SUPREME COURT OF NORWAY

On 24 June 2014, the Supreme Court rendered the following judgment in

HR-2014-01323-A, (case no. 2014/220), criminal case, appeal against judgment.

A	(Counsel: Thor André Bjerkhaug – qualifying test case)
Norwegian Organisation for Asylum Seekers (accessory intervener)	(Counsel: Anders Ryssdal)
vs. The Public Prosecuting Authority	(Public Prosecutor Erik Førde)

VOTING:

(1)
Justice Bull: This case involves the prohibition of Article 31, no. 1, of the Refugee Convention against imposing penalties on refugees on account of their illegal entry or presence, in a case where an asylum seeker was convicted of presenting a forged document to passport control upon entry to Norway. Specifically, the issue is whether the individual has complied with a condition for impunity, which specifies that the asylum seeker must "without delay" present himself to authorities to show good cause for his illegal entry or presence.

(2)
A, who is a Cameroonian national, arrived at Oslo Airport, Gardermoen, on 17 September 2013 from Moscow. At passport control, he presented a forged Portuguese residence permit. He was pulled aside for closer examination, and later, when prompted, informed officers that he was seeking asylum in Norway. His presentation of the forged residence permit led to his being charged with presenting a forged instrument pursuant to Section 182 of the General Civil Penal Code.

(3)
On 1 October 2013, Øvre Romerike District Court rendered a judgment with the following conclusion:

> 1. **A, date of birth: 00.00 1984, is sentenced to a period of imprisonment lasting 60—sixty—days for having violated Section 182, Subsection 1, second penal option, of the Penal Code.**
>
>   **19—nineteen—days will be deducted from his sentence for time already spent in custody.**
>
> 2. **The seized Portuguese residence permit is forfeited, cf. Section 35 of the Penal Code.**

(4)
A appealed the judgment, specifically item 1 of the conclusion, to the court of appeal. The appeal was made against the district court's application of the law and its procedural handling of the case. In reference to the application of the law, it was argued that it contravened Article 31, no. 1, of the Refugee Convention to convict before immigration authorities had decided whether A met the conditions for protection under the terms of the convention. Secondly, it was argued that the condition specifying that the refugee has to present himself to authorities "without delay" to benefit from impunity pursuant to the Article in question, had been too

stringently interpreted by the district court. Thirdly, it was argued that Article 31, no. 1, also accords impunity from punishment for refugees in transit, and that Norway was a country of transit for A. Finally, it was argued that A had been subjected to unfair treatment in comparison to individuals who dispose of forged documents prior to leaving the airplane. The appeal against procedure was not justified in further details.

(5)
The court of appeal refused to hear the appeal with regard to the arguments of transit and unfair treatment, as well as the unsubstantiated claims of procedural errors, but otherwise gave leave to appeal.

(6)
On 12 December 2013, Eidsivating Court of Appeal rendered a judgment with the following conclusion:

> **"The appeal is dismissed."**

(7)
A appealed to the Supreme Court against the court of appeal's application of the law. Firstly, the appeal submitted that Article 31, no. 1, of the Refugee Convention prohibits conviction for criminal acts associated with entry until the application for asylum has been finally decided by immigration authorities. Secondly, A submitted that the court of appeal had applied a too narrow interpretation of the condition in Article 31, no. 1, that the refugee must present himself to authorities "without delay". In its decision of 25 March 2014, the Appeals Selection Committee of the Supreme Court referred the appeal to the Supreme Court for a hearing of the condition "present himself without delay to authorities". The appeal was otherwise denied hearing.

(8)
On 29 April 2014, the Norwegian Organisation for Asylum Seekers (NOAS) declared itself accessory intervener in support of Ndjankoum. In its decision of 13 May 2014, the Appeals Selection Committee permitted said accessory intervention.

(9)
I have concluded that the appeal must be upheld.

(10)
As previously described, A presented a forged Portuguese residence permit to passport control at Oslo Airport upon his arrival on 17 September 2013. About A's background, stay in Russia and arrival to Oslo Airport, the district court in its judgment, on which the court of appeal's judgment is based, states the following:

> **"The defendant is from Cameroon. He was a student, studying languages: English, Portuguese and Russian. He left Cameroon in 2012, because he is homosexual, and his life is in danger as a result. He was pursued and beaten, and spent two months in prison. He went to Nigeria, but could not stay there. He got an opportunity to travel to Russia, and took it. However, he did not feel safe in Russia either. He suffered racism and hostility for being homosexual. Homosexuality is prohibited by law in Russia, and he could not seek asylum there. His intentions was to go to France or Belgium, because he speaks French, but as he urgently needed to leave Russia, he bought the first available cheap flight, which caused him to end up in Norway.**
>
> **In Russia, he bought a forged Portuguese residence permit online. He knew it was forged. He presented this, along with his Cameroonian passport, to passport control at Oslo Airport.**
>
> **Police Officer B, who worked the passport control desk, tried to talk to the defendant in English and French, but he was very unresponsive, expressing that he did not understand. Two border patrol officers collected him, to conduct a more thorough examination in another room. They tried to engage him in conversation. They perceived him as stating that it was his residence permit, and that he was in transit to Portugal. When Officer B returned to talk to the defendant some time later, when he was waiting to be taken for processing, she asked him if he needed protection from the Norwegian government. To this, he answered yes. Later on, when interviewed by police, with a French interpreter present, he stated that he sought asylum in Norway."**

(11)
Formally speaking, it is clear, and uncontested, that A has violated Section 182, Subsection 1, second penal option, of the Penal Code, which concerns the use of a forged instrument. However, it follows from Section 1, Subsection 2 of the Penal Code, that Norwegian criminal legislation is subject to the limitations that are derived from any agreement with a foreign state or from international law in general. The question thus becomes whether he is to be acquitted on the grounds of the prohibition of Article 31, no. 1, of the Refugee Convention against penalizing refugees for illegal entry or presence. Article 31, no. 1, reads as follows in the Norwegian translation:

> ***"De kontraherende stater skal ikke straffe flyktninger, som er kommet direkte fra et område hvor deres liv eller frihet var truet i den i artikkel 1 omhandlede betydning, og som uten tillatelse kommer inn eller befinner seg på deres territorium, på grunn av deres ulovlige innreise eller opphold, forutsatt at flyktningene straks fremstiller seg for myndighetene og godtgjør at de har gyldig grunn for deres ulovlige innreise eller opphold."*** [1]

(12)
Article 31, no. 1, specifies certain conditions for a refugee to enjoy impunity under the terms of the article. The issue in this case before the Supreme Court is whether the court of appeal's interpretation of the condition "present themselves without delay to authorities" is correct, in that the court of appeal concluded that this condition for impunity had not been met. Before I examine the court of appeal's application of the law in more detail, I will account for my view of how to interpret the above condition.

(13)
The term "straks" is hardly a good translation of the terms "without delay" and "sans délai" in the English and French versions of the convention, respectively. In my view, the English and French expressions allow for wider scope than the Norwegian term "straks" in its traditional sense. The term rather translates to "promptly" and "immédiatement" in English and French.

(14)
The protection objective behind Article 31, no. 1, and the Refugee Convention in general, indicates a more concrete assessment of what constitutes "without delay" in each individual case. In this assessment, one must take into account not only the refugee's circumstances, objectively speaking, but also how the refugee, given his or her capacities and background, had reason to perceive said circumstances. The need for such an approach, in my view, follows from the 1999 guidelines, prepared by the United Nations High Commissioner for Refugees on "Applicable Criteria and Standards relating to the Detention of Asylum-Seekers". Item 4 of these guidelines reads:

> **"[G]iven 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'".**

(15)
This furthermore entails that a refugee may be protected by Article 31, no. 1, even if he does not inform authorities of his actions and need for protection until after he has been detained by the authorities. Even in these situations, a more concrete assessment is necessary.

---

[1] Translators note: The text of Article 31 no. 1 in English is:

> "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."

(16)
In my view, an interpretation of the term "without delay" that takes into account the specific circumstances of each case, also follows from the close connection between this condition and the following condition for impunity, i.e. that the refugee must show “good cause” (“des raisons reconnues valables” in French) for his illegal entry or presence. This—by definition concrete—assessment of whether the refugee had good cause for his infractions, must also apply to the time frame of the violation. In cases involving the presentation of forged documents to passport control especially, this assessment would, in practice, easily merge with the assessment of whether the person has informed authorities “without delay”.

(17)
The Immigration Act appears to be founded on the same case-by-case interpretation of this term. Article 31, no. 1, has not been incorporated into the Immigration Act. However, Section 93, Subsection 1, of the Act specifies that an application for protection pursuant to Section 28 of the Act, i.e. as a refugee, must be lodged “*uten ugrunnet opphold*”, i.e. without undue delay. Strictly speaking, an application for asylum does not equal showing good cause for any infractions, as required by Article 31, no. 1, of the Refugee Convention. However, in showing good cause, the person necessarily has to explain why he or she found it necessary to flee, which in practice also will lead to an application for protection as a refugee. It follows from the preparatory works to Section 93, Subsection 1, that the provision in part is based on Article 31, no. 1, of the Refugee Convention, and that the condition of presenting oneself to authorities “without delay” is interpreted as the refugee having to present himself to authorities without “undue” delay, cf. Official Norwegian Report (NOU) 2004: New Immigration Act, p. 180. In this context, use of the word “undue” necessarily entails an acknowledgement of the need to assess the aspect of time individually in each case.

(18)
I cannot see that the judgment published in the "Norsk Retstidende" 1995, page 1218, is based on a different interpretation of Article 31, no. 1. A woman from Sri Lanka was convicted of violating Section 182 of the Penal Code after attempting to go through passport control with a false passport, despite the fact that she applied for asylum after being apprehended. The District Court's judgment was overturned due to an insufficient reasoning with regard to the application of the principle of necessity, but the Supreme Court noted that it would have been natural for the district court to first discuss the relationship with Article 31, no. 1, of the Refugee Convention. In this regard, the Supreme Court noted that the woman obviously had not reported to Norwegian authorities immediately, but that the procedure for the Supreme Court did not provide a sufficient basis on which to conclude whether she had failed to report to Norwegian authorities “without delay”.

(19)
It follows from the premise of the court of appeal's judgment that the court was aware that “*straks*” is not necessarily a good translation of “without delay”. The court furthermore found that “[i]n applying Article 31, no. 1, one must conduct an assessment of the term “without delay” given the specific circumstances of the individual case.” So far, this corresponds to my view of Article 31, no. 1. Regarding the specific application of the law, the court of appeal states the following:

> **“In the court of appeal's opinion, it is a relevant concern, in interpreting [the Article], that one does not allow for a practice, whereby one with impunity can attempt to enter Norway by presenting false documents, and then seek asylum when it becomes apparent that the illegal entry was not successful. The objective of Article 31, no. 1, is to ensure that refugees, without risking penal sanctions, can make their way to a safe country. Presenting false documents to Norwegian authorities upon entry to Norway is thus different from using false documents when fleeing from danger.”**

(20)
The court of appeal goes on to state that it has not taken a position on whether an application for asylum must always be presented at passport control or the immigration desk for Article 31, no. 1, to apply. Held in conjunction with the quote above, this shows, in my opinion, that the court of appeal applied an interpretation that was too narrow to the facts of this case.

(21)

Objectively speaking, there is no reason for a refugee upon arriving in Norway to refrain from calling attention to any false documents in his or her possession at passport control. If the individual applies for protection from persecution at the same time, having false documents will not cause him or her to be turned away. It may be that the individual in question is aware of this, and right there and then is level-headed enough to act accordingly. If that is the case, the individual has no "good cause" for presenting a forged instrument at passport control, and thus is not protected by Article 31, no. 1, even if the remaining conditions have been met.

(22)
However, I refer to the quotes above from the UNHCR guidelines on how refugees often perceive border crossings. The Supreme Court has furthermore been informed that not all countries treat asylum seekers stopped with false documents at passport control the same way Norway does, so the fear of not getting through passport control is likely legitimate. Even regular travellers often do not feel they have gained entry to a country before they have passed through passport control, and would likely feel uneasy about their legal standing should they be detained at this point in the process.

(23)
The district court's description of the events that transpired when A arrived at Oslo Airport, as cited above, provides sufficient basis, in my opinion, to conclude that he reported [to authorities] "without delay", in my interpretation of this term. He applied for asylum before completing the border inspection, and given the circumstances, the condition for impunity has been met.

(24)
Given the above, the court of appeal's judgment and appellate proceedings are set aside, cf. Section 347, Subsection 1 of the Criminal Procedure Act. The prosecutor has also requested that the court of appeal's decision to refer the case for hearing be set aside. No objections were raised against this. Given the circumstances, the court of appeal's decision to refer is also set aside.

(25)
The Norwegian Organisation for Asylum Seekers acted as accessory intervener in this case, and has claimed costs of action equivalent to the standard rate for defence counsel before the Supreme Court when acting on behalf of a respondent: NOK 33,000. The claim is granted, and in line with current practice in civil cases, the Norwegian state, represented by the Ministry of Justice and Public Security is ordered to pay costs of action, cf. Rt. 2013, page 374. The amount is subject to VAT.

(26)
I vote in favour of the following

JUDGMENT:

1. The court of appeal's judgment, including appellate proceedings, and decision to refer, are set aside.
2. The Norwegian state, represented by the Ministry of Justice and Public Security, shall pay costs of action to the Norwegian Organisation for Asylum Seekers in the amount of NOK 41,250.00—forty one thousand two hundred and fifty kroner—within 2—two—weeks of this judgment being pronounced.

(27)
Justice Skoghøy: I agree with the first-voting justice in all material aspects and with his conclusion.

(28)
Justice Stabel: Likewise

(29)
Interim Justice Kaasen: Likewise

(30)
Justice Gjølstad: Likewise

(31)
Following the vote, the Supreme Court rendered the following

JUDGMENT:

1. The court of appeal's judgment, including appellate proceedings, and decision to refer, are set aside.
2. The Norwegian state, represented by the Ministry of Justice and Public Security, shall pay costs of action to the Norwegian Organisation for Asylum Seekers in the amount of NOK 41,250.00—forty one thousand two hundred and fifty kroner—within 2—two—weeks of this judgment being pronounced.

True transcript certified: