Case No: CO/00217/2005

Neutral Citation Number: [2006] EWHC 539 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 20th March 2006

Before :

LADY JUSTICE HALLETT DBE
MR JUSTICE NELSON

- -

Between :

THE QUEEN ON THE APPLICATION OF FAHIM BADUR	**Claimant**
- and -	
BIRMINGHAM CROWN COURT	**First Defendant**
-and-	
SOLIHULL MAGISTRATES COURT	**Second Defendant**
-and-	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**1st Interested Party**
-and-	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**2nd Interested Party**
-and-	
THE CROWN PROSECUTION SERVICE	**3rd Interested Party**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr David Jones (instructed by **Tyndalwoods**) for the **Claimant**
Mr Shane Crawford (instructed by **CPS**) for the **1st Interested Party**

- -

Judgment

Mr Justice Nelson :

1. This claim began as an application for a mandatory injunction requiring Mr Recorder Cooke to state a case for the opinion of the High Court after his refusal to do so on 23 September 2004 in relation to his judgment at Birmingham Crown on 18 March 2004 dismissing the Claimant's appeal against his conviction by the Birmingham Magistrates Court on 3 July 2003 for seeking to obtain leave to remain in the UK by deception contrary to Section 24A (1) of the Immigration Act 1971 as amended. The claim has now become primarily a question of whether the applicant was lawfully

charged, or whether the proceedings which resulted in his conviction were a nullity. These contentions are set out in the amended grounds for a judicial review served on 11 October 2005 and in respect of which, as well as for the original grounds, the Divisional Court gave leave on 13 October 2005.

2. If the Court finds that the Claimant was lawfully charged, he contends that the Recorder erred in his ruling on the issue of whether the Claimant had come to the UK directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention) under Section 31 of the Immigration and Asylum Act 1999, and erred in relation to the construction of that section in its application to the facts.

Background facts.

3. On 2 October 1999 the Claimant, who is a national of Afghanistan, arrived in the United Kingdom with his father and mother. The Claimant was then 19 years of age having been born on 12 August 1980. His father had been Health Minister in the government of Dr Najibullah in Afghanistan between April 1987 and June 1988. On 24 November 1999 the Claimant, together with his parents, claimed asylum, stating that they had fled Afghanistan in 1999 because of fear of persecution by the Taleban. On 4 January 2001 exceptional leave to remain was granted to the Claimant and his parents until 4 January 2005. The Claimant was granted such leave to remain on the basis that he was the dependant of his parents which was in fact incorrect as he was already 19 when he arrived in the UK.

4. The Home Office received fresh information that the Claimant and his family had in fact resided in India for 7 years prior to their flight to the UK. The Claimant was interviewed on two occasions in July and November 2001; in the second of those interviews he conceded that he had been resident in India as alleged and that therefore his prior claim to have fled Afghanistan in 1999 was untrue.

5. On 1 November 2001 the Claimant was charged under section 24(1)(a)(a) of the Immigration Act 1971 with:-

> "Obtaining leave to enter UK by deception between the 2nd October 1999 and 1st November 2001 at the City of Birmingham in the County of the West Midlands, not being a British Citizen, obtained leave to enter or remain in the United Kingdom by means including deception, namely applied for asylum in the UK claiming to be fleeing from persecution in Afghanistan and concealed material facts namely residence and domicile in India."

6. On 16 November 2001 the Claimant appeared on bail before Solihull Magistrates Court. The offence with which he had been charged was treated as one which was capable of being tried either summarily or on indictment. The Claimant entered a plea of not guilty and elected a trial in the Crown Court. The case was accordingly adjourned for the preparation of committal papers. There were further adjournments until 8 February 2002 when the case was committed to Warwick Crown Court for a plea and directions hearing on 7 March 2002. At the hearing on 8 February 2002 the

CPS amended the 'Particulars of the Offence' laid before the Magistrates at committal to read:-

> "Fahir Badur on a day between the 21st day of November 1999 and the 27th day of November 1999 sought to obtain leave to remain in the United Kingdom by deception, namely that he was a refugee from Afghanistan having left that country in 1999."

7. The 'Statement of Offence' was also amended to indicate that the deception alleged was contrary to section 24A (1) (a) of the Immigration Act 1971 as amended. The Claimant was committed to Warwick Crown Court on this modified indictment.

8. It can be seen that there were various changes made on 8 February 2002 to the charges which the Claimant faced, compared with the charge originally brought against him. Firstly it was no longer alleged to be a continuing offence from November 1999 until November 2001, but an offence committed over a period of a week in November 1999. Secondly it had by this time been appreciated that the Claimant had not obtained leave to remain by his deception, as that had been granted because it was wrongly thought that he was a dependant. He had however sought to obtain leave to remain by deception and the charge was amended accordingly. Thirdly the offence charged was no longer under section 24(1)(a)(a) of the Immigration Act 1971 as amended by section 4 of the Asylum and Immigration Act 1996, but under section 24A (1)(a) of the Immigration Act 1971 as amended by section 28 of the Immigration and Asylum Act 1999.

9. Both section 24(1) (a) (a) of the Immigration 1971 as amended by section 4 of the Asylum and Immigration Act 1996 and section 24A (1) (a) as amended by section 28 of the Immigration and Asylum Act 1999, made it an offence... "if, by means which include deception by him, he obtains or seeks to obtain leave to enter or remain in the United Kingdom". Section 24(1) (a) (a) came into force on 1 October 1996 and section 24A (1) (a) came into force on 14 February 2000. The offence under section 24(1) (a) (a) as amended by the 1996 Act, was triable only summarily whereas the offence under section 24A (1) (a) as amended by the 1999 Act was triable either summarily or on indictment. The maximum penalty on summary trial was six months imprisonment whereas on indictment it was two years imprisonment. The other substantial difference between the two offences is that section 24(1)(a)(a) was subject to Article 31(1) of the Refugee Convention whereas section 24A (1)(a) by virtue of the 1999 amendment was expressly subject to a statutory defence based upon, but not the same as, Article 31(1) of the Refugee Convention.

10. When section 24A (1) (a) under the 1999 amendment came into force on 14 February 2000 section 24(1) (a) (a) under the 1996 amendment was repealed. There is no transitional provision or saving relating to section 24(1) (a) (a) in the Immigration and Asylum Act 1999. Nor do the provisions of section 24A(1)(a) apply retrospectively. No prosecution could therefore be brought under section 24A(1)(a) prior to 14 February 2000. Offences committed prior to that date could however be prosecuted under section 24(1)(a)(a) after its repeal by virtue of section 16 of the Interpretation Act 1978 which provides that:

> "where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, …
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;
>
> and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

There was, unfortunately, confusion from the outset as to the section under which the Claimant was to be prosecuted. The arresting officer referred to section 24(A)(1) of the Immigration Act 1971 whereas the notice of offence charged records that the Claimant was charged under section 24(1)(a)(a) of the Immigration Act 1971. The case summary prepared by the CPS states:

> "Parliament considered such matters sufficiently serious as to require a change in the law so that with effect from 14/02/2000 offences provided by section 24 of the Immigration Act as amended had been triable either summarily or by the Crown Court. Although the originating event occurred at Dover on 2/10/1999 it is a continuing offence of deception which was only later detected in this jurisdiction, hence the reason why the defendant has been brought before this court and not charged elsewhere."

The statement dated 1 November 2001 from Graham Alexander, the Immigration Officer who interviewed the Claimant, records the fact that Mr Alexander told the Claimant that he believed there had been a deception "sufficient to constitute the offence provided by section 24A(1) of the Immigration Act 1971 as amended" and he therefore prepared a criminal charge against the Claimant under section 24A(1) of the Immigration Act. There was therefore on the face of it a clear intention by the CPS prosecute under section 24A(1) of the Immigration Act 1971 pursuant to the 1999 amendment.

The Crown Court Hearing

11. When the matter came before the Crown Court at Warwick on 5 April 2002 the Crown applied to quash the indictment on the basis that the matter should never have been committed for trial, and requested that the case be remitted back to the magistrates' court. The Crown submitted that the deception which supported the charge went back to the original asylum application in 1999, when the offence was purely a summary offence committed prior to the change in the law created by the 1999 amendment which came into force on 14 February 2000. The amendment to the charge which had been made on 8 February 2002 meant that the case became summary only, no longer being a continuing offence committed after the change in the law. The defence did not challenge this application save to indicate that an abuse of process argument was contemplated because of the delay and confusion about

which charge the Claimant was to face. His Honour Judge Coates concluded that he had to send the case back to the magistrates because the committal was invalid.

The Solihull Magistrates' Court hearing 24 October 2002

12. The matter was tried before the Solihull Magistrates' Court after several adjournments. The information before the Magistrates was identical to that outlined in the amended indictment. The letter from Mr Colin Booton, the Court Centre Manager, Solihull Magistrates' Court of 3 February 2003, confirmed that the information heard by the Magistrates on 23 October 2002 was identical to the charge remitted from the Crown Court and hence under section 24A(1)(a) of the Immigration Act 1971. The Certificate of Conviction dated 29 July 2005 also confirms that this is so.

13. On 7 November 2002 the Claimant was sentenced to 90 days' imprisonment and bailed pending an appeal.

14. On 12 March 2003 the case was reopened by Solihull Magistrates' Court under section 42 of the Magistrates' Court Act 1980 and the conviction and sentence set aside. It appears that this was because the Clerk to the Justices read out the original charge, which was "obtaining leave by deception" instead of the amended charge, namely "seeking leave to obtain by deception". Mr Graham Hubbard of the CPS confirms this in his letter of 17 October 2005. The Claimant accordingly abandoned his appeal against that conviction.

The Birmingham Magistrates' Court hearing on 11 June 2003

15. The Claimant was re-tried at Birmingham Magistrates' Court on the identical charge on 11 June 2003. The Certificate of Conviction, 29 July 2005, confirms that the offence of which the Claimant was convicted under section 24A(1)(A) (sic) of the Immigration Act 1971. The letter of 1 August 2005 confirms that the conviction was under section 24A(1)(a) though it wrongly describes the conviction date as 3 July 2003 instead of ll June 2003. In fact, the Claimant was sentenced on 3 July 2003 to 120 hours' community service and ordered to pay £200 towards the prosecution costs. His appeal against that conviction was dismissed by Recorder Cooke at Warwick Crown Court on 18 March 2004.

16. At the hearing at Birmingham Magistrates' Court on 11 June 2003 Mr Faux, Counsel for the Claimant, submitted unsuccessfully, as he had at the hearing before the Solihull Magistrates' Court on 28 October 2002, that the Claimant's admissions in interview should be excluded on the grounds that they were inadmissible. He also argued that the statutory defence under section 31 of the Immigration Act 1971 pursuant to the 1999 amendment was applicable but the District Judge ruled on 11 June 2003 that as a matter of law the statutory defence was not available to the Claimant because of the delay prior to his filing the true facts in support of his claim.

17. Mr Graham Hubbard of the CPS in his affidavit on behalf of the DPP states that it is his recollection that when the case was remitted by the Crown Court to the justices he made an application for the charge to be amended to section 24(1)(a)(a). The affidavit was sworn on 13 October 2005. In his letter of 17 October 2005 to the Claimant's solicitors Mr Hubbard said:

> "Mr Booton has turned up a note of the hearing which took place on 22 May. The year is not specified. This states that I outlined to the court the history of the matter and explained to the court why it had been returned to them for summary trial. There is no note that I applied for the section to be varied at this stage.
>
> "We are therefore at a position where I am reasonably certain that I did make the necessary application but I have no file note to confirm this nor is there a court record so clearly that matter is not capable of resolution at this stage
>
> "However, what is not in doubt is my proposition that I put forward in my affidavit that once the matter had been returned to the Magistrates' Court all parties, namely the prosecution, the court and the defendant, were fully aware that he was facing a summary only charge under section 24 of the Immigration Act 1971."

In his affidavit Mr Hubbard says that the defendant and those representing him were fully away that it was the summary offence under the 1996 Act that the defendant was facing and that the wording of the offence was identical in any event under both Acts.

18. Mr Hubbard produces as an exhibit to his affidavit the certificate of the Assistant Chief Constable under the Immigration Act 1971 that the evidence sufficient to justify proceedings against the Claimant under section 24A(1) of the Immigration Act 1971 came to the notice of an officer of the West Midlands Police Force on 25 October 2001.

The Submissions

(1) The Claimant

19. The Claimant's case is put upon two alternative bases. It was always the intention of the CPS to proceed under section 24A(1) as can be seen from the case summary, Mr Graham Alexander's statement, and the arresting officer's statement, and that this was the charge upon which the parties proceeded and upon which the court convicted. No amendment was made. As a consequence of the charge being treated as if it were summary only, when it was triable either summarily or on indictment, the Claimant was deprived of his opportunity to have a trial by jury at the Crown court. Alternatively, if section 24(1)(a)(a) was the correct charge there was a failure by the Crown to effect the appropriate amendment. Had that been done the case would have been run differently. Because it was thought that the charge remained under section 24A(1) the statutory defence under section 31 brought in by the 1999 amendment was relied upon, whereas if it had been known that the charge was under section 24(1)(a)(a) the predecessor to the statutory defence under section 31, namely Article 31(1) of the Refugee Convention would have been relied upon. As Article 31 is wider in its scope than section 31 the defence would have been different and would have had a greater prospect of success. This was particularly so in that Article 31 would have allowed the defence to put forward the proposition that for most of his time in India the Claimant was a minor in the charge of his parents. This was relevant as to

whether he could have taken any steps himself to leave India whilst still under his parents' care. He could not, for example, have obtained travel documents himself whilst still a minor.

20. As the Divisional Court said in *R, on the application of Gjovalin Pepushi and CPS 2004 EWHC 798 (Admin)***,** section 31(2) provides that the defence under section 31 is only available to a refugee who stopped in another country, if that refugee is able to show that he could not reasonably have been expected to be given protection under the Convention in that other country, whereas under Article 31 a short term stopover en route would not forfeit such protection. Thus the reasons for delaying would need to be considered and "even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on" (*R v Uxbridge Magistrates' Court and another, ex parte Admin 1999 EWHC (Admin) 765 per Simon Brown LJ***).** The fact that the Claimant was a minor for six years of his time in India would be relevant in considering the reasons for delay under Article 31.

21. Mr David Jones on behalf of the Claimant submitted that there is no power in the Divisional Court to amend an information once the matter has been heard by a tribunal of fact. A defect could not be cured after conviction (*Simpson v Roberts 1984 The Times 21 December).* By analogy an indictment can only be amended before conviction. (See section 5 of the Indictment Act 1915.) Although the Court of Appeal Criminal Division has the power to substitute a conviction for an alternative offence, that is only applicable where on indictment it appears on the finding of the jury that they must have been satisfied of facts which proved him guilty of the alternative offence. Such could not even by analogy apply here where the Claimant was not able, because of the way the charge was framed, to put forward the wider defence available under Article 31.

22. The amendment on 8 February 2002, which changed the section under which the Claimant was charged and no longer alleged that the offence was a continuing one, should not have been allowed as it was outside the extension of time permitted under section 28 of the Immigration Act 1971. The amended information was not laid within three years after the commission of the offence and not more than two months after the date certified by the Assistant Chief Constable. In any event this point reinforces the argument that to amend now, even if it were possible, would be inappropriate given the lapse of time and the number of hearings which have taken place.

23. There are additional points made on behalf of the Claimant in relation to the hearing of the appeal before Mr Recorder Cooke. He found that India was a safe country because it was the largest democracy in the world without noting that it was not a signatory to the Refugee Convention and more particularly failed to make any reference whatsoever to the expert evidence on this issue given by Dr Shah. He gave evidence as to the safety of India for Afghan refugees. The Recorder also, Mr Jones submitted, wrongly construed and applied section 31(1)(b) and (c).

(2) The Defendants and Interested Parties

24. Oral submissions were presented on behalf of the CPS and written submissions on behalf of the Secretary of State for the Home Department. Mr Shane Crawford submitted on behalf of the CPS that whether there was an application to amend the

information or not, everyone thought that they were proceeding under a purely summary offence as the transcript of the application by the Crown to quash the indictment on 5 April 2002 shows. The representation was the same at the subsequent hearings before the Magistrates' Court as it had been at Warwick Crown Court on 5 April 2002. Even though the wrong label may have been attached by the court system it was the understanding of all parties that this was a summary only matter. This is not a case where either the court or the Claimant was misled or misinformed. There was no submission at the Magistrates' Court that the Claimant had been denied his right to elect a jury trial. All these matters support the proposition that the trial was under section 24(1)(a)(a) even if no formal amendment took place. Had an application to amend been made it would surely have been granted and it may be that it was simply not recorded.

25. Mr Crawford conceded however that the parties appeared to have been labouring under the misapprehension that the charge was under section 24A(1) as that is what the court records say. Mr Faux, on behalf of the Claimant, believed that section 31 applied and that could only have been the case had the charge been under section 24A(1). The trial and appeal were therefore conducted on the false premise that the statutory defence under section 31 applied.

26. Mr Crawford also conceded that Article 31 is in wider terms than the statutory defence under section 31 and the misconception that the charge was under section 24A(1) meant that the Claimant did not argue Article 31 even though he was entitled to do so. The fact that the Recorder made no reference to Dr Shah's evidence could be because of the fact that he was addressing the arguments under section 31 and not Article 31. It may be that both the lawyers and the court misled themselves and were under the same misapprehension. The difficult manner in which the legislation was brought in may also have had an influence upon this.

27. It was nevertheless a matter for the Claimant as to how he presented his case, and his representatives could have argued Article 31 had they thought it appropriate to do so. In fact it would have made no difference had Article 31 been argued, and hence no prejudice to the Claimant that it was not, as the Claimant had clearly lied in his accounts and the Recorder was entitled to reject his evidence as he did. The failure to raise the "minor" argument would in such circumstances have made no difference even had it been put forward. The Claimant was not a minor when he came into the United Kingdom, nor when his application was lodged and the tribunal would have had to have taken those matters into account had there been submissions under Article 31.

28. The Claimant knew what "misdoing" was being alleged against him. Indeed the "misdoing" under section 24A(1) and 24A(1)(a) was identical (see *Simpson v Roberts*). On the facts it was appropriate to amend the record or for the Divisional Court to substitute its own decision so as to reflect that on the evidence the Claimant would in any event have been convicted of either offence.

29. In written submissions subsequently provided at the request of the Court, both the Claimant and the CPS accept that there is no jurisdiction to amend the charge that has already been subject to the scrutiny of the tribunal of fact. Under CPR 54.19 the Divisional Court may quash the order of the lower court and, if it considers there is no purpose to be served in remitting the matter to the decision maker, make the decision

itself. The Court can therefore if it decides to quash the lower court's decision in whole or in part, substitute its own decision if that is the appropriate course to take on the merits of the evidence before it. Such a course, the Claimant submits, should only be adopted with caution. The power under CPR 54.19(3) should be utilised sparingly.

Conclusions

30. This case has had a most unfortunate history. To describe it as Mr Booton, the Court Centre Manager of Solihull Magistrates' Court did in his letter of 3 February 2003 as being "beset with problems" seems now to be an understatement. After numerous hearings, both before the Magistrates' Court and the Crown Court, the charge which the Claimant faced remained uncertain, and even before this Court, some four and a half years after the initial prosecution, the CPS seek to contend that the charge was amended to reflect the correct state of affairs in the Magistrates' Court. What is clear is that none of the records support such an amendment having been made. The memoranda of convictions of the hearings on 28 October 2002 and 11 June 2003 both record that the offence of which the Claimant was convicted was section 24A(1) of the Immigration Act 1971, not section 24(1)(a)(a) of the Act. As Mr Hubbard concedes in his letter of 17 October 2005, there is no file note to confirm his 'reasonable certainty' that he did make the necessary application, nor is there any court record confirming this. The Magistrates' clerk's notes of 22 May, year unknown, do record that the history of the quashing of the indictment and the return to the Magistrates' Court was recounted to the court but when, at what hearing and for what purpose is not clear. It does appear that at least one hearing, the details of which are not before the Divisional Court, did in fact take place. For example there is a reference to a hearing before His Honour Judge Nicholl at the Crown Court sitting at Warwick in Mr Booton's letter of 3 February 2003 but no information as to when and for what purpose that hearing took place. For my part I am quite satisfied on the evidence that this Court cannot conclude an amendment was applied for and granted after the case had been returned to the Magistrates Court.

31. Once the decision had been made by the prosecution not to treat the deception as a continuing offence but to treat it as having taken place over one week in November 1999, the offence could not be charged under section 24A(1) as the 1999 Amendment had not come into force when the offence was committed. Offences under section 24(1)(a)(a) pursuant to the 1996 Amendment could however be charged even after the commencement of the 1999 Amendment by virtue of the Interpretation Act 1978 section 16. The Crown were entitled to amend the charge on 8 February 2002 at least insofar as the removal of the allegation of a continuing offence was concerned. As was rightly recognised at Warwick Crown Court on 5 April 2002 however such an amendment had the consequence that the case could no longer be tried on indictment under section 24A(1) but only summarily under section 24(1)(a)(a). The Claimant was not therefore entitled to a trial by jury and hence not deprived of any right to such a trial.

32. As all parties must have known after the hearing at Warwick Crown Court on 5 April 2002 that the case could only be tried summarily, there is, on the face of it, some force in the CPS' contention that a formal amendment of the record of conviction is all that is necessary to regularise a proper finding of guilt against the Claimant, or alternatively a substitution of a verdict of guilty under the correct section by this Court after it has quashed the conviction in the lower Court.

33. I am not satisfied however that it would be appropriate for this Court to take either of these courses of action. This is not simply a question of the wrong label being used by the Magistrates' Court, and Crown Court on appeal therefrom, which can be cured by this Court attaching the correct label. It is clear that as a result of the misapprehension of the prosecution, the defence, the Magistrates' Court and indeed the Crown Court on appeal, the case proceeded upon the basis that the prosecution was under section 24A(1) pursuant to the 1999 Amendment. Had an application been made to amend the charge, as the prosecution should have done, no such misapprehension would have occurred. The consequence of this misapprehension however is that the statutory defence provided by section 31 of the 1999 Amendment was presented to the Court, and dealt with by the Court as if it was the appropriate defence. The defence should have been that provided by Article 31, the predecessor of section 31. The Crown concede that Article 31 is wider in its scope and more advantageous to a defendant. It is however contended by the Crown that on the facts of this case there is no prejudice to the Claimant in not running the Article 31 defence as it would have made no difference had he done so.

34. I cannot accept the Crown's contention on this issue. It seems to me that the section 31 defence, limited as it is by sub-section 2 where a person stops over in another country to whether protection under the Convention can reasonably be expected in that other country, is narrower than the Article 31 defence in a manner which would impact upon this case. Under Article 31, where the reasons for delay in a third country would need to be explored in accordance with the decision in *Adimi*, the fact that for six of his seven years in India the Claimant was a minor, is relevant. During this period he could not for example have applied himself, as a minor, for travel documents. More particularly he was throughout that period under the protection of his parents and may have been influenced by his father in giving a dishonest account as to his time in India, as it appears that his father's account of the whereabouts of himself and his family was not wholly truthful. This is not therefore simply a case of saying that the applicant told 'a pack of lies', as the Recorder said, and that a conviction under either offence was inevitable whatever label was applied to the charge he faced.

35. It is of course true that the Claimant's legal advisers should have appreciated, as much as the CPS, that the charge could no longer be under section 24A(1) but could only have been under section 24(1)(a)(a). The fact remains however that the Claimant was charged under section 24A(1) and the CPS and the Magistrates' Court and the Crown Court treated him as being so charged. This was therefore a shared misapprehension and as the burden of ensuring that the proper charge was before the court lay on the Crown, it would not in my judgment be appropriate to lay the consequences of the misapprehension on the Claimant.

36. I conclude therefore that it would not be safe for this Court simply to amend the record or, having quashed the conviction, substitute a conviction under the correct section of the Act. The Court cannot be satisfied that if the defence had been run on the proper basis under Article 31 as opposed to the statutory defence under section 31, a conviction would have followed.

37. The only appropriate solution in these circumstances in my judgment is for the conviction to be quashed and no other order made. It would be inappropriate for the

matter to be remitted to the Magistrates' Court for any further hearing to take place given the long and unsatisfactory history.

38. Mr Jones indicated to the Court during argument that he did not put forward any claim for damages as set out in his re-amended grounds as there was no evidence upon which he could put forward such a claim.

39. It is unnecessary in the light of my earlier conclusions to consider the additional arguments in relation to the refusal to state a case or other issues. I do however note that the failure to refer in any way to Dr Shah's evidence by the Recorder in his judgment was surprising, given that that evidence was relevant to the question of whether India, not being a party to the Refugee Convention, was a safe country for Afghan refugees. This is a further factor in my conclusion that there is no other option than simply to quash this conviction.

Lady Justice Hallett: I agree.

MR JUSTICE NELSON: Yes, good morning.

MR JONES: My Lord, I trust your clerk received my email in response to the draft judgment and the corrections and amendments to the draft judgment?

MR JUSTICE NELSON: Yes, thank you very much.

MR JONES: I have endeavoured to contact counsel representing the Crown Prosecution Service.

MR JUSTICE NELSON: We have had an e-mail from him as well, saying that he had no corrections and nothing to add or state.

MR JONES: I am not sure I can assist the court any further then, my Lord. The only issue, I suppose, relates to costs.

MR JUSTICE NELSON: Well, had it be known that there was an issue, it might have been possible to deal with it but, as I sit by myself, because unfortunately Lady Justice Hallett is unwell and this was to be a formal hand-down, I do not think I can deal with that. But tell me what your application is and then I will discuss the matter with her and see if we can deal with it on paper.

MR JONES: I am grateful, my Lord. Well, my Lord, I am in some difficulty because I am not sure that the court can actually enforce costs against an interested party --

MR JUSTICE NELSON: Indeed.

MR JONES: -- because I think that, at the end, it was only the Crown Prosecution Service who were appearing and making representations.

MR JUSTICE NELSON: You are right.

MR JONES: But should the court consider that it is in a position to make such an order, we would only seek such an order from the point of their intervention, which I think was on 28th June 2005, although it must be said that it was only on 13th October 2005 when it was formally joined as an interested party.

MR JUSTICE NELSON: Tell me that date again.

MR JONES: The first date was 28th June 2005. This matter came before Kennedy LJ and Crane J.

MR JUSTICE NELSON: But joined?

MR JONES: They were only joined on 13th October 2005 as an interested party.

MR JUSTICE NELSON: Yes.

MR JONES: But we have the benefit of a certificate from the Legal Services Commission, which I have put a copy of with the court. So if the court makes no order for costs, we would ask for a detailed assessment. We obviously do not seek to enforce costs against the Magistrates or the Birmingham Crown Court. It would not be appropriate on the particular facts of this case.

MR JUSTICE NELSON: No. Well, as I say, my problem is that I sit by myself and so the court cannot make that decision but I have noted your application. I will discuss it with Lady Justice Hallett and we will deal with it, unless otherwise advised, simply in writing and we will inform both you and the CPS of our decision. Thank you very much indeed.

I formally hand down the judgment of the court in this case. For the reasons set out in the written judgment, the conviction is quashed.

Thank you very much.