Hassan v Department of Labour

High Court Wellington CRI 2006-485-101
17 October 2006; 4 April 2007
Mallon J

Article 31 - coming directly from - meaning of directly - Article 31

Article 31 - present themselves without delay - meaning of - Article 31

Sentencing - fraud - factors to be taken into account - Crimes Act 1961, s 229A(b) - Crimes Act 1961, s 111

The appellant, a citizen of Somalia, left Somalia in 1991 and lived in a refugee camp in Kenya. He possessed an identity card purporting to be issued by the Ethiopian government indicating he had registered with the Office of the Administration for Refugee and Returnee Affairs as a refugee. Later he was accepted as a re-settlement refugee by New Zealand, arriving in New Zealand on 15 July 1998. It was subsequently discovered that his application for re-settlement in New Zealand had been made in the name of another person and charges of fraud under the Crimes Act 1961 were laid. To these charges a plea of guilty was entered and on 17 June 2003 the appellant was sentenced to six months imprisonment with leave to apply for home detention. The Minister of Immigration subsequently issued a direction that a residence permit be issued to the appellant in his own name as he had been resident in New Zealand for more than seven years, was in a stable relationship and had two New Zealand born children.

After the sentence had been served application was made to appeal both the convictions and sentence as the convictions had become a substantial impediment to the appellant's employment. The appeal against conviction was on the basis that he had not known that he had available a defence pursuant to Article 31(1) of the Refugee Convention. The appeal raised two issues: First, whether a failure to seek the benefit of the protection afforded by Article 31 could form the basis of an appeal against conviction; and second, whether the appellant was likely to be within the protection of Article 31 in any event. The appeal against sentence was on the basis that the sentence of imprisonment was excessive in light of the protection conferred by Article 31.

Held:

1. No provision in the Immigration Act 1987 (nor any other Act) specifically incorporated Article 31(1) of the Refugee Convention as a defence to charges brought under New Zealand domestic law. The defence of necessity (s 20 of the Crimes Act 1961) might sometimes apply to criminal charges brought against refugees but this had been viewed as of narrower scope than the protection afforded by Article 31. The circumstances that were the basis for the Article 31 claim might also be relevant in mitigation when sentencing refugees convicted of fraud offences. When officers were exercising powers under the Immigration Act failure to have regard to New Zealand's obligations under the Refugee Convention might lead to a judicial review. A submission to the Executive might lead to a withdrawal of charges brought in breach of Article 31. An application to the Court for an adjournment or a stay of the charges pending consideration of the status of a refugee claim might be sought. But there was no power vested in the Courts to set aside convictions because they breached New Zealand's international obligations under the Refugee Convention (see paras [24] & [25]).

R v Uxbridge Magistrates' Court; Ex parte Adimi [2001] QB 667; *Ghuman v Registrar of the Auckland District Court* [2004] NZAR 440 and *AHK v Police* [2002] NZAR 531 referred to.

2. The broad purpose of Article 31 was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. It applied to those ultimately accorded refugee status but also those claiming asylum in good faith. It applied to those who

used false documents and those who entered a country clandestinely. However, to obtain protection the refugee must have come directly from the country of his persecution; presented himself to the authorities without delay; and showed good cause for his illegal entry or presence (see para [36]).

R v Uxbridge Magistrates' Court; Ex parte Adimi [2001] QB 667 and *Ghuman v Registrar of the Auckland District Court* [2004] NZAR 440 referred to.

3. However, on the facts, the appellant had not apparently come directly from the country of his persecution. The "coming directly" requirement will not necessarily render ineligible a refugee who has spent some weeks or even months in an intermediate country. But the appellant left Somalia in 1991, was placed in a refugee camp in Kenya and was recognised as a refugee by the Ethiopian government in January 1998 before obtaining entry to New Zealand. He therefore did not satisfy the "coming directly" requirement because he had apparently spent a number of years in Kenya and/or Ethiopia and there was no evidence that his protection, safety and security could not be assured in those countries (see paras [37] &]39]).

R v Uxbridge Magistrates' Court; Ex parte Adimi [2001] QB 667 applied.

4. In addition, the appellant had not presented himself "without delay" to the authorities. If it is the intention of a refugee to claim asylum within a short time of his arrival, then this requirement should be satisfied. While it may be understandable why, having gained permission to enter New Zealand using a false identity, the appellant had not come forward to disclose his true identity on or shortly after arrival in New Zealand, to obtain the protection of Article 31 this requirement had to be satisfied (see paras [40] & [42]).

R v Uxbridge Magistrates' Court; Ex parte Adimi [2001] QB 667 applied.

5. While the appellant might not fall within the protection of Article 31, the recognition of the plight that faces refugees and the discussion of the protection afforded by Article 31 in *Adimi* adds some additional weight to the submission that the human plight that may cause a person to commit a crime of this nature is a very relevant mitigating factor in the sentencing context (see para [50]).

6. In the circumstances a term of imprisonment was excessive and/or not appropriate and that instead a period of community service would be appropriate (see para [53]).

Appeal against conviction dismissed; Appeal against sentence allowed

Other cases mentioned in judgment

Cleggs Ltd v Department of Internal Affairs (High Court Auckland, M1032/84, 5 September 1984)
Cole v Police [2001] 2 NZLR 139
Lillandt v The Crown (High Court Christchurch, 9 August 1991, William Young J)
Police v Wasim (District Court Wellington, 27 March 2003, Judge BM Mackintosh)
R v Ahmadi (District Court Auckland, 7 June 2002, Judge MF Hobbs)
R v Qi (CA 103/01, June 2001) (CA)
R v Rahimi (District Court Auckland, 14 December 2001, Judge RL Kerr)
R v Rahimi (District Court Auckland, 30 April 2002 Judge SG Lockhart QC)
Udy v Police [1964] NZLR 235
Vergis (CA 165/92, 17 July 1992) (CA)

Counsel

M Lillico for the appellant
K Stone for respondent

Judgment of MALLON J

Introduction

[1] Mr Hassan, a Somali national, fled war torn Somalia in 1991. He was placed in a refugee camp in Kenya where there was little to eat and violence was not out of the ordinary. In pursuit of a better life he made an application for residence in New Zealand under this country's annual refugee quota. His application was granted and he arrived in New Zealand on 15 July 1998.

[2] His application, however, had been made not in his own name but in the name of Mr Abdi Mohamud Ali. Mr Ali had also fled Somalia and was placed in the same Kenyan refugee camp as Mr Hassan. When this was eventually discovered Mr Hassan was charged with fraud offences under the Crimes Act 1961. He pleaded guilty and was sentenced on 17 June 2003 to six months imprisonment with leave to apply for home detention. He has served his sentence but he now seeks to appeal his conviction and sentence.

[3] His appeal against conviction is on the basis that he did not know he had available to him a defence pursuant to article 31(1) of the 1951 Convention Relating to the Status of Refugees ("the 1951 Convention"). His appeal raises two issues: first, whether a failure to seek the benefit of the protection afforded by article 31 of the 1951 Convention can form the basis of an appeal against conviction; and secondly, whether Mr Hassan is likely to be within the protection of article 31 in any event. For the reasons that follow I find against Mr Hassan on his appeal against conviction because he has not established a factual basis for article 31 protection.

[4] Mr Hassan's appeal against sentence is on the basis that the sentence of imprisonment was excessive in light of the protection conferred by article 31. For the reasons that follow I consider that in the circumstances of this case a sentence of imprisonment was excessive and/or inappropriate and that, despite having served his sentence, his appeal against sentence should be allowed.

The background

[5] To apply for resettlement as part of New Zealand's annual refugee quota the Office of the United Nations Commissioner for Refugees ("the UNCR") must first determine that a person is a refugee within the meaning of the 1951 Convention. Mr Ali was recognised by the UNCR as having refugee status.

[6] Enquiries have been unable to find any record of Mr Hassan having that same status. He has an identity card that purports to be issued by the Ethiopian Government. That card indicates that he is registered with the Office of the Administration for Refugee and Returnee Affairs as a refugee. The respondent says that there are doubts about the authenticity of the card. In any event, the card does not confer on Mr Hassan status as a refugee that is recognised in New Zealand.

[7] Mr Hassan says that Mr Ali gave up his opportunity to come to New Zealand in favour of Mr Hassan. Mr Hassan says that some years earlier, when he was about 12, he had been informally adopted by the Ali family who were comparatively more prosperous than his own family. At some point Mr Hassan formed a relationship with Mr Ali's sister (Sahara Mohamud Ali) but after fleeing Somalia she had been placed in a refugee camp in Ethiopia. Ms Ali was a secondary applicant on the application made by Mr Hassan in the name of Mr Ali. This was on the basis of her relationship as a sister of Mr Ali.

[8] Matters came to light when Mr Hassan married Ms Ali. Mr Hassan applied to change his name and then applied for New Zealand citizenship. The Department of Internal Affairs noted that Mr Hassan and Ms Ali had married, but that they had entered New Zealand as brother and sister. The Department of Labour was alerted and an investigation followed. On 21 February 2003 Mr Hassan was arrested and charged with fraud offences under the Crimes Act. At this stage Mr Hassan revealed his identity.

The convictions

[9] Mr Hassan was charged with six counts of fraudulently using a document (s 229A(b) Crimes Act), two counts of "personation"1, and one count of making a false declaration (s 111 Crimes Act). All counts related to his application and entry into New Zealand in the name of Mr Ali.

[10] Mr Stevenson was instructed as his counsel. Mr Stevenson explained to Mr Hassan that he could plead guilty or not guilty. He said he believed the evidence against Mr Hassan was strong but the decision to enter a guilty plea was Mr Hassan's. Mr Hassan entered guilty pleads and was accordingly convicted and sentenced.

Present immigration status

[11] After the prosecution Mr Stevenson contacted the Department of Labour to enquire how Mr Hassan's immigration status could be resolved. A submission was provided to the Associate Minister of Immigration. The Court was not provided with a copy of the submission that was made to the Associate Minister. The Associate Minister's letter to Mr Stevenson records that "having carefully considered Mr Hassan's situation" he had "decided to make an exception" and had directed that a residence permit be granted to Mr Hassan in his own name.

[12] According to an affidavit from a Mr Holmes, the immigration officer in charge of the investigation of Mr Hassan, Mr Hassan's residence permit was not on account of any refugee status accorded to Mr Hassan. Mr Hassan has never made an application to be recognised as refugee in New Zealand. Mr Holmes says that the Associate Minister's decision to intervene reflected that Mr Hassan had by this time been resident in New Zealand for more than seven years, was in a stable relationship and had two New Zealand born children.

Lodging of appeal

[13] A notice of appeal against Mr Hassan's conviction and sentence was filed in the High Court on 7 August 2006. That followed advice from Mr Stevenson to Mr Hassan that, contrary to his earlier advice, he believed that Mr Hassan had a defence to the charges based on article 31 of the 1951 Convention. This arose out of Mr Stevenson's research while acting for Mr Hassan's wife. Mr Hassan says that he would not have pleaded guilty if he had known that he had a realistic defence to the charges.

[14] The appeal is out of time. Accordingly the appellant has also filed an application to extend the time for lodging an appeal. The application to extend time is made "in the interests of justice".

Effect of convictions

[15] At the time of the hearing before me Mr Hassan had a part-time job as a produce assistant at a supermarket. He was also studying for an information technology degree.

[16] Over the previous 18 months Mr Hassan had applied for about 27 jobs involving computers and had been turned down for all of them. Mr Hassan believes that his difficulty in finding employment is because of his convictions. Mr Hassan deposed that six or seven of the rejection letters specifically stated that he had been rejected because of his convictions. Mr

Hassan also deposed that when at a recruitment firm earlier in the year he was told that the firm could not place him because he had fraud convictions.

[17] It is not known whether Mr Hassan endeavoured to explain the circumstances of his convictions to the recruitment firm or any prospective employer. Nor is it known whether he has provided them with the decision of the Associate Minister that has allowed him to obtain a residence permit despite his convictions. I accept, however, that Mr Hassan's convictions have been and are likely to continue to be a source of on-going difficulty in Mr Hassan's efforts to obtain employment utilising the training he is undertaking.

Jurisdiction

[18] Under the Summary Proceedings Act 1957 Mr Hassan has a general right of appeal from his conviction (s 115). An appeal is by way of rehearing (s 119(1) SPA). The High Court may make such order in relation to the appeal as it thinks fit (s 121(1)). That includes the power to confirm, set aside, amend or quash a conviction and to impose a more or less severe sentence or deal with the offender in any other way that the convicting Court could have dealt with the offender on the conviction as so amended (s 121(2)). The High Court may also exercise any powers that the Court whose decision is appealed against might have exercised (s 121(6)).

[19] A guilty plea is not a bar to an appeal. Although the express provisions in the Summary Proceedings Act that enable a guilty plea to be withdrawn do not apply2, in exceptional circumstances a change of plea on an appeal against conviction can be entertained.3 Exceptional circumstances can arise where, for example, the plea was entered under some obvious mistake, misunderstanding or misapprehension.4

[20] Mr Hassan also has a right to appeal his sentence (s 115). The High Court may quash or vary the sentence or pass another sentence or otherwise deal with the offender in any way that the Court imposing the sentence could have dealt with the offender. The power to intervene arises if there was no jurisdiction to impose the sentence, it was clearly excessive or inappropriate, if substantial facts relating to the offence or to the offender's character or personal history were not before the Court imposing the sentence, or if those facts were not substantially as placed before or found by the Court.

[21] It is not a bar to an appeal of a sentence that the sentence has been served. There is nothing in s 115 that restricts the appeal right in this way and counsel for the respondent did not cite any authority holding that an appeal could not be brought in such circumstances.

[22] A notice of appeal is to be filed within 28 days after sentencing (s 116(1)) but the Court has power to extend this time (s 123(1)). Time may be extended to avoid a miscarriage of justice. Relevant to whether time should be extended is whether there is a real likelihood that the appeal would succeed if leave were granted.5 I will therefore consider first the merits of this appeal before deciding whether to extend the time for bringing the appeal.

Appeal against conviction

The status of the Convention

[23] New Zealand is a signatory to the 1951 Convention. Article 31(1) 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.

[24] To seek to meet New Zealand's obligations under the 1951 Convention, Part 6A of the Immigration Act 1987 was enacted. This requires refugee status officers and the Refugee Status Appeals Authority to act in a manner that is consistent with New Zealand's obligations under the 1951 Convention (s 129D(1)). Further, immigration officers are to have regard to the provisions of the 1951 Convention in carrying out their functions under the Immigration Act in relation to refugees and refugee status claimants (s 129X(2)). However, no provision in the Immigration Act (nor any other Act) specifically incorporates article 31(1) as a defence to charges brought under New Zealand domestic law.6

[25] The defence of necessity (s 20 of the Crimes Act) might sometimes apply to criminal charges brought against refugees but this has been viewed as of narrower scope than the protection afforded by article 31.7 The circumstances that are the basis for the article 31 claim might also be relevant in mitigation when sentencing refugees convicted of fraud offences.8 When officers are exercising powers under the Immigration Act failure to have regard to New Zealand's obligations under the 1951 Convention might lead to a judicial review.9 A submission to the Executive might lead to a withdrawal of charges brought in breach of article 31.10 An application to the Court for an adjournment or a stay of the charges pending consideration of the status of a refugee claim might be sought.11 But there is no power vested in the Courts to set aside convictions because they breach New Zealand's international obligations under the 1951 Convention.

Can article 31 provide a basis for an appeal?

[26] Mr Hassan does not rely on the defence of necessity. Nor has he brought an application for review. Mr Lillico, counsel for Mr Hassan, submitted that either an administrative decision to withdraw the charges or an application for stay were reasonably open to Mr Hassan based on article 31. Mr Lillico submitted that there had been a miscarriage of justice in the entering of the convictions on Mr Hassan's guilty plea because he made a material mistake in that he did not know he had a defence based on article 31.

[27] The position advanced by Mr Lillico is unusual. The defence alleged to arise does not go to whether the elements of the offence could be made out. The Court had jurisdiction to enter the convictions. Essentially Mr Hassan's position is that by pleading guilty he lost the opportunity to have the prosecution reconsidered and withdrawn.

[28] In these unusual circumstances Mr Lillico was seeking an order setting aside the convictions to enable Mr Hassan to replead. Then an administrative reconsideration of the prosecution would be sought. This would be sought on the basis of Mr Hassan's successful application to remain in the country. Alternatively a suspension of the proceeding would be sought pending the outcome of an application for refugee status. If the prosecution would not suspend the proceeding an application for stay could be made.

[29] Mr Lillico submitted that the principles applicable on an application for leave to withdraw a guilty plea under s 169 of the Summary Proceeding Act were relevant by analogy if not by direct application. In that context a miscarriage of justice can arise where in entering a guilty plea the accused made a material mistake. It can also arise where, notwithstanding the plea, there was a "clear defence" to the charge.

[30] Mr Lillico submitted that a clear defence is not one that would inevitably or probably succeed, but there must be a reasonably arguable defence. He acknowledged that it is a rare case where an accused person, who is represented by experienced counsel and makes a considered decision to plead guilty, is allowed to replead. He submitted that this can arise, however, if the legal advice was not "adequate advice on the key issues in relation to his defence". In support of these principles Mr Lillico relied on *Sharp v District Court at Whangarei* [1989] NZAR 221 at 230 and 231.

[31] Mr Lillico submitted that Mr Hassan had a clear defence because of article 31 and that he made a material mistake in pleading guilty to the charges because he did not understand that

he had a defence available to him. Mr Hassan did not get "adequate advice on the key issues in relation to his defence" because his counsel was not experienced at dealing with refugee issues. (It was said that Wellington counsel are generally not experienced at dealing with refugee issues because Wellington does not have a true international port or airport.)

[32] Mr Stone, for the respondent, submitted that the position advanced for Mr Hassan on this appeal could not form the basis of a successful appeal. He submitted that international obligations were the province of the Executive rather than the judiciary. The most Mr Hassan might be able to show is that the Executive (here, the Immigration Department and its Minister) had an obligation to consider Mr Hassan's position. That does not give rise to a clear defence to the charges. Mr Stone referred to *R v Uxbridge Magistrates' Court, Ex p Adimi* (DC) [2001] QB 667. There, although two of the parties in the judicial review applications before the court (who had been convicted and served imprisonment sentences for fraud) had a case for eligibility for protection under article 31, the Court found that quashing the convictions was not open to it. Further, Mr Stone submitted that even if an appeal was available to Mr Hassan he did not meet the article 31 requirements.

[33] Mr Lillico did not provide any authority where an appeal has been allowed because the appellant wishes to pursue administrative action that would have been taken earlier had the convicted person been properly advised. Mr Lillico referred to *AHK v Police* [2002] NZAR 531. In that case the appellant, who said he was a refugee from Iran, had pleaded guilty to being in possession of a false passport. On appeal counsel for both parties were agreed that the information as laid did not correctly set out the elements of the offence in question. It was an offence under s 31(1)(f) of the Passport Act 1992 to have possession of a falsified passport providing that was without reasonable cause. If the appellant was a true refugee then this might constitute reasonable cause. In these circumstances the plea of guilty had been entered by mistake. With the agreement of counsel the High Court treated the matter as an appeal against conviction and ordered a rehearing. The High Court commented that if the appellant was a true refugee then the probabilities were that the charge would be withdrawn.

[34] That case is distinguishable because the appellant potentially had a substantive defence to the charges, had the information been properly laid. The Court did not consider whether the appeal could have been allowed where there was no potential substantive defence but so as to enable consideration to be given to the withdrawal of the charges. Nor is this like appeals brought on the basis of counsel incompetence where the conduct of counsel has led to an unfair trial or a suspect verdict. Even so, if a Court is satisfied that a person convicted of an offence had the opportunity to avoid those convictions if properly advised by counsel, theoretically it might be open to a Court to quash a conviction and direct a rehearing so that the opportunity can then be pursued. Otherwise a person may be left without any effective remedy. I do not, however, need to decide this issue in the circumstances of this case because of the view I take as the next issue (paras [35] to [43]).

Application of article 31

[35] The purpose and scope of article 31 was discussed in *Adimi*. That decision was referred to in *Ghuman v Registrar of the Auckland District Court*12 as being a decision "that has received wide support from commentators". It was referred to in *R v Zanzoul* CA 297/06 6 December 200613 and applied to the extent it was relevant in the appeal before the Court.

[36] The broad purpose of article 31 is "to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law".14 It applies to those who are ultimately accorded refugee status but also those claiming asylum in good faith.15 It applies to those who use false documents and those who enter a country clandestinely.16 However, as it can be seen from its terms, to obtain 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.

[37] There are two potential problems for Mr Hassan even if he can establish a claim for refugee status within the meaning of the 1951 Convention. In the first place Mr Hassan has not apparently come directly from the country of his persecution. In *Adimi* Simon Brown LJ said:17

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

[38] Simon Brown LJ with approval to18 the following extract from the UNHCR Handbook on Procedures and Criteria for determining Refugee Status (1992):

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

[39] The "coming directly" requirement will not necessarily render ineligible a refugee who has spent some weeks or even months in an intermediate country. However, according to the information before me, Mr Hassan fled Somalia in 1991, was placed in a refugee camp in Kenya and was recognised as a refugee by the Ethiopian Government in January 1998 before obtaining entry to New Zealand. Mr Hassan therefore does not satisfy the "coming directly" requirement because he apparently spent a number of years in Kenya and/or Ethiopia and there is no evidence that his protection, safety and security could not be assured in those countries.

[40] The second difficulty is that Mr Hassan did not present himself "without delay" to the authorities. In *Adimi* it was said19 that if a refugee's intention was to claim asylum within a short time of his arrival then this requirement should be satisfied.

[41] Mr Lillico submitted that *Adimi* did not consider the situation where a refugee needs to use false documents to maintain his presence. In *Ghuman* Baragwanath J said:20

> "The requirement that refugees present themselves without delay to the authorities and show good cause for their illegal entry or presence is a pointer to the need to come clean at the time of entry, which is inconsistent with any right to engage in further deceit. It is only the illegality of mere presence which may not be penalised."

[42] On that basis Mr Hassan was not excused from presenting himself to the authorities without delay. While it may be understandable why, having gained permission to enter New Zealand using a false identity, Mr Hassan did not come forward to disclose his true identity on or shortly after arrival to New Zealand, to obtain the protection of article 31 this requirement must be satisfied.

[43[For these reasons I consider that there is an insufficient basis, on the material before me, to indicate that a claim for protection under article 31 might be made out. I consider that it is not appropriate to quash the conviction on this appeal.

Appeal against sentence

[44] Mr Lillico submitted that if the District Court Judge was aware of article 31(1) Mr Hassan would have been discharged without conviction. It was submitted that article 31(1) placed the seriousness of the offending in its correct light. This was because the consequences of the conviction outweighed the seriousness of the offending. Mr Stone submitted that this was highly speculative, that in cases of identity fraud sentences of imprisonment are almost invariable and that Mr Hassan was fortunate to have had the Minister show mercy to him and his wife by allowing them to remain in New Zealand. Mr Stone also submitted that Mr Hassan's fraudulent use of another's refugee status was detrimental to others awaiting entry into this country.

[45[The District Court Judge commenced his sentencing by noting that it was a very difficult case and that the matter ought to have been set down for hearing rather than placed in the middle of a busy list. The Judge referred to the difficulty that confronts the Court in a case such as this. On the one hand the position that a refugee finds him or herself in deserves tremendous sympathy. On the other hand the Court is required to enforce the law and the cases have established that a sentence of imprisonment is usually the only appropriate course.

[46] The Judge said:

> [7] In the appeal case of *Vergis* on 17 July 1992 CA 165/92 the Court of Appeal said:
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> > "... the preservation of the integrity of the immigration system is basic to our society. It is important in the public interest that the courts, through sentencing, make it clear that those who imperil its proper functioning will receive condign sentences."
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> [8] That is the principle on which the Court's are forced to work. It is of course arguable whether the prospect of imprisonment could have any deterrent effect on a person who is tempted to escape the horror of a refugee camp in order to obtain permission to enter New Zealand. On the other hand, imprisonment is a message that must be sent back by refugee and immigrant communities to people who are tempted to break the law of New Zealand in order to enter here. A more effective deterrent is the prospect that after establishing a family in New Zealand you may have residency revoked and be deported from the country. That would be worse to you than a sentence of imprisonment.
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> [9] Turning back to the seriousness of the offending, I bear in mind what the prosecutor has said that the Immigration Authority and the Court have no proof of your history. Because of your dishonest conduct towards the Immigration Authority and UNHCR it is not possible to determine whether you were a person of sufficiently good character to enter New Zealand. But in your case your history here since 1999 has established that you are presently a person of good character. In your case there is not so much concern about the possibility that you have concealed a discreditable history before coming here. The concern is that the Immigration Authority has been deprived of the opportunity of finding out.
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> ...
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> [12] One of the consequences may well be that you have used the quota privilege that someone else could have taken up to enter New Zealand. Putting yourself forward with a false identity may have resulted in another person being excluded from the refugee quota. Or perhaps the quota place would have been used by your brother-in-law.
>
> [13] The seriousness of the offence lies in depriving the Immigration Service of the ability to assess your case. It also lies in the fact that you have used part of the annual quota which should perhaps have benefited some other person, and that your conduct, along with the conduct of other people who mislead the Immigration Service results in

> a greater atmosphere of mistrust of scrutiny of the credentials of applicants. These are serious matters because they affect other people who have been in the same desperate predicament as you have yourself.

[47] The Judge therefore concluded that the only appropriate sentence was one of imprisonment.

[48] It is clear that despite the difficulty of the issues that were placed before the Judge in the middle of a busy list the Judge, in his careful and thoughtful sentencing notes recognised all the competing considerations in this case. While expressing doubt about the effectiveness of a deterrent sentence he saw that as the only penalty that was open to him. The cases he was referred to led him to that conclusion.

[49] However, none of the cases the Judge was referred to involved circumstances similar to the present.21 A number of them involved falsifying passports and other documents for financial gain.22 Only two of them involved defendants who claimed to be refugees, but those cases were not similar to the present.23 It is not clear that the differences were pointed out to him.

[50] Unlike any of the other cases to which the Judge was referred Mr Hassan had entered New Zealand having spent a number of years in a refugee camp. The Judge was not referred to article 31 nor *Adimi*. While Mr Hassan may not fall within the protection of article 31, the recognition of the plight that faces refugees and the discussion of the protection afforded by article 31 in *Adimi* adds some additional weight to the submission that the human plight that may cause a person to commit a crime of this nature is a very relevant mitigating factor. Further the Judge's question about the effectiveness of deterrence in circumstances such as these finds support in *Adimi* where Simon Brown LJ commented:24

> "If sanctuary is to be granted, it seems somewhat unwelcoming first to imprison the refugee. If, however, it is to be refused, it is not best simply to remove him without delay.
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> ...
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> Why then, one wonders, should it be thought appropriate to resort to the general criminal law (carrying, as it does, altogether heavier penalties) to deal with these cases? Having regard to all these considerations, I would express the earnest hope that the decisions to prosecute, not least for offences under the general criminal law rather than under Part III of the Immigration Act, will be made only in the clearest of cases and where the offence itself appears manifestly unrelated to a genuine quest for asylum.

[51] The Judge referred to Mr Hassan taking the place of his brother-in-law or another. However, because the application in Mr Ali's name was granted it seems very likely that the person who had missed out on a place was Mr Ali. It was not a place that some other unrelated person would have taken. According to Mr Hassan he had taken the place of Mr Ali with his agreement. While that claim may not be able to be checked, if the position was as he claimed then the seriousness of his offending is mitigated to some degree.

[52] The Judge referred to the seriousness of this case lying partly in depriving the Immigration Service the ability to assess Mr Hassan's case. The lost opportunity to assess Mr Hassan's character was not in my view of sufficient consequence to warrant a term of imprisonment. The information before the Judge indicated that Mr Hassan was of good character. Significantly, since then the Government has decided that Mr Hassan is a suitable person to remain in New Zealand. That is a substantial fact about Mr Hassan that was not before the sentencing Judge.

[53] For these reasons, in the circumstances of this case I consider that a term of imprisonment was excessive and/or not appropriate and that instead a period of community service was appropriate. That raises the question of whether I should extend the time for the lodging of the appeal on sentence. I consider that in the unusual circumstances of this case I should do so. I consider that the sentence was not appropriate and it may well be that the fact of a sentence of imprisonment (which indicates a certain level of seriousness in the offending) is continuing to adversely affect Mr Hassan's employment efforts.

[54] I therefore allow his appeal on sentence. Because Mr Hassan has already served his sentence of imprisonment it would not be appropriate to now require him to undertake a period of community service. He is discharged from doing so.

Result

[55] The application to extend the time for lodging the appeal against sentence is granted. The appeal against conviction is dismissed. The appeal against sentence is allowed. The end result is therefore that Mr Hassan is convicted (in accordance with the convictions entered on 17 June 2003) and discharged.

Solicitor for the appellant: *Sladden, Cochrane and Co* (Wellington)
Solicitor for the respondent: *Crown Law Office* (Wellington)

Endnotes:

1. The informations and the submissions referred to s 248 of the Crimes Act. However that appears to be in error as that is an interpretation section for crimes involving computers. This point was not raised before me.
2. Section 169, which empowers the High Court to grant leave to withdraw the guilty pleas so that a matter can be returned to the District Court for a plea to be re-entered does not apply because the charges were laid against Mr Hassan summarily. In the summary jurisdiction a plea can be withdrawn "before the defendant has been sentenced" (s 42 of the Summary Proceedings Act). This section is also not applicable because Mr Hassan has been sentenced.
3. See eg *Udy v Police* [1964] NZLR 235 at 237.
4. *Udy* at 237.
5. See eg *Cleggs Ltd v Department of Internal Affairs* HC AK M1032/84 5 September 1984.
6. Compare with s 31 of the Immigration and Asylum Act 1999 (UK) which provides a defence to certain fraud offences for refugees that meet the requirements of article 31.
7. In *R v Uxbridge Magistrates' Court ex p Adimi* [2001] QB 667 at 695 this was considered to have narrower scope than the protection to refugees afforded by article 31. In *Ghuman v Registrar of the Auckland District Court* 20 CRNZ 600 at [73] Baragwanath J commented that it was likely that a similar conclusion would be reached in New Zealand.
8. *Adimi* at 695; *Ghuman* at [74].
9. *Ghuman* at [75].
10. *Adimi* at 696; *Ghuman* at [75]; *AHK v Police* [2002] NZLR 530 at [12].
11. *Adimi* at 695; In *Ghuman* judicial review was sought of the District Court's decision not to grant a stay. The application failed because the factual basis for protection under article 31 was not made out.
12. At [27].
13. At [30].
14. *R v Uxbridge Magistrates' Court and another ex parte Adimi* [2001] QB 667 at p 677.
15. *Adimi* at 677. Although the Court is not required to assume an entitlement to refugee status merely on the basis of a previous, undetermined, claim for it: *Ghuman* at [43].
16. *Adimi* at 678.
17. *Adimi* at 678.
18. At p 678.
19. At p 679.

20. At [71].
21. *R v Rahimi* DC Auckland, 14 December 2001, Judge RL Kerr; *R v Rahimi* DC Auckland, 30 April 2002 Judge SG Lockhart QC; *Cole v Police* [2001] 2 NZLR 139; *R v Ahmadi* DC Auckland, 7 June 2002, Judge MF Hobbs; *Vergis* CA 165/92 17 July 1992; *Lillandt v The Crown* HC Christchurch, 9 August 1991, William Young J; *R v Qi* CA 103/01, June 2001, Blanchard, Fisher and Potter JJ; *Police v Wasim* DC Wellington, 27 March 2003, Judge BM Mackintosh.
22. *Cole; Vergis; Lillandt*.
23. In the *Rahimi* cases (and the case which counsel for the informant submitted was most comparable) a person had claimed to have been an army officer and a member of the secret police in Afghanistan and to have been imprisoned and tortured. In reality, he and his family had been long term residents in Asia and he had never been an army officer or member of the secret police, let alone imprisoned and tortured. In *Wasim* the person had entered New Zealand under a study and working permit and made a number of attempts to stay here including making up a claim that he was a refugee.
24. At p 685.