Case No: 201300512 C4; 201303174 C2
201303176 C2; 201301678 B5; 201301837 B5
Neutral Citation Number: [2013] EWCA Crim 1372

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT
ISLEWORTH (Judge McGregor-Johnson) T20097247
(Judge Lowen) T20127215
LEWES (Judge Richard Brown) T20077602
MANCHESTER (Judge Foster Q.C.) T20067856

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2013

Before :

LORD JUSTICE LEVESON
LORD JUSTICE FULFORD
and
MR JUSTICE SPENCER

- -

Between :

REGINA
- and -
KOSHI PITSHOU MATETA
AMIR GHAVAMI
SAEIDEH AFSHAR
YASIN BASHIR
SIMON EBUNJI ANDUKWA

- -
- -

R. Thomas for Mateta, Bashir and Andukwa
D. Bunting for Ghavami and Afshar
J. McGuinness Q.C. and **B Douglas-Jones** for the Crown

Hearing date : 30 July 2013

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Judgment

Lord Justice Leveson:

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 Article 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* [2011] 1 Cr App R 35; [2010] EWCA Crim 2400 ("*R v MA"*). The judgment of the court makes it clear:

> "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 amended text of s. 31 of the Immigration and Asylum Act 1999, as relevant to the present cases, provides defences based on Article 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] 2 Cr App R 11; [2006] EWCA Crim 175, this court rehearsed the general proposition that when a defendant raises a defence under section 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 Article 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 section 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]).

11. Similarly, the defendant bears the burden of proof on a balance of probabilities of the other matters that need to be established under section 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] 1 AC 1061; [2008] UKHL 31). As Lord Hope observed "[t]he single most important point that emerges from a consideration of the travaux preparatoires 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 p. Adimi* [2001] Q.B. 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 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]."

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 Article 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 Article 31(1) of the Convention, as reflected in section 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 At 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. (s. 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 p. Adimi* at 679 H).

Advice on the parameters of the section 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 section 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. 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 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 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."

[…]

> 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 section 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 section 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 section 25 offence. On 25 May 2009 he pleaded guilty at the Isleworth Crown Court and was sentenced to 9 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 section 25 offence, and he was sentenced to 6 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 9th 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 4th January 2008 the Home Secretary refused the appellant's application for asylum and on 18th January 2008 the appellant lodged an appeal against this decision. Thereafter, on 10th June 2008, the appeal against the Home Secretary's decision was successful and, on 7th July 2008, the appellant was granted asylum with leave to remain in the UK until July 2013.

43. Meanwhile, on 21st January 2008, at Lewes Crown Court, the appellant pleaded guilty to an offence of possession of a passport with intent, contrary to section 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 4 months earlier and travelled, using their Iranian passports, to Thailand, entering that country with visitors' visas. They remained in Thailand for about 2 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 8 months' imprisonment.

52. For reasons that remain essentially unclear, it was only on 18th July 2012 that the asylum claims of the appellants were recorded, although this had been raised on arrest by Ms Afshar. On 17th August, the Home Office granted both appellants asylum with 5 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.