IN THE SUPREME COURT OF THE UNITED KINGDOM

2014/0418

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
Neutral Citation: [2014] EWCA Civ 90
BETWEEN:

SXH

Appellant

-and-

CROWN PROSECUTION SERVICE

Respondent

- and -

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

CASE FOR THE INTERVENER
(UNHCR)

INTRODUCTION

1. UNHCR intervenes, with the Court's permission, in light of its supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees and its attendant 1967 Protocol ("**the 1951 Convention**").[1] Under the 1950 Statute of the Office of the UNHCR (annexed to UN General Assembly Resolution 428(V) of 14 December 1950), UNHCR has been entrusted with the mandate to provide protection to refugees and, together with governments, to seek permanent solutions.[2] UNHCR's supervisory responsibility is also reflected in the Preamble to, and Article 35 of the 1951 Convention, and Article II of the 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions, including, in particular, to facilitate UNHCR's duty of supervising the application of these instruments. The supervisory responsibility is exercised in part by the issuance of interpretative guidelines, including (a) UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued

[1] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the attendant *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) **[1/2]**.

[2] Statute of the Office of the United Nations High Commissioner for Refugees, GA Res. 428(v), Annex, UN Doc A/1775 (1950) at §1. As set out in the Statute (§8(a)), UNHCR fulfils its mandate inter alia by, "*[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.*"

January 1992 and December 2011) (*"**Handbook**"*) **[11/98]**; and (b) UNHCR's subsequent Guidelines on International Protection.[3] The Conclusions of the Executive Committee of the High Commissioner's Programme ("**ExCom**") are also an important elaboration of the content of existing standards of international protection.[4]

2. In domestic United Kingdom law, UNHCR has a statutory right to intervene before the First Tier and Upper Tribunals (Immigration and Asylum Chamber).[5] In this Court UNHCR seeks, in appropriate cases, permission to intervene to assist through submissions on issues of law related to its mandate with respect to refugee protection and the interpretation and application of the 1951 Convention. In the present case UNHCR is very grateful for the grant of permission to make written submissions. UNHCR respectfully requests that such permission be extended to the ability to make brief oral submissions, limited to one hour or such time as the Court directs, given in particular the importance of Article 31 of the 1951 Convention to the issues raised.

3. This case raises important issues regarding the prosecution of refugees who have used false documents as part of a *"genuine"* quest for asylum,[6] and the circumstances in which such a prosecution may infringe Article 8 of the European Convention on Human Rights ("**ECHR**"). This raises questions as to the relationship between Article 8 ECHR and Article 31 of the 1951 Convention.

4. In light of the scope of its supervisory mandate, UNHCR does not address the application of Article 8 ECHR to prosecutorial decisions in general, but rather focuses on the engagement of Article 8 in cases where refugees have used false travel documents as part of a quest for asylum, and are subsequently prosecuted by national authorities. For the reasons developed below, the position of refugees under international refugee law and international human rights law is in many respects *sui generis*.

5. UNHCR's submissions in this appeal are principally concerned with questions of law and, in line with its supervisory responsibility, offered to ensure that refugees receive the protection to which they are entitled under the 1951 Convention and international human rights law. However, the facts of the Appellant's case, as set out in the judgments of the

[3] UNHCR issues "*Guidelines on International Protection*" pursuant to its mandate, as contained in its Statute, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the *Handbook* and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

[4] The Executive Committee is an elected body consisting of representatives of States and members of specialised agencies with specialist knowledge which adopts its Conclusions by consensus.

[5] Rule 49 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and rule 9(5) of the Amended Tribunal Procedure (Upper Tribunal) Rules 2008, in force since 15 February 2010.

[6] See *R v Uxbridge Magistrates Court, ex p Adimi* [2001] QB 667 at 677: *"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"* **[1/3]**.

courts below and the Statement of Facts and Issues ("**SFI**"), are illustrative of an important category of protected individuals. It is common ground that the Appellant was a refugee who used false documents as an integral part of her quest for asylum. On an objective evaluation of the facts, this engaged the protection afforded under Article 31 of the 1951 Convention: neither her stay in Yemen under threat of deportation and in "*appalling conditions*" **[Appendix, p.227]**, nor her very brief stay in the Netherlands, disqualified her from Article 31, as the Crown Prosecution Service ("**CPS**") were later to accept. For the reasons developed below, the Appellant's case provides a paradigm illustration of a situation where prosecution will give rise to a breach of Article 8 ECHR.

UNHCR's key materials

6. UNHCR has placed various materials before the Court with regard to this case and invites particular attention to the following core materials:

(1) UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued January 1992 and December 2011) ("***Handbook***") **[11/98]**.

(2) UNHCR's letters dated 10 September 2002 and 13 September 2007, submitted in the case of *Kola v Secretary of State for Work and Pensions* [2007] UKHL 54 ("***UNHCR 2002 Letter***", and "***UNHCR 2007 Letter***") **[11/100]**.

(3) UNHCR's Memorandum to the House of Commons Home Affairs Select Committee dated 1 December 2005 ("***UNHCR 2005 Memorandum***") **[11/101]**.

(4) UNHCR's *Submission to the Home Affairs Select Committee in response to the Call for Written Evidence of 22 July 2008* (October 2008) ("***UNHCR 2008 Submission***") **[11/105]**.

(5) UNHCR's *Statement on the right to asylum, UNHCR's supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility* (August 2012) ("***UNHCR 2012 Statement***") **[11/104]**.

(6) Professor Goodwin-Gill, *"Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*", a Background Paper commissioned by UNHCR for the Expert Roundtable (published in updated form in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (ed. Erika Feller, Volker Türk and Frances Nicholson), Cambridge University Press, 2003, pp. 425-478) ("***Goodwin-Gill Background Paper 2001***") **[11/93]**.

(7) The Geneva Expert Roundtable's Summary Conclusions on Article 31 of the 1951 Convention, dated 8-9 November 2001 ("***Expert Roundtable Conclusions 2001***") **[11/92]**.

7. UNHCR commends these materials to the Court. The House of Lords and the Supreme Court have previously recognised the assistance that can be derived from such sources.[7] Lord Bingham said in *R v Asfaw* [2008] 1 AC 1061 at §13 that: "*The opinion of the Office of the UNHCR … is a matter of some significance, since by article 35 of the Convention member states undertake to co-operate with the office in the exercise of its functions, and are bound to facilitate its duty of supervising the application of the provisions of the Convention*" **[1/4]**. Lord Bingham referred to the observations of Simon Brown LJ (in *Adimi* at 678), to the effect that UNHCR's Guidelines "*should be accorded considerable weight*" **[1/3]**. The observations of both Lord Bingham and Simon Brown LJ were endorsed by the Supreme Court in *Al-Sirri v SSHD* [2013] 1 AC 745 at §36. Lord Clyde noted in *Horvath v SSHD* [2001] 1 AC 489 at 515, that the Handbook has "*the weight of accumulated practice behind it*". It has been accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties ("**VCLT**"), in reflecting "*subsequent practice in the application of the treaty*" **[1/13]**: *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at §54. It has similarly been recognised that the ExCom Conclusions should be given "*considerable weight*": *Rahaman v Minister of Citizenship and Immigration*, 2002 ACWSJ Lexis 1026. Further endorsements have included those in *Fornah v SSHD* [2007] 1 AC 412 at §15 by Lord Bingham **[3/26]**;[8] *Januzi v SSHD* [2006] 2 AC 426 at §20 by Lord Bingham;[9] *Adan (Lul Omar) v SSHD* [2001] 2 AC 477 at 520 by Lord Steyn;[10] and *R v SSHD ex parte Robinson* [1998] 1 QB 929 at 938 by Lord Woolf.[11]

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[7] *Contra* the considerable weight of authority here identified with the approach adopted by Laws LJ in *AH (Algeria) v SSHD* [2015] EWCA Civ 1003 at §13 which UNHCR submits is, with respect, contrary to both principle and precedent.

[8] "*[T]he UNHCR Guidelines, clearly based on a careful reading of the international authorities, provide a very accurate and helpful distillation of their effect.*"

[9] "*It is...important, given the immense significance of the decisions they have to make, that decision-makers should have some guidance ... Valuable guidance is found in the UNHCR Guidelines on International Protection of 23 July 2003.*"

[10] "*[T]he UNHCR plays a critical role in the application of the Refugee Convention ... Contracting states are obliged to co-operate with UNHCR. It is not surprising therefore that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals: Aust, Modern Treaty Law and Practice (2000), p 191.*"

[11] *"There is no international court charged with the interpretation and implementation of the Convention, and for this reason the Handbook... is particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice."*

UNHCR's submissions in summary

8. UNHCR submits that it will normally be a breach of Article 8 ECHR to prosecute a refugee for the use of false travel documents, where such use is integral to a quest for asylum. In support, UNHCR advances the following core submissions:

8.1. One of the key purposes of the 1951 Convention was to protect persons who are rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) in the course of a quest for asylum.

8.2. Article 31(1) is a critical provision of the 1951 Convention, giving effect to this purpose. It reflects the long recognised reality that refugees are rarely in a position to travel with genuine documentation when they seek sanctuary. Article 31(1) is unique in international human rights law: refugees are a *sui generis* class in this respect.

8.3. The right to seek asylum was recognised by Article 14 of the Universal Declaration of Human Rights ("**UDHR**"), is inherent in the 1951 Convention itself, and is now guaranteed by Article 18 Charter of Fundamental Rights ("**CFR**") **[2/12]**, which establishes in the EU legal order (at least) an affirmative right to be granted asylum as well as to seek it. Article 31(1) seeks to protect that right.

8.4. It is well established that the grant of refugee status is declaratory and not constitutive of rights in the 1951 Convention. Importantly, Article 31(1) therefore protects both formally recognised and "*presumptive refugees*" (*Adimi* at 677 **[1/3]**) (those whose claims have not been determined), provided certain further qualifying conditions (as to directness, promptitude, and good cause) are met. With great respect, neither Court of Appeal authority, nor CPS policy derived from it, properly reflect this basic position.

8.5. The concept of "*penalties*" in Article 31(1) is not limited to conviction and sentence, but includes prosecution. It follows from the language, context, and purpose of the provision: consider a prosecution where the prosecuting authority *knows* that the refugee fulfils the qualifying conditions for immunity under Article 31(1), but nonetheless prosecutes to trial. It would be an austere approach indeed to Article 31(1), contrary to its language, context and purpose, to say that there was no breach because the refugee was acquitted and therefore not penalised, despite (as here) having spent months on remand as a highly vulnerable refugee. Such an approach would not reflect the profound importance of the protection granted by Article 31(1).

8.6. The same observation applies to a prosecution where the prosecuting authority *ought* to know that the refugee fulfils the qualifying conditions. It is therefore incumbent on the State to put in place systems so as to ensure that a thorough enquiry is undertaken as to whether the qualifying conditions are met, so as to identify those to whom Article 31 applies, *before* commencing a prosecution. The UK has sought but failed to do this: ever since *Adimi* was decided, State agencies have properly accepted the need to avoid inappropriate prosecutions through proper administrative systems as a matter of principle, but have failed to deliver Article 31(1) protection in practice.

8.7. The protection which Article 31(1) confers in the UK has been weakened by the Court of Appeal's approach to section 31 of the Immigration and Asylum Act 1999 ("**1999 Act**") **[1/1]**. Most significantly, and contrary to Simon Brown LJ's expectation in *Adimi*, the Court of Appeal has interpreted section 31 as imposing a legal burden of proof on the refugee in respect of the qualifying conditions. Such an interpretation is contrary to principle, contrary to the central purpose of the section, and is apt to weaken pre-trial administrative and prosecutorial practice. It has an impact on the present case.[12]

8.8. Article 8 can be engaged by a decision to prosecute if, *inter alia*, (a) the nature of the activity involved in the alleged offence is such that prosecution may properly be regarded as an interference with the individual's right to respect for his private life; (b) the characteristics of the accused person, and the consequences of prosecution for that person, are such as to engage Article 8; or (c) the facts of the case are such that a charge should not be brought (e.g. because there is clearly a valid defence to the charge).

8.9. UNHCR submits that Article 8 will be engaged wherever a State prosecutes a refugee for the use of false documents that is integral to a quest for asylum, essentially on basis (a) identified above, and in many cases on bases (b) and (c) too. The autonomy, psychological integrity, dignity, and liberty of the refugee are directly in play. The Courts below were, with respect, incorrect to sever the Appellant's presentation of a false document from her quest for asylum, and her right to respect for private life protected by Article 8.

8.10. Whether or not a prosecution is seen as a "*penalty"* for Article 31(1) purposes is not critical for the purposes of Article 8 ECHR. As stated above, UNHCR's primary submission is that the prosecution of a refugee who fulfils the qualifying conditions is contrary to Article 31(1) irrespective of conviction. But if (which is

[12] See the judgment of the Court of Appeal [2014] 1 WLR 3238 at §73 (hereafter "CA§73", etc.).

denied) a conviction is necessary for there to be a *"penalty",* UNHCR's secondary submission is as follows: where there is a prosecution of a refugee that, *if prosecuted to conviction,* would violate Article 31(1), Article 8 is engaged. This is because the refugee will have been prosecuted for a course of conduct that is integral to a quest for asylum, and is expressly contemplated by Article 31(1), irrespective of the approach to "*penalty"*.

8.11. A prosecution that violates Article 31(1) either actually or prospectively (UNHCR's primary and secondary submissions respectively) will be incapable of justification under Article 8(2) ECHR, save in unusual cases (where, for instance, despite best efforts and the operation of a properly designed and robust system, facts giving rise to Article 31(1) protection are not identified or do not emerge until later in the process).

8.12. A finding of a violation of Article 8 ECHR with an entitlement to damages serves two important aspects of legal policy: first, it increases accountability for wrongs and improves standards (standard setting is a basic function of tort law); second, it gives effect to the international law principle that human rights breaches should be the subject of reparations. The application of Article 8 in this class of cases will protect the autonomy and psychological integrity of vulnerable refugees by promoting the diligent observance of the Article 31(1) protection in practice, and not merely in theory.

9. These submissions are developed below as follows: Part 1: the purpose of Article 31(1) and the right to claim asylum (§§13-23); Part 2: Article 31(1) – the constituent elements (§§24-47); Part 3: "*penalties*" (§§48-60); Part 4: the approach in the UK: administrative practice and section 31 (§§61-86); and Part 5: Article 8 ECHR (§§87-99). Parts 1 to 4 inform the approach to Part 5.

10. Before turning to develop these submissions, UNHCR briefly addresses the well-settled interpretative principles that apply.

11. The 1951 Convention must be interpreted in accordance with the ordinary meaning of its terms, construed in context and in light of the object and purpose of the treaty.[13] As Lord Hope stated in *R v Asfaw* [2008] 1 AC 1061, §55 "*a generous interpretation should be given to the wording of the articles, in keeping with the humanitarian purpose that [the*

[13] Articles 31-33 VCLT **[2/13]**; *Fothergill v Monarch Airlines* [1981] AC 251, 282D; UNHCR's *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (2001) at §2 **[11/99]**; *Sepet v. SSHD* [2003] 1 WLR 856, §6 (Lord Bingham); A Aust, *Modern Treaty Law and Practice* (3rd ed, 2013) 205-211. This is a unitary rule of interpretation, in that neither the text, nor the context, nor the purpose, have primacy. As Aust explains, "*the three paragraphs represent a logical progression, nothing more. One naturally begins with the text, followed by the context, and then other matters, in particular subsequent material*" (*id* 208).

1951 Convention] seeks to achieve …" **[1/4]**.[14] There are of course limits: the language cannot be stretched to breaking point.[15] But the preambular aims, which expressly comprise part of the context[16], include "the principle that human beings shall enjoy fundamental rights without discrimination" and the "*profound concern ... to assure refugees the widest possible exercise of these fundamental rights and freedoms*" (emphasis supplied).[17]

12. Thus a construction which promotes the protective purposes of the 1951 Convention, assessed in the light of modern human rights standards, should be adopted where the language permits. This important principle has meant that the Courts, consistently with UNHCR's position, have not infrequently read in provisions to the 1951 Convention: for example, in *Asfaw* itself, the House of Lords held that Article 31(1) protected a refugee from penalty not only where he is illegally entering or present, but also when he is illegally leaving the State, notwithstanding the absence of such protection on the face of the article. There are other examples.[18] But no such "read in" is necessary here. Indeed, UNHCR submits that its proposed approach to Article 31(1) in the present case follows naturally from the language of the provision and the applicable interpretative principles.

PART 1: THE PURPOSE OF ARTICLE 31(1) AND THE RIGHT TO CLAIM ASYLUM

13. Article 31(1) is of critical importance in the present appeal because the protection it confers is apt to inform Article 8 ECHR.

Purpose

14. The 1951 Convention extended the right to seek asylum and the obligation (and correlative right[19]) to non-*refoulement* to all refugees, irrespective of whether their arrival had been the subject of prior authorisation by the host state. The original prohibition on

[14] See also *Januzi v SSHD* [2006] 2 AC 426, §4 (Lord Bingham); *Fornah v SSHD* [2007] 1 AC 412, §10 (Lord Bingham); §62 (Lord Rodger); §117 (Lord Brown) **[3/26]**; *HJ (Iran) v SSHD* [2011] 1 AC 596, §14 **[4/30]**; *R (ST) v SSHD* [2012] 2 AC 135, §30 (Lord Hope).

[15] See *R (European Roma Rights Centre) v. Immigration Officer* [2005] 2 AC 1, §18 (Lord Bingham) and *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063, §§8-9 (Lord Hope): "*A large and liberal spirit is called for when a court is asked to say what the Convention means. But there are limits to this approach … It is not open to a court ... to expand the limits of which the language of the treaty has set for it.*"

[16] VCLT, Article 31(2) **[2/13]**, and see eg. *Asfaw* at §55 **[1/4]**.

[17] Thus, Recommendation E of the Final Act of the Conference of Plenipotentiaries which adopted the 1951 Convention itself called for a generous application of its terms **[1/2]**. The Final Act falls within Article 31(2)(b) of the VCLT as an "*instrument which was made … in connection with the conclusion of the treaty …*" and therefore may be taken into account as part of the context **[2/13]**.

[18] Thus, Article 1A(2) of the 1951 Convention recognises as a refugee a person who could avoid persecution on return by relocating internally where it would be unduly harsh to do so. Article 1A(2) does not actually say that. But the words have been read purposively to "*temper*" the harshness of a literal approach (*Januzi* at §7 (Lord Bingham)*; AH (Sudan) v SSHD* [2008] 1 AC 678 at §5 (Lord Bingham); *Karanakaran v SSHD* [2000] 3 All ER 449 at §40 (Brooke LJ)).

[19] See *Saad, Diriye and Osorio v SSHD* [2002] INLR 34, §§7-11 **[6/46]**.

refoulement, contained in the 1933 Convention[20] was limited to "*refugees who have been authorised to reside [in the state party] regularly*". One of the key purposes of the 1951 Convention was to protect such (unauthorised) refugees from penalty for breaches of the law committed in the course of a quest for asylum.

15. As Lord Bingham observed in *Asfaw* at §9 **[1/4]**,

> **"*The Refugee Convention had three broad humanitarian aims. The first was to ensure that states acceding to the Convention would afford a safe refuge to those genuinely fleeing from their home countries to escape persecution or threatened persecution … Such refugees were not to be returned to their home countries. The second aim was to ensure reasonable treatment of refugees in their countries of refuge, an aim to which most of the articles in the Convention were addressed. The third aim, broadly expressed, was to protect refugees from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution.*"**

16. To similar effect, in *Adimi*, Simon Brown LJ (as he then was) referred to "*immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law*", including in relation to "*illegal entry or use of false documents*" (at 677G) **[1/3]**.

17. Article 31(1) is therefore a critical provision of the 1951 Convention, giving effect to this important purpose. It responds to the self-evident reality that refugees are rarely in a position to travel with genuine documentation when they seek sanctuary abroad.[21]

17.1. As Lord Bingham observed in *Asfaw* at §9 **[1/4]**:

> **"*[i]t was recognised in 1950, and has since become even clearer, that those fleeing from persecution or threatened persecution in countries where persecution of minorities is practiced may have to resort to deceptions of various kinds (possession and use of false papers, forgery,***

[20] Convention relating to the International Status of Refugees, 159 LNTS 3663, 28 October 1933, Article 3.

[21] See, e.g., UNHCR, ExCom No.58 (XL) 1989, §(i): "*It is recognised that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered*"; *UNHCR 2008 Submission* (§36) ("*Refugees are often forced to flee their own country in fear of their lives. In such desperate circumstances individuals may need to resort to desperate measures merely to survive. It is well-established that the need to escape persecution frequently compels refugees to resort to irregular means of entry into host countries – including reliance on facilitators and/or the use of false documents. Article 31 is specifically aimed at protecting persons in this situation from prosecution for the measures that they were forced to use to reach safety*"); UNHCR and European Refugee Fund of the European Commission, "Beyond Proof: Credibility Assessment in EU Asylum Systems" (2013) p.213 ("*Many applicants travel and enter EU Member States with false documents or by evading immigration controls as it would be difficult, if not impossible, for them to enter in a regular manner*"); Amnesty International, "Fear and Fences: Europe's Approach to Keeping Refugees at Bay (2015) p.9 ("*Many refugees lack necessary travel documents such as passports or visas, either because they were forced to flee without proper documentation, or because obtaining them from a persecuting state would be impossible or extremely dangerous*"); United States Department of State "*2015 Country Reports on Human Rights Practices: Somalia*" (13 April 2016) p.13.

***misrepresentation, etc) in order to make good their escape*"** (see also Lord Hope at §57).

17.2. As Simon Brown LJ explained in *Adimi* (at 673F-674C) (emphasis supplied) **[1/3]**:

> ***"The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. Escapes from persecution have long been characterized by subterfuge and false papers … The need for article 31 has not diminished. Quite the contrary. Although under the Convention subscribing states must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents."***[22]

18. This has long been recognised. In a widely cited Memorandum,[23] the UN Secretary General explained in 1950 that

> **"*[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognised as a bona fide refugee."***

19. Article 31(1) is unique in international human rights law: and hence refugees are a *sui generis* class in this respect. As the *UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention for Asylum-Seekers (February 1999) ("**UNHCR 1999 Guidelines***"), guideline 2 (at p.3) recognises (emphasis supplied) **[11/97]**:

> "***According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter, a territory illegally. However the position of asylum-seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry.*"**

[22] See also, e.g., *Attorney General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577, where the New Zealand Court of Appeal said this: "*In practice, refugee status claimants often arrive at a border without papers, or are travelling on forged documents, or have destroyed their travel documents when approaching the border in order to impede their being removed on arrival*" (at §6).

[23] Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex (1950) p.46 **[9/69]**, cited in *R v Asfaw* at §9 **[1/4]**; *Adimi* at 673G **[1/3]**; *Goodwin-Gill Background Paper 2001* at p.170 fn.11 **[11/93]**.

The right to asylum

20. The right to seek and enjoy asylum was recognised in Article 14 UDHR, is inherent in the 1951 Convention, and is now proclaimed by Article 18 CFR **[2/12]**, which provides that:

> **"*The right to asylum shall be guaranteed with due respect for the rules of the [1951 Convention] and in accordance with the Treaty establishing the European Community.*"**

21. As Judge Lenaerts, writing extra-judicially, has observed, the right to asylum in Article 18 CFR is "*a right vested in individuals ('the right to receive asylum'), rather than ... a prerogative of States ('the right to grant asylum')*".[24] The context and drafting history of the Charter, the constitutional traditions of member states, and Article 13 of the EU Qualification Directive[25] all support this view.[26]

22. UNHCR submits that the right to asylum in Article 18 CFR contains the following elements (see, generally *UNHCR 2012 Statement* at §2.2.9 **[11/104]**, emphasis supplied): (i) protection from *refoulement*, including non-rejection at the frontier; (ii) access to territories for the purpose of admission to fair and effective processes for determining status and international protection needs; (iii) assessment of an asylum claim in fair and efficient asylum processes (with qualified interpreters and trained responsible authorities and access to legal representation and other organizations providing information and support) and an effective remedy (with appropriate legal aid) in the receiving state; (iv) access to UNHCR (or its partner organisations); and (v) treatment in accordance with adequate reception conditions; (vi) the grant of refugee or subsidiary protection status where the criteria are met; (vii) ensuring refugees and asylum-seekers the exercise of fundamental rights and freedoms; and (viii) the attainment of a secure status.[27]

23. Article 31(1), in its turn, seeks to protect the right to asylum. A practice of prosecuting refugees for use of false documents to enter a country and gain access to sanctuary is apt to have chilling effects. In the present case itself, there was an attempt by the Immigration Officer to coerce the Appellant into leaving the UK, by (a subsequently executed) threat of prosecution contrary to Article 31(1): the Appellant was told that if she did not, then

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[24] Lenaerts, *The Contribution of the ECJ to the Area of Freedom Security and Justice* ICLQ vol 59, April 2010, pp.255, 289 **[10/89]**.

[25] *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted* [2011] OJ L 337/9 ("**EU Qualification Directive**").

[26] Gil-Bazo *The Charter of Fundamental Rights of the EU and The Right to be Granted Asylum in the Union's Law*, (2008) Refugee Survey Quarterly, Vol 27(3) p.33 **[10/87]**.

[27] The right plainly extends beyond protection from *refoulement*, because there are other articles of the CFR which address that question: Articles 4 (implicitly) and 19(2) (expressly) do so. To hold that Article 18 CFR is simply coterminous with *non-refoulement* would undermine its effectiveness (*effet utile*).

she *"would go to prison in the UK for a very long time"* (HC§14; see also Appellant's witness statement at §24 [**Appendix p.109]**). UNHCR deprecates such conduct as contrary to the 1951 Convention. Moreover, the Immigration Officer was not on a frolic: she appears to have been following policy (HC§15). The observation by the court below that the prosecution *"had no effect whatever on [the Appellant's] ability to claim asylum in the United Kingdom"* (CA§69) with respect misses the point: it could have, and was intended to.

PART 2: ARTICLE 31(1) – THE CONSTITUENT ELEMENTS

24. Article 31(1) of the 1951 Convention provides **[1/2]**:

> ***"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."***

25. The Article protects **"*refugees*"** from the imposition of **"*penalties*"** on account of illegal entry or presence, and contains three qualifying conditions which must be satisfied: **directness**, **promptness** and "***good cause***".

"Refugees"

26. It is well established that the grant of refugee status is declaratory and not constitutive of rights in the 1951 Convention. As the *Handbook* states at §28 **[11/98]**:

> **"*A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.*"**

27. This has important consequences. In the present context, it means that Article 31(1) *"extends not merely to those ultimately accorded refugee status, but also to those claiming asylum in good faith (presumptive refugees)"* (*Adimi* at 677H **[1/3]**). This proposition "*is not in doubt*": *id*. Any alternative approach would render the protection afforded under Article 31 meaningless. As UNHCR has explained (*UNHCR 2005 Memorandum* §13 fn 191 **[11/101]**) (emphasis supplied):

> **"*Although Article 31 refers to "refugees" the effective implementation of this provision requires that it be applied to any person who claims to be in need of international protection. Article 31 would be rendered meaningless if it were***

> ***applied only after formal recognition is issued. Indeed the entire construct of refugee protection would be undermined if parties to the 1951 Convention could disavow any obligations towards those who express an intention to seek asylum. Consequently, an asylum seeker is presumptively entitled to receive the provisional benefit of the 'no penalties' provision in Article 31(1) until s/he is found not to be in need of international protection in a final decision following a fair procedure.*"**[28]

28. This approach has overwhelming support.[29] It follows that where the qualifying conditions (of directness, promptness, and good cause) are met, then the person is protected. In UNHCR's respectful submission, this basic feature of Article 31(1) is not properly reflected in domestic law and guidance.

Section 31 of the 1999 Act and R v Makuwa

29. Section 31 was enacted approximately three months after the decision in *Adimi*, and was intended to "*supplement*" the protection conferred by administrative practices in relation to Article 31(1): see Explanatory Notes to the 1999 Act at §114 **[1/1]**.[30] In *Asfaw*, Lord Bingham observed (at §25) that save in certain respects (which are not material for present purposes), "*no indication was given of an intention to depart from Adimi*" **[1/4]**. As already noted, in *Adimi* Simon Brown LJ had held that it was "*not in doubt*" that Article 31(1) extended to presumptive refugees **[1/3]**. Lord Bingham considered that *Adimi* was "*fully supported by such authority as there is ... and was rightly decided*": *Asfaw* at §22.[31] For present purposes, section 31 provides relevantly as follows **[1/1]**:

> **"*(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-***
>
> ***…***
>
> ***(6) 'Refugee' has the same meaning as it has for the purposes of the Refugee Convention.***
>
> ***(7) 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.*"**

[28] For similar statements of principle see *UNHCR 2002 Letter* (at §7) and *UNHCR 2007 Letter* (at §5) **[11/100]**.

[29] See EU Qualification Directive, Preamble (14): "*The recognition of refugee status is a declaratory act"*; *Expert Round Table Conclusions* §10(g) **[11/92]**; *Goodwin-Gill Background Paper 2001* p.193 fn.22 (citing UNHCR *Handbook* §28 **[11/98]**), p.219 §7 **[11/93]**; *Khaboka v SSHD* [1993] AR 483, 489; *R (ST) v SSHD* [2012] 2 AC 135 at §§31-32.

[30] "*The defence is intended to supplement the administrative arrangements introduced in mid-1999 which are intended to identify at an early stage those cases where Article 31(1) may be relevant*."

[31] Lord Bingham's *dicta* at §31: "*the respondent was entitled to question whether the appellant was a refugee, and if she was not neither the article nor the section could avail her"* (emphasis supplied) must be read in the context of his previous observations at §§22, 25, cited in the text above, and does not in any sense undermine the declaratory nature of refugee status. Nor was *Asfaw* a case concerning the application of Article 31 to the prosecutorial process.

30. In *R v Makuwa* [2006] 1 WLR 2755 **[5/37]**, the Court of Appeal rejected the submission that "*refugee*" in section 31(1) meant presumptive refugee. It reasoned at §§19-20 that (emphasis supplied, lettering inserted for ease of reference):

> "***(A) 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 … but that is not how the legislation is drafted. … (B) 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 ,… . (C) 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) …***
>
> ***(D) 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". (E) Moreover, subsection (6) defines a refugee in terms of the Convention, not simply as a person who has claimed asylum …*****"**

31. The Court of Appeal held that a defendant bore an evidential (but not a legal) burden of showing that he was a refugee for the purposes of section 31(1), and bore a legal burden of showing that he was a refugee for the purposes of section 31(7): §§25-26. UNHCR submits with respect that the Court's reasoning at §§19-20 is mistaken and rests on a misunderstanding of the declaratory nature of refugee status.

32. In circumstances where Parliament's expressly stated purpose in enacting section 31 was to give effect to and strengthen the protection conferred by Article 31(1), the reason why it was neither necessary nor appropriate for section 31(1) to adopt the suggested terminology in proposition (A) above is that (a) it would be over-inclusive to do so (it would include those whose claims have been rejected) and (b) the term "*refugee*" in the 1951 Convention and in Article 31(1) precisely does extend to "*a person who claimed to be a refugee*" (where the claim remained undetermined). For the same reasons, subsection (6) does not refer to a "*person who has claimed asylum*" (proposition (E)).

33. The reason why it would make no sense for section 31(1) to simply refer to a "*person*" (proposition (D)) is because again that would be over-inclusive: a "*person*" who does not fall within the criteria of the 1951 Convention[32] is neither a presumptive nor an actual refugee.

[32] Or any other relevant international refugee law instrument.

34. The Court indeed does have to consider whether the defendant is a "*refugee*" (proposition B): but an undetermined claim for asylum suffices because that constitutes the defendant as a presumptive refugee.

35. UNHCR accepts that section 31(7) and proposition (C) give *some* support to the Court of Appeal's approach, but submits that the terms of that section are not sufficiently clear as to displace the clear and strong intention of Parliament in enacting section 31, namely to give effect to and to supplement Article 31(1) protection. In the present context, there is a strong presumption of compatibility.[33] As Lord Diplock explained in *Garland v British Rail* [1983] 2 AC 751 at 771 **[3/27]**:

> **"*[I]t is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it.*"**[34]

36. One obvious and orthodox situation where section 31(7) would apply is where the defendant succeeded on a refugee appeal: he would prove his refugee status by adducing the appellate decision. In other situations, section 31(7) may be seen as a national measure going beyond (supplementing) Article 31(1), insofar as it permits the issue of a defendant's refugee status to be proven notwithstanding an adverse determination by the Secretary of State (and on appeal).

37. UNHCR therefore submits that on a proper construction, and compatibly with Article 31(1), section 31(1) applies to both actual and presumptive refugees, and there is no burden, evidential or otherwise, on a defendant who has made a refugee claim that remains undetermined. Where a refugee claim has been rejected, section 31(7) means that the defence may still be available.

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[33] See, e.g., *R(JS) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 where Lord Kerr JSC observed, at §240, that "*[t]he presumption of compatibility of domestic legislation with international law is well established*" **[4/39]**, and *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 where, at §122, Lord Dyson JSC said this: "*there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations*" **[2/16]**. See too Lord Bingham, *The Rule of Law*, Sixth Sir David Williams Lecture, CLJ 66(1), March 2007, pp.67-85, referring to the recognised principle of the rule of law that the state should be required to comply with its obligations in international law.

[34] See further *A v SSHD* [2006] 2 AC 221 (Lord Bingham, §27); *R v SSHD ex p Brind* [1991] 1 AC 696, 747. The need for a compatible interpretation is the more compelling where the relevant statutory provision was enacted to give effect to an obligation in an international instrument: see, e.g., *R (Mullen) v SSHD* [2005] 1 AC 1 §5 (Lord Bingham). There is strong authority recognising the need, so far as possible, to read and apply domestic legislation compatibly with the rights and obligations arising throughout the 1951 Convention: see, e.g., *Saad, Diriye and Osorio v SSHD* [2002] INLR 34, §§9, 14-16, 72 **[6/46]**.

Consequences of R v Makuwa

38. While the Secretary of State's recognition of refugee status is clearly relevant to the public interest in prosecuting, the consequence of *R v Makuwa* appears to be that the CPS regards such recognition as relevant to the section 31(1) defence. Thus CPS guidance (cited by Irwin J at HC§42) provides that "*the fact that a defendant's application for asylum remains undetermined should not of itself prevent or delay prosecution or conviction",* without specifying that the only circumstance in which this is permissible is where the qualifying conditions (directness, promptness and good cause) are not met.

39. Where the defendant has complied with the qualifying conditions but the claim remains undetermined, CPS guidance states that (emphasis supplied): *"it would normally be appropriate to await the outcome of the asylum proceedings before commencing prosecution."* The correct approach in law is that it would always be appropriate to do so: in the posited circumstances (of compliance with qualifying conditions), the defendant would enjoy protection under Article 31(1) and section 31, unless and until the claim is rejected.

40. In the present case, the evidence was that "*it would be impracticable to await the outcome of asylum claims before deciding whether to prosecute*" (CA§47). Where the qualifying conditions are satisfied, no question of practicability arises: the individual whose claim remains undetermined is entitled to protection under both Article 31(1) and section 31 as a matter of law.

41. The current CPS policy provides that *at trial,* "*[w]here the defendant claims to be a refugee and no determination has been made, the Crown's position should be that while not accepting the merits of the refugee claim, we will not seek to establish that he is not a refugee for the purpose of the criminal trial".*[35] This is consonant with Article 31(1) and the proper approach to s.31. But this should be the approach *throughout the entire prosecutorial process*, and should not be limited to the trial itself.

The qualifying conditions: directness, promptness and good cause

42. As to **directness**, Article 31(1) protection only applies to refugees "*coming directly from a territory where their life or freedom was threatened in the sense of article 1"*. This is codified in section 31(1)(c) of the 1999 Act. This allows a refugee to come from any country of relevant danger, not just their country of origin. It requires them to come directly. However, as Simon Brown LJ in *Adimi* concluded (at 678B-679A): a "*short term stopover en route to such intended sanctuary cannot forfeit the protection of the article*",

[35] Available at http://www.cps.gov.uk/legal/h_to_k/immigration/.

and "*the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing*" (at 678E-F) **[1/3]** (affirmed in *Asfaw* at §26) **[1/4]**.

43. As Lord Hope said in *Asfaw*, "*[t]he single most important point that emerges from a consideration of the travaux préparatoires is that there was universal acceptance that the mere fact that refugees stopped while in transit ought not deprive them of the benefit of the article*" (at §56) **[1/4]**.

44. This approach to the concept of "*coming directly*" is set out in the *UNHCR 1999 Guidelines* at §4 **[11/97]**:

> ***"The expression 'coming directly' in article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its merits.*"**

This passage was cited with approval in *Asfaw* by Lord Bingham at §13 **[1/4]** and *Adimi* at 679G **[1/3]**. The position was reaffirmed in the *Expert Roundtable Conclusions 2001* (at §10(b)-(c)) **[11/92]**:

> ***"(b) Refugees are not required to have come directly from territories where their life or freedom was threatened. (c) Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country…"***[36]

45. As to **promptness,** the protection applies only to refugees "*provided they present themselves without delay to authorities*". This is codified in section 31(1)(c) of the 1999

[36] See too *Goodwin-Gill Background Paper 2001* at p.218 §4, pp.192-193 **[11/93]***;* J. C. Hathaway, *The Rights of Refugees Under International Law* (2005) pp.393-399 (including p.394 fn 514, citing *UNHCR 1999 Guidelines* at §4, and fn 538, p.398). Such an approach is consistent with UNHCR ExCom Conclusion No. 15, "Refugees Without an Asylum Country" (1979) at §h(iii) which provides that "*[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state*" **[11/96]**. See generally *Asfaw* at §26 **[1/4]**. Nothing, e.g., in *R v Jaddi* [2012] EWCA Crim 2565 detracts from the fundamental principles set out in *Adimi* and *Asfaw*: see, e.g., *R v Mateta* [2014] 1 WLR 1516 §19 **[5/38]**.

Act. As the *Expert Roundtable Conclusions 2001* put it, this is a "*matter of fact and degree*" that "*depends on the circumstances of the case, including the availability of advice. In this context it was acknowledged that refugees and asylum-seekers have obligations arising out of Article 2 of the 1951 Convention*" (at §10(f)) **[11/92]**.[37]

46. As to **good cause**, the protection applies only to refugees "*provided they … show good cause for their illegal entry or presence*". This is codified in section 31(1)(b) of the 1999 Act. As the *Expert Round Table Conclusions 2001* explain (at §10(e)) **[11/92]**:

> ***"Having a well-founded fear of persecution is recognised in itself as 'good cause' for illegal entry. To 'come directly' from such country via another country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as 'good cause' for illegal entry. There may, in addition, be other factual circumstances which constitute 'good cause'."***

47. As explained in *Adimi* (at 679H): "*this condition has only a limited role in the article. It will be satisfied by a genuine refugee showing that he was reasonably travelling on false papers*" **[1/3]**.[38]

PART 3: "PENALTIES"

48. Consistent with basic interpretative principles (see §§10-12 above), UNHCR submits that the term "***penalties***" should be given a "*generous interpretation*" in keeping with the "*humanitarian purpose*" of the 1951 Convention (Lord Hope in *Asfaw* at §55 **[1/4]**). UNHCR submits that "*penalties"* includes both criminal and administrative penalties.[39] The term includes, but is not limited to, prosecution, fines and imprisonment: *Expert Roundtable Conclusions 2001* at §10(h) **[11/92]**.[40] This also accords with the view of Professor Goodwin-Gill: *Goodwin-Gill Background Paper 2001* at p.219 **[11/93]**, described by Lord Bingham in *R v Asfaw* (at §19) as "*one of the most thorough examinations of the scope of article 31 and the protection due*" (citing Simon Brown LJ in *Adimi*) **[1/4]**.[41] Indeed, the UK accepted this approach in its interim guidance on "*Section 31 of Immigration and Asylum Act 1999 and Article 31 of the 1951 Refugee*

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[37] See also *Adimi* at 679B-H **[1/3]**. Again, see *R v Mateta* [2014] 1 WLR 1516 §19 **[5/38]**, emphasising that the principles established in *Asfaw* govern the interpretation of section 31.
[38] See too *Goodwin-Gill Background Paper 2001* at p.218 §5 **[11/93]**.
[39] See *UNHCR 2002 Letter* (at §11) and *UNHCR 2007 Letter* (at §12) **[11/100]**. See also UNHCR Advisory Opinion on Criminal Prosecutions of Asylum-Seekers for Illegal Entry (2 March 2006) **[11/94]**.
[40] See list of participants in E. Feller, V. Türk and F Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) pp.259-260 **[11/92]**, commented upon by Lord Bingham in *Asfaw* at §19 **[1/4]**.
[41] Professor Goodwin-Gill had earlier explained: "*[T]he object and purpose of the protection envisaged by Article 31(1) of the 1951 Convention is the avoidance of penalization on account of illegal entry or illegal presence. An overly formal or restrictive approach to defining this term will not be appropriate for otherwise the fundamental protection intended may be circumvented and the refuge's rights withdrawn at discretion*" **[11/93]**.

Convention" (2012), which stated (at §5), that "*Article 31(1) does not give a definition of penalties, but the drafters of the Convention appear to have had in mind measures such as prosecution, fine and imprisonment.*"[42]

49. It follows that subjecting a refugee (or presumptive refugee) to a prosecution for the use of false documents therefore constitutes a "*penalty*" for the purposes of Article 31(1).

50. Quite apart from the conclusions of the *Expert Roundtable Conclusions 2001,* UNHCR's position has strong support. UNHCR makes six points.

51. **First**, the term "*penalty*" has a range of meanings, from a "*disadvantage suffered as a result of an action or situation*" to "*a punishment imposed for breaking a law*".[43] A "*generous interpretation*" should be adopted. The appropriate approach is to regard "*penalties*" in Article 31(1) as meaning disadvantages imposed for breaking a law in a particular factual context ("*on account of their illegal entry or presence*"). Thus it is the *particular factual context* that narrows the scope of Article 31(1), rather than the nature of the "*penalty*".

52. **Second,** UNHCR's interpretation accords with the views expressed by the drafters in the *travaux préparatoires*. During the drafting of the 1951 Convention a clear distinction was drawn between investigating the circumstances of an asylum seeker's arrival, and the prosecution of a presumptive refugee. There was general agreement amongst the drafters that "*every State was fully entitled to investigate the case of each refugee who clandestinely crossed its frontier, and to ascertain whether he met the necessary entry requirements*" (emphasis supplied).[44] As the UNHCR representative emphasised "*[e]ach State was, of course, entitled to make the investigations necessary to safeguard its security*" (emphasis supplied).[45] But "*investigations"* here was not coterminous with prosecution. As the UK representative stated that "*the reference in paragraph 1 to penalties did not rule out any provisional detention that might be necessary to investigate*

[42] The current version of the guidance is silent on this point, although the position is not disavowed: see Home Office, "*Section 31 Immigration and Asylum Act 1999: Defence against prosecution*" (21 May 2015) **[9/77]**.
[43] Oxford English Dictionary (available at: http://www.oxforddictionaries.com/definition/english/penalty). The French version refers to "*sanctions pénales*", whereas the English version only uses the term "*penalties*" which allows a wider interpretation. Pursuant to Article 33(4) VCLT **[2/13]**, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty needs to be identified. For the reasons set out below, this meaning is reflected in the English term: see *Goodwin-Gill Background Paper 2001* at p.194. Indeed, as Professor Goodwin-Gill points out, the UN Human Rights Committee has refused to restrict the term "*penalty*" in Article 15 of the International Covenant on Civil and Political Rights (prohibition of retroactive criminality) to criminal penalty, despite the criminal law context of that provision.
[44] A/CONF.2/SR.35, p.13 **[9/70]**.
[45] A/CONF.2/SR.35, p.13 **[9/70]**.

the circumstances in which a refugee had entered a country, but simply precluded the taking of legal proceedings against him" (emphasis supplied).[46]

53. **Third**, subjecting a refugee to a criminal process is likely to have grave consequences. A prosecution and deprivation of liberty through remand is likely to be traumatising, and is hardly apt to "*assure refugees the widest possible exercise of … fundamental rights and freedoms":* it will amount to an interference with the dignity, liberty and autonomy of the refugee. Consider the present case of an orphaned young rape victim entitled, as the CPS were to accept, to Article 31(1) protection: see Appellant's witness statement §§21-37 **[Appendix pp.108-113]** (accepted by the CPS without challenge: Irwin at HC46).[47] Indeed detention on remand could *exceed* the time spent in prison pursuant to criminal sentence, depending on the circumstances. It makes little sense to exclude the *prosecutorial process* from the notion of "*penalties".*

54. **Fourth,** subjection to criminal process is also antithetical to one of the basic purposes of the 1951 Convention to "*ensure reasonable treatment of refugees in their countries of refuge"* (Lord Bingham in *Asfaw* at §9 **[1/4]**). Prosecuting a refugee where the qualifying conditions of Article 31(1) are met is hardly conducive to "*reasonable treatment"* or to promoting the integration of the refugee into civil society. As Simon Brown LJ observed in *Adimi* at p.685B, "*[i]f sanctuary is to be granted, it seems somewhat unwelcoming first to imprison the refugee*" **[1/3]**.[48]

55. **Fifth,** as noted above the UK appears to accept UNHCR's approach (see §48 above). In Canada the position is even stronger. Section 113 of the Immigration and Refugee Protection Act defers any prosecution against a refugee for entering the country using false documents pending disposition of their claim for refugee status, and prohibits *any* prosecution after refugee status has been conferred: see the recent Canadian Supreme

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[46] A/CONF.2/SR.35, p.12 **[9/70]**. The analysis in J C Hathaway, *The Rights of Refugees under International Law* (2005) 407 and A Grahl-Madsen, *The Status of Refugees in International Law* (vol 2) 210-211 (cited in *Adimi* at 682 **[1/3]**) appears to have been based on an incomplete review of the *travaux préparatoires*.

[47] "*As soon as he told me I had broken the law I became very afraid … I started crying and asked the man to forgive me*"; "*I was very scared when I heard the word 'prison' because prisons in Somalia are very bad places where no one is safe*"; "*I started shaking when the police officers came to take me away. One of the officers unhooked his handcuffs from his belt and held them up towards me*"; "*I had never been to a police station before. When I arrived I was sobbing*"; "*I was taken into the courtroom in handcuffs. I was really afraid and I was shaking*"; "*I was then taken to HMP Holloway. When I arrived there I was so frightened that I started to feel sick*"; "*I was frightened of the prison officers, especially of the male officers after my experience of rape in Somalia*"; "*I still sometimes cry when I see officers in uniform"; "I have nightmares about being in prison*"

[48] See, in the present case, the Appellant's witness statement (at §§35-37) **[Appendix pp.112-113]**: "*I imagined when I arrived in the UK I would be received warmly … In Somalia unfairness and mistreatment are part of everyday life, but I never expected to be treated so unfairly in the UK. I had done nothing wrong and I had only come to the UK to be safe*"; "*I feel I have not had a chance to start a new life in the UK as I had expected; I often feel lonely and hopeless*".

Court decision in *R v Appulonappa* [2015] 3 SCR 754 **[9/68]**.[49] In New Zealand, s.342(2) of the Immigration Act 2009 provides that proceedings may not be brought against a person who enters New Zealand using a false document, if the documents or information are supplied in circumstances where Article 31 applies.

56. **Sixth**, the clear need for proper systems, which follows from the requirement to implement Article 31(1) in good faith,[50] and to ensure that Article 31(1) protection is delivered in a practical and effective manner, would not make sense if "*penalties"* are restrictively construed to mean simply conviction and sentence. If that was the sole reach of Article 31(1), States Parties could simply enact defences which would be engaged at the point of trial, while prosecuting refugees with impunity. But that is not a remotely tenable view. As the *Expert Roundtable Conclusions 2001* explain (at §§6-7) (emphasis supplied)[51] **[11/92]**:

> "***6. The effective implementation of these obligations require concrete steps at the national level. In the light of experience and in view of the nature of the obligations laid down in Article 31, States should take the necessary steps to ensure that refugees and asylum seekers within its terms are not subject to penalties. Specifically, States should ensure that refugees benefiting from this provision are promptly identified, that no proceedings or penalties for illegal entry or presence are applied pending the expeditious determination of claims to refugee status and asylum, and that the relevant criteria are interpreted in the light of the applicable international law standards.***
>
> ***7. ... [F]ull account must always be taken of the circumstances of each individual case if international obligations are to be observed …"***

57. To like effect, is the *Goodwin-Gill Background Paper 2001* (at pp.218 §§1-3 & 11-12) (emphasis supplied) **[11/93]**:

> ***"2. States have a choice of means in implementing certain Convention provisions, such as Article 31, and may elect to use legislative incorporation, administrative regulation, informal and ad hoc procedures, or a combination thereof. Mere formal compliance is not in***

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[49] *"42. The Refugee Convention reflects humanitarian concerns. It provides that states must not impose penalties for illegal entry on refugees who come directly from territories in which their lives or freedom are threatened and who are present on the territory of the foreign state without authorization, "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence": art. 31(1). 43. Consistent with this, s.133 of the IRPA provides that foreign nationals who enter Canada without documents cannot be charged with illegal entry or presence while their refugee claims are pending. As I explain in B010, art. 31(1) of the Refugee Convention seeks to provide immunity for genuine refugees who enter illegally in order to seek refuge. For that protection to be effective, the law must recognise that persons often seek refuge in groups and work together to enter a country illegally. To comply with art. 31(1), a state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety."*

[50] VCLT, Article 26 ("*pacta sund servanda"*) **[2/13]**.

[51] See also *UNHCR 2005 Memorandum* at §14 **[11/101]**.

> ***itself sufficient to discharge a State's responsibility; the test is whether, in the light of domestic law and practice, including the exercise of administrative discretion, the State has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.***[52]
>
> ***3. Particular attention needs to be paid to situations where the system of administration may produce results incompatible with the applicable principle or standard of international law.***
>
> ***...***
>
> ***11. Article 31(1) of the 1951 Convention obliges States Parties specifically to take account of any claim to be a refugee entitled to its benefit. This responsibility can be engaged by … an act of the State, for example, in … instituting immigration-related criminal proceedings (such as prosecution for the use of false travel documents).***
>
> ***12. … The policy of prosecuting or otherwise penalizing illegal entrants, those present illegally, or those who use false travel documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant's claim, amount to a breach of a State's obligations in international law."***[53]

58. **Seventh, and finally,** UNHCR's position can be tested as follows. Consider a prosecution where the prosecuting authority *knows* that the refugee fulfils the qualifying conditions for immunity under Article 31(1), but nonetheless prosecutes to trial. It would be an austere approach indeed to Article 31(1), contrary to purpose, to say that there was no breach because the refugee was acquitted and therefore not penalised, despite (as here) having spent months on remand. No-one suggests that such prosecution would be compatible with Article 31(1). Such an approach would not reflect the profound importance of the protection granted by the article. UNHCR submits therefore that *in principle* it is clear that *"penalties"* include a prosecution.

59. But the same observation applies to a prosecution where the prosecuting authority *ought* to know that the refugee fulfils the qualifying conditions. It would not be an answer that the authority did not *in fact* know, if it ought to have known. The refugee cannot be expected to volunteer all information necessary for the qualifying conditions in Article 31(1), just as s/he cannot be expected to do so for the qualifying conditions in Article 1A(2): there is a shared burden (*Handbook*, §196: "*the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner*" **[11/98]**). There is a need for a proper system to ensure that this occurs (see §§56-57 above). It is therefore incumbent on the State to put in place systems so as to ensure that a thorough enquiry is undertaken as to whether the qualifying conditions are met, so as to identify those to whom Article 31 applies, *before* commencing a prosecution. This follows from basic

[52] See also p.216.
[53] See also p.217.

public law principles too: *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014. This is consistent with and explains the approach adopted by a number of States (see §55 above).

60. However, the logic of UNHCR's position goes further. As a matter of principle, UNHCR's position means that there will be a breach of Article 31(1) even in the situation where a refugee is properly prosecuted to trial, but acquitted, because at trial it becomes clear that the qualifying conditions are met. The prosecution may be regarded as "*proper*" where *despite* the existence of robust systems and their effective implementation, the facts as to the qualifying conditions only emerge or become clear at trial. UNHCR accepts that to regard such a prosecution as a *"penalty"* and therefore a breach of Article 31 may appear harsh and constrain State action. There are three responses.

60.1. **First**, the protection granted by Article 31(1) is objective. It is not dependent on actual or constructive knowledge on the part of the State. There are other contexts where the policy of the law is to impose objective protection: consider for instance detention. If there is no lawful authority for detention, in objective terms, detention is unlawful. It is not an answer that the detainor (reasonably) thought there was authority: *R v Governor of Brockhill Prison ex p Evans* [2001] 2 AC 19 **[3/28]**. In the context of illegal entry and administrative detention, consider the precedent fact approach in *Khawaja v SSHD* [1984] AC 74 **[4/33]**.

60.2. **Second**, recognition that Article 31(1) protection is objective, and may be breached even where there are proper systems effectively implemented, incentivises vigilant State conduct, in a human rights context in which vigilance is essential.

60.3. **Third**, finally, even if the consequences of a principled interpretation of Article 31(1) appears over-inclusive, that is preferable to the under-inclusivity that results from excluding a prosecution from the concept of *"penalties"* in Article 31(1). No-one suggests that it is acceptable to prosecute without regard to the qualifying conditions, or in the knowledge that they are satisfied, on the basis that at trial the refugee will be acquitted. And yet if a prosecution is not a *"penalty",* this is the consequence that invariably follows.

PART 4: THE APPROACH IN THE UK: ADMINISTRATIVE PRACTICE AND SECTION 31

61. The UK has accepted the need for "*concrete steps*" (§56 above) in domestic law to implement Article 31(1) effectively and in good faith. The UK has accepted that "*mere formal compliance is not in itself sufficient*" (§57 above). It has accepted in effect that:

"The policy of prosecuting … those who use false travel documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant's claim, amount to a breach of a State's obligations in international law" (§57 above). Thus ever since *Adimi* was decided, State agencies have properly accepted the need to avoid inappropriate prosecutions through proper administrative systems as a matter of principle. They have, however failed to deliver Article 31(1) protection as a matter of practice. All of this is readily apparent from a consideration of (a) *Adimi* itself; (b) the reasons why Parliament enacted section 31 of the 1999 Act; and (c) subsequent policy.

Adimi and administrative practice

62. In *Adimi,* Simon Brown LJ observed the "*striking fact"* that "*until these challenges were brought, no arm of state, neither the Secretary of State nor the Director of Public Prosecutions, nor anyone else, had apparently given the least thought to the United Kingdom's obligations arising under Article 31*" (at 676H) **[1/3]**. In *Adimi* there was a contest between the claimants and the Secretary of State and DPP as to how Article 31(1) protection should be secured in domestic law: the claimants submitted that the responsibility should be that of the Secretary of State: pp.680H-682B. The Secretary of State and DPP submitted at p.682E-F that "*the prosecuting authorities and the judicial authorities, rather than the Secretary of State, bear primary responsibility for ensuring the United Kingdom's compliance with Article 31"* (emphasis supplied). There were to be "*future efforts to ensure that only those falling outside the protection are prosecuted" (*emphasis supplied).

63. Simon Brown LJ preferred the claimant's approach, observing that there were "*strong reasons why the Secretary of State rather than the CPS should assume responsibility*" (p.684A, D) but held that this was not "*the only lawful way forward*". Newman J considered that it was and differed from Simon Brown LJ in this respect: p.696C.

64. Simon Brown LJ held at p.684E that (emphasis supplied) the "*abuse of process jurisdiction is able to provide a sufficient safety net for those wrongly prosecuted".* But this was *"[p]rovided that the [Secretary of State and DPP] henceforth recognise the true reach of Article 31 … and put in place procedures to ensure that those entitled to its protection … are not prosecuted, at any rate to conviction, for offences committed in their quest for refugee status."* He expressed *"the earnest hope that decisions to prosecute … will be made only in the clearest of cases and where the offence itself appears manifestly unrelated to a genuine quest for asylum."*

65. In *Adimi's* own case, Simon Brown LJ held that the claimant was "*exempt from penalty under Article* 31" so that

> "***It must surely follow that the prosecution still outstanding against him will be discontinued.*"**

66. Simon Brown LJ concluded that "*[i]t must be hoped that these challenges will mark a turning point in the Crown's approach to the prosecution of refugees for travelling on false passports. Article 31 must henceforth be honoured*" (emphasis supplied).

67. In summary, it is clear that Simon Brown LJ's conclusion that the criminal law (abuse of process) could supply Article 31(1) protection domestically was expressly (a) said to be a "*safety net*" that was (b) premised upon proper systems designed to prevent prosecution in all but "*the clearest of cases … where the offence itself appears manifestly unrelated to a genuine quest for asylum."* UNHCR regrets that this has not transpired.

The rationale for section 31

68. The clear understanding following *Adimi* was that there were to be arrangements to prevent a prosecution in violation of Article 31(1). Prior to the decision in *Adimi* concern over this issue had already prompted the convening of a multi-agency group. The group, comprising the police, Home Office, CPS, the Law Society, the Refugee Council, and UNHCR (as an observer), amongst others, drafted a Joint Memorandum of Good Practice. That Joint Memorandum, which was never formally published, indicated that immigration officers, police and prosecutors should apply both Article 31 and the statutory defence in section 31 in deciding whether to investigate, initiate or continue a prosecution, and stated that *only in the clearest of cases should police proceed to charge*. See MacDonald and Webber, *Immigration Law and Practice* (6th ed. 2005).[54]

69. It was against the background of these proposed administrative arrangements, designed to identify Article 31(1) cases at an early stage, that section 31 was enacted. Section 31 was intended as a safety-net designed for those that had not already by protected against prosecution by administrative arrangements.[55]

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[54] It appears that definitive agreement on the draft was not reached: see Mrs Bowen's evidence at HC§87. This language has been adopted in Scotland by the Crown Office & Procurator Fiscal Service "*Guidance on the Application of the Defence in Section 31 of the Immigration Act 1999 which provides protection for those refugees and presumptive refugees*" (2015) which provides that "*[d]ecisions to prosecute … should be made only in the clearest of cases and where the offence itself appeared manifestly unrelated to a genuine quest for asylum*" (at §11) **[10/81]**.

[55] That is clear from the Explanatory Notes to the 1999 Act **[1/1]**, which stated: "*The defence is intended to supplement the administrative arrangements introduced in mid-1999 which are intended to identify at an early stage those cases where Article 32(1) may be relevant*" (§114). Further, as Lord Williams of Mostyn said, in promoting the relevant clause in the House of Lords on 18 October 1999 (Hansard HL cols 855, 857): "*…we*

70. Lord Bingham described the context and reasons for the enactment of section 31 in the following terms (*Asfaw* at §24) (emphasis supplied) **[1/4]**:

> **"*When the Bill which became the 1999 Act was before Parliament, the Divisional Court judgment in Adimi loomed largely in the discussion (see Hansard, HL, 18 October 1999, cols 844, 845, 848, 849, 850, 851, 852, 856, 857, 2 November 1999, col 784). A number of statements made by the Attorney General on behalf of the Government were relied on in argument. The Government wanted an outcome which properly accommodated article 31(1) asylum seekers and the difficulties raised by Simon Brown LJ (18 October, col 855). It was hoped to achieve this and avoid inappropriate prosecutions by giving administrative guidance to the prosecuting authorities (18 October, cols 855, 856) but if such prosecutions did occur the defence would exist (18 October, col 857). This was an appropriate and generous response and solution to difficult problems (18 October, col 857). On 2 November 1999, when the clause which became section 31 was (before amendment) introduced, the Attorney General said (col 784) that the purpose of the clause was to ensure that someone who came within article 31(1) of the Convention was properly protected and did not have a penalty imposed on him on account of his illegal entry or presence. He referred again to the administrative steps taken to identify article 31(1) issues at an early stage. In relevant cases therefore the matter would never come to court. Sometimes the administrative procedures would fail, and the defence was a further safeguard.*"**

Subsequent policy

71. Current CPS policy seeks to avoid "*inappropriate prosecutions*" by emphasising the need to obtain *proper information from the UKBA* before a decision to charge is made. Thus the policy provides *inter alia* that (emphasis supplied):

> **"*It remains the case that the CPS is reliant upon the UKBA for information and evidence relevant to an assessment of whether a defence under section 31 may apply …*
>
> *In all cases which are submitted to the CPS for a charging decision and for which a defence under section 31 could apply, a prosecutor will require proper information to inform a decision on charge.*
>
> *Information … should include:*
>
> - *Any credible evidence that the suspect has a section 31 defence available to him. This should cover all the elements of the defence …*
> - *If there is no such evidence, an explanation … as to why the UKBA officer has taken the view that the suspect is not entitled to the protection afforded by the section 31 defence, with evidence to support that view.*"**

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want an outcome which properly accommodates Article 31(1) asylum seekers and the difficulties raised by Lord Justice Simon Brown…" **[9/71]**.

72. A similar approach is set out in the Home Office's current guidance (21 May 2015) **[9/77]**. That Guidance provides *inter alia* that "*In all asylum cases you refer to the CPS you must give them as much information as possible which may mean making some extra enquiries*" (p.9). It suggests that all cases enter the "*investigate process in some way*", but only "*risk prosecution if there is no evidence of a section 31 defence*" (p.19). The guidance provides that "*If you believe a section 31 defence does or might apply you must put the criminal investigation on hold and wait for the outcome of the asylum claim. If this happens you do not, at this point, need to either: arrest, take into custody, interview the offender*" (p.25).

73. Notwithstanding these policies, there appear to be manifest and systemic failures in the system. It appears that refugees that fall within the scope of Article 31 are being prosecuted and convicted. Although there is a paucity of immigration crime data,[56] the following materials indicate this: (a) the most recent Annual Report (2014/15) of the Criminal Case Review Commission ("**CCRC**") which states that as at March 2015 the CCRC had referred a total of 34 cases of refugees or asylum seekers having been prosecuted for offences relating to their entry to the UK **[9/78]**; (b) an article published by the CCRC in April 2016 which refers to systemic failures which required a systemic response[57]; (c) research commissioned by the Solicitors Regulation Authority and Legal Ombudsman, which demonstrates that refugees were regularly advised to plead guilty when entering the country on false documentation in exchange for reduced sentences, notwithstanding the availability of the section 31 defence[58]; (d) the significant number of Court of Appeal cases concerning wrongful conviction of refugees, where legal representatives have failed to properly advise their clients as to the existence or scope of the section 31 defence.[59] These cases illustrate the importance of proper systems to prevent the prosecution of refugees, and the danger of relying exclusively on the section 31 defence as a safety net to prevent convictions.

74. The present case provides a striking example of the serial failures in the system. For example:

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[56] See G. Christie, "*Prosecuting the Persecuted in Scotland: Article 31(1) of the 1951 Refugee Convention and the Scottish Criminal Justice System*" (March 2016) **[10/86]**, noting the paucity of published UK Government data on the extent of prosecutions and convictions for immigration-related criminal offences (at p.5), but citing academic research offering various estimations of wrongful convictions of refugees in England without due regard to Article 31(1), ranging from hundreds to thousands.

[57] CCRC, "*Understanding and misunderstanding: Developments in the CCRC's asylum and immigration cases*" (6 April 2016) **[10/84]**. Here, the CCRC (a) recognises the particular vulnerability of asylum seekers; (b) states that there was growing evidence of systemic failures in the way applicants were being wrongly advised by incompetent lawyers and these systemic failures required a systemic response; and (c) notes the potential damage to the criminal justice system in terms of loss of confidence and the waste of public money. See also oral evidence, the Criminal Cases Review Commission, HC 850, 6 February 2015, question 122.

[58] Migration Work CIC, "Quality of legal services for asylum seekers" (January 2016) pp.21, 27-28 **[10/82]**.

[59] See, by way of illustration only, *R v Mohamed (Abdalla) and others* [2011] 1 Cr App R 35; *R v Mateta and others* [2014] 1 WLR 1516 **[5/38]**; *R v Ali Shabani* [2015] EWCA Crim 1924.

74.1. The CPS lawyer taking the decision to charge on 28 December 2009 was not provided with information and evidence from the UKBA as to whether the Appellant was entitled to protection under Article 31(1) or a defence under section 31 (HC§18).

74.2. Despite that absence of information and evidence, the CPS lawyer thought that the Appellant's *"means of acquiring [her travel] document was totally unorthodox, her explanation is unconvincing."* The public interest in prosecution was said to be met without consideration of the Appellant's individual circumstances, and without reference to Article 31(1) or section 31 (HC§§18-19).

74.3. Even when Article 31(1) was expressly raised on 22 February 2010 in a skeleton argument at a Plea and Case Management Hearing, it *"appears unlikely that the CPS advocate at court did anything constructive*" (HC§25).

74.4. When the CPS' employed barrister asked on 29 April 2010 for information about the Appellant's stay in Yemen, the Immigration Officer responded that: *"The year spent in Yemen had not been expanded upon in interview because the country was not a signatory to the 1951 Convention."* This was incorrect but not understood to be so by the CPS' barrister at the time. Yet the barrister considered on 4 May 2010 that the stay in Yemen deprived the Appellant of a defence so that the prosecution should proceed. As Irwin J noted at HC§30, this was "*a curious explanation*" given the barrister's state of mind at the time.

74.5. The barrister's view was confirmed on 13 May 2010 by a senior member of CPS staff with responsibility for CPS policy in this area (HC§31).

74.6. It was only between 1 and 8 June 2010 that a (new) CPS Advocate "*took a grip of the case, reviewed the law … and herself at least conducted at least some research as to the position of Somalis in Yemen*" (HC§34).

75. In the premises it is with respect unsurprising that Irwin J concluded that had the system worked properly, the Appellant would probably not have been prosecuted (HC§92). The "*vital facts*" that ought to have been communicated but were not, were first, the inability of Somalis to obtain official Somali travel documents and second, the objective conditions faced by Somali refugees in Yemen[60]. "*The UKBA were clearly aware*" of the former fact, and "*on the face of it… should have been aware of the position of a Somali in Yemen*" (HC§§43-44).

[60] These were identified in the Appellant's Asylum Decision Letter, which noted, *inter alia*, that conditions were *"terrible"*, *"appalling"*, and *"desperate"*, with the threat of deportation **[Appendix pp.226-8 §§39, 41, 42, 45]**.

76. It is also unsurprising that Irwin J (provisionally) considered at §48 that (emphasis supplied):

> **"*the immigration officers took a more punitive line than is the norm amongst their colleagues and secondly, failed to inform the relevant CPS lawyers of background information which, on any sensible view, might be thought essential before initiating charges* …"**

77. This was because:

> **"*the normal response on the part of the UKBA is not to recommend prosecution in circumstances such as those arising in his case.*"**

78. Despite the fact that the Appellant would not *"normally"* have been *"recommended"* for prosecution (i.e. relevant information contra-indicating a charge would have been passed by the UKBA onto the CPS) the failures in the Appellant's case appear illustrative of a wider and troubling trend (see §73 above)

Reverse burden of proof

79. The protection which Article 31(1) confers has been weakened in the UK by the Court of Appeal's approach to section 31 of the 1999 Act. In particular, the Court of Appeal has interpreted section 31 as imposing a legal burden of proof on the refugee in respect of the qualifying conditions. Such an interpretation is contrary to principle, contrary to the central purpose of the section, and is apt to weaken pre-trial administrative and prosecutorial practice. It had an impact on the present case: see the Court of Appeal's approach below at CA§73, and the evidence of the CPS' Senior Policy Advisor at HC§88.

80. In *Adimi*, the reason why Simon Brown LJ considered it preferable that Article 31 protection should "*operate by way of a defence*" was that "*where it is invoked the burden should be on the prosecution to disprove it. It would be appropriate to proceed to conviction only in the clearest cases*" (at 683E) (emphasis supplied) **[1/3]**. He also considered that where Article 31 was in play, the issues raised concerned immigration control rather than criminality (at 684A):

> **"*Decisions should depend more upon considerations arising out the proper administration and control of immigration and asylum than upon the need to suppress and punish criminal activity generally.*"**

81. Regrettably, this is not how the case law has developed.

82. *R v Makuwa* **[5/37]** marked, with respect, a wrong turn in the case law. A mother from the DRC arrived at Heathrow on a false passport, with her two children, and claimed asylum. She was convicted of using a false instrument, but a misdirection by the trial judge on the section 31 defence (namely that she bore a legal as well as a persuasive burden on the issue of refugee status: see §31 above) led to the conviction being overturned. But in addition, she had been prosecuted and convicted of facilitation of illegal entry under section 25(1) of the Immigration Act 1971. Section 31 did not apply to that offence, and so she was prosecuted, convicted and sentenced to 12 months' imprisonment. The illegal entrants were the two children who had accompanied her. In its written Case and oral submissions in *Asfaw*, UNHCR described this as a grotesque outcome. It continues to do so. This is not what Article 31 contemplates and not what Simon Brown LJ intended.

83. *R v Makuwa* is problematic for a further reason. The Court of Appeal held that the legal burden lay on the refugee to prove the qualifying conditions. UNHCR submits that this is wrong as a matter of principle and contrary to the purpose of section 31 of the 1999 Act.

84. Section 31 of the 1999 Act provides relevantly that (emphasis supplied) **[1/1]**:

> **"*(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—***
>
> > ***(a) presented himself to the authorities in the United Kingdom without delay;***
> >
> > ***(b) showed good cause for his illegal entry or presence; and***
> >
> > ***(c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.***
>
> ***(2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country*.**"

85. In *R v Mukuwa*, the Court of Appeal held at §§27-36 that **[5/37]**:

85.1. The words "*It is a defence for a refugee … to show that …*" indicated 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*", given the identical wording in section 92(5) of the Trade Marks Act 1994 where the House of Lords considered in *R v Johnstone* [2003] 1 WLR 1736 **[4/32]**, that a legal burden had been imposed on the defence (at §27).

85.2. The matters addressed in the qualifying conditions were "*all matters of which the defendant is likely to be at least as well, if not better, informed than the*

prosecution" (§27). "*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*" (§36).

85.3. "*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*" (§32).

85.4. "*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*" (§33).

85.5. "*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*" (§33).

85.6. "*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*" (§36).

86. UNHCR submits that in section 31 of the 1999 Act the refugee should bear only an evidential, but not a legal, burden as to the qualifying conditions. The Court of Appeal's reasoning is, with great respect, deeply flawed.

86.1. **First**, as to legislative mischief. The "*principal mischief*" that Parliament had in mind was <u>not</u> the use of false passports for entry, but rather the conferment of a defence in respect of a wide class of offences. The conferment was in light of *Adimi*, which "*loomed largely in the discussion*" (Lord Bingham, in *Asfaw* at §24 **[1/4]**), and in which Simon Brown LJ had expressly stated that he would prefer Article 31 to be given domestic effect by way of a defence <u>precisely so that it would be for the prosecution to disprove it</u>. Moreover, the *"principal mischief"* was to enact a <u>safety-net</u> for "*inappropriate prosecutions*", where administrative arrangements to prevent prosecutions except in "*the clearest of cases*" (where the

offence was *"manifestly unrelated to a genuine quest for asylum"*) had not worked. The Court of Appeal misunderstood the rationale for the section.

86.2. **Second**, it follows that the fact that the defence did not require the refugee to disprove an essential element of the offence was not to the point, nor that imposing an evidential burden on the refugee in respect of the qualifying conditions would render *"the statutory provisions to which section 31 relates … largely ineffective".*

86.3. **Third**, as to relative ability to prove. In order for the defence to be made good, all qualifying conditions must be shown to be met. It follows that if as UNHCR submits, there is only an evidential burden on the refugee, it would be sufficient to defeat the defence for the CPS to disprove any one of the qualifying conditions.

a) It is significant that the Court of Appeal at §36 omitted to address the obvious condition which it is far easier for the CPS to disprove than for the refugee to prove: namely the governing, final clause in section 31(2): whether refugee can show "*that he could not reasonably have expected to be given protection under the Refugee Convention in that other country*." Instead the Court of Appeal simply addressed the first, subordinate clause in section 31(2).

b) The governing clause in section 31(2) concerns an objective condition, relating to the objective country situation, in respect of which the state will possess far greater knowledge than the refugee. Indeed, on the question of the nature of the burden in showing "refugee" status, the Court of Appeal accepted this logic (CA§25[61]). Consider the present case: the Appellant said no more than that she "*did not know that it might have been possible to register as a refugee when I was in Yemen*." **[Appendix p.105, §11]**; the Secretary of State gives chapter and verse: there was a threat of deportation; the conditions were "*terrible*"; "*appalling*"; "*desperate*"; "*Yemen cannot afford these people*" **[Appendix pp.225-228]**, such that the Appellant could not reasonably have expected to be given protection there.

c) Even with regard to the other qualifying conditions (good cause, promptness), again these require an objective assessment, based on

"... 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."

primary facts. It is difficult to see why these matters are more difficult for the CPS to disprove than for the refugee to prove.

86.4. **Fourth**, as to unfounded claims. This is totally irrelevant to the issue of the nature of the burden. If a claim is rejected, the defence is not available *at all.* The defence is expressly predicated (in the Court of Appeal's view) on refugee status being shown (the demonstration of a real risk and the raising of a real doubt as to refugee status amount to the same thing). In UNHCR's view, it is available to presumptive as well actual refugees. But it is not available to those whose claims are unfounded (see Simon Brown LJ in *Adimi* at 686H-683A).

86.5. **Fifth**, *R v Johnstone* **[4/32]** supports UNHCR's case. As the Court of Appeal recognised, the result in that case (a legal burden on the defendant) was in a very different context. But the reasoning avails UNHCR's argument.

a) At §§49-50, Lord Nicholls said that "*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 relevant question was "why it is said that, in the absence of a persuasive [legal] burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused."*

b) Both Simon Brown LJ in *Adimi* and, on proper analysis, Parliament in enacting section 31 as a safety-net, considered that the public interest is prejudiced by the conviction of a refugee where there is a real doubt as to whether the qualifying conditions are met, not *vice versa,* and that there is no compelling reason to convict in those circumstances.

86.6. **Sixth**, for all of the reasons given above, the reverse burden applied in *R v Mukaka* is contrary to Article 6(2) ECHR and, insofar as necessary, sections 31(1)(a)-(c) and section 31(2) falls to be read down pursuant to section 3 of the Human Rights Act 1998.

PART 5: ARTICLE 8 ECHR

Engagement of Article 8

87. The Court of Appeal rightly held that Article 8 ECHR can be engaged in a decision to prosecute (CA§§71, 79). There are at least three categories of case where it may be engaged:

87.1. Category 1: when the *nature of the activity* involved in the alleged offence is such that prosecution may properly be regarded as an interference with the individual's right to respect for his private life. An example is the ECtHR's decision that Article 8 was engaged in *G v UK* (2011) 53 EHRR SE25 **[1/7]**, in relation to the prosecution of a 15 year old boy for rape following allegedly consensual sex with a 12 year old girl, because the sexual activities at issue fell within the meaning of "*private life*".[62]

87.2. Category 2: if the *characteristics* of the accused person, and the *consequences* of prosecution for that person, are such as to engage Article 8. The Court of Appeal's example was: *"a decision to prosecute a dying woman may constitute a disproportionate interference with her private life"* (CA§71). The language of this example deals with both engagement *and* breach (i.e. a *"disproportionate interference"*; emphasis supplied).

87.3. Category 3: if the facts of the case are such that a charge should not be brought. The Court of Appeal's example was: *"if the prosecutor is aware of facts that provide the suspect with an unanswerable statutory defence to the charge it seems to me that a decision to prosecute would not only be perverse but it might also constitute an interference with the suspect's right of respect for her private life"*.[63]

These categories are of course not mutually exclusive.

88. UNHCR submits that Article 8 ECHR will be engaged where a State prosecutes a refugee for the use of false documents, where such use is integral to a quest for asylum. That is for five principal reasons.

89. **First**, use of false documents that is integral to a quest for asylum is intimately connected with a refugee's autonomy and attempt to protect his private life. The prosecution of a

[62] *G v UK* §§34-35, 39 **[1/7]**.
[63] CA§71. The CA's example relies on the *actual* (subjective) knowledge of the prosecutor. As set out below, UNHCR submits that the Court's assessment should be based on facts that ought reasonably to have been known to the prosecutor.

refugee for such activity interferes with his right to respect for his private life and will need to be justified under Article 8(2) (see "*Category 1*" at §87.1 above):

89.1. The use of false travel documents is a constitutive part of the predicament of most (or many) refugees: it is *"well nigh impossible"* to seek refuge without such documents (per Simon Brown LJ in *Adimi*; §17.2 above). In the present case Irwin J found that *"an individual such as the Claimant could not obtain valid travel documents in Somalia…"* (HC§9). Article 31(1) was included in the 1951 Convention *because* the parties recognised that the use of false documents was likely to be an essential part of the quest for asylum of most (or many) refugees.[64]

89.2. A quest for asylum is the means by which a refugee seeks the surrogate protection of the international community, to allow him to continue his private life, free from a fear of being persecuted. It is a necessary means of protecting dignity and expressing autonomy. This is what Article 8 ECHR can and does protect: *"Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them"* (*R (Countryside Alliance) v Attorney General* [2008] 1 AC 719 §116 **[3/23]**). The ECtHR has explained that *"'private life' is a broad term not susceptible to exhaustive definition… The Court has found that health, together with physical and moral integrity, falls within the realm of private life…"* (*Nada v Switzerland* (2013) 56 EHRR 18 §151). Further, *"The notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8."* (*Aksu v Turkey* (2013) 56 EHRR 4 §58).[65]

89.3. The Court of Appeal accepted in the Appellant's case that: *"in entering the United Kingdom the claimant was exercising her individual freedom to flee from persecution; I accept also that, in the light of her history, she was protecting her personal and sexual autonomy"* (CA§69). However, the Court then considered that *"…possession of a false identity document with intent to mislead at border control is not an expression of personal autonomy, nor is it an expression of the enjoyment of private life for which the defendant could have a reasonable expectation of respect"* (CA§69). The Court erred in drawing such a sharp dividing line. The acts of entering a State and using a false document to do so should not be severed in this manner (see §§89.1-89.2 above). UNHCR is of the

[64] See Part 1 above and see *Adimi* **[1/3]** at 674: *"Thus it was that article 31(1) found its way into the Convention"* (emphasis supplied).

[65] See, to similar effect, *Pretty v United Kingdom* (2002) 35 EHRR 1 §61 **[8/63]**: *"Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world… Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees"*.

view that this was conduct capable of engaging Article 8. The threshold for engagement of Article 8 is a low one (*R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123 §§27-8[66] **[6/52]**). The existence and application of criminal offences in relation to this conduct is properly a matter for justification under Article 8(2).[67]

90. **Second**, refugees are a highly vulnerable category of persons, on whom the impact of prosecution is likely to be particularly severe (see "*Category 2*" at §87.2 above):

90.1. Refugees seek sanctuary against persecution and abuse. They are frequently traumatised by their experiences[68] and often in a state of vulnerability in the host country, where they may be unfamiliar with the language, culture, and legal and political system. The Appellant's case is an example: she was orphaned and raped as a result of ethnic and religious violence in Somalia (HC§§5-8); she suffered from anxiety and depression upon arrival in the UK (HC§93); she was illiterate and did not speak English.

90.2. The ECtHR has identified the vulnerability of asylum seekers and their need for special protection. See *MSS v Belgium* (2011) 53 EHRR 2 at §251 **[7/58]**:

> ***"The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special***

[66] *"[A]rticle 8(1) is generously applied"*; *"where state action touches the individual's personal autonomy, it should take little to require the state to justify itself"*. See, to similar effect, Lester, Pannick and Herberg (eds.) *Human Rights Law and Practice* 3rd ed. (London: LexisNexis, 2009): §4.8.2 *"Of all the Convention rights, art 8 has by far the widest scope"*; §4.8.87: *"Such is the width of the rights protected by art 8(1) that the state often does not dispute that its measures have interfered with the respect for one or other of those rights. The real question is whether the interference can be justified under art 8(2)…"*.

[67] The role of Article 8(2) was emphasised by Lord Hughes in *R (Nicklinson) v Ministry of Justice* [2015] AC 657 at §§263-4 **[5/41]**: *"the fundamental right is to what article 8.1 actually speaks of - namely respect for private and family life. Whether there is a right to do the particular thing under consideration depends on whether the state is or is not justified in prohibiting it… and that in turn depends on whether the state's rules meet the requirements of article 8.2. To take a simple example… the consumption of drugs-whether for reasons of health, pain relief, athletic performance or simple recreation - may well be an aspect of private life within the reach of article 8.1. But it does not follow that there is a fundamental right to take cannabis or steroids… The great majority of European states prohibit at least some drug usage in the general public interest, and such prohibition is generally more than fully justified under article 8.2… a person's autonomy in making decisions about how to end his life engages article 8… These cases depend not simply on article 8.1 but on its interrelation with article 8.2."*

[68] See UNHCR Note on the Integration of Refugees in the European Union, May 2007 §23 **[11/102]**: *"People in need of protection are more likely than other migrants to have experienced traumatic events. Persecution, exposure to brutality and violence, displacement and forced separation from family and friends are all factors that can have a serious impact on mental health."* See also UNHCR Response to Vulnerability in Asylum - Project Report, December 2013, §1.1 (p.9) **[11/103]**: *"Asylum-seekers are vulnerable persons per se as those forced to leave their home become detached from familiar sources of support and are faced with a number of difficult challenges related to negotiating asylum procedures and establishing a new life… within the asylum-seeking population there are those that may face particular difficulties and thus may require specific support and/or be in need of special procedural guarantees. This includes… persons with medical or psychological needs… and survivors of torture, sexual or gender-based violence or other harm."*

> ***protection… It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive."***[69]

This principle has been emphasised in subsequent cases concerning the interpretation and application of ECHR rights: see *Tarakhel v Switzerland* (2015) 60 EHRR 28 §§97[70], 118[71] **[8/65]**. It affects what is required in order to comply with the ECHR: in *Tarakhel*, assurances were required (§122).

90.3. For a refugee, the likely consequence of a decision to prosecute is detention on remand, given their likely recent arrival and the likely absence of ties and a fixed abode. Detention on remand of an ordinary suspect is an interference with Article 8.[72] Refugees are *a fortiori*: detention is likely to be experienced as a traumatic event to add to likely pre-existing trauma.[73] Even absent remand in custody, the stress and stigma of ongoing criminal proceedings, court appearances, trial and the threat of incarceration, are likely to be acutely experienced.

90.4. The Appellant's case illustrates these points. The prosecuting authorities successfully sought remand in custody pending trial.[74] The CPS does not dispute the distress caused (§53 above) and Irwin J held that the *"arrest and remand in custody of [the Appellant] whilst prosecution was anticipated must have added to the psychological impact of what had gone before…"* (HC§93). Such consequences are relevant to the engagement of Article 8.[75]

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[69] At §263, the ECtHR held: *"the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker…"* (emphasis supplied).

[70] *"[T]he Court [in MSS] attached considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It noted the existence of a broad consensus at the international and European level concerning this need for special protection"*.

[71] *"The Court reiterates that to fall within the scope of art.3 the ill-treatment must attain a minimum level of severity… It further reiterates that, as a 'particularly underprivileged and vulnerable' population group, asylum seekers require 'special protection' under that provision".*

[72] *Norris v Government of United States of America* [2010] 2 AC 487 §54.

[73] See UNHCR Detention Guidelines, Guideline 9, §§49-50 **[11/95]**: *"Because of the experience of seeking asylum, and the often traumatic events precipitating flight, asylum-seekers may present with psychological illness, trauma, depression, anxiety, aggression, and other physical, psychological and emotional consequences… Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms."* See also Cleveland, J and Rousseau, C (2013) "*Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada*", Canadian Journal of Psychiatry, 58(7), 409-416.

[74] The charging decision stated: *"I feel that continued detention is justified because there is a substantial risk that S will fail to surrender commit offences on bail interfere [sic] as she clearly has access to travel documentation… the Suspect will be remanded in custody…"* **[Appendix, p.302]**.

[75] See, for example, *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 at §9 **[6/45]**: *"reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on*

91. **Third**, Article 8 ECHR is engaged if a refugee is prosecuted in circumstances where they are protected by Article 31(1) of the 1951 Convention, because Article 8 must be interpreted in light of the UK's broader international law obligations:

91.1. The Court must take into account relevant international law obligations where they inform the interpretation and application of the ECHR rights scheduled to the HRA: see *R (JS)* at §§217[76], 256[77] **[4/31]** and *Mathieson v SSWP* [2015] 1 WLR 3250 at §43 **[5/39]**; Article 31(3)(c) VCLT **[2/13]**.[78] The application of Article 8 ECHR is therefore properly informed by the content and purpose of Article 31(1) of the 1951 Convention, and the right to asylum recognised in Article 14 UDHR and Article 18 CFR. The relevance of these broader international law obligations to the application of Article 8 ECHR was not considered by the CA.

91.2. UNHCR's primary submission is that the prosecution of a refugee who fulfils the qualifying conditions is contrary to Article 31(1) irrespective of conviction (§60 above). Article 8 is plainly engaged by a prosecution that subjects a refugee to criminal process in breach of an international law provision that specifically seeks to protect his autonomy, liberty, dignity, and other basic rights.[79]

91.3. But whether or not a prosecution is seen as a "*penalty"* under Article 31(1) is not critical for the purposes of the engagement of Article 8 ECHR. Where there is a prosecution that, *if prosecuted to conviction*, would give rise to a violation of Article 31(1), the refugee is still prosecuted for a course of conduct that is integral to a quest for asylum, and is expressly contemplated by Article 31(1). Such a prosecution still has likely attendant effects of incarceration and further trauma. It

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the consequences for his mental health of removal to the receiving country… It is plain that 'private life' is a broad term, and the court has wisely eschewed any attempt to define it comprehensively. It is relevant for present purposes that the [ECtHR] saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life".

[76] *"[T]he international obligations which the United Kingdom has undertaken are also taken into account in our domestic law in so far as they inform the interpretation and application of the rights contained in the European Human Rights Convention, which are now rights in United Kingdom domestic law… those obligations …inform the interpretation of the substantive Convention rights".*

[77] *"Standards expressed in international treaties or conventions dealing with human rights to which the United Kingdom has subscribed must be presumed to be the product of extensive and enlightened consideration… If the Government commits itself to a standard of human rights protection, it seems to me entirely logical that it should be held to account in the courts as to its actual compliance with that standard".* See also §§118-9, 130, 142-4.

[78] Article 31(3)(c) requires decision-makers to take into account *"any relevant rules of international law applicable in the relations between the parties"*. For its invocation in Strasbourg, see, e.g.: *Demir v Turkey* (2009) 48 EHRR 54, at §§69, 146; *Neulinger v Switzerland* (2012) 54 EHRR 31 at §131 **[8/60]**; *National Union of Rail, Maritime and Transport Workers v UK* (2015) 60 EHRR 10 at §76 **[8/59]**.

[79] The Preamble to the 1951 Convention underscores its purpose to *"assure refugees the widest possible exercise of… fundamental rights and freedoms"* **[1/2]**. Article 5 further stipulates that "*[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention*" **[1/2]**.

may still have a chilling effect on the ability or willingness to seek asylum.[80] It will still constitute *interference* with a refugee's right to respect for his autonomy and psychological integrity that is contrary to the purpose and spirit of Article 31(1). It must also engage Article 8 ECHR.

91.4. The Court of Appeal relied on the availability of a defence for refugees[81] but the mere existence of a statutory defence is an insufficient guarantee that a refugee will be afforded the protection of Article 31(1) in a practical and effective manner or that the autonomy and psychological integrity of this vulnerable class of persons will be properly respected. At a systemic level, a State would clearly not be complying with the letter or purpose of Article 31(1) if it made available a statutory defence equivalent to Article 31(1) but always prosecuted refugees for document offences, leaving them to seek acquittal following a lengthy prosecution and trial,[82] with probable detention on remand. An individual prosecution in which the prosecuting authority *knew* that the refugee fulfilled the qualifying conditions for immunity would also be incompatible with the letter or purpose of Article 31(1). Such scenarios would not show sufficient respect for the autonomy and psychological integrity of the prosecuted refugees: indeed, the Court of Appeal recognised that a decision to prosecute would engage Article 8 ECHR if the prosecutor was aware that a valid defence applied (see §87.3 above).

92. **But fourth**, the same result follows where the prosecutor *ought* to be aware of an Article 31(1) defence. The engagement of Article 8 must be determined with reference to the objective facts of the case (i.e. those that ought reasonably to be known to the State agencies involved in the reception and processing of the refugee and the decision to prosecute) and not the subjective knowledge of a particular prosecutor:

92.1. If a refugee fulfils the qualifying conditions for protection under Article 31(1), then he is entitled to protection as a matter of international law, irrespective of the prosecutor's subjective knowledge. The State cannot sidestep the relevance of the Article 31(1) protection to the engagement of Article 8 ECHR (§91 above) by asserting that a prosecutor was unaware of the applicability of the protection.

92.2. This is consistent with the position under the ECHR in other cases: the Court will normally consider whether an ECHR right was breached as a matter of substance. It is concerned with the practical outcome, judged objectively, and not with

[80] For example, the Appellant was told that the threat of prosecution would be lifted if she promptly left the country.
[81] CA§69: *"if the defendant proves, on balance, that she could not reasonably seek protection in another state en route… and shows good cause for illegal entry and presence… no offence is committed and she is not to be convicted of the offence"*.
[82] Especially where a legal burden is placed on the refugee: see Part 4 above.

whether the preceding decision-making process was defective or exemplary: *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 §§29,[83] 30,[84] 31,[85] 68[86] **[6/47]**; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 §31[87] **[3/18]**.

92.3. Moreover, having regard to the object and purpose of Article 31(1), State authorities are under an obligation to make reasonable inquiries as to whether a refugee is protected by this provision (or would be if prosecuted to conviction) and to do so before making a decision to prosecute (see §§56-57, 59 above). The requirement to make reasonable inquiries is integral to the lawful exercise of executive action affecting an individual's fundamental rights and familiar to administrative law: see *Tameside* at 1065.[88] If prosecutorial accountability was not based on what could *reasonably* be known by the competent authorities, on the basis of the proper operation of robust systems, then this would lead to the nonsensical result that a prosecutor who routinely failed to make relevant inquiries would be subject to less accountability than a diligent colleague.

Justification under Article 8(2)

93. Pursuant to Article 8(2), an interference with private life must be *"in accordance with the law"*.[89] Article 8(2) further requires that an interference with private life is *"necessary in a democratic society"*. This requires an assessment of the proportionality of the interference: see *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 at §20[90].

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[83] *"[T]he focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated".*

[84] *"Proportionality must be judged objectively, by the Court"* (emphasis supplied).

[85] *"[W]hat matters in any case is the practical outcome, not the quality of the decision-making process that led to it"* (emphasis supplied).

[86] *"[A]rticle 9 is concerned with substance, not procedure… what matters is the result…".*

[87] *"The first, and most straightforward, question is who decides whether or not a claimant's Convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account"* (emphasis supplied).

[88] *"[D]id the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?".*

[89] This requires compliance with domestic law, including directly effective EU law (see, for example, *Caprino v United Kingdom* (App. No. 6871/75) 3 Mar 1978 at §2(b)), and may additionally require compliance with applicable international law (*Medvedyev v France* (2010) 51 EHRR 39 §79).

[90] The assessment *"depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four*

94. UNHCR submits that Article 8 ECHR is likely to be infringed if a refugee is prosecuted by national authorities for the use of false documents as part of his quest for asylum, and this is especially so in circumstances where he meets the criteria for protection under Article 31(1) of the 1951 Convention.

95. **First**, since the prosecution of a refugee who fulfils the qualifying conditions is contrary to Article 31(1) irrespective of conviction (see §§48-58 above), such a prosecution will not be justifiable under Article 8(2), where it is known or ought to be known by the prosecuting authorities that the qualifying conditions are met, given the requirement to interpret and apply Article 8 ECHR in light of Article 31(1) (see §91.1 above). Moreover:

95.1. A finding of breach is consistent with legal policy. Promoting the observation and maintenance of appropriate standards is the purpose of tort law,[91] especially statutory torts such as breach of Article 8 ECHR/section 6, HRA. The ability to bring retrospective actions when adequate standards have not been maintained plays an important role in holding those responsible to account.[92] This is particularly important for asylum seekers who are unfamiliar with the domestic legal system.[93] The result of a successful claim for a particular individual may be compensatory, but the systemic consequence is accountability and the maintenance of proper standards.

95.2. Further, if refugees are not afforded the protection of Article 31(1), to which they are entitled under international law, then the application of Article 8 ECHR will provide refugees with a practical and effective means of achieving compensation. It is a principle of customary international law that a State should make reparation for any loss or damage caused by its breach of international law, including to any individuals who have suffered damage (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* ICJ Reports 2004 at §§152-153 **[9/67]**, referring to the *Chorzow Case* PCIJ Series

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requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them"

[91] Honore, *The Morality of the Law of Tort*, in *Philosophical Foundations of Tort Law* (Owen (ed.)) (1995) **[10/88]**. See p.76: *"The tort system is one means by which the state, on behalf of the community, seeks to reduce conduct that it sees as undesirable"*.

[92] Ibid **[10/88]**, p.75: *"One point of creating a tort, as opposed to a crime, is to define and give content to people's rights by providing them with a mechanism for protecting them and securing compensation if their rights are infringed"*.

[93] See, analogously, *D v Home Office* [2006] 1 WLR 1003, CA §51: *"[Bail for Immigration Detainees'] similar evidence was given by a policy and research officer at their headquarters. She said: 'Mechanisms of application for adjudicator bail and challenges in the High Court are frequently not exercised as a result of a lack of access to effective legal representation. In BID's experience, current policies and practices of immigration detention render those detained exceptionally vulnerable to unlawful detention as there is no adequate check on the power of the immigration service to detain. In BID's opinion, pursuit of civil actions by former detainees provides a crucial mechanism for redress and holding those responsible to account…'"*.

A No 17 p 47). Customary international law properly informs the content and development of ECHR rights (see §91.1 above) and the common law (*R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665, SC §150).

95.3. An example of a case in which a prosecution in breach of Article 31(1) could be justified would be where, despite best efforts and the operation of a properly designed and robust system, facts giving rise to Article 31(1) protection are not identified or do not emerge until later in the process.

96. **Second**, even if prosecution absent conviction is not a "penalty" within the meaning of Article 31(1) of the 1951 Convention, the prosecution of a refugee that, *if prosecuted to conviction*, would violate Article 31(1) will still not be justified under Article 8(2), save in unusual cases:

96.1. The refugee will have been prosecuted for a course of conduct that is integral to a quest for asylum, and is expressly contemplated by Article 31(1).

96.2. It is incumbent on the State to put in place systems so as to ensure that a thorough enquiry is undertaken as to whether the qualifying conditions are met, so as to identify those to whom Article 31(1) applies, *before* commencing a prosecution (§§56-57, 59 above). It is not proportionate for a State to prosecute protected refugees, with the hope that those who are entitled to Article 31(1) protection will be identified at some point during the pre-trial process or ultimately acquitted at trial. This is not a fair or balanced approach. Rigorous investigation by the competent authorities is a <u>less intrusive interference</u> and a more practical and effective means of securing the Article 31(1) protection.[94]

96.3. A lack of proportionality will be particularly evident in cases in which the prosecution has resulted in the lengthy incarceration and further traumatisation of the refugee, given that a loss of liberty and/or interference with psychological wellbeing, in circumstances where the Article 31(1) protection applies, is itself contrary to the fundamental purpose of the 1951 Convention to *"assure refugees the widest possible exercise of these fundamental rights and freedoms [under the UDHR]"*.[95]

[94] Delaying prosecution until the determination if the asylum claim is one means of promoting a rigorous investigation, and also a less intrusive interference.
[95] See the second recital to the Refugee Convention **[1/2]**.

97. **Third**, the prosecution of a refugee cannot be justified under Article 8(2) on the grounds that the prosecutor was not provided with relevant information by the agency responsible for determining the refugee claim ("**the refugee determining authority**"):

97.1. Article 31(1) places an obligation on the United Kingdom to afford the protection guaranteed under that provision, and makes no distinction between the national prosecuting authority and the national refugee determining authority. Refugees are entitled to consistent and effective protection, not protection that is contingent upon lines of communication between the responsible State authorities.

97.2. Information and knowledge held by the refugee determining authority is part of the factual matrix that should, on any view, be known to the prosecuting authority. Administrative difficulties carry little weight given the need to apply an objective standard when considering whether an interference is *"necessary"* for the purposes of Article 8(2) (see *Olsson v Sweden* (1989) 11 EHRR 259 §82[96]).

97.3. The HRA does not permit a public authority to justify interference with an ECHR right, or to escape liability for interference amounting to a breach, on the grounds that another public authority contributed to its actions. The HRA is concerned with effect: the question is whether the interference with an ECHR right was objectively justified (see §92.2 above).[97] In the present appeal, the interfering measure is the prosecution of a refugee and the proximate cause is the action of the prosecutorial authority. Unless that authority can show that the interference was objectively justified, there is a breach of Article 8 ECHR and section 6, HRA.[98] The obligation of the UK under Article 8 ECHR is that of the State. Any complaint in Strasbourg for breach of Article 8 would lie against the UK.

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[96] *"There is nothing to suggest that the Swedish authorities did not act in good faith in implementing the care decision. However, this does not suffice to render a measure 'necessary' in Convention terms: an objective standard has to be applied in this connection. Examination of the Government's arguments suggests that it was partly administrative difficulties that prompted the authorities' decisions; yet, in so fundamental an area as respect for family life, such considerations cannot be allowed to play more than a secondary role"* (emphasis supplied).

[97] See also *Denbigh High School* at §29 **[6/47]**: *"The unlawfulness proscribed by section 6(1) [HRA] is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act"*.

[98] The result is no different to a tort claim in which the party who was the proximate cause of the injury is sued by the injured party for his full losses. If the defendant believes that his actions were contributed to by the negligence of another person, then he can bring a claim against that person for a contribution to any damages awarded (under CPR Part 20). The contributory fault of another person is not a defence: it is a justification for another party to contribute to compensation for the loss caused.

98. **Fourth**, to the extent that procedure is relevant to justification and proportionality under Article 8 ECHR[99]:

98.1. The allocation of responsibility for discharging the obligation to secure Article 31(1) protection is an internal matter for each State party to the 1951 Convention. Insofar as responsibility for processing asylum applications and making decisions to prosecute are allocated to different branches of the State, the purpose of Article 31(1) requires adequate arrangements for the sharing of expertise and information between the relevant State agencies. It is inappropriate to commence a prosecution until all relevant information has been provided to the prosecutor by the refugee determining authority, including as to (a) refugee status and (b) information relevant to whether the Article 31(1) criteria are met.[100] In considering these matters, the competent authorities must ask a refugee questions relevant to establishing whether he is entitled to the protection of Article 31(1). A vulnerable and traumatised refugee, who may be suspicious of State officials, cannot be expected to volunteer relevant information or to be aware of his legal right to protection under Article 31(1).[101]

98.2. It will generally be inappropriate to commence a prosecution before an asylum claim is substantively considered by the competent authority. Waiting until the determination of the claim by the competent authorities is a natural way to give effect to the obligation to make reasonable inquiries, under Article 31(1) and ordinary administrative law principles. This is an approach that has been adopted by other States (§55 above) (the CPS's policy on the timing of the charging decision appears to have varied over the past 15 years, i.e. some iterations of the policy have recommended waiting until an individual's asylum claim has been processed before any decision on prosecution is made[102]). Refugees who have presented false documents are unlikely to present a risk to public safety that requires an immediate charging decision to be made. Any delay is unlikely to be

[99] As set out above, when considering whether a prosecution has breached Article 8 ECHR, it is the objective facts of a refugee's case that are material; justification cannot be predicated on the subjective ignorance of the prosecutor. However, a failure to follow a fair procedure may provide an *additional* reason to find Article 8 ECHR has been breached: see *Commons v United Kingdom* (2005) 40 EHRR 9 §83 (*"the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Art.8"*) and §95 (*"the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a 'pressing social need' or proportionate to the legitimate aim being pursued"*).

[100] Current CPS policy appears to acknowledge this: see §71 above.

[101] UNHCR's *Handbook* recognises the shared burden between competent authority and refugee to ascertain relevant facts: see §59 above.

[102] At the time the Appellant's case was considered, the CPS's policy appears to have stated: *"the fact that the defendant's application for asylum remains undetermined should not of itself prevent or delay prosecution or conviction"* (CA§21).

excessive (the Appellant's application was processed within 6 months) and, even if lengthy delays did occur, a State's responsibility to afford effective Article 31(1) protection should take precedence over administrative delays that are not the fault of the refugee.

99. In light of these four submissions, the handling of the Appellant's case appears to have fallen short of the standards required to avoid a breach of Article 8 ECHR:

99.1. The Appellant was entitled to protection under Article 31(1). She has been recognised as a refugee from Somalia;[103] she could not reasonably have been expected to claim asylum in Yemen; and she made only a short stopover en route to the UK through Europe. The CPS prosecuted the Appellant because the charging decision was made in ignorance of the fact that the Appellant could not reasonably have been expected to claim asylum in Yemen (see HC§92, CA§30). Had this fact been identified, it would have been apparent that the Appellant was protected by Article 31(1) and should not be prosecuted.[104] The prosecution of the Appellant notwithstanding her entitlement to Article 31(1) protection is sufficient to breach Article 8(2).

99.2. Nor are there any features of the Appellant's case that could arguably render the prosecution necessary or proportionate. Pitchford LJ with respect selectively quoted from the material on Yemen (CA§73: "*Yemen was a Refugee Convention country which welcomed those fleeing from violence and turmoil in Somalia*"), neglecting to repeat the Secretary of State's actual position (*viz.* that conditions were *"terrible"*; *"appalling"*; *"desperate"*; with the threat of deportation[105]) or the fact that the CPS Advocate was able to discover the position in the space of seven days, through personal research and some assistance from an Immigration Officer, but only after the Appellant had been detained for six months (see HC§34).

99.3. Further, even if Pitchford LJ had been right to conclude that the position in Yemen depended on *"investigation and expert analysis by UKBA"*, UNHCR respectfully disagrees with the CA's assessment that *"It is unrealistic… to expect that inquiries into the conditions in which the claimant lived in Yemen should have been completed before the decision to prosecute was made"* (CA§73). This was the issue that determined whether the Appellant was protected by Article 31(1). Such inquiries were of paramount importance. They should have been

[103] As noted above, the formal recognition of refugee status is declaratory only (§26 above). It follows that the Appellant was a refugee at all material times.
[104] See, e.g., *R v Mateta* §§21(ii)(a), 44-46, 49-50, 53, 55-6 **[5/38]**.
[105] See Asylum Decision Letter §§39, 41, 42, 45 **[Appendix pp.226-8]**.

completed before the Appellant was charged and detained on remand.[106] Moreover, CPS policy indicated that the CPS was reliant upon the UKBA for information and evidence when assessing whether the Article 31(1) protection applied,[107] which could only reasonably mean that the CPS required the provision of such specialist expertise by UKBA when the charging decision was being made.

99.4. In short, this was a clear case of Article 31(1) protection, which should have been identified before the Appellant was charged and detained on remand, and would have been had systems worked properly.

CONCLUSION

100. For the reasons set out above, UNHCR respectfully submits that:

100.1. The protection against prosecution for use of false travel documents in the context of a quest for asylum is a vital component of the protection of refugees under international law.

100.2. Article 8 ECHR is engaged in cases where a refugee is threatened with prosecution as a result of using false travel documents during a quest for asylum.

100.3. If a State prosecutes a refugee who is (or would be) protected by Article 31(1) then this will be a breach of Article 8 ECHR, save in exceptional circumstances, and certainly where the prosecution is commenced because the State failed to make the inquiries necessary to establish whether the protection applies.

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Acting pro bono

BAKER & McKENZIE

Acting pro bono

6 July 2016

[106] Pitchford LJ appears to have relied in part on the view that the Appellant *"undertook the burden of establishing her defence"* (CA§73), as did the CPS Senior Policy Advisor (HC§88). As set out in Part 4 above, the protection that the UK confers pursuant to Article 31(1) has been wrongly weakened by an approach to section 31 of the 1999 Act that places the legal burden of proof on the refugee in respect of the qualifying conditions.

[107] HC§42 and **[Appendix p.350]**. The current CPS policy is emphatic on this point: see §71 above.