Case Nos. CO/7853/2010, CO/1191/2011

Neutral Citation Number: [2011] EWHC 1094 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Tuesday, 12 April 2011

B e f o r e:

LORD JUSTICE LAWS

MR JUSTICE STADLEN

- - - - - - - - - - - - - - - - - - - -

Between:
STERNAJ

Appellant

v

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

STERNAJ

Appellant

v

CROWN PROSECUTION SERVICE

Respondent

- - - - - - - - - - - - - - - - - - - -

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Mr Manjit Gill QC and **Mr Mumin Hashim** (instructed by Corper of London) appeared on behalf of the Appellant
Mr Richard Whittam QC and **Mr Benjamin Keith** (instructed by Crown Prosecution Service) appeared on behalf of the Respondents

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J U D G M E N T

1. LORD JUSTICE LAWS: These are appeals by way of case stated against a decision by His Honour Judge O'Sullivan given at the Canterbury Crown Court on 13 November 2009 when the court held that the prosecution of the appellants for facilitating the commission of a breach of United Kingdom immigration law, contrary to Section 25 of the Immigration Act 1971, was not vitiated by abuse of process. The appeals involve consideration of the extent to which, if at all, reliance may be placed on Article 1 of the United Nations Convention Relating to the Status of Refugees by way of defence to a charge under Section 25 of the 1971 Act where the defendant has allegedly facilitated the entry into the United Kingdom of a person who is a bona fide asylum seeker.

2. The appellants are brothers. The first appellant Mondi is a naturalised British citizen and holds a United Kingdom passport. The second appellant Edmir is an Albanian national. On 26 May 2009, at committal proceedings before the Folkestone Magistrates' Court, both pleaded guilty to facilitating illegal entry into the United Kingdom of a person who was not a citizen of the European Union in breach of Section 25 (1) of the 1971 Act (which I shall set out in due course). The person in question was Edmir's two-year old son, also an Albanian national. The appellants were committed to the Canterbury Crown Court for sentence. Their wives had originally been charged alongside them. On 3 August 2009 the Crown offered no evidence against them [their wives].

3. On the same day, as I understand it, at a pre-hearing conference, the appellants' counsel happened to notice a Home Office identity card issued to Edmir which registered the fact that he had claimed asylum. It transpired that Edmir's wife and infant son were also registered as asylum seekers along with him. In consequence, when the case came on for the substantive hearing at the Crown Court on 28 September 2009 the appellants applied by counsel to change their pleas to not guilty, seeking to contend, principally, that Article 31 of the 1951 Refugee Convention afforded both of them a defence to the charge.

4. His Honour Judge O'Sullivan rejected that submission and, accordingly, declined to allow the change of plea. Therefore they stood convicted and each appellant was sentenced to eight months' imprisonment suspended for 18 months and ordered to carry out 120 hours' unpaid work.

5. The facts giving rise to the charge as alleged by the Crown are largely, if not entirely, undisputed and are as follows. Edmir came to the United Kingdom in October 2008 without his wife or child. On 16 November 2008 Mondi and his wife travelled by car from the United Kingdom to Belgium. They did so with the connivance and at the request of Edmir in order to bring Edmir's wife and son Klajeis into the United Kingdom. Edmir's wife was able to travel separately to this country in a lorry but the lorry driver would not take Klajeis who was in a distressed state. Mondi and his wife brought the boy in by car and attempted to procure his entry into the United Kingdom by using their own son's passport. However they were stopped at Dover docks, questioned and made full admissions.

6. Edmir who had been staying at Mondi's home surrendered himself at the Edmonton Police Station. The brothers were both arrested on the same day, 16 November 2008. Edmir thereupon claimed asylum but had not done so before his arrest. He claimed also for his wife and son.

7. Section 25 of the Immigration Act 1971 in its present form provides, so far as relevant, as follows:

> "(1) A person commits an offence if he —
>
> (a) does an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union;
>
> (b) knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law by the individual, and
>
> (c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union.
>
> (2) In sub-section (1) 'immigration law' means a law which has effect in a member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to —
>
> (a) enter the State,
>
> (b) transit across the State, or
>
> (c) be in the State."

8. I should also set out part of Section 25A of the same Act:

> "(1) A person commits an offence if —
>
> (a) he knowingly and for gain facilitates the arrival in, or the entry into, the United Kingdom of an individual, and
>
> (b) he knows or has reasonable cause to believe that the individual is an asylum-seeker.
>
> (2) In this section 'asylum-seeker' means a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under —
>
> (a) the Refugee Convention ..... or
>
> (b) the Human Rights Convention ..... "

9. Article 31 of the 1951 Refugee Convention provides as follows:

> "1 The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2 The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such

> restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow
>
> such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

10. Lastly, Section 31 of the Immigration & Asylum Act 1999, which is cross-headed "Defences based on Article 31.1 of the Refugee Convention", provides:

> "(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he —
>
> (a) presented himself to the authorities in the United Kingdom without delay;
>
> (b) showed good cause for his illegal entry or presence; and
>
> (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.
>
> (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, sub-section (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.
>
> (3) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under —
>
> (a) Part I of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);
>
> (aa) Section 4 or 6 of the Identity Documents Act 2010;
>
> (b) Section 24A of the 1971 Act (deception); or
>
> (c) Section 26 (1) (d) of the 1971 Act (falsification of documents)."

11. The Crown Court judge had at first stated a case only in relation to Edmir. Mondi's case was stated after judicial review proceedings. The question for the opinion of this court, first set out in Mondi's stated case, was:

> "To what extent, if at all, is an individual entitled to rely on the protection afforded by Article 31 of the 1951 United Nations Convention Relating to the Status of Refugees where he is charged under Section 25 of the Immigration Act 1971 for facilitating the entry into the United Kingdom of a person who is a bona fide asylum seeker recognised as such by the Home Secretary?"

12. The question in Edmir's case was the same, subject to necessary adjustments to reflect the fact that he is himself an asylum seeker and the father of Klajeis. The question reads:

> "To what extent can an asylum seeker rely on the protection afforded by Article 31 of the 1951 United Nations Convention Relating to the Status of Refugees where he is charged under Section 25 of the Immigration Act 1971 for facilitating the entry into the United Kingdom of his child where the Secretary of State is treating their claim for asylum as a single valid claim?"

13. However there is an addendum to the questions relating, as I understand it, to both cases stated. There are two further questions set out there as follows. (The typing is corrupt. The text must mean):

> "Whether on the facts of this case the appellants were or could have been properly charged under Section 25 Immigration Act 1971 at all."

Secondly:

> "Whether the prosecution of the appellants ought to have been stayed as an abuse of process and as being contrary to the purposes of Article 31 of the Refugee Convention 1951."

14. The Crown Court held that as Mondi was not an asylum seeker he had no claim to protection under Article 31 of the 1951 Convention or Section 31 of the 1999 Act in any event. As for Edmir, being an asylum seeker, he was a potential beneficiary of Article 31 and Section 31 but only as regards alleged offences regarding his own entry. He could claim no protection in relation to his having sought to facilitate the entry of a third party, namely his infant son.

15. Mr Gill QC, for the appellants, summarised his case at paragraph 23 of his skeleton argument in six propositions as follows:

> "(i) Properly construed, the Immigration Act 1971, as amended, does not seek to criminalise the conduct of persons who, for no gain, assist refugees to gain illegal entry for the purposes of claiming asylum.
>
> (ii) Section 25 Immigration Act 1971 is inapplicable to the conduct of the appellants; they committed no offence under Section 25.
>
> (iii) The section which covers the appellants' conduct is Section 25A Immigration Act 1971. Had they been charged under Section 25A, the appellants would have had a complete defence as they did not act for gain, but acted only to help a helpless child family-member to flee persecution.
>
> (iv) The prosecution of the appellants, for helping to bring in Edmir's asylum-seeking child illegally into the United Kingdom was an abuse of process.
>
> (v) R v Alps is distinguishable as it was decided under a different statutory regime and before the applicable law, including the abuse of

process arguments, was clarified in Asfaw.

(vi) The appellants were wrongly deprived of a defence under section 31 of the 1999 Act."

16. Alps is a reference to R v Alps [2001] EWCA Crim 218 and Asfaw is a reference to R v Asfaw [2008] UKHL 31, [2008] 1 AC 1061, to both of which I will return.

17. In his submissions today Mr Gill reduced the scheme of his argument to four propositions. These however are essentially the same as propositions 1, 2, 5 and 6 as set out in paragraph 23 of the skeleton argument. The missing propositions, so to speak, are really consequential on the others.

18. I turn to the first three propositions in Mr Gill's argument as originally set out. The overall submission here is that the legislative scheme of Sections 25 and 25A is to the effect that a person who facilitates or seeks to facilitate the entry into the United Kingdom of an asylum seeker may only be proceeded against under Section 25A, and in that case the prosecution have to prove that it was done for gain. It is also said that Section 25 must be referring to the immigration law of a European Member State other than the United Kingdom (see paragraph 38 (a) of the skeleton argument), and that there could have been no offence contrary to Section 25 on the facts here because Edmir's son, being only 2, cannot himself have been guilty of any offence and so has not committed a breach of immigration law within the meaning of Section 25 (1) (a).

19. There is nothing in these two subsidiary submissions. There is nothing whatever to suggest that the first is the case, and the second is refuted by the fact that the child was an illegal entrant because his entry was sought to be procured by Mondi's deception.

20. Mr Gill this morning raised a related point: since Edmir's son never, as it were, passed the gate, he did not in any event commit any breach of immigration law. However as Mr Whittam QC for the respondent pointed out, Section 33 of the Act of 1971 defines "entrant" as including a person seeking to enter the United Kingdom. Edmir's son was a person seeking to enter the United Kingdom. His doing so was dependent upon the deception practised by Mondi in deploying his son's passport. Accordingly, Edmir's son was, within the contemplation of the 1991 Act, an illegal entrant.

21. I return to the principal point on the relation between Section 25 and 25A. In my judgment it is not possible to conclude, by reading Section 25 and 25A together, that only Section 25A covers a case where the third party is an asylum seeker. Section 25A would in my judgment apply in the case of an asylum seeker who arrives in or enters the United Kingdom without any breach of immigration law being committed by the third party at all. It is plainly principally directed at traffickers of asylum seekers.

22. Section 25, by contrast, is concerned with facilitation of the commission of breaches of immigration law. This conclusion is, I think, supported by Alps, decided in the Court of Appeal (Criminal Division), albeit, as Mr Gill rightly submits, the legislation was then in a somewhat different form. Section 25 of the 1971 Act then read, in part:

"(1) Any person knowingly concerned in making or carrying out arrangements for securing or facilitating -

(a) the entry into the United Kingdom of anyone whom he knows or has reasonable cause for believing to be an illegal entrant;

(b) the entry into the United Kingdom of anyone whom he knows or has reasonable cause for believing to be an asylum claimant; or

(c) the obtaining by anyone of leave to remain in the United Kingdom by means which he knows or has reasonable cause for believing to include deception,

shall be guilty of an offence .....

(1A) Nothing in sub-section (1) (b) above shall apply to anything which is done -

(a) by a person otherwise than for gain, or in the course of his employment by a bona fide organisation whose purpose it is to assist refugees ..... "

23. The facts in Alps were not dissimilar to those in the present case. The appellant had attempted to smuggle his nephew into the United Kingdom from France using someone else's passport. He was prosecuted under the then Section 25. Delivering the judgment of the court, Lord Justice Henry said:

"20 The appellant effectively concedes that for the purposes of this appeal Emram Gotzas is an illegal entrant, and the appellant facilitated his attempts at entry. The Crown accepts that Emram Gotzas is an asylum seeker. But Mr Owen Davies QC contends that the would-be entrant is both an illegal entrant and an asylum seeker, but cannot be proceeded against because of the Article 31 protection. While that is, or may be, in proper cases, true of the aspirant asylum seeker, it is not true of the facilitator, nor is there any policy reason why it should be true of him - quite the reverse. We know from recent legislation that Parliament has shown its disapproval of facilitators who break the law by increasing the maximum penalties under Section 25 (1) (a) from seven to ten years.

.....

24 The wording of the Act is quite clear and quite unambiguous. Mr Alps is properly charged under Section 25 (1) (a). The statutory defence under Section 25 (1A) is available only to those charged under Section 25 (1) (b). He was not charged under Section 25 (1) (b) and rightly so, as there is no evidence that he was acting for reward. But the question as to whether or not he was acting for gain in committing the sub-section (1) (a) offence (facilitating the entry of anyone he knows to be an illegal entrant) is nothing to the point. Gain is not relevant to the question as to whether or not he has committed the offence under Section 25 (1) (a) charged in the indictment.

25 The effect of those provisions is to make it an offence to facilitate the entry of an asylum claimant (one who intends to claim asylum) into the UK unless the facilitator does not do it for gain, or does it in the course of his employment by a bona fide organisation whose purpose it is to assist refugees. But that statutory defence is not given to those charged with facilitating the entry into the United Kingdom of anyone who he knows or has reasonable cause for believing to be an illegal entrant. Mr Alps must

have known that trying to get his nephew into the United Kingdom on a British passport that was not his made him an illegal entrant. That he accepted in the course of his interview. He was an illegal entrant before he claimed asylum. No subsequent acquisition by the nephew of asylum seeker status could cancel or annul the fact that Mr Alps had (on the facts as set out by the Crown) attempted to get his nephew into the country by deception on a passport that was not his. That is the offence under Section 25 (1) (a) alleged in the indictment."

24. Notwithstanding the changes in the terms of Section 25, it seems to me that similar considerations apply here.

25. The remainder of Mr Gill's case - propositions 4 to 6 - overlap with those I have already addressed, at least to the extent that his abuse argument (proposition 4) depended on the suggestion that the appellants in this case were prosecuted under Section 25 so that the prosecution would not have to prove, which manifestly they could not, that the appellants acted for gain. For reasons I have given, Section 25 is properly deployed in a case like the present. Accordingly, there is no basis for suggesting that it was in fact deployed out of some improper motive.

26. What Mr Gill's last propositions add to his argument is the submission, heavily dependent on Asfaw and also on Adimi [2001] QB 667 (which preceded Alps and Asfaw in this court), that Article 31 of the 1951 Convention and Section 31 of the 1999 Act provided a defence to the Section 25 charge against the appellant. It is true that Mr Gill was at pains this morning to put the matter somewhat more broadly and submitted that the Crown should, whatever the niceties of the issues arising here of statutory construction, have appreciated that it was frankly inappropriate to address these charges. That seems to me to be a very frail basis on which to erect an argument of abuse of process.

27. Adimi and Asfaw concern the use or attempted use by a refugee of a forged or false passport. In Adimi, the Court of Appeal held that there was a legitimate expectation that asylum seekers would be accorded the protection of Article 31 (see the judgment of Lord Justice Simon Brown, as he then was, at 686 D):

> " ..... By the time of these applicants' prosecutions, at latest, it seems to me that refugees generally had become entitled to the benefit of Article 31 in accordance with the developing doctrine of legitimate expectations ..... "

I should also cite this passage at page 674 B:

> "The need for Article 31 has not diminished. Quite the contrary. Although under the Convention subscribing states must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country) they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents."

There is also this passage at page 683 E to F:

> "The second reason why I am unhappy at the notion of resolving an

> Article 31 dispute by an abuse of process application is that, as the respondents themselves assert, the defendant upon such an application has to establish the abuse on the balance of probabilities. I would prefer Article 31 protection to operate by way of a defence: where it is invoked the burden should be upon the prosecution to disprove it. Certainly it would be appropriate to proceed to conviction only in the clearest cases."

28. In consequence of this decision, as I understand it, Section 31 of the 1999 Act was enacted.

29. In Asfaw, the individual in question had in fact been leaving the United Kingdom, having fled Ethiopia where she had been tortured and raped. She had arrived at Heathrow on a false passport and intended to proceed to the Untied States of America. She was charged here on two counts, first, using a false instrument contrary to Section 3 of the Forgery & Counterfeiting Act 1981 and, secondly, attempting to obtain services by deception contrary to Section 1 (1) of the Criminal Attempts Act 1981.

30. Their Lordships' House held that Section 31, given its genesis in the 1951 Convention, should be read as covering the case of a refugee leaving the United Kingdom in the course of a continuing flight from persecution. Thus Lord Bingham stated at paragraph 26:

> "26 ..... Section 31 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 stop-over in transit. This interpretation is consistent with the Convention jurisprudence to which I have referred, consistent with the judgment in Adimi, consistent with the absence of any indication that it was intended to depart in the 1999 Act from the Convention or (subject to the exception already noted) Adimi, and consistent with the humanitarian purpose of the Convention."

31. I have already indicated that Mr Gill submits there was an abuse of process here arising from the fact that the appellants had faced the two counts I have mentioned. There was also an abuse argument in Asfaw. Lord Bingham said at paragraph 31 and following:

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

.....

> 33 ..... [defence] counsel's preliminary objection to count 2 could only, consistently with Article 31 and the intention of Section 31, have been fairly met by staying further prosecution of count 2 .....
>
> 34 ..... it was an abuse of process in the circumstances to prosecute her to conviction ..... the appellant was, in the Attorney General's expressive phrase, 'still running away' from persecution. Once that was established, count 2 being factually indistinguishable from count 1, she should not have been convicted at all ..... "

32. In the present case I should underline my view that there can, as I see it, be no abuse if the Section 25 prosecution is properly brought and persisted in. It seems to me that in this case it was. That is to say nothing of course as to the wisdom or necessity of the invocation of the criminal process on the particular facts here.

33. In the course of his submissions Mr Gill sought to build on the humanitarian and courageous acts of Oskar Schindler in the Second World War. However what is plain to my mind is that neither Adimi nor Asfaw had anything to say about the possible application of Article 31 or Section 31 for the protection of someone charged with facilitating the entry into the United Kingdom of someone else. I see no reason why those provisions should be so applied given their terms and with whatever degree of generosity they may be read. They are plainly inapplicable to such a state of affairs on their face. I do not consider that the approach described in paragraph 1-19 of Symes & Jorro on Asylum Law Practice 2nd Edn, to which Mr Gill took us this morning alters the matter. The authors there stated:

> "As a human rights instrument, the Convention should not be given a narrow or a strict interpretation. Rather the spirit of the inquiry should be large and liberal, general and purposive without straying too far from the printed text. Central to any interpretation of the Refugee Convention is appreciation of its humanitarian purpose, one which should move with the times to maintain its currency."

34. Nor is assistance to be gained in the particular circumstances from the Convention on the rights of the child. I can, for my part, see no realistic possibility of an interpretation of Article 31 or Section 31, such that a third party assistant or facilitator might be protected where the object of his assistance is a child but not otherwise.

35. All this is so even if one assumes - which may be a benign assumption and which Mr Whittam, for the respondent, would not make - that it was always Edmir's intention to seek asylum for himself and his family.

36. For all these reasons, in my judgment, there is no legal merit in these appeals and for my part I would dismiss them.

37. It follows, if my Lord agrees, that we shall need to formulate answers to the questions in the cases stated.

38. MR JUSTICE STADLEN: For the reasons given by my Lord, Lord Justice Laws, I too agree that these appeals should be dismissed.

39. I would add one observation. It was accepted by Mr Whittam QC, for the respondent, that if the person who had knowingly tendered the passport for Edmir's two-year old son had been Edmir himself rather than his brother Mondi, and if at the same time Edmir had also knowingly tendered a false passport in his own name to secure his own illegal entry into the United Kingdom, Edmir would have had a good defence under Section 31 in respect of a charge arising out of the tendering of his own passport but not in respect of a charge of facilitating the illegal entry of his son by tendering his false passport. On its face Mr Whittam also accepted that this might be thought of as somewhat anomalous. It gives rise to the question whether, in a case such as that postulated, prosecution would be in the public interest. That is of course a separate and distinct question from whether a prosecution for facilitating illegal entry is an abuse of process. It does not arise on the case stated in this case but no doubt is a question to which prosecuting authorities would wish to give anxious consideration in an appropriate case.

40. LORD JUSTICE LAWS: As regards the questions, taking first the question as originally drafted and attached to each case, the answer given in our judgment could be the simple word none, that is to say he is not entitled to rely on the protection afforded by the Article. That is the answer to that question.

41. The question in the addendum - whether on the facts of this case the appellants could properly have been charged under Section 25 - answer yes.

42. Lastly - whether the prosecution ought to have been stayed as an abuse contrary to the purpose of Article 31 - answer no.

43. MR GILL: It may be that it takes a few days for the transcript to be prepared. I will, for my part, be taking instructions on asking the court to certify a question for the opinion of the Supreme Court. I would want a bit of time to consider how to formulate that and digest the transcript.

44. LORD JUSTICE LAWS: I do not know whether the rules have changed. I may be getting this wrong. There was at one time a problem with timing in this situation. Time for seeking leave from their Lordships' House ran from delivery of the judgment. Is this right? If you delayed in seeking your question you were diminishing your own available time - - - - -

45. MR GILL: That is absolutely right. I have had this problem more recently in one or two extradition cases.

46. LORD JUSTICE LAWS: It is in your hands. Is it two weeks or three weeks?

47. MR GILL: It is fourteen days, if I remember aright. It depends on how soon we have the transcript.

48. LORD JUSTICE LAWS: I do not think this court has power to extend it; the Supreme Court may have.

49. MR GILL: I cannot recall that it has power to extend it. I thought there was a difficulty with the extension when I last looked at it.

50. LORD JUSTICE LAWS: If you wish to seek the court's assistance in directing a question of general public importance do put it in writing, preferably having agreed its terms with Mr Whittam.

51. MR GILL: I wonder if the transcript could be provided at the earliest opportunity.

52. LORD JUSTICE LAWS: Yes. I would have thought we can ask for that, yes. Does anything else arise? I am obliged to counsel for their submissions. I will direct an expedited transcript.