Case No: 2005/03157 D2

Neutral Citation Number: [2006] EWCA Crim 175
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT ISLEWORTH
HIS HONOUR JUDGE McGREGOR-JOHNSON
T20050167

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 23rd February 2006

Before :

LORD JUSTICE MOORE-BICK
MR. JUSTICE LLOYD JONES
and
HIS HONOUR JUDGE FINDLAY BAKER Q.C.

- -

Between :

REGINA	**Respondent**
- and -	
LILIANE MAKUWA	**Appellant**

- -

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

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Mr. Ian Macdonald Q.C. and **Ms N. Ini Udom** (instructed by **Aston Clark**) for the **appellant**
Mr. Alper Riza Q.C. and Mr. John Hulme (instructed by the **Crown Prosecution Service**) for the **respondent**

- -

Judgment

Lord Justice Moore-Bick:

1. On 20th May 2005 at the Crown Court at Isleworth before His Honour Judge McGregor-Johnson the appellant, Liliane Makuwa, was convicted of using a false instrument with the intention of inducing somebody to accept it as genuine contrary to section 3 of the Forgery and Counterfeiting Act 1981 and two counts of facilitating an illegal entrant contrary to section 25(1) of the Immigration Act 1971. The two illegal entrants were the appellant's children and the instrument in question was a passport issued in the Democratic Republic of Congo ("DRC") to a friend of the appellant which had been altered by the removal of the original photographs and the insertion of photographs of the appellant and her children. The appellant was sentenced to 12 months' imprisonment on each count concurrent. She now appeals against conviction by leave of the Single Judge.

2. At about 4.30 p.m. on 15th January 2005 the appellant arrived at Heathrow airport from the DRC with her two children. She presented herself to an immigration officer, Mr. McMahon, who asked her why they had come to this country and how long they would be staying. Their conversation was conducted in French which the appellant appeared to speak reasonably well, although her mother tongue is Lingala. It did not take him long to discover that the passport she had tendered had been tampered with, but the appellant insisted that it was hers until she was confronted with evidence to the contrary in the form of a photograph of her friend that had been attached to her application for an entry visa.

3. The next morning after spending the night at the airport the appellant was arrested and taken to the police station where the services of a Lingala interpreter were made available. She was seen by a doctor and later that day was interviewed. It was not until well into the course of the interview that she explained that she had fled the DRC out of fear for her personal safety and claimed asylum. She did not tell the doctor that she had been raped, nor did she mention it during the interview.

4. In evidence the appellant said that the danger she faced in her own country drove her to present false documents in an attempt to gain entry to the UK. Her desperate position and her language difficulties accounted for what she had said at the airport and was the reason why her claim for asylum was not made until a Lingala interpreter was available. She was reluctant to mention the rape when she was interviewed because the interpreter, the solicitor and the immigration officials present were all male. She had not mentioned it to the doctor for the same reason.

5. In relation to the charge under the Forgery Act the appellant relied at trial on the statutory defence provided by section 31 of the Immigration and Asylum Act 1999 which 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.

. . . . . .

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

6. The Refugee Convention is, of course, the Convention Relating to the Status of Refugees of 28th July 1951 as extended by the Protocol of 31st January 1967 ("the Convention"), Article 1 of which defines a refugee as a person who

> ". . . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

7. Having given the jury the standard directions on the law, including a direction on the burden and standard of proof, and having directed them on the ingredients of the offence of using a false instrument with intent, the judge told them about the statutory defence. He directed them as follows:

> "First of all in relation to count 1 there is what is called a statutory defence. It only applies to count 1 and this is where the exception to the general rule comes in. As I say, the general rule is that the prosecution must prove the defendant's guilt, prove all of the elements of the charge so that you are sure. There are some occasions, and this is one, where there is a particular defence put forward where it is for the defendant to prove the defence. But there is an important difference here. Where it is on the defendant to prove something, he or she does not have to prove it to the same high standard the prosecution have to prove things. They have to prove it on what is called the balance of probabilities, that is to say, they must show that it is more likely than not to be true."

Then, having handed the jury a sheet of written directions, he continued as follows:

> "The defendant must show the following five matters on a balance of probabilities, that is to say, that they are more likely than not to be true.
>
> Firstly, that her genuine reason for coming to the United Kingdom was to claim asylum.

> Secondly, that she left the Congo owing to a well-founded fear of being persecuted for reasons of membership of a particular social group, i.e. her family, her husband having been arrested, or for reasons of her political opinions.
>
> Thirdly, that she presented herself to the authorities in the UK without delay. There is no dispute about that; she went straight to Mr. McMahon.
>
> Fourthly, that she showed good cause for her illegal entry into the United Kingdom in that she was reasonably travelling on false papers in order to come to the United Kingdom to claim asylum. Just pausing there, members of the jury, for a moment, you will understand that if somebody is a genuine asylum-seeker they are unlikely to be able to travel on proper documents. That is what this paragraph is directed towards.
>
> And fifthly, that she made a claim for asylum as soon as was reasonably practicable after her entering into the UK. Now I emphasise that word or those words "reasonably practicable". It is for you to judge in the circumstances."

8. It will be seen that the judge's direction followed closely the language of section 31 with the addition of a requirement for the appellant to show that she had a genuine reason for coming here to claim asylum and a reference to a well-founded fear of persecution which was clearly intended to reflect the Convention definition of a refugee.

9. The grounds of appeal in this case give rise to four related issues. The first is whether the judge was right to direct the jury that the burden of establishing all the facts giving rise to a defence under section 31, including the fact that he is a refugee, rests on the defendant. The second is whether, if the defendant does bear the burden of proving that he is a refugee, the judge should have directed the jury that it is sufficient for him to show only that there is a serious possibility that, if returned to the country of his nationality (or, in the case of a stateless person, his former habitual residence), he will be persecuted for a Convention reason, not that he must establish that on the balance of probabilities. The third, which is closely related to the second, is whether the judge failed properly to explain to the jury what is meant in this context by a "well-founded" fear of persecution, membership of a social group or political opinions. The fourth is whether, insofar as the defendant bears the burden of proof in relation to matters other than his status as a refugee, that burden is legal (i.e. persuasive) or evidential in nature.

What facts give rise to a defence under section 31?

10. It is convenient to begin by considering the second of these question first because it raises issues of principle relating to the meaning and effect of section 31. Mr. Macdonald Q.C. submitted on behalf of the appellant that section 31 of the Immigration and Asylum Act 1999 was enacted to give effect in relation to a limited range of offences to the provisions of article 31 of the Convention and should

therefore be construed and applied in the same way as the courts have construed the requirements of the Convention.

11. Article 31 of the Convention provides 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 authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

12. In order to be considered a refugee within the terms of the Convention a person must be outside the country of his nationality or former habitual residence and unwilling to avail himself of the protection of that country by reason of a well-founded fear of persecution. For such a fear to be well-founded there must be sufficient grounds for it of a kind that are capable of objective verification. In *R v Secretary of State for the Home Department Ex parte Sivakumaran* [1988] 1 A.C. 958 Lord Keith said at page 994F

> "In my opinion the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country. In *Reg. v. Governor of Pentonville Prison, Ex parte Fernandez* [1971] 1 W.L.R. 987, this House had to construe section 4(1)(c) of the Fugitive Offenders Act 1967, which requires that a person shall not be returned under the Act if it appears "that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions."
>
> Lord Diplock said at p. 994
>
> > "My Lords, bearing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or in the other, I do not think that the test of the applicability of paragraph (c) is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. 'A reasonable chance,' 'substantial grounds for thinking,' 'a serious possibility' - I see no significant difference between these various ways of describing the degree of likelihood of the detention or restriction of the fugitive on his return which justifies the court in giving effect to the provisions of section 4(1)(*c*)."

> I consider that this passage appropriately expresses the degree of likelihood to be satisfied in order that a fear of persecution may be well-founded."

13. Lord Goff expressed similar views at page 1000B-F where he said

> "But once it is accepted that the Secretary of State is entitled to look not only at the facts as seen by the applicant, but also at the objective facts as ascertained by himself in relation to the country in question, he is, on the High Commissioner's approach, not asking himself whether the actual fear of the applicant is plausible and reasonable; he is asking himself the purely hypothetical question whether, if the applicant knew the true facts, and was still (in the light of those facts) afraid, his fear could be described as plausible and reasonable. On this approach, the Secretary of State is required to ask himself a most unreal question. His appreciation is in any event likely to be coloured by his own assessment of the objective facts as ascertained by him; and it appears to me that the High Commissioner's approach is not supported, as a matter of construction, by the words of the Convention, even having regard to its objects and to the travaux préparatoires. In truth, once it is recognised that the expression "well-founded" entitles the Secretary of State to have regard to facts unknown to the applicant for refugee status, that expression cannot be read simply as "qualifying" the subjective fear of the applicant - it must, in my opinion require that an inquiry should be made whether the subjective fear of the applicant is objectively justified. For the true object of the Convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people whose fear of persecution is in reality well-founded."

14. As Mr. Macdonald pointed out, it is not necessary for a person seeking asylum to satisfy the authorities on the balance of probabilities that his fear of persecution is well-founded; something less than that will suffice.

15. The purpose and effect of article 31 of the Convention was considered by the Divisional Court in *R v Uxbridge Magistrates' Court Ex parte Adimi* [2001] Q.B. 667. In that case the court considered the position of three asylum seekers who were being prosecuted for being in possession of false passports at a time when their applications to be accorded refugee status had yet to be determined by the Home Secretary. In each case the applicant sought judicial review of the decision to prosecute him and in two cases the applicants also sought judicial review of the policy of prosecuting asylum seekers holding false papers whose claims had yet to be determined. Each of them relied on article 31 of the Convention. Simon Brown L.J., with whom on this question Newman J. agreed, described the position as follows at page 677G-678A:

> "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. Nor is it disputed that article 31's protection can apply equally to those using false documents as to those (characteristically the refugees of earlier times) who enter a country clandestinely."

16. The parties in that case made conflicting submissions about the steps that should be taken to ensure that the United Kingdom complied with its obligations under international law as expressed in article 31 of the Convention. The applicants submitted that there should be no prosecution until the Home Secretary had determined the claim for asylum and that his decision should be determinative of the question whether article 31 applied. The respondents submitted that the proper course was for the defendant to apply for a stay of any proceedings against him. Simon Brown L.J. did not consider either course entirely satisfactory and it is interesting to note that one of his reasons for rejecting the respondents' submission that the issue be determined in the context of an application to stay for abuse of the process was that it would place on the defendant the burden of proof on the balance of probabilities: see page 683E-F. In the end, however, he concluded in the light of the respondents' assurances that they intended to give full effect to article 31 that the abuse of process jurisdiction was able to provide a sufficient safety net for those wrongly prosecuted. Newman J. took a different view. He noted that article 31 had not been incorporated into domestic law and was therefore unable to accept that the court could grant or refuse relief by reference to it. It was in his view entirely a matter for the executive: see pages 694F-695B.

17. The Immigration and Asylum Act 1999 was passed a little over three months after the decision in *Adimi*. Section 31(1) is closely modelled on article 31 of the Convention with the addition in paragraph (c) of the requirement that the defendant must have made a claim for asylum as a soon as reasonably practicable after his arrival in the United Kingdom. It is reasonable to conclude, therefore, that the purpose of enacting section 31 was to meet the difficulties exposed by the judgments in *Adimi* by incorporating into domestic law, with certain modifications, the principles contained in article 31 in the form of a defence to the charges most likely to be brought against asylum seekers entering the country on false passports. In our view Mr. Macdonald was right, therefore, to submit that section 31(1) of the Act is to be construed against the background of article 31 of the Convention.

18. The responsibility for determining whether a person is to be recognised as a refugee rests exclusively on the Home Secretary: see *Sivakumaran* per Lord Templeman at page 996. On that ground, and on the grounds that article 31 of the Convention was intended to afford protection to those whose claims for asylum have yet to be determined, Mr. Macdonald submitted that anyone who has claimed asylum and invokes the defence provided by section 31 of the Immigration and Asylum Act 1999

must be assumed to be a refugee until the Home Secretary has determined his application for asylum. In further support for the argument he sought to rely on a passage in the speech of Lord Bridge in *R v Home Secretary Ex parte Bugdaycay* [1987] A.C. 514 at page 525H in which he said that it was to be assumed that the applicant in that case, Mr. Musisi, was a refugee.

19. We are unable to accept that submission. If Parliament had wished to exclude from the jury's consideration the issue of the defendant's refugee status, no doubt subsection (1) could have been worded to provide that it was a defence for a person charged with a relevant offence who claimed to be a refugee to show that he satisfied the requirements of paragraphs (a) to (c), but that is not how the legislation is drafted. (We do not think that any assistance can be derived from Lord Bridge's comment in *Bugdaycay* which simply reflected the nature of the argument before the House and the fact that Mr. Musisi's refugee status was not in dispute.) It is clear from the terms of subsection (1) that whether the defendant is a refugee in Convention terms is one of the matters that the court has to consider as an essential element of the defence, as well as the question whether he has come directly from a country where his life or freedom was threatened. Moreover, it is clear that the decision of the Home Secretary whether to grant or refuse refugee status is not final for these purposes since by virtue of subsection (7) the refusal of an application for asylum does not prevent the defendant from showing that he does in fact fall within the terms of subsection (1). In our view, therefore, one is brought back to the terms of section 31 itself.

20. The first thing one notices about section 31 is that instead of referring to a "person" charged with an offence to which this section applies it refers specifically to a "refugee". Moreover, subsection (6) defines a refugee in terms of the Convention, not simply as a person who has claimed asylum. In the light of what was said by their Lordships in *Sivakumaran* we are satisfied that one of the essential characteristics of a refugee as defined by the Convention is that it can be said of him that there is a serious possibility, a reasonable degree of likelihood, or a real and substantial risk (the expressions are interchangeable) that if he is returned to the country of his nationality or former habitual residence he will suffer persecution for one of the Convention reasons. That is reinforced by the use of the words "(within the meaning of the Refugee Convention)". They cannot have been intended to govern the word "refugee", both because they do not naturally relate to it within the structure of the subsection, and because the meaning of the word "refugee" is defined separately in subsection (6). They must therefore have been included to make it clear that the reference to a country where his life or freedom was threatened are to be understood in the same sense as they are to be understood in the context of the Convention.

21. The first question, therefore, to which section 31 gives rise is whether the defendant is unwilling to return to the country of his nationality or former habitual residence because he is afraid of persecution. If he is, the next question is whether there is a serious possibility that if he were returned to that country he would suffer persecution. If there is, it is then necessary to ask whether the risk is of persecution for one of the Convention reasons. If it is, he is a refugee for the purposes of subsection (1). At that stage it becomes necessary to enquire whether he came to the United Kingdom directly from a country where his life or freedom was threatened and whether he satisfies the requirements of paragraphs (a) to (c).

22. It follows that in our view, if the defendant bears the burden of proving that he is a refugee (a question to which we will return in a moment), it is sufficient for him to show that there is a serious possibility that he would suffer persecution for a Convention reason if he were returned to the country of his nationality or former habitual residence. We consider that adequately reflects both the conventional standard of proof where the burden is on the defendant and also the appropriate criterion for establishing refugee status.

The burden of proof

23. We turn next to consider the burden of proof. Mr. Riza Q.C. on behalf of the Crown submitted that the burden of proving all the matters giving rise to a defence under section 31(1) lies on the defendant who must establish them on the balance of probabilities. In this connection two questions arise for consideration: (a) whether subsection (1) imposes on the defendant the burden of proving all or any of the facts necessary to establish the defence; and (b) insofar as it does, whether that burden is legal or only evidential.

(i) Refugee status

24. It is convenient to consider first the question of the defendant's refugee status. In *Sheldrake v D.P.P.* [2004] UKHL 43, [2005] 1 A.C. 264 Lord Bingham (citing Lord Griffiths in *R v Hunt* [1987] A.C. 352, 374) reaffirmed that if the language of the statute in question does not make it clear whether the ground of exoneration must be established by the defendant or negatived by the prosecutor, the court should consider the mischief at which the statute was aimed and practical considerations affecting the burden of proof, in particular the ease or difficulty that the respective parties would encounter in discharging the burden.

25. In the present case section 31 provides a defence to charges made under various statutory provisions relating to the use of false documents, but in view of the specific nature of that defence, the particular mischief which Parliament had in mind when enacting that section must have been the use of false passports or other identity papers to obtain entry to this country. As to the practical considerations relating to the ease or difficulty of establishing refugee status, the defendant is in the best position to know whether he is afraid of persecution in the country of his nationality or former habitual residence, but it may be difficult for him to show that his fear of persecution for a Convention reason is objectively well-founded because he is unlikely to have access to the wider country information relevant to that question. Moreover on the face of it the language of subsection (1) draws a distinction between the defendant's status as a refugee and what, as a refugee, he has to show. Further support for the appellant's position can be gained from subsection (7) which provides as follows:

> "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."

The fact that the statute casts a burden on the defendant under these circumstances to show that he is a refugee tends to support the conclusion that he does not bear that burden under other circumstances.

26. In the light of these matters we have come to the conclusion that, as in the case of other more commonly raised defences, such as self-defence or alibi, provided that the defendant can adduce sufficient evidence in support of his claim to refugee status to raise the issue, the prosecution bears the burden of proving to the usual standard that he is not in fact a refugee.

(ii) Other matters

27. Different considerations apply, however, in relation to the other matters which have to be established under section 31(1). In the first place the words "It is a defence for a refugee . . . . to show that . . . ." are themselves sufficient to make it clear that a burden of some kind is being imposed on the defendant and the expression as a whole strongly suggests that the burden was intended to be legal rather than merely evidential. A similar question arose in *R v Johnstone* [2003] 1 W.L.R. 1736, although admittedly in a different context. In that case the provision under consideration was section 92(5) of the Trade Marks Act 1994. This provides a defence to a charge of counterfeiting in the following terms:

> "It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark."

Lord Nicholls, with whom the other members of the House agreed, did not think that the subsection could be read as imposing an evidential rather than a legal burden on the defendant. Although the subject matter of the legislation in that case was different, the terms in which the defence was expressed are identical to those of section 31(1). We are left in no doubt it was the intention of Parliament not merely to place the burden of proof on the defendant but to impose on him the legal burden of proving the remaining matters to which subsection (1) refers. We do not find that surprising given that they are all matters of which the defendant is likely to be at least as well, if not better, informed than the prosecution.

28. The question then arises whether in this case the imposition of a legal burden of proof involves an unjustifiable infringement of the presumption of innocence which, although historically part of the common law, is now also enshrined in article 6(2) of the European Convention on Human Rights. Since the burden ordinarily lies on the prosecution to prove all the elements of the offence with which the defendant is charged, it may be said that the presumption of innocence is infringed whenever there is imposed on the defendant the legal burden of proving matters which, if established, provide him with a defence. Almost all the exceptions to the presumption are statutory, a matter which has assumed greater significance since the passing of the Human Rights Act 1998, section 3(1) of which requires both primary and subordinate legislation to be read and given effect in a way which is compatible with Convention rights. The question therefore arises whether it is necessary in this case to read section 31(1) as imposing an evidential, rather than a legal, burden of proof to ensure compatibility.

29. In *Sheldrake v D.P.P.* Lord Bingham reviewed a number of decisions of the European Court of Human Rights in which the presumption of innocence had been considered

in the context of provisions imposing a reverse burden of proof. In paragraph 21 of his speech he expressed the following conclusions:

> "From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

30. Having then considered a number of decisions of the courts in the United Kingdom, including *R v D.P.P. Ex parte Kebilene* [2000] 2 A.C. 326, *R v Lambert* [2002] 2 A.C. 545 and *R v Johnstone* he said in paragraph 31:

> "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. It may none the less be questioned whether (as the Court of Appeal ruled in para 52d) "the assumption should be that Parliament would not have made an exception without good reason". Such an approach may lead the court to give too much weight to the enactment under review and too little to the presumption of innocence and the obligation imposed on it by section 3."

31. In *R v Johnstone* Lord Nicholls said in paragraph 50:

> "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 will 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."

32. The offences in respect of which section 31(1) provides a defence are those set out in Part 1 of the Forgery and Counterfeiting Act 1981 (making, copying, possessing and using false instruments, including passports), offences under sections 24A of the Immigration Act 1971 (obtaining or seeking to obtain entry by deception) and offences under section 26(1)(d) of that Act (falsification of documents and possession of a false passport for use for the purposes of that Act). In each case the prosecution is obliged to establish to the usual standard all the ingredients of the offence just as it would if the defendant were not a refugee. The effect of section 31(1) is simply to provide a defence to a defined class of persons in prescribed circumstances. It does not therefore impose on the defendant the burden of disproving an essential ingredient of the offence.

33. The mischiefs at which these statutory provisions are aimed are many and various, but the principal mischief that Parliament must have had in mind when enacting section 31(1) was the use of false passports and other identity papers by those who are not entitled to enter the United Kingdom in order to obtain entry. It has been recognised both in Strasbourg and in this country that there is a legitimate public interest in the implementation of a lawful immigration policy which may provide a justification for measures that would otherwise involve an infringement of Convention rights, provided that their effect is not disproportionate to the aim which they seek to achieve: see, for example, see *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 A.C. 323 and *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 A.C. 368. The fact that the claims to refugee status of many of those who seek asylum in this country are ultimately rejected as unfounded underlines the importance of maintaining effective immigration control.

34. Mr. Riza Q.C. submitted on behalf of the Crown that the matters which the defendant is required to prove in order to take advantage of the statutory defence are all largely, if not entirely, within his own knowledge. Moreover, they are matters in relation to which it will usually be difficult, if not impossible, for the Crown to adduce positive evidence. He submitted that if the defendant bore no more than an evidential burden in relation to them, the Crown would be at a serious disadvantage and the effectiveness of the legislation relating to the use of false passports to obtain entry would be seriously undermined. In support of this argument he referred us to the

recent decision of this court in *R v Embaye and others* [2005] EWCA Crim 2865 (unreported).

35. In *Embaye* the court was concerned with section 2 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 which makes it an offence to attend a leave or asylum interview without being in possession of a valid immigration document. Subsection (4) provides a number of defences, one of which is for the defendant to prove that he has a reasonable excuse for not being in possession of a document of that kind. One question that arose was whether the defendant bears the burden of proof in such cases and, if so, whether the burden is legal or evidential in nature. In the light of the wording of the subsection ("It is a defence for a person . . . . to prove . . .") the court had no difficulty in holding that the defendant bears the burden of proof. Nor did it have difficulty in holding that the burden is legal rather than evidential. Kennedy L.J. said in paragraph 29:

> "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. "

36. The maximum sentence for most of the offences under Part I of the Forgery and Counterfeiting Act 1981, including the offence created by section 3 under which the appellant in this case was charged, is ten years' imprisonment following conviction on indictment. That is a considerably greater penalty than the maximum of two years' imprisonment provided for an offence under section 2 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. In other respects, however, the considerations are little different from those which weighed with the court in *Embaye*. In almost all cases it would be very difficult, if not impossible, for the Crown to prove that the defendant's life or freedom had not been threatened in the country from which he had come; in most cases it would be difficult, if not impossible, for the Crown to prove that he had not presented himself to the authorities in the United Kingdom without delay; in many cases it would be difficult to show that he had not shown good cause for his illegal entry or presence or that he had not made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom. If the burden on the defendant were no more than to adduce sufficient evidence to raise an issue in relation to matters of that kind, the statutory provisions to which section 31 relates would be rendered largely ineffective in the case of all those who came to this country claiming a right to asylum here. We recognise that imposing a legal burden of proof on the defendant engages the presumption of innocence and we recognise that the consequences of conviction, at any rate for an offence under Part I of the Forgery and Counterfeiting Act, are severe. Nonetheless, we regard these as sufficient reasons for imposing a legal burden of proof on the defendant. We are accordingly satisfied that the infringement of article 6(2) is justifiable in this case since it represents a proportionate way of achieving the legitimate objective of maintaining proper

immigration controls by restricting the use of forged passports which are one of the principal means by which they are liable to be overcome. We should add that we do not consider that the existence of the reverse burden of proof provided for in section 31(1) will prevent the defendant who seeks to rely on its provisions from receiving a fair trial.

How should the jury be directed?

37. In the light of our conclusions we return to the way in which the judge should direct the jury in a case where the defendant seeks to rely on section 31(1). The first thing they should be told is that section 31 provides a special defence to a person who is a refugee. It may well be that, in many cases where the defendant claims to be a refugee, the Crown, while not accepting the claim, will not seek to establish that he is not. In such cases there will be no issue for the jury to decide and no need to explain the term. Where the Crown disputes the defendant's claim it will be necessary to explain what a refugee is for the purpose of s.31. We would suggest that is best done by drawing on the language of the Convention itself, using words of the following kind:

> "a refugee is a person who has left his own country owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."

38. It will also be necessary to give the jury some assistance on the meaning of a "well-founded fear". We would suggest that the concept can best be conveyed by directing them that a fear of persecution is well-founded if there is a serious possibility that the defendant will suffer persecution if returned to his own country. Finally, it will be necessary to direct their attention to the fact that in order to be a refugee the defendant must fear persecution for one of the reasons mentioned in the Convention, that is, race, religion, nationality, membership of a particular social group or political opinion. In most cases there will be no need to give the jury further directions on the meanings of those expressions, but there may be cases when it will be necessary to do so. In such cases the judge should discuss the proposed directions with counsel before he begins his summing-up.

39. Having thus defined a refugee, the judge should then tell the jury (if the matter is disputed) that the burden is on the prosecution to prove that the defendant is not a refugee. If they are sure that he is not, that is the end of the matter as far as this defence is concerned. However, if they think he may be a refugee, they must go on to consider the other matters that have to be proved. These should be separately identified and the jury should be told that it is for the defendant to satisfy them of each matter on the balance of probabilities. The remaining requirements of subsection (1) are couched in ordinary language and will not normally call for further directions. However, in some cases it may be necessary to give specific directions about certain matters: for example, if there is evidence that the defendant spent any length of time in another safe country on the way to the United Kingdom, it may be necessary to explain what is meant in this context by coming *directly* from a country where his life or freedom was threatened. In our view it may be helpful to the jury to give them directions on all these matters in writing.

40. In the present case the judge did give the jury directions in writing, but he did not direct them correctly on the burden of proof in relation to the issue of the appellant's refugee status. Nor, in our view, did he give them a proper direction on what is required to render a fear of persecution "well-founded". The jury rejected the appellant's defence and may have done so because, although they accepted that there was a real possibility that she would suffer persecution if she were returned to her own country, they were not satisfied that it was more likely than not that she would do so. In a matter of this kind the application of the appropriate test for refugee status and the correct burden of proof have a significant part to play in the protection of those seeking asylum from the imposition of penalties under the criminal law. For the reasons we have given we are satisfied that the judge's directions were defective.

Is the appellant's conviction unsafe?

41. On the face of it the judge's failure to give the jury appropriate directions as to what constitutes a refugee and as to the burden of proof in relation to that issue is sufficient to render the conviction unsafe. However, Mr. Riza submitted that despite those shortcomings the appellant's conviction can nonetheless be considered safe because, even if the judge had directed the jury in the manner we have suggested, her defence was bound to fail since she did not adduce any evidence capable of establishing the matters set out in paragraphs (a)-(c).

42. In the present case there was evidence that the appellant had changed flights in Paris on her way from Kinshasa to London, but although in his summing-up the judge mentioned that the appellant had passed through Paris, he said nothing at all to the jury about the requirement in section 31(1)(a) that the defendant must have come to the United Kingdom directly from a country where her life or freedom was threatened. The obvious explanation for that omission is that it was not a matter in issue at the trial. In those circumstances is it not open to the Crown to rely on it at this stage.

43. Next Mr. Riza submitted that the appellant had not presented herself to the authorities in the United Kingdom without delay. However, there does not appear to have been a dispute about that either and again it is too late to raise the point at this stage.

44. Finally he submitted that the appellant had not made a claim for asylum as soon as was reasonably practicable after her arrival in the United Kingdom. Whether she had done so or not was a question of fact for the jury which called for the exercise of a degree of judgment and the judge directed the jury correctly in relation to it. The circumstances were not in the appellant's favour since she had failed to claim asylum until the day after her arrival and after she had been interviewed twice by the immigration officer, but she said that she had language difficulties and she was not provided with the services of a Lingala interpreter until she was interviewed by the police the following day. (It was during the course of that interview that she first sought to claim asylum.) Despite these obvious difficulties, we are not confident that the jury must have rejected her defence on this ground and that they would therefore have convicted her in any event.

45. In those circumstances we are satisfied that the appellant's conviction is unsafe and must be quashed.