Case Nos: 2005/01741/D1 & 2005/03155/C2

Neutral Citation Number: [2005] EWCA Crim 2865

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday,11 November 2005

Before :

LORD JUSTICE KENNEDY
MR JUSTICE BELL
and
MRS JUSTICE DOBBS

– –

Between :

R
– v –
Fraydon Navabi & Senait Tekie Embaye

– –

(Transcript of the Handed Down Judgment of
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Ms Frances Webber & Mr Richard Thomas for the appellant **Embaye**
Mr Ives for the appellant **Navabi**
Mr Hulme for the **Respondents**

– –

Judgement
As Approved by the Court

Lord Justice Kennedy:

1. These are two appeals against convictions recorded in the Crown Court at Isleworth in March and May 2005. Both cases were heard by the same judge and the grounds of appeal in each case raise substantially the same points in relation to section 2 of the Asylum and Immigration Act 2004. We have therefore heard both cases together. Navabi was granted leave to appeal by the single judge. We granted Embaye leave to appeal at the outset of proceedings in this court.

Legislative history and relevant Statutory provisions.

2. Article 31(1) of the 1951 Convention and Protocols relating to the Status of Refugees reads as follows -

> 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."

It is to be noted that Article 31 only prohibits penalties imposed on account of illegal entry or presence, and even that prohibition is subject to the proviso that the refugee shows good cause for his or her illegal entry or presence. In other words the burden of proof is on the refugee.

3. In 1999 the Divisional Court in R v Uxbridge Magistrates' Court ex parte Adimi [2001] QB 667 considered a case concerned with three asylum seekers all of whom arrived in the United Kingdom at different times in possession of false passports. They were prosecuted for possession or use of false documents contrary to section 5 of the Forgery and Counterfeiting Act 1981 or for attempting to obtain air services by deception, contrary to section 1(1) of the Criminal Attempts Act 1981. They all sought judicial review of the decision to prosecute, and also the refusal to defer the prosecutions until after the resolution of the claims for asylum. At least two of the applicants had not come directly to the United Kingdom from the country where they alleged that they had been persecuted, but, having considered the broad purpose of Article 31, the court held that a refugee was entitled to some element of choice as to where and when he claimed asylum, so neither a short term stopover nor a failure to present his claim immediately upon arrival (one of the applicants had waited seven weeks) would justify forfeiture of the protection of Article 31 where good cause was made out. At 677G Simon Brown LJ said −

> What, then, was the broad purpose sought to be achieved by Article 31? Self−evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. In the course of argument Newman

> J suggested the following formulation: where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by Article 31. That seems to me helpful.
>
> That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt."

Simon Brown LJ went on to point out that although the United Kingdom had acceded to the Convention it had done nothing to incorporate Article 31 into domestic law, and he rejected any suggestion that compliance was achieved because a defendant might on certain facts be able to raise a defence of necessity or duress of circumstances, saying at 680D −

> This defence applies only in cases of imminent peril of death or serious injury to the defendant, and is manifestly narrower than that afforded by Article 31."

4. Simon Brown LJ also expressed distaste for resolving an Article 31 dispute by an abuse of process application because the burden falls on the defendant to establish an abuse on the balance of probabilities. He said at 683E−

> 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."

5. Prior to 1999 it had already been accepted by the Court of Appeal in Khaboka v Secretary of State for the Home Department [1993] Imm. A. R. 483 that a refugee does not become a refugee because of recognition as such. He is recognised because he is a refugee so, for the purposes of Article 31.1 the term refugee includes someone who is only subsequently established as being a refugee, in other words a bona fide claimant.

6. Following the decision in Adimi Parliament enacted section 31 of the Immigration and Asylum Act 1999 which provided a statutory defence to certain statutory offences, including those under Part I of the Forgery and Counterfeiting Act, 1981. Section 31 of the 1999 Act begins 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;

(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."

7. In R (Pepushi) v Crown Prosecution Service [2004] EWHC 798 (Admin) the Divisional Court had to consider whether section 31 of the 1999 Act left any scope for reliance on Article 31 of the 1951 Convention. It was held not to have done so. At paragraph 33 Thomas LJ said −

> We have reached the clear conclusion from the application of well known principles and our consideration of the language of the 1999 Act that the scope of the defence available to the claimant is that set out in section 31 and not in Article 31; Parliament has decided to give effect to the International obligations of the UK in a narrower way, but that is, on the authorities that are binding on us, the law which must be applied in the UK. The decision on the first issue in Adimi is therefore, in effect, no longer relevant for persons such as the claimant when faced with a criminal prosecution in the UK."

The decisions to which Thomas LJ referred are decisions of the House of Lords which are also binding on this court.

8. In section 2 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, the section with which these appeals are concerned, Parliament sought to address directly the problem of those seeking asylum or leave to enter without documentation to establish their identity, nationality or citizenship. It was recognised that some of those seeking assistance may never have had documentation, or may have only had false documentation, but even false documentation might assist immigration authorities, and the aim was at least in part to prevent wilful disposal or destruction of documents which ought to be produced, and which would assist the immigration authorities if they were produced, so the section created a new offence and, so far as relevant, it reads−

(1) a person commits an offence if at a leave or asylum interview he does not have with him an immigration document which −

(d) is in force, and

(e) satisfactorily establishes his identity and nationality or citizenship.

(4) It is a defence for a person charged with an offence under subsection (1) −

(f) To prove that he has a reasonable excuse for not being in possession of a document of the kind specified in subsection (1),

(g) To produce a false immigration document and to prove that he used that document as an immigration document for all purposes in connection with his journey to the United Kingdom, or

(h) To prove that he travelled to the United Kingdom without, at any stage since he set out on the journey, having possession of an immigration document.

(7) For the purposes of subsections (4) to (6) −

(a)the fact that a document was deliberately destroyed or disposed of is not a reasonable excuse for not being in possession of it (or for not providing it in accordance with subsection (3) unless it is shown that the destruction or disposal was −

(i) For a reasonable cause , or

(ii) Beyond the control of the person charged with the offence, and

(b) in paragraph (a)(i) ‘reasonable cause' does not include the purpose of −

(iii) complying with instructions or advice given by a person who offers advice about, or facilitates, immigration into the United Kingdom, unless in the circumstances of the case it is unreasonable to expect non−compliance with the instructions or advice."

9. The first submission made by Ms Webber for Embaye, and adopted by Mr Ivers for Navabi, is that section 2 must be read in the light of Article 31, even if that means reading down or applying a gloss to the words of the statute, and in particular the words set out in subsection 7 (b)(iii). We will return to the submission later in this judgment.

Burden and Standard of Proof.

10. Clearly subsection (4) as amplified in subsection (7) places upon a defendant a burden of proof, and we have been asked to consider whether, in the light of the European Convention on Human Rights and the authorities that should be regarded as a legal burden or an evidential burden (under which the burden of proof would revert to the prosecution once the issue was effectively raised). If the burden of proof remained with the defence we were asked to consider the extent of the burden. Was it, as the judge said, a burden to be discharged on the balance of probabilities, or should there be imported into this section some lesser burden which, as in claims for asylum, makes express allowance for the difficulties faced by the asylum−seeker in articulating his claim and establishing that which he needs to prove (c.f. R v SSHD ex parte Khawaja [1984] AC 74). In support of her submission that the burden of proof should be no higher than that applied in relation to the substantive application for asylum Ms Webber pointed out that a conviction under section 2 will impact upon the claim for asylum because section 8, so far as relevant, provides −

> (1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.
>
> (2) This section applies to any behaviour by the claimant that the deciding authority thinks −
>
> (i) is designed or likely to conceal information,
>
> (j) is designed or likely to mislead, or

(k) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of the decision in relation to the claimant.

(3) Without prejudice to the generality of subsection (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead −

(a) failure without reasonable explanation to produce a passport on request to an Immigration Officer or to the Secretary of State,

(b) the production of a document which is not a valid passport as if it were,

(c) the destruction, alteration or disposal, in each case without reasonable explanation, of a passport,

(d) the destruction, alteration or disposal, in each case without reasonable explanation, of a ticket or other document connected with travel, and

(e) failure without reasonable explanation to answer a question asked by a deciding authority."

11. One difficulty in the way of Ms Webber's argument for parity in the standard of proof is that if the argument be right it must apply not only to a prosecution under section 2, but also to any prosecution arising out of behaviour to which section 8(2) applies, and that we cannot accept. It could even have the extraordinary result of different standards of proof being applied to different defendants in relation to the same offence if the offence charged were, for example, a conspiracy, and not all of the alleged conspirators were asylum seekers.

12. We return therefore to the question of how to interpret this particular statutory reversal of the burden of proof, and its compatibility with the presumption of innocence, guaranteed by Article 6(2) of the European Convention. In Sheldrake v DPP [2005] 1 AC 264 Lord Bingham, at paragraph 27, cited from paragraphs 49 and 50 of the speech of Lord Nicholls in R v Johnstone [2003] 1 WLR 1736. That citation includes these passages −

> All that can be said is that for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence. ×. A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact−finding tribunal having a reasonable doubt as to the guilt

> of the accused: see Dickson CJ in R v Whyte [1988] 51 DLR (4th) 481,493. This consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it is said that in the absence of a persuasive burden on the accused, the public interest would be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access."

13. In the case of section 2 of the 2004 Act the punishment which may flow from a conviction on indictment is a term of imprisonment not exceeding two years or a fine or both (see subsection (4), and Mr Hulme who appeared for the respondent in both appeals, invites us to consider in particular the final sentence of that citation from Lord Nicholls.

14. At paragraph 31 of Sheldrake Lord Bingham continued −

> The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence."

15. Having set the scene in relation to the legal issues involved, which include in the case of Navabi the availability of the defence of necessity, we turn now to look at the facts of these two cases before setting out our own conclusions.

The appeal of Navabi.

16. Navabi arrived at Heathrow airport on 13th October 2004. He was interviewed by Mr Athwal, an immigration officer, and said that he had no passport and had arrived from Kabul "on the plane, made three to four stops on the way". He was asked if he was accompanied by anyone, and said that his agent travelled with him "but he did not come with me after the last stop". He said that he was born on 1st September 1988, and if that was correct he was at the time of interview just over 16 years of age. He said that he had no family in the United Kingdom but that he had friends and he was running away from his enemies.

17. Later the same day Navabi was interviewed again by Mr Athwal, on this occasion with the assistance of an interpreter. During that interview the following exchange took place−

> Q. Where is your passport?
>
> A. The agent had it, I handed it over.
>
> Q. Why do you not have a passport?
>
> A. I was following agent's instructions.
>
> Q. Why did you do that?
>
> A. I was following agent's instructions. I had agreed to do what the agent was telling me.
>
> Q. What did the facilitator say?
>
> A. The agent told me that if I give him some money he would take me to London. The agent asked that I give the passport and ticket back to him.
>
> Q. What do you think would happen if you did not follow the instructions?
>
> A. He told me that if you do not do as I tell you, you would not get to your destination."

18. On the following day, 14th October 2004, Navabi was interviewed by PC Knight with the assistance of an interpreter. For that interview he had the benefit of legal assistance, and he said that he was born on the 1st September 1985, so he was 19 years of age. To most of the questions he made no reply, or said "no comment". He was then charged with the offence contrary to section 2.

19. At trial Mr Ivers submitted at the outset that the proceedings should be stayed pending the determination of the application for asylum, and that if they were not to be stayed the judge should indicate that the burden of proof upon the defendant, who proposed to rely upon section 2(4) should be no more than an evidential burden. Those issues had arisen at Isleworth Crown Court on previous occasions, and the Resident Judge, Judge McGregor Johnson, had given a reasoned decision which was adopted and followed by Judge McDowall when he rejected the opening submissions made by Mr Ivers on this occasion. Although the first ground of appeal relates to the refusal of the application for a stay that was not pursued by Mr Ivers, and we need say no more about it. Plainly the legislation does not require that an application for asylum be determined before a trial for an alleged breach of the requirements of section 2.

20. At the trial the jury heard the evidence of the immigration officer and the police officer read, and the defendant gave evidence. He indicated that he was aware of the significance of documents such as passports but said that he was determined to get out of Afghanistan where he was at risk of his life. When it came to the last stage of his journey he was told by his handler that he would be met at the airport at the other end. The handler said "Don't say anything. Just follow me. If you don't maybe I'll just leave you." Nothing more was said, and there was it seems no evidence of any threat, expressed or implied beyond that of being unable to complete his journey.

21. Before closing speeches the judge discussed with counsel the directions of law which he proposed to give to the jury and he made it clear that he was not prepared to leave to the jury the question of necessity, because there was no evidence of the kind which the law would require to make necessity a possible defence. Mr Ivers submits to us that the judge was wrong to rule as he did. The judge also asked Mr Ivers not to address the jury on the impact of Article 31, and Mr Ivers complied with that request.

22. When directing the jury the judge told them that their decision did not involve saying whether the defendant's claim for asylum was genuine or not. They did not have the material to make that decision, which was a matter for others. All they were concerned with was the statutory defence raised by the defendant which he had to establish on the balance of probabilities. Of course if what the defendant said about events in Afghanistan, and the circumstances of his departure were untrue that would affect his credibility. The reasonable excuse which the defendant put forward for not producing documents was that he was following the orders of his facilitator, or minder, but Parliament has said that alone is not enough "unless in the circumstances of the case it is unreasonable to expect non−compliance with the instructions or advice". That was something which the judge invited the jury to decide for themselves in relation to the evidence in the particular case.

23. Towards the end of the summing−up Mr Ivers, in the absence of the jury, invited the judge to leave to the jury the defence set out in section 2(4) untrammelled by the provisions of section 2(7)(b)(iii), because the defendant expected to be met on arrival and did not himself destroy or dispose of any document. The judge declined to add to his earlier directions, and although Mr Ivers submitted to us that the judge was wrong to do so we found that submission difficult to understand. The defence raised was under section 2(4)(c). Subsection (7) applies to any such defence, and on the facts the judge left the matter completely at large for the consideration of the jury.

The appeal of Embaye.

24. This appellant is 32 years of age. She presented herself to an immigration officer at Heathrow airport of 15th January 2005, and said that she was an Eritrean who had arrived from the Sudan. She had neither a passport nor any ticket. When interviewed by another immigration officer with the aid of an interpreter she said that she did have a valid passport of her own which she left in Eritrea. She said that she had boarded an aircraft bound for the United Kingdom with a passport provided by a Sudanese man. It was a false passport. The photograph was not of her, but it was like her. That false passport was taken away by the man who brought her to the UK. She had met him in Khartoum on 14th January 2005 and paid him $4000 US. He left her before she went to the toilet at Heathrow. She had given him back the passport because he asked for it. The interviewing officer asked her -

> Q. What would have happened if you had not followed the agent's instructions?
>
> A. I don't know."

A little later, in answer to a similar question, she said "I just followed his instructions".

25. She was then arrested and on the following day she was interviewed by a police officer with the aid of an interpreter, and in the presence of a legal representative. She made it clear that she had returned the passport to the Sudanese agent after clearing the immigration controls in the Sudan. She was asked if the agent had threatened her at all and she said not.

26. At her trial background materials relating to conditions in Eritrea and the Sudan were formally admitted, and the judge rejected an initial submission that it would be an abuse of process to try the defendant because she was to be treated as a bona fide claimant for asylum, and any penalty imposed upon her would breach the obligations of the United Kingdom under Article 31 of the 1951 Convention. The prosecution evidence was then read, and the defendant gave evidence. She said that because of her religion she was arrested in Eritrea, raped and held in a desert dungeon. She managed to escape to the Sudan where a family gave her sanctuary, but eventually put pressure on her to marry and convert to Islam. At that stage she met a fellow countrywoman who put her in touch with the agent who arranged her passage to the UK. She went on to give evidence as to the circumstances under which she returned the false passport, and that accorded with what she had previously said to the immigration officer and the police.

27. When summing−up the judge provided the jury with copies of section 2 of the 2004 Act, and took them through the relevant parts. He explained that the burden of proving the statutory defence lay upon the defence, which must show it to be more likely than not. In a passage which was helpfully tailored to the facts of the instant case the judge said at page 7F of the transcript −

> In the circumstances of the case, does the defendant prove that it was, on the balance of probabilities, that it was unreasonable to expect non−compliance with the instructions of the ×.agent who was with her."

As to the asylum claims the judge said at page 8G−

> You are not deciding directly the rights and wrongs of this defendant's asylum claim. There is another tribunal, another kind of procedure to deal with the rights and wrongs of her claim, and it does not make any difference what you decide, that claim will be processed and a decision made as to whether there is a good claim or, as the case may be, not."

The judge went on to observe that if the jury were to conclude that her account of the circumstances in which she left first Eritrea and then the Sudan were untrue that would impact upon her defence. He said at 10G −

> If you took the view that you were not accepting what this defendant was saying about the circumstances under which she left her own country, the circumstances under which she left the Sudan, then that would, obviously, present her (with) difficulties in proving the reasonable excuse which the Act lays down×."

A little later, at 11G, the judge said −

> If, and it is your decision, you are not persuaded by her evidence, then you might well then say: ‘we cannot therefore accept the reasonableness or unreasonableness of what she did.'"

Discussion and Conclusion.

28. We start with the submissions as to the impact of Article 31which were presented by Ms Webber. We accept, as indicated by Simon Brown LJ in Adimi, that Article 31 is to be generously interpreted, and therefore that the offence created by section 2 of the 2004 Act falls within the ambit of the Article. Mr Hulme, for the respondents, accepted that proposition. But, as with other obligations imposed by the Refugee Convention, Parliament has decided how and to what extent to reflect those obligations in domestic law. At no stage has either the text of the Refugee Convention as a whole or of Article 31 in particular been formally incorporated. Both in 1999 and again in 2004 Parliament was fully alive to the terms of Article 31 when enacting first the 1999 Act and then the 2004 Act. That is clear both from the legislative history to which we have referred, and from the Parliamentary material placed before us. Of course that does not mean that the statutes as enacted fully satisfied the requirements of Article 31, but, as Thomas LJ explained in Pepushi, it is the terms of the statute which we must regard as decisive. Parliament is entitled to decide for itself how it will reflect a treaty obligation in domestic law, and once it has decided the courts cannot take the decision afresh. We accept that if there is ambiguity the terms of the Convention may assist, but we find no ambiguity in any relevant part of section 2. We also accept that where there is a relevant treaty or ratified convention courts when free to do so will interpret statutory provisions in such a way as to comply with the United Kingdom's international obligations, but that cannot be done when the statutory words are clear, and were enacted in full knowledge of the Convention obligations. In these two cases the appellants submit that in order to render section 2 of the 2004 Act compatible with Article 31 the judge should have directed the jury to regard each defendant as a bona fide asylum−seeker, and should have gone on to direct them that if they found the disposal of the passport to be part of the quest for asylum and not extraneous to it then the statutory defence was made out. That seems to us to be nothing less than an attempt to re−write the statute, and in particular section 2(7)(b)(iii), and to do so in such a way as to render the whole section of little if any effect in addressing the serious problem of missing documentation which Parliament was attempting to address. It is no part of our function to emasculate statutory provisions in that way. Consequently the judge was right not to permit Mr Ivers to address the jury in relation to Article 31. They were not concerned with it, only with the words of the statute as explained to them by the judge.

29. We turn to the burden and standard of proof. The statute clearly places the burden of proving the defence set out in section 2(4) upon the defendant. The wording "it is a defence for a person charged with an offence .. to prove.." permits of no other interpretation. That is compatible with the requirements of the European Convention in certain circumstances (see Sheldrake supra), and in particular where, as here, all of the relevant information is in the possession of the defendant and is not available to the prosecuting authority unless disclosed by the defendant. In saying that we recognise that a defendant may be traumatised and unable to produce documents or witnesses to support his factual claims, but the jury can be trusted to make allowances for those difficulties. For that same reason, namely that the defendant alone is likely to have all of the relevant information, and bearing in mind the importance of maintaining an effective immigration policy, and the limitation on the penalties which

can be imposed under the Act, we see no reason to conclude that the burden of proof should be interpreted as being anything less than a legal burden. An evidential burden would do little to promote the objects of the legislation in circumstances where the prosecution would have very limited means of testing any defence raised. As was said by Lord Bingham in Sheldrake , it is not our function to decide whether a reverse burden should be imposed on a defendant, but to decide whether what Parliament has done unjustifiably infringes the presumption of innocence. In our judgment it does not do so. So we find no incompatibility between the terms of the statute and the requirements of the European Convention.

30. As to the standard of proof it must be accepted that when Parliament enacted section 2 of the 2004 Act it did so in the knowledge that when the burden of proof is placed upon a defendant the defendant is required to prove the matter on the balance of probabilities. If, for the purposes of establishing the defence set out in section 2(4) Parliament envisaged a lesser standard of proof it would have said so, and that is really conclusive in relation to the standard of proof. But in any event in our judgment the attempt to reduce the standard of proof to that required of an applicant when seeking to establish his right to asylum, *inter alia* because when the claim for asylum is determined a conviction for an offence contrary to section 2 will be taken into account as damaging the applicant's credibility (see section 8) is misconceived. If it were not the same argument could be raised in relation to, for example, a charge of forgery. It was also urged upon us that the standard of proof should be lowered because otherwise a defendant might be convicted who had no criminal intent, but that, in our judgment, fails to give sufficient weight to the statutory defence.

31. Finally we return to the refusal of the judge in the case of Navabi to leave to the jury the issue of necessity or duress. The boundaries of this defence are uncertain, and, as has been said in this court on many occasions, they need to be defined, but certain matters are clear. For the defence to succeed the defendant must show that he acted when in imminent (though not necessarily immediate) peril of death or serious injury, and that peril must be shown to have driven him to do what he did. In R v Abdul Hussain and others [1999] CLR 570 this court held that the judge was wrong when he refused to leave the defence to the jury, and gave useful guidance as to the proper approach. The judge, it was said, should have asked himself whether there was evidence of such fear operating on the mind of the defendant at the time of the alleged offending as to impel him to act as he did, and whether if so there was evidence that the danger he feared objectively existed, and that the alleged offending was a reasonable and proportionate response to it. Clearly, as it seems to us, there was no evidence of the relevant type of fear operating on the mind of Navabi at the time of the alleged offending, and impelling him to act as he did, so the judge was right to rule as he did. But we add this warning. The defence sought to be raised is one of general application. Although it is apparently less favourable to a defendant charged with an offence contrary to section 2(1) of the 2004 Act than the defence provided by section 2(4) the Act does not render the common law defence of necessity unavailable, and there may be circumstances in which it would be right to leave that defence to the jury. As the decision will depend upon the evidence the matter should normally be dealt with, as it was in the case of Navabi, at the conclusion of the evidence.

32. For those reasons we find no substance in any of the grounds of appeal raised by either appellant, and both appeals against conviction are therefore dismissed.

33. Although we have not in the course of this judgment cited from the rulings of Judge McGregor Johnson first in Chohan and later in El Hudarey and others it will be clear that our conclusions on the main issues of law which we have had to consider are the same as his, and we are grateful for the clear and careful way in which he dealt with the issues (and with some other issues with which we have not been concerned) particularly in the latter case. It enabled Mr Hulme to rely heavily upon that ruling when presenting his case to us.