No. 2008/04023/B3

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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 12 November 2008

B e f o r e:

LORD JUSTICE KEENE

MR JUSTICE AIKENS

and

HIS HONOUR JUDGE PATIENCE QC
(Sitting as a Judge in the Court of Appeal, Criminal Division)

R E G I N A

- v -

M M H

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Mr D Bunting appeared on behalf of the Applicant
Mr D Wilson appeared on behalf of the Crown

J U D G M E N T
(As Approved)

Wednesday 12 November 2008

LORD JUSTICE KEENE: I shall ask Mr Justice Aikens to give the judgment of the court.

MR JUSTICE AIKENS:

1. This is an application for leave to appeal against conviction and for an extension of time of 139 days in which to apply for leave to appeal against sentence. The applications have been referred to the full court by the Registrar. He granted an extension of time of 99 days in respect of the application for leave to appeal against conviction.

2. The applicant is a youth of just over sixteen and a half years who is of Somali origin. He is a member of the minority Reerhamar clan and comes from Mogadishu. In the course of the criminal proceedings there was some doubt about his age. That doubt has now been resolved following a comprehensive report from Dr Diana Birch, who is a consultant paediatrician and a leading authority on adolescence. She has experience in conducting age assessments. Her assessment of the applicant's age as being sixteen and a half years as at August 2008 is not disputed by the Crown.

3. On 15 April 2008 the applicant appeared before His Honour Judge Ball QC at Chelmsford Crown Court for arraignment in respect of one count on the indictment of an offence of Possession of an Identity Document with Intent contrary to section 25(1) and (6) of the Identity Cards Act 2006. Before his appearance in court, the applicant received advice from Levy & Co Solicitors, through an interpreter, on how he should plead. There is some dispute as to the precise advice he received about possible defences to the charge, and in particular whether he was advised about a possible defence to the charge by virtue of section 31 of the Immigration and Asylum Act 1999.

4. Section 31 of the Immigration and Asylum Act 1999, so far as relevant, 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 --

....

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

...."

5. We have before us a note that has been prepared by Levy & Co of the advice that was given at this stage and at the next stage in the proceedings on 15 April. It indicates that when the applicant was arraigned before Judge Ball (after he had received the first advice), he refused to enter a plea. The judge put the matter back so that further advice could be given to the applicant. The judge advised the solicitor representing the applicant, Mr Levy, that he should endorse any brief with the result of the advice.

6. Mr Levy and the interpreter attended the applicant in the cells where a further conference took place. It appears from a letter from Levy & Co to the applicant's present solicitors, dated 17 July 2008, the contents of which are not in dispute, that in that conference the applicant said to Mr Levy that he accepted various things. First, that he was not the person on the passport. Secondly, that he had not sought asylum as soon as possible "thereafter" (the phrase used in the letter). It does not appear from that letter that there was any great discussion as to what was meant by "as soon as possible thereafter". Thirdly, that he did not upon presentation of the false passport immediately advise that he presented himself to the authorities without delay claiming asylum in this country. It is also clear from the letter that there was no discussion of whether or not the applicant was a refugee who had come to the United Kingdom *directly* from a country where his life or freedom was threatened (the wording of section 31(1)), or about the matters raised in section 31(2) of the Immigration and Asylum Act 1999.

7. The applicant signed an endorsement on Mr Levy's papers as follows:

"I have received advice from my solicitor on the evidence against me, namely that I presented a passport to immigration which was not mine. I bought this passport believing I could travel with the document."

The endorsement also acknowledged that this had been interpreted to him in the Somali language and that statement is countersigned by the interpreter.

8. After that conference there was a second hearing before Judge Ball, at which the applicant was arraigned. He pleaded guilty to the count and he was sentenced forthwith to ten months'

imprisonment. The sentence was passed on the basis that the applicant was over 21 years of age. That conclusion was based on an assessment by a social worker from Essex who conducted a full Merton Compliant Age assessment and who, as a result, concluded that the applicant was aged between 19 and 21. That, it is now accepted, was a wrong assessment.

9. This, therefore, is one of those unusual cases where an applicant seeks leave to appeal against conviction where he has pleaded guilty following legal advice. It is said on his behalf that there are two reasons why leave to appeal should be granted. The first is that the applicant's plea was not a "true" plea, in the sense that he never properly admitted his guilt. The second reason is that he has a defence to the allegation that he contravened section 25 of the Identity Cards Act 2006 because his circumstances come within section 31 of the Immigration and Asylum Act 1999, notwithstanding the views expressed by the applicant's then solicitors when giving advice on 15 April 2008.

10. This court undoubtedly has jurisdiction to entertain an application for leave to appeal against conviction under section 2(1) of the Criminal Appeal Act 1968, even if the applicant has entered a guilty plea: see R v Lee (Bruce) [1984] 1 WLR 578 at 583, per Ackner LJ. But this court has also said that it will not generally entertain an appeal in a case where there has been an unequivocal plea of guilty, unless the proposed defence would "quite probably have succeeded and concludes, therefore, that a clear injustice has been done": R v Boal [1992] QB 591 at 600A, per Simon Brown J (as he then was), giving the judgment of the court.

11. On this application we have not heard any oral evidence from Mr Levy. In addition to the letter to which we have referred, we have a statement from the applicant and a copy of the interview that was conducted by the immigration officials. Following his detention, the applicant was taken to an interview room at Stanstead Airport Police Station on 5 April 2008 where he was interviewed by immigration officials at approximately midday.

12. We have considered the cases to which we have been referred: R v Makuwa [2006] 1 WLR 2755; R v Uxbridge Magistrates Court, Ex parte Adimi (DC) [2001] QB 667; and R v Asfaw (HL) [2008] 2 WLR 1178. In R v Makuwa the court considered the way that section 31(1) works. The court concluded that: (i) it was for the accused to present sufficient evidence to raise the issue of whether he was a refugee as defined in the Refugee Convention of 1951; but (ii) if he did so, it was then for the prosecution to prove to the usual criminal standard that the accused was not a refugee; (iii) in respect of the remaining matters set out in section 31(1), ie. first, that the applicant had come directly from a country where his life or freedom was threatened, and secondly the matters under section 31(1)(a), (b) and (c), the legal burden of proof is on the applicant to show that he satisfies those four conditions. Although the court did not expressly say so in Makuwa, following general principles the burden must be one that is discharged if the accused proves the relevant points on a balance of probabilities. Although that case referred to section 31(2), it did not deal specifically with it.

13. There is, however, assistance on how Article 31 of the Refugee Convention 1951 is to be interpreted in Adimi and R v Asfaw, and, in the latter case, how section 31 of the 1999 Act (which was passed after the Adimi case), is to be interpreted. Broadly speaking, those cases, and in particular Asfaw, (which approved the analysis of Article 31 of the Convention and the decision of the Divisional Court in Admimi), demonstrate that section 31(1) and (2) must be

construed by reference to, and in accordance with, the Refugee Convention of 1951. Broadly speaking, Article 31 of the Refugee Convention deals with states' obligations with regard to refugees who are unlawfully in the country of refuge. In Asfaw, at paragraph 11, Lord Bingham of Cornhill stated that the Refugee Convention must be "given a purposive construction consistent with its humanitarian aims".

14. This is relevant to two particular matters with which we are concerned. First, the requirement under section 31(1)(c) that the applicant must make a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom. This does not mean at the earliest possible moment: see Asfaw para 16, per Lord Bingham. Secondly, in dealing with the requirement that a person must come *directly* from a territory where his life or freedom was threatened (in the sense of article 1 of the Convention), that did not mean, for the purposes of Article 31 of the Convention, that it was intended necessarily to exclude the position where a refugee stopped in a third country in transit. As Lord Bingham pointed out (paragraph 11), at the time of the Convention, air transport had not become a means of escape used by any considerable number of refugees.

15. Therefore, as Lord Bingham said, referring to the judgment of Simon Brown LJ in Adimi:

> "He held at page 678 that some element of choice was open to refugees as to where they might properly claim asylum and concluded that any merely short-term stopover en route to such intended sanctuary could not deprive the refugee of the protection of Article 31."

Lord Bingham went on to say that Simon Brown LJ identified (at page 678 of Adimi), the main touchstones by which exclusion from protection should be judged were: the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugees sought or found their protection de jure or de facto from the persecution which the refugee was seeking to escape.

16. On the evidence that we have seen on this application, it would appear that the applicant arrived by aircraft at Stansted Airport shortly before midnight on 3/4 April 2008. It is not in dispute that the applicant arrived on a plane that had come from Oslo, Norway. In the early hours of 4 April 2008 the applicant arrived at Stansted Airport Immigration Control. He presented a passport in the name of Ali Ahmed, which stated that the passport holder was born in Mogadishu, Somalia on 1 February 1985. The passport was not the applicant's. It had, in fact, been stolen on 23 March 2007.

17. The applicant was detained. He was arrested late on the evening of 4 April 2008 and taken to Stansted Airport Police Station. Although there was some discussion, there was no interpreter available at that stage.

18. The applicant was interviewed the following day. On that occasion there were present a Somali interpreter, Mr Graeme McCormack of Levy & Co and another immigration officer. The

interview was taped. We have seen a transcript of the interview. The applicant answered questions put to him. He said that he had bought the passport in Mogadishu for US $500 and that he had boarded a flight in Africa. He was vague about the journey. At that time he denied that he had come from Oslo to Stansted. He said that if he had been allowed into the United Kingdom he proposed to search for a cousin who lived in this country.

19. During the interview the applicant referred to the fact that, because of the conditions in his country, there was no register for births and that was why he could not give a birth date. He also said:

> "The reason why I used this passport is because of the problems I experienced in my country and my intention was to go to a safe place like this country."

20. After the interview he was charged with possessing an identity document with intent contrary to section 25(1), (2) and (6) of the 2006 Act. He was cautioned but did not reply.

21. We are prepared to assume, for the purposes of this application, that the applicant can raise sufficient of an issue on whether he is a refugee to put the burden of disproving it on the prosecution. We are also prepared to assume that, upon his arrival at Stansted, he presented himself to the authorities without delay. There are, however, three further matters to consider in order to deal with the possible defence under section 31 of the 1999 Act. First, does the applicant have a reasonably arguable case that he came *directly* from a country where his life or freedom was threatened, within section 31(1) of the 1999 Act? Secondly, did he "stop" in another country within the meaning of section 31(2)?

22. Looking at the evidence as a whole, we have come to the conclusion that it is reasonably arguable, given the interpretation that we must place on section 31(1) and (2) in accordance with the Convention and the cases of Adimi and Asfaw, that overall the applicant has a reasonable prospect of demonstrating that he came *directly* to this country from one where his life or freedom was threatened and that he did not “stop” in another country.

23. The third hurdle that the applicant must surmount in order to demonstrate that he has a reasonable prospect of success on this defence is the issue of whether he made a claim for asylum as soon as reasonably practicable after his arrival in the United Kingdom. There are indications that that is precisely what he did in as good a manner as a 16 year old could in very strange and doubtless intimidating circumstances in the interview that he had at midday on 5 April with the immigration officials. It is noteworthy that at that stage no one assumed that he was only 16.

24. In all these circumstances we have concluded, although with some diffidence, that there would have been a reasonable prospect of successfully defending this charge on the ground proposed, viz. section 31 of the 1999 Act. We note that advice was not given on the aspects of coming *directly* from a country where his life or freedom was threatened (section 31(1)), nor the issues raised by section 31(2) of the 1999 Act.

25. If the position is as we have held it to be, then in our view this is a case where we can consider the safety of the conviction, notwithstanding that a guilty plea was entered. We have concluded in all the circumstances that we have set out that this conviction was indeed unsafe. We therefore grant leave to appeal, allow the appeal and quash the conviction. In the circumstances there is no need to deal with the application for leave to appeal against sentence.

26. **MR WILSON:** In the circumstances, my Lord, the defendant having served the sentence, it would not in the Crown's view be in the public interests to pursue the matter to a fresh trial.

27. **LORD JUSTICE KEENE:** I was going to ask if you wanted to have a fresh trial, but it seemed to us that in the circumstances you would not seek to do so.

28. **MR WILSON:** My Lord, no.

29. **LORD JUSTICE KEENE:** Very well, we make no order. Thank you both very much indeed.