No: 2005/03836/C2

Neutral Citation Number: [2006] EWCA Crim 707
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday, 21st March 2006

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Phillips of Worth Matravers)

MR JUSTICE McCOMBE

MR JUSTICE GROSS

– – – – – – –

**R E G I N A**

**– v –**

**FREGENET ASFAW**

– – – – – – –

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**MR RICHARD THOMAS** appeared on behalf of **THE APPELLANT**

**MR GRAHAM LODGE** appeared on behalf of **THE CROWN**

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**J U D G M E N T**
**(As Approved by the Court)**

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Tuesday, 21st March 2006

**THE LORD CHIEF JUSTICE:**

**Introduction**

1. On 22 June 2005, in the Crown Court at Isleworth, before His Honour Judge Lowen, the appellant pleaded guilty on re−arraignment to a charge of attempting to obtain services by deception, contrary to section 1(1) of the Criminal Attempts Act 1981 (count 2), and was convicted by the jury on the judge's direction following a legal ruling. She was acquitted of using a false instrument with intent contrary to section 3 of the Forgery and Counterfeiting Act 1981 (count 1). The following day she was sentenced to nine months' imprisonment. The appellant appeals against conviction by leave of the single judge, who referred the application for leave to appeal against sentence to the full court.

**The Facts**

2. The appellant is an Ethiopian aged 29. She alleges that her father was murdered and that some years later she was raped and tortured. She set out from Ethiopia intending to travel to the United States on forged documents, there to seek asylum. She was assisted in this venture by an agent. She arrived at Heathrow with her agent on a forged passport and successfully passed through immigration. Her agent gave her another forged passport, purporting to be an Italian passport, in the name of Hana Gebrele, a forged Italian driving licence in the same name, and an "E" ticket, purchased in London, for a passenger of the same name, for a Virgin Atlantic flight from Heathrow to Washington.

3. When the appellant presented her ticket at the Virgin Atlantic check−in an airline official spotted that her passport was forged. He checked her in, but informed the police who arrested her at the embarkation point. She alleged that she claimed asylum in this country shortly after being arrested, although there was an issue about this at her trial.

4. The appellant was acquitted by the jury of the offence charged by count 1, having raised a statutory defence that affords protection to refugees charged with that offence, provided that certain criteria are satisfied. That defence was enacted by section 31 of the Immigration and Asylum Act 1999 ("section 31") in belated recognition of this country's obligations under Article 31 of the 1951 Convention and Protocols relating to the Status of Refugees ("Article 31"). The statutory defence does not extend to the offence charged by count 2. Mr Richard Thomas, who was acting for the appellant, sought a ruling from the trial judge before the trial began that the appellant could nonetheless rely upon Article 31 by way of defence to the second count. The judge rejected that application, whereupon the appellant pleaded guilty to the second count.

5. The appellant has been given leave to appeal in order to challenge the judge's ruling. The case that Mr Thomas has advanced differs to some extent from that advanced before the trial judge. Before the judge he argued that the appellant could rely upon Article 31 by way of defence to count 2. Before us he has argued that the

prosecution acted in abuse of process by seeking to avoid the effect of section 31 by adding count 2 to the indictment.

**The background to section 31**

6. Article 31 provides as follows:

> "**Refugees unlawfully in the country of refuge**
>
> 1. The contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

7. In R v Uxbridge Magistrates' Court, ex parte Adimi [2001] QB 667, three applications were heard together by the Administrative Court consisting of Simon Brown LJ and Newman J over three days in July 1999. In each case the applicant applied for judicial review to challenge the decision taken to prosecute him. Each was an asylum seeker. One had travelled to this country on a forged passport to seek asylum here. The other two were apprehended when in transit for Canada, using forged passports. All three were charged with possession or use of false passports contrary to section 5 of the Forgery and Counterfeiting Act. The two who were bound for Canada were also charged with attempting to obtain services by deception contrary to section 1(1) of the Criminal Attempts Act 1981. All three alleged that their prosecution was unlawful because it infringed Article 31.

8. After setting out the facts Simon Brown LJ turned to consider the scope of protection under Article 31. He remarked at page 677:

> "What then was the broad purpose sought to e 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 32. That seems to me helpful."

9. In dealing at page 678 with the phrase in Article 31 "coming directly" Simon Brown LJ held that there was some element of choice open to refugees as to where they might properly claim asylum, so that a short stop–over in a country en route to their chosen refuge could be accommodated within the phrase.

10. Subsequently, when dealing with the two applicants who were arrested en route to Canada, Simon Brown LJ said this at page 687:

> "I propose to deal with these two applicants together since both were arrested as transit passengers embarking for Canada and, in my judgment, no material distinction can be drawn between them. I use the term transit passenger here not in a technical sense to mean only passengers who throughout have remained airside of United Kingdom immigration control (even then, if discovered with false documents, they will be brought landside for that reason) but rather to mean passengers who have been in the United Kingdom for a limited time only and are on the way to seek asylum elsewhere. I understand the respondents to argue that such passengers can never be entitled to article 31 immunity because, having been apprehended whilst attempting to leave the United Kingdom rather than enter it, it follows that they never intended to present themselves, least of all without delay, to the immigration authorities here. Mr Kovats further submits that, having chosen not to claim asylum here despite the United Kingdom clearly being a safe country for the purpose, these passengers will in addition be unable to satisfy the coming directly condition.
>
> Neither of these arguments are in my judgment sustainable. If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum, and that a short term stopover en route in a country where the traveller status is in no way regularised will not break the requisite directness of flight, then it must follow that these applicants would have been entitled to the benefit of article 31 had they reached Canada and made their asylum claims there. If article 31 would have availed them in Canada, then logically its protection cannot be denied to them here merely because they have been apprehended en route."

11. The court allowed the applications for judicial review on the ground that the prosecutions were in breach of this country's obligations under Article 31 and the applicants had had a legitimate expectation that they would be accorded the immunity from penalty that should have been conferred under that article.

12. The respondents to the application were the Secretary of State for the Home Department and the Crown Prosecution Service. They conceded that no arm of the state had ever given thought to the obligations imposed by Article 31 and gave an assurance that a multi–agency group was being convened to examine the whole issue. In these circumstances the court decided that there was no need to make specific orders or declarations but their judgments could be left to speak for themselves. In the course of their judgments, however, the court gave consideration to what relief was appropriate. The applicants contended that the onus should be on the Secretary of State to ensure that asylum seekers entitled to expect the protection of Article 31 should not be prosecuted. The respondents contended that it was for the Crown Prosecution Service to ensure that asylum seekers were not prosecuted where they were entitled to expect the protection of Article 31. Should they fail to

do so, an application for a stay of the prosecution would be the appropriate remedy. Simon Brown LJ's conclusions at page 684 were as follows:

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

13. Newman J at page 696 differed from Simon Brown LJ. He concluded that it was for the Secretary of State to decide whether to accord an asylum seeker immunity from suit in accordance with Article 31. A stay of criminal proceedings could be sought while the Secretary of State decided whether to do so. If he decided not to, it would be no abuse of process for the Crown Prosecution service to proceed with a prosecution. The defendant would be left to raise the facts in mitigation.

14. In response to the state of affairs disclosed by the applications in Adimi Parliament enacted section 31, which provides as follows:

> "**Defences based on Article 31(1) of the Refugee Convention**
>
> (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 country.

(3) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under ––

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

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

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

.....

and any attempt to commit any of those offences."

15. The protection afforded by section 31 does not extend as far as that provided for by Article 31, as interpreted in Adimi. In particular, the asylum seeker is not afforded protection if he stopped en route to this country in another country which could reasonably have been expected to grant him asylum. This was the position of the applicant for judicial review in R(Pepushi) v Crown Prosecution Service [2004] EWCH 798 (Admin). He was a national of the former Yugoslavia and was arrested as he attempted to board an Air Canada flight for Canada, using a false Swedish passport. On the way to the United Kingdom he had passed through both Italy and France. He was originally charged both with offences under sections 3 and 6 of the Forgery and Counterfeiting Act 1981 and with attempting to obtain services by deception. In his case, however, the Crown Prosecution Service discontinued the latter charge.

16. The applicant, with permission, sought by judicial review to challenge the decision of the Crown Prosecution to prosecute him. He relied upon Adimi, arguing that he could invoke Article 31 where its scope was wider than that of section 31.

17. The court held in paragraph 21 that it was clear that section 31 did not cover the entire scope of the application of Article 31. In particular it did not cover the further offence of attempting to obtain an advantage by deception with which the applicant had initially been charged. In these circumstances the court, in paragraph 33, reached the following conclusion:

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

claimant when faced with a criminal prosecution in the UK."

18. The court went on to hold that the effect of section 31 was that there was no longer scope for a legitimate expectation that Article 31 would be respected in respects that fell outside the scope of the section.

19. Turning to the question of procedure, the court held that it was not appropriate to attack the decision to prosecute by applying for judicial review. The proper course was to raise an objection to prosecution by way of defence in the Crown Court and, if necessary, by appeal to this court. That is the course that the appellant has followed.

20. For the appellant Mr Thomas submitted that what had happened in this case was an abuse of process. Parliament, by section 31, had, as the jury's verdict demonstrated, given the appellant a defence to using her forged passport in the circumstances in which she was using it, when charged specifically with that offence under the Forgery and Counterfeiting Act. It was improper that a different charge, not falling within the statutory defence, should be brought in respect of precisely the same facts. The proper course would have been to follow the example of the prosecution in Pepushi and withdraw the second count. As that course had not been followed the appropriate course was to quash the conviction.

21. Mr Graham Lodge for the Crown accepted that, on the facts of this case, Article 31 required that the appellant should have a defence, even if charged with attempting to obtain the service of the airline by deception. This concession did not extend to other circumstances in which services might have been so obtained. He further accepted that both Article 31 and section 31 could apply to an asylum seeker who is seeking to use this country as a transit post in a journey to a preferred place of refuge. He submitted, however, that Parliament, in enacting section 31 had expressly determined the offences to which the defence should apply and that there was no basis for contending that the defence should apply to other offences. It was the duty of the Crown Prosecution Service to enforce the law of the land, and no criticism could be made of the Service for including the second count.

22. There are aspects of this case that have caused us concern. It is apparently standard practice when an asylum seeker is attempting to leave this country for another place of refuge using false documents to combine a charge of infringement of the Forgery and Counterfeiting Act with a charge of attempting to obtain air services by deception. It seems to us likely that this practice reflects a policy. It is also possible that the decision to withdraw the latter charge in the case of Pepushi also reflected some policy consideration. We asked Mr Lodge if he was aware of any such policy and he said that he was not, although he would have expected to if such a policy existed. He suggested that the practice of including the second count might be out of concern for the airlines, which were put at potential risk of financial penalties if they carried passengers who lacked proper documentation.

23. Mr Lodge may be correct, but the sentencing remarks of the judge suggest that he was under the impression that the object of the second count was immigration control. His sentencing remarks included the following passage:

> "The courts must ensure that people are deterred from using forged documents in a way which undermines the whole system of immigration control and these offences and others like it are very prevalent [so] that public interest requires deterrent sentences for them and for that reason only a custodial sentence can be justified."

24. We have not found it possible to reach any firm conclusion as to the reason why, in cases such as this, the prosecution combine the two counts. If it were the case that the second count was added in the interests of immigration control, in order to prevent the asylum seeker from invoking he defence that section 31 would otherwise provide, we believe that there would be strong grounds for contending that this practice constituted an abuse of process. At the same time we cannot ignore the possibility that Mr Lodge is correct to suggest that the Crown Prosecution Service is doing no more than seeking to enforce the law in the interest of the airlines that are put at risk by the use of false documents.

25. We hope that careful consideration will be given to our concerns and to whether the practice reflected by the facts of this case is a proper one. We need say no more than this for we believe that we have identified a response to this appeal which will be fair to the appellant regardless of whether or not there is merit in Mr Thomas' argument that there has been an abuse of process.

26. The offence to which the appellant pleaded guilty was of attempting to obtain services by deception, that is to commit an offence of dishonesty under the Theft Act. When sentencing for that offence the judge should have had regard to the circumstances and consequences of that dishonesty. As for the circumstances, the attempt was made in an attempt to fly to Washington in order to seek asylum; conduct which, on Mr Lodge's concession, should attract no punishment were there to be full compliance by this country with Article 31. So far as concerns consequences to Virgin Atlantic, the putative victim of the deception, there is no suggestion that the appellant's ticket was not properly purchased, nor any evidence that, had the appellant been carried to Washington, the airline would in fact have been exposed to the risk of any penalty.

27. Mr Lodge accepted that he could not support the reasoning that led the judge to impose the custodial sentence that he did. That reasoning was not merely not appropriate in the light of the offence for which the appellant fell to be sentenced, it was at odds with the principle reflected by Article 31 and section 31, assuming that each has the ambit that Mr Lodge has accepted.

28. Having regard to all these circumstances, we consider that the proper course is to dismiss the appeal against conviction, but to give leave to appeal against sentence, to allow that appeal, to quash the sentence of nine months' imprisonment, and to order instead that the appellant should have an absolute discharge pursuant to section 12 of the Powers of Criminal Courts (Sentencing) Act 2000. This will mean, by virtue of section 14 of that Act, that she will not in future be deemed to have had a conviction for any purpose.

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