A APPENDIX

In The House of Lords

B

ON APPEAL

C **FROM HER MAJESTY'S COURT OF APPEAL**

CRIMINAL DIVISION (ENGLAND)

D **B E T W E E N:**

REGINA

Respondent

E **and**

FREGENET ASFAW

Appellant

F

CASE FOR THE INTERVENER

G **(UNHCR)**

H

A

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(1) INTRODUCTION

1. Under the 1950 Statute of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), annexed to UN General Assembly Resolution 428(V) of 14.12.50, the UNHCR has been entrusted with the responsibility of providing international protection under the auspices of the UN to refugees within its mandate and by assisting States in seeking permanent solutions for refugees. As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "*[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.*"[1] UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees ("1951 Convention") and Article II of the 1967 Protocol relating to the Status of Refugees.[2] In domestic law, the UNHCR has a statutory right to intervene before the Asylum and Immigration Tribunal. In this House, the UNHCR seeks, in appropriate cases, permission to intervene to assist through submissions of principle, which permission has always been granted, as here.

2. The UNHCR has placed various materials before the House with regard to this case, as cited below. It invites particular attention to these:

   (1) UNHCR's Memorandum to the House of Commons Home Affairs Select Committee dated 1.12.05 (*UNHCR Memorandum*).

1. Id., paragraph 8(a).

2. UNTS No. 2545, Vol. 189, p. 137 and UNTS No. 8791, Vol. 606, p. 267

(2) The Geneva Expert Round Table's Summary Conclusions on Article 31, dated 8/9.11.01 (*Expert Round Table Conclusions* in *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (ed. Feller, Turk and Nicholson) (2003)).

(3) Professor Goodwin-Gill's Paper on Article 31, for the Geneva Expert Round Table (*Goodwin-Gill Paper* in Feller, Turk and Nicholson, chapter 3.1)[3].

3. The 1951 Convention confers international law obligations on States, and equivalent international law rights on refugees. The obligation (and right) in Article 31(1) of the 1951 Convention is that:

> ***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.***

4. It is understood that the following points are not in dispute in this appeal:

(1) Article 31(1) applied in this case in respect of (a) the charge under the Criminal Attempts Act 1981 (attempting to obtain services by deception) just as (b) the charge under the Forgery and Counterfeiting Act 1981 section 3 (using a false instrument with intent). These were parallel charges arising from and alleging precisely the same act: of presenting a false passport as

[3] Your Lordships' House placed weight on similar Round Table papers and conclusions in *K and Fornah v SSHD* [2006] UKHL 46 [2007] 1 AC 412.

a transit passenger at the Virgin check-in desk at Heathrow. The conviction and sentence under (b) placed the UK in direct violation of its Article 31(1) international law obligation, and infringe the appellant's Article 31(1) right.

(2) On appeal against sentence, the Court of Appeal (Criminal Division) were justified in principle in substituting for the appellant's sentence an absolute discharge, as a proper course designed to mean that the appellant would not in future be deemed to have had a conviction for any purpose: see §§25 and 28.

5. It can also be seen that:

(1) When the Divisional Court heard and decided the case of *R v Uxbridge Magistrates' Court ex p Adimi* [2001] QB 667, it was the accepted position of both the Home Office and the Crown Prosecution Service that a criminal conviction should not be sought or secured where that would breach Article 31(1). What was disputed were certain questions as to the scope and reach of Article 31(1), properly interpreted.

(2) When Parliament included section 31 in the Immigration and Asylum Act 1999 it did so to strengthen the position of refugees in domestic law, by providing for statutory: *"Defences based on Article 31(1) of the Refugee Convention"*.

6. These points draw into sharp focus:

(1) Whether and how, once it is accepted that the penalty violates the international law right and obligation (and an absolute discharge is appropriate in principle), the prosecution and conviction (and future prosecutions) can be defensible. After all, prosecution is a serious step calling for fairness and consistency where the overriding objective is to ensure that justice is done: see CPS Code for Crown Prosecutors (2004), §§1.1-1.2.

(2) Whether the introduction of the statutory defence is to be taken and applied as having reduced the protection of the refugee.

(2) ARTICLE 31(1)

7. The following key points arise in the present context as to Article 31(1) of the 1951 Convention. First, as to the non-penalisation purpose. As had been explained in the UN Secretary General's 1950 memorandum (*Adimi* at 673G; *Goodwin-Gill Paper* at p.190 n.11):

> ***A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.***

Travelling without the necessary papers, or on false ones, may therefore be a necessary reality for refugees who seek to invoke the international protection afforded to them under the 1951 Convention. Their status and presence will often be unauthorised and/or unlawful. But they should not be penalised for doing that which was necessary to their flight to secure international protection. In *Adimi* (quoted in the judgment below at §8), Simon Brown LJ referred to "*immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law*", including in relation to "*illegal entry or use of false*

documents". As the Executive Committee of the Programme of UNHCR (ExCom No.58 (XL) 1989 §(i), cited in *Goodwin-Gill Paper* p.215) noted: *"It is recognised that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered"*.

8. Secondly, as to the refugee precondition. Like other provisions of the 1951 Convention, Article 31(1) protects *"refugees"*. In order not to render the provision meaningless, Article 31(1) does not require formal recognition and also applies to asylum seekers. As UNHCR has explained (*UNHCR Memorandum §13 fn191*):

> ***Although Article 31 refers to "refugees" the effective implementation of this provision requires that it be applied to any person who claims to be in need of international protection. Article 31 would be rendered meaningless if it were applied only after formal recognition is issued. Indeed the entire construct of refugee protection would be undermined if parties to the 1951 Convention could disavow any obligations towards those who express an intention to seek asylum. Consequently, an asylum seeker is presumptively entitled to receive the provisional benefit of the 'no penalties' provision in Article 31(1) until s/he is found not to be in need of international protection in a final decision following a fair procedure.***

This approach has strong support: see *Expert Round Table Conclusions §10(g)*; *Goodwin-Gill Paper* p.193 fn.22 (citing *UNHCR Handbook §28*), p.219 §7; *Khaboka v SSHD* [1993] Imm AR 483, 489; also *Adimi* at 677H. This was a topic touched on in *R (Hussain) v SSHD* [2001] EWHC Admin 555 at §28.

9. Thirdly, the conditions as to the directness, promptness and good cause. Article 31(1) contains these three provisos:

(1) As to directness, the protection applies only to refugees "*coming directly from a territory where there life or freedom was threatened in*

the sense of article 1". This allows a refugee to come from any country of relevant danger, not just their country of national origin. It requires them to come directly, not to "*change their country of asylum for purely personal reasons*": see the record of the 1951 *Conference of Plenipotentiaries, p.6 et seq* (where this issue was discussed); and cf. *R (Badur) v Birmingham Crown Court* [2006] EWHC 539 (Admin) at §§3-4 (where the claimant had fled from Afghanistan but was said to have spent the last 7 years in India). However, as Simon Brown LJ in *Adimi* concluded (at 678B-679A; judgment below at §9): a "*short term stopover en route to such intended sanctuary cannot forfeit the protection of the article*". This approach to Article 31(1) had strong support, including from the *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers* (Feb 1999) ("*UNHCR Revised Guidelines")* Introduction, §4(cited at 678G). Post-*Adimi*, it was reinforced by the *Expert Round Table Conclusions §10(c)*:

> ***Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penaly should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country…***

See too *Goodwin-Gill Paper p.218 §4, pp.192-193*; *Weis, Travaux and Commentary, Article 31*; Hathaway, *The Rights of Refugees under International Law* ("*Hathaway"), pp 393-399*.including *p394 fn 514* citing *UNHCR's Revised Guidelines* §4.

(2) As to promptness, the protection applies only to refugees

"*provided they present themselves without delay to the authorities*". As the *Expert Round Table Conclusions §10(f)* put it:

> ***'Without delay' is a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice. In this context it was acknowledged that refugees and asylum-seekers have obligations arising out of Article 2 of the 1951 Convention.***

See too *Goodwin-Gill Paper p.219 §6*; *Adimi* at 679A-H (citing various source including the *UNHCR Revised Guidelines*, §4).

(3) As to <u>good cause</u>, the protection applies only to refugees "*provided they … show good cause for their illegal entry or presence*". As the *Expert Round Table Conclusions §10(e)* put it:

> ***Having a well-founded fear of persecution is recognized in itself as 'good cause' for illegal entry. To 'come directly' from such country via another country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as 'good cause' for illegal entry. There may, in addition, be other factual circumstances which constitute 'good cause'.***

See too *Goodwin-Gill Paper p.218 §5*. As explained in *Adimi* (at 679H): "*this condition has only a limited role in the article. It will be satisfied by a genuine refugee showing that he was reasonably travelling on false papers*".

10. Fourthly, the application to <u>transit</u> passengers. As UNHCR has put it (*UNHCR Memorandum §13*):

> ***In granting this protection from penalization, Article 31(1) recognises, inter alia, that departure and entry into host countries by irregular means may be a method used by refugees fleeing persecution to reach safety as refugees are often forced to flee their own country in fear of their lives. In UNHCR's view, a purposive interpretation of Article 31 will also include situations where a person seeking international protection arrives in the UK by irregular means without a valid travel document; whether with a false passport, a passport s/he is not***

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> ***entitled to or without a passport. Refugees and asylum seekers in transit to a final destination country could equally benefit from Article 31 of the 1951 Convention, if all the conditions of Article 31 are met.***

See too UNHCR Comments 3 March 2003 on the October 2002 Home Office API pp.1-2; UNHCR Comments April 2004, §2 and further *Hathaway* p.406. This conclusion fits with the purpose of the protection (§7 above), and the fact that a "*short term stopover*" would not prevent satisfaction of the "*coming directly*" condition (see §9(1) above). It is an approach applied in *Adimi* at 687 and by the Court of Appeal in this case (judgment below at §10). It is not in dispute. Indeed, the appellant was a transit passenger who has been acquitted under the statutory defence based on Article 31(1).

11. Fifthly, the meaning of penalties. Article 31(1) imposes an obligation on the State not to "*impose penalties*" on the refugees whom it protects. As explained by the *Expert Round Table Conclusions §10(h)*:

> ***The term 'penalties' includes, but is not necessarily limited to, prosecution, fine, and imprisonment.***

See too *Goodwin-Gill Paper p.219 §9*.

12. Sixthly, the State obligation which arises.

(1) Like the rights and protections in the ECHR, Article 31(1) of the 1951 Convention is intended to confer a right which is practical and effective, and the State's obligation is one of result, not means.

(2) As the UNHCR has put it (*UNHCR Memorandum §14*)[4]:

> ***The effective implementation of these obligations requires <u>concrete steps</u> at national level to <u>ensure</u> that refugees and asylum seekers within its terms are not subject to penalties.***

B

(3) As the *Expert Round Table Conclusions §§6-7, 9* explain:

> ***6. The effective implementation of these obligations <u>require concrete steps at the national level</u>. In the light of experience and in view of the nature of the obligations laid down in Article 31, States should take the necessary steps to ensure that refugees and asylum seekers within its terms are not subject to penalties…***

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> ***7. … international obligations … are implemented most effectively where accountable national mechanisms are able to determine the applicability of Article 31, having regard to the rule of law and due process, including advice and representation.***

D

> ***…***

> ***9. The incorporation and elaboration of the standards of Article 31 in <u>national legislation</u> … would be an important step for the <u>promotion</u> of compliance with Article 31 and related human rights provisions.***

E

(4) To like effect, is the *Goodwin-Gill Paper p.218 §§1-3 & 12*:

F

> ***1. States party to the 1951 Convention and the 1967 Protocol undertake to accord certain standards of treatment to refugees, and to guarantee to them certain rights. They necessarily undertake to implement those instruments in good faith.***

G

> ***2. States have a <u>choice of means</u> in implementing certain Convention provisions, such as Article 31, and may elect to use legislative incorporation, administrative regulation, informal and ad hoc procedures, or <u>a combination thereof</u>. Mere formal compliance is not in itself sufficient to discharge a State's responsibility; the test is whether, in the light of domestic law and practice, including the exercise of administrative discretion, the***

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[4] Underlining in quotations connotes emphasis added.

State has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.

3. Particular attention needs to be paid to situations where the system of administration may produce results incompatible with the applicable principle or standard of international law.

...

12. Where a State leaves compliance with international obligations within the realm of executive discretion, a policy and practice inconsistent with those obligations involves the international responsibility of the State. The policy of prosecuting or otherwise penalizing illegal entrants, those present illegally, or those who use false travel documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant's claim, amount to a breach of a State's obligations in international law.

(5) See too Professor Grahl-Madsen's 1962/3 *Commentary on the Refugee Convention 1951* (republished by UNHCR's Division of International Protection in 1997):

> ***Article 31(1) obligates, however, the Contracting States to amend, if necessary, their penal codes, to ensure that no person entitled to benefit from the provisions of this paragraph shall run the risk of being found guilty of any offence. If proceedings should have been instituted against a refugee, and it becomes clear that his case is falling under the provisions of Article 31(1), the public prosecutor will be duty bound to withdraw the case or else see to it that the refugee is acquitted. In no case may a judgement be executed, if the offence is one to which Article 31(1) applies.***

See too *Goodwin-Gill Paper p.32 §97.*

(3) SECTION 31

13. Section 31 of the Immigration and Asylum Act 1999 provides 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—

(a) Part I of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);

(aa) section 25(1) or (5) of the Identity Cards Act 2006;

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

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

(4) In Scotland, the offences to which this section applies are those—

(a) of fraud,

(b) of uttering a forged document,

(ba) under section 25(1) or (5) of the Identity Cards Act 2006

(c) under section 24A of the 1971 Act (deception), or

(d) under section 26(1)(d) of the 1971 Act (falsification of documents),

and any attempt to commit any of those offences.

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

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

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

(8) A person who—

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

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

may apply to the Criminal Cases Review Commission with a view to his case being referred to the Court of Appeal by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(9) A person who—

(a) was convicted in Scotland of an offence to which this section applies before the commencement of this section, but

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

may apply to the Scottish Criminal Cases Review Commission with a view to his case being referred to the High Court of Justiciary by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(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.

14. In Professor Grahl-Madsen's language (§12(5) above), section 31 was an amendment of the domestic penal code as a means of ensuring no risk of a finding of guilt in a case protected by Article 31(1). In Professor Goodwin-Gill's language (§12(4) above) section 31 was a choice of a legislative means, adopted alongside and in combination with administrative practice including as to the executive discretion of the public prosecutor. In the language of the Expert Round Table (§12(3)), section 31 was an incorporation and elaboration in national legislation of the Article 31 standards, as an important concrete step for the promotion of compliance with Article 31.

15. The following key points can be made about the enactment of section 31. First, section 31 was a legislative step which took place against the backcloth of the *Adimi* case, decided on 29 July 1999. The UNHCR intervened in writing in *Adimi*, in the Sorani case (see UNHCR's written submissions dated November 1998 and 11 March 1999) and in the Adimi case itself (see UNHCR's submissions dated 17 November 1998). In that case it was plainly envisaged that there would be effective protection under Article 31(1) standards, through responsible use of the power to prosecute, and safeguards in the criminal court, with or without the enactment of a statutory defence. The UNHCR observes that:

(1) As the Divisional Court recorded in *Adimi*, the joint position of the respondents – the Secretary of State and the Crown Prosecution Service – was that (680G):

the respondents agree that steps must now be taken to ensure

that article 31 protection is accorded its proper place in domestic law and practice.

(2) Accordingly, the Court's ruling focused on the interpretation of Article 31 as a matter of law, its approach being that (at 684B):

> ***Given that the respondents now propose to give full effect to article 31 protection, the court is entitled to ensure that its true scope has been properly understood ...***

Having been told that administrative arrangements would be addressed by a multi-agency group (677C), Simon Brown LJ was able to conclude with these words (688B-C):

> ***Article 31 must henceforth be honoured.***

(3) On the issue of interpretation, the ratio was that the claimants were entitled to exemption from penalty under Article 31: see 687B, 687H. That meant, as to the case which was still live (687B):

> ***... it must surely follow that the prosecution still outstanding against him will be discontinued.***

(4) Simon Brown LJ took the view (at 686D) citing *R v SSHD, ex p Ahmed* [1998] INLR 570, 583 (Lord Woolf MR) and 591 (Hobhouse LJ), that refugees were:

> ***entitled to the benefit of article 31 in accordance with the developing doctrine of legitimate expectations.***

Newman J indicated that he agreed (see 691E):

> ***If, as in my judgment is the case, these applicants can establish a legitimate expectation that protection under article 31(1) would be afforded to them ...***

The need to protect this legitimate expectation was subsequently expressly confirmed in the administrative

arrangements which were promulgated post-*Adimi.*

(5) The clear understanding was that there were to be (a) arrangements to prevent a prosecution being maintained in the face of Article 31(1), with or without (b) the enactment of a substantive defence, but (c) with the safety net of invoking the abuse of process jurisdiction. In the words of Simon Brown LJ (at 684D-F):

> ***Provided that the respondents henceforth recognise the true reach of article 31 as we are declaring it to be, and put in place procedures to ensure that those entitled to its protection (ie travellers recognisable as refugees whether or not they actually have claimed asylum) are not prosecuted, at any rate to conviction, for offences committed in their quest for refugee status, I am inclined to conclude that, even without enacting a substantive defence under English law, the abuse of process jurisdiction is able to provide a sufficient safety net for those wrongly prosecuted.***

16. Secondly, section 31 was plainly intended to be in the role of a residual safety net, alongside other protections, designed as a whole to avoid the prospect of a violation of Article 31(1). UNHCR notes that:

(1) This was to be expected in the light of *Adimi*. A combination of safeguards, including the possibility of a statutory defence, is precisely what Simon Brown LJ had described at 684D-F (§15(5) above). A key response was to be administrative arrangements involving the public prosecutor.

(2) This combination approach is also in line with the principled approach of the *Expert Round Table* (§12(3) above) and the analysis of Professors Goodwin-Gill and Grahl-Madsen (§§12(4) and (5) above).

(3) It is supported by the Explanatory Notes to the 1999 Act, which stated (§114):

> ***The defence is intended to supplement the administrative arrangements introduced in mid-1999 which are intended to identify at an early stage those cases where Article 31(1) may be relevant.***

(4) Dealing with this safety-net role was the purpose and function of section 31, and the mischief to which it was directed, as described to Parliament. As Lord Williams of Mostyn said, in promoting the section 31 solution in the House of Lords on 18 October 1999 (Hansard HL cols 855, 857):

> ***... we want an outcome which properly accommodates Article 31(1) asylum seekers and the difficulties raised by Lord Justice Simon Brown ...***
> ***We say that we recognise Article 31(1) and that the administrative directions exist to avoid prosecutions which are inappropriate. If inappropriate prosecutions get through the sieve, the defence exists.***

Lord Williams repeated the position on 2 November 1999 (Hansard HL col. 784):

> ***Amendment No.21 was tabled in response to the judgment in the case of Adimi and others which was handed down the day after the Committee stage of the Bill had been completed in this House...***
>
> ***<u>The purpose of the amendment is to ensure that someone who comes within Article 31(1) of the United Nations Convention of 1951 is properly protected and does not have a penalty imposed on him on account of his illegal entry or presence</u>. As I told your Lordships on an earlier occasion, we have already put in place administrative procedures to identify at an early stage Article 31(1) issues. Ideally, therefore, in relevant cases the matter would never come to court. Sometimes these arrangements will fail. They will fail to identify someone who comes within Article 31(1) and this amendment is therefore a further safeguard...***

(5) Macdonald and Webber, *Immigration Law and Practice* (6th ed. 2005) ("*Macdonald and Webber*") describe (at §14.39 fn.1) the front line administrative arrangements which were in fact adopted:

> ***A joint Memorandum of Good Practice, drafted by representatives of the police, the Home Office, the Crown Prosecution Service and the Law Society in the wake of the Adimi judgment, indicated that immigration officers, police and prosecutors should apply both Article 31(1) of the Refugee Convention and the statutory defence in deciding whether to investigate, initiate or continue a prosecution, and stated that only in the clearest of cases (for example, where the suspect is a British citizen or says nothing to suggest any fear of persecution) should police proceed to charge. It was never formally published. For details see the previous edition of this work, at 14.26.***

(6) In the light of *Adimi*, the protection of Article 31(1) was permitted to take effect in another way, namely as a direct defence in the criminal court. This direct defence is supported by the terms of section 31 itself. Section 23(8)(b) dealt with the position of those recently convicted and so imprisoned prior to the entry into force of section 31. In doing so, Parliament made very clear that it recognised an underlying, direct Article 31(1) defence. That alone makes sense of section 31(8):

> ***A person who –***
> ***(a) was convicted in England and Wales or Northern Ireland of an offence to which this section applies before the commencement of this section, but***
>
> ***(b) at no time during the proceedings for that offence argued that he had <u>a defence based on Article 31(1)</u>***
>
> ***may apply to the Criminal Cases Review Commission with a view to his case being referred to the Court of Appeal by the Commission on the ground that he would have had a defence under this section had it been in force at the relevant time..***

(7) This provision (and section 31(9), in respect of Scotland) plainly

contemplates that such a person could have raised Article 31(1) as a valid defence and, if he did so, would only have failed (and so been convicted) if he failed to come within its terms. Otherwise it makes no sense and would have bizarre consequences: a person seeking to raise an invalid defence (Article 31(1)) would alone be denied a referral by the Criminal Cases Review Commission ("CCRC").

(8) The existence of a direct Article 31(1) defence in a case to which section 31 does not apply is also supported by authority: see the *Badur* case (§9(1)). In that case, the analysis and the ratio of the case proceeded on the basis that – in relation to an offence not listed in section 31 – the accused did not have the statutory defence, but could rely directly on Article 31(1): see §§9 and 19. The DPP was represented and did not dispute the availability of the direct defence.

(9) In this context attention is invited to *Abwnawar v Crown Prosecution Service*; *CCRC Statement of Reasons for Reference to the Crown Court* (CCRC Ref. 00555/2003); *Ruling of HHJ McGregor-Johnson* (Isleworth Crown Court 1 November 2005). In that case, transit passengers convicted in 1998 under both (a) the Forgery and Counterfeiting Act 1981 and (b) the Criminal Attempts Act 1981, succeeded in obtaining a CCRC referral and crown court ruling vacating their guilty pleas. That outcome turned on Article 31 (see the crown court ruling §7), which was successfully invoked by reference to the common law principle of abuse of process (see ruling at §§2 and 22).

17. Thirdly, the obvious and stated intention of section 31 was to secure the protection required of the UK by Article 31(1). The UNHCR points out that:

(1) Section 31 was framed by reference to Article 31(1), which is entitled: "Defences based on Article 31(1) of the Refugee Convention".

(2) The Explanatory Notes (§113) provided that:

> ***This defence ... is modelled on Article 31(1) of the Refugee Convention ...***

(3) The function and purpose intended for section 31 was stated in terms to be:

> ***to ensure that someone who comes within Article 31(1) of the United Nations Convention of 1951 is properly protected and does not have a penalty imposed on him***

(4) As has been recognised (see Home Office API October 2006 pp.2-3):

> ***Section 31 ... is Parliament's interpretation of what Article 31 of the Convention requires ...***
>
> ***Section 31 represents Parliament's interpretation of what is required by Article 31 of the Refugee Convention ...***

See, to similar effect, Hansard 18 May 2004 HL Col.662 (Lord Bassam).

(5) This reinforced what Simon Brown LJ had said in *Adimi* (at 686E):

> ***Parliament can hardly have intended ...that those entitled to claim asylum under the rules should nevertheless still be prosecuted in contravention of the Convention.***

18. Fourthly, in certain identifiable respects, section 31 contained Parliament's elaboration of what Article 31 – properly interpreted – requires. The UNHCR makes the following observations:

(1) It is neither surprising nor impermissible that Parliament should include elaboration of Article 31 standards in section 31. As the *Expert Round Table Conclusions §9* put it (§12(3) above):

> ***The incorporation and elaboration of the standards of Article 31 in national legislation ... would be an important step for the promotion of compliance with Article 31 ...***

(2) In relation to the refugee precondition (§8 above), Parliament provided in section 31(6) and (7) that:

> ***(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.***

(3) In relation to directness (§9(1) above), Parliament provided in section 31(1) and (2) that:

> ***(1) It is a defence for a refugee ... having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention) ...***
>
> ***(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.***

(4) In relation to promptness (§9(2) above), Parliament provided in section 31(1)(a) and (c) that:

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> ***(1) It is a defence for a refugee ... to show that ... he***
>
> ***(a) presented himself to the authorities in the United Kingdom without delay;***
>
> ***...***
>
> ***(c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.***

B

(5) These aspects of section 31 go beyond the wording of Article 31(1) and were described in the Explanatory Notes (at §113) and in Hansard (see eg. 2 November 1999 HL Col. 784-785). Questions would arise – though not for determination in the present appeal – as to whether and to what extent Parliament's formulation in these respects would involve a *"protection gap"* compared to Article 31(1). If the House wishes to consider such questions, the UNHCR will seek to assist. The UNHCR has described the position under Article 31(1) above and has consistently called for an Article 31(1) compatible application of section 31: see, e.g., UNHCR Comments 3 March 2003 pp.2-3. The UNHCR makes two further observations.

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(6) In the first place, even where narrower than that articulated in *Adimi*, the statutory formulation can be seen, not as a deliberate part-implementation of Article 31(1), but rather as *"Parliament's interpretation of <u>what is required by Article 31</u>"*. That is how it is described in the relevant Home Office API (October 2006, pp.2-3). It, in turn, reflects what was said to Parliament, regarding a view of Article 31(1) which the UK is *"entitled"* to take (Hansard 2 November 1999 HL Cols.784-785). After all, the stated purpose was said to be (§16(4) above):

G

H

> ***to ensure that someone who comes within Article 31(1) of the United Nations Convention of 1951 is properly protected and does not have a penalty imposed on him***

APPENDIX

(7) In the second place, ultimately the true and autonomous meaning of Article 31(1) of the 1951 Convention is a matter of law which Your Lordships' House would decide in a case in which it arose: cf.*R v SSHD, ex p Adan* [2001] 1 AC 477, 517; *R (Mullen) v SSHD* [2004] UKHL 18 [2005] 1 AC 1 at §36. There would only be a "*protection gap*" if (a) section 31 could not be read compatibly (eg. as to the meaning of "*stopped*" in s.31(2)) and (b) no alternative protection beyond section 31 were available. Where any such gap threatens to arise, the UNHCR's position is that the UK and its relevant authorities would be required to close it, that being the State's obligation.

19. In section 31, Parliament included a list of relevant offences by reference to which the statutory defence arose. This list is crucial to the issue in the present case. The UNHCR observes that:

(1) The natural explanation is that Parliament was seeking to identify a list of offences which between them would directly cover the range of relevant actions in respect of which (a) the State could impose criminal sanctions, but (b) Article 31(1) required protection.

(2) Accordingly, in identifying a list of offences, Parliament originally included (in s.31(3)): (a) making, copying, using or possessing for use a false instrument (Forgery and Counterfeiting Act 1981 Part I); (b) seeking to enter or remain by deception (Immigration Act 1971 s.24A); and (c) using or possessing for use a passport, entry clearance etc (1971 Act

s.26(1)(d)). Equivalent offences were listed for Scotland: section 31(4). Moreover, when possessing a false or improper foreign passport or other identity document (with intent or without reasonable excuse) was dealt with separately in 2006, Parliament added this to the list: see Identity Cards Act 2006 s.25(1).

(3) It can readily be seen that this range of activity, by reference to this list of specific offences, was intended to cover the field of activity which the State criminalised but Article 31(1) protected. It reflected the non-penalisation purpose of Article 31(1) (§7 above), focusing on those who travel without the necessary papers, or with false ones, who enter or remain by deception, or who are found in possession with false papers because their quest for asylum has reasonably involved them in doing so, including as a transit passenger (§10 above). Insofar as the described range of activity proved to be incomplete for Article 31(1) purposes two things could be expected to follow. First, the envisaged arrangements ought, in any event, to prevent a prosecution; see §16 above. Secondly, the Secretary of State was expressly given power to expand the statutory list; see section 31(10).

(4) This is strongly supported by the legislative history. In the light of the *Adimi* judgment, two proposed amendments to the 1999 Bill were suggested. One was moved by the Lord Bishop of Southwark (Amendment No.29) and would have prohibited prosecutions of asylum seekers without the consent of the Attorney General. The Bishop's amendment involved a list of

offences: s.24A and s.26(1)(d) of the 1971 Act, and ss.3 and 5 of the Forgery and Counterfeiting Act 1981 (Hansard 18 October 1999 Col.843). The other was moved by Lord Bassam (Amendment No.30), promoted by the Government, and became section 31. It involved an equivalent list of offences. It was said by the Lord Bishop that (Col.845):

> ***... both seek to honour Article 31(1) of the refugee convention ...***

Lord Williams of Mostyn, promoting the Government amendment, explained that (Cols.853, 855):

> ***I do not believe we have differed in our fundamental purpose.***
>
> ***we want an outcome which properly accommodates Article 31(1) asylum seekers ...***

He later added, in relation to the list of offences (2 November 1999 HL Col.785):

> ***The offences for which the new defence will be available are listed in subsections (3) and (4). I believe that we have it right. There is quite a degree of conformity between this list and the offences listed in the amendment tables by the right reverend Prelate the Bishop of Southwark ...***

(5) There is no part of the public record which remotely suggests that in drawing up the list of offences, Parliament was intending that the self-same conduct would be prosecuted by another name, in breach of Article 31(1). That would be flatly contrary to the idea of inappropriate prosecutions being avoided (§16 above). It would be inconsistent with the stated purpose (§18(6) above):

> ***to ensure that someone who comes within Article 31(1) of the United Nations Convention of 1951 is properly protected and does not have a penalty imposed on him***

It would also be ironic: an offence under the Criminal Attempts Act had been included in *Adimi*, and so was covered by the judgment, and section 31 was intended "*to give effect to this ruling*" (18 October 1999 Col.844).

(6) No sensible rationale can be attributed to Parliament having decided: (a) to confer a statutory defence in respect of a particular action (eg. possessing a false passport or presenting it at an airline desk), so as to secure Article 31(1) compliance; but (b) with the consequence that prosecution would ensue for the self-same action by repackaging the offence under the label of another and more general offence, so as to be in breach of Article 31(1). That makes no sense at all.

(7) Yet this is precisely what has happened. With the (obiter) blessing of the lower Courts in cases like *Hussain* and *R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), it has been said that: (a) section 31 is the sole focus for protection; (b) the self-same action which would be a listed offence and attract a statutory defence can be prosecuted by another name; and (c) provided that there is no breach of section 31 as framed on its face prosecution and conviction are proper in the light of section 31. Far from respecting the position as envisaged in 1999, current arrangements adopt the stark position that beyond the listed offences in section 31, neither it nor Article 31(1) have any relevance. See the latest *Home Office API* (October 2006).

(8) The current position also involves invoking criminal offences in the Asylum and Immigration Act 2004 (see *R v Navabi* [2005] EWCA Crim 2865, §28), notwithstanding express Ministerial reassurance that the 2004 statutory defence was intended to be the equivalent of "good cause" in Article 31(1) and section 31(1)(b) (see Hansard 13 January 2004 HC Standing Committee B Col.118-120).

(9) Viewed in this way, the enactment of a statutory defence – far from being an important and concrete step to promote compliance with Article 31(1) – has weakened the position of asylum seekers compared to the position which immediately preceded it. Far from being an amendment of the penal code to ensure that no person protected by Article 31(1) runs the risk of being found guilty of an offence, section 31 will have increased that risk. By legislating, Parliament would have made the position worse.

(10) The consequences are striking. Although the prosecution may (as in *Pepushi* itself) drop the parallel charge, it may not (as in this case). So, in the present case the existence of a protection based on an international law right leading to an acquittal did not prevent a conviction and sentence for the self-same action under a parallel charge in recognised breach of the same right.

(11) In *R v Makuwa* [2006] EWCA Crim 175 [2006] 1 WLR 2755 a mother from the DRC arrived at Heathrow on a false passport,

with her two children, and claimed asylum. She was convicted of using a false instrument, but a misdirection by the trial judge on the section 31 defence led to the conviction being overturned. In addition, she had been prosecuted and convicted of facilitating an illegal entrant under s.25(1) of the 1971 Act. On the basis that she lacked the statutory defence, she was convicted, sentenced to 12 months' imprisonment and did not appeal. The illegal entrants were the two children who had accompanied her. That is a grotesque outcome.

(12) The authors of *Macdonald and Webber* put the position reached by domestic law and practice graphically (at §14.38):

> ***That asylum seekers can be deprived of the full benefit of such a fundamental aspect of refugee protection by a very restrictive interpretation is bad enough; that the UK courts can regard this situation with equanimity indicates an alarming return to the most narrowly traditional view of the constitutional role of Parliament and the courts in respect of international human rights law.***

(4) SOLUTIONS

20. There are various solutions which can be advanced. The UNHCR makes observations as to four of them.

21. First, there is the response adopted by the Court of Appeal and not challenged by the Respondent: that the conviction stands, but that the sentence should be replaced with an absolute discharge. The UNHCR observes:

(1) This solution was regarded as inadequate by the Divisional Court in *Adimi*:

> ***[T]here is not the least doubt that a conviction constitutes a penalty and that article 31 impunity is not afforded, as at one point [counsel] suggested it would be, simply by granting an***

absolute discharge. The gravity of a conviction for a refugee needs little emphasis…

(2) An absolute charge is not adequate: there can be no conviction if an individual is entitled to the protection of Article 31: see Grahl-Madsen (§12(5) above) and *Hathaway p.407 fn 571.*

(3) There can be no good reason in principle why, if penalisation is required to be avoided under an international human rights obligation, it is appropriate to prosecute and convict, only for there in principle to be an absolute discharge (and especially on appeal). The decision to prosecute is, for obvious reasons, contra-indicated where "*the court is likely to impose a nominal penalty*": see CPS Code for Crown Prosecutors (2004), §5.10(a).

(4) If it is justified in principle (as is common ground) for there to be an absolute discharge, there can be no good reason for not grasping the nettle and dealing with the issue in relation to prosecution and conviction.

22. <u>Secondly</u>, there is the solution of a <u>statutory defence</u> found to arise under section 31 itself. The UNHCR observes:

(1) It would be possible to reflect the fact that section 31 was intended to encompass a range of activities (see §19 above), if it were read as follows:

It is a defence for a refugee charged with <u>conduct which does or would constitute</u> an offence to which this section applies to show that ...

(2) This interpretation would ensure that section 31 is compatible

with the 1951 Convention. Further to Simon Brown LJ's comments in *Adimi*¸ it avoids a situation where a prosecution defeats the purpose of the Convention and section 31, by charging the very same conduct which could be charged under a listed offence but would be protected under the statutory defence, by characterising it as an alternative unlisted offence. It is a solution which elevates content over labelling, substance over form.

(3) This can be supported in at least three ways. First, section 2 of the Asylum and Immigration Appeals Act 1993 provides:

> ***Nothing in the immigration rules (within the meaning of the [Immigration Act 1971]) shall lay down any practice which would be contrary to the Convention.***

Lord Steyn, commenting on this provision in *R (ERRC) v SSHD* [2004] UKHL 55 [2004] 2 AC 1 stated (§§41-42),

> ***It is necessarily implicit in section 2 that no administrative practice or procedure may be adopted which would be contrary to the Convention. After all, it would be bizarre to provide that formal immigration rules must be consistent with the Convention but that informally adopted practices need not be consistent with the Convention ... Parliament must have intended that the strengthened reference to the Refugee Convention in primary legislation would be treated by the courts as an incorporation of the Refugee Convention into domestic law.***

These comments echo those of Simon Brown LJ in *Adimi* where he observed (686):

> ***True it is that section 2 of the 1993 Act is by its terms strictly concerned only with the Immigration Rules. Parliament can hardly have intended, however, that those entitled to claim asylum under the rules should nevertheless still be prosecuted in contravention of the Convention.***

It follows that an informally adopted practice (whether arising out of, or in relation to, a statutory provision or not) must be consistent with the 1951 Convention.

(4) Interpretation of the immigration rules or a statutory provision (which gives rise to, or in relation to which there is, an informally adopted practice) in accordance with the exhortation in section 2 of the 1993 Act may be undertaken by analogy with the principles developed under section 3 of the Human Rights Act 1998. Thus, the section 2 principle can be invoked even where there is no ambiguity in the immigration rules/statutory provision (*Ghaidan v Godin-Mendoza* [2004] UKHL 30 [2004] 2 AC 557, §§44-45) and can be invoked so as to read words into the immigration rules/statutory provisions (*R v Lambert* [2001] UKHL 39 [2002] 2 AC 545, §§80-81).

(5) The Court of Appeal in this case observed (judgment below §22),

> ***It is apparently standard practice when an asylum seeker is attempting to leave this country for another place of refuge using false documents to combine a charge of infringement of the Forgery and Counterfeiting Act with a charge of attempting to obtain air services by deception. It seems to us likely that this practice reflects a policy.***

(6) By virtue of section 2 of the 1993 Act this practice, and the criminal court response to it through the statutory protection in section 31, must be made consistent with the 1951 Convention and, in particular, with Article 31. For this practice to be consistent with Article 31 it must be possible for the statutory defence described in section 31(1) to be used in response to a

charge of attempting to obtain air services by deception where that charge is laid in relation to the same acts which lead to a charge under the Forgery and Counterfeiting Act 1981 (or indeed under section 31(3)(aa), (b) or (c)).

(7) Alternatively, it is possible to arrive at this solution by use of the principle of legality. This canon of interpretation requires general words in primary or subordinate legislation to be construed compatibly with fundamental rights on the basis that Parliament cannot have intended, by using general words, to override such rights (*R v SSHD ex p Simms* [2000] 2 AC 115 at 131 *per* Lord Hoffmann). The principle is displaced by express language or necessary implication that Parliament intended to legislate contrary to the fundamental right in question: *Simms* at 131.

(8) The general words in section 31, and in particular in section 31(3), require to be interpreted compatibly with the fundamental right to seek asylum without being penalised. That such a right can properly be recognised by the common law is clear from the application of the "anxious scrutiny" principle which, alongside the common law principle of legality, serves as the means of protecting fundamental rights at common law (see *Simms* at 130B (re anxious scrutiny) and 130E-G (re principle of legality)). Speaking of the anxious scrutiny doctrine in *R (Q) v SSHD* [2003] EWCA Civ 364 [2004] QB 36 the Court of Appeal explained in terms that (at §115):

> ***... it is apt in our judgment to apply to the right to seek asylum, which is not only the subject of a separate international convention but is expressly recognised by article***

14 of the Universal Declaration of Human Rights (1948) (Cmd 7662).

(In the context of ECHR rights, the common law anxious scrutiny doctrine and principle of legality now find their statutory equivalent in sections 6 and 3 respectively of the Human Rights Act 1998, hence Lord Hoffmann's observations in *Simms* at 131G-132B.) An interpretation of section 31(3) that is compatible with this fundamental right, and with Article 31 of the 1951 Convention, is set out above: §22(6).

(9) Further or alternatively, it is possible to arrive at this solution of a statutory defence by use of the presumption of compatibility.[5] As Lord Diplock explained in *Garland v British Rail* [1983] 2 AC 751 at 771:

> ***"[I]t is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."***

See further *A v SSHD* [2005] UKHL 71 [2006] 2 AC 221 (Lord Bingham, §27). See too Lord Bridge in *R v SSHD ex p Brind* [1991] 1 AC 696 at 747 referring to a provision which is

> ***capable of a meaning which either conforms to or conflicts with the Convention.***

5. It is a recognised principle of the rule of law that the state should be required to comply with its obligations in international law: see Lord Bingham, *The Rule of Law*, Sixth Sir David Williams Lecture, page 29.

The need for a compatible interpretation is the more compelling where the relevant statutory provision was enacted to give effect to an obligation in an international instrument: see eg. *R (Mullen) v SSHD* [2005] 1 AC 1 at §5 (Lord Bingham).

(10) There is strong authority recognising the need, so far as possible, to read and apply domestic legislation compatibly with the rights and obligations arising throughout the 1951 Convention. A graphic example is *Saad v SSHD* [2001] EWCA Civ 2008 at §§9; 14-16; 72.

23. Thirdly, there is the solution of a non-statutory defence arising independently of section 31, i.e. in a case to which section 31 does not apply. The UNHCR observes:

(1) Section 31 provides only that the statutory defence arises in the situations to which it is applicable. Section 31 does not state that no Article 31 defence arises in a situation to which section 31 is inapplicable. As to such a defence, see §16(6)-(9) above.

(2) Section 31 does not exclude the possibility of a defence directly based on Article 31, where section 31 is inapplicable but Article 31 would protect the individual. Section 31(8)(b) reflects the fact that a listed offence, outside the ambit of section 31 because it was not in force, could properly be the subject of a direct Article 31 defence.

(3) The same logic can apply to a situation where section 31 is inapplicable, because the offence is outside the ambit of section

31 as being unlisted, but where Article 31 would protect the individual. See *Badur* §16(8) above.

(4) There is no reason why a criminal law defence must be statutory in nature. A defence may in principle arise at common law, the common law is not static, and international law can inform its content (see, e.g. *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976, §13 (Lord Bingham) and §27 (Lord Hoffmann)). Moreover, there is a link between the protectionist rationale of Article 31(1) (see §7 above) and concepts of 'necessity' recognised at common law. The scope of the common law doctrine of necessity is uncertain and developing: cf. *R v Navabi* at §31.

(5) This would promote, and not defeat, the legislative purpose (see §17 above) and ensure compatibility with the UK's international obligations and international human rights (see §22(10) above).

24. Fourthly, there is the solution of the prosecution being characterised as an abuse of process (and an abuse of power). The UNHCR observes:

(1) The safety net of abuse of process was recognised by the Divisional Court in *Adimi*. As Simon Brown LJ put it at 684E:

> ***..I am inclined to conclude that, even without enacting a substantive defence under English law, the abuse of process jurisdiction is able to provide a sufficient safety net for those wrongly prosecuted.***

(2) The availability of abuse of process in principle was jointly recognised in *Adimi* by both the Secretary of State and the Crown Prosecution Service. Their submission to the Court was recorded by Simon Brown LJ as follows (at 682F):

> ***It is, submit, the respondents, the prosecuting authorities and***

the judicial authorities hearing criminal proceedings, rather than the Secretary of State, who bear primary responsibility for ensuring the United Kingdom's compliance with article 31. Despite the non incorporation of article 31 into domestic law, they contend, it would be open to the trial court (and thereafter, if necessary, any appeal court) to ensure that article 31 is honoured. On an abuse of process application for non-compliance, the court would hear the relevant evidence and determine the factual issues.

The availability of abuse of process was also recognised in the *Abwnwar* case (see §16(9) above)

(3) There is nothing novel in compatibility with international law being a result which can be achieved through "*an application of common law principles*": cf. *A v SSHD* [2005] UKHL 71 [2006] 2 AC 221 at §112 (Lord Hope). That the result is achieved through a <u>combination</u> of protections, in part by but not limited to the statutory defence, is consistent with (a) the purpose and intent of the 1999 Act (see §16 above), (b) the observations of Goodwin-Gill (§12(4) above) and (c) Simon Brown LJ's observation regarding the use of abuse of process (see §24(1) above)

(4) The Court of Appeal in the present case considered that there were strong grounds for reliance on abuse of process: see judgment below at §24. They posed the question whether it could be an answer for the prosecution to rely on the rationale that its exercise of power supported the carrier penalty regime. No such rationale can be relied on to justify such a prosecution. If support of carrier penalties were a basis for a prosecution in breach of Article 31(1), then it would always be so. There is invariably such a link between Article 31(1), prosecutions and

carrier penalties: see *Adimi* at 676D; also *Kola v Secretary of State for Work and Pensions* [2007] UKHL 54 at §42 (Lord Brown).

(5) The abuse of process jurisdiction ultimately involves the criminal court (and appellate courts) in an exercise of discretion: see, e.g. *R v Horseferry Road Magistrates' Court ex p Bennett* [1994] 1 AC 42 *per* Lord Lowry at 74:

> ***I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.***

See too *R v Latif* [1996] 1 WLR 104. It is well-established that international law obligations properly inform the exercise by the Court of discretion, so that it can be exercised to ensure compatibility with international law: see for example *R v Khan* [1997] AC 558 at 571 *per* Lord Slynn and *AG v Guardian Newspapers* [1987] 1 WLR 1248 at 1296-1297 *per* Lord Templeman.

(6) The international law implications of invoking the criminal process can therefore, in principle, be addressed by the criminal court, in the context of a judicial discretion. In addition, it provides the means of examining the exercise of executive discretion by the state prosecuting authorities. The abuse of process jurisdiction of the criminal court has been recognised as (a) "*an inherent power and duty*" available in a case of "*misuse of state power*", (b) applying where the prosecution would not be

"fair" or would be "*deeply offensive to ordinary notions of fairness*" or "*an affront to the public conscience*", and (c) allowing the court to refuse to countenance action which threatens a basic human right: see *R v Looseley* [2001] 1 WLR 2060 at §§1, 19, 25 (Lord Nicholls), 40 (Lord Hoffmann). Abuse of process has the advantage that the forum for argument is the criminal court, rather than collateral challenge by judicial review based on abuse of power by the prosecution. There are doubtless good reasons why abuse of process (and abuse of power) should be raised directly and not by satellite public law litigation which delays the criminal process. This was the conclusion on this aspect of *Pepushi* at §49.

(7) As to the relationship between exercises of executive discretion and international law obligations see, e.g., *R v SSHD ex p Venables* [1998] AC 407 at 499 (Lord Browne-Wilkinson, referring to the relevance of the UN Convention on the Rights of the Child to reviewing the exercise of the executive discretion of setting a tariff) and *R v SSHD ex p Norney* (1995) Admin LR 861 at 871 *per* Dyson J.

(8) It is axiomatic in public law that a public authority is required to act to promote and not frustrate the purpose of a relevant statutory provision (see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). Prosecution action which frustrates the statutory purpose is an abuse of power, and can properly be characterised as an abuse of process.

(9) There is no reason in principle why a prosecution which contravenes an international law obligation of the State not to penalise an individual, should be other than an abuse of process. Contravention of international law obligations – for example as to due extradition process – is a recognised basis for a plea of abuse of process. The invocation of abuse of process in *Bennett* itself was informed by the fact that the prosecution was the consequence of an international law breach (improper extradition): see Lord Bridge at 64 (referring to forcible abduction "in violation of international law") and at 67 referring to "*the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law*". The present context is even clearer. The invocation of the criminal law against the individual is not the mere consequence of an international law violation (as in *Bennett*) but itself constitutes the violation of international law.

(10) Moreover, it is surely surprising if is it not an abuse of process for a public prosecutor – faced with an offence which, charged directly, would attract a defence by reason of international human rights protection – to simply frame the charge, in respect of the self-same conduct, under an alternative offence conviction which would attract the same international human rights law protection. To act in this way is to subvert the protection to which the individual is entitled, and circumvent the human rights defence recognised in domestic law.

(11) Nor can a public prosecutor simply disavow an international

human rights law obligation, and the legitimate expectation held to have arisen from that obligation (see §15(4) above), in circumstances where the prosecutor is required to act in the public interest. It surely cannot be characterised as being in the public interest to penalise an individual in violation of their international human rights .[6]

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6. Cf. the CPS Code for Crown Prosecutors (2004) especially §5.7.

In The House of Lords

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

CRIMINAL DIVISION (ENGLAND)

B E T W E E N:

REGINA

Respondent

and

FREGENET ASFAW

Appellant

CASE FOR THE INTERVENER

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