Case No: CO 808/2004

Neutral Citation Number: [2004] EWHC 798 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday 11th May 2004

Before :

LORD JUSTICE THOMAS

AND

MR JUSTICE SILBER

- -

Between :

THE QUEEN (on the application of GJOVALIN PEPUSHI)
- and -
CROWN PROSECUTION SERVICE

- -

(Transcript of the Handed Down Judgment of
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Andrew Nicol QC and John Walsh (instructed by **J.R. Hobbs**) for the **Claimant**
David Perry and Simon Ray (instructed by the **Crown Prosecution Service**) for the **Defendant**

- -

Judgment
As Approved by the Court

Lord Justice Thomas:

1. This application (on which this judgment is the judgment of the Court) raises two points of principle:

   i) Whether the enactment of s.31 of the Immigration and Asylum Act 1999 (the 1999 Act) leaves any scope for reliance on Article 31 of the Convention relating to the Status of Refugees (the Convention) in the manner decided by

this Court in *R v. Uxbridge Magistrates' Court and another, ex parte Adimi* [1999] EWHC Admin 765, [2001] QB 667.

ii) Whether this application before this Court is the proper means and forum in which to raise the issue in the criminal proceedings brought against the claimant.

The factual background

2. The facts can be briefly stated.

i) The claimant, a national of the former Yugoslavia, was stopped by Immigration Officers at Heathrow Airport on 7 January 2004 when attempting to board an *Air Canada* flight for Canada using a false Swedish passport. He was arrested.

ii) On 8 January 2004 he was interviewed. During the interview he stated that he was from the former Yugoslavia; that his life was in danger in that country owing to his involvement in the seizure of illegal firearms. It was his intention to travel to Canada and claim asylum there.

iii) He gave details of his journey. He said he had left Serbia on 21 December 2003 and travelled to Italy using a false German passport. He then travelled to France. He stayed in Paris for about 16 days from either 22 or 23 December 2003 until 7 January 2004. Whilst he was there, he received, in the post, the false Swedish passport. This had been arranged by an agent in the former Yugoslavia to whom he had paid €9000.

iv) On 7 January 2004 he travelled to the UK and used the false Swedish passport to gain entry at Heathrow. Using the same passport, he checked in for the *Air Canada* flight that same day. It was his intention to claim asylum in Canada, as he thought that the immigration laws were softer there. It had not been his intention to claim asylum in the UK.

v) He said that he had not claimed asylum in France or Italy because he had been told that Canada was better and that European immigration laws were getting tougher; furthermore Italy was too close to the former Yugoslavia and he did not feel safe there.

vi) During his police interview, the claimant claimed asylum in the UK as he had been intercepted; his explanation was: "anything but going back to Yugoslavia. I mean if England doesn't want me then you can go and take me to France again you know."

vii) On the 7 January 2004 the defendants, the Crown Prosecution Service, (CPS) decided to prosecute him for the offence of Using a False Instrument contrary to ss. 3 and 6 of the Forgery and Counterfeiting Act 1981; he was charged additionally with an offence of Attempting to Obtain Services by Deception, pursuant to s. 1(1) of the Criminal Attempts Act 1981, but the CPS subsequently discontinued that charge.

viii) The claimant appeared before the Uxbridge Magistrates Court on 9 January 2004. On 22 January 2004, the claimant elected trial by jury and was therefore committed by the Magistrates for trial at the Crown Court; the criminal proceedings were then adjourned until 19 February 2004 for the preparation of committal bundles.

ix) The claimant brought this application on 17 February 2004 seeking leave to challenge the decision of the CPS to prosecute him. On 18 February 2004, McCombe J ordered that the prosecution be stayed until the hearing of the application for permission.

x) Permission was granted on 5 March 2004 by Richards J and the stay was continued until the hearing of the application.

xi) At the conclusion of the argument on 2 April 2004, we were asked to lift the stay, because the claimant had been advised that he had already spent a period in custody equivalent to that to which he would be sentenced on a plea of guilty; he therefore wished to plead guilty and to ask the Magistrates to reconsider their decision to hear the matter and sentence him.

xii) We gave our decision dismissing the application on the basis that the procedure and venue were not appropriate and that the claimant's defence was confined to that set out in s.31 of the 1999 Act. We lifted the stay. We indicated that we would give our reasons in writing.

3. In the result, our decision on these issues is moot, but as the issues may be ones of some importance, we give our full reasons for the decision we announced at the conclusion of the oral argument.

4. Although logically we should first set out our reasons for our determination that this application before this court was not the appropriate means and the appropriate court in which to raise the issue in relation to s. 31 of the 1999 and Article 31 of the Convention, as the argument on the appropriateness of the procedure and the venue depended in part upon the issue relating to s. 31 and Article 31, it is convenient to consider that first.

(1) Article 31 and s. 31

5. The claimant's substantive contention was that he was entitled to protection under Article 31 of the Convention; that therefore we should, following the decision of this court in *Adimi* (given by Simon Brown L.J. and Newman J on 29 July 1999) stay the prosecution against him. The contention of the CPS was that the position had been changed as a result of s. 31 of the 1999 Act, enacted shortly after the decision in *Adimi*; that that section delineated the scope of the defence open to the claimant and he could no longer rely on Article 31 of the Convention.

6. It was common ground, for the purposes of the application, that the claimant would on the facts we have summarised not be able to bring himself within the defence set out in s.31(2) of the 1999 Act; his contention was that he was within Article 31 of the Convention and thus had a reasonable expectation of protection under that Article of the Convention as this court had decided in *Adimi*.

7. It is convenient therefore to set out the brief history of the way in which the law has developed.

(a) The history

8. The Convention was signed by the UK on 28 July 1951 and ratified by it on 11 March 1954; the UK also became a party to the 1967 protocol. Article 31(1) of the Convention provides:

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

9. The term 'refugee' is defined by Article 1.A(2) as applying 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…"

10. Although the UK has ratified the Convention and is therefore bound, as a matter of international law, to ensure that its criminal law does not impose penalties in the circumstances set out in Article 31, no steps were taken by the Executive or Parliament to honour this international obligation until late in 1999.

11. It was in these circumstances that in 1997, the first applicant in *Adimi* had entered the UK as an asylum seeker on a false passport; he was prosecuted for possession of a false passport contrary to the provisions of s. 5 of the Forgery and Counterfeiting Act and attempting to obtain air services by deception. He had spent 10 days in Italy, but had not claimed asylum there; he made his application for asylum on entry to the UK. He applied in November 1998 for judicial review of the decision to prosecute, relying on the provisions of Article 31 of the Convention in respect of which, as we have observed, despite its terms, nothing had been done to give effect to its terms by amending the domestic law of England and Wales to provide for a defence to an asylum seeker using false documents.

12. When the matter came on for hearing in July 1999, the court had to consider two questions – the scope of Article 31 and whether a remedy could be found to provide the defence envisaged by Article 31 to the applicant in criminal proceedings brought in England and Wales.

13. Simon Brown LJ (with whom Newman J agreed) set out in this court a clear interpretation of the scope Article 31; he considered it provided broad protection which he summarised:

> "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…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. 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."

14. Simon Brown LJ then set out in greater detail what he considered was meant by each of these phrases; it is only necessary to refer to his conclusion on "coming directly":

> "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 the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing".

15. We have considered the decision in *Adimi* on this issue of the interpretation of Article 31; on well known principles, we shall follow the court's interpretation of Article 31, as it seems to us in the light of the argument briefly addressed to us to have been rightly decided.

16. As on this Court's interpretation of Article 31 the applicant in *Adimi* was within its scope, the second question to be considered by the Court in *Adimi* was the available remedy. It was accepted on behalf of both respondents in *Adimi* (the Secretary of State and the Director of Public Prosecutions) that the protection afforded by Article 31 should be available under the domestic law of the UK, but there was a dispute as to how this be best done.

17. It is sufficient for present purposes to set out the conclusion of both members of the court. Simon Brown LJ, after referring to the differing arguments, first concluded:

> "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 for a sufficient safety net for those wrongly prosecuted."

18. He then went on to consider whether the applicant Adimi and the other applicants had enforceable rights under the domestic law of England and Wales. The first argument advanced by the applicants for such rights was, relying upon a passage in the speech of Lord Keith of Kinkel's speech in *R v Secretary of State for the Home Department, Ex P. Sivakumaran* [1988] AC 958 at 990, that the provisions of the Convention had for all practicable purpose been incorporated into UK law; Simon Brown LJ did not accept that contention. He did, however, accept the applicants' second argument that the UK's ratification of the Convention created a legitimate expectation that its provisions would be followed:

> "By the time of these applicants' prosecutions, at the 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."

19. Newman J, who also rejected the incorporation argument, summarised his views in a series of propositions at page 696:

> "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 the protection is not accorded, subject only to any defence of necessity or duress, the refugee can only raise facts in mitigation

4. …

5. …

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"

20. In the same year, Parliament was considering the Immigration and Asylum Bill; during its passage through Parliament, a provision which became s.31 of the 1999 Act was added; it came into force on 11 November 1999. The section provided:

> "(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he –
>
> (a) presented himself to the authorities in the United Kingdom without delay;
>
> (b) showed good cause for his illegal entry or presence; and
>
> (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.
>
> (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.
>
> (3) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under –
>
> (a) Part I of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);

(b) section 24A of the 1971 Act (deception); or

(c) section 26(1)(d) of the 1971 Act (falsification of documents).

(4) …

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

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

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

(8) A person who -

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

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

may apply to the Criminal Cases Review Commission with a view to his case being referred to 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. "

(b) The position after the enactment of s.31: the relevance of the decision on the first issue in Adimi

21. It is clear from the language of s.31 that it is narrower in scope than Article 31 as interpreted by this Court in *Adimi*; indeed the position taken by the parties before us implicitly accepts that its scope is narrower. Under s. 31(2) the defence is only available to a refugee who stopped in another country, if the refugee is able to show that he could not reasonably have been expected to be given protection under the Convention in that other country, whereas under Article 31 a short term stopover en route would not forfeit the protection.

22. It was contended on behalf of the claimant that the enactment of s.31 had made no difference to his position and that he was entitled to the rights set out in Article 31:

i) S. 31 of the 1999 Act had not affected the meaning of Article 31.

ii) *Adimi* was correctly decided and should be followed.

iii) There remained the legitimate expectation that a refugee would be entitled to the full scope of the protection of Article 31 interpreted in the way declared by this court in *Adimi.*

iv) The Claimant was on his account of events entitled to the protection set out in Article 31.

23. We will consider the first two submissions together. It is clear that s. 31 does not, as we have said, cover the entire scope of the application of Article 31; for example, it does not cover the further offence of attempting to obtain an advantage by deception (with which the claimant had also initially been charged) and as we have said, the scope of subsection (2) is narrower than that of Article 31.

24. It was submitted that nonetheless, the claimant was entitled to the protection in Article 31; we were referred to passages in the Home Office's Asylum Policy Instructions issued in October 2003 dealing with Article 31 and s. 31. Although these instructions made clear that s. 31 is "Parliament's interpretation of what Article 31 of the Refugee Convention requires" and that "a person who falls outside the scope of the s. 31 defence is liable to prosecution", the Home Office instructions concluded:

> "In respect of all other offences, the defence in s. 31 is not available. In relation to those offences, refugees are entitled to Article 31 protection in accordance with legitimate expectations."

This statement was expressly repudiated on behalf of the CPS who submitted it was misconceived and wrong in law.

25. It was contended on behalf of the claimant that, as Parliament had not legislated in a manner that fulfilled the international obligations of the UK, there remained available to refugees the full scope of the protection of Article 31, as this court had declared it to be.

26. We agree with the submission that the meaning and scope of Article 31 as interpreted by the judgment of this Court in *Adimi* is not affected by s.31; but that is not the relevant question. The relevant question is to ask what is the position under UK domestic law, now that Parliament, in enacting into the domestic law of the UK the provisions of Article 31, has made express provision in s. 31 of the 1999 Act for the scope of the relevant defence available to a refugee using a false passport.

27. As we have set out, the Convention has not been directly incorporated into the domestic law of the UK. When giving effect to the obligations of the UK under Article 31, Parliament did not incorporate the terms of the Article but chose to use the language set out in s.31 which is narrower in scope than the meaning of Article 31 as

declared by this Court in *Adimi*. The position under our domestic law in such circumstances, as established by decisions binding on us, is clear.

28. First, treaties entered into by the sovereign do not confer rights under our domestic law; it is sufficient to refer to two passages in more recent decisions of the House of Lords. The first is a passage in the speech of Lord Oliver of Aylmerton in *The International Tin Council Litigation (Rayner (Mincing Lane) Ltd v Department of Trade and Industry)* [1990] 2 AC 418 at page 500:

> "as a matter of 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 could enjoy in domestic law without the interpretation 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 second is a passage in the speech of Lord Hoffman in *R v Lyons* [2002] UKHL 44:

> "… it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*. Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation as Lord Goff of Chieveley said in *Attorney-General v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109, 283:
>
> > 'I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the Convention]'

> "But for the present purposes the important words are "when I am free to do so". The sovereign legislator in the United Kingdom is Parliament. If Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not."

29. On behalf of the claimant it was submitted that these classic statements had to be read in the light of the observations of Lord Steyn in *Re McKerr* [2004] UKHL 12 at paragraph 49 where he drew attention to the narrowness of the basis of the decision in the *International Tin Council Litigation* and the observations of distinguished commentators. We note the cogent arguments advanced that, in the field of human rights treaties, there may be a limitation, whether by estoppel or otherwise, on the ability of the Executive to act against an individual where that action is in breach of the obligations undertaken under by the Executive under international human rights treaties. However, no argument was addressed to us on this important issue, as clearly that argument is not open in this Court in view of the decisions binding on us.

30. Second, in construing the terms of s. 31, we would if at all possible strive to give it the meaning that is consistent with the meaning of the Convention. However we are clearly bound by the decisions to which we have referred to apply the provisions of s.31, if we cannot interpret them in such a way as to be consistent with the Convention. Where it is clear that, however generous a construction we can give to the language chosen by Parliament to try and make the provision of the Act consistent with the Convention, Parliament has chosen to legislate in terms that differ from that of Article 31, we must, on present authority, apply the terms of s. 31.

31. The language of s. 31 is clear; subsection (3) only covers three specific offences; it does not cover any other. More pertinently to the issue in this application subsection (2) provides that the defence is available to a person who stops in another country "only if" the refugee shows he could not reasonably be expected to be given protection under the Convention in that other country. The words "only if" make it clear that the circumstances are limited to those set out. There is no room to apply the scope of Article 31 as interpreted and declared by this Court in *Adimi;* we are bound to apply the narrower provisions of s 31, even if in so doing it has the consequence that the UK is in breach of international obligations under a human rights treaty.

32. These issues were briefly considered in this Court in *Hussain v. Secretary of State for the Home Department and Others* [2001] EWHC (Admin) 555 in the course of rejecting a renewed application for permission to apply for judicial review of the decision of the CPS to prosecute the claimant for offences arising from his use of a false passport. The conclusion we have reached is the same as that reached by Munby J. (with whom Latham L.J. agreed) at paragraph 27:

> "...in contradistinction, for example, to the European Convention on Human Rights, the [Refugee] Convention with which we are concerned is not and never has been part of the domestic law, save that in this particular respect Parliament has now enacted section 31. That being so, it seems to me that this court and, more to the point, the CPS in deciding whether to

> continue the prosecution is necessarily obliged to have regard to the terms of the statute as laying down authoritatively the nature of this country's obligations under Article 31."

33. We have reached the clear conclusion from the application of well known principles and our consideration of the language of the 1999 Act that the scope of the defence available to the claimant is that set out in s.31 and not in Article 31; Parliament has decided to give effect to the international obligations of the UK in a narrower way, but that is, on the authorities that are binding on us, the law which must be applied in the UK. The decision on the first issue in *Adimi* is therefore, in effect, no longer relevant to persons such as the claimant when faced with a criminal prosecution in the UK.

34. It is not therefore strictly necessary to refer to statements made when the bill was before Parliament which the CPS submitted were admissible under the mischief rule. It is clear from the statement made on 2 November 1999 by the Minister that the scope of subsection (2) was intended to be narrower than the definition adopted in *Adimi***,** as that was the view taken by the Executive of their obligations, having considered the view of the court in *Adimi*; they wished to place a limit on "forum shopping". Under the authorities binding on us, the Executive is entitled to put its view to Parliament and Parliament is entitled to legislate for the purposes of UK domestic law on that basis, even though, as we have observed, neither the view of the Executive nor the terms of s 31 alter the meaning of Article 31 as declared by this Court for the purposes of the international obligations of the UK.

(c) Legitimate expectations: the relevance of the second issue in Adimi

35. We turn therefore to consider the third and fourth submission that there was a legitimate expectation that the claimant was nonetheless entitled to the protection set out in Article 31 and that we should, on his account of matters, give effect to that intention.

36. Given the principles to which we have referred in paragraphs 27 to 31 above, there is, in our judgment, no room for a legitimate expectation that the claimant is entitled to the protection of the wider provisions of Article 31 now that Parliament has enacted s. 31.

37. Where Parliament has enacted in words specifically chosen the scope of an international obligation in relation to criminal law, there is no room for a legitimate expectation to protection other than that which Parliament has provided. To acknowledge that an international treaty gives rights to legitimate expectations under our domestic law relating to crime on a point where Parliament has expressly legislated would in effect be indirectly circumventing the scope of our domestic law as set out in statute in a way that was bound to give rise to very considerable confusion and uncertainty.

38. Furthermore the CPS must, as a prosecution service independent of the Executive, apply the domestic law of England and Wales where Parliament had enacted the provisions of an international Convention; there can be no legitimate expectation that the CPS could do otherwise; the principle is the same as that set out by Lord Bingham of Cornhill CJ in this court in *R v Director of Public Prosecutions ex parte Kebilene* [2000] 2 AC 326 at 339.

39. It is not therefore necessary for us to consider whether the second issue decided in *Adimi* (the means of securing the rights under Article 31) was correctly decided by this court; it is sufficient to draw attention to paragraph 51 of the judgment of Simon Brown LJ in *R (European Roma Rights Centre and others) v Prague Immigration Officer* [2003] EWCA Civ 666 where he left open for further argument the difficult issues that arose in the light of decisions not cited in *Adimi*.

40. It was also submitted that it was an abuse of process for the CPS to maintain this prosecution; we reject that argument unhesitatingly on the assumption that this is the correct court in which to make that argument. The CPS, a body independent of the Executive, is simply applying the domestic law of England and Wales which it is its duty to do; there can be no abuse of process in that. The argument is simply an attempt to use a device to circumvent the principles discussed at paragraphs 27 to 31 which apart from being impermissible would if permitted bring great uncertainty to the criminal courts. There is no route available in this court to circumvent these principles through the back door.

41. The fourth submission of the claimant in relation to the facts therefore does not arise.

(2) The appropriate procedure and forum

42. We turn next to consider the important question as to whether this application before this court was an appropriate procedure for raising the issues we have decided.

43. As we have set out in paragraph 2.ix), this application was made after the Magistrates had made their decision to commit the proceedings against the Claimant for trial in the Crown Court.

44. s.29(3) of the Supreme Court Act 1981 provides:

> " In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court. "

45. In *ex parte Kebilene* [1999] UKHL 43 (decided in October 1999 after the decision in *Adimi),* it was held that a decision to prosecute is not ordinarily amenable to Judicial Review. Lord Steyn explained the rationale for this principle at page 371:

> "I would rule that absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review. And I would further rule that the present case falls on the wrong side of that line. While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system. In my view the Divisional Court should have dismissed the applicants' application."

46. If the challenge had been made to a decision of the magistrates courts on the issues that had arisen, then this would of course be the correct forum; similarly if the challenge was made to a decision not to prosecute. However that is not the challenge made. It was made clear in *Kebilene* that where there was another remedy available or the question in issue was a decision of the prosecution in respect of a trial in Crown Court, then a challenge by way of judicial review did not lie in this court.

> "In the opposite case, namely a decision not to prosecute, judicial review is available: see *Reg. v. Director of Public Prosecutions, Ex parte C.* [1995] 1 Cr. App. R. 136. That is, however, a wholly different situation because in such a case there is no other remedy. Counsel for the Respondents also relied on *Reg. v. Bedwellty Justices, Ex parte Williams* [1997] A.C. 225 where the House of Lords quashed a Magistrates Court's decision to commit a defendant on inadmissible evidence. A Magistrates' Court is, however, an inferior court. The present case involves a decision by the DPP in respect of a trial pending in the Crown Court which is a superior court"

47. A decision was made to commit the claimant for trial to the Crown Court; this challenge is therefore made in respect of proceedings to be conducted in the Crown Court. Furthermore the position is the same as in *Kebilene* and the decision of the CPS to prosecute, whether in the Magistrates Court or the Crown Court, cannot be challenged in this court, save in exceptional circumstances of the kind described in *Kibilene*; there are no such circumstances in this case. If the matter had proceeded in the Magistrates Court (and had not been committed to the Crown Court), then the issue should have been raised in that court by the process of that court, awaited a decision of that court and that decision appealed or reviewed by an appropriate procedure. There should have been no challenge to the decision of the CPS to prosecute.

48. Finally, we must refer to a matter of general importance. There have in recent years been a number of attempts to challenge decisions of prosecuting authorities for

example, to challenge a decision to prosecute (as *in Kebilene*) or to obtain decisions relating to the prospect of a future prosecution *(see R (Pretty) v. Director of Public Prosecutions* [2001] UKHL 61 and *R (Rusbridge) v. Attorney General* [2003] UKHL 38.

49. In view of the frequency of applications seeking to challenge decisions to prosecute, we wish to make it clear and, in particular, clear to the Legal Services Commission (which funds applications of this kind which seek to challenge the bringing of criminal proceedings), that, save in wholly exceptional circumstances, applications in respect of pending prosecutions that seek to challenge the decision to prosecute should not be made to this court. The proper course to follow, as should have been followed in this case, is to take the point in accordance with the procedures of the Criminal Courts. In the Crown Court that would ordinarily be by way of defence in the Crown Court and if necessary on appeal to the Court of Appeal Criminal Division. The circumstances in which a challenge is made to the bringing of a prosecution should be very rare indeed as the speeches in *Kebilene* make clear.

50. We stress that the Legal Services Commission and those advising prospective applicants for judicial review should always realise that judicial review is very rarely appropriate where an alternative remedy is available. If such a remedy is available, a judicial review application should not be pursued.