having acceded to the Convention and Protocol, their provisions have for all practical purposes been incorporated into United Kingdom law." No person is within article 31(1) unless he or she is a refugee (which includes presumptive refugee). Whichever arm of state has to give consideration to an individual's claim to protection will have to be satisfied on refugee status. So far as determining entitlement to refugee status, the House of Lords repeated in *Ex p Sivakumaran* what had been said in *R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514*, namely that it was not for the court but for the Secretary of State alone. The principle underlying this conclusion was expressed by Lord Templeman, at pp 535, 537:

"Applications for leave to enter and remain do not in general raise justiciable issues. Decisions under the Act are administrative and discretionary rather than judicial and imperative. Such decisions may involve the immigration authorities in pursuing inquiries abroad, in consulting official and unofficial organisations and in making value judgments. The only power of the court is to quash or grant other effective relief in judicial review proceedings in respect of any decision under the 1971 Act which is made in breach of the provisions of the Act or the rules thereunder or which is the result of procedural impropriety or unfairness or is otherwise unlawful ... where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."

Even if article 31 had been incorporated, which in my judgment it has not, it would be curious if status under article 31 was for the courts but under the 1971 Act it was not. I am not persuaded that the dicta of Lord Keith in *Ex p Sivakumaran* can be taken to extend beyond the provisions which bore upon the Secretary of State's responsibility to determine refugee



status. That is what the case was all about and what Lord Keith obviously had in mind when referring to the then Immigration Rules made under section 3(2) of the Immigration Act 1971 (Statement of Changes in Immigration Rules (1983) (HC 169)) which contained the following:

"16. Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of \*690 Refugees ... Nothing in these Rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments ..."

Nor do I consider the argument for incorporation for practical purposes is assisted by section 2 of the Asylum and Immigration Appeals Act 1993 enacted after *Ex p Sivakumaran*, which constitutes a legislative advance in the exact area, requiring that for "practical purposes" be substituted "all purposes". It provides in its material part: "2. Nothing in the Immigration Rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention." I accept the submission made by Mr Kovats for the Secretary of State, that the suggested route via the Immigration Rules does not lead to incorporation. Neither the 1993 Act nor for that matter the Asylum and Immigration Act 1996 affected or altered the Immigration Rules in a manner relevant to the imposition of penalties in criminal proceedings.

### **Legitimate expectation**

Neither the Secretary of State nor the Director of Public Prosecutions advanced argument on this particular topic. In my judgment, if regard and effect is to be paid to article 31(1) of the Convention, it depends principally upon this principle. In *R v Secretary of State for the Home Department, Ex p Ahmed [1998] INLR 570* the Court of Appeal held that the entering into of a treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general were entitled to rely because, subject to any indication to the contrary, ratification could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the relevant treaty. Such a legitimate expectation could, the court went on to hold, in turn 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 the United Kingdom had undertaken. The conclusion has not been doubted. It received the unanimous approval of the Privy Council in *Thomas v Baptiste [2000] 2 AC 1* and I take it to be firmly established that treaty obligations assumed by the executive are capable of giving rise to legitimate expectations which the executive will not under municipal law be at liberty to disregard.

A seminal judgment of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273* has influenced the jurisprudence. Mason CJ and Deane J said, at p 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 ... The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount \*691 to treating it as a rule of law. It incorporates the provisions of the unincorporated Convention into our municipal law by the back door."

It is not in dispute that the 1951 Convention was designed to alleviate the plight of asylum seekers and was driven by humanitarian considerations. The Convention addresses not the population at large but a particular class of person and comprises positive statements about the way in which they will be treated. It would be hollow indeed if those who, having acted so as to become members of the contemplated class and having exposed themselves to the

risks and dislocation of becoming refugees are without remedy to obtain some measure of protection in accordance with the Convention. Mere ratification may not be enough but in this case there is more. There has been a large measure of incorporation, and it is not in dispute that there have been ministerial statements of compliance with the terms of the Convention and a practice of compliance. The very argument in this case has reflected an attitude of comprehensive compliance. Unlike the law and practice in connection with the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), at issue in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, British law and practice in connection with the 1951 Convention has assumed that the Convention should be given practical effect. No argument was advanced as to whether the facts gave rise to a substantive legitimate expectation. That being so, it being a developing area (see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, absent argument I propose to express no view.

#### **The informing of the relevant discretion**

If, as in my judgment is the case, these applicants can establish a legitimate expectation that protection under article 31(1) would be afforded to them, then the approach to be derived from *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839 and *R v Ministry of Defence, Ex p Smith* [1996] QB 517 adds little to the position. The respondents' approach went no further than an acceptance that a decision maker (the Director of Public Prosecutions) might in certain circumstances have to take account of article 31(1); otherwise it was for the judicial authorities. Contrary to general principle no member of the executive was required to do so. No authority was cited in support of this novel approach and I shall therefore turn to examine it.

#### **The Secretary of State's position with regard to article 31(1)**

The position can be summarised as follows. It was submitted on his behalf that the Convention had not been incorporated into English law, but it was accepted that article 31 of the Convention *may* be relevant to a decision to prosecute. It was submitted that it had no relevance to any discretion he had to exercise in connection with asylum seekers and it follows he has to date paid no regard to it. The Secretary of State and the Director of Public Prosecutions were separately represented in the proceedings but nevertheless submitted a joint skeleton argument. From that I take it that the common position is that the relevant decision-making process upon which the content of the article can impact is the discretion of the Director of Public Prosecutions in deciding whether to prosecute. It was \*692 submitted that if in his consideration of the public interest in pursuing a prosecution material was brought to his attention showing unequivocal article 31 circumstances, then it was highly likely that he would make a decision not to prosecute. Put more specifically, his discretion would be informed where it appeared to him unequivocally that the alleged offender was a person to whom the protection of article 31 applied. It was submitted that where the evidence did not establish an unequivocal case there was no duty to have regard to article 31. This position inexorably led to a submission in a supplementary skeleton argument and note after the close of argument to the following effect:

"It is the prosecuting authorities, and the judicial authorities hearing the criminal proceedings, not the Secretary of State, who have the primary responsibility of complying with article 31 of the Convention. But, if it were drawn to the Secretary of State's attention that prosecutions were proceeding which appeared to be contrary to the terms of article 31 of the Convention, the Secretary of State would draw this to the attention of the Crown Prosecution Service—Director of Public Prosecutions." (Supplementary skeleton.) "Which body should determine the facts for the purposes of taking account of article 31? The court hearing the criminal proceedings." (Note.)

It was not submitted that the court should merely determine the facts but that, having done so, it should exercise its judicial powers so as to comply with article 31. In my judgment the approach of the Secretary of State and the Director of Public Prosecutions is constitutionally flawed.

On the assumption that I am right in concluding that a legitimate expectation on the part of asylum seekers that they will receive due consideration as to whether they should be given protection is made out, I am unable to accept that the primary responsibility for complying with the article falls upon either the Director or the judicial authorities. As to the Director's constitutional position, Lord Bingham of Cornhill CJ stated in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 , 339 in the course of considering legitimate expectation, that:

"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."

Under our constitution the courts of law are charged with the responsibility of enforcing the law and where criminal offences have been committed, imposing penalties in accordance with the justice of the case. Judicial discretion in sentencing cannot take account of a legitimate expectation derived from executive action, let alone have its decision dictated by the expectation. I am unable to follow how an individual asylum seeker who has committed an offence within the jurisdiction can assert any private right to have the law applied to him in a way which differs from other offenders by relying upon the terms of an international convention. As Lord Oliver of **\*693** Aylmerton stated in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 , 499:

"It is axiomatic the municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law."

He said, at p 500:

"as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant."

The suggestion that the formidable weight of these principles can be overcome by limiting any judicial inquiry to an abuse of process application, in my judgment, falls foul of the same principle. Where the facts are equivocal and the Director of Public Prosecutions has instituted a prosecution against an asylum seeker, for the court to determine whether or not he falls within article 31(1) can only mean that he will be invoking the jurisdiction of the court to stay the proceedings by praying in aid rights he enjoys by virtue of the Convention. The suggestion that the factual inquiry should be assumed to be confined to an abuse of process application merely avoids the stark conflict which would arise if the court, being sure of guilt, had no discretion in sentencing and by reason of article 31 was required to impose no penalty. Reliance upon the availability of the concept of abuse of process was advanced by reference to case law and I turn to that.

#### **The scope of the concept of abuse of process**

In *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 43 , the scope of the concept of abuse of process was taken a stage further. Lord Griffiths stated, at pp 61-62:

"Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

**\*694** A little later Lord Griffiths observed, at p 62:

"In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party."

Lord Oliver, who dissented, commenced his speech with this passage, at pp 68-69:

"It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all. But it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime. Absent any suggestion of unfairness or oppression in the trial process, an application to the court charged with the trial of a criminal offence (to which it may be convenient to refer by the shorthand expression 'a criminal court'), whether that application be made at the trial or at earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason."

Just as the majority of the House of Lords found cogent reason to interfere in *R v Horseferry Road Magistrates' Court, Ex p Bennett*, so the Divisional Court in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 concluded that the Director of Public Prosecutions should have paid regard to the future prospect that the passing of the Human Rights Act would lead to the convictions obtained being vulnerable and most likely to be quashed on appeal. In both cases the court was exercising its supervisory role. Contrary to the above cases, the submissions on these applications do not ascribe an overseeing role to the courts but pass responsibility to the courts for the decision-making process in all but unequivocal cases.

In my judgment, there is no support for the suggestion that in a case where the facts are equivocal as to whether a person falls within article 31(1) and where the Director of Public Prosecutions decides to prosecute, the court can be the decision maker and grant or refuse relief. In my judgment, whether a person is entitled to benefit according to article 31(1) of the Convention must depend upon an executive decision granting or refusing him protection. That does not exclude the Director from all impact from the article. He will not act irrationally in circumstances where the facts do not impel a particular conclusion. If the facts impel a conclusion but none has been reached, the Secretary of State should reach it. If the facts give rise to an arguable claim to protection under the article, the Secretary of State should determine the claim. A prosecution prior to determination could be stayed pending determination. In the absence of an offender being able to come before the court and lay a basis for challenging a decision to prosecute on the grounds that he has a prima facie case for being granted protection by the executive **\*695** the court can give no relief. Where relief has been refused by the Secretary of State and the prosecution is authorised, the offender could not be prevented from raising the facts as a defence (duress or necessity) or in mitigation but the court will not be adjudicating upon article 31. I have no doubt that in a situation where a case for immunity in accordance with article 31(1) is made apparent to the magistrates, but there has been no executive decision, the court should stay its hand. But

that will not involve the court enquiring into the merits beyond deciding whether to grant a stay pending a decision by the executive. In the 18th century it was not uncommon for those who were accomplices to crime to be promised a pardon in return for giving evidence to secure the conviction of their fellow criminals. In *Rex v Rudd (1775) 1 Cowp 331* Lord Mansfield CJ observed, in such a case where Mrs Rudd applied for a writ of habeas corpus, having already given evidence as an accomplice and being ready to give further evidence to assist in convicting her partners in crime, as follows, at p 334:

"If she had such a right, we should be bound ex debito justitiae to bail her. If she had not such legal right, but yet came under circumstances sufficient to warrant the court in saying, that she had a title of recommendation to the King for a pardon, we should bail her for the purpose of giving her an opportunity of applying for such pardon."

In my judgment the principle has long been recognised that a court will stay its hand in circumstances where somebody is before the court and there are sufficient facts to conclude that by virtue of some right in that individual there may be immunity from the proposed prosecution. Similarly, if the decision to prosecute is flawed in accordance with public law principles, the court will act to see that the decision should be reconsidered. This brings me to the next issue, namely, the character of the protection under article 31(1).

#### **The character of the protection under article 31(1)**

To be relieved of the consequences of criminal wrongdoing is to be pardoned. In Rudd's case Lord Mansfield CJ concluded that the defendant could not claim a pardon as of right (that is, pardons promised by proclamation or given under statute or earned by the ancient procedure of approvement) but he stated, at p 334:

"There is besides a practice, which indeed does not give a legal right; and that is, where accomplices having made a full and free confession of the whole truth, are in consequence thereof admitted evidence for the Crown, and that evidence is afterwards made use of to convict other offenders. If in that case they act fairly and openly, and discover the whole truth, though they are not entitled of right to a pardon, yet the usage, the lenity, and the practice of the court is, to stop the prosecution against them, and they have an equitable title to a recommendation for the King's mercy."

There is an echo of this in the need for the refugee to act without delay and to show good cause for his conduct. The procedure of approvement has been overtaken by the practice of granting immunity from prosecution. The nature and effect of a pardon is to clear the person from all infamy, \*696 and from all consequences of the offence for which it is granted. The case to which I have referred show that a pardon was effective to prevent prosecution. In *R v Boyes (1861) 1 B & S 311, 317* it was held that the beneficiary of a pardon could be called upon to incriminate himself because he merited no protection: the effect of the pardon was to make him a new man, and consequently to bar any proceedings by or in the name of the Crown.

There is recent authority which shows that where a pardon has been granted, which cannot be relied upon because a condition of the pardon has been breached, it may nevertheless be an abuse of process to prosecute: see *Attorney General of Trinidad and Tobago v Phillip [1995] 1 AC 396*; see also *Phillip v Director of Public Prosecutions [1992] 1 AC 545* where the nature and effect of a pardon were considered.

For the above reasons I feel driven to conclude that the way forward is dictated by principle and to this extent only differ from the judgment of Simon Brown LJ. The above considerations lead me to the following conclusions.

1 The protection contemplated by article 31 is, if afforded, in the nature of a pardon or grant of immunity from suit. Such relief lies with the executive to grant and is not within the class of immunity granted by the Director of Public Prosecutions.

2 A legitimate expectation that the executive will consider whether to afford protection requires no request from the refugee for the duty upon the Secretary of State to consider the position to arise. He should do so whenever the facts disclosed to him give rise to an arguable case for consideration.

3 His decision will be capable of challenge by judicial review, but if protection is not accorded, subject only to any defence of necessity or duress, the refugee can only raise the facts in mitigation.

4 It must be for the Secretary of State to decide whether he deals with the claim to refugee status before or at the same time as the article 31 issue. Having regard to the overlap between the subject matter of each of the two decisions good administrative practice may point to a simultaneous process.

5 Where refugee status is recognised, that will be a highly relevant factor in deciding whether to accord protection under article 31. As Simon Brown LJ indicated in the course of argument, it is not obvious what interest would be served in prosecuting a refugee who is given leave to remain. Different considerations may apply to one refused leave to remain. In any event the decision whether to prosecute will be for the Director having the benefit of the Secretary of State's decision.

6 The court will be required, probably in rare cases, to consider whether an arguable case for article 31 is available, where the refugee asserts a claim for protection which the Secretary of State had no cause to consider. If no credible case is made out the court will be entitled to reject the application and refuse a stay pending a determination by the Secretary of State.

#### **Entitlement to relief on these applications**

Mr Sorani and Mr Kaziu have been convicted and served sentences of imprisonment. Both cases disclosed a case for eligibility to be treated as \*697 refugees and in the light of our conclusions on interpretation both had a case for being granted protection under article 31 which received no consideration at all. Quashing the convictions is not open to us. There is no clear case for quashing the decision to prosecute.

#### **Mr Adimi**

I share all Simon Brown LJ's views about his case. Although the decision is for the Secretary of State, I would expect him to follow the conclusion these judgments dictate. The Director of Public Prosecutions will then be required to discontinue the prosecution.

SIMON BROWN LJ For the reasons given in the judgments which have already been handed down, we allow these applications. As we have explained, we have not thought it necessary or appropriate to make specific orders or declarations, but rather we let our judgments speak for themselves. We recognise, of course, that our views differ as to whether what the respondents propose for the future would or would not strictly comply with the law. Given, however, that both of us express a strong preference for what may be called the Secretary of State solution, we would expect the respondents to give careful consideration as to how they propose now to give effect to article 31.

#### **Representation**

Solicitors: Christian Fisher & Co ; Stuart Miller & Co ; B M Birnberg & Co ; Treasury Solicitor ; Crown Prosecution Service, Harrow .

*No orders. (Reported by Durand Malet Esq, Barrister )*

### 3. R v AM, MV, RM and MN [2010] EWCA Crim 2400

**R v M; R v MV; R v M; R v N**

*Criminal law – Plea – Possessing a false identity document with intent – Defendants being foreign nationals presenting false travel documents upon entry into United Kingdom – Defendants claiming asylum – Defendants pleading guilty to possessing false identity document with intent – Defendants later contending that convictions unsafe on ground of failure by representatives to advise as to statutory defence – Whether pleas to be held as a nullity – Whether convictions unsafe – Identity Cards Act 2006, s 25 – Immigration and Asylum Act 1999, s 31*

**[2010] EWCA Crim 2400**, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

**CA, CRIMINAL DIVISION  
LEVESON LJ, OWEN, FLAUX JJ**

**28 SEPTEMBER, 19 OCTOBER 2010**

**19 OCTOBER 2010**

I Macdonald QC and F Delany for MV  
I Macdonald QC and D Bunting for AM and N

R Thomas for RM

A Arlidge QC for the Crown

Registrar of Criminal Appeals; Crown Prosecution Service

**LEVESON LJ:**

(reading the judgment of the court)

**[1]** Section 25(1) of the Identity Cards Act 2006 (“the 2006 Act”) provides that it is an offence for a person with the requisite intention to have in his possession or under his control an identity document that either to his knowledge or belief is false, or to his knowledge or belief was improperly obtained or that relates to someone else. The requisite intention is either to use the document for establishing registrable facts about himself (not being the person to whom it relates) or to allow or induce another to use it for a similar purpose. The presentation of false documents on entry to the UK and for the purpose of obtaining entry is an obvious example of the vice to which the provision relates.

**[2]** This offence is not, however, absolute. Pursuant to UK obligations under art 31(1) of the Refugee Convention (“the Convention”), s 31 of the Immigration and Asylum Act 1999 (“the 1999 Act”) provides a defence which (by s 31(3)(aa) of that Act) was specifically amended to apply to any offence or attempt to commit an offence under s 25(1) of the Identity Cards Act 2006 and is in these terms:

“(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 each of these appeals, which have no connection with each other save for the similarity of the facts which form the basis of the argument, the relevant Applicant pleaded guilty to a breach of the 2006 Act offence and was sentenced to a term of imprisonment. It is now submitted that each was wrongly advised as to the law and could have mounted a defence in reliance upon s 31 of the 1999 Act. Each has been referred to the full court by the Registrar; during the course of the hearing, we granted leave along with the relevant extension of time.

**[4]** It is necessary, first, to analyse the general scope of the defence under the 1999 Act and, second, the basis upon which it is appropriate to allow a challenge to the safety of a conviction after an unequivocal plea of guilty which followed legal advice. We will then deal with the facts of the four specific cases.

#### *THE DEFENCE*

**[5]** The background to the legislation is not unimportant. Article 1 of the Convention defines a refugee as a person who:

“owing to a 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.”

Article 31(1) goes on:

“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.”

**[6]** It was only in *R v Uxbridge Magistrates Court ex parte Adimi* [2001] QB 667, [1999] 4 All ER 520, [2000] 3 WLR 434 that the circumstances of prosecuting for documentary offences those who claimed asylum were first considered. Simon Brown LJ considered the broad purpose of art 31 and put the matter in this way (at 677G):

“Self evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaking the law. In the course of argument, Newman J suggested the following formulation: where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by Article 31.”



[7] The response of the Government to this decision was to move an amendment to the Immigration and Asylum Bill then before Parliament. It was that amendment which became s 31 of the 1999 Act although it is to be noted that the legislation contains two aspects that more narrowly define the position than that advanced by Simon Brown LJ namely, in sub-s (1) the requirement that anyone claiming protection must have applied for asylum as soon as is reasonably practicable and in sub-s (2) that a refugee who has stopped in another country outside the UK must show that he could not reasonably have been expected to have been given Convention protection in that other country.

[8] The decision in *Adimi* was subsequently affirmed by the House of Lords in *R v Asfaw* [2008] UKHL 31, [2008] 1 AC 1061, [2008] 3 All ER 775 which concluded (per Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Carswell, Lord Rodger of Earlsferry and Lord Mance dissenting) that the Convention (and the amendment to the 1999 Act) was to be given a purposive construction consistent with its humanitarian aims. It was thus sufficient to include protection of refugees from the imposition of criminal penalties for infractions of the law reasonably or necessarily committed in the course of their flight from persecution, even if they had made a short term stopover in an intermediate country on route to the country of intended refuge.

[9] Although the full scope of s 31 of the 1999 Act was not determined by *Afsaw*, Lord Bingham did make clear that in order to satisfy the requirement of s 31(1)(c) the claim for asylum must be made as soon as was reasonably possible (which did not necessarily mean at the earliest possible moment: see para 16). Second, the fact that a refugee had stopped in a third country in transit was not necessarily fatal: he affirmed the observations of Simon Brown LJ in *Adimi* (at p 678) that refugees had some choice as to where they might properly claim asylum and that the main touchstones by which exclusion from protection should be judged were the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape: see also *R v MMH* [2008] EWCA Crim 3117 at paras 14-15.

[10] The upshot of this analysis is that it is open to anyone charged with an offence under s 25(1) of the 2006 Act to adduce sufficient material to raise an issue that he or she is a refugee and entitled to the protection of s 31 of the 1999 Act whereupon the burden of disproving that defence will fall upon the prosecution: see *R v Makuwa* [2006] EWCA Crim 175, [2006] 1 WLR 2755, [2006] 2 Cr App Rep 184. It is thus critical that those advising Defendants charged with such an offence make clear the parameters of the defence (including the limitations and potential difficulties) so that the Defendant can make an informed choice whether or not to seek to advance it. We now turn to consider the consequence if such advice is not given.

#### *FAILURE TO ADVISE*

[11] There is no doubt that this court can entertain an application for leave to appeal against conviction on the grounds that a tendered guilty plea was a nullity. The limited basis of that jurisdiction was explained in *R v Evans* [2009] EWCA Crim 2243, [2010] Crim LR 491) by Thomas LJ in these terms (at para 52):

“The applicable general principle is that such a writ will be granted where the proceedings are a nullity, that is to say where a purported trial 'is actually no trial at all' (see the opinion of Lord Atkinson in *Crane v DPP* [1921] 2 AC 299 at 330) or where there has been 'some irregularity in procedure which prevents the trial ever having been validly commenced' (see the opinion of Lord Diplock in *Rose* (1982) 75 Cr App R 322 at 336.”

**[12]** The test for a plea to be held a nullity was elaborated (per Scott Baker LJ in *R v Saik* [2004] EWCA Crim 2936) as requiring the facts to be so strong as to demonstrate that there is no true acknowledgment of guilt with the advice going to the heart of the plea so that it was not “a free plea”. It is, however, important not to water down the underlying concept of the jurisdiction so as to bring nullity into play purely on the basis of advice alleged to be wrong. For those circumstances, there remains a basis on which this court can intervene which is firmly grounded in the safety of the conviction. Thus, in *R v Lee (Bruce)* [1984] 1 All ER 1080, [1984] 1 WLR 578, 79 Cr App Rep 108, the approach was articulated by Ackner LJ in this way:

“The fact that [Lee] was fit to plead; knew what he was doing; intended to make the pleas he did; pleaded guilty without equivocation after receiving expert advice; although factors highly relevant to whether the convictions or any of them were either unsafe or unsatisfactory, cannot of themselves deprive the court of the jurisdiction to hear the applications.”

**[13]** This alternative approach was adopted in *R v Boal* [1992] QB 591, [1992] 3 All ER 177, (1992) 95 Cr App Rep 272 which concerned the failure to challenge what was held to be the erroneous assumption that an assistant general manager at a bookshop, responsible for the shop during a week in which the manager was absent, was a manager within s 23(1) of the Fire Precautions Act 1971. In quashing the conviction that followed guilty pleas based on that assumption (observing that the Appellant “was deprived of what was in all likelihood a good defence in law”), Simon Brown LJ also made clear the additional hurdle that had to be overcome when he said (at 278):

“This decision must not be taken as a licence to appeal by anyone who discovers that following conviction (still less where there has been a plea of guilty) some possible line of defence has been overlooked. Only most exceptionally will this court be prepared to intervene in such a situation. Only, in short, where it believes the defence would quite probably have succeeded and concludes, therefore, that a clear injustice has been done. That is this case. It will not happen often.”

**[14]** It is against that background of law that we now examine the facts of the four cases which were argued before us.

#### *R V AM*

**[15]** Abdalla Mohamed, who is a Somali national now aged 27, arrived at Stansted Airport on Saturday 25 April 2009, on a flight from Bergamo in Italy. He was in possession of a Swedish passport belonging to another person which he presented to an immigration officer. The Appellant spoke no English and the officer in question spoke no Somali. He was detained and when an interpreter was provided who spoke Somali he claimed asylum on the basis that he was a refugee. He was later arrested and, in due course, charged with an offence under s 25(1)(c) of the 2006 Act.

**[16]** On 7 May 2009, at the Crown Court at Chelmsford, before His Honour Judge Hayward Smith QC, the Appellant pleaded guilty to that offence and was sentenced initially to a term of 12 months imprisonment; when the judge realised that this would lead to automatic deportation, he reduced the sentence to 11½ months imprisonment. He now seeks to appeal this conviction on the grounds that he was not advised of the possibility of a defence under s 31 of the 1999 Act and that accordingly his plea was not a proper admission of guilt.

[17] Again, it is necessary to summarise the nature of this Appellant's case. During a screening interview with immigration officers which took place on the day of his arrival, the Appellant claimed that he had flown from Mogadishu Airport in the company of an agent pursuant to arrangements made by his father, who had paid 3,000 Euros. They had flown for three hours to another airport where people spoke Arabic. They had stayed there for one and a half days, not leaving the airport. He had then caught a second flight that very day but was unable to say how long that flight had taken, other than he believed that it had lasted longer than the first flight. He could not confirm whether they had stopped anywhere else before landing at Stansted, but said that it was possible they had done so.

[18] In answer to a question as to his reason for coming to the UK, he said that his intention was to seek asylum in any European country and he had no idea where the agent was taking him. He said that he could not return to Somalia because the country was unstable and he belonged to the minority Ashraf clan who were persecuted. He had to stay at home all the time and could not even go to the local mosque or study. He said that he and his father had discussed his leaving Somalia some two months previously and that his father was concerned about his well-being. He also said that hopefully his family would travel to Ethiopia the following week. We add that the Appellant's claim for asylum has recently been refused by the Borders Agency: we were informed that the Appellant intends to appeal that decision.

[19] For the purposes of the criminal proceedings, the Appellant was represented by Mr Richard Conley, a solicitor advocate and partner in Taylor Haldane Barlex LLP. The Appellant asserted that he had not received advice about the possibility of mounting a defence under s 31 of the 1999 Act and waived privilege. In a response dated 18 June 2010, Mr Conley said that he was able to say with confidence that he would have advised the Appellant about the statutory defence because at the time that he represented the Appellant, he was also briefed to represent another Defendant who had come from Iran to the UK via another EU country whom Mr Conley had advised about the availability of the defence and who was proposing to run it at trial. He said that it was inconceivable that having researched the availability of that defence for that other client he would not have advised the Appellant as to the existence of the defence. In order to resolve this issue, the court heard the evidence of both the Appellant and Mr Conley *de bene esse*.

[20] The Appellant's evidence about the court hearing and events surrounding it was somewhat vague. He appeared to have no clear recollection, even of whether he was being asked to plead guilty or not guilty. Although he claimed that he was told by the lawyer to plead guilty, he said that he could not remember any discussion about the availability of a defence.

[21] Mr Conley, on the other hand, told us that his firm was located in the catchment area for Stansted Airport and he had represented at Chelmsford Crown Court dozens of Defendants who had entered the country on false documents, at the rate of two or three a month. He could not recall specifically this particular case and had not been able to find his counsel's notebook in which he would have made notes of his conference in the cells. He was confident as to his usual practice, which would have involved informing the Appellant about the possible statutory defence.

[22] Reconstructing what he would have thought about this particular case, he thought that the sticking point for the Appellant was the period in transit, including spending a day and a half at an airport in Italy. He said that he would undoubtedly have advised the Appellant that if the prosecution could show that he should have claimed asylum when he had an opportunity to do so in Italy, the defence under s 31 would fail.

**[23]** It was suggested to him by Mr Macdonald QC in cross-examination that the reference in his letter of 18 June 2010 to the Appellant “cutting his losses” was to the Appellant not feeling he was guilty, but pleading guilty as a compromise. He said that this was not the point he was making; what he was seeking to say was that, if run at trial, a defence of this sort would involve the jury weighing up whether what the Appellant did or did not do in Italy was reasonable. It was a difficult defence to run and unless the Appellant was supremely confident, there was the risk of a longer prison sentence if he was convicted after a trial. Mr Conley was insistent that he would have given advice along those lines and that it was then for the Appellant to weigh matters in the balance after that advice and decide what course to take. It was not for Mr Conley to take that decision.

**[24]** Mr Conley was asked whether there were difficulties in explaining, through an interpreter, the complex concepts that this defence involved. He explained that he had experience, from many cases, of Somali interpreters appointed by the court. Some were very good and others not so good. With a competent interpreter, it was possible to be confident of the Defendant understanding the concepts; with a less competent interpreter, it would be necessary to work harder to ensure the Defendant understood.

**[25]** We accept Mr Conley's evidence that he would have followed his usual practice in the present case. We consider that he did provide the Appellant advice about the availability of a defence under s 31, including the difficulty of running such a defence, given the terms of s 31(2) and the fact that he had spent one and a half days at an airport in another country. Having heard the Appellant's evidence, we are not sure to what extent he was really in a position to challenge that he was given advice about the statutory defence, in the light of his poor recollection of events. To such extent as it is said to support the allegation of inadequate advice, we do not consider it capable of belief although the better way of putting it may be that even if we had accepted the evidence, it would not afford a ground for allowing the appeal: see s 23(2) of the Criminal Appeal Act 1968.

**[26]** For the avoidance of doubt, however, to the extent that there remained a conflict of evidence about whether the advice was given, we preferred the evidence of Mr Conley. We are also satisfied that Mr Conley would have satisfied himself that the Appellant understood the advice that was given, so there is no scope for Mr Macdonald's fall back position that even if the advice was given, the Appellant did not understand it. Furthermore, we consider that such advice as to the difficulty of running the defence in this case was appropriate advice in all the circumstances and the submission that the Appellant was given no advice or the wrong advice is misconceived. Accordingly, there is no basis for setting aside the plea of guilty.

**[27]** Even if we had concluded that no advice had been given, we would still have concluded that the plea of guilty should not be set aside. There was no reasonable prospect of a defence under s 31 succeeding, given the facts of the Appellant's case as they emerged in the screening interview and to an extent in cross-examination:

(i) he was extremely vague about the journey from Mogadishu and in particular where he had come from when he entered the UK, notwithstanding that he was being interviewed on the same day as he had flown into the country and that he had never been on an aeroplane before, so that he might have been expected to have a greater interest in where he was going;

(ii) he had said that hopefully his family would travel to Ethiopia the following week and did not explain why he could not have also gone there or suggest that he would not have been safe in Ethiopia:

(iii) he had no specific desire to go to the UK but just to any European country and

(iv) he had in fact come into the UK on a flight from Italy and given his inability to say whether the flight had stopped somewhere else after leaving the airport where he had spent one and a half days, a jury would in all probability have concluded that that time had been spent in Italy.

Against that background, we consider that s 31(2) would have presented real difficulties standing in way of any defence under s 31(1).

**[28]** Accordingly, there is no arguable basis for saying that the conviction is unsafe and the appeal is dismissed.

*R V MV*

**[29]** MV (wrongly indicted as MW) is an Iranian national. On 7 August 2009 he arrived at Liverpool John Lennon airport from Reus in Spain. At immigration control he presented a false Bulgarian passport in the name of Stanimirov. He was arrested and in due course charged with an offence under s 25 of the 2006 Act. On 7 September 2009 he appeared in the Crown Court at Liverpool where he pleaded guilty to possession of a false identity document with intent and was sentenced to 12 months imprisonment. He now seeks to appeal this conviction on the grounds that he was not advised of the possibility of a defence under s 31 of the 1999 Act and that accordingly his plea was not a proper admission of guilt.

**[30]** In order to analyse the circumstances, it is necessary to set out the facts in some detail. This Appellant was born on 23 December 1977 and is therefore now 32 years of age. He has filed a witness statement in support of his appeal dated 16 September 2010 in which he gives a detailed account of the circumstances in which he left Iran and travelled to the United Kingdom. Mr Arlidge QC (for the Crown in each of these appeals) accepts that its contents are consistent with the screening interview carried out on 7 August 2009 and the asylum interview carried out on 26 November 2009.

**[31]** According to the witness statement, the Appellant was born in Abhar, a city in the North West of Iran. He married in October 1998 and has a son born in August 1999. His wife and son are still in Iran. In June 2009 he became involved in demonstrations against the Iranian government. On 15 June he travelled by bus to Tehran with a number of friends and relations. They joined a demonstration; but he became separated from the group, and was subjected to physical violence at the hands of what he described as soldiers. He was taken into custody and was detained for 16 days during which he was interrogated and subjected to torture. It is not necessary for present purposes to particularise the treatment that he claims to have suffered at the hands of the authorities.

**[32]** He was able to escape with outside assistance arranged, he thinks, by his father and an uncle. The arrangements involved his being supplied with a drink containing soap that provoked symptoms indicative of illness with the consequence that he was transferred to hospital from which he was able to escape. Arrangements had been made for him to be taken to Turkey in the back of a lorry. The agent who accompanied him on the journey provided him with an Iranian passport, and after arrival in Ankara arranged for the passport to be endorsed with a visa for Syria. He then travelled to Syria by air and on arrival was taken to a flat where he stayed for a week. He was then taken by the agent to an airport from which he flew to Spain. He was in transit in Spain for about three hours, during which he did not leave the airport. He was then given the Bulgarian passport the subject of the charge, and was told that he would be on his own when he arrived in the

United Kingdom. Up until that point he had been told to follow the agent, and to do what he said at all times.

**[33]** A witness statement from an immigration officer on duty at Liverpool John Lennon airport on 7 August 2009 states that he was approached by the Appellant who handed him the Bulgarian passport which the officer immediately recognised as a forgery. The Appellant gave his name and date of birth. He also gave his nationality as Iranian and told the officer “. . . that he had problems in Iran”. In the course of the screening interview carried out on the same day he was asked the standard question as to why, if he had stayed in a country or countries before arriving in the United Kingdom, he had not applied for asylum before arriving in the UK. His answer is recorded in the following terms “Turkey and Iran are hand in hand. There is nowhere safe in Turkey and my father asked to take me to a safe country.”

**[34]** On 8 August 2009, when charged with the offence, the Appellant was represented by a duty solicitor, Graham Polson of Canter Levin and Berg. Mr Polson also represented him on his appearance at the Liverpool City Magistrates' Court two days later when he gave him advice as to his plea. In his witness statement, dated 21 May 2010, Mr Polson states in terms that at no time did he advise the Appellant on the statutory defence under s 31. Having pleaded guilty at the Magistrates Court, the Appellant was committed to the Liverpool Crown Court for sentence where he was represented by Mr Brendon Carville of counsel. In his note to the Registrar, Mr Carville says that he took the view that there had been a bona fide plea before the Magistrates, and, further, that the statutory defence under s 31 did not apply as the Appellant had not come directly to this country from Iran. Thus, although Mr Carville addressed his mind to the issue, his note is consistent with the Appellant's evidence that even when he appeared in the Crown Court, he was not, in fact, given advice as to s 31.

**[35]** The Appellant was only too aware that he had entered the UK using false documents and, on the basis of the evidence we have summarised, before the case was disposed of, counsel did address the issue of a potential defence. In the circumstances, we are not prepared to conclude that the plea was a nullity but we recognise that the circumstances potentially render it unsafe and so consider the merits of the potential defence.

**[36]** Although there has yet to be an adjudication as to the Appellant's refugee status, in his skeleton argument, Mr Arlidge QC conceded that “amongst the details he produced to the Border Control Officer, the Probation Officer and the court, there are matters which might lead to a conclusion that he is a refugee”. He suggested that it might be advisable for the Appellant to make a more detailed statement for the assistance of the court dealing with his escape from custody and the issue of danger to life and freedom which he has now done and it is accepted by the Crown that its content is consistent with the information given in the course of the screening interviews. In the circumstances, we are satisfied that had the defence under s 31 been raised, the Appellant would have been able to adduce sufficient evidence in support of his claim to refugee status to shift the burden to the prosecution to prove that he was not: see para 9 above.

**[37]** It is also conceded by Mr Arlidge that the Appellant presented himself to the authorities in the United Kingdom without delay, and made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

**[38]** The remaining issue with regard to the availability of the statutory defence is whether the Appellant could have discharged the burden under s 31(2) of showing that he could not reasonably have been expected to have been given protection by the Convention in the countries through which he passed en route to the UK. It was accepted by the Crown that if his stay in Spain was limited to three hours in transit at the airport, he could not

reasonably have been expected to seek asylum in that country. It was also accepted that he could not reasonably have been expected to do so in Syria, given that it is not a signatory to the Refugee Convention. As to Turkey, the statement that the Appellant made to the immigration officer in the course of the first screening interview to which we have already referred, was supported by the report from Amnesty International “Stranded – Refugees in Turkey denied protection” dated April 2009, and Mr Arlidge QC did not seek to argue that the Appellant ought to have sought asylum in that country. It follows that it is highly likely that the Appellant would have been able to discharge the evidential burden imposed by s 31(2).

**[39]** We are therefore satisfied that this Appellant would have had a good prospect of a successful defence under s 31. Given that he was not at any stage advised as to the availability of the statutory defence, we are also satisfied that notwithstanding his plea of guilty, the conviction was unsafe. We therefore allow this appeal and quash the conviction.

*R V RM*

**[40]** On 9 August 2007, at Stansted airport, Rahma Bukar Mohamed (then aged 32) entered the UK on a flight from Eindhoven. She approached an immigration officer saying that she had arrived from Holland and presenting a genuine UK Convention travel document along with a UK asylum registration card in the name Ayni Abdalla. The officer noticed that the photograph was not that of the Appellant; when questioned she revealed her correct name and age. She then claimed asylum. On the following day, the Appellant was arrested and, after interview, charged with two offences each of possession of a false instrument under s 25(1) and 25(5) of the 2006 Act.

**[41]** On 21 August 2007, at a preliminary hearing in the Crown Court at Chelmsford, the Appellant pleaded guilty to both offences and was sentenced by His Honour Judge Gratwicke to 15 months and three months imprisonment respectively, the sentences to run concurrently. She now also seeks leave to appeal her conviction (and an extension of time within which to do so) on the basis that she was not advised of the possibility of mounting a defence under s 31 of the 1999 Act.

**[42]** Her account, set out in her screening interview and amplified in a witness statement, can be shortly summarised. The militia in Somalia had shot her in 2000 due to her ethnicity and in 2004 she was threatened with rape (although a neighbour intervened and prevented the attack); in May 2007, she was assaulted by the militia and suffered a dislocated arm; she feared she might be killed. Thus, leaving her husband and children but accompanied by an agent who had been paid US \$3,000, she had left Somalia and travelled by lorry to various African countries. She then flew to Holland arriving on 6 August: she did not know where she was and only knew that she was on her way to the UK (which was her destination of choice because she knew that members of her clan were here). She was subsequently taken to the airport and provided with the documents she later presented to the immigration authorities at Stansted. In her witness statement, she put the matter in this way:

“When I arrived in Holland, I did not even know that I was in Europe; only that I was on my way to the UK . . . . I was frightened that I would be abandoned if I did not do what the agent had told me to do.

The agent took me to some friends of his in Holland who we stayed with for three days. During these days I did not speak to the other people at all. I felt extremely frightened and alone. I did not ask the people about Holland . . . . It did not occur to me to claim asylum at this point. I would not have known where to go or who to speak to. All I knew is that I had

to do what the agent said and that he was going to take me to the UK and that I should stay with him at all times.”

**[43]** Conditions in Somalia and the likely persecution of Ms Mohamed's sect have been confirmed by Professor Lewis, an acknowledged expert upon life in Somalia; he also confirmed the cultural background that explained her obedience to each and every instruction issued by the male agent. It is pertinent to add that, although initially refused asylum, Ms Mohamed was successful on appeal and has now been granted leave to remain for five years in the UK as a refugee.

**[44]** She maintained that she was advised by her representatives to plead guilty and was not told that she had or may have a defence. There is no evidence from the lawyer who apparently represented the Appellant when she was interviewed but, on her first appearance in the Magistrates Court after charge, the duty solicitor, then Mr Gary Ryan of Buxton Ryan, appeared on her behalf. After the appropriate waiver of privilege, he has made it clear that his firm had not previously represented her and that his advice on that occasion was limited to the procedural issues. He did not provide Ms Mohamed with any advice as to plea but instructed counsel to appear on her behalf. Mr Rio Pahlavanpour of counsel has written to the effect that he “advised fully as to the elements of the offence, including the requisite intention contained in sub-s 2 of s 25” and that it was on this basis that she was advised to enter a plea of guilty. Although the point in issue was flagged, counsel did not address the possibility of mounting a defence under s 31 and has not since done so.

**[45]** In the light of the absence of contrary evidence and the circumstances, Mr Arlidge QC does not challenge the proposition that this Appellant was not advised of the potential defence open to her and accepts that she had a good prospect of successfully establishing that she came directly and that, in any event, it was reasonable for her not to claim asylum in Holland. Thus, he does not oppose this application or the appeal.

**[46]** Mr Thomas, who appeared for Ms Mohamed in this court, was content to approach the appeal on the basis that these convictions were unsafe. We agree with both counsel. In the circumstances, the appeal is allowed and the convictions are quashed.

*R V MN*

**[47]** On 2 August 2009, this Appellant arrived at Gatwick airport having arrived on a flight from Athens. He handed the immigration official a Danish passport in the name of Soren Howell but made no response to questions put to him, save eventually to nod when asked if he was Iranian. The passport was found to be counterfeit with a substituted biodata page. He was arrested and, on 21 August 2009, appeared in the Crown Court at Lewes before His Honour Judge Rennie where he pleaded guilty to a contravention of s 25 of the 2006 Act. He was sentenced to eight months imprisonment. He now seeks leave to appeal his conviction and an extension of time on the grounds that he was not advised of a potential defence under s 31 of the 1999 Act and could successfully have relied upon it.

**[48]** The Appellant's various accounts to the authorities have not been entirely consistent in that they have developed although it is clear that, either to the immigration authorities or the police, he claimed asylum. In his screening interview, he explained that he had been arrested and accused of embezzlement; because he could not prove that he was innocent, he was sentenced to two years imprisonment but bailed pending appeal; as a result, he had to escape. He later explained to his criminal solicitor, Mr Anthony Eden of Frame Smith & Co that he had been employed as a bank manager and, in that capacity, granted a loan which had been approved by his superiors: the loan had later been found to have been obtained using false documents. When the borrower defaulted, he was



prosecuted to conviction and, after five years, his appeal failed and not only ordered to serve the sentence but also ordered to pay compensation. He feared that if he went to prison he would never be released until the money was paid and could have faced execution. Thus he fled. The handwritten note of his instructions goes on “Nothing to do with political problems.” Mr Eden then advised that there was no defence and instructed counsel accordingly.

**[49]** By the time that the Appellant appeared in the Crown Court, his instructions were more extensive. It was explained to Judge Rennie that, with his daughter, the Appellant had been on a demonstration against the recently disputed elections in Iran, his photograph had been taken and he had been identified by the intelligence services. It was further put that he believed that the two issues (the embezzlement and the identification by the intelligence services) were “inextricably linked”. In later statements for the purposes of his claim to asylum, he elaborated further and also explained that the authorities had raided his house in his absence and his wife had three times been detained and interrogated.

**[50]** The Appellant's claim for asylum was originally rejected. On appeal, the Immigration Judge focused on the Appellant's involvement with his daughter in the political demonstration (in which he said that both used and was treated with violence); he found the Appellant a credible witness who would be at risk if he was returned to Iran; the appeal was successful both on asylum and art 3 ECHR grounds. It does not appear that the allegation of embezzlement and the conviction was ever mentioned: not only is there no mention of it but the Immigration Judge specifically emphasised that the Appellant was a middle aged man with “a good future ahead of him in Iran if he had not become involved in this demonstration”.

**[51]** As for his travel out of Iran, he has consistently explained that he left Iran on 1 July in a lorry (paying the equivalent of between 7,000 and 8,000 Euros); he remained in the lorry for 25 days, the lorry driver offering to drop him off anywhere that was suitable. He ended up in Athens (not applying for asylum in intermediate countries because he did not know where he was and could not speak the language), spent two weeks locked in a flat in Athens and then flew to the UK.

**[52]** Section 31 of the 1999 Act applies only in the case of a refugee (which, using the definition within art 1 of the Refugee Convention defines a refugee as set out in para 5 above). If the Appellant was simply seeking to avoid the consequences of his criminal conviction (specifically disavowing 'political problems'), it is difficult to see on what basis he would qualify. In those circumstances, we reject any suggestion that he was not properly advised by his solicitors. What was later to emerge before the Immigration Judge cannot affect the advice given on the basis of the instructions which Mr Eden then received.

**[53]** By the time counsel was instructed, however, the position was slightly different in that the political dimension surrounding the investigation was part of the Appellant's instructions and was advanced in mitigation to the judge. The Appellant having waived privilege, Leesha Whawell of counsel was asked about her advice to the Appellant. In a candid letter to this court, she agreed with the advice of counsel now advising the Appellant that he had what was, potentially, a good defence; she accepted full responsibility for failing to advise him of it. Had it not been for the additional material placed before the Crown Court, we would have wanted to investigate that concession (and its consistency with the instructions from solicitors) in rather greater detail.

**[54]** Having regard to the circumstances, however, we do not seek to do so but are prepared to accept it at face value. We also accept that he satisfies the criteria under s

31(1) of the 1999 Act subject only to the exception in s 31(2) and whether he came directly or could reasonably have been expected to claim asylum in Greece. Only because of the very favourable impression that this Appellant made upon the Immigration Judge (putting to one side that the judge does not appear to have known about the embezzlement conviction), we are not prepared to conclude that the defence would have failed and that a jury would not have been entitled to accept his account that he had been locked in a flat in Athens and conclude that he had done no more than engaged in a “short term stopover” within the meaning of that phrase as explained in *Adimi*.

**[55]** Not without some hesitation, we are prepared to conclude that this Appellant's conviction is unsafe and is quashed.

#### *CONCLUDING REMARKS*

**[56]** These cases are characterised by allegations that those advising illegal entrants to this country have simply failed to ensure that the scope of the potential defences to an allegation of breach of s 25 of the 2006 Act have fully been explored. If the circumstances and instructions generate the possibility of mounting a defence under s 31 of the 1999 Act, there is simply no excuse for a failure to do so and, at the same time, properly to note both the instructions received and the advice given. If these steps are taken, cases such as the four with which the court has just dealt, will not recur and considerable public expense (both in the imprisonment of those convicted and in the pursuit of an appeal which will involve evidence and waiver of privilege) will be avoided.  
*Judgment accordingly.*

#### 4. R v Mateta and others [2013] EWCA Crim 1372

##### R v Mateta and others

*Criminal law – Appeal – Appeal against conviction – Solicitor advice – Defendants being charged with possession of an identity document with improper intention – Defendants' solicitors advising no defence available at all or in relation to facts of particular case – Defendants pleading guilty – Defendants appealing – Guidance being provided on proper approach to be taken when a defendant, following incorrect legal advice, has pleaded guilty to the offence – Identity Cards Act 2006, s 25(1) – Identity Documents Act 2010. Section 4 – Immigration and Asylum Act 1999, s 31*

[2013] EWCA Crim 1372, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

**CA, CRIMINAL DIVISION  
LEVESON, FULFORD LJ, SPENCER J**

**30 JULY 2013**

R Thomas for Mateta, Bashir and Andukwa  
D Bunting for Ghavami and Afshar

J McGuinness QC and B Douglas-Jones for the Crown

Registrar for Criminal Appeals; Wilson Solicitors LLP; Crown Prosecution Service

**LEVESON LJ:**

(reading the judgment of the court)

##### *INTRODUCTION*

[1] Four of the present cases are before the court by way of a reference from the Criminal Cases Review Commission (“CCRC”) and one application for leave to appeal has been referred by the Registrar of Criminal Appeals: we grant that Applicant the necessary extension of time and leave to appeal. In each case, the same issue arises and because other similar cases are being pursued by way of application or appeal, it is appropriate to review the law and practice, thereby providing some guidance for the future.

[2] In short, each of the Appellants, when entering or leaving the United Kingdom, attempted to rely on a false passport or a false travel document issued under the 1951 Convention Relating to the Status of Refugees (“a Geneva passport”), in that the passport or travel document was a forgery or it related to a different person. They all pleaded guilty to an offence of possession of an identity document with improper intention, either contrary to s 25(1) Identity Cards Act 2006 or s 4 Identity Documents Act 2010 (the latter replacing s 25 in similar but not identical terms).

[3] The issue can be stated simply and concerns the approach to be taken by the Court of Appeal when a Defendant, following incorrect legal advice, has pleaded guilty to an offence under s 25 or s 4 if a defence under s 31 Immigration and Asylum Act 1999 (“the Act”) was or may have been available to him or her.

[4] The Crown does not resist the suggestion that the convictions in the cases of Koshi Mateta, Simon Andukwa, Yasin Bashir, Amir Ghavami and Saeideh Afshar should be quashed. Following further analysis of the position, an appeal by Herve Tchiengang, although referred by the Criminal Cases Review Commission, was abandoned on notice prior to the hearing.

#### *THE LAW*

[5] The terms of the offence in its earlier and present form are as follows. The differences in wording between the two sections are immaterial for the purposes of this appeal. For the sake of completeness, we set out both:

“Section 25(1) Identity Cards Act 2006

#### *POSSESSION OF FALSE IDENTITY DOCUMENTS ETC*

(1) It is an offence for a person with the requisite intention to have in his possession or under his control –

- (a) an identity document that is false and that he knows or believes to be false;
- (b) an identity document that was improperly obtained and that he knows or believes to have been improperly obtained; or
- (c) an identity document that relates to someone else.

(2) The requisite intention for the purposes of subsection (1) is –

- (a) the intention of using the document for establishing registrable facts about himself; or
- (b) the intention of allowing or inducing another to use it for establishing, ascertaining or verifying registrable facts about himself or about any other person (with the exception, in the case of a document within paragraph (c) of that subsection, of the individual to whom it relates).

Section 4 Identity Documents Act 2010

#### *POSSESSION OF FALSE IDENTITY DOCUMENTS ETC WITH IMPROPER INTENTION*

(1) It is an offence for a person ('P') with an improper intention to have in P's possession or under P's control –

- (a) an identity document that is false and that P knows or believes to be false,
- (b) an identity document that was improperly obtained and that P knows or believes to have been improperly obtained, or
- (c) an identity document that relates to someone else.

(2) Each of the following is an improper intention –

- (a) the intention of using the document for establishing personal information about P;
- (b) the intention of allowing or inducing another to use it for establishing, ascertaining or verifying personal information about P or anyone else.”

**[6]** As for possible defences to these offences, the background is to be found in art 31 of the 1951 Convention and of the 1967 Protocol Relating to the Status of Refugees in which the United Nations addressed the need for a defence to illegal entry or presence by refugees in the aftermath of the Second World War. Under the heading “Refugees unlawfully in the country of refuge” it provided (at para 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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence . . . .”

**[7]** The Court of Appeal considered the evolution of this defence as applied in the United Kingdom in *R v Mohamed Abdalla*; *R v V(M)*; *R v Mohamed (Rahma Abukar)*; *R v Nofallah* [2010] EWCA Crim 2400, [2011] 1 Cr App Rep 432 (“*R v MA*”). The judgment of the court makes it clear:

“6 It was only in *R v Uxbridge Magistrates’ Court ex parte Adimi* [2001] QB 667 that the circumstances of prosecuting for documentary offences those who claimed asylum were first considered. Simon Brown LJ considered the broad purpose of art 31 and put the matter in this way (at 677G):

‘Self evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. In the course of argument, Newman J suggested the following formulation: where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by Article 31.’

7 The response of the Government to this decision was to move an amendment to the Immigration and Asylum Bill then before Parliament. It was that amendment which became s 31 of the 1999 Act although it is to be noted that the legislation contains two aspects that more narrowly define the position than that advanced by Simon Brown LJ namely, in sub-s 1) the requirement that anyone claiming protection must have applied for asylum as soon as is reasonably practicable, and in sub-s 2) that a refugee who has stopped in another country outside the United Kingdom must show that he could not reasonably have been expected to have been given Convention protection in that other country.”

**[8]** The amended text of s 31 of the Immigration and Asylum Act 1999, as relevant to the present cases, provides defences based on art 31(1) of the Refugee Convention as follows:

“(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 –

...

(aa) Section 4 or 6 of the Identity Documents Act 2010;

...

(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 . . . .

(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.”

**[9]** How does this defence operate? In *R v Makuwa* [2006] EWCA Crim 175, [2006] 1 WLR 2755, [2006] 2 Cr App Rep 184, this court rehearsed the general proposition that when a Defendant raises a defence under s 31, he must provide sufficient evidence in support of his claim for refugee status to raise the issue, but thereafter the prosecution bears the burden of proving – to the criminal standard – that the Defendant was not a refugee 26. The definition of refugee is to be found in art 1 of the Refugee Convention, namely 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”.

**[10]** However, if an application by the Defendant for asylum has been refused by the Secretary of State, then in those circumstances pursuant to s 31(7) of the Asylum and Immigration Act 1999, the legal burden rests on him to establish on a balance of probabilities that he is a refugee (see *R v Ali Reza Sadighpour* [2012] EWCA Crim 2669, 38 – 40, [2013] 1 Cr App Rep 269).

**[11]** Similarly, the Defendant bears the burden of proof on a balance of probabilities of the other matters that need to be established under s 31 in order for the defence to operate. As this court explained in *Sadighpour* (supra):

“18 If the Crown fails to disprove that the Defendant was a refugee, it then falls to a Defendant to prove on the balance of probabilities:

(a) that he did not stop in any country in transit to the United Kingdom or, alternatively, that he could not reasonably have expected to be given protection under the Refugee Convention in countries outside the United Kingdom in which he stopped; and, if so;

(b) to prove that he presented himself to the authorities in the UK without delay;

(c) to show good cause for his illegal entry or presence in the UK; and

(d) to prove that he made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.”

See also *Makuwa* supra 27.

**[12]** Article 31(1) provides a refugee with immunity from prosecution if he made a short-term stopover in an intermediate country en route to the intended country of refuge when fleeing the country of persecution (*R v Asfaw* [2008] UKHL 31, [2008] 1 AC 1061, [2008] 3 All ER 775). As Lord Hope observed “[t]he single most important point that emerges from a consideration of the travaux préparatoires is that there was universal acceptance that the mere fact that refugees stopped while in transit ought not deprive them of the benefit of the article” 56.

**[13]** Lord Bingham put the matter thus:

“26 I am of opinion that section 31 of the 1999 Act should not be read [. . .] as limited to offences attributable to a refugee's illegal entry into or presence in this country, but should provide immunity, if the other conditions are fulfilled, from the imposition of criminal penalties for offences attributable to the attempt of a refugee to leave the country in the continuing course of a flight from persecution even after a short stopover in transit. This interpretation is consistent with the Convention jurisprudence to which I have referred, consistent with the judgment in *Adimi* [*R v Uxbridge Magistrates' Court ex parte Adimi* [2001] QB 667], consistent with the absence of any indication that it was intended to depart in the 1999 Act from the Convention or (subject to the exception already noted) *Adimi*, and consistent with the humanitarian purpose of the Convention. It follows that the jury in the present case, on finding the conditions in section 31 to be met, were fully entitled to acquit the Appellant on count 1, as the Respondent then accepted, even though the offence was committed when the Appellant was trying to leave the country after a short stopover in transit.”

**[14]** In *R v Kamalanathan* [2010] EWCA Crim 1335, the Appellant travelled to the United Kingdom from Sri Lanka via Russia and Poland, and remained in this country for a month prior to attempting to take a flight to Canada. In giving the judgment of the court in which the conviction was upheld, Thomas LJ said:

“5 The real question is, looking at all the circumstances: is the person in the course of a flight? Is he making a short-term stop over? Is he in transit? Whichever phrase is used, one has to see whether at the material time the person was here, not having come to this country either temporarily or permanently seeking to stop here, but was going on. That is a question of fact.”

**[15]** This approach was underscored by the Court of Appeal in *R v MA* in these terms:

“9 Although the full scope of s 31 of the 1999 Act was not determined by *Asfaw*, Lord Bingham did make clear that in order to satisfy the requirement of s 31(1)(c) the claim for asylum must be made as soon as was reasonably possible (which did not necessarily mean at the earliest possible moment: see 16). Second, the fact that a refugee had stopped in a third country in transit was not necessarily fatal: he affirmed the observations of Simon Brown LJ in *Adimi* (at 678) that refugees had some choice as to where they might properly claim asylum and that the main touchstones by which exclusion from protection should be judged were the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape: see also *R v MMH* [2008] EWCA Crim 3117 at 14-15.”

**[16]** It follows that a refugee may have a defence to a charge of possession of an identity document with the requisite or improper intention contrary to s 25 or s 4 when he is arrested following an attempt to leave the United Kingdom following a short stopover in this country.

**[17]** Given an accused does not lose the protection of art 31 and s 31 if he is genuinely in transit from a country where his life or freedom was threatened en route to another country wherein he intended to make an asylum application, depending on the facts of the case if he fails to present himself to the authorities in the United Kingdom “without delay” during a short stopover in this country when travelling through to the nation where he proposed to claim asylum, the defence may remain extant. As Hughes LJ explained in *R v Jaddi* [2012] EWCA Crim 2565:

“16 . . . However, it is right to say that in thus concluding the House of Lords accepted a proposition which derives from the judgment of Simon Brown LJ in *R v Uxbridge Magistrates' Court ex parte Adimi* [2001] QB 667 at 687. That was an observation to the effect that in order to give effect to the Convention it is necessary not to punish those who are merely in transit in a third country or, in Mrs Asfaw's case, in this country. A person who is genuinely in transit does not, on the authority of *Asfaw*, lose the protection of the Convention and thus of section 31.”

**[18]** Hughes LJ went on to identify that the same reasoning may equally apply to the requirement that the individual made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom if he was genuinely in transit. As to the possible limitations of the operation of s 31, Hughes LJ observed:

“26 . . . In very general terms, it seems to us that in the great majority of cases there will simply be no excuse for a genuine refugee not to make himself known immediately he arrives in the safe place that is to say the arrivals immigration hall at a United Kingdom airport. Moreover, from the point of view of sensible immigration control, that makes sense . . . .

30 . . . it is certainly open to a tribunal of fact to conclude and in many cases it may be the right conclusion, that there is simply no reason for such a traveller not to identify himself the moment he is in friendly official hands.”

**[19]** These observations were not intended to detract from the principles in *Asfaw*, *AM* or the other authorities to which we have referred: they do no more than make clear the very real importance of focussing on the particular facts and circumstances of each case.



[20] Finally, we add that the requirement in art 31(1) of the Convention, as reflected in s 31(1)(b) of the Act, that the refugee must show “good cause” for his illegal entry or presence in the United Kingdom may not present an onerous requirement, given that in *Adimi* the Divisional Court affirmed the proposition that this condition has only a limited role to play and it will be satisfied by a genuine refugee showing that he was reasonably travelling on false papers 679 H.

[21] To summarise, the main elements of the operation of this defence are as follows:

i) The Defendant must provide sufficient evidence in support of his claim to refugee status to raise the issue and thereafter the burden falls on the prosecution to prove to the criminal standard that he is not a refugee (section 31 Immigration and Asylum Act 1999 and *Makuwa* 26) unless an application by the Defendant for asylum has been refused by the Secretary of State, when the legal burden rests on him to establish on a balance of probabilities that he is a refugee (s 31(7) of the Asylum and Immigration Act 1999 and *Sadighpour* 38 – 40).

ii) If the Crown fails to disprove that the Defendant was a refugee (or if the Defendant proves on a balance of probabilities he is a refugee following the Secretary of State's refusal of his application for asylum), it then falls to a Defendant to prove on the balance of probabilities that

a) that he did not stop in any country in transit to the United Kingdom for more than a short stopover (which, on the facts, was explicable, see (iv) below) or, alternatively, that he could not reasonably have expected to be given protection under the Refugee Convention in countries outside the United Kingdom in which he stopped; and, if so:

b) he presented himself to the authorities in the UK “without delay”, unless (again, depending on the facts) it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum;

c) he had good cause for his illegal entry or presence in the UK; and

d) he made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom, unless (once again, depending on the facts) it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum. (Section 31(1); *Sadighpour* 18 and 38 – 40; *Jaddi* 16 and 30).

iii) The requirement that the claim for asylum must be made as soon as was reasonably practicable does not necessarily mean at the earliest possible moment (*Asfaw* 16; *R v MA* 9).

iv) It follows that the fact a refugee stopped in a third country in transit is not necessarily fatal and may be explicable: the refugee has some choice as to where he might properly claim asylum. The main touchstones by which exclusion from protection should be judged are the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape (*Asfaw* 26; *R v MA* 9).

v) The requirement that the refugee demonstrates “good cause” for his illegal entry or presence in the United Kingdom will be satisfied by him showing he was reasonably travelling on false papers (*ex parte Adimi* at 679H).

#### ADVICE ON THE PARAMETERS OF THE S 31 DEFENCE

[22] *R v MA* established that there is an obligation on those representing Defendants charged with an offence of possession of an identity document with improper intention to advise them of the existence of a possible s 31 defence. It did so in these terms:

“10 The upshot [. . .] is that it is open to anyone charged with an offence under s 25(1) of the 2006 Act to adduce sufficient material to raise an issue that he or she is a refugee and entitled to the protection of s 31 of the 1999 Act whereupon the burden of disproving that defence will fall upon the prosecution: see *R v Makuwa* [2006] EWCA Crim 175, [2006] 2 Cr App Rep 11 (p 184). It is thus critical that those advising Defendants charged with such an offence make clear the parameters of the defence (including the limitations and potential difficulties) so that the Defendant can make an informed choice whether or not to seek to advance it.

11 There is no doubt that this court can entertain an application for leave to appeal against conviction on the grounds that a tendered guilty plea was a nullity. The limited basis of that jurisdiction was explained in *R v Evans* [2009] EWCA Crim 2243) by Thomas LJ in these terms (at 52):

'The applicable general principle is that such a writ will be granted where the proceedings are a nullity, that is to say where a purported trial 'is actually no trial at all' (see the opinion of Lord Atkinson in *Crane v DPP* [1921] 2 AC 299 at 330) or where there has been 'some irregularity in procedure which prevents the trial ever having been validly commenced' (see the opinion of Lord Diplock in *Rose* (1982) 75 Cr App Rep 322 at 336.'

12 The test for a plea to be held a nullity was elaborated (per Scott Baker LJ in *R v Saik* [2004] EWCA Crim 2936) as requiring the facts to be so strong as to demonstrate that there is no true acknowledgment of guilt with the advice going to the heart of the plea so that it was not 'a free plea'. It is, however, important not to water down the underlying concept of the jurisdiction so as to bring nullity into play purely on the basis of advice alleged to be wrong. For those circumstances, there remains a basis on which this court can intervene which is firmly grounded in the safety of the conviction. Thus, in *R v Lee (Bruce)* (1984) 79 Cr App Rep 108, the approach was articulated by Ackner LJ in this way at 113:

'The fact that Lee was fit to plead; knew what he was doing; intended to make the pleas he did; pleaded guilty without equivocation after receiving expert advice; although these factors highly relevant to whether the convictions, or any of them, were either unsafe or unsatisfactory, cannot of themselves deprive the court of the jurisdiction to hear the applications.'

13 This alternative approach was adopted in *R v Boal* (1992) 95 Cr App Rep 272 which concerned the failure to challenge what was held to be the erroneous assumption that an assistant general manager at a bookshop, responsible for the shop during a week in which the manager was absent, was a manager within s 23(1) of the Fire Precautions Act 1971 . In quashing the conviction that followed guilty pleas based on that assumption (observing that the Appellant 'was deprived of what was in all likelihood a good defence in law'),

Simon Brown LJ also made clear the additional hurdle that had to be overcome when he said at 278:

'This decision must not be taken as a licence to appeal by anyone who discovers that following conviction (still less where there has been a plea of guilty) some possible line of defence has been overlooked. Only most exceptionally will this court be prepared to intervene in such a situation. Only, in short, where it believes the defence would quite probably have succeeded and concludes, therefore, that a clear injustice has been done. That is this case. It will not happen often.'

[. . .]

56 These cases are characterised by allegations that those advising illegal entrants to this country have simply failed to ensure that the scope of the potential defences to an allegation of breach of s 25 of the 2006 Act have fully been explored. If the circumstances and instructions generate the possibility of mounting a defence under s 31 of the 1999 Act, there is simply no excuse for a failure to do so and, at the same time, properly to note both the instructions received and the advice given. If these steps are taken, cases such as the four with which the court has just dealt will not recur and considerable public expense (both in the imprisonment of those convicted and in the pursuit of an appeal which will involve evidence and waiver of privilege) will be avoided."

**[23]** If the Applicant's case has reached the stage of the First Tier Tribunal (Immigration and Asylum Chamber) and if the latter's decision is available, it is appropriate for the Court of Appeal to assess the prospects of an asylum defence succeeding by reference to the tribunal's findings. This was explained in *Sadighpour* as follows:

"35 We are therefore satisfied that it is appropriate to have regard to the tribunal's decision in assessing the Appellant's prospects under section 31 on any retrial. After all, the tribunal is a properly constituted judicial body. Its members have particular specialist experience in dealing with matters pertaining to immigration and asylum. The Appellant was able to deploy his full arguments and call relevant witnesses. The evidence was fully tested. Both parties made their respective submissions, and a fully reasoned judgment was reached.

36 As already stated, paragraph 31(7) provides 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 taken not to be a refugee unless he shows that he is."

**[24]** To summarise the main elements of an accused's entitlement to advice on the s 31 defence:

- i) There is an obligation on those representing Defendants charged with an offence of possession of an identity document with improper intention to advise them of the existence of a possible s 31 defence if the circumstances and instructions generate the possibility of mounting this defence, and they should explain its parameters (*R v MA 10*).
- ii) The advisers should properly note the instructions received and the advice given (*R v MA 56*).
- iii) If an accused's representatives failed to advise him about the availability of this defence, on an appeal to the Court of Appeal Criminal Division the court will assess whether the defence would "quite probably" have succeeded (*R v MA 13*)

(iv) It is appropriate for the Court of Appeal to assess the prospects of an asylum defence succeeding by reference to the findings of the First Tier Tribunal (Immigration and Asylum Chamber), if available (*Sadighpour* 35).

**[25]** With these remarks we turn to the cases before the court none of which, in the event, as between the parties was contentious.

*KOSHI MATETA*

**[26]** This Applicant, who is a Congolese national, was stopped on 11 March 2009 at Heathrow Airport whilst trying to board a flight to Canada. He was in possession of a fake passport, purportedly issued by the Democratic Republic of Congo (“DRC”).

**[27]** When interviewed by the police, he maintained that he had fled the DRC because he had received death threats from members of the presidential guard on account of his membership of one of the opposition parties. He said he had travelled to the UK via Belgium where he had stayed overnight awaiting a connecting flight to London, and his intention was to fly to Canada in order to claim asylum. However, at this stage, he sought asylum in Great Britain.

**[28]** The Applicant was released on bail and on 15 April 2009 the Home Secretary refused his asylum application. He appealed that decision but on 7 May 2009 he was charged with a s 25 offence. On 25 May 2009 he pleaded guilty at the Isleworth Crown Court and was sentenced to nine months' imprisonment and the judge made a recommendation for his deportation.

**[29]** On 29 March 2010, his appeal against the Home Secretary's decision on his asylum application was allowed (on asylum and human rights grounds), and he was given permission to remain in the UK as a refugee.

**[30]** It is sufficiently clear from the attendance notes compiled by the Applicant's solicitors, along with their response to the Grounds of Appeal and the contents of the brief to counsel, that the availability of the defence under s 31 was never raised with the Applicant, on the basis of the incorrect assumption that there was no potential defence to the charge.

**[31]** The prosecution concedes against the background of this Applicant's refugee status (now recognised) that it is probable he did not stay in any country in transit to the United Kingdom for more than a short stopover; he was in a position to suggest he had good cause for his illegal entry into the UK; it was open to him to argue he made a claim for asylum as soon as was reasonably practicable, although clearly it was not made at the earliest possible moment after his arrival in this country; and he was entitled to contend he was justified in not presenting himself to the authorities in the UK “without delay”. In all the circumstances, the prosecution accepts that his intention to travel to Canada did not remove the availability of the defence.

**[32]** Although there were a number of complex factual issues, given the prosecution's concession and on the basis of the approach established in *Boal*, we are prepared to accept this Applicant's defence “would quite probably have succeeded” and we conclude, therefore, “that a clear injustice has been done”.

**[33]** Accordingly, we allow the appeal and quash the conviction. The Respondent does not seek a retrial.

*SIMON ANDUKWA*

[34] On 29 September 2006 the Appellant who is a national of Cameroon was stopped at Manchester Airport attempting to board a flight to Canada. He was in possession of a passport in someone else's name; he was arrested, and thereon he claimed asylum. In interview he said that it had been necessary to leave because of fear of persecution on account of his political activities (he was a member of the SCNC, a group that promotes the rights of the English speaking minority in Cameroon), and that he had travelled to the United Kingdom via Kenya (without leaving Nairobi airport). He had arrived at Heathrow airport the previous day, and had been driven to Manchester Airport for his connecting flight to Canada. He maintained that he had been accompanied by an agent and had been given the passport seized by the police once he had arrived in the United Kingdom.

[35] On 26 October 2006 the Appellant pleaded guilty to a s 25 offence, and he was sentenced to six months' imprisonment. In June 2007, the Home Secretary refused the Appellant's application for asylum, but his appeal was successful in November 2007, when he was granted asylum and leave to remain until October 2013.

[36] There are no indications from the relevant attendance notes compiled by the solicitors or in the brief to counsel that the Appellant received any advice on the availability of a defence under s 31; indeed the solicitors have suggested to the CCRC that, in their estimation, the defence did not apply.

[37] The prosecution concedes against the background of this Applicant's refugee status (now recognised) that it is probable he did not stop in any country in transit to the United Kingdom for more than a short stopover; he was in a position to suggest he had good cause for his illegal entry into the UK; it was open to him to argue he made a claim for asylum as soon as was reasonably practicable, although clearly it was not made at the earliest possible moment after his arrival in this country; and he was entitled to contend that he was justified in not presenting himself to the authorities in the UK "without delay". In all the circumstances, the prosecution accepts that his intention to travel to Canada did not remove the availability of the s 31 defence.

[38] Although, again, there were a number of complex factual issues, given the prosecution's concession and on the basis of the approach established in *Boal*, we are prepared to accept this Applicant's defence "would quite probably have succeeded" and we conclude, therefore, "that a clear injustice has been done".

[39] In all the circumstances we allow this appeal and quash the conviction. Again, the Respondent rightly does not seek a retrial.

*YASIN BASHIR*

[40] On 9 November 2007 the Appellant (a Somalian national) arrived at Gatwick airport on a flight from Greece, having travelled to this country via Kenya and Dubai. He presented a false UK passport and was detained. A brief interview was conducted with the assistance of a Somali interpreter, and when asked his reasons for coming to the UK, the Appellant replied "asylum".

[41] During a later interview under caution, the Appellant said he had travelled from Somalia to Kenya with the assistance of a man related to his wife who had provided the money for an agent (in due course he told the authorities he had stayed in Kenya about a month). He had travelled to the United Kingdom from Nairobi in the company of the agent he retained (to whom he had paid \$6,500), stopping off at two other countries en route but without leaving the airport on either occasion. The Appellant did not know through which countries they passed, although the CCRC has established they travelled via Dubai and Greece. He said he had used the false passport to "escape for his life". He maintained he

had not claimed asylum in Dubai and Greece because no one had told him he could. He had not realised his ultimate destination was to be the UK but he had claimed asylum when he was aware he had arrived here because he is aware it is a “safe” country.

**[42]** On 4 January 2008 the Home Secretary refused the Appellant's application for asylum and on 18 January 2008 the Appellant lodged an appeal against this decision. Thereafter, on 10 June 2008, the appeal against the Home Secretary's decision was successful and, on 7 July 2008, the Appellant was granted asylum with leave to remain in the UK until July 2013.

**[43]** Meanwhile, on 21 January 2008, at Lewes Crown Court, the Appellant pleaded guilty to an offence of possession of a passport with intent, contrary to s 25 and he was sentenced to 12 months' imprisonment.

**[44]** The prosecution concedes against the background of this Applicant's refugee status (now recognised) that although he spent a month in Kenya, there were good reasons that have been explained by the CCRC in its report why he might not have reasonably expected to be given protection in that country, given “the inconsistent treatment of Somali refugees by the Kenyan authorities” at the time. The same applies to Greece, in that the CCRC concluded there are reasons to doubt whether the Appellant would have obtained protection in Greece. We note Dubai is not a Convention country. Apart from Kenya, it is probable the Appellant did not stop in any country in transit to the United Kingdom for more than a short stopover. In the circumstances, he was in a position to argue he had good cause for his illegal entry into the UK; he made a claim for asylum as soon as was reasonably practicable; and he presented himself to the authorities in the UK “without delay”. Thus, the prosecution acknowledges the defence under s 31 was available to this Appellant.

**[45]** Furthermore, the Crown accepts the Appellant received erroneous advice in that although his representatives raised the issue of s 31 with him, they have suggested that he had no defence to offer because he should have claimed asylum in “the first place he could have done so” (presumably Kenya, Dubai or Greece). Therefore, it is agreed the Appellant was not given a proper opportunity to make an informed choice as to whether to rely on the s 31 defence.

**[46]** On the basis of the history rehearsed above, we are prepared to accept the Appellant's defence on this basis “would quite probably have succeeded” and in the event “a clear injustice has been done”. This appeal is also allowed and the conviction is quashed. Again, the Respondent does not seek a retrial.

#### *AMIR GHAVAMI AND SAEIDEH AFSHAR*

**[47]** These Appellants are husband and wife who arrived in the UK together and who have consistently given the same account. The Crown acknowledges that the merits of their appeals are identical, and it is convenient to deal with their cases together.

**[48]** On 22 March 2012 the Appellants (who are Iranian nationals) each presented a forged Austrian passport at Heathrow Airport as they attempted to board a flight to Montreal; the passports bore false names. They were arrested and interviewed under caution at Heathrow Police Station. Both provided a similar account.

**[49]** Mr Ghavami said that he and his wife were both politically active in Iran and, because of this, they feared arrest and ill treatment. They had left Iran about four months earlier and travelled, using their Iranian passports, to Thailand, entering that country with visitors' visas. They remained in Thailand for about two months, where they met an agent who

was paid \$35,000 by Mr Ghavami's father. From there, still using their Iranian passports, they flew to Tanzania in the company of the agent. On his instructions, they destroyed their Iranian passports en route and the agent provided them with the forged Austrian passports in order to enter Tanzania.

**[50]** They stayed in Tanzania for 20 days, waiting for directions. They next accompanied the agent by bus to Kenya where they remained for a week, before flying to Spain. After a wait of 20 days in Madrid, they flew to Gatwick and took a coach to Heathrow in order to catch a connecting flight to Montreal, which was their ultimate destination. Mr Ghavami has relatives in Canada, and some years earlier he had lived there with his father before they returned to Iran. The Appellants intended to claim asylum in Canada.

**[51]** On 2 April 2012 at Isleworth they both pleaded guilty to being in possession or control of identity documents with intent, contrary to s 4. Each was sentenced to eight months' imprisonment.

**[52]** For reasons that remain essentially unclear, it was only on 18 July 2012 that the asylum claims of the Appellants were recorded, although this had been raised on arrest by Ms Afshar. On 17 August, the Home Office granted both Appellants asylum with five years' leave to remain in the United Kingdom.

**[53]** Against the background of the Applicants' refugee status (now recognised) and notwithstanding that they did not travel directly to this country from Iran, the prosecution concedes that there were good reasons (explained by the CCRC) why this did not happen. Although they spent two months in Thailand, 20 days in Tanzania, one week in Kenya and 20 days in Spain, the Crown accepts they were entitled to doubt whether they could reasonably have expected to be given protection in Thailand, Tanzania, Kenya or Spain.

**[54]** The CCRC gave detailed consideration to these issues and the Crown acknowledges that the speed with which the Home Office granted asylum (one month after the claims were recorded, and effectively "on the papers") leads to the probable inference that the Appellants' joint account of the circumstances leading to their arrival in the United Kingdom is honest and credible. Therefore, the explanations they gave as to why they remained in those other countries for the periods they did and for the reasons they gave, together with their accounts as to why they did not claim asylum prior to arriving in the United Kingdom, would also probably be accepted as genuine and truthful.

**[55]** In summary only, they said that while in Thailand, Tanzania and Kenya they were under the control of the agent and acting on his direction. In relation to their stay in Spain, they did not try to claim asylum both because they accepted what the agent had told them (*viz* Spain would not accept them as refugees and would send them back to Iran) and because of language difficulties. In addition, Thailand is not a party to the Refugee Convention and Kenya is an unstable destination for refugees. In all the circumstances, the prosecution submits there were good reasons why the Appellants might not have reasonably expected to be given protection in the countries through which they passed. Therefore, the prosecution concedes the defence under the s 31 was available to them.

**[56]** Further, the Crown accepts the Appellants received no advice from their legal representatives on the availability of a defence under s 31. Given the decision of this court in *MA* (to say nothing of the other decisions to which we have referred), it is both surprising and disturbing that neither solicitors nor counsel appear to have been aware of the position in law and we repeat that this situation should not recur in the future. On the basis of the history rehearsed above, however, we are prepared to accept the Appellants' defences "would quite probably have succeeded" and in the event "a clear injustice has

been done". In these cases also, the appeals are allowed and the convictions quashed. In this case also, there is no question of a request for a retrial.

**[57]** In addition to acknowledging the assistance of counsel, the court must also recognize the very real contribution made by the CCRC to this area of the law: we are indebted to it. *Judgment accordingly.*



## 5. R v Jaddi [2012] EWCA Crim 2565

Neutral Citation Number: [2012] EWCA Crim 2565

No: 2012/4216/C1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 22 November 2012

**B e f o r e:**

**THE VICE PRESIDENT**

**(LORD JUSTICE HUGHES)**

**MR JUSTICE RAMSEY**

**MR JUSTICE IRWIN**

**R E G I N A**

v

**SINA JADDI**

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(Official Shorthand Writers to the Court)

**Mr R Halim** appeared on behalf of the **Appellant**

**Mr M Robinson (Solicitor Advocate)** appeared on behalf of the **Crown**

J U D G M E N T

(As Approved by the Court)

1. THE VICE PRESIDENT: This defendant pleaded guilty at the Crown Court to offences of possession of identity documents with improper intention. He appeals against his conviction on the grounds that he had available a sound legal defence under section 31 of the Immigration and Asylum Act 1999. He contends that the advice given to him by his trial advocate was, although otherwise careful, in this respect in error.
2. The defendant arrived at Gatwick Airport on 31st May 2012. As we shall explain in a moment, the precise sequence of events at passport control is surrounded by some limited penumbra of doubt. But what is clear is that he had in his possession a French passport in the name of Marcelle Girette and a French identity card in the same name. Both were in fact forgeries. The passport had a bogus bio data page inserted into what had once been a genuine passport and the identity card was wholly counterfeit.
3. The falsity of the documents was spotted and so he was detained. It turned out that his fingerprints were on record in this country because he had made an asylum claim here in the past which had been refused.
4. From a stage before he was interviewed by the police he was advised by a very experienced local solicitor who was well familiar with immigration cases and in due course that gentleman represented the appellant at the Crown Court. Since it is contended that the advice which the appellant was given was in some respects erroneous, the defendant has chosen to waive privilege. That has been very helpful because the result of it is that we have a very full and careful statement from the solicitor in question, which both sides to this appeal accept as factually accurate and complete. This is known: that the defendant's case, as advanced through his solicitor by way of mitigation after his plea of guilty, was as follows. He is an Iranian citizen. In the early 2000s he was in this country as a student and had a student visa permitting him to be here. In 2006 he made an asylum claim, claiming that he was fleeing from persecution in his home country. That was rejected after investigation by the Secretary of State. The appellant appealed that, no doubt to the adjudicator as it would then have been, and it may be further, but certainly by 2008 all his legal routes of appeal were exhausted.
5. In that year, 2008, he returned to Iran. He had not been deported, although no doubt that would have happened had he not returned. He said that the reason that he returned was that his father had died and he went back to be with the family. Thereafter, according to the account which he advanced, he had been suspected in Iran of being a British spy, detained for about ten weeks and subjected to physical ill-treatment. He had then been released but he was politically active, taking part in anti-government demonstrations, and he also incurred disapproval because he pursued an affair with a girlfriend who was now a married woman, he says because she had been pressured by her father into marrying someone else.
6. With that background he asserted that he had left Iran a second time because he had a genuine fear of persecution there and he asserted that it was his intention to travel by one way or another to the United Kingdom and to make a fresh new claim for asylum here. He went initially to Turkey where he stayed for about a month and while he was there, he says, he sought out an agent, a fixer, who he says agreed for a fee of €12,000 to get him to the United Kingdom. Through the assistance of either that agent or a further agent, he journeyed from Turkey to Greece on a different false passport and after two to three days in Greece he moved on to Rome, again travelling on some form of false documentation. He spent three or four days in Rome and then, as arranged he says by the person helping him, he went first by train to Bologna and then there boarded the flight which brought him to Gatwick and to the beginning of the story that we have told. He has said throughout that his object was to claim asylum here. Whether he is indeed a refugee

or not remains undetermined. We are told that he has now undertaken the first screening interview by the immigration authorities, but his claim to be in fear of persecution has yet to be decided upon by the Secretary of State, still less has it been tested in the tribunal.

7. Subject to the possibility of the statutory defence under section 31 of the Immigration and Asylum Act 1999, there can be no doubt that the defendant was guilty of the offences of possession of the two false identity documents with the necessary improper intention. On any view he knew that they were false and on any view he had them with him with the intention of using them to establish personal information about himself - in other words with a view to passing under the false identity that they provided.

8. So the question revolves around section 31. Section 31 is a statutory defence which was introduced into English law, as the solicitor originally acting for the defendant rightly says rather belatedly, in order to give effect to article 31(1) of the Refugee Convention. Article 31 provides:

"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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

When that provision of the Convention to which this country has been a signatory for a great many years was given effect, it was given effect via section 31 of the Immigration and Asylum Act 1999 inserted by the Identity Documents Act 2010. Section 31 provides as follows, under the side heading: "Defences based on article 31(1) of the Refugee Convention:

"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."

The solicitor who acted for Mr Jaddi in the Crown Court was very familiar with this section. He considered it and he advised Mr Jaddi that he had no defence and that he ought to plead guilty. The submission which is now made is that that advice was erroneous because the defendant did have a defence which could have been advanced before the jury; indeed Mr Halim submits that it would have been bound to succeed.

9. This court does have power to entertain an appeal against conviction even though the defendant pleaded guilty in the trial court. It is very rarely appropriate to do so because in the ordinary course of events a plea of guilty amounts to an admission of the facts which amount to the offence. There is a very limited exception where the plea of guilty is a nullity, but that is clearly not an arguable possibility here and nor is it contended.

10. Another situation in which the court can hear an appeal against conviction despite a plea of guilty is if this court is persuaded of two things. First, that the plea was tendered on advice which was wrong and also, secondly, that there was a defence which would quite probably have succeeded so that a clear injustice can be shown to have occurred. For those propositions see R v Boal (1992) 95 Cr.App.R 272. It is that jurisdiction described in Boal which Mr Halim contends we should exercise in this case. He reminds us, correctly, that this court has done so in the context of the section 31 defence in at least two cases, one of which is reported as R v Mohammed (Abdalla) [2011] 1 Cr.App.R 35. There the court considered four cases in all. It considered whether the defendant had received advice as to the section 31 defence or not and it considered whether the defence would have been available or not. In those cases this court found that in one of them, the first, there had been advice about section 31 and the defendant had been left to make an informed decision of his own as to whether to advance the defence or not. Accordingly, his appeal failed. In the other cases the court was satisfied that no advice at all had been given and went on to consider whether the defence under section 31 had good prospects of succeeding. It concluded that it had, but in two of those cases there was an express concession of the point by the Crown at the appeal and in the third, counsel who had appeared at trial expressly conceded that she ought to have advised that the defence could succeed. So the cases which succeeded in Mohammed (Abdalla) were cases where the point was substantially conceded.

11. In the present case, it is perfectly clear to us that the defendant, unlike the three successful applicants in Mohammed (Abdalla) did receive advice and indeed thorough and careful advice from the solicitor who acted for him in relation to section 31. The plea that he entered as a result was plainly unequivocal, but we agree with Mr Halim that unlike the case of the first defendant in Mohammed (Abdalla) the advice that this defendant received was not an explanation of how the defence could be run, with an invitation to him to make up his own mind whether to advance it or not; this was a case in which the advice received was that the defence was simply not available. The solicitor says with complete transparency, such as one would expect from an officer of the court, this:

"I did not discuss the statutory defence in any detail with Mr Jaddi as it seemed clear to me that whilst a court might well accept that his 2006 claim for asylum could be disregarded as he had fresh reasons to seek asylum, his time spent in Italy where he was supplied with the false French documents meant that he could not succeed under section 31."

12. It follows that we are persuaded that what we will call the Boal exception is available to the defendant and there is jurisdiction to entertain the appeal. The question then becomes: 'Did the section 31 defence have good prospects of succeeding?'

13. There are in section 31 two potential obstacles to this defendant successfully relying on the statutory defence. The first is the one that principally concerned the solicitor who advised him. It arises from a combination of the words in section 31(1): "Having come to the United Kingdom *directly* from a country ..." (our emphasis), together with the provisions of section 31(2) which effectively say that the defence is not available if the refugee stopped in another country where he could reasonably have been expected to make his asylum claim.

14. The second potential obstacle to the defence in this case arises from the terms of section 31(1)(c). Those require for the defence to succeed that the claim for asylum be made as soon as was reasonably practicable after arrival in the United Kingdom. We take those two potential hurdles in turn.

15. Although Mr Robinson for the Crown has drawn our attention to the fact that the defendant stayed for something like a month in Turkey and for some days in Greece, he does not in the end contend that in either of those countries the defendant could reasonably have been expected to have made his asylum claim. Turkey is a place where, for him at least, appropriate refugee protection could not be relied upon. Greece is a friendly country, a member of the European Union and a signatory to the Refugee Convention, but it is right to say that there are currently some reservations in this country about its methods of dealing with refugees. As we understand it, currently it is unusual for a person to be returned to Greece under the terms of the Dublin Convention 1990 for asylum claim to be made there. That being so, that would bear on the question of whether a person could reasonably be expected to make a claim there in the first place. Accordingly, it is necessary to concentrate, as the trial solicitor did and indeed as Mr Robinson in the end does here, on the stay in Italy.

16. On the defendant's behalf Mr Halim's careful submission is that the solicitor's advice that this stay in Italy was fatal to the statutory defence is erroneous. It overlooked, says Mr Halim, the availability to the defendant of the contention that he had merely been in transit in Italy and that therefore he was not to be treated in law as having "stopped" there for the purposes of section 31(2). Says Mr Halim, that follows from the decision of the House of Lords in R v Asfaw [2008] UKHL 31, [2008] 1 AC 1061. That was an in-transit case of a slightly different kind. The defendant travelled through Heathrow and was stopped when presenting a false passport outward bound for Washington at the boarding gate. She had arrived at Heathrow not many hours beforehand, but because of the flights that she was taking and the manner of her travel she had crossed from air side to land side and was presenting herself at the boarding gate to board a flight to Washington. The actual issue in Asfaw was quite different. It was whether the section 31 defence applies not only to the offence to which it is made explicitly referable, namely the identity documents offence, but also to the additional offence with which Mrs Asfaw was charged of attempting dishonestly to obtain services, that is to say the proposed flight to Washington, by deception. The decision of the House of Lords was that in order to give effect to this country's obligations under the Convention not to punish refugees who are present without authorisation, provided they fulfil the necessary conditions, the defence had to be extended beyond its explicit terms to apply also to the offence of obtaining services by deception. However, it is right to say that in thus concluding the House of Lords accepted a proposition which derives from the judgment of Simon Brown LJ in R v Uxbridge Magistrates' Court ex parte Adimi [2001] QB 667 at 687. That was an observation to the effect that in order to give effect to the Convention it is necessary not to punish those who are merely in transit in a third country or, in Mrs Asfaw's case, in this country. A person who is genuinely in transit does not, on the authority of Asfaw, lose the protection of the Convention and thus of section 31.

17. Adimi, it is necessary to remind ourselves, was a decision made before section 31 and its statutory defence came into existence. Indeed the statutory defence came into existence very largely because of the decision in Adimi. It follows that Adimi could not provide any decision on the construction of section 31 as eventually enacted, but Asfaw could and did.

18. The defendant's instructions appear to have been, in this respect consistently, that he had not claimed asylum in either of the other two countries and particularly in Italy because he was bent on claiming asylum here. He said that he was bent on claiming asylum here because his agent had advised him that since he had been here before and had made a claim here before that is what he ought to do. We are unable to see that the fact that he had that advice in his agent is determinative, but that certainly was his case. We observe also that the Secretary of State appears to be processing the claim which the

defendant has made to asylum in this country and does not appear to be asserting that he ought to be returned to Italy under the terms of the Dublin Convention.

19. It may at first sight appear a little surprising that the explicit terms of section 31(2) may not catch defendants such as this one, if they have passed for some days through another country in which they could reasonably have expected the same approach to be given to an asylum claim as would be given to it here. But we are, we think, compelled by Asfaw to conclude that it is possible that the defendant could have advanced the section 31 defence despite the few days stopover in Italy. We do not say whether it would have succeeded or not, but we think it had sufficient prospects of success for it to be right for us to have regard to it and to provide him with a reason for quashing his conviction.

20. The second hurdle is different. As we have said, section 31(1)(c) requires for the statutory defence that a defendant made his claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom. Mr Robinson for the Crown contends that the defendant transparently failed to do so. Finding himself successfully at Gatwick Airport in the presence of the uniformed officials of Her Majesty's Customs and the immigration officers, the defendant did not announce his claim to asylum. Instead, says Mr Robinson, he produced first one and then a second false document and, says Mr Robinson, the clear inference is that what he was trying to do was to get into the country and disappear.

21. There appears to be, to us, the limited penumbra of uncertainty to which we referred earlier about precisely what happened at the immigration control and because of the defendant's plea of guilty it was never investigated. The statement of the immigration officer contains two propositions. One a global one and one on the face of it a particularisation of it. The global one is that the defendant approached her desk and handed her the French passport and the French identity card. However, she goes on to say that she examined the passport, that she suspected that it was false because it did not scan on her machine and that she told the defendant that, whereupon he produced the identity card. Thereafter she says that she asked him where he had come from and he replied, truthfully, Bologna. At that stage she said because she was not satisfied that he should be admitted formally, she issued him with the necessary Home Office form advising him that he was being detained. If that is right he had omitted any claim to asylum not only on first arrival at passport control but also when his passport failed and instead chose to provide a second forged document.

22. He, however, in a statement which it has to be said has only been made since the proceedings in the Crown Court, gives a slightly different account. He says that the officer tried to scan his passport and that it would not scan. He says that he remembers her then going off to check with a colleague, but more importantly he says that when she came back with her colleague, the colleague asked him his nationality and he said both that he was Iranian and that he was here to claim asylum. On the face of it, that does not explain the tendering of the identity card, because in the ordinary way one would only tender the passport and one would only get to tendering the identity card if there was something wrong with the passport.

23. There is further doubt about it because according to the solicitor who represented him at the Crown Court, he had enquired of the defendant whether he had identified himself as an asylum seeker to the officers at Gatwick. He had done that not so much because he was investigating the application of section 31(1)(c), as because he wondered whether if the defendant had made it clear from the outset that he was an asylum seeker he had ever had the necessary dishonest intention in respect of the use of the false documents. But whatever the reason for the enquiry, the answer that he had had from the

defendant, he says, was that the defendant had handed the passport and identity card to the immigration officer, who had asked "What is your nationality?", and then he had said who he was and that he was here to claim asylum. So he told the solicitor that he handed both the passport and the card and on the face of it one would have thought they must have been handed in sequentially rather than together, as the officer says. But there is doubt about all of that and it has never been investigated.

24. The defendant also says through Mr Halim that he always intended to go to Croydon where he knew the immigration authorities had their offices which deal with asylum and that is where he was going. Further, says Mr Halim, there was no sign up at Gatwick to say that asylum seekers must identify themselves immediately. Accordingly the defendant was, says Mr Halim, bound to succeed in the statutory defence because he had not failed to make his claim for asylum as soon as was reasonably practicable. It is apparent that by the time this defendant got to Gatwick there was not, on his own account, any question of him going to any other country. This was the place he says where he wished to claim asylum.

25. The plain purpose of article 31 of the Convention and of section 31 which derives from it is to avoid criminalising genuine asylum seekers simply because they use false documents to get themselves to the place where they can make their asylum claim. Everybody understands that if you are fleeing from persecution you may very well be unable to travel on your own passport. However, the purpose of article 31 and section 31 is not to enable such a person to gain entry to the safe country of his choice unrestricted and there to live illegally and make his asylum claim when he feels like it. Still less is it to enable him to live illegally until he is caught and then make his asylum claim.

26. The destination country is, as it seems to us, plainly entitled to take the stance which the judge in this case echoed when he was sentencing the defendant. That is that it is necessary to protect its borders and to know who is passing through them. In very general terms, it seems to us that in the great majority of cases there will simply be no excuse for a genuine refugee not to make himself known immediately he arrives in the safe place - that is to say the arrivals immigration hall at a United Kingdom airport. Moreover, from the point of view of sensible immigration control, that makes sense. It is a great deal more difficult to discern whether a claim to be a refugee is genuine if it is not made until some time later and especially if it is only made when it is forced on the claimant by discovery that he is living illegally.

27. Mr Halim's submission however is that the combination of Asfaw with Adimi is to preclude that approach to section 31. We respectfully disagree. It is correct to say that in Adimi Simon Brown LJ expressly rejected the submission made in that case that Mr Adimi failed to come within article 31 of the Convention because he had not made his claim at arrivals but only some time a little later. Adimi however is a decision on the Convention and not on the terms of section 31 which are and were presented to Parliament as intentionally a little narrower. Moreover, Adimi is a decision of the Divisional Court and not binding on this court. It is also true that the passage in Simon Brown LJ's judgment to which we have just referred was quoted without qualification by Lord Bingham in his speech in Asfaw at paragraph 16. But of course the point did not arise in Asfaw for decision and there is no such reference in the other speeches. Moreover, Lord Bingham makes clear in paragraph 24 that when section 31 was introduced into Parliament it was a deliberately narrower definition in some respects than the terms of article 31 and one of the respects in which it is narrower is the specific requirement of section 31(1)(c) which we are now addressing. Is there nevertheless plain principle to be derived from the proposition as enunciated by Simon Brown LJ in Adimi? It seems to us that the principle is limited. In reaching the conclusion that he did there, Simon Brown LJ referred to the

practical necessities encountered by refugees and particularly to the work of Mr Grahl-Madsen, the Status of Refugees in International Law [1972] 2 page 219. He observed, citing that work, that a person crossing a frontier illegally may have good reason for not giving himself up at the nearest frontier control point. He may be perfectly reasonable in finding his way to the capital or another major city.

28. We entirely agree that there may be situations in which it is perfectly reasonable to act in that way. That may especially be so if the traveller genuinely believes that he would be simply sent back immediately or if he arrives on a remote beach and simply has to find his way somewhere. He is not, one would anticipate, normally to be criticised for not having found the police station that is nearest. But the situation described by Grahl-Madsen and endorsed by Simon Brown LJ and by Lord Bingham is quite a long way away from the situation of a traveller who is arriving at an English major airport and is in the hands of officials.

29. As it seems to us, the question of whether section 31(1)(c) is satisfied or not must be a question of fact in every case. Accordingly, in the Crown court it is a question for the jury. The question of whether it was reasonably practicable to make a claim for asylum sooner than was done is an objective one for the jury to decide but, in deciding it, the jury will certainly have to take account of the defendant's state of knowledge, intention and mind. It will also need to establish precisely what happened. For the reasons which we have explained, we do not think the facts in this case are sufficiently clear and no jury has ever applied its mind to the question of whether this defendant made his claim for asylum as soon as was reasonably practicable or not.

30. Beyond attempting to express the general considerations which we have, it is not for us to decide that question. We confine ourselves to saying that, as it seems to us, for the reasons which we have endeavoured to give, it is certainly open to a tribunal of fact to conclude and in many cases it may be the right conclusion, that there is simply no reason for such a traveller not to identify himself the moment he is in friendly official hands. Whether that applies to this defendant or not remains to be decided. The point has never been investigated and nor has the transit question where his case is rather stronger. We are satisfied that there was a defence under section 31(2) which was available to him to advance and which was not advanced because of the conscientious but in the end over summary advice which he received. For those reasons, the conviction must be quashed.

31. We have asked Mr Halim what should happen in the event that he succeeds to that extent. His submission is that the defence was bound to succeed. If that was so there would be no occasion for a retrial, but we do not agree that it is so, for the reasons which we have endeavoured to give. Accordingly, the right order is to quash the conviction but direct a retrial.

32. Where was he tried Mr Halim? Can you remind us.

33. MR ROBINSON: Lewes Crown Court, my Lord.

34. THE VICE PRESIDENT: There is no reason why it should not go back to Lewes. Is Lewes the ordinary place for these cases?

35. MR ROBINSON: Yes.

36. THE VICE PRESIDENT: Mr Halim, there is no reason why it should not go back to that court, is there?

37. MR HALIM: Canterbury is the better Crown Court.



38. THE VICE PRESIDENT: Why?
39. MR HALIM: Only because he is in Canterbury Prison at the moment.
40. THE VICE PRESIDENT: He can be tried at either of those Crown Courts or any other convenient Crown Court according to the direction of the Presiding Judges of the South Eastern Circuit. He must be arraigned on a fresh indictment containing the two counts to which he previously pleaded guilty and that must happen within two months, unless there is further order by this court. In the meantime I suppose he is in custody, Mr Halim?
41. MR HALIM: Yes, he is approaching the end of that sentence.
42. THE VICE PRESIDENT: Quite. Do you have any application that you ought to make, or not? Sentence has gone, you see.
43. MR HALIM: My Lord, my concern is not to place this appellant in any further position -- I have not taken instructions. I did not expect --
44. THE VICE PRESIDENT: The best thing is for us simply to say that any application for bail, if he is advised to make one, should be made to the Crown Court.
45. MR HALIM: Yes.
46. THE VICE PRESIDENT: He must not languish for long in prison if he has already spent a long time there.
47. MR HALIM: My Lord, perhaps the onus does fall upon me to make an application for bail given the quashing of the conviction.
48. THE VICE PRESIDENT: I suspect that you will not have at the moment any alternative address or conditions to suggest. He would be much better off making it to the Crown Court when you have.
49. MR HALIM: I only thought it might be prudent on the basis that if any decision is to be reached in principle then it might be made --
50. THE VICE PRESIDENT: I think the most we can say is that the application should be made to the Crown Court. We have no doubt that the Crown Court will be very much alive to the time that he has spent in custody. It will also need to investigate what the alternative is and what practical arrangements can be made to ensure that he remains on hand.
51. MR HALIM: Very well, my Lord.
52. THE VICE PRESIDENT: Mr Halim, thank you very much for extremely helpful submissions.

## 6. R v Mohammed Abdalla [2011] 1 Cr App R 35

<http://login.westlaw.co.uk/maf/wluk/app/document?&suppsrguid=ia744c09a0000015144a0b650cb1d96bd&docguid=IB338E260657A11E08818C3B6BED98B2E&hitguid=I3CF71DC0DBD111DF8EA8C8217C5F794B&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=5&resolvein=true>

**R. v Mohamed (Abdalla)**

**R. v V(M)**

**R. v Mohamed (Rahma Abukar)**

**R. v Nofallah**

Court of Appeal (Criminal Division)

19 October 2010

**[2010] EWCA Crim 2400**

**[2011] 1 Cr. App. R. 35**

Lord Justice Leveson , Mr Justice Owen and Mr Justice Flaux :

September 28; October 19, 2010

Asylum seekers; Criminal law; Defences; Guilty pleas; Identity documents; Nullity;

Possession of false identity documents

H1 *Possession of false identity document—Defence available to refugees—Defendants pleading guilty after legal advice—Convictions challenged on ground that defendants wrongly advised—Scope of defence—Whether convictions to be quashed where unequivocal guilty pleas entered after legal advice—Immigration and Asylum Act 1999 (c.33) s.31(1)(2)(3)(aa) (as inserted by Identity Cards Act 2006 (c. 15) s.30(2)(a))—Identity Cards Act 2006 (c. 15) s.25(1)*

H2 The defendants in four separate cases entered the United Kingdom and presented false passports or other identity documents to immigration officials. They were charged with having in their possession a false identity document, contrary to s.25(1) of the Identity Cards Act 2006 . After receiving legal advice, they pleaded guilty. The defendants appealed against conviction on the ground that their pleas were not proper admissions of guilt as they had not been advised of the possibility of a defence under s.31 of the Immigration and Asylum Act 1999 , which was available to a refugee charged with such an offence who could show that, having come to the United Kingdom from a country where his life or freedom was threatened, he had claimed asylum as soon as was reasonably practicable and that, if he had stopped in transit in a third country, he could not reasonably have been expected to claim asylum in that country.

H3 **Held**, dismissing the appeal in the first case but allowing the appeals in the other cases, that it was open to any defendant charged with an offence under s.25(1) of the 2006 Act to adduce sufficient material to raise an issue that he was a refugee and entitled to the protection of s.31 of the 1999 Act, whereupon the burden of disproving that defence fell upon the prosecution. It was, therefore, critical that those advising defendants charged with such an offence made clear the parameters of the defence, including the limitations and potential difficulties, so that the defendant could make an informed choice whether or not to seek to advance it. \*433 The Court of Appeal could, in limited circumstances, entertain an application for leave to appeal against conviction on the grounds that a tendered guilty plea was a nullity, although it was important not to water down the underlying concept of that jurisdiction so as to bring nullity into play purely on the basis of advice alleged to be wrong. However, in exceptional circumstances, the court could intervene, based on the safety of the conviction, if it believed that the defence would quite probably have succeeded and that, therefore, a clear injustice had been done. In the first case, the defendant had been appropriately advised as to the availability of the s.31 defence and, in any event, there was no reasonable prospect of the defence succeeding and, therefore, there was no arguable basis for saying that the conviction was unsafe. However, in the other cases, the defendants

had not been advised of the s.31 defence and they would have had a good prospect of the defence succeeding and, accordingly, notwithstanding their pleas of guilty, the convictions were unsafe (see post, [9]–[13], [27]–[28], [38]–[39], [45]–[46], [54]–[55]).

H4 *R. v Asfaw (United Nations High Commissioner for Refugees intervening) [2008] UKHL 31; [2008] 1 A.C. 1061; [2008] 2 W.L.R. 1178 applied.*

H5 **Per curiam.** These cases are characterised by allegations that those advising illegal entrants to this country have simply failed to ensure that the scope of the potential defences to an allegation of breach of s.25 of the 2006 Act have fully been explored. If the circumstances and instructions generate the possibility of mounting a defence under s.31 of the 1999 Act, there is simply no excuse for a failure to do so and, at the same time, properly to note both the instructions received and the advice given (see post, [56]).

H6 (For the offence contrary to s.25 of the Identity Cards Act 2006, see Archbold 2011, para.22-45a, and for the defence under s.31 of the Immigration and Asylum Act 1999, as amended by s.30(2)(a) of the Identity Cards Act 2006, see *ibid*, para.25-284 and 25-285.)

H7 **Additional cases referred to in the judgment of the court:**

- *R. v Boal (1992) 95 Cr. App. R. 272; [1992] Q.B. 591; [1992] 2 W.L.R. 890 CA*
- *R. v Evans [2009] EWCA Crim 2243*
- *R. v Lee (Bruce) (1984) 79 Cr. App. R. 108; [1984] 1 W.L.R. 578 CA*
- *R. v MMH [2008] EWCA Crim 3117*
- *R. v Makuwa [2006] EWCA Crim 175; [2006] 2 Cr. App. R. 11 (p.184); [2006] 1 W.L.R. 2755*
- *R. v Saik [2004] EWCA Crim 2936*
- *R. v Uxbridge Magistrates' Court Ex p. Adimi [2001] Q.B. 667; [2000] 3 W.L.R. 434 DC*

### **Appeals against conviction**

*R. v Mohamed (Abdalla)*

H8 On May 7, 2009 in the Crown Court at Chelmsford (Judge Hayward-Smith QC), the defendant, Abdalla Mohamed, pleaded guilty to an offence under s. 25(1)(c) of the Identity Cards Act 2006 and was sentenced to 11-and-a-half months' imprisonment. He appealed against conviction on the grounds that he was not advised of the possibility of a defence under s.31 of the Immigration and Asylum Act 1999 and that accordingly his plea was not a proper admission of guilt. \*434

H9 The facts are stated in the judgment of the court.

*R. v V(M)*

H10 On September 7, 2009 in the Crown Court at Liverpool (Judge George) the defendant, MV, pleaded guilty to possession of a false identity document with intent, contrary to s.25 of the Identity Cards Act 2006 and was sentenced to 12 months' imprisonment. He appealed against conviction on the grounds that he was not advised of the possibility of a defence under s.31 of the Immigration and Asylum Act 1999 and that accordingly his plea was not a proper admission of guilt.

H11 The facts are stated in the judgment of the court.

*R v Mohamed (Rahma Abukar)*

H12 On August 21, 2007 at a preliminary hearing in the Crown Court at Chelmsford, the defendant, Rahma Abukar Mohamed, pleaded guilty to two offences of possession of a false instrument under s.25(1) and (5) of the Identity Cards Act 2006. She was sentenced by Judge Gratwicke to 15 months' imprisonment and three months' imprisonment respectively, the sentences to run concurrently. She appealed against conviction on the basis that she was not advised of the possibility of mounting a defence under s.31 of the Immigration and Asylum Act 1999 and that accordingly her plea was not a proper admission of guilt.

H13 The facts are stated in the judgment of the court.

*R. v Nofallah*

On August 21, 2009 in the Crown Court at Lewes (Judge Rennie) the defendant, Mohsen Nofallah, pleaded guilty to a contravention of s.25 of the Identity Cards Act 2006. He was

sentenced to eight months' imprisonment. He appealed against conviction on the grounds that he was not advised of a potential defence under s.31 of the Immigration and Asylum Act 1999 and could successfully have relied upon it and that accordingly his plea was not a proper admission of guilt.

H14 The facts are stated in the judgment of the court.

#### H15 Representation

- Ian Macdonald QC and Francesca Delany (assigned by the Registrar of Criminal Appeals ) for MV.
- Ian Macdonald QC and Daniel Bunting assigned by the Registrar of Criminal Appeals ) for Abdalla Mohamed and Nofallah.
- Richard Thomas assigned by the Registrar of Criminal Appeals ) for Rahma Mohamed.
- Anthony Arlidge QC (instructed by the Crown Prosecution Service ) for the Crown.

The court took time for consideration.

Leveson L.J.:

1 Section 25(1) of the Identity Cards Act 2006 (the 2006 Act) provides that it is an offence for a person with the requisite intention to have in his possession or under his control an identity document that either to his knowledge or belief is false, or to his knowledge or belief was improperly obtained or that relates to someone else. The requisite intention is either to use the document for establishing registrable facts about himself (not being the person to whom it relates) or to allow **\*435** or induce another to use it for a similar purpose. The presentation of false documents on entry to the United Kingdom and for the purpose of obtaining entry is an obvious example of the vice to which the provision relates.

2 This offence is not, however, absolute. Pursuant to UK obligations under art.31(1) of the Refugee Convention , s.31 of the Immigration and Asylum Act 1999 (the 1999 Act) provides a defence which (by s.31(3)(aa) of that Act) was specifically amended to apply to any offence or attempt to commit an offence under s.25(1) of the Identity Cards Act 2006 and is in these terms:

- “(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 each of these appeals, which have no connection with each other save for the similarity of the facts which form the basis of the argument, the relevant applicant pleaded guilty to a breach of the 2006 Act offence and was sentenced to a term of imprisonment. It is now submitted that each was wrongly advised as to the law and could have mounted a defence in reliance upon s.31 of the 1999 Act. Each has been referred to the full court by the registrar; during the course of the hearing, we granted leave along with the relevant extension of time.

4 It is necessary, first, to analyse the general scope of the defence under the 1999 Act and, secondly, the basis upon which it is appropriate to allow a challenge to the safety of a conviction after an unequivocal plea of guilty which followed legal advice. We will then deal with the facts of the four specific cases.

## The defence

5 The background to the legislation is not unimportant. Article 1 of the Convention defines a refugee as a person who “owing to a 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”. Article 31(1) goes on:

“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.” **\*436**

6 It was only in *R. v Uxbridge Magistrates’ Court Ex p. Adimi* [2001] Q.B. 667 that the circumstances of prosecuting for documentary offences those who claimed asylum were first considered. Simon Brown L.J. considered the broad purpose of art.31 and put the matter in this way (at 677G):

“Self evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. In the course of argument, Newman J suggested the following formulation: where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by article 31.”

7 The response of the Government to this decision was to move an amendment to the Immigration and Asylum Bill then before Parliament. It was that amendment which became s.31 of the 1999 Act although it is to be noted that the legislation contains two aspects that more narrowly define the position than that advanced by Simon Brown L.J. namely, in subs.(1) the requirement that anyone claiming protection must have applied for asylum as soon as is reasonably practicable, and in subs.(2) that a refugee who has stopped in another country outside the United Kingdom must show that he could not reasonably have been expected to have been given Convention protection in that other country.

8 The decision in *Adimi* was subsequently affirmed by the House of Lords in *R. v Asfaw* [2008] 1 A.C. 1061 which concluded (per Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Carswell; Lord Rodger of Earlsferry and Lord Mance dissenting) that the Convention (and the amendment to the 1999 Act) was to be given a purposive construction consistent with its humanitarian aims. It was thus sufficient to include protection of refugees from the imposition of criminal penalties for infractions of the law reasonably or necessarily committed in the course of their flight from persecution, even if they had made a short term stopover in an intermediate country on route to the country of intended refuge.

9 Although the full scope of s.31 of the 1999 Act was not determined by *Asfaw*, Lord Bingham did make clear that in order to satisfy the requirement of s.31(1)(c) the claim for asylum must be made as soon as was reasonably possible (which did not necessarily mean at the earliest possible moment: see [16]). Second, the fact that a refugee had stopped in a third country in transit was not necessarily fatal: he affirmed the observations of Simon Brown L.J. in *Adimi* (at 678) that refugees had some choice as to where they might properly claim asylum and that the main touchstones by which exclusion from protection should be judged were the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape: see also *R. v MMH* [2008] EWCA Crim 3117 at [14]–[15].

10 The upshot of this analysis is that it is open to anyone charged with an offence under s.25(1) of the 2006 Act to adduce sufficient material to raise an issue that he or she is a refugee and entitled to the protection of s.31 of the 1999 Act whereupon the burden of disproving that defence will fall upon the prosecution: see *R. v Makuwa* [2006] EWCA Crim 175; [2006] 2 Cr. App. R. 11 (p.184). It is thus critical that those advising defendants charged with such an offence make clear the parameters of the defence (including the limitations and

potential difficulties) so that the defendant can make an informed choice whether or not to \*437 seek to advance it. We now turn to consider the consequence if such advice is not given.

### **Failure to advise**

11 There is no doubt that this court can entertain an application for leave to appeal against conviction on the grounds that a tendered guilty plea was a nullity. The limited basis of that jurisdiction was explained in *R. v Evans [2009] EWCA Crim 2243* ) by Thomas L.J. in these terms (at [52]):

“The applicable general principle is that such a writ will be granted where the proceedings are a nullity, that is to say where a purported trial ‘is actually no trial at all’ (see the opinion of Lord Atkinson in *Crane v DPP [1921] 2 AC 299* at 330) or where there has been ‘some irregularity in procedure which prevents the trial ever having been validly commenced’ (see the opinion of Lord Diplock in *Rose (1982) 75 Cr App R 322* at 336.”

12 The test for a plea to be held a nullity was elaborated (per Scott Baker L.J. in *R. v Saik [2004] EWCA Crim 2936* ) as requiring the facts to be so strong as to demonstrate that there is no true acknowledgment of guilt with the advice going to the heart of the plea so that it was not “a free plea”. It is, however, important not to water down the underlying concept of the jurisdiction so as to bring nullity into play purely on the basis of advice alleged to be wrong. For those circumstances, there remains a basis on which this court can intervene which is firmly grounded in the safety of the conviction. Thus, in *R. v Lee (Bruce) (1984) 79 Cr. App. R. 108* , the approach was articulated by Ackner L.J. in this way at 113:

“The fact that Lee was fit to plead; knew what he was doing; intended to make the pleas he did; pleaded guilty without equivocation after receiving expert advice; although these factors highly relevant to whether the convictions, or any of them, were either unsafe or unsatisfactory, cannot of themselves deprive the court of the jurisdiction to hear the applications.”

13 This alternative approach was adopted in *R. v Boal (1992) 95 Cr. App. R. 272* which concerned the failure to challenge what was held to be the erroneous assumption that an assistant general manager at a bookshop, responsible for the shop during a week in which the manager was absent, was a manager within s.23(1) of the Fire Precautions Act 1971 . In quashing the conviction that followed guilty pleas based on that assumption (observing that the appellant “was deprived of what was in all likelihood a good defence in law”), Simon Brown L.J. also made clear the additional hurdle that had to be overcome when he said at 278:

“This decision must not be taken as a licence to appeal by anyone who discovers that following conviction (still less where there has been a plea of guilty) some possible line of defence has been overlooked. Only most exceptionally will this Court be prepared to intervene in such a situation. Only, in short, where it believes the defence would quite probably have succeeded and concludes, therefore, that a clear injustice has been done. That is this case. It will not happen often.”

14 It is against that background of law that we now examine the facts of the four cases which were argued before us. \*438

### **R. v Abdalla Mohamed**

15 Abdalla Mohamed, who is a Somali national now aged 27, arrived at Stansted Airport on Saturday April 25, 2009, on a flight from Bergamo in Italy. He was in possession of a Swedish passport belonging to another person which he presented to an immigration officer. The appellant spoke no English and the officer in question spoke no Somali. He was detained and when an interpreter was provided who spoke Somali he claimed asylum on the basis that he was a refugee. He was later arrested and, in due course, charged with an offence under s.25(1)(c) of the 2006 Act.

16 On May 7, 2009, at the Crown Court at Chelmsford, before Judge Hayward Smith QC, the appellant pleaded guilty to that offence and was sentenced initially to a term of 12

months' imprisonment; when the judge realised that this would lead to automatic deportation, he reduced the sentence to 11-and-a-half months imprisonment. He now seeks to appeal this conviction on the grounds that he was not advised of the possibility of a defence under s.31 of the 1999 Act and that accordingly his plea was not a proper admission of guilt.

17 Again, it is necessary to summarise the nature of this appellant's case. During a screening interview with immigration officers which took place on the day of his arrival, the appellant claimed that he had flown from Mogadishu Airport in the company of an agent pursuant to arrangements made by his father, who had paid €3,000. They had flown for three hours to another airport where people spoke Arabic. They had stayed there for one and a half days, not leaving the airport. He had then caught a second flight that very day but was unable to say how long that flight had taken, other than he believed that it had lasted longer than the first flight. He could not confirm whether they had stopped anywhere else before landing at Stansted, but said that it was possible they had done so.

18 In answer to a question as to his reason for coming to the United Kingdom, he said that his intention was to seek asylum in any European country and he had no idea where the agent was taking him. He said that he could not return to Somalia because the country was unstable and he belonged to the minority Ashraf clan who were persecuted. He had to stay at home all the time and could not even go to the local mosque or study. He said that he and his father had discussed his leaving Somalia some two months previously and that his father was concerned about his well-being. He also said that hopefully his family would travel to Ethiopia the following week. We add that the appellant's claim for asylum has recently been refused by the Borders Agency: we were informed that the appellant intends to appeal that decision.

19 For the purposes of the criminal proceedings, the appellant was represented by Mr Richard Conley, a solicitor advocate and partner in Taylor Haldane Barlex LLP. The appellant asserted that he had not received advice about the possibility of mounting a defence under s.31 of the 1999 Act and waived privilege. In a response dated June 18, 2010 Mr Conley said that he was able to say with confidence that he would have advised the appellant about the statutory defence because, at the time that he represented the appellant, he was also briefed to represent another defendant who had come from Iran to the United Kingdom via another EU country whom Mr Conley had advised about the availability of the defence and who was proposing to run it at trial. He said that it was inconceivable that having researched the availability of that defence for that other client he would **\*439** not have advised the appellant as to the existence of the defence. In order to resolve this issue, the court heard the evidence of both the appellant and Mr Conley *de bene esse*.

20 The appellant's evidence about the court hearing and events surrounding it was somewhat vague. He appeared to have no clear recollection, even of whether he was being asked to plead guilty or not guilty. Although he claimed that he was told by the lawyer to plead guilty, he said that he could not remember any discussion about the availability of a defence.

21 Mr Conley, on the other hand, told us that his firm was located in the catchment area for Stansted Airport and he had represented at Chelmsford Crown Court dozens of defendants who had entered the country on false documents, at the rate of two or three a month. He could not recall specifically this particular case and had not been able to find his counsel's notebook in which he would have made notes of his conference in the cells. He was confident as to his usual practice, which would have involved informing the appellant about the possible statutory defence.

22 Reconstructing what he would have thought about this particular case, he thought that the sticking point for the appellant was the period in transit, including spending a day and a half at an airport in Italy. He said that he would undoubtedly have advised the appellant that, if the prosecution could show that he should have claimed asylum when he had an opportunity to do so in Italy, the defence under s.31 would fail.

23 It was suggested to him by Mr Macdonald QC in cross-examination that the reference in his letter of June 18, 2010 to the appellant "cutting his losses" was to the appellant not

feeling he was guilty, but pleading guilty as a compromise. He said that this was not the point he was making; what he was seeking to say was that, if run at trial, a defence of this sort would involve the jury weighing up whether what the appellant did or did not do in Italy was reasonable. It was a difficult defence to run and unless the appellant was supremely confident, there was the risk of a longer prison sentence if he was convicted after a trial. Mr Conley was insistent that he would have given advice along those lines and that it was then for the appellant to weigh matters in the balance after that advice and decide what course to take. It was not for Mr Conley to take that decision.

24 Mr Conley was asked whether there were difficulties in explaining, through an interpreter, the complex concepts that this defence involved. He explained that he had experience, from many cases, of Somali interpreters appointed by the court. Some were very good and others not so good. With a competent interpreter, it was possible to be confident of the defendant understanding the concepts; with a less competent interpreter, it would be necessary to work harder to ensure the defendant understood.

25 We accept Mr Conley's evidence that he would have followed his usual practice in the present case. We consider that he did provide the appellant with advice about the availability of a defence under s.31, including the difficulty of running such a defence, given the terms of s.31(2) and the fact that he had spent one and a half days at an airport in another country. Having heard the appellant's evidence, we are not sure to what extent he was really in a position to challenge that he was given advice about the statutory defence, in the light of his poor recollection of events. To such extent as it is said to support the allegation of inadequate advice, we do not consider it capable of belief although the better way of putting it may \*440 be that, even if we had accepted the evidence, it would not afford a ground for allowing the appeal: see s.23(2) of the Criminal Appeal Act 1968.

26 For the avoidance of doubt, however, to the extent that there remained a conflict of evidence about whether the advice was given, we preferred the evidence of Mr Conley. We are also satisfied that Mr Conley would have satisfied himself that the appellant understood the advice that was given, so there is no scope for Mr Macdonald's fall-back position that, even if the advice was given, the appellant did not understand it. Furthermore, we consider that such advice as to the difficulty of running the defence in this case was appropriate advice in all the circumstances and the submission that the appellant was given no advice or the wrong advice is misconceived. Accordingly, there is no basis for setting aside the plea of guilty.

27 Even if we had concluded that no advice had been given, we would still have concluded that the plea of guilty should not be set aside. There was no reasonable prospect of a defence under s.31 succeeding, given the facts of the appellant's case as they emerged in the screening interview and to an extent in cross-examination: (i) he was extremely vague about the journey from Mogadishu and in particular where he had come from when he entered the United Kingdom, notwithstanding that he was being interviewed on the same day as he had flown into the country and that he had never been on an aeroplane before, so that he might have been expected to have a greater interest in where he was going; (ii) he had said that hopefully his family would travel to Ethiopia the following week and did not explain why he could not have also gone there or suggest that he would not have been safe in Ethiopia; (iii) he had no specific desire to go to the United Kingdom but just to any European country; and (iv) he had in fact come into the United Kingdom on a flight from Italy and, given his inability to say whether the flight had stopped somewhere else after leaving the airport where he had spent one and a half days, a jury would in all probability have concluded that that time had been spent in Italy. Against that background, we consider that s.31(2) would have presented real difficulties standing in the way of any defence under s.31(1).

28 Accordingly, there is no arguable basis for saying that the conviction is unsafe and the appeal is dismissed.

**R. v MV**



29 MV (wrongly indicted as MW) is an Iranian national. On August 7, 2009 he arrived at Liverpool John Lennon airport from Reus in Spain. At immigration control he presented a false Bulgarian passport in the name of Stanimirov. He was arrested and in due course charged with an offence under s.25 of the 2006 Act. On September 7, 2009 he appeared in the Crown Court at Liverpool where he pleaded guilty to possession of a false identity document with intent and was sentenced to 12 months' imprisonment. He now seeks to appeal this conviction on the grounds that he was not advised of the possibility of a defence under s.31 of the 1999 Act and that accordingly his plea was not a proper admission of guilt. 30 In order to analyse the circumstances, it is necessary to set out the facts in some detail. This appellant was born on December 23, 1977 and is therefore now 32 years of age. He has filed a witness statement in support of his appeal dated September 16, 2010 in which he gives a detailed account of the circumstances in which he left Iran and travelled to the United Kingdom. Mr Arlidge QC (for the Crown in each of these appeals) accepts that its contents are consistent with the \*441 screening interview carried out on August 7, 2009 and the asylum interview carried out on November 26, 2009.

31 According to the witness statement, the appellant was born in Abhar, a city in the North West of Iran. He married in October 1998 and has a son born in August 1999. His wife and son are still in Iran. In June 2009 he became involved in demonstrations against the Iranian government. On June 15, he travelled by bus to Tehran with a number of friends and relations. They joined a demonstration; but he became separated from the group, and was subjected to physical violence at the hands of what he described as soldiers. He was taken into custody and was detained for 16 days during which he was interrogated and subjected to torture. It is not necessary for present purposes to particularise the treatment that he claims to have suffered at the hands of the authorities.

32 He was able to escape with outside assistance arranged, he thinks, by his father and an uncle. The arrangements involved his being supplied with a drink containing soap that provoked symptoms indicative of illness with the consequence that he was transferred to hospital from which he was able to escape. Arrangements had been made for him to be taken to Turkey in the back of a lorry. The agent who accompanied him on the journey provided him with an Iranian passport, and after arrival in Ankara arranged for the passport to be endorsed with a visa for Syria. He then travelled to Syria by air and on arrival was taken to a flat where he stayed for a week. He was then taken by the agent to an airport from which he flew to Spain. He was in transit in Spain for about three hours, during which he did not leave the airport. He was then given the Bulgarian passport the subject of the charge, and was told that he would be on his own when he arrived in the United Kingdom. Up until that point he had been told to follow the agent, and to do what he said at all times.

33 A witness statement from an immigration officer on duty at Liverpool John Lennon airport on August 7, 2009 states that he was approached by the appellant who handed him the Bulgarian passport which the officer immediately recognised as a forgery. The appellant gave his name and date of birth. He also gave his nationality as Iranian and told the officer "... that he had problems in Iran". In the course of the screening interview carried out on the same day he was asked the standard question as to why, if he had stayed in a country or countries before arriving in the United Kingdom, he had not applied for asylum before arriving in the United Kingdom. His answer is recorded in the following terms: "Turkey and Iran are hand in hand. There is nowhere safe in Turkey and my father asked to take me to a safe country."

34 On August 8, 2009, when charged with the offence, the appellant was represented by a duty solicitor, Graham Polson of Canter Levin & Berg. Mr Polson also represented him on his appearance at the Liverpool City Magistrates' Court two days later when he gave him advice as to his plea. In his witness statement, dated May 21, 2010, Mr Polson states in terms that at no time did he advise the appellant on the statutory defence under s.31. Having pleaded guilty at the magistrates' court, the appellant was committed to the Liverpool Crown Court for sentence where he was represented by Mr Brendan Carville of counsel. In

his note to the registrar, Mr Carville says that he took the view that there had been a bona fide plea before the magistrates, and, further, that the statutory defence under s.31 did not apply as the appellant had not come directly to this country from Iran. Thus, although Mr \*442 Carville addressed his mind to the issue, his note is consistent with the appellant's evidence that, even when he appeared in the Crown Court, he was not, in fact, given advice as to s.31 .

35 The appellant was only too aware that he had entered the United Kingdom using false documents and, on the basis of the evidence we have summarised, before the case was disposed of counsel did address the issue of a potential defence. In the circumstances, we are not prepared to conclude that the plea was a nullity but we recognise that the circumstances potentially render it unsafe and so consider the merits of the potential defence.

36 Although there has yet to be an adjudication as to the appellant's refugee status, in his skeleton argument, Mr Arlidge conceded that "amongst the details he produced to the Border Control Officer, the Probation Officer and the court, there are matters which might lead to a conclusion that he is a refugee". He suggested that it might be advisable for the appellant to make a more detailed statement for the assistance of the court dealing with his escape from custody and the issue of danger to life and freedom, which he has now done, and it is accepted by the Crown that its content is consistent with the information given in the course of the screening interviews. In the circumstances, we are satisfied that had the defence under s.31 been raised, the appellant would have been able to adduce sufficient evidence in support of his claim to refugee status to shift the burden to the prosecution to prove that he was not: see [9] above.

37 It is also conceded by Mr Arlidge that the appellant presented himself to the authorities in the United Kingdom without delay, and made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

38 The remaining issue with regard to the availability of the statutory defence is whether the appellant could have discharged the burden under s.31(2) of showing that he could not reasonably have been expected to have been given protection by the Convention in the countries through which he passed en route to the United Kingdom. It was accepted by the Crown that, if his stay in Spain was limited to three hours in transit at the airport, he could not reasonably have been expected to seek asylum in that country. It was also accepted that he could not reasonably have been expected to do so in Syria, given that it is not a signatory to the Refugee Convention. As to Turkey, the statement that the appellant made to the immigration officer in the course of the first screening interview to which we have already referred, was supported by the report from Amnesty International, Stranded—Refugees in Turkey denied protection dated April 22, 2009 (Index No. EUR 44/001/2009) and Mr Arlidge did not seek to argue that the appellant ought to have sought asylum in that country. It follows that it is highly likely that the appellant would have been able to discharge the evidential burden imposed by s.31(2) .

39 We are therefore satisfied that this appellant would have had a good prospect of a successful defence under s.31 . Given that he was not at any stage advised as to the availability of the statutory defence, we are also satisfied that notwithstanding his plea of guilty, the conviction was unsafe. We therefore allow this appeal and quash the conviction.

**\*443**

### **R. v Rahma Abukar Mohamed**

40 On August 9, 2007, at Stansted airport, Rahma Abukar Mohamed (then aged 32) entered the United Kingdom on a flight from Eindhoven. She approached an immigration officer saying that she had arrived from Holland and presenting a genuine UK Convention travel document along with a UK asylum registration card in the name AA. The officer noticed that the photograph was not that of the appellant; when questioned she revealed her correct name and age. She then claimed asylum. On the following day, the appellant was arrested and, after interview, charged with two offences each of possession of a false instrument under s.25(1) and 25(5) of the 2006 Act.

41 On August 21, 2007, at a preliminary hearing in the Crown Court at Chelmsford, the appellant pleaded guilty to both offences and was sentenced by Judge Gratwicke to 15 months' and three months' imprisonment respectively, the sentences to run concurrently. She now also seeks leave to appeal her conviction (and an extension of time within which to do so) on the basis that she was not advised of the possibility of mounting a defence under s.31 of the 1999 Act.

42 Her account, set out in her screening interview and amplified in a witness statement, can be shortly summarised. The militia in Somalia had shot her in 2000 due to her ethnicity and in 2004 she was threatened with rape (although a neighbour intervened and prevented the attack); in May 2007, she was assaulted by the militia and suffered a dislocated arm; she feared she might be killed. Thus, leaving her husband and children but accompanied by an agent who had been paid US \$3,000, she had left Somalia and travelled by lorry to various African countries. She then flew to Holland arriving on August 6: she did not know where she was and only knew that she was on her way to the United Kingdom (which was her destination of choice because she knew that members of her clan were here). She was subsequently taken to the airport and provided with the documents she later presented to the immigration authorities at Stansted. In her witness statement, she put the matter in this way:

"When I arrived in Holland, I did not even know that I was in Europe; only that I was on my way to the UK ... . I was frightened that I would be abandoned if I did not do what the agent had told me to do.

The agent took me to some friends of his in Holland who we stayed with for three days. During these days I did not speak to the other people at all. I felt extremely frightened and alone. I did not ask the people about Holland ... It did not occur to me to claim asylum at this point. I would not have known where to go or who to speak to. All I knew is that I had to do what the agent said and that he was going to take me to the UK and that I should stay with him at all times."

43 Conditions in Somalia and the likely persecution of Rahma Abukar Mohamed's sect have been confirmed by Professor Lewis, an acknowledged expert upon life in Somalia; he also confirmed the cultural background that explained her obedience to each and every instruction issued by the male agent. It is pertinent to add that, although initially refused asylum, Rahma Abukar Mohamed was successful on appeal and has now been granted leave to remain for five years in the United Kingdom as a refugee. **\*444**

44 She maintained that she was advised by her representatives to plead guilty and was not told that she had or may have had a defence. There is no evidence from the lawyer who apparently represented the appellant when she was interviewed but, on her first appearance in the magistrates' court after charge, the duty solicitor, then Mr Gary Ryan of Buxton Ryan, appeared on her behalf. After the appropriate waiver of privilege, he has made it clear that his firm had not previously represented her and that his advice on that occasion was limited to the procedural issues. He did not provide Rahma Abukar Mohamed with any advice as to plea but instructed counsel to appear on her behalf. Mr Rio Pahlavanpour of counsel has written to the effect that he "advised fully as to the elements of the offence, including the requisite intention contained in subsection 2 of section 25" and that it was on this basis that she was advised to enter a plea of guilty. Although the point in issue was flagged, counsel did not address the possibility of mounting a defence under s.31 and has not since done so.

45 In the light of the absence of contrary evidence and the circumstances, Mr Arlidge does not challenge the proposition that this appellant was not advised of the potential defence open to her and accepts that she had a good prospect of successfully establishing that she came directly and that, in any event, it was reasonable for her not to claim asylum in Holland. Thus, he does not oppose this application or the appeal.

46 Mr Thomas, who appeared for Rahma Abukar Mohamed in this court, was content to approach the appeal on the basis that these convictions were unsafe. We agree with both counsel. In the circumstances, the appeal is allowed and the convictions are quashed.

**R. v Nofallah**

47 On August 2, 2009 this appellant arrived at Gatwick airport having arrived on a flight from Athens. He handed the immigration official a Danish passport in the name of Soren Howell but made no response to questions put to him, save eventually to nod when asked if he was Iranian. The passport was found to be counterfeit with a substituted biodata page. He was arrested and, on August 21, 2009, appeared in the Crown Court at Lewes before Judge Rennie where he pleaded guilty to a contravention of s.25 of the 2006 Act. He was sentenced to eight months' imprisonment. He now seeks leave to appeal his conviction and an extension of time on the grounds that he was not advised of a potential defence under s.31 of the 1999 Act and could successfully have relied upon it.

48 The appellant's various accounts to the authorities have not been entirely consistent in that they have developed, although it is clear that, either to the immigration authorities or the police, he claimed asylum. In his screening interview, he explained that he had been arrested and accused of embezzlement; because he could not prove that he was innocent, he was sentenced to two years' imprisonment but bailed pending appeal; as a result, he had to escape. He later explained to his criminal solicitor, Mr Anthony Eden of Frame Smith & Co. that he had been employed as a bank manager and, in that capacity, granted a loan which had been approved by his superiors: the loan had later been found to have been obtained using false documents. When the borrower defaulted, he was prosecuted to conviction and, after five years, his appeal failed and he was not only ordered to serve the sentence but also ordered to pay compensation. He feared that if he went \*445 to prison he would never be released until the money was paid and could have faced execution. Thus he fled. The handwritten note of his instructions goes on:

"Nothing to do with political problems."

Mr Eden then advised that there was no defence and instructed counsel accordingly.

49 By the time that the appellant appeared in the Crown Court, his instructions were more extensive. It was explained to Judge Rennie that, with his daughter, the appellant had been on a demonstration against the recently disputed elections in Iran, his photograph had been taken and he had been identified by the intelligence services. It was further put that he believed that the two issues (the embezzlement and the identification by the intelligence services) were "inextricably linked". In later statements, for the purposes of his claim to asylum, he elaborated further and also explained that the authorities had raided his house in his absence and his wife had three times been detained and interrogated.

50 The appellant's claim for asylum was originally rejected. On appeal, the immigration judge focused on the appellant's involvement with his daughter in the political demonstration (in which he said that he both used and was treated with violence); he found the appellant a credible witness who would be at risk if he was returned to Iran; the appeal was successful both on asylum and art.3 European Convention on Human Rights grounds. It does not appear that the allegation of embezzlement and the conviction was ever mentioned: not only is there no mention of it but the immigration judge specifically emphasised that the appellant was a middle aged man with "a good future ahead of him in Iran if he had not become involved in this demonstration".

51 As for his travel out of Iran, he has consistently explained that he left Iran on July 1 in a lorry (paying the equivalent of between €7,000 and €8,000); he remained in the lorry for 25 days, the lorry driver offering to drop him off anywhere that was suitable. He ended up in Athens (not applying for asylum in intermediate countries because he did not know where he was and could not speak the language), spent two weeks locked in a flat in Athens and then flew to the United Kingdom.

52 Section 31 of the 1999 Act applies only in the case of a refugee (which, using the definition within art.1 of the Refugee Convention defines a refugee as set out in [5] above). If the appellant was simply seeking to avoid the consequences of his criminal conviction (specifically disavowing "political problems"), it is difficult to see on what basis he would qualify. In those circumstances, we reject any suggestion that he was not properly advised

by his solicitors. What was later to emerge before the immigration judge cannot affect the advice given on the basis of the instructions which Mr Eden then received.

53 By the time counsel was instructed, however, the position was slightly different in that the political dimension surrounding the investigation was part of the appellant's instructions and was advanced in mitigation to the judge. The appellant having waived privilege, Leesha Whawell of counsel was asked about her advice to the appellant. In a candid letter to this court, she agreed with the advice of counsel now advising the appellant that he had what was, potentially, a good defence; she accepted full responsibility for failing to advise him of it. Had it not been for the additional material placed before the Crown Court, we would have wanted to investigate that concession (and its consistency with the instructions from solicitors) in rather greater detail. **\*446**

54 Having regard to the circumstances, however, we do not seek to do so but are prepared to accept it at face value. We also accept that he satisfies the criteria under s.31(1) of the 1999 Act subject only to the exception in s.31(2) and whether he came directly or could reasonably have been expected to claim asylum in Greece. Only because of the very favourable impression that this appellant made upon the immigration judge (putting to one side that the judge does not appear to have known about the embezzlement conviction), we are not prepared to conclude that the defence would have failed and that a jury would not have been entitled to accept his account that he had been locked in a flat in Athens and conclude that he had done no more than engaged in a "short term stopover" within the meaning of that phrase as explained in *Adimi*.

55 Not without some hesitation, we are prepared to conclude that this appellant's conviction is unsafe and is quashed.

#### **Concluding remarks**

56 These cases are characterised by allegations that those advising illegal entrants to this country have simply failed to ensure that the scope of the potential defences to an allegation of breach of s.25 of the 2006 Act have fully been explored. If the circumstances and instructions generate the possibility of mounting a defence under s.31 of the 1999 Act, there is simply no excuse for a failure to do so and, at the same time, properly to note both the instructions received and the advice given. If these steps are taken, cases such as the four with which the court has just dealt will not recur and considerable public expense (both in the imprisonment of those convicted and in the pursuit of an appeal which will involve evidence and waiver of privilege) will be avoided.

*Appeal of Abdalla Mohamed dismissed.*

*Appeals of MV, Rahma Mohamed and Nofallah allowed.*

## 7. R v MMH [2008] EWCA Crim 3117

### R v H

*Criminal law – Possession of false identity document with intent – Appeal following guilty plea – Refugee entering country with false passport – Defendant charged with possession of false identity document with intent – Defendant claiming asylum – Meaning of 'as soon as was reasonably practicable' in context of asylum claim – Whether defendant having reasonable prospect of defending charge – Immigration and Asylum Act 1999 s 31*

[2008] EWCA Crim 3117, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

### COURT OF APPEAL (CRIMINAL DIVISION)

**KEENE LJ, AIKENS J, JUDGE PATIENCE QC (sitting as a judge in the Court of Appeal, Criminal Division)**

**12 NOVEMBER 2008**

**KEENE LJ:** I shall ask Aikens J to give the judgment of the court.

D Bunting for the Applicant

D Wilson for the Crown

Registrar of Criminal Appeals; Crown Prosecution Service

### **AIKENS J:**

(reading the judgment of the court)

[1] This is an application for leave to appeal against conviction and for an extension of time of 139 days in which to apply for leave to appeal against sentence. The applications have been referred to the full court by the Registrar. He granted an extension of time of 99 days in respect of the application for leave to appeal against conviction.

[2] The Applicant is a youth of just over sixteen and a half years who is of Somali origin. He is a member of the minority Reerhamar clan and comes from Mogadishu. In the course of the criminal proceedings there was some doubt about his age. That doubt has now been resolved following a comprehensive report from Dr Diana Birch, who is a consultant paediatrician and a leading authority on adolescence. She has experience in conducting age assessments. Her assessment of the Applicant's age as being sixteen and a half years as at August 2008 is not disputed by the Crown.

[3] On 15 April 2008 the Applicant appeared before His Honour Judge Ball QC at Chelmsford Crown Court for arraignment in respect of one count on the indictment of an offence of Possession of an Identity Document with Intent contrary to s 25(1) and (6) of the Identity Cards Act 2006. Before his appearance in court, the Applicant received advice from Levy & Co Solicitors, through an interpreter, on how he should plead. There is some dispute as to the precise advice he received about possible defences to the charge, and in

particular whether he was advised about a possible defence to the charge by virtue of s 31 of the Immigration and Asylum Act 1999.

**[4]** Section 31 of the Immigration and Asylum Act 1999, so far as relevant, provides as follows:

“(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 –

...

(aa) section 25(1) of the Identity Cards Act 2006;

...”

**[5]** We have before us a note that has been prepared by Levy & Co of the advice that was given at this stage and at the next stage in the proceedings on 15 April. It indicates that when the Applicant was arraigned before Judge Ball (after he had received the first advice), he refused to enter a plea. The judge put the matter back so that further advice could be given to the Applicant. The judge advised the solicitor representing the Applicant, Mr Levy, that he should endorse any brief with the result of the advice.

**[6]** Mr Levy and the interpreter attended the Applicant in the cells where a further conference took place. It appears from a letter from Levy & Co to the Applicant's present solicitors, dated 17 July 2008, the contents of which are not in dispute, that in that conference the Applicant said to Mr Levy that he accepted various things. First, that he was not the person on the passport. Secondly, that he had not sought asylum as soon as possible “thereafter” (the phrase used in the letter). It does not appear from that letter that there was any great discussion as to what was meant by “as soon as possible thereafter”. Thirdly, that he did not upon presentation of the false passport immediately advise that he presented himself to the authorities without delay claiming asylum in this country. It is also clear from the letter that there was no discussion of whether or not the Applicant was a refugee who had come to the United Kingdom *directly* from a country where his life or freedom was threatened (the wording of s 31(1)), or about the matters raised in s 31(2) of the Immigration and Asylum Act 1999.

**[7]** The Applicant signed an endorsement on Mr Levy's papers as follows:

“I have received advice from my solicitor on the evidence against me, namely that I presented a passport to immigration which was not mine. I bought this passport believing I could travel with the document.”

The endorsement also acknowledged that this had been interpreted to him in the Somali language and that statement is countersigned by the interpreter.

**[8]** After that conference there was a second hearing before Judge Ball, at which the Applicant was arraigned. He pleaded guilty to the count and he was sentenced forthwith to ten months' imprisonment. The sentence was passed on the basis that the Applicant was over 21 years of age. That conclusion was based on an assessment by a social worker from Essex who conducted a full Merton Compliant Age assessment and who, as a result, concluded that the Applicant was aged between 19 and 21. That, it is now accepted, was a wrong assessment.

**[9]** This, therefore, is one of those unusual cases where an Applicant seeks leave to appeal against conviction where he has pleaded guilty following legal advice. It is said on his behalf that there are two reasons why leave to appeal should be granted. The first is that the Applicant's plea was not a “true” plea, in the sense that he never properly admitted his guilt. The second reason is that he has a defence to the allegation that he contravened s 25 of the Identity Cards Act 2006 because his circumstances come within s 31 of the Immigration and Asylum Act 1999, notwithstanding the views expressed by the Applicant's then solicitors when giving advice on 15 April 2008.

**[10]** This court undoubtedly has jurisdiction to entertain an application for leave to appeal against conviction under s 2(1) of the Criminal Appeal Act 1968, even if the Applicant has entered a guilty plea: see *R v Lee (Bruce)* [1984] 1 All ER 1080, [1984] 1 WLR 578 at 583, 79 Cr App Rep 108, per Ackner LJ. But this court has also said that it will not generally entertain an appeal in a case where there has been an unequivocal plea of guilty, unless the proposed defence would “quite probably have succeeded and concludes, therefore, that a clear injustice has been done”: *R v Boal* [1992] QB 591 at 600A, [1992] 3 All ER 177, [1992] IRLR 420, per Simon Brown J (as he then was), giving the judgment of the court.

**[11]** On this application we have not heard any oral evidence from Mr Levy. In addition to the letter to which we have referred, we have a statement from the Applicant and a copy of the interview that was conducted by the immigration officials. Following his detention, the Applicant was taken to an interview room at Stanstead Airport Police Station on 5 April 2008 where he was interviewed by immigration officials at approximately midday.

**[12]** We have considered the cases to which we have been referred: *R v Makuwa* [2006] EWCA Crim 175, [2006] 1 WLR 2755, [2006] 2 Cr App Rep 184; *R v Uxbridge Magistrates Court, ex parte Adimi (DC)* [2001] QB 667, [1999] 4 All ER 520, [2000] 3 WLR 434; and *R v Asfaw (HL)* [2008] UKHL 31, [2008] 3 All ER 775, [2008] 2 WLR 1178. In *R v Makuwa* the court considered the way that s 31(1) works. The court concluded that: (i) it was for the accused to present sufficient evidence to raise the issue of whether he was a refugee as defined in the Refugee Convention of 1951; but (ii) if he did so, it was then for the prosecution to prove to the usual criminal standard that the accused was not a refugee; (iii) in respect of the remaining matters set out in s 31(1), ie first, that the Applicant had come directly from a country where his life or freedom was threatened, and secondly the matters under s 31(1)(a), (b) and (c), the legal burden of proof is on the Applicant to show that he satisfies those four conditions. Although the court did not expressly say so in *Makuwa*, following general principles the burden must be one that is discharged if the



accused proves the relevant points on a balance of probabilities. Although that case referred to s 31(2), it did not deal specifically with it.

**[13]** There is, however, assistance on how art 31 of the Refugee Convention 1951 is to be interpreted in *Adimi and R v Asfaw*, and, in the latter case, how s 31 of the 1999 Act (which was passed after the *Adimi* case), is to be interpreted. Broadly speaking, those cases, and in particular *Asfaw*, (which approved the analysis of art 31 of the Convention and the decision of the Divisional Court in *Admimi*), demonstrate that s 31(1) and (2) must be construed by reference to, and in accordance with, the Refugee Convention of 1951. Broadly speaking, art 31 of the Refugee Convention deals with states' obligations with regard to refugees who are unlawfully in the country of refuge. In *Asfaw*, at para 11, Lord Bingham of Cornhill stated that the Refugee Convention must be "given a purposive construction consistent with its humanitarian aims".

**[14]** This is relevant to two particular matters with which we are concerned. First, the requirement under s 31(1)(c) that the Applicant must make a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom. This does not mean at the earliest possible moment: see *Asfaw* para 16, per Lord Bingham. Secondly, in dealing with the requirement that a person must come *directly* from a territory where his life or freedom was threatened (in the sense of art 1 of the Convention), that did not mean, for the purposes of art 31 of the Convention, that it was intended necessarily to exclude the position where a refugee stopped in a third country in transit. As Lord Bingham pointed out (para 11), at the time of the Convention, air transport had not become a means of escape used by any considerable number of refugees.

**[15]** Therefore, as Lord Bingham said, referring to the judgment of Simon Brown LJ in *Adimi*:

"He held at page 678 that some element of choice was open to refugees as to where they might properly claim asylum and concluded that any merely short-term stopover en route to such intended sanctuary could not deprive the refugee of the protection of Article 31."

Lord Bingham went on to say that Simon Brown LJ identified (at p 678 of *Adimi*), the main touchstones by which exclusion from protection should be judged were: the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugees sought or found their protection de jure or de facto from the persecution which the refugee was seeking to escape.

**[16]** On the evidence that we have seen on this application, it would appear that the Applicant arrived by aircraft at Stansted Airport shortly before midnight on 3/4 April 2008. It is not in dispute that the Applicant arrived on a plane that had come from Oslo, Norway. In the early hours of 4 April 2008 the Applicant arrived at Stansted Airport Immigration Control. He presented a passport in the name of Ali Ahmed, which stated that the passport holder was born in Mogadishu, Somalia on 1 February 1985. The passport was not the Applicant's. It had, in fact, been stolen on 23 March 2007.

**[17]** The Applicant was detained. He was arrested late on the evening of 4 April 2008 and taken to Stansted Airport Police Station. Although there was some discussion, there was no interpreter available at that stage.

**[18]** The Applicant was interviewed the following day. On that occasion there were present a Somali interpreter, Mr Graeme McCormack of Levy & Co and another immigration officer. The interview was taped. We have seen a transcript of the interview. The Applicant answered questions put to him. He said that he had bought the passport in Mogadishu for US \$500 and that he had boarded a flight in Africa. He was vague about the journey. At

that time he denied that he had come from Oslo to Stansted. He said that if he had been allowed into the United Kingdom he proposed to search for a cousin who lived in this country.

[19] During the interview the Applicant referred to the fact that, because of the conditions in his country, there was no register for births and that was why he could not give a birth date. He also said “The reason why I used this passport is because of the problems I experienced in my country and my intention was to go to a safe place like this country.”

[20] After the interview he was charged with possessing an identity document with intent contrary to s 25(1), (2) and (6) of the 2006 Act. He was cautioned but did not reply.

[21] We are prepared to assume, for the purposes of this application, that the Applicant can raise sufficient of an issue on whether he is a refugee to put the burden of disproving it on the prosecution. We are also prepared to assume that, upon his arrival at Stansted, he presented himself to the authorities without delay. There are, however, three further matters to consider in order to deal with the possible defence under s 31 of the 1999 Act. First, does the Applicant have a reasonably arguable case that he came *directly* from a country where his life or freedom was threatened, within s 31(1) of the 1999 Act? Secondly, did he “stop” in another country within the meaning of s 31(2)?

[22] Looking at the evidence as a whole, we have come to the conclusion that it is reasonably arguable, given the interpretation that we must place on s 31(1) and (2) in accordance with the Convention and the cases of *Adimi* and *Asfaw*, that overall the Applicant has a reasonable prospect of demonstrating that he came *directly* to this country from one where his life or freedom was threatened and that he did not “stop” in another country.

[23] The third hurdle that the Applicant must surmount in order to demonstrate that he has a reasonable prospect of success on this defence is the issue of whether he made a claim for asylum as soon as reasonably practicable after his arrival in the United Kingdom. There are indications that that is precisely what he did in as good a manner as a 16 year old could in very strange and doubtless intimidating circumstances in the interview that he had at midday on 5 April with the immigration officials. It is noteworthy that at that stage no one assumed that he was only 16.

[24] In all these circumstances we have concluded, although with some diffidence, that there would have been a reasonable prospect of successfully defending this charge on the ground proposed, viz s 31 of the 1999 Act. We note that advice was not given on the aspects of coming *directly* from a country where his life or freedom was threatened (s 31(1)), nor the issues raised by s 31(2) of the 1999 Act.

[25] If the position is as we have held it to be, then in our view this is a case where we can consider the safety of the conviction, notwithstanding that a guilty plea was entered. We have concluded in all the circumstances that we have set out that this conviction was indeed unsafe. We therefore grant leave to appeal, allow the appeal and quash the conviction. In the circumstances there is no need to deal with the application for leave to appeal against sentence.

*Judgment accordingly.*

## 8. R v Mohammed and Osman [2007] EWCA Crim 2332

**R v Mohammed; R v Osman**

*Criminal Law – Immigration offences – Immigration document – Failure to provide immigration document at asylum interview – Defendants entering United Kingdom on false passports – Judge failing to direct jury on defence of reasonable excuse – Whether judge erring – Whether defendants having defence because unable to obtain genuine immigration document – Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 2*

[2007] EWCA Crim 2332, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

**COURT OF APPEAL (CRIMINAL DIVISION)**  
**SIR IGOR JUDGE P, ELIAS, GRIFFITH WILLIAMS JJ**

**11 JULY 2007, 16 OCTOBER 2007**

**16 OCTOBER 2007**

F Rutherford for the First Appellant

D Bunting for the Second Appellant

A Chalk for the Crown in both appeals

Tosswills; Wilson & Co; Crown Prosecution Service

**SIR IGOR JUDGE (P):**

(reading the judgment of the court)

[1] These appeals against conviction, heard consecutively, raise interesting questions about the offence created by s 2(1) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (the 2004 Act), that is, failing to produce at an asylum interview an immigration document that is in force and that satisfactorily establishes the identity, nationality or citizenship of the Applicant.

[2] On 21 July 2005 in the Crown Court at Croydon, before Mr Recorder King and a jury, Farida Said Mohammed was convicted of this offence. She was sentenced to four months imprisonment, reduced on appeal to one month imprisonment.

[3] Leave to appeal against conviction was referred to the full court and granted on 15 March 2007. The Registrar of Criminal Appeals invited the Secretary of State for the Home Department to attend the appeal and, if he wished, to make representations. The invitation was not accepted.

[4] On 18 August 2005 in the Crown Court at Croydon, before His Honour Judge Tanzer and a jury, Abdullah Osman was convicted of an identical offence. He was sentenced to nine months imprisonment and recommended for deportation. An application for leave to appeal against conviction was abandoned. An appeal against his recommendation for deportation was dismissed on 15 January 2007. Following a deportation order made on 25 August 2006, by a decision promulgated on 27 May 2007, the Asylum and Immigration Tribunal allowed an appeal against this determination on asylum, humanitarian and human rights grounds. The Criminal Cases Review Commission referred the conviction to this court on 18 June 2007.

*FARIDA SAID MOHAMMED – THE FACTS*

**[5]** On 5 April 2005 the Appellant, then heavily pregnant, arrived in the United Kingdom. She presented herself to the Asylum Screening Unit at Lunar House in Croydon. At her screening interview she informed a member of the immigration staff that she was a Somali national, born on 8 September 1979. She was asked if she could produce her passport or the travel document she had used to enter the United Kingdom. She replied, “no, agent took passport”. She was also asked if she could produce any such document within three days. She replied, “no”.

**[6]** In interview, conducted with the assistance of a solicitor, and with an interpreter, she stated that she had arrived in the United Kingdom early that morning but was unable to remember her port of entry. She had travelled with an agent. She had never owned a national passport because “nobody had to help me to, you know, get a passport”; so she herself had never made an application for a passport or appropriate documents. The “passport” she had used to enter was given to her by the agent after she had disembarked from the aeroplane that morning. She handed the “passport” to the immigration officer, and once through immigration control, handed it back to the agent. She was afraid not to follow his instructions.

**[7]** At trial the Appellant gave evidence that she left Somalia with her lover on 21 March 2005. She came from a small village which had no electricity. She had never been to school. She had been the victim of rape on two occasions. She decided to leave. She and her lover took a boat to Kenya. She stayed with him until 4 April 2005. Her lover paid for everything, including the passport. Through him she met an agent, who she named. He arranged her journey to the United Kingdom where she arrived on 5 April. She did not organise any of her travel documents herself. She had not applied in her own right for a passport in her name as a national of Somalia, and she had not applied for a visa. Everything was arranged by her agent. He was in possession of the passport, and the first time she saw it was “when we were in the UK after we had left the aircraft. It was near to where the plane had landed . . . he gave it to me to show the investigation officer”. He opened the passport and gave it to her so that she could show it to immigration officials. It was open at the page with her photograph and her name, Said Mohammed, but not Farida, on it. After they went through immigration, the agent took back the passport. She asked him to return it to her but he asserted that the passport was his. He had earlier told her that it belonged to her, but she gave it back to the agent because she did not know the regulations in this country. The agent took her straight to Lunar House. She came to know about the possibility of seeking asylum after she had arrived in the United Kingdom. She did not know what help she could get. She claimed asylum. She did not know where the agent went.

**[8]** In cross examination she denied getting rid of the passport to delay her asylum application. If she had the power she would have taken the passport back from the agent. In answer to a question from the judge, she said that the agent had not done anything to make her frightened, rather she was afraid of the situation in Somalia.

#### *ABDULLAH MOHAMED OSMAN – THE FACTS*

**[9]** This Appellant presented himself to the Asylum Screening Unit at Lunar House, Croydon on 4 November 2004. He made an application for asylum. He claimed to be a Somali national, born on 2 October 1972. During the screening process it was established that he did not have any immigration documents. He was unable to produce a passport, or any document used to travel to the United Kingdom, and said that he would not be able to do so within three days. He explained that the agent who he met in Kenya was a foreign black man, who may have been Eritrean or Ethiopian, to whom he was introduced by a broker. He used a “forged British passport” to enter the United Kingdom via Heathrow, and

had travelled here via Kenya and The Netherlands. When he was asked how the document was taken from him, he said “I gave him back the passport, because he had told me that when you arrive, I will take the passport”. He handed the document back “outside Heathrow Airport”. Later that day he was arrested.

**[10]** In interview under caution, assisted by a solicitor, in the presence of an interpreter, he said that he was unable to produce any immigration documents. He had never owned his own passport because he had never travelled before. He travelled to the United Kingdom with the help of an agent, arriving on 2 November. He used a false British passport with a different name and date of birth but similar photograph. He returned it to the agent after passing through immigration control.

**[11]** It was not possible to confirm whether or not the Appellant used the flight he claims to have used, or to establish his name, date of birth, nationality, date or means of entry, travel route or indeed whether he had applied for a visa. It was admitted on behalf of the Appellant that he was indeed unable to produce any genuine or false immigration documents at his immigration interview.

**[12]** The Appellant's evidence at trial was that he was a native of Somalia, born in October 1972. In the troubles his family were vulnerable, and targeted. His father was kidnapped by armed militia men. A ransom was demanded, which was not paid. The family home was broken into. His sister was sexually assaulted. When their mother tried to intervene, she was killed. His sister was then sexually assaulted and killed. His father was murdered. He was the next intended victim.

**[13]** He left the city, travelling overland to Kenya. He stayed there for three months before making his way to the United Kingdom. He could not get any documents in Somalia, because there were no authorities to issue them. He paid an agent, while in Kenya, who provided him with a passport. The agent promised to take him to a country where he would be safe. He was unaware which country, and the agent also said that the passport would be “removed” once he had arrived at his destination. He did not say why, and the Appellant did not ask. He left Kenya on 1 November 2004. The agent went on the flight with him. He was later told that they had arrived at Heathrow. He did not even know that he was being brought to the United Kingdom. Once through immigration control he returned the passport to the agent on the basis that the passport did not belong to him, “so I returned it to its owner and he took it off me”. At the airport he did not seek asylum, because he did not know what was to happen to him, and in particular whether he would be left by the agent, or continue on elsewhere. The agent told him to look for other Somalis. He found some of them at the airport. They assisted him.

**[14]** He explained in cross-examination how he sat next to the agent on the flight, but accepted the instruction that he should “stick” to him, but not ask anything. He left Heathrow airport with the agent. They passed through a desk where he had to show his passport. At that stage nothing was said. Afterwards the agent told him that he was now in a safe country and that he should return the passport, which he did, because it did not belong to him. That was the last he saw of the agent. He agreed that he could simply have kept the passport and that he was not threatened. The agent simply took it off him and walked away. He accepted that at Lunar House he attended without any immigration documents, passport or other form of identification. It was an admitted fact that “there was no claim by Mr Osman that he travelled to the United Kingdom without an immigration document at any stage of the journey”.

## *SECTION 2 OF THE 2004 ACT*

**[15]** The feature common to both appeals is that when they sought asylum the Appellants were not in possession of any genuine, or indeed any document, which established their identity, nationality or citizenship. They entered the United Kingdom using false passports. Thereafter neither retained the false passport, or any other immigration document, and they produced none at their asylum interview the offence of which the Appellants were convicted is created by s 2(1) of the 2004 Act. This provides:

“(1) A person commits an offence if at a leave or asylum interview he does not have with him an immigration document which –

(a) is in force, and

(b) satisfactorily establishes his identity and nationality or citizenship.”

The offence is clearly defined in unambiguous language. However it is not absolute. To begin with, a statutory period of grace, permitting late production of appropriate documentation in defined circumstances is provided by s 2(3). Thereafter when the facts which give rise to the offence under s 2(1) are established, specific defences are expressly provided. It is this aspect of the legislative language and structure which gives rise to both appeals.

**[16]** Section 2(4) provides:

“It is a defence for a person charged with an offence under sub-section (1) –

...

(c) To prove that he has a reasonable excuse for not being in possession of a document of the kind specified in sub-section (1),

(d) To produce a false immigration document and to prove that he used that document as an immigration document for all purposes in connection with his journey to the United Kingdom, or

(e) To prove that he travelled to the United Kingdom without, at any stage since he set out on the journey, having possession of an immigration document.

(6) Where the charge for an offence under sub-section (1) or (2) relates to an interview which takes place after the Defendant has entered the United Kingdom –

(a) sub-section (4)(c) and (5)(c) shall not apply, but

(b) it is a defence for the Defendant to prove that he has a reasonable excuse for not providing a document in accordance with sub-section (3).

(7) For the purposes of sub-sections (4) to (6) –

(a) the fact that a document was deliberately destroyed or disposed of is not a reasonable excuse for not being in possession of it or for not providing it in accordance with sub-section (3), unless it is shown that the destruction or disposal was –

(i) for a reasonable cause, or

(ii) beyond the control of the person charged with the offence, and

(b) in paragraph (a)(i) “reasonable cause” does not include the purpose of –

(i) delaying the handling or resolution of a claim or application or the taking of a decision,

(ii) increasing the chances of success of a claim or application, or

(iii) complying with instructions or advice given by a person who offers advice about, or facilitates, immigration into the United Kingdom, unless in the circumstances of the case it is unreasonable to expect non-compliance with the instructions or advice.”

**[17]** Sub-section 12 explains the meaning of “immigration document” for the purposes of the section and sub-s 13 does not define, but is descriptive of, the circumstances in which an immigration document will be treated as a false immigration document.

“(12) In this section –

...

'immigration document' means –

(a) a passport, and

(b) a document which relates to a national of a State other than the United Kingdom and which is designed to serve the same purpose as a passport, and

'leave or asylum interview' means an interview with an immigration officer or an official of the Secretary of State at which a person –

...

(a) seeks leave to enter or remain in the United Kingdom, or

(b) claims that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 (c 42) as being incompatible with his Convention rights.

(13) For the purposes of this section –

(a) a document which purports to be, or is designed to look like, an immigration document, is a false immigration document, and

(b) an immigration document is a false immigration document if and in so far as it is used –

(i) outside the period for which it is expressed to be valid,

(ii) contrary to provision for its use made by the person issuing it, or

(iii) by or in respect of a person other than the person to or for whom it was issued.”

## DISCUSSION

**[18]** This statutory framework represents the current stage in the process by which the United Kingdom gives effect to the obligations created by art 31(1) of the 1951 Convention and Protocols relating to the Status of Refugees. This reads:

“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.”

**[19]** In *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667, [1999] 4 All ER 520, [2000] 3 WLR 434, the broad purpose of art 31 was addressed by Simon Brown LJ. He said:

“... self-evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law . . . 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.”

In the light of the observations of the Divisional Court in *Adimi*, s 31 of the Immigration and Asylum Act 1999 created a statutory defence to some of the offences which then applied to the possession or use of false documents. Thereafter, in *R (Pepushi) The Crown Prosecution Service* [2004] EWHC 798 (Admin) the Divisional Court reached the clear conclusion:

“... that the scope of the defence available to the Claimant is that set out in section 31 and not in Article 31; Parliament has decided to give effect to the international obligations of the UK in the narrower way, but that is, on the authorities that are binding on us, the law which must be applied in the UK.”

**[20]** Section 31 of the 1999 Act was followed by s 2 of the 2004 Act. In *R v Navabi and Embaye* [2005] EWCA Crim 2865 Kennedy LJ observed that in s 2:

“Parliament sought to address directly the problem of those seeking asylum or leave to enter without documentation to establish their identity nationality or citizenship. It was recognised that some of those seeking assistance may never have had documentation, or may have only had false documentation, but even false documentation might assist immigration authorities, and the aim was at least in part to prevent wilful disposal or destruction of documents which ought to be produced, and which would assist the immigration authorities if they were produced, so the section created a new offence.”

These observations are plainly consistent with and derived from the Home Office guidance that:

“The offence is intended to discourage persons from destroying or disposing of their immigration documents en route to the United Kingdom. In particular to discourage them from doing so in order to conceal their identity, age or nationality in an attempt to increase the chances of success of a claim or application or to make consideration of their claim or application more difficult and/or to thwart removal . . . .”



Finally we note that, in effect for the reasons identified by Simon Brown LJ in *Adimi*, the court accepted that the offence created by s 2 of the 2004 Act fell within the ambit of art 31, and indeed that art 31 was to be “generously interpreted”.

**[21]** The legislation is therefore directed to the exercise of proper control over those who seek to enter the United Kingdom. While we, in the United Kingdom, can obtain our passports without significant difficulty or delay, this is not the universal experience. In other countries, living conditions can be intolerable, the fear and danger of persecution rife, and passports or similar documents not available in our accustomed way. Indeed the very act of seeking to apply for a passport may bring with it the wrath of the authorities. It is therefore unsurprising that refugees sometimes arrive in this country using false documents or without any documents at all. A reasonable compromise has to be maintained between necessary control over entry, with arrangements which reflect the stark realities faced by refugees whose claims are genuine, encompassed in a structure which addresses the equal certainty that some of those claiming to be refugees are bogus. For these purposes, each and every document used to gain entry, whether genuine or false, may provide valuable information to the authorities responsible for border controls, not least in the context of bogus claims, because combined with other information in the possession of the authorities, they may at least reveal the Applicant's true country of origin. The legislation therefore provides not only that those who enter the United Kingdom should normally do so using genuine and current immigration documents, but that each and every document used to gain entry, whether genuine or false, should be retained and produced.

**[22]** With these considerations in mind we must return to the statutory defences themselves. Reading sub-ss 4(c)-(e) together with sub-s 6, the individual who brings himself or herself within one or more of the defined circumstances is provided with a defence. These are:

- i) that he has a reasonable excuse for not producing a genuine document; (s 2(4)(c))
- ii) that he travelled to the United Kingdom without at any stage being in possession of any immigration document; (s 2(4)(e))
- iii) that he used a false document as an immigration document for all purposes in connection with his journey to the United Kingdom, and produces it. (s 2(4)(d))

**[23]** Sub-section 7 qualifies or explains the ambit of the statutory defences provided by ss 4 and 6, with which it is inextricably linked. It identifies specific circumstances in which they will not apply, when the purported excuse for not being in possession of or providing the requisite document is in effect deemed to be unreasonable. Thus, it cannot be “reasonable cause” for the Applicant's inability to provide the document, or failure to be in possession of it, that his purpose was to delay the resolution of the claim to asylum, or to increase the chances of a successful application, or that he complied with the instructions or advice given by an individual offering advice about or facilitating immigration into the United Kingdom, although this in turn is subject to reasonable “non-compliance”. These limitations underline the importance in the overall statutory structure which is attached to the preservation and production of every available document.

**[24]** Before examining the defence provided by sub-s 4(c) we note that the position of the immigrant without any documents, and the individual who has entered using a false document is expressly distinguished in sub-ss 4(e) and (d) respectively. The former cannot realistically be expected to produce any immigration document; he has never had one. However to come within the defence which appears to apply to his case, the latter,

not unreasonably, and in accordance with the legislative purpose, is required to do so. This approach to sub-ss 4(d) and (e) and the distinction between them seems clear enough. However sub-s 4(c) provides a defence for the Applicant who has a “reasonable excuse for not being in possession of a document” of the kind required by s 2(1) – that is, a genuine document – and is mirrored in relation to a post-entry asylum interview by sub-s 6(b). The wide ambit of this subsection was not fully appreciated until the decision of the Divisional Court presided over by Lord Phillips CJ, in *Thet v Director of Public Prosecutions* [2006] EWHC 2701 (Admin), [2007] 2 All ER 425, [2007] 1 WLR 2022.

**[25]** *Thet* entered the United Kingdom using a false passport. At the hearing he satisfied the District Judge that it was impossible for him to obtain a passport in his country of origin. The District Judge concluded that s 2(3) and 6(b) covered only a genuine immigration document. The defences did not apply where no genuine document had ever existed. He specified two questions for the opinion of the Divisional Court:

“(i) is the defence under section 2(6)(b) available to a Defendant in relation to a genuine document, as defined by section 2(1) where no such document exists?

(ii) if so, can section 2(6)(b) provide a defence in relation to a genuine document where the accused has travelled to and entered the United Kingdom using a false document which is not provided in accordance with section 2(3) and has no reasonable excuse for not having done so?”

**[26]** The appeal was allowed. The Divisional Court concluded that although *Thet* had failed to produce the false passport used on entry, he nevertheless had established a reasonable excuse for not providing a genuine document. It was “impossible for him to obtain a passport in his country of origin”, and “he clearly had a reasonable excuse for not providing an immigration document, that is a genuine document, within three days of his asylum interview. In these circumstances he had a valid defence to the charge”. This language is as relevant to sub-s 4(c) as to sub-s 6(b), and the Crown before us accepted that the defence under sub-s 4(c) can extend to the individual who enters on the basis of a false document and who, with a reasonable excuse, does not produce it. That concession however did not apply to any purported defence under sub-s 4(d). The distinction is not without some practical importance, and required us to address a further observation at para 26 in *Thet* to which we were told by Mr Chalk, who appeared for the Respondent in the Divisional Court, specific argument was not directed.

**[27]** Lord Phillips CJ added that sub-s 4(e) also provided a defence if it were proved “that from beginning to end of the journey he has not possessed a valid immigration document and on its face would appear to provide that defence even if he had entered on false documents which he has subsequently disposed or destroyed”. As the judgment makes clear, Lord Phillips was not seeking to express any final or concluded view about the ambit of sub-s 4(e).

### THE APPEALS

**[28]** These appeals against conviction largely echo the successful appeal to the Divisional Court by *Thet*. Farida Mohamed's grounds of appeal assert that the directions to the jury involved a misinterpretation of both s 2(6)(b), and by implication s 2(4)(e). The same misdirections are relied in by Osman. The distinction between the two grounds is readily demonstrated. If the appeals are successful on the basis of the defence in sub-s 4(e) then they are bound to succeed. There would be no issue to be left to the jury. By contrast, if the Appellants cannot bring themselves within sub-s 4(e) and have to rely on sub-s 4(c)

alone, then the separate question whether they had a reasonable excuse for not being in possession of genuine documents would arise.

#### *THE APPEAL UNDER S 2(4)(C)*

**[29]** We need not repeat the text of the summings up. It is accepted in Osman's appeal by Mr Chalk, after careful analysis of the relevant provisions, that in the light of the decision in *Thet*, the jury was not correctly directed about the impact of s 2(6)(b) in the context of a possible statutory defence. The same concession was not made in relation to the appeal by Mohamed, on the basis of the evidence actually given at trial. The argument on the facts was that this particular Appellant's reasons for not having obtained a genuine passport in Somalia did not constitute explanations capable of amounting to a "reasonable excuse". Our views can be briefly expressed. We disagree with Mr Chalk. As a matter of fact it would have been open to the jury, properly directed, to have found that this Appellant's excuse was reasonable. For both Appellants, this ground of appeal succeeds.

**[30]** These conclusions do not imply any criticism of either trial judge. Until the legal principles have been clarified in *Thet*, where s 2 was described by the Lord Chief Justice as both "ill-drafted" and "difficult", their approach to the directions of law would have appeared logical and consistent.

#### *THE APPEAL UNDER S 2(4)(E)*

**[31]** As we have already indicated, the significance of this ground is that if the observation in para 26 of the judgment in *Thet* is correct, irrespective whether the Appellants could bring themselves within s 2(4)(c), both would have a complete defence.

**[32]** Mr Chalk submitted, with appropriate courtesy, that the obiter observations about sub-s 4(e) in *Thet* should not be followed. We had the advantage of detailed submissions on the point.

**[33]** Without depriving them of their cogency, the conflicting arguments can be simply summarised. For the Appellant it is pointed out that sub-s 12 defines an immigration document as a passport or, for non UK nationals, a document, however described, designed to serve the same purpose. This, it is submitted, plainly means a genuine and valid passport. Insofar as there may be any ambiguity, as this is a criminal statute, it should be resolved in favour of the Appellant. If the definition in sub-s 12 is applied to sub-s 4(e), whenever the Defendant begins his journey to the United Kingdom without a genuine document, he is provided with a defence in all circumstances. The failure of the Appellants to keep and produce the false documents used to effect entry did not deprive them of this defence. They fell within the ambit of sub-s 4(e) simply because they were never in possession of genuine documents. Although it was proved that they entered on the basis of false documents which were not presented at interview, or within the period of grace, the defence was available, and should have been left to the jury.

**[34]** The contention for the Crown is that this construction would wholly defeat the purpose of the legislation. Although, taken in isolation, the definition of "immigration" document in sub-s 12 would apply more naturally to a genuine rather than a false document, it is contended that an alternative construction of the definition is to treat a false immigration document as one "designed to serve the same purpose as a passport". More significantly, however, the Crown suggests that the construction adopted in *Thet*, and now advanced on behalf of the Appellants, would in practice render sub-s 4(d) a dead letter. Anyone who travels on a false document is not travelling with a genuine one. If the Appellants are right, it would be open to them to rely on sub-s 4(e) even if they travelled on a false document

which they destroyed or refused to produce. This would frustrate the purpose of the legislation.

**[35]** It would lead to a further curiosity. When two individuals travel together, one may have a genuine passport, the other a false one. If after entry into the United Kingdom, and for no good reason, they both give their passports to an agent in accordance with his instructions, the holder of the genuine passport would be unable to advance a reasonable excuse falling within sub-s 4(c), but equally, he could not rely on sub-s 4(e) since he started out with a genuine passport. By contrast, the holder of the false passport or immigration document, although lacking any reasonable excuse for having disposed of his false passport, could still rely on sub-s 4(e) precisely because he started out without any genuine document at all.

**[36]** We are persuaded that the Crown's fundamental premise is correct. The contention advanced by the Appellants would mean that the only Defendants who would be criminally liable under s 2(1) would be those who started off in possession of genuine documents and thereafter, without reasonable excuse, parted with them, whereas those who entered on the basis of false documents, and without good reason destroyed or disposed of them, would be provided with a defence. It seems improbable that the legislative structure providing for defences in the limited circumstances specified within a statutory framework should achieve such an odd result. If it did, although the defence provided by sub-s 4(d) is categoric and self-contained, the distinct defences created by the structure of sub-s 4(c)-(e) would be elided. Accordingly, consistent with the legislative purpose, a Defendant seeking to avoid criminal liability under s 2(1) by reliance on the defence in sub-s 4(d) is required to produce the false documents relied on by him. The same Defendant, seeking to rely on sub-s 4(c), must show that he has a reasonable excuse (as defined and limited by sub-s 7) for not being in possession of a genuine document, and although, in accordance with *Thet*, this defence extends to the Defendant who enters using a false document, it nevertheless remains subject to the same sub-s 7 limitations. In these circumstances we are unable to agree with a construction of sub-s 4(e) which would effectively strike out the express provision in sub-s 4(d) and deprive it of any meaning, and simultaneously remove the limits on the defence in sub-s 4(c) imposed by sub-s 7. On this analysis, the combination of statutory defences acknowledges the plight of those who cannot reasonably obtain genuine immigration documents and who enter without any documents at all or relying on false ones, while at the same time providing some measure of control over those who enter using false documents by requiring them either to produce them (in accordance with s 2(4)(d)) or to demonstrate a reasonable excuse for their non-production which is not otherwise excluded by sub-s 7 (sub-s (4)(c)).

**[37]** This conclusion is reinforced by a number of further considerations. The provisions in sub-s 1(a) and (b) are superfluous. That view was expressed in *Thet*. However, unsurprisingly, s 2 addresses both genuine and false documents. Sub-section 13(b) supports our preferred construction, by providing that "an immigration document is a false immigration document" if certain conditions are satisfied. It is not identifying a false immigration document in contrast to a genuine one, but rather treating it as a sub-species of the species "immigration document". Moreover, we agree with Mr Chalk that notwithstanding that the express purpose of sub-s 4(d) is to require the immigrant to produce the false documents relied on by him to effect entry, he would still be provided with a defence under sub-s 4(e) if he blatantly refused to hand over or deliberately destroyed or disposed of the documents. It is also difficult to see any logical basis for depriving someone of a defence who without reasonable excuse parts with possession of a genuine passport, while making one available to an individual who, in identical circumstances, chooses to part with possession of a false one.

## CONCLUSION

**[38]** The appeal with respect to s 2(4)(e) fails. It provides no defence to these Appellants. However the appeals will be allowed on the basis that the jury was not directed to consider whether each Appellant's excuse for failing to produce the false document used to gain entry to the United Kingdom may have been reasonable. At this late stage however, no useful purpose would be served in either case by an order for retrial. *Judgment accordingly.*

## 9. R v Liliane Makuwa [2006] EWCA Crim 175

### R v Makuwa

*Criminal evidence – Burden of proof – Defence – Immigration – Refugee – Using false instrument – Statutory defence providing that refugee having to show certain facts – Whether burden of proving defendant to be a refugee on prosecution or defence – Whether burden of proving certain facts pursuant to defence on prosecution or defence – Whether legal or evidential burdens – Directions to jury – Immigration and Asylum Act 1999, s 31(1) – Convention Relating to the Status of Refugees, art 1*

[2006] EWCA Crim 175, (Transcript: Smith Bernal Wordwave)

### COURT OF APPEAL (CRIMINAL DIVISION)

MOORE-BICK LJ, LLOYD JONES J, JUDGE FINDLAY BAKER QC

23 FEBRUARY 2006

I Macdonald QC and N Udom for the Appellant/Defendant  
A Riza QC and J Hulme for the Respondent

Aston Clark; Crown Prosecution Service

### MOORE-BICK LJ:

(reading the judgment of the court)

[1] On 20 May 2005 at the Crown Court at Isleworth before His Honour Judge McGregor-Johnson the Appellant, Liliane Makuwa, was convicted of using a false instrument with the intention of inducing somebody to accept it as genuine contrary to s 3 of the Forgery and Counterfeiting Act 1981 and two counts of facilitating an illegal entrant contrary to s 25(1) of the Immigration Act 1971. The two illegal entrants were the Appellant's children and the instrument in question was a passport issued in the Democratic Republic of Congo ("DRC") to a friend of the Appellant which had been altered by the removal of the original photographs and the insertion of photographs of the Appellant and her children. The Appellant was sentenced to 12 months' imprisonment on each count concurrent. She now appeals against conviction by leave of the Single Judge.

[2] At about 4.30pm on 15 January 2005 the Appellant arrived at Heathrow airport from the DRC with her two children. She presented herself to an immigration officer, Mr McMahon, who asked her why they had come to this country and how long they would be staying. Their conversation was conducted in French which the Appellant appeared to speak reasonably well, although her mother tongue is Lingala. It did not take him long to discover that the passport she had tendered had been tampered with, but the Appellant insisted that it was hers until she was confronted with evidence to the contrary in the form of a photograph of her friend that had been attached to her application for an entry visa.

[3] The next morning after spending the night at the airport the Appellant was arrested and taken to the police station where the services of a Lingala interpreter were made available. She was seen by a doctor and later that day was interviewed. It was not until well into the course of the interview that she explained that she had fled the DRC out of fear for her personal safety and claimed asylum. She did not tell the doctor that she had been raped, nor did she mention it during the interview.

**[4]** In evidence the Appellant said that the danger she faced in her own country drove her to present false documents in an attempt to gain entry to the UK. Her desperate position and her language difficulties accounted for what she had said at the airport and was the reason why her claim for asylum was not made until a Lingala interpreter was available. She was reluctant to mention the rape when she was interviewed because the interpreter, the solicitor and the immigration officials present were all male. She had not mentioned it to the doctor for the same reason.

**[5]** In relation to the charge under the Forgery Act the Appellant relied at trial on the statutory defence provided by s 31 of the Immigration and Asylum Act 1999 which provides as follows:

“(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.

.....

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

**[6]** The Refugee Convention is, of course, the Convention Relating to the Status of Refugees of 28 July 1951 as extended by the Protocol of 31 January 1967 (“the Convention”), art 1 of which defines a refugee as a 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, is unable or, owing to such fear, is unwilling to return to it.”

**[7]** Having given the jury the standard directions on the law, including a direction on the burden and standard of proof, and having directed them on the ingredients of the offence of using a false instrument with intent, the judge told them about the statutory defence. He directed them as follows:

“First of all in relation to count 1 there is what is called a statutory defence. It only applies to count 1 and this is where the exception to the general rule comes in. As I say, the general rule is that the prosecution must prove the Defendant's guilt, prove all of the elements of the charge so that you are sure. There are some occasions, and this is one, where there is a particular defence put forward where it is for the Defendant to prove the defence. But there is an important difference here. Where it is on the Defendant to prove something, he or she does not have to prove it to the same high standard the prosecution have to prove things. They have to prove it on what is called the balance of probabilities, that is to say, they must show that it is more likely than not to be true.”

Then, having handed the jury a sheet of written directions, he continued as follows:

“The Defendant must show the following five matters on a balance of probabilities, that is to say, that they are more likely than not to be true.

Firstly, that her genuine reason for coming to the United Kingdom was to claim asylum.

Secondly, that she left the Congo owing to a well-founded fear of being persecuted for reasons of membership of a particular social group, ie her family, her husband having been arrested, or for reasons of her political opinions.

Thirdly, that she presented herself to the authorities in the UK without delay. There is no dispute about that; she went straight to Mr McMahon.

Fourthly, that she showed good cause for her illegal entry into the United Kingdom in that she was reasonably travelling on false papers in order to come to the United Kingdom to claim asylum. Just pausing there, members of the jury, for a moment, you will understand that if somebody is a genuine asylum-seeker they are unlikely to be able to travel on proper documents. That is what this paragraph is directed towards.

And fifthly, that she made a claim for asylum as soon as was reasonably practicable after her entering into the UK. Now I emphasise that word or those words 'reasonably practicable'. It is for you to judge in the circumstances.”

**[8]** It will be seen that the judge's direction followed closely the language of s 31 with the addition of a requirement for the Appellant to show that she had a genuine reason for coming here to claim asylum and a reference to a well-founded fear of persecution which was clearly intended to reflect the Convention definition of a refugee.

**[9]** The grounds of appeal in this case give rise to four related issues. The first is whether the judge was right to direct the jury that the burden of establishing all the facts giving rise to a defence under s 31, including the fact that he is a refugee, rests on the Defendant. The second is whether, if the Defendant does bear the burden of proving that he is a refugee, the judge should have directed the jury that it is sufficient for him to show only that there is a serious possibility that, if returned to the country of his nationality (or, in the case of a stateless person, his former habitual residence), he will be persecuted for a Convention reason, not that he must establish that on the balance of probabilities. The third, which is closely related to the second, is whether the judge failed properly to explain to the jury what is meant in this context by a “well-founded” fear of persecution, membership of a social group or political opinions. The fourth is whether, insofar as the Defendant bears the burden of proof in relation to matters other than his status as a refugee, that burden is legal (ie persuasive) or evidential in nature.

#### *WHAT FACTS GIVE RISE TO A DEFENCE UNDER S 31?*

**[10]** It is convenient to begin by considering the second of these question first because it raises issues of principle relating to the meaning and effect of s 31. Mr Macdonald QC submitted on behalf of the Appellant that s 31 of the Immigration and Asylum Act 1999 was enacted to give effect in relation to a limited range of offences to the provisions of art 31 of the Convention and should therefore be construed and applied in the same way as the courts have construed the requirements of the Convention.

**[11]** Article 31 of the Convention provides as follows:



“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.”

**[12]** In order to be considered a refugee within the terms of the Convention a person must be outside the country of his nationality or former habitual residence and unwilling to avail himself of the protection of that country by reason of a well-founded fear of persecution. For such a fear to be well-founded there must be sufficient grounds for it of a kind that are capable of objective verification. In *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] 1 AC 958, [1987] 3 WLR 1047 Lord Keith said at p 994F:

“In my opinion the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country. In *R v Governor of Pentonville Prison, ex parte Fernandez* [1971] 1 WLR 987, this House had to construe section 4(1)(c) of the Fugitive Offenders Act 1967, which requires that a person shall not be returned under the Act if it appears that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.”

Lord Diplock said at p 994

“My Lords, bearing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or in the other, I do not think that the test of the applicability of paragraph (c) is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. 'A reasonable chance,' 'substantial grounds for thinking,' 'a serious possibility' – I see no significant difference between these various ways of describing the degree of likelihood of the detention or restriction of the fugitive on his return which justifies the court in giving effect to the provisions of section 4(1)(c).

I consider that this passage appropriately expresses the degree of likelihood to be satisfied in order that a fear of persecution may be well-founded.”

**[13]** Lord Goff expressed similar views at p 1000B-F where he said

“But once it is accepted that the Secretary of State is entitled to look not only at the facts as seen by the Applicant, but also at the objective facts as ascertained by himself in relation to the country in question, he is, on the High Commissioner's approach, not asking himself whether the actual fear of the Applicant is plausible and reasonable; he is asking himself the purely hypothetical question whether, if the Applicant knew the true facts, and was still (in the light of those facts) afraid, his fear could be described as plausible and reasonable. On this approach, the Secretary of State is required to ask himself a most unreal question. His appreciation is in any event likely to be coloured by his own assessment of the objective facts as ascertained by him; and it appears to me that the High Commissioner's approach is not supported, as a matter of construction, by the words of the Convention, even having regard to its objects and to the travaux préparatoires. In truth, once it is recognised that the expression 'well-founded' entitles the Secretary of

State to have regard to facts unknown to the Applicant for refugee status, that expression cannot be read simply as “qualifying” the subjective fear of the Applicant – it must, in my opinion require that an inquiry should be made whether the subjective fear of the Applicant is objectively justified. For the true object of the Convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people whose fear of persecution is in reality well-founded.”

**[14]** As Mr Macdonald pointed out, it is not necessary for a person seeking asylum to satisfy the authorities on the balance of probabilities that his fear of persecution is well-founded; something less than that will suffice.

**[15]** The purpose and effect of art 31 of the Convention was considered by the Divisional Court in *R v Uxbridge Magistrates' Court ex parte Adimi* [2001] QB 667, [1999] 4 All ER 520, [2000] 3 WLR 434. In that case the court considered the position of three asylum seekers who were being prosecuted for being in possession of false passports at a time when their applications to be accorded refugee status had yet to be determined by the Home Secretary. In each case the Applicant sought judicial review of the decision to prosecute him and in two cases the Applicants also sought judicial review of the policy of prosecuting asylum seekers holding false papers whose claims had yet to be determined. Each of them relied on art 31 of the Convention. Simon Brown LJ, with whom on this question Newman J agreed, described the position as follows at p 677G-678A:

“What, then, was the broad purpose sought to be achieved by Article 31? Self-evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. In the course of argument, Newman J suggested the following formulation: where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by Article 31. That seems to me helpful.

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. Nor is it disputed that Article 31's protection can apply equally to those using false documents as to those (characteristically the refugees of earlier times) who enter a country clandestinely.”

**[16]** The parties in that case made conflicting submissions about the steps that should be taken to ensure that the United Kingdom complied with its obligations under international law as expressed in art 31 of the Convention. The Applicants submitted that there should be no prosecution until the Home Secretary had determined the claim for asylum and that his decision should be determinative of the question whether art 31 applied. The Respondents submitted that the proper course was for the Defendant to apply for a stay of any proceedings against him. Simon Brown LJ did not consider either course entirely satisfactory and it is interesting to note that one of his reasons for rejecting the Respondents' submission that the issue be determined in the context of an application to stay for abuse of the process was that it would place on the Defendant the burden of proof on the balance of probabilities: see p 683E-F. In the end, however, he concluded in the light of the Respondents' assurances that they intended to give full effect to art 31 that the abuse of process jurisdiction was able to provide a sufficient safety net for those wrongly prosecuted. Newman J took a different view. He noted that art 31 had not been incorporated into domestic law and was therefore unable to accept that the court could grant or refuse relief by reference to it. It was in his view entirely a matter for the executive: see pp 694F-695B.

[17] The Immigration and Asylum Act 1999 was passed a little over three months after the decision in *Adimi*. Section 31(1) is closely modelled on art 31 of the Convention with the addition in para (c) of the requirement that the Defendant must have made a claim for asylum as soon as reasonably practicable after his arrival in the United Kingdom. It is reasonable to conclude, therefore, that the purpose of enacting s 31 was to meet the difficulties exposed by the judgments in *Adimi* by incorporating into domestic law, with certain modifications, the principles contained in art 31 in the form of a defence to the charges most likely to be brought against asylum seekers entering the country on false passports. In our view Mr Macdonald was right, therefore, to submit that s 31(1) of the Act is to be construed against the background of art 31 of the Convention.

[18] The responsibility for determining whether a person is to be recognised as a refugee rests exclusively on the Home Secretary: see *Sivakumaran* per Lord Templeman at p 996. On that ground, and on the grounds that art 31 of the Convention was intended to afford protection to those whose claims for asylum have yet to be determined, Mr Macdonald submitted that anyone who has claimed asylum and invokes the defence provided by s 31 of the Immigration and Asylum Act 1999 must be assumed to be a refugee until the Home Secretary has determined his application for asylum. In further support for the argument he sought to rely on a passage in the speech of Lord Bridge in *R v Home Secretary ex parte Bugdaycay* [1987] AC 514 at p 525H, [1987] 1 All ER 940, [1987] 2 WLR 606 in which he said that it was to be assumed that the Applicant in that case, Mr Musisi, was a refugee.

[19] We are unable to accept that submission. If Parliament had wished to exclude from the jury's consideration the issue of the Defendant's refugee status, no doubt sub-s (1) could have been worded to provide that it was a defence for a person charged with a relevant offence who claimed to be a refugee to show that he satisfied the requirements of paras (a) to (c), but that is not how the legislation is drafted. (We do not think that any assistance can be derived from Lord Bridge's comment in *Bugdaycay* which simply reflected the nature of the argument before the House and the fact that Mr Musisi's refugee status was not in dispute.) It is clear from the terms of sub-s (1) that whether the Defendant is a refugee in Convention terms is one of the matters that the court has to consider as an essential element of the defence, as well as the question whether he has come directly from a country where his life or freedom was threatened. Moreover, it is clear that the decision of the Home Secretary whether to grant or refuse refugee status is not final for these purposes since by virtue of sub-s (7) the refusal of an application for asylum does not prevent the Defendant from showing that he does in fact fall within the terms of sub-s (1). In our view, therefore, one is brought back to the terms of s 31 itself.

[20] The first thing one notices about s 31 is that instead of referring to a "person" charged with an offence to which this section applies it refers specifically to a "refugee". Moreover, sub-s (6) defines a refugee in terms of the Convention, not simply as a person who has claimed asylum. In the light of what was said by their Lordships in *Sivakumaran* we are satisfied that one of the essential characteristics of a refugee as defined by the Convention is that it can be said of him that there is a serious possibility, a reasonable degree of likelihood, or a real and substantial risk (the expressions are interchangeable) that if he is returned to the country of his nationality or former habitual residence he will suffer persecution for one of the Convention reasons. That is reinforced by the use of the words "(within the meaning of the Refugee Convention)". They cannot have been intended to govern the word "refugee", both because they do not naturally relate to it within the structure of the subsection, and because the meaning of the word "refugee" is defined separately in sub-s (6). They must therefore have been included to make it clear that the reference to a country where his life or freedom was threatened are to be understood in the same sense as they are to be understood in the context of the Convention.

[21] The first question, therefore, to which s 31 gives rise is whether the Defendant is unwilling to return to the country of his nationality or former habitual residence because he is afraid of persecution. If he is, the next question is whether there is a serious possibility that if he were returned to that country he would suffer persecution. If there is, it is then necessary to ask whether the risk is of persecution for one of the Convention reasons. If it is, he is a refugee for the purposes of sub-s (1). At that stage it becomes necessary to enquire whether he came to the United Kingdom directly from a country where his life or freedom was threatened and whether he satisfies the requirements of paras (a) to (c).

[22] It follows that in our view, if the Defendant bears the burden of proving that he is a refugee (a question to which we will return in a moment), it is sufficient for him to show that there is a serious possibility that he would suffer persecution for a Convention reason if he were returned to the country of his nationality or former habitual residence. We consider that adequately reflects both the conventional standard of proof where the burden is on the Defendant and also the appropriate criterion for establishing refugee status.

### *THE BURDEN OF PROOF*

[23] We turn next to consider the burden of proof. Mr Riza QC on behalf of the Crown submitted that the burden of proving all the matters giving rise to a defence under s 31(1) lies on the Defendant who must establish them on the balance of probabilities. In this connection two questions arise for consideration: (a) whether sub-s (1) imposes on the Defendant the burden of proving all or any of the facts necessary to establish the defence; and (b) insofar as it does, whether that burden is legal or only evidential.

#### *(1) Refugee Status*

[24] It is convenient to consider first the question of the Defendant's refugee status. In *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 All ER 237 Lord Bingham (citing Lord Griffiths in *R v Hunt* [1987] AC 352, 374, [1987] 1 All ER 1, [1986] 3 WLR 1115) reaffirmed that if the language of the statute in question does not make it clear whether the ground of exoneration must be established by the Defendant or negated by the prosecutor, the court should consider the mischief at which the statute was aimed and practical considerations affecting the burden of proof, in particular the ease or difficulty that the respective parties would encounter in discharging the burden.

[25] In the present case s 31 provides a defence to charges made under various statutory provisions relating to the use of false documents, but in view of the specific nature of that defence, the particular mischief which Parliament had in mind when enacting that section must have been the use of false passports or other identity papers to obtain entry to this country. As to the practical considerations relating to the ease or difficulty of establishing refugee status, the Defendant is in the best position to know whether he is afraid of persecution in the country of his nationality or former habitual residence, but it may be difficult for him to show that his fear of persecution for a Convention reason is objectively well-founded because he is unlikely to have access to the wider country information relevant to that question. Moreover on the face of it the language of sub-s (1) draws a distinction between the Defendant's status as a refugee and what, as a refugee, he has to show. Further support for the Appellant's position can be gained from sub-s (7) which provides as follows:

“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.”

The fact that the statute casts a burden on the Defendant under these circumstances to show that he is a refugee tends to support the conclusion that he does not bear that burden under other circumstances.

**[26]** In the light of these matters we have come to the conclusion that, as in the case of other more commonly raised defences, such as self-defence or alibi, provided that the Defendant can adduce sufficient evidence in support of his claim to refugee status to raise the issue, the prosecution bears the burden of proving to the usual standard that he is not in fact a refugee.

*(ii) Other Matters*

**[27]** Different considerations apply, however, in relation to the other matters which have to be established under s 31(1). In the first place the words “It is a defence for a refugee . . . . to show that . . . .” are themselves sufficient to make it clear that a burden of some kind is being imposed on the Defendant and the expression as a whole strongly suggests that the burden was intended to be legal rather than merely evidential. A similar question arose in *R v Johnstone* [2003] UKHL 28, [2003] 3 All ER 884, [2003] 1 WLR 1736, although admittedly in a different context. In that case the provision under consideration was s 92(5) of the Trade Marks Act 1994. This provides a defence to a charge of counterfeiting in the following terms:

“It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.”

Lord Nicholls, with whom the other members of the House agreed, did not think that the subsection could be read as imposing an evidential rather than a legal burden on the Defendant. Although the subject matter of the legislation in that case was different, the terms in which the defence was expressed are identical to those of s 31(1). We are left in no doubt it was the intention of Parliament not merely to place the burden of proof on the Defendant but to impose on him the legal burden of proving the remaining matters to which sub-s (1) refers. We do not find that surprising given that they are all matters of which the Defendant is likely to be at least as well, if not better, informed than the prosecution.

**[28]** The question then arises whether in this case the imposition of a legal burden of proof involves an unjustifiable infringement of the presumption of innocence which, although historically part of the common law, is now also enshrined in art 6(2) of the European Convention on Human Rights. Since the burden ordinarily lies on the prosecution to prove all the elements of the offence with which the Defendant is charged, it may be said that the presumption of innocence is infringed whenever there is imposed on the Defendant the legal burden of proving matters which, if established, provide him with a defence. Almost all the exceptions to the presumption are statutory, a matter which has assumed greater significance since the passing of the Human Rights Act 1998, s 3(1) of which requires both primary and subordinate legislation to be read and given effect in a way which is compatible with Convention rights. The question therefore arises whether it is necessary in this case to read s 31(1) as imposing an evidential, rather than a legal, burden of proof to ensure compatibility.

**[29]** In *Sheldrake v DPP* Lord Bingham reviewed a number of decisions of the European Court of Human Rights in which the presumption of innocence had been considered in the context of provisions imposing a reverse burden of proof. In para 21 of his speech he expressed the following conclusions:

“From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the Defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.”

**[30]** Having then considered a number of decisions of the courts in the United Kingdom, including *R v DPP ex parte Kebilene* [2000] 2 AC 326, [1999] 4 All ER 801, [1999] 3 WLR 972, *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, [2001] 3 All ER 577 and *R v Johnstone* he said in para 31:

“The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence. It may none the less be questioned whether (as the Court of Appeal ruled in para 52d) ‘the assumption should be that Parliament would not have made an exception without good reason’. Such an approach may lead the court to give too much weight to the enactment under review and too little to the presumption of innocence and the obligation imposed on it by section 3.”

**[31]** In *R v Johnstone* Lord Nicholls said in para 50:

“All that can be said is that for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence. . . . A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused: see Dickson CJ in *R v Whyte* (1988) 51 DLR (4th) 481, 493. This consequence of a reverse burden of proof should colour one’s approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.”

**[32]** The offences in respect of which s 31(1) provides a defence are those set out in Pt 1 of the Forgery and Counterfeiting Act 1981 (making, copying, possessing and using false instruments, including passports), offences under ss 24A of the Immigration Act 1971 (obtaining or seeking to obtain entry by deception) and offences under s 26(1)(d) of that

Act (falsification of documents and possession of a false passport for use for the purposes of that Act). In each case the prosecution is obliged to establish to the usual standard all the ingredients of the offence just as it would if the Defendant were not a refugee. The effect of s 31(1) is simply to provide a defence to a defined class of persons in prescribed circumstances. It does not therefore impose on the Defendant the burden of disproving an essential ingredient of the offence.

**[33]** The mischiefs at which these statutory provisions are aimed are many and various, but the principal mischief that Parliament must have had in mind when enacting s 31(1) was the use of false passports and other identity papers by those who are not entitled to enter the United Kingdom in order to obtain entry. It has been recognised both in Strasbourg and in this country that there is a legitimate public interest in the implementation of a lawful immigration policy which may provide a justification for measures that would otherwise involve an infringement of Convention rights, provided that their effect is not disproportionate to the aim which they seek to achieve: see, for example, see *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [2004] 3 All ER 785 and *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, [2004] 3 All ER 821. The fact that the claims to refugee status of many of those who seek asylum in this country are ultimately rejected as unfounded underlines the importance of maintaining effective immigration control.

**[34]** Mr Riza QC submitted on behalf of the Crown that the matters which the Defendant is required to prove in order to take advantage of the statutory defence are all largely, if not entirely, within his own knowledge. Moreover, they are matters in relation to which it will usually be difficult, if not impossible, for the Crown to adduce positive evidence. He submitted that if the Defendant bore no more than an evidential burden in relation to them, the Crown would be at a serious disadvantage and the effectiveness of the legislation relating to the use of false passports to obtain entry would be seriously undermined. In support of this argument he referred us to the recent decision of this court in *R v Embaye and others* [2005] EWCA Crim 2865 (unreported).

**[35]** In *Embaye* the court was concerned with s 2 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 which makes it an offence to attend a leave or asylum interview without being in possession of a valid immigration document. Subsection (4) provides a number of defences, one of which is for the Defendant to prove that he has a reasonable excuse for not being in possession of a document of that kind. One question that arose was whether the Defendant bears the burden of proof in such cases and, if so, whether the burden is legal or evidential in nature. In the light of the wording of the subsection (“It is a defence for a person . . . to prove . . .”) the court had no difficulty in holding that the Defendant bears the burden of proof. Nor did it have difficulty in holding that the burden is legal rather than evidential. Kennedy LJ said in para 29:

“For that same reason, namely that the Defendant alone is likely to have all of the relevant information, and bearing in mind the importance of maintaining an effective immigration policy, and the limitation on the penalties which can be imposed under the Act, we see no reason to conclude that the burden of proof should be interpreted as being anything less than a legal burden. An evidential burden would do little to promote the objects of the legislation in circumstances where the prosecution would have very limited means of testing any defence raised.”

**[36]** The maximum sentence for most of the offences under Pt I of the Forgery and Counterfeiting Act 1981, including the offence created by s 3 under which the Appellant in this case was charged, is ten years' imprisonment following conviction on indictment. That is a considerably greater penalty than the maximum of two years' imprisonment provided

for an offence under s 2 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. In other respects, however, the considerations are little different from those which weighed with the court in *Embaye*. In almost all cases it would be very difficult, if not impossible, for the Crown to prove that the Defendant's life or freedom had not been threatened in the country from which he had come; in most cases it would be difficult, if not impossible, for the Crown to prove that he had not presented himself to the authorities in the United Kingdom without delay; in many cases it would be difficult to show that he had not shown good cause for his illegal entry or presence or that he had not made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom. If the burden on the Defendant were no more than to adduce sufficient evidence to raise an issue in relation to matters of that kind, the statutory provisions to which s 31 relates would be rendered largely ineffective in the case of all those who came to this country claiming a right to asylum here. We recognise that imposing a legal burden of proof on the Defendant engages the presumption of innocence and we recognise that the consequences of conviction, at any rate for an offence under Pt I of the Forgery and Counterfeiting Act, are severe. Nonetheless, we regard these as sufficient reasons for imposing a legal burden of proof on the Defendant. We are accordingly satisfied that the infringement of art 6(2) is justifiable in this case since it represents a proportionate way of achieving the legitimate objective of maintaining proper immigration controls by restricting the use of forged passports which are one of the principal means by which they are liable to be overcome. We should add that we do not consider that the existence of the reverse burden of proof provided for in s 31(1) will prevent the Defendant who seeks to rely on its provisions from receiving a fair trial.

#### *HOW SHOULD THE JURY BE DIRECTED?*

**[37]** In the light of our conclusions we return to the way in which the judge should direct the jury in a case where the Defendant seeks to rely on s 31(1). The first thing they should be told is that s 31 provides a special defence to a person who is a refugee. It may well be that, in many cases where the Defendant claims to be a refugee, the Crown, while not accepting the claim, will not seek to establish that he is not. In such cases there will be no issue for the jury to decide and no need to explain the term. Where the Crown disputes the Defendant's claim it will be necessary to explain what a refugee is for the purpose of s 31. We would suggest that is best done by drawing on the language of the Convention itself, using words of the following kind:

“a refugee is 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.”

**[38]** It will also be necessary to give the jury some assistance on the meaning of a “well-founded fear”. We would suggest that the concept can best be conveyed by directing them that a fear of persecution is well-founded if there is a serious possibility that the Defendant will suffer persecution if returned to his own country. Finally, it will be necessary to direct their attention to the fact that in order to be a refugee the Defendant must fear persecution for one of the reasons mentioned in the Convention, that is, race, religion, nationality, membership of a particular social group or political opinion. In most cases there will be no need to give the jury further directions on the meanings of those expressions, but there may be cases when it will be necessary to do so. In such cases the judge should discuss the proposed directions with counsel before he begins his summing-up.

**[39]** Having thus defined a refugee, the judge should then tell the jury (if the matter is disputed) that the burden is on the prosecution to prove that the Defendant is not a refugee. If they are sure that he is not, that is the end of the matter as far as this defence



is concerned. However, if they think he may be a refugee, they must go on to consider the other matters that have to be proved. These should be separately identified and the jury should be told that it is for the Defendant to satisfy them of each matter on the balance of probabilities. The remaining requirements of sub-s (1) are couched in ordinary language and will not normally call for further directions. However, in some cases it may be necessary to give specific directions about certain matters: for example, if there is evidence that the Defendant spent any length of time in another safe country on the way to the United Kingdom, it may be necessary to explain what is meant in this context by coming *directly* from a country where his life or freedom was threatened. In our view it may be helpful to the jury to give them directions on all these matters in writing.

**[40]** In the present case the judge did give the jury directions in writing, but he did not direct them correctly on the burden of proof in relation to the issue of the Appellant's refugee status. Nor, in our view, did he give them a proper direction on what is required to render a fear of persecution "well-founded". The jury rejected the Appellant's defence and may have done so because, although they accepted that there was a real possibility that she would suffer persecution if she were returned to her own country, they were not satisfied that it was more likely than not that she would do so. In a matter of this kind the application of the appropriate test for refugee status and the correct burden of proof have a significant part to play in the protection of those seeking asylum from the imposition of penalties under the criminal law. For the reasons we have given we are satisfied that the judge's directions were defective.

#### *IS THE APPELLANT'S CONVICTION UNSAFE?*

**[41]** On the face of it the judge's failure to give the jury appropriate directions as to what constitutes a refugee and as to the burden of proof in relation to that issue is sufficient to render the conviction unsafe. However, Mr Riza submitted that despite those shortcomings the Appellant's conviction can nonetheless be considered safe because, even if the judge had directed the jury in the manner we have suggested, her defence was bound to fail since she did not adduce any evidence capable of establishing the matters set out in paras (a)-(c).

**[42]** In the present case there was evidence that the Appellant had changed flights in Paris on her way from Kinshasa to London, but although in his summing-up the judge mentioned that the Appellant had passed through Paris, he said nothing at all to the jury about the requirement in s 31(1)(a) that the Defendant must have come to the United Kingdom directly from a country where her life or freedom was threatened. The obvious explanation for that omission is that it was not a matter in issue at the trial. In those circumstances is it not open to the Crown to rely on it at this stage.

**[43]** Next Mr Riza submitted that the Appellant had not presented herself to the authorities in the United Kingdom without delay. However, there does not appear to have been a dispute about that either and again it is too late to raise the point at this stage.

**[44]** Finally he submitted that the Appellant had not made a claim for asylum as soon as was reasonably practicable after her arrival in the United Kingdom. Whether she had done so or not was a question of fact for the jury which called for the exercise of a degree of judgment and the judge directed the jury correctly in relation to it. The circumstances were not in the Appellant's favour since she had failed to claim asylum until the day after her arrival and after she had been interviewed twice by the immigration officer, but she said that she had language difficulties and she was not provided with the services of a Lingala interpreter until she was interviewed by the police the following day. (It was during the course of that interview that she first sought to claim asylum.) Despite these obvious

difficulties, we are not confident that the jury must have rejected her defence on this ground and that they would therefore have convicted her in any event.

**[45]** In those circumstances we are satisfied that the Appellant's conviction is unsafe and must be quashed.

*Judgment accordingly.*