HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 31

on appeal from: [2006] EWCA Crim 707

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R v Asfaw (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Carswell
Lord Mance

Counsel

Appellants:
Edward Fitzgerald QC
Raza Husain
Richard Thomas
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Respondents:
Clare Montgomery QC
Julian Knowles
(Instructed by Crown Prosecution Service)

Intervener (UNHCR)
Michael Fordham QC
Shaheed Fatima
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LORD BINGHAM OF CORNHILL

My Lords,

1. The Criminal Division of the Court of Appeal (Lord Phillips of Worth Matravers CJ, McCombe and Gross JJ: [2006] EWCA Crim 707) certified the following point of law of general public importance as involved in its decision now under appeal:

> "If a defendant is charged with an offence not specified in section 31(3) of the Immigration and Asylum Act 1999, to what extent is he entitled to rely on the protections afforded by article 31 of the 1951 United Nations Convention Relating to the Status of Refugees?"

Differently expressed, the question is whether, to the extent that the protection given to a defendant by section 31(3) of the 1999 Act does not match that which the United Kingdom is bound in international law to give by article 31 of the Refugee Convention, our domestic law gives a defendant any remedy. The formulation of the question clearly assumes that the offence charged against the defendant is not within the scope of section 31(3) of the 1999 Act but is within the scope of article 31 of the Convention.

2. According to her evidence, the appellant is an Ethiopian national who had been imprisoned, tortured and raped in Ethiopia on account of her alleged support for student activism. Her father also was persecuted and died in police custody. She decided to leave Ethiopia and travel to the United States to claim asylum. With the help of an agent she left

Ethiopia by air, travelling on a false Ethiopian passport. They stopped in an unknown Middle Eastern country and remained in the airport for about three hours. They arrived in the UK on 14 February 2005 at Heathrow Airport and passed through immigration control, with the agent presenting the passport on her behalf. The agent then left her in the airport for about an hour, after which he returned and gave her a false Italian passport, in the name of Hanams Gebrele, a false driving licence in the same name and a ticket to Washington DC. He then left.

3. It is agreed that on 14 February 2005 the appellant (then aged 28) checked in for a Virgin Atlantic flight from Heathrow to Washington. She presented the false Italian passport. She said she was Ethiopian. The official on the desk (Mohammed Hussan) recognised the passport as false and informed the police, but said nothing to the appellant and allowed her to check in. When she attempted to board the aircraft at the departure gate she was stopped. Her passport was examined and found to be false. She was arrested and taken to the police station. There she was questioned but gave no answers. Through an interpreter she told her legal representative at the police station that she wished to claim asylum and he gave evidence that he communicated this claim to the police at 5.00 pm on the day of her arrival. On 11 April 2007 the appellant was formally recognised by the Home Secretary as a refugee.

4. The appellant was charged with two offences on which she was later indicted and stood trial at Isleworth Crown Court before His Honour Judge Lowen and a jury. Count 1 charged her with using a false instrument with intent contrary to section 3 of the Forgery and Counterfeiting Act 1981, the particulars being that on 14 February 2005 she used an Italian passport which she knew to be false, with the intention of inducing another (identified as Mohammed Hussan, the official on the check-in desk) to accept it as genuine. In count 2 the appellant was charged with attempting to obtain services by deception, contrary to section 1(1) of the Criminal Attempts Act 1981. The particulars were that she had dishonestly attempted to obtain air transport services from Virgin Atlantic by falsely representing that she was authorised to use the Italian passport in the name of Hana (*sic*) Gebrele. Both these counts related to the appellant's attempt to leave this country on a Virgin Atlantic flight to Washington, and both, it seems, were based on presentation of the false Italian passport at the check-in desk.

5. The appellant pleaded not guilty to count 1 and relied on the defence provided by section 31 of the Act. Directing the jury, His Honour Judge Lowen, said:

> "There is available a defence to such a charge [as count 1] which the law has provided for persons who genuinely seek asylum. Because the law recognises that refugees may inevitably have to commit such offences as a means of seeking safe refuge. It would, you may think, be quite unjust for genuine refugees to be faced with the prospect of inevitable conviction of crime in relation to the process by which they seek to enter a safe haven. And that is why the law recognises that common sense proposition and that is why the law provides that if a person, on the balance of probability, fulfils the criteria provided for in law, then the law says they have a complete defence to a charge of this kind."

In the light of the evidence at trial, prosecuting counsel accepted that the appellant was a refugee, but disputed that the other requirements of section 31 were met. The jury, however, acquitted, and must therefore have found that they were.

6. Before the trial began, counsel for the appellant (Mr Richard Thomas) resisted further prosecution of count 2 on the ground that the offence charged, although not within section 31 of the Act, was within article 31 of the Convention. The judge rejected the submission. He ruled:

> "The prosecution have decided to proceed in this case and take the view that those offences, catered for in section 31, are all offences which a refugee may commit involving the process of entering a safe haven. Once within the United Kingdom a person who then goes on to commit a further offence should not have a defence available to protect him or her from prosecution and conviction. That is the justification for the prosecution proceeding in this case. The logical distinction is clear."

He went on to refer to

> "the real distinction between offences which are necessary and reasonable in the quest for asylum on the one hand and those which arise as a matter of choice or convenience

> and it is into the latter category that the prosecution put this offence of obtaining or attempting to obtain services by deception."

In response to this ruling the appellant pleaded guilty. After her acquittal on count 1, the judge sentenced the appellant to nine months' imprisonment (most of which she had already served) on count 2. He said that offences of this kind undermined the whole system of immigration control and were so prevalent as to call for deterrent sentences. It is not clear what factual (as opposed to legal) difference the judge saw between the two counts.

7. The appellant appealed against conviction and sentence on count 2. In the Court of Appeal prosecuting counsel did not question the correctness of the appellant's acquittal on count 1, and implicitly accepted its correctness. He accepted that on the facts of this case article 31 required that the appellant should have a defence, even if charged with attempting to obtain the service of the airline by deception (see [2006] EWCA Crim 707, para 21). He accepted that both article 31 and section 31 could apply to an asylum seeker seeking to use this country as a transit post in a journey to a preferred place of refuge (para 21). He accepted that the appellant's attempt to fly to Washington in order to seek asylum should attract no punishment if the UK were fully to comply with article 31 (para 26). He accepted that he could not support the reasoning which led the judge to impose the custodial sentence he did (para 27). Thus the issue in the Court of Appeal was a narrow one. Counsel for the appellant submitted that it was improper for a different charge, not falling within section 31, to be brought in respect of precisely the same facts (para 20). The Crown's reply was that section 31 listed the offences to which the statutory defence should apply, that the list did not include attempted deception, and the duty of the Crown Prosecution Service was to apply the law (para 21). The court expressed its concern about some aspects of the case. It considered that if the second count had been added in the interests of immigration control, in order to prevent the asylum seeker from invoking the defence that section 31 would otherwise provide, there would be strong grounds for contending that the practice would be an abuse of process (para 24). The court dismissed the appellant's appeal against conviction, but allowed her appeal against sentence, quashed the sentence of imprisonment and ordered that the appellant should be absolutely discharged. The certified question set out in para 1 above relates, of course, to the legal issue which then fell for decision. In the House, however, the respondent contended, for the first time, that the offences allegedly committed by the appellant fell outside both article

31 of the Convention and section 31 of the Act because they were committed in the course of trying to leave the country and not in the course of entering it or as a result of the appellant's illegal presence here. Thus the central issue now is whether these offences, or either of them, fell within the scope, first, of article 31 and, secondly, of section 31.

Article 31

8. During the 1920s and 1930s the League of Nations sought to address the problems caused internationally by refugees from Russia, Armenia, Germany and elsewhere. The ending of the Second World War gave the problem a new urgency and importance. Thus the Constitution of the International Refugee Organization was adopted in 1946, the Statute of the Office of the United Nations High Commissioner for Refugees was adopted in 1950 and in 1950-1951 the 1951 Refugee Convention was negotiated.

9. 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 on grounds of race, religion, nationality, membership of a particular social group or political opinion. 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. It 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 practised may have to resort to deceptions of various kinds (possession and use of false papers, forgery, misrepresentation, etc) in order to make good their escape.

10. Effect was given to this third aim in article 31, which (referring to the very familiar definition of "refugee" in article 1), provides:

> "REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

The respondent to this appeal submits that this article should be interpreted as meaning exactly what it says, and attaches particular importance to the words "on account of their illegal entry or presence" and "good cause for their illegal entry or presence". These words, it is said, show that the immunity of a refugee is limited to offences of entering and being illegally in a country, thus excluding offences committed when leaving an intermediate country in order to seek asylum elsewhere.

11. It is of course true that in construing any document the literal meaning of the words used must be the starting point. But the words must be construed in context, and an instrument such as the Refugee Convention must be given a purposive construction consistent with its humanitarian aims. The Convention was negotiated against the background of then recent events, particularly in Europe. Hence the reference in the original definition of "refugee" in article 1 A(2) to "As a result of events occurring before 1 January 1951" and hence the original option for acceding states to adopt an interpretation of that expression as meaning "events occurring in Europe before 1 January 1951". Consideration of the travaux préparatoires of the Convention shows that the focus of discussion was on clandestine crossing of land frontiers. There was little or no discussion of air transportation, doubtless because air transport had not become a means of escape used by any considerable number of refugees, and there was accordingly no consideration of the position of refugees changing planes in the course of escape to a country of intended asylum. The travaux show that what became article 31 went through a number of drafts and the words

"coming directly from a territory where their life or freedom was threatened in the sense of article 1" did not appear in the original texts. They were inserted at the instance of the French delegate (M Rochefort), who was concerned that there were large numbers of refugees living in countries bordering on France where their lives were not threatened, and whom, if they crossed into France, the French government would wish to penalise and return: see Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalisation, detention, and protection" in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), p 192. There was resistance to the notion that a refugee who had settled temporarily in one country should be free to enter another for reasons of mere personal convenience: Weis, *The Refugee Convention 1951: Travaux Préparatoires*, p 298. The UK representative favoured a certain amount of flexibility in the case of refugees coming through intermediary countries: *ibid*, p 301. The "good cause" requirement was also, it seems, intended to exclude refugees who wished to change their country of asylum for purely personal reasons from the immunity provided by article 31: Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1962-63), para (8).

12. With the passage of time and the growth of air transport the application of article 31 to refugees in transit came to attract attention. In *The Status of Refugees in International Law*, vol II (1972), pp 206-207, Grahl-Madsen distinguished between different cases, the first being "A refugee who only passes through the first country of refuge, without any delay or with only a minimum of delay". Of this class of case he wrote:

> "With respect to the first category, it is important to note that the practice of States is more lenient than would be expected on the background of Mr Rochefort's above-quoted statements. Thus, refugees who pass through Austria into the Federal Republic of Germany are not penalized in the latter country on account of their illegal entry. In Belgium it is an established practice to consider a refugee as 'coming directly' if he arrives in Belgium within a fortnight after his departure from his country of origin. And in France each case is considered on its merits, emphasis apparently being placed on the final proviso of Article 31(1), that is to say: whether the refugee can 'show good cause for [his] illegal entry or presence'. It seems to be the opinion of the Office of the United

> Nations High Commissioner for Refugees that the term 'coming directly' is to be interpreted in such a way that it does not impose an obligation solely on countries adjacent to countries of persecution, or — more precisely — that any person who had no factual residence in an intermediary country should be considered coming directly from a country of persecution. On this basis it appears justified to conclude that a refugee belonging to the first category may normally claim the benefit of Article 31 in the country where he finally arrives."

He had addressed the meaning of "country of refuge" in volume I of the same work (1966), in which (para 108, p 301) he had written:

> "As we see it, the 'country of refuge' (*pays d'accueil*), being the opposite of a 'country of persecution', corresponds on the whole with the territory where Article 31 (1) of the Convention may be invoked. In other words, the 'country of refuge' will normally be the country into which a refugee is 'coming directly from a territory where [his] life or freedom was threatened in the sense of article 1' (or in which he becomes a refugee *sur place*).
>
> However, in practice the provisions of Article 31 are given a liberal interpretation, so that a person may actually travel through several countries until he eventually applies for asylum and recognition as a refugee in a country more or less of his choice, and may still get the benefit of those provisions. The implication is that if the refugee had ended his journey in any of the transit countries, he would have been able to invoke Article 31 (1) there, too."

13. The opinion of the Office of the UNHCR to which Grahl-Madsen refers in the first of these quoted extracts 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. In 1992 the UNHCR in its *Handbook on Procedures and Criteria for determining Refugee Status* published guidelines with regard to the detention of asylum seekers, quoted by Simon Brown LJ in *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001]

QB 667, 678. These guidelines, re-published without alteration of this provision in February 1999, included the following passage:

> "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."

14. The judgment of the Queen's Bench Divisional Court (Simon Brown LJ and Newman J) in *Adimi* related to three applicants for judicial review, two of whom were in transit through this country and one of whom (Mr Sorani) was in a factual position legally indistinguishable from that of the appellant. The court noted (pp 676, 677) that until the point was raised on behalf of Mr Adimi (p 674) the immunity required by article 31 had never been the subject of consideration by the Secretary of State for the Home Department, the Director of Public Prosecutions, the Crown Prosecution Service, the police or, it seems, anyone else. But that group of cases called for it to be considered, with reference in two of the cases to refugees, or potential refugees, in transit.

15. In his leading judgment Simon Brown LJ first considered the requirement that, to qualify for immunity under article 31, a person must be "coming directly" from the country of persecution. The Secretary of State and the Director contended that article 31 allowed the refugee no element of choice as to where he should claim asylum. Having considered the conclusions of the UNHCR's executive committee and the academic literature, Simon Brown LJ rejected that contention. He held (p 678) that some element of choice was open to refugees as to where they might properly claim asylum and concluded that any merely short-term stopover en route to such intended sanctuary could not deprive the refugee of the protection of article 31. He went on to say that the main touchstones by which exclusion from protection should be judged were the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found there protection de jure or de facto from the persecution which the refugee was seeking to escape. These latter considerations have been

said (Hathaway, *The Rights of Refugees under International Law*, (2005), p 399, f.n. 539) to be more properly relevant to "good cause", but they are clearly relevant to the applicability of article 31.

16. Simon Brown LJ then considered (p 679) the requirement that refugees should present themselves "without delay". The respondents contended that Mr Adimi fell outside article 31 because he had not claimed asylum on reaching passport control. This argument was rejected (p 679): if Mr Adimi's intention was to claim asylum within a short time of his arrival even if he had successfully secured entry on false documents, he was not in breach of this condition.

17. The "good cause" condition was agreed by all counsel (p 679) to be satisfied by a genuine refugee showing that he was reasonably travelling on false papers.

18. Simon Brown LJ considered the two applicants who had been in transit at p 687 of his judgment:

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

> ordinarily entitled to choose where to claim asylum, and that a short term stopover en route in a country where the traveller's status is in no way regularised will not break the requisite directness of flight, then it must follow that these applicants would have been entitled to the benefit of article 31 had they reached Canada and made their asylum claims there. If article 31 would have availed them in Canada, then logically its protection cannot be denied to them here merely because they have been apprehended en route."

Newman J (p 688) agreed with Simon Brown LJ's interpretation of the scope of article 31(1) of the Convention. Neither the Secretary of State nor the Director argued that article 31 was inapplicable to offences committed by a refugee seeking to leave the country as distinct from entering or being here.

19. On 8-9 November 2001 an expert round-table conference was held in Geneva, attended by representatives of different countries and disciplines, including six governmental members, to discuss article 31. For this Professor Goodwin-Gill wrote the paper cited in para 11 above, in which he described Simon Brown LJ's judgment in *Adimi* as (p 203) "one of the most thorough examinations of the scope of Article 31 and the protection due". He drew on an extensive survey of state practice (p 206). On p 216 he opined:

> "Although States may and do agree on the allocation of responsibility to determine claims, at the present stage of legal development, no duty is imposed on the asylum seeker travelling irregularly or with false travel documents to lodge an asylum application at any particular stage of the flight from danger."

He concluded (p 218) that

> "Refugees are not required to have come directly from their country of origin. Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection in the first country or countries to which they

flee, or who have 'good cause' for not applying in such country or countries."

In its "Summary of Conclusions" (*Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Feller, Türk and Nicholson (eds), 3.2, p 255) the expert round-table listed a number of specific considerations which included the following:

"10. In relation to Article 31(1):

(a) Article 31(1) requires that refugees shall not be penalized solely by reason of unlawful entry or because, being in need of refuge and protection, they remain illegally in a country.

(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. The mere fact of UNHCR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country."

20. In his recent work *The Rights of Refugees under International Law* (2005), Professor Hathaway comments adversely (p 372, f.n. 412) on the UK's prosecution of asylum-seekers transiting through the country en route to North America, and expresses the opinion (p 406) that international law provides no sanction for the UK's policy of pursuing criminal charges against refugees found to have used false papers to pass through its territory. He quotes with implicit approval (p 406, f.n. 566) Simon Brown LJ's observation in *Adimi* (pp 684-685) that the "respondents' argument provides no justification whatever for prosecuting refugees in transit".

21. In a memorandum submitted to the House of Commons Select Committee dated 1 December 2005 the UNHCR submitted (para 13):

> "In granting this protection from penalization, Article 31(1) recognises, *inter alia*, that departure and entry into host countries by irregular means may be a method used by refugees fleeing persecution to reach safety as refugees are often forced to flee their own country in fear of their lives. In UNHCR's view, a purposive interpretation of Article 31 will also include situations where a person seeking international protection arrives in the UK by irregular means without a valid travel document; whether with a false passport, a passport he/she is not entitled to or without a passport. Refugees and asylum seekers in transit to a final destination country could equally benefit from Article 31 of the 1951 Convention, if all the conditions of Article 31 are met."

22. On 14 February 2005, when the appellant presented a false Italian passport to Mohammed Hussan at the check-in desk she was a refugee within the Convention definition, as accepted at the criminal trial and now recognised by the Secretary of State. It has never been questioned, despite her brief stopover somewhere in the Middle East, that she was coming directly from the country where she had been persecuted. The jury accepted that she had, when challenged, presented herself to the authorities and that she had good cause for resorting to forgery and deception in the course of her flight from persecution. It seems to me that *Adimi* is fully supported by such authority as there is, both before and since, and was rightly decided. The UNHCR, who has intervened in this appeal and made most valuable submissions, strongly so submits. On the facts of this case, as now established, the appellant should not in my opinion, consistently with article 31, have been subjected to any criminal penalty on either count of the indictment preferred against her.

Section 31

23. The decision in *Adimi* exposed a serious lacuna in our domestic law, which failed to give any immunity against criminal penalties in accordance with article 31. Steps were hastily taken to make good the

omission, by enactment of section 31 of the Immigration and Asylum Act 1999. This section as amended now provides:

> "*Defences based on Article 31(1) of the Refugee Convention*
>
> 31 (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—
>
> (a) presented himself to the authorities in the United Kingdom without delay;
>
> (b) showed good cause for his illegal entry or presence; and
>
> (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.
>
> (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.
>
> (3) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under—
>
> (a) Part 1 of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);
>
> (aa) section 25(1) or (5) of the Identity Cards Act 2006;
>
> (b) section 24A of the 1971 Act (deception); or
>
> (c) section 26(1)(d) of the 1971 Act (falsification of documents).
>
> (4) In Scotland, the offences to which this section applies are those—
>
> (a) of fraud,
>
> (b) of uttering a forged document,

(ba) under section 25(1) or (5) of the Identity Cards Act 2006,

(c) under section 24A of the 1971 Act (deception), or

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

and any attempt to commit any of those offences.

(5) A refugee who has made a claim for asylum is not entitled to the defence provided by subsection (1) in relation to any offence committed by him after making that claim.

(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.

(8) A person who—

(a) was convicted in England and Wales or Northern Ireland of an offence to which this section applies before the commencement of this section, but

(b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1),

may apply to the Criminal Cases Review Commission with a view to his case being referred to the Court of Appeal by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(9) A person who—

(a) was convicted in Scotland of an offence to which this section applies before the commencement of this section, but

(b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1),

may apply to the Scottish Criminal Cases Review Commission with a view to his case being referred to the High Court of Justiciary by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(10) The Secretary of State may by order amend—

(a) subsection (3), or

(b) subsection (4),

by adding offences to those for the time being listed there.

(11) Before making an order under subsection (10)(b), the Secretary of State must consult the Scottish Ministers."

24. 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. He acknowledged as an addition the requirement in subsection (1) that a person should have applied for asylum as soon as was reasonably practicable, which he considered a fair addition. This was a narrower definition than that adopted by the Divisional Court, but he thought the Government was entitled to take its own view, and it had taken a different view. This did not mean (col 785) that every refugee who passed through a third country would be prosecuted, which did not and would not happen. There should be a limit on "forum shopping", deciding to accept an

offer of safety in country B or C, but not in country A. The definition of "coming directly" was a generous one. There had to come a time when an individual stopped running away, the article 31 situation, and started to travel towards a preferred destination. The Attorney General believed that the Government had got it right, but if the list of offences in subsections (3) and (4) needed to be added to, this could be done by order.

25. It is clear that in one respect, expressed in section 31(2), it was intended to depart from *Adimi*. Whether that subsection is consistent with the Convention, interpreted in the light of the travaux, may be open to question, but it is not a question which arises in this case, since it has never been suggested that in coming from Ethiopia the appellant stopped in any country outside the UK where she could reasonably have been expected to be given protection under the law of that country. Subsection (2) apart, no indication was given of an intention to depart from *Adimi*. More importantly, no indication was given of an intention to derogate from the international obligations of the UK as fully expounded in *Adimi*, as would be expected if that was the legislative intention. The indication was, rather, of an intention to reflect in statute the obligations undertaken by the UK in the Convention.

26. I am of opinion that section 31 should not be read (as the respondent contends) as limited to offences attributable to a refugee's illegal entry into or presence in this country, but should provide immunity, if the other conditions are fulfilled, from the imposition of criminal penalties for offences attributable to the attempt of a refugee to leave the country in the continuing course of a flight from persecution even after a short stopover in transit. This interpretation is consistent with the Convention jurisprudence to which I have referred, consistent with the judgment in *Adimi*, consistent with the absence of any indication that it was intended to depart in the 1999 Act from the Convention or (subject to the exception already noted) *Adimi*, and consistent with the humanitarian purpose of the Convention. It follows that the jury in the present case, on finding the conditions in section 31 to be met, were fully entitled to acquit the appellant on count 1, as the respondent then accepted, even though the offence was committed when the appellant was trying to leave the country after a short stopover in transit.

27. That result follows because the offence in count 1 was charged in Part 1 of the Forgery and Counterfeiting Act 1981, an offence covered by section 31(3)(a).

28. The offence in count 2, although within article 31 on my analysis and that accepted by both parties in the Court of Appeal, is not listed expressly in section 31(3). The list in that subsection is in some respects perplexing, since it does not (as one might expect) include an offence of illegal entry contrary to section 24 of the Immigration Act 1971 and there is no close correspondence between the offences listed in subsection (3), which do not include that charged in count 2, and those listed in subsection (4) which, as I understand, would cover the substance of that count, had the alleged offence been committed in Scotland. As matters stand, however, there is a disparity between the scope of article 31 and the scope of section 31(1) and (3), and by no legitimate process of interpretation can those subsections be read as including the offence charged in count 2.

29. The appellant sought to address this disparity by submitting that the Convention had been incorporated into our domestic law. Reliance was placed on observations of Lord Keith of Kinkel in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, 990G; Lord Steyn in *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees Intervening*) [2004] UKHL 55, [2005] 2 AC 1, paras 40-42; section 2 of the Asylum and Immigration Appeals Act 1993; and para 328 of Statement of Changes in Immigration Rules (HC 395). It is plain from these authorities that the British regime for handling applications for asylum has been closely assimilated to the Convention model. But it is also plain (as I think) that the Convention as a whole has never been formally incorporated or given effect in domestic law. While, therefore, one would expect any government intending to legislate inconsistently with an obligation binding on the UK to make its intention very clear, there can on well known authority be no ground in domestic law for failing to give effect to an enactment in terms unambiguously inconsistent with such an obligation.

30. The appellant sought to assert that she had a legitimate expectation that the UK would honour its obligation under article 31 of the Convention. But she cannot, at the relevant time, have had any legitimate expectation of being treated otherwise than in accordance with the 1999 Act. Nor can the criminal defence of necessity be stretched to cover this case.

31. The appellant also submitted that it was an abuse of the criminal process to prosecute her to conviction under count 2. That submission calls for closer consideration. It was not an abuse to prefer charges

under both counts, since 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. It is true that the two counts related to identical conduct and the second count served no obvious purpose, but the court could ensure, on conviction, that no disproportionate penalty was inflicted. If, however, the second count was included in the indictment in order to prevent the appellant from relying on the defence which section 31 would otherwise provide, I would share the Court of Appeal's view (para 24) that there would be strong grounds for contending that this was an abuse of process. It is not at all clear what legitimate purpose was sought to be served by including the second count, and it must be questioned whether there was any legitimate purpose.

32. In rejecting the appellant's objection to count 2 the learned judge was following authority binding on him: see *R (Pepushi) v Crown Prosecution Service* [2004] 798 (Admin). But there is an obvious inconsistency between his grounds for rejecting that objection and his direction to the jury (see paras 5 and 6 above). His grounds for dismissing the appellant's objection was also, in my opinion, wrong, since if the jury were to acquit the appellant on count 1 in reliance on section 31, it would be both unfair and contrary to the intention of the statute to convict her on count 2. The Attorney General expressly recognised that additional offences might have to be added to section 31(3), and when such offences, requiring addition to the list, arose in individual cases it would plainly be necessary to avoid injustice in those cases. There was in my opinion a clear risk of injustice in this case if the jury were to acquit on count 1 but convict on count 2.

33. The trial judge cannot of course be criticised for acting in accordance with binding authority, incoherent though (on his interpretation) the outcome was. It is, however, apparent that counsel's preliminary objection to count 2 could only, consistently with article 31 and the intention of section 31, have been fairly met by staying further prosecution of count 2 at that stage. If the jury acquitted the appellant on count 1, the stay on prosecuting count 2 should have been maintained. If the jury convicted the appellant on count 1, rejecting her section 31 defence, there would have been no objection in principle to further prosecution of count 2. But the appellant would be likely in that situation to have pleaded guilty (as she did in response to the judge's ruling), and the question would arise whether further prosecution of count 2 could be justified: given that the judge had power to sentence the appellant to imprisonment for 10 years on count 1, it could scarcely be suggested that his powers of punishment were inadequate to reflect the appellant's culpability.

34. The Court of Appeal expressed its concern about this case by allowing the appellant's appeal against sentence and ordering that she be absolutely discharged. But in my opinion it was an abuse of process in the circumstances to prosecute her to conviction. On 14 February 2005 the appellant was, in the Attorney General's expressive phrase, "still running away" from persecution. Once that was established, count 2 being factually indistinguishable from count 1, she should not have been convicted at all. I would accordingly allow the appeal, quash the appellant's conviction and invite the parties (other than the intervener) to make written submissions on costs within 14 days.

LORD HOPE OF CRAIGHEAD

My Lords,

35. The issues raised by this case fall conveniently into two parts. The first is whether the appellant was entitled to the protection of article 31(1) of the 1951 Convention and Protocol relating to the Status of Refugees. The second is whether she had a defence under section 31 of the Immigration and Asylum Act 1999 to the charge of attempting to obtain services by deception contrary to section 1(1) of the Criminal Attempts Act 1981, notwithstanding the fact that this is not one of the offences specified in section 31(3) of the 1999 Act as those to which a defence under that section is available.

36. Before I examine these two issues I should like to say something about the circumstances in which the appellant came to be charged with the offence under section 1(1) of the 1981 Act. It has to be acknowledged at the outset that this is not the type of case that was in the forefront of the minds of the framers of the Convention in 1950 when article 31 was being formulated. Their concern was to protect refugees who were coming to the territory of a contracting state. In this case the fact that the appellant was travelling on a false Ethiopian passport was not detected when she entered this country at Heathrow Airport. She was detected when she was attempting to leave this country from the same airport with a false Italian passport later the same day. The question which lies at the heart of the first issue is whether she was entitled to the protection of article 31(1) against the imposition of a penalty on account of her attempt to leave the country illegally, not to enter it.

The facts

37. The current practice is for passengers departing on international flights to be asked to present their passports at the airline's check-in desk when they are checking in for the flight which they intend to take, and for their passports to be examined again at the departure gate. This is because airlines are exposed to substantial penalties if they carry passengers to a country which they will not be permitted to enter because they have no valid passport or its visa requirements are not satisfied. The Immigration (Carriers' Liability) Act 1987 requires carriers to make payments to the Secretary of State in respect of passengers brought by them by ship or aircraft to the United Kingdom without proper documents, currently amounting to £2,000 per passenger. (The 1987 Act was repealed by the Immigration and Asylum Act 1999, section 169(3) and Schedule 16 as from a date to be appointed, and replaced by a new system of carriers' liability under sections 40 and 42. But no date for the taking effect of these provisions has yet been appointed.) Carriers who carry passengers from the United Kingdom without proper documents are exposed to similar sanctions in the countries to which they are travelling.

38. The appellant's attempt to leave the country with a false passport was detected when the first opportunity arose for her passport to be examined to avoid incurring this liability, which was at the Virgin Atlantic check-in desk. Information was passed to the police and she was arrested when, after passing through security and passport control, she reached the departure gate. The obstacle which she encountered was one that can be expected to confront all refugees who are in transit by air through Gatwick or Heathrow from a territory where their life or freedom was threatened to the country where they intend to seek asylum.

39. Heathrow Airport, where this incident took place, is one of the busiest airports in Europe. One of the reasons why it attracts so much business is that it serves so many destinations. Many of the passengers who use it are in the course of travel from places both within and outside Europe to destinations in North America. Usually changing from one flight to another while in transit can be done without having to enter the United Kingdom. But this may not always be possible. Refugees whose movements and documents have been prepared for them by their couriers may not be able to avoid doing so. Even if they can, they will still face the problem of having to present their passports for examination by the airline at the departure gate before they are

permitted to board the aircraft. In *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667, 674B-C Simon Brown LJ observed that the combined effect of visa requirements and carriers' liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents. The barrier to onward travel which faces passengers in possession of false passports or other travel documents is one which every refugee is likely to encounter while in transit to North America through any of Europe's principal international airports.

40. The situation which I have described is unlike that with which the framers of the Convention were familiar in 1950. Transfers from one vehicle to another have, of course, been part of travel from time immemorial. But the journey which the respondent was taking when she was at Heathrow had some significant features that are the product of more recent developments. Transatlantic travel in the early 1950s was almost always by ship. And it was for the few, before the introduction of suitable aircraft made international air travel over long distances accessible to everyone. The significant increase in air travel that resulted from the use of such aircraft led to the practice of permitting passengers to transfer from one flight to another without requiring them to enter the country in which the airport where the transfer was to take place was situated. Then came the prospect of the imposition of financial penalties under carrier sanctions legislation in the United Kingdom and North America.

41. In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1, para 28 Lord Bingham of Cornhill quoted a passage from an article published in 1998 ("United Kingdom: Breaches of article 31 of the 1951 Convention" (1998) 10 Int J Refugee Law 205, 209-210) in which Richard Dunstan, formerly Refugee Officer, Amnesty International United Kingdom, provided this description of the practice that many leading countries have adopted:

> "In recent years, and in common with many other western countries, the United Kingdom, Canada and the United States have imposed visa regimes on nationals of practically all significant refugee-producing countries, in an apparent attempt to reduce the number of would-be asylum-seekers from such countries arriving at their borders. These visa regimes have then been enforced by the imposition of heavy financial penalties on those transport operators bringing passengers lacking a valid

> visa where one is required. For example, under the Immigration (Carriers' Liability) Act 1987, the United Kingdom authorities impose a financial penalty of £2,000 per passenger brought without either a valid passport or a visa where one is required. Introducing this legislation in March 1987, the then Home Secretary, Douglas Hurd, stated that 'the immediate spur to this proposal has been the arrival of over 8,000 people claiming asylum in the three months to the end of February 1987.' Between May 1987 and October 1996, fines totalling £97.6 m were imposed on over 440 airlines and shipping companies. The United Kingdom authorities have also provided training, advice and technical support in respect of the detection of false travel documents to airline staff based at various points of embarkation….
>
> "Similarly, in the United States a financial penalty of US$3,000 per improperly-documented passenger may be imposed under section 273 of the Immigration and Nationality Act 1952, the penalty having been increased from US$1,000 in 1990. And in Canada a financial penalty of up to CAN$ 3,200 per improperly-documented passenger may be imposed under the Immigration Act 1976, as amended. As long ago as 1986, a total of 541 airlines were each fined CAN$1,000 by the Canadian authorities for not demonstrating sufficient vigilance in their checking of passengers' travel documents."

The practice of imposing liability on carriers has been adopted by most European countries too. A study conducted for the European Council on Refugees and Exiles, "Carriers' Liability: Country up-date on the application of carriers' liability in European States", published in February 1999, showed that all states parties to the Schengen Convention, plus Norway and Iceland, who had concluded a parallel convention, had introduced a system of carriers' liability.

42. It can be assumed therefore that the incident at the Virgin Atlantic check-in desk was the product of demands made on the airline by the country of destination, not the country of departure. Formerly passport controls on exit were comparatively relaxed. The emphasis was on controls on entry. Now the controls on exit which are imposed by the carrier are diligently exercised. It is significant that the fact that the appellant was attempting to travel on a false passport was detected by the airline's security official at the check-in desk. She then passed

through passport control to departures apparently without incident before she was stopped by the police, who had been alerted by the security official, at the departure gate.

Article 31 of the Refugee Convention

43. Article 31 is headed "Refugees unlawfully in the country of refuge". Its purpose is to exempt illegally entering refugees from penalties. The need for protection of this kind was first observed by the 1950 Ad Hoc Committee on Statelessness and Related Problems which prepared the draft Convention. It noted in its draft report 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 into the country of refuge: *Refugee Protection in International Law, ed Feller, Türk and Nicholson* (2003), p 190. After further discussion and negotiation article 31(1), which was not among the texts considered by the Ad Hoc Committee, was included in the Convention. It provides:

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

44. The phrase "on account of their illegal entry or presence" appears to limit the situations to which the protection of the article can apply. As I have already mentioned, the fact that the appellant was travelling on a false passport was not detected when she entered this country from somewhere in the Middle East. This did not happen until about an hour later when, having been provided by her agent with further travel documents, she presented her false Italian passport at the check-in desk. Her offences were committed while she was still present in this country. But they were not committed with a view to persuading the authorities that she should be allowed to remain here. They were committed with a view to her being permitted by the airline to continue her journey to Washington. The way her agent dealt with her made it necessary for her to pass through passport control on her arrival at Heathrow to check in for her onward flight to Washington. But she was in reality a passenger who was in transit. Her entry to this country was purely incidental to

the journey to the United States which she was still engaged in when she was arrested.

45. There is no indication in the travaux préparatoires that any of the plenipotentiaries who met in Geneva in 1951 had in mind the position of refugees who were still in transit to another country when their illegal presence was detected. The position of refugees passing through intermediate countries to the state of refuge was referred to. But this was in the context of illegal entry to or presence in the country of refuge. The wording of the original version of article 31(1) was amended to meet an objection by the French representative that France could not bind itself as a country of second reception to accept refugees coming through intermediate countries. This objection was met by the French amendment, which addressed the problem of defining what might constitute good cause for their illegal entry into or presence in the country of refuge. There is no indication that it was the intention that refugees should be denied protection if their illegal presence happened not to be detected until they were on the point of departure from the country where, in the event, they decided to seek refuge.

46. In his commentary on article 31 in *The Refugee Convention 1951 with travaux préparatoires*, p 279, Dr Paul Weis, said that 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 presented himself as soon as possible to the authorities of the country of asylum and was recognised as a *bona fide* refugee. The generality of Dr Weis's comment suggests that all refugees escaping persecution who, having crossed the frontier, are still in the country and satisfy this requirement are entitled to the exemption from penalties. But the context for his remark shows that the penalties that he had in mind were those associated with illegal entry, not with illegal exit while in transit to another country.

47. Your Lordships have not been provided with any evidence that article 31(1) was being interpreted judicially as extending to situations of this kind until *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667. Judgment in that case was delivered on 29 July 1999. Two of the applicants in that case, Mr Sorani and Mr Kaziu, were in transit when they presented false documents at Heathrow while attempting to board flights to Canada. At p 677H Simon Brown LJ said that he regarded as helpful Newman J's suggestion that the illegal entry or use of false documents which could be attributed to a bona fide desire to seek asylum "whether here or elsewhere" should be covered by the

article. At p 687F-G he said that, as the applicants would have been entitled to the benefit of article 31(1) had they reached Canada, logically its protection could not be denied to them in this country merely because they had been apprehended en route. In *R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), para 15 the Divisional Court said that it seemed to it, in the light of the brief argument that had been addressed to it on this point, that *Adimi* was rightly decided.

48. In a Memorandum of Good Practice endorsed by the Association of Chief Police Officers, the Immigration and Nationality Directorate, the Crown Prosecution Service and the Law Society representing defence solicitors (third draft, 8 March 2000), it was recognised that criminal offences giving rise to the question whether the protection afforded by article 31(1) was available might be committed by persons entering, departing from or in transit via the United Kingdom: para 3.1. The advice that the defence might be available was put into practice in this case. The appellant, a transit passenger, was permitted to take advantage of the statutory defence based on article 31(1) in regard to the first count on the indictment without objection from the prosecutor. It was only when the case reached this House that the defence was called into question by the respondent on the ground that the appellant's conduct was outside the scope of article 31(1).

49. Miss Montgomery QC submitted that the analysis in *Adimi* did not give sufficient weight to the restriction that the words "illegal entry or presence" impose on the scope of article 31(1). She said that there was nothing illogical in denying its protection to a person seeking to leave for a foreign state even though, upon arrival in that foreign state, he would be entitled to it. This was because the wording of the article suggests that it is concerned to protect refugees solely against offences arising from conduct involved in their illegal entry or presence in the state where they are detected. Nevertheless, there are indications that Simon Brown LJ's view that refugees are entitled to the protection of article 31(1) while in transit has been welcomed by academics and by the UNHCR as falling within the spirit of the article.

50. An expert roundtable organised by the UNHCR and the Graduate Institute of International Studies was held in Geneva in November 2001. The discussion was based on a background paper on article 31 by Guy Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: non-penalisation, detention, and Protection*, in *Refugee Protection in International Law,* ed *Feller, Türk and Nicholson*, at pp

185 – 252. The conclusions that were reached are set out at p 253 – 258 in the same volume. They include the following, at p 255:

> "10. In relation to Article 31(1) …
>
> (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 were settled, temporarily or permanently, in another country. The mere fact of UNCHR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country.
>
> (d) The intention of the asylum seeker to reach a particular country of destination, for instance for family reunification purposes, is a factor to be taken into account when assessing whether s/he transited through or stayed in another country."

These conclusions support the view that asylum seekers who were in transit when passing through other countries before they reached the country where they have claimed asylum are entitled to the protection of the article. But they do not deal directly with the situation where the offence was committed while the asylum seeker was attempting to leave with a view to claiming asylum somewhere else. Article 2 obliges every refugee to conform to the laws and regulations of the country in which he finds himself. But Miss Montgomery did not suggest that this article deprived asylum seekers who were in transit of the benefit of article 31(1) and I, for my part, do not think that it does.

51. Comments that are more directly in point are to be found in *The Rights of Refugees under International Law* (2005) by James C Hathaway. At p 406 he said that it was apparent that many refugees needed to cross borders clandestinely in order to access protection. So long as a refugee's failure to present valid travel documents was purely incidental to his or her flight from the risk of being persecuted, he should not be sanctioned for illegal entry. He then added this comment:

> "Nor does international law sanction the United Kingdom's policy of pursuing criminal charges against

> refugees found to have used false documents to pass through its territory. As an English court has observed, the right of refugees to breach migration control laws in search of protection means that the propriety of prosecution for such matters by a transit state is particularly doubtful."

A footnote to this passage explains that it is based on comments by Simon Brown LJ in *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667, and on a passage in Guy Goodwin-Gill's background paper on article 31 at pp 216-217 where he states that if a state initiates action within its territory to deal generally or internationally with the use of false travel documents, then that state, rather than the state of intended destination, assumes the responsibility of ensuring that the refugee benefits from the provisions of the Convention, such as article 31, which are not dependent upon lawful presence or residence: *Refugee Protection in International Law,* ed *Feller, Türk and Nicholson*, pp 216-217.

52. The UNHCR made written submissions in support of the applicants in *Adimi* who were arrested as transit passengers while they were attempting to board flights for Canada with the intention of seeking asylum there, Mr Sorani and Mr Kaziu. It said that UNHCR considered that their prosecution for possession of false documents in such a situation constituted prosecution for their illegal presence in the United Kingdom, contrary to article 31(1). In a Memorandum submitted to the Select Committee on Home Affairs dated 1 December 2005, para 13, UNHCR repeated its view that refugees and asylum seekers in transit to a final destination country could equally benefit from article 31 of the Convention if all the conditions of that article were met.

53. As a general rule it is desirable that international treaties should be interpreted by the courts of all states parties uniformly: *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 657B. So if it could be said that a uniform interpretation was to be found in the authorities, it would be appropriate for the courts of this country to follow it. It is plain from the material that is before your Lordships that the situation in this case falls far short of that ideal. The travaux préparatoires are uninformative, and there is an absence of relevant judicial authority other than the dicta in *R v Uxbridge Magistrates' Court, Ex p Adimi.* As for the rest, while weight must be attached to the views of UNHCR in the light of its functions under article 35 of the Convention and to those of academics who specialise in this field, their

assertions appear never to have been tested judicially elsewhere in the courts of the states parties.

54. In this situation, as in *Shah*, I suggest that the best guide is to be found in the evolutionary approach that ought to be taken to international humanitarian agreements. It has long been recognised that human rights treaties have a special character. This distinguishes them from multilateral treaties that are designed to set up reciprocal arrangements between states. Humanitarian agreements of the kind to which the Convention belongs are entered into for a different purpose. Their object is to protect the rights and freedoms of individual human beings generally or falling within a particular description. As Judge Weeramantry said in *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (1996) 115 ILR 1, 57, they represent a commitment of the states parties to certain norms and values recognised by the international community.

55. In *Shah's* case the problem was whether Pakistani women accused of adultery were a "particular social group" within the meaning of article 1A(2) of the Refugee Convention. Lord Hoffmann said at p 651C-D that the concept was a general one and that its meaning could not be confined to those social groups which the framers of the Convention may have had in mind. In this case a meaning has to be given to the words "on account of their illegal entry or presence" in article 31(1) which identify the type of penalties that the contracting states are not to impose on refugees who satisfy the requirements of the article. I would not confine the meaning of that expression to the particular situations that the framers had in mind in this case either. The overall context is provided by the preamble to the Convention. It refers to the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. It states that

> "the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms".

This is an indication that a generous interpretation should be given to the wording of the articles, in keeping with the humanitarian purpose that it seeks to achieve and the general principle that the Convention is to be regarded as a living instrument.

56. The 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. The phrase "coming directly", if read literally, would have that effect. But, as Dr Weis noted in *The Refugee Convention 1951*, p 310, the UK representative said that these words, which appeared for the first time in his suggested amendment, would allow for a certain amount of flexibility in the case of refugees coming through intermediary countries. They were then incorporated in the French amendment, which was adopted by a large majority. Lord Williams of Mostyn acknowledged this point when he said during the Third Reading in the House of Lords of the Bill which became the 1999 Act that, as he had already observed on Report, the definition of "coming directly" was a generous one: Hansard (HL) 2 November 1999, col 785. It is hard, then, to see why the fact that the refugees are still in transit should be ignored when the question arises whether they are entitled to the protection of the article. Lord Williams said that a time must come when they have stopped running away, which he described as the article 31(1) situation. But, on the facts of this case, the appellant had not stopped running when she was arrested.

57. Article 31(1) does not, of course, give the refugee a right to choose the country in which to seek asylum. So the United Kingdom was not in breach of it when the appellant's wish to travel on to the United States was frustrated by her arrest at the departure gate. But what article 31(1) does deal with is the issue of punishment. It deals with the situation where the question is whether refugees should be punished for offences committed while escaping from persecution by the use of false documents. It recognises that refugees, whose departure from their country of origin is usually a flight, are rarely in a position to comply with the requirements of legal entry to the country of refuge: Dr Weis, *The Refugee Convention 1951*, p 279. It was designed to protect refugees from punishment who resort to the use of false documents while they are still in flight to obtain entry to the country of refuge.

58. The effect of the liability that the country of destination imposes on the carrier was that the false passport was detected in a country where the appellant was in transit, not in the country to which she was seeking entry. But it would be artificial in the extreme to deny her the protection to which she would have been entitled had she reached the United States just because she was detected at Heathrow before she boarded her flight to Washington. The situation is one where the United Kingdom, having asserted jurisdiction over her because she was present

here, must assume responsibility for affording her the benefit of the article.

59. For these reasons I consider that the appellant was entitled to rely on article 31(1) of the Refugee Convention to protect her from prosecution for seeking to use a false passport to leave the United Kingdom while she was still in transit to North America.

Section 31 of the 1999 Act

60. The appellant was charged with two offences. The first was the using of a false instrument with the intention of inducing the security officer at the check-in desk to accept it as genuine, contrary to section 3 of the Forgery and Counterfeiting Act 1981. The second was the offence of attempting to obtain the services of air transportation from Virgin Atlantic by deception, contrary to section 1(1) of the Criminal Attempts Act 1981. She was permitted to rely at her trial on the defence provided for by section 31 of the 1999 Act in relation to the first charge, and she was acquitted. The judge refused to allow her to rely on the defence in relation to the second charge, whereupon she pleaded guilty and was sentenced to nine months imprisonment. The facts on which these two charges were based were indistinguishable. They arose out of precisely the same incident – the presentation of the false passport at the check-in desk. They were treated differently simply because the offence in count one is one of those listed in section 31(3) of the 1999 Act as those to which the section applies, whereas the offence in count two is not.

61. The question which then arises is whether the omission from section 31(3) of section 1(1) of the Criminal Attempts Act 1981 was what Parliament intended or whether it was due to an oversight. The section itself provides grounds for thinking that the omission may have been due to an oversight. Section 31(3), which contains the list in question, applies to England and Wales and Northern Ireland. The list is in these terms:

> "any offence, and any attempt to commit an offence, under
>
> (a) Part 1 of the Forgery and Counterfeiting Act 1981 (forgery and connected offences); …
>
> (b) section 24A of the 1971 Act (deception); or

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

The 1971 Act is the Immigration Act 1971: 1999 Act, section 167(1). Section 31(4), which applies to Scotland, states that the offences to which the section applies are the following:

"(a) of fraud;

(b) of uttering a forged document; …

(c) under section 24A of the 1971 Act (deception), or

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

and any attempt to commit any of those offences."

62. The offences of fraud and uttering listed under heads (a) and (b) in section 31(4) are common law crimes in Scotland. Part I of the Forgery and Counterfeiting Act 1981 does not extend to Scotland: section 31(1). The activities that are proscribed by it can be dealt with there under the common law. The Criminal Attempts Act 1981 does not extend to Scotland either: section 11(2). An attempt to commit a common law crime is an offence at common law in Scotland. If the appellant had been attempting to board a flight from Edinburgh or Glasgow to North America she could not have been charged with either of the offences listed in the indictment against her at Isleworth. Her case would probably have been dealt with on a single charge of attempted fraud by the Scottish prosecutor.

63. It is often just a matter of convenience whether the charge in cases of this kind is framed in Scotland as one of uttering a forged document or as one of fraud. But in this case, as the appellant had reached the stage of attempting to obtain services by tendering the false passport, attempted fraud would probably have been regarded as the better alternative: Gordon, *Criminal Law*, 3rd ed (2001), para 18.35. The important point is that, on either alternative, in Scotland the defence under section 31 would have been available. The exact matching of statutory offences in England and Wales with common law crimes in Scotland is at best very difficult, and more often than not it is virtually impossible. But no sensible reason can be given for thinking that Parliament intended, in this context, that the same conduct on either side of the border should be treated differently.

64. The respondent submits however that Parliament cannot be taken to have intended that a defence under section 31 was to be available to a person who is being prosecuted for using false documents in an attempt to leave the United Kingdom. As Miss Montgomery was at pains to emphasise, the offence of dishonestly attempting to obtain air transportation services by deception is an offence that someone commits who is trying to get out of the country, not trying to get into it. Her argument on this point assumed, contrary to her first submission, that article 31(1) applied to passengers who were found to be acting illegally when they were seeking to leave the country while they were still in transit. Even so, she said, Parliament had deliberately narrowed its protection when it was considering how far it was to be available in the United Kingdom. Section 31 of the 1999 Act had been framed in a way that ensured that it would be available to cases of illegal entry or presence, and no more. The omission of section 1(1) of the Criminal Attempts Act 1981 was not to be regarded as an oversight. It was deliberate, because it was never intended that the section should protect acts of that kind.

65. I cannot accept this argument. Section 31 does appear to have imposed an additional hurdle that refugees must cross before they will be entitled to make use of a defence based on article 31. Section 31(2) deals with the case where the refugee, in coming from the country where his freedom was threatened, stopped in another country outside the United Kingdom before his arrival in this country. The test which he must satisfy is not to be found in those terms in article 31(1). This subsection has narrowed its scope in comparison with what was contemplated in *Adimi*. But the section as a whole indicates that, once the prerequisites are all satisfied, a defence will be available in all cases that are within the reach of the article. Subsections (8) and (9) refer to cases where, before the commencement of the section, it was not argued that "a defence based on article 31(1)" was available. This suggests that no restriction on the kind of offences to which a defence under that article would be available was contemplated.

66. A further indication is to be found in what the Attorney General, Lord Williams of Mostyn, said at Third Reading about the amendment which introduced the clause that was to become section 31: Hansard (HL), 2 November 1990, col 784:

> "The purpose of the amendment is to ensure that someone who comes within article 31(1) of the United Nations convention of 1951 is properly protected and does not

> have a penalty imposed on him on account of his illegal entry or presence. As I told your Lordships on an earlier occasion, we have already put in place administrative procedures to identify at an early stage article 31(1) issues. Ideally, therefore, in relevant cases the matter would never come to court. Sometimes these arrangements will fail. They will fail to identify someone who comes within article 31(1) and this amendment is therefore a further safeguard. I told your Lordships on Report that subsection (1) draws on the terms of the article itself."

On Report he said that the government wanted an outcome which properly accommodated article 31(1) asylum seekers and the difficulties that had been raised by Simon Brown LJ in *Adimi*: Hansard (HL), 18 October 1999, col 855.

67. These comments seem to me to reinforce the impression given by subsections (8) and (9) that, subject only to the limitation which is built in by subsection (2), it was the intention that someone who comes within article 31(1) should have a defence under section 31. On this view the absence of section 1(1) of the Criminal Attempts Act 1981 must be regarded as an oversight. I do not see it as a deliberate omission from the list, designed to restrict still further the scope of the protection that was contemplated by Simon Brown LJ in *Adimi* when, adopting Newman J's formula, he said at p 677G-H that conduct that could be attributed to a bona fide desire to seek asylum whether here or elsewhere should be covered by article 31

68. Mr Fitzgerald QC submitted that the omission of section 1(1) of the 1981 Act from the list of offences in section 31(3) should be made good in one or other of four ways: (i) by recognising that there was a freestanding defence under article 31(1); (ii) by reading section 1(1) of the 1981 Act into the list; (iii) by legitimate expectation; or (iv) by holding that her prosecution under section 1(1) of the 1981 Act was an abuse of process.

69. I would reject the first three alternatives, essentially for the same reasons as those given by my noble and learned friend Lord Bingham of Cornhill. The giving effect in domestic law to international obligations is primarily a matter for the legislature. It is for Parliament to determine the extent to which those obligations are to be incorporated domestically. That determination having been made, it is the duty of the

courts to give effect to it. There can be no free-standing defence, nor can there be any legitimate expectation that one will be provided, where Parliament has chosen in its own words to set out the scope of the defence that is to be available. For the courts to add further offences of their own choosing to the list of those to which Parliament has said section 31 applies in England and Wales and Northern Ireland would not be to interpret the subsection but to legislate. Our constitutional arrangements do not permit this.

70. There remains the fourth alternative. The margin between declining to add to the list in section 31(3) and declaring that it was an abuse for the appellant to be required to plead guilty to an offence that is not on the list when she was still being prosecuted for an offence for which the defence under that section is available is a narrow one. But it is not illusory. There is a substantial point to be made here. The brief narrative that is given of the circumstances in each count shows that they arose out of precisely the same incident. The appellant was accused in the first count of having the intention of inducing Mohammed Hussan to accept the false Italian passport as genuine. He was the security officer at the Virgin Atlantic check-in desk. She was then accused in the second count of dishonestly attempting to obtain air transportation services from Virgin Atlantic by falsely representing that she was authorised to use that passport and that it was genuine. The evidence showed that the person to whom the representation was made was Mohammed Hussan, the security officer named in the first count.

71. The offences mentioned in each count are different, and the complainants named in each of them were different too – the security officer in one case, the airline in the other. But they were two sides of the same coin. As one attracted the section 31 defence and the other did not, the effect was to expose the appellant to the imposition of a penalty for doing something against which she was entitled to claim protection under that section. It seems to me to be plain that it was an abuse for the prosecutor to undermine the protection in this way. Section 31 must be read in the light of article 31(1) of the Convention, to which it was intended to give effect. There is no room in this context for the formalistic argument that the omission from section 31(3) of section 1(1) of the Criminal Attempts Act 1981 enabled the prosecutor to take this course. He was alleging that the appellant had committed one of the offences on the list. The fact that it was a listed offence was a sufficient indication that it was the intention of Parliament that she should have the article 31(1) protection against the imposition of a penalty for her illegal act, provided the requirements of sections 31(1) and 31(2) were satisfied. She ought not to have been required to plead to the second

count until the jury had delivered its verdict on the first count. As the jury found her not guilty on the first count, holding that the requirements of sections 31(1) and 31(2) had been satisfied, her prosecution on the second count should not have been proceeded with. As it is, the way in which the prosecution was conducted in this case deprived her of the protection and it was an abuse.

Conclusion

72. For these reasons I would allow the appeal and quash the appellant's conviction on the second count of the indictment.

LORD RODGER OF EARLSFERRY

My Lords,

73. The appellant, Ms Fregenet Asfaw, is from Ethiopia. She was granted refugee status by the Home Office on 11 April 2007, almost thirteen months after the decision of the Court of Appeal in the criminal proceedings against her which are the subject of the present appeal.

74. According to the appellant's version of events, after she left Ethiopia to avoid further persecution, her 'plane stopped in an unknown Middle Eastern country. She remained there for about three hours before flying on to London. On arriving at Heathrow on 14 February 2005, the appellant presented a false Ethiopian passport to the immigration officer on duty and so entered the United Kingdom. Her intention, however, was not to stay in this country, but to travel on to the United States and claim asylum there. So, having passed through immigration control, she waited, for something less than an hour, until an agent who was arranging her journey from Ethiopia brought her a ticket for a Virgin Atlantic flight to New York and a false Italian passport in the name of Hanams Gebrele.

75. Ms Asfaw then presented the ticket and passport to the official on duty at the Virgin Atlantic check-in desk in Terminal 3. He realised that the passport was a forgery and alerted the police. The appellant was stopped at the departure gate. She was taken to a police station where

she was questioned. After a private interview with a solicitor, the appellant claimed asylum. She was eventually charged with using a false instrument with intent to use it as genuine, contrary to section 3 of the Forgery and Counterfeiting Act 1981, and with attempting to obtain services by deception, contrary to section 1(1) of the Criminal Attempts Act 1981.

76. Article 31(1) of the 1951 Geneva Convention relating to the Status of Refugees ("the Convention"), which is headed "Refugees unlawfully in the country of refuge", provides:

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

With the aim of complying with the international law obligation imposed on the United Kingdom by this article, Parliament enacted section 31 of the Immigration and Asylum Act 1999 ("the 1999 Act"), which is headed "Defences based on Article 31(1) of the Refugee Convention". Subsections (1) to (5) of section 31 provide:

> "(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—
>
> (a) presented himself to the authorities in the United Kingdom without delay;
>
> (b) showed good cause for his illegal entry or presence; and
>
> (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.
>
> (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if

he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.

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

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

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

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

(4) In Scotland, the offences to which this section applies are those—

(a) of fraud,

(b) of uttering a forged document, …

(c) under section 24A of the 1971 Act (deception), or

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

and any attempt to commit any of those offences.

(5) A refugee who has made a claim for asylum is not entitled to the defence provided by subsection (1) in relation to any offence committed by him after making that claim."

77. Two points about section 31 can be made straightaway. First, the offence of entering the United Kingdom unlawfully, contained in section 24 of the Immigration Act 1971, is not listed in section 31(3). Nor is the offence of attempting to obtain services by deception, contrary to section 1(1) of the Criminal Attempts Act 1981. While, for the reasons I shall give, the omission of the second provision is entirely understandable and correct, as presently advised, I am at a loss to understand why the first of these provisions has been omitted from the lists in section 31(3) and (4), since section 24, like section 24A, falls four-square within the terms of article 31. Article 31 is designed indeed for precisely that kind of offence.

78. Both at first instance and before the Court of Appeal, those representing the prosecution proceeded on the basis that, if the jury accepted the appellant's version of events, she would have a defence to the first count on the indictment, since the offence in question is included in the list in section 31(3) of the 1999 Act. But the same did

not apply to the second count on the indictment, since the relevant offence is not included in that list. HH Judge Lowen upheld the prosecution position on the second count and rejected a defence argument that, despite the limited terms of section 31(3) of the 1999 Act, the appellant had a free-standing defence to the count by virtue of article 31 of the Convention. The appellant then pleaded guilty to the second count. After trial, the jury acquitted her of the first count. The judge sentenced the appellant to 9 months' imprisonment on the second count. She appealed against her conviction.

79. The Court of Appeal criticised the prosecuting authorities for including the second count on the indictment, on the ground that it really covered the same conduct as the first count, but did not afford the appellant the protection of a defence under section 31 of the 1999 Act. The court disposed of the whole matter on a pragmatic basis, by dismissing her appeal against conviction, giving her leave to appeal against sentence and allowing that appeal and substituting an absolute discharge. Ms Asfaw has appealed to this House against her conviction on the second count, not least because it could cause problems for her if, for instance, she wished to travel to the United States.

80. Before this House counsel for the prosecuting authorities adopted a different position. Ms Montgomery QC withdrew any concession made below and asserted that article 31 applies only to offences of entering and being present on the territory of a Contracting State and does not apply to offences committed by a refugee, such as the appellant, who is trying to leave that State and to travel on to settle in another country. Section 31(1) has the same scope. So it did not apply to either of the counts in the indictment against the appellant. The logic of counsel's position was, accordingly, that, even if the jury accepted the appellant's version of events, she had no defence under section 31 (or indeed by virtue of article 31) to either count in the indictment. So, although Ms Montgomery naturally stressed that she was not trying to appeal against the appellant's acquittal on the first count, on her argument, the appellant should have pleaded guilty to the first, as well as the second, count.

81. The confusion which has hitherto reigned on the part of the prosecution in these proceedings is remarkable, to say the least. Nevertheless, the House must confront the actual legal issues to which the case gives rise. The fundamental point is the scope of article 31. If that article does not apply to a refugee who is trying to leave a Contracting State which he has entered, then there is no basis for

arguing that section 31 of the 1999 Act should apply to such cases. Similarly, a person in the appellant's position could not have any kind of free-standing defence based on article 31. Finally, unless the indictment were bad for duplicity – which the appellant has never argued and which was not the basis of the Court of Appeal's criticism of the Crown – there could be no valid criticism of the Crown for prosecuting the appellant for attempting to obtain services by deception.

82. My Lords, I should like to think that anyone who simply read the words of article 31, in either of the official languages, would be as surprised as I was to be told that it covered offences committed by a refugee in order to leave the country. On its face, the article is all about entry and presence and says nothing about leaving. And the starting point of any interpretation of the article must indeed be the language itself: *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305, per Lord Lloyd of Berwick. As I understood him, however, Mr Fitzgerald QC contended that article 31 must be approached as a living instrument. It fell to be interpreted in the light of the development of air travel, which would not have been in the minds of those drafting the Convention in 1951. The House should accordingly hold that a penalty imposed on refugees on account of their use of a false passport, in an attempt to leave the country and continue their flight from persecution, was imposed on account of their illegal presence in the country. An interpretation to that effect was supported by the decision of the Divisional Court in *R v Uxbridge Magistrates' Court , Ex p Adimi* [2001] QB 667, which had been approved, indeed welcomed, by commentators on the Convention.

83. Mr Fordham QC, who appeared for the United Nations High Commissioner for Refugees, argued, in support of the appellant's position, that article 31 should be interpreted as applying to refugees who presented a false passport when trying to leave the country in order to pursue their flight from persecution.

84. The fact that commentators and the High Commissioner support the interpretation of article 31 advocated by the appellant does not excuse your Lordships from the duty of forming a considered view of the proper scope of the article. Indeed, nothing in the relevant passages in the commentaries or other extra-judicial material cited by counsel actually grapples with the text of article 31 or shows how, on the preferred interpretation, article 31 fits into the overall scheme of the Convention. For my part, I have come to the clear conclusion that the interpretation favoured by the appellant is not only impossible on the

language, but is actually at odds with the scheme of the Convention and with its true humanitarian philosophy.

85. The approach which is to be adopted in construing the terms of the Convention was considered by my noble and learned friend, Lord Bingham of Cornhill, in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1. Having described an impossible contention not advanced by Lord Lester of Herne Hill QC, Lord Bingham continued, at pp 18-19, para 18:

> "Instead, Lord Lester urged that the Convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and purpose clearly stated in the Preamble quoted in full in para 6 above. This is, in my opinion, a correct approach to interpretation of a Convention such as this and it gains support, if support be needed, from article 31(1) of the Vienna Convention on the Law of Treaties which, reflecting principles of customary international law, requires a treaty to be interpreted in the light of its object and purpose. But I would make an important caveat. However generous and purposive its approach to interpretation, the court's task remains one of interpreting the written document to which the contracting states have committed themselves. It must interpret what they have agreed. It has no warrant to give effect to what they might, or in an ideal world would, have agreed. This would violate the rule, also expressed in article 31(1) of the Vienna Convention, that a treaty should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context."

I accept this guidance. In my view, however, it has little to do with the real question in this case.

86. Nothing in the travaux préparatoires suggests that those who drafted the Convention had commercial air travel in mind. That is not surprising since it was still in its infancy in 1951 and refugees would have been unlikely to be in a position to use it. So the words of the Convention have to be applied to a form of transport which those framing the Convention cannot have had at the forefront of their minds, if they thought of it at all.

87. As counsel for the appellant emphasised more than once, a feature of international air travel is that people transfer from one flight to another, and from one airline to another. The appellant flew into Heathrow and wanted to change on to a Virgin Atlantic flight to Washington. Had she been an ordinary passenger, she might well have been able to do so while remaining airside as a transit passenger, waiting for her Washington flight in a transit lounge and never presenting herself to the United Kingdom immigration authorities for entry into this country. Arrangements of these kinds have been developed in the decades since the Convention was agreed. The Convention has, of course, to be applied in a world where they are a feature. On any view, however, the appellant did not remain airside. Instead, she entered the United Kingdom on one false passport and then used another false passport to try to board a Virgin Atlantic flight to Washington.

88. So, when she was stopped, the appellant was changing 'planes in the United Kingdom. Changing 'planes is, simply an example of changing from one conveyance to another in the course of a journey. People in 1951 were more than familiar with changing trains, changing buses, changing from buses to trains or from boats to trains, and any number of other combinations of modes of transport. The Oxford English Dictionary cites a passage from a 1955 novel of Elizabeth Bowen, set during the First World War, for the first use of "transit passenger" in a written publication. Even assuming that she may have been guilty of an anachronism, in all probability she was using a term that was already familiar in spoken English before 1955. Since few refugees would travel first class, and many of them would be anxious to avoid the attention of hostile authorities, their journeys would tend to involve frequent changes and long waits in-between. So the idea that transfers from one aircraft or airline to another would have introduced a novel type of problem, undreamed of in 1951, is wide of the mark. Such transfers are simply one modern version of a process which would have been well known to anyone concerned with refugees in 1951.

89. The language of article 31 shows that what cannot be penalised is a refugee's unlawful entry to, or presence in, a state. But the entitlement of refugees to this impunity is subject to the proviso that they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The French text, "et leur exposent", suggests that what is envisaged is that the refugees present themselves to the authorities and, at that stage, show the authorities why they had good cause for entering or being present in the country illegally.

90. Refugees may cross a border away from a frontier post, or land from a boat, or in a light aircraft, at a spot where there are no immigration officials. Being unauthorised, their entry and presence in the country will be illegal. Alternatively, refugees may arm themselves with false papers and present them to immigration officials. If the papers are accepted as genuine, the refugees will then be given official authorisation to enter the country, but that authorisation will have been obtained by deception. It is common ground that article 31 is apt to cover both types of stratagem: in either event the refugees' entry or presence will be illegal for purposes of the article.

91. In order to enjoy the protection of article 31, then, the refugees have to present themselves to the authorities without delay and explain to them why they have entered or are present illegally. Of course, as refugees, their most basic need will be that the authorities should not throw them out or return them to the country where they were exposed to persecution. Article 33 ensures that the Contracting State concerned cannot send them back. In this respect, therefore, all refugees who present themselves to the authorities can be thought of as claiming asylum, if not expressly, then at least impliedly. Correspondingly, for the purposes of, inter alia, section 31(1)(c), section 167(1) of the 1999 Act defines a "claim for asylum" broadly, as meaning "a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom." So a refugee fulfils the requirement in section 31(1)(c) merely by asking the authorities not to remove him or to require him to leave the United Kingdom in breach of the Convention.

92. It follows that a refugee makes a claim for asylum, if he asks the authorities in a country not to throw him out or return him to the country of persecution, even though he simultaneously tells them that he does not wish to settle in their country, but wants to go on to another country. He is asking for temporary asylum until he can continue on his way. Indeed, any other interpretation of article 31 would be absurd, since it would force refugees to make a claim to settle in the country as a precondition to obtaining impunity for their illegal entry or presence. Yet, a major concern of those negotiating the 1951 Convention was that their governments would find themselves having to take more refugees than they could handle.

93. Commentators are agreed that the delegates who inserted the requirement for refugees to present themselves without delay to the

authorities regarded it as important. Its purpose was to encourage refugees to come forward and regularise their position, rather than eking out an existence in an unlawful twilight world on the fringes of society.

94. Indeed, the spirit behind the Convention is one of treating refugees humanely, as people having a recognised place in the legitimate world, not as beings who can exist only on the margins and by committing crimes which Contracting States must then ignore. That is why the Convention deals with a whole range of topics which relate to the position of refugees in society: for example, freedom to practise their religion (article 4), personal status (article 12), property rights (article 13), artistic rights and industrial property (article 14), right of association (article 15), access to the courts (article 16), employment (articles 17 and 18), liberal professions (article 19), housing (article 21), public education (article 22), public relief and assistance (article 23) and social security (article 24). The aim behind including these provisions is to ensure that refugees enjoy a measure of dignity.

95. It is wholly consistent with this scheme that Contracting States need only overlook the initial offence of entering and being present illegally. After they arrive in a safe country, the refugees are to present themselves to the authorities who must then treat them in accordance with the Convention. In that situation the refugees have no justification for committing further offences to escape persecution and are bound by the criminal law, just like anyone else in the country concerned. That is made clear by article 2:

> "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."

Section 31(5) of the 1999 Act is consistent with article 2. As Ms Montgomery put it, the Convention was not designed to create an Alsatia where refugees could commit crimes with impunity. So they cannot avoid punishment if they steal food on the pretext that they need it to feed themselves or their children, or if they break into a house to provide themselves or their children with accommodation, or if they use a forged ticket to travel by bus or train to the docks in order to get a ship to another country, or if, to catch a flight, they take a taxi to the airport and run off without paying the fare. In each and all of these situations, article 31 is quite deliberately silent and article 2 applies.

96. Equally deliberately, article 31 is silent and article 2 applies if refugees reach the departure gate in the Contracting State and present false documents with the intention of travelling to another country in order to claim asylum and settle there. If they present false passports or visas in order to persuade the airline to carry them, they are practising a deception on the airline which could result in it being subject to severe penalties in the destination country, under the equivalent of section 40 of the 1999 Act. Not only would it require clear language to oblige Contracting States to grant refugees immunity from an offence that could have such potential consequences for a third party, but it would be contrary to the philosophy of the Convention. Refugees who are in a safe country and who want to travel on to another country have no more right than anyone else to use criminal means to do so. To suggest otherwise is to treat them as a breed apart, not as legitimate members of society.

97. The argument at the hearing tended to focus almost exclusively on article 31 – which is actually a relatively minor, if very worthwhile, provision. Far more significant are articles 27 and 28. Article 27 is headed "Identity Papers" and obliges a Contracting State to issue identity papers to any refugee in their territory who does not possess a valid travel document. This article deals with travel within the State in question and amounts to an obligation to provide an identity card where people in that State require one. Article 28(1) deals with documents for travel outside the State and so is more immediately relevant for present purposes:

> "The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence."

Under para 7 of the Schedule to the Convention, the Contracting States undertake to recognise the validity of the documents issued in

accordance with the provisions of article 28. The Annex to the Convention sets out, in great detail, the terms of the Specimen Travel Document, which must, in particular, include a provision authorising the holder to return to the issuing country within a certain period.

98. *A Study of Statelessness* was published by the United Nations in 1949. Despite being directed at the specific problems of stateless persons, the study did much to prompt the adoption of the 1951 Convention and to determine the range of subjects which it covered. Even a quick glance at the study is enough to show the importance which was attached to travel documents at the time. I refer, for instance, to Part One, Section I, Chapter 1 (International Movement, Sojourn and Settlement), Section II, Chapter 2 (Travel Documents), and Section III, Chapter 1(1) (Travel, Right of Entry and Sojourn). As the study explained, experience in the years between the World Wars had proved that, unless a refugee had a travel document which not only authorised him to travel to another country but also authorised him to return to the country which issued the document, countries would be reluctant to admit the refugee. They would do so only if they could be confident that, when appropriate, the refugee would be able to return to the country from which he had come and would, therefore, not be stuck in their territory. Article 28 and para 7 of the Schedule were designed to provide just that kind of travel document.

99. In *The Rights of Refugees under International Law* (2005), p 846, Professor Hathaway aptly summarises the situation produced by article 28:

> "The net result is to establish a unified regime for international freedom of movement that exists in parallel to the more general passport-based system."

Refugees who do not have a passport are rescued from the need to resort forgery and deception: they are to be issued with a Convention travel document which allows them to move from country to country. One of the most particular functions of the travel document is to allow refugees "to seek out opportunities for resettlement in a preferred country of asylum": Hathaway, *The Rights of Refugees*, p 851.

100. It is unnecessary for present purposes to enquire who, precisely, count as refugees "lawfully staying" in the territory of a Contracting

State and who are therefore entitled to a travel document under article 28. What matters is that, under article 28, by contrast with the equivalent provision in earlier conventions, Contracting States may issue these travel documents even to refugees who are not lawfully in their territory. And the travaux préparatoires show that article 28 was drafted in this way precisely to deal with refugees who had just arrived clandestinely in the initial reception country. Hathaway, *The Rights of Refugees*, p 848, quotes the Danish representative, Mr Larsen, as saying at a meeting in January 1950:

> "He took as an example the hypothetical case of a German refugee arriving clandestinely in Denmark, without identity papers, and anxious to travel to the United States for family or other reasons. In accordance with paragraph 1 of article [28] as adopted, Denmark would not issue him travel documents, because he did not reside regularly in that country. If, therefore, the real objective was to protect the interests of refugees effectively, it seemed expedient to make some provision whereby Denmark would be able to grant such a refugee a travel document….
>
> He therefore proposed that article [28] should be so amended that the High Contracting Parties would be able to grant travel documents to all refugees in their territory, whatever their status in the eyes of the law, with the sole stipulation that they should not be regularly resident in another country."

Mr Larsen continued:

> "A refugee who arrived in Denmark, for example, and was immediately granted a travel document, could go for a certain period of time to the country where he intended to settle; while there, he could obtain authorisation to reside there regularly. On the other hand, if such a refugee had no freedom of movement but was confined to Denmark owing to the lack of a travel document, it would be very difficult for him to study the possibility of settling elsewhere."

Mr Larsen's initiative was warmly supported by the representative of the International Refugee Organisation: Hathaway, *The Rights of Refugees*, p 849 n 601.

101. It is, accordingly, as plain as it is unsurprising that those who drafted the Convention did not overlook the plight of refugees who found themselves in a safe state but wanted to settle in another safe state. On the contrary, they designed a system that would allow refugees to continue their journey lawfully, even though they had no passport. The very last thing that the representatives would have contemplated was undermining this noble and humanitarian initiative by extending the provisions of article 31 to refugees who ignored the system and resorted to criminal means to achieve the same objective. As would be expected, therefore, none of the legislation of countries implementing article 31, which is set out in E Feller, V Türk and F Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), pp 234-252, covers anything other than offences relating to entering and being present in the country in question.

102. The only authority from any jurisdiction which supports the appellant's proposed interpretation of article 31 as extending to offences committed by refugees when attempting to move on from a safe country is the decision of the Divisional Court in *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667.

103. One of the applicants in that case, Mr Sorani, had fled from the Kurdish safe haven in Iraq to Turkey in 1997. Since it was not safe for him to remain there, he had flown from Istanbul to Heathrow on a false Greek passport and, while in transit there, an agent had supplied him with a false Dutch passport and an airline ticket. While checking-in, the same day, for an onward flight to Canada where he had family, Mr Sorani was stopped. When his documents were found to be false, he was arrested and charged. It is unclear whether or not he applied for asylum. He pleaded guilty to the same offences as those on the indictment against the present appellant. Mr Sorani's predicament was essentially the same as the present appellant's, except that the 1999 Act, including section 31, had not yet been enacted and the appellant did apply for asylum.

104. Another of the applicants was Mr Kaziu, an Albanian who, along with his wife, fled to Greece on false Greek passports in 1998. Three days later, they flew to Gatwick, with the intention of travelling on to Canada where they would claim asylum. They successfully gained entry to the United Kingdom at Gatwick. But, the following day, they were discovered to be holding false passports when they attempted to

board the 'plane for Canada at Heathrow. Mr Kaziu did not ask for asylum. He and his wife pleaded guilty to the same charges as Mr Sorani. Again, Mr Kaziu's case was essentially the same as the present appellant's, except that section 31 of the 1999 Act had not been enacted and the appellant did apply for asylum.

105. Since the 1999 Act had not been enacted at the relevant time, the applicants had to try to rely on article 31 of the Convention itself. Much of Simon Brown LJ's judgment was therefore devoted to deciding whether article 31 could provide them with a defence to an offence under English domestic law and, if so, what form that defence might take. But, in the cases of Mr Sorani and Mr Kaziu, the Divisional Court had also to decide whether article 31 applied to refugees who, having entered the United Kingdom, used false passports in order to travel on to Canada where they wished to claim asylum. The court held that it did.

106. The court focused on the requirement that, for article 31 to apply, the refugee must have come "directly" from the country where he was in danger. Referring, in general terms, to the travaux, and to "the writings of well respected academics and commentators", Simon Brown LJ held, [2001] QB 667, 678E-F, that:

> "any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the article, and that 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."

He pointed out that the UNHCR *Handbook on Procedures and Criteria for determining Refugee Status* (1992) commented that "It is understood that this term ['coming directly'] also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there." The basis and scope of that understanding are not explained.

107. In *Adimi* the respondents argued that refugees like Mr Sorani and Mr Kaziu did not fall within the scope of article 31 for two reasons. First, since such refugees had entered the United Kingdom with the intention of leaving it again within a short time, they never intended to present themselves to the United Kingdom authorities, least of all "without delay". Secondly, having chosen not to claim asylum here, despite the United Kingdom being a safe country, they would be unable to satisfy the "coming directly" requirement in article 31.

108. Simon Brown LJ rejected both of the respondents' arguments, at p 687E-H:

> "Neither of these arguments are in my judgment sustainable. If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum, and that a short term stopover en route in a country where the traveller's status is in no way regularised will not break the requisite directness of flight, then it must follow that these applicants would have been entitled to the benefit of article 31 had they reached Canada and made their asylum claims there. If article 31 would have availed them in Canada, then logically its protection cannot be denied to them here merely because they have been apprehended en route.
>
> I recognise, of course, that even when arrested, Mr Kaziu did not claim refugee status, and that there is a dispute in Mr Sorani's case as to whether he did either. Both, however, were clearly identifiable as passengers who might be eligible for asylum…. It is not suggested, moreover, that the making of a claim would have made any difference to the course of events. In my judgment both should have been recognised as refugees within the meaning of article 31 and both should have been exempt from penalty under it."

I am respectfully unable to agree with the reasoning in this passage.

109. Nothing in the Convention gives refugees the right to choose where to claim asylum. Mr Fordham emphasised that point on behalf of the High Commissioner. Indeed, the Dublin Convention of 1990 only works because that is the position. It contains an elaborate system for deciding which member state of the European Community should

examine the application of an alien for asylum. With a minor exception in article 9, that Convention treats the wishes of the applicant as irrelevant. So, here, Ms Asfaw had no right to choose to claim asylum in America or to try to exercise such a right by committing offences in the United Kingdom in breach of her duty under article 2 of the Refugee Convention.

110. Secondly, I have no doubt that a refugee can spend time en route in an unsafe third country and still be regarded as "coming directly" to the receiving country for the purposes of article 31. In 1944 Mr van Heuven Goedhart - who was later the United Nations High Commissioner when the Convention was being negotiated - left the Netherlands on account of persecution, hid in Belgium for five days where he was still under threat, was helped by the Resistance to cross France, went on to Spain and finally reached Gibraltar. When article 31 was being debated, he rightly considered that it would be very unfortunate if a refugee in similar circumstances were penalised for not having proceeded directly to the country of asylum: P Weis, *The Refugee Convention 1951* (1995), p 297. Those agreeing the final terms of the article must have had such cases well in mind. So, in all probability, Mr Sorani's stop in Turkey would not have affected his position under article 31.

111. It does not follow, however, that the same applies where a refugee stops in a country where he is safe. In such a situation the refugee is no longer in danger of persecution. Rather, he is in a position to take the necessary steps to regularise his position by presenting himself without delay to the authorities. If he intends to do so, but is caught before he can, then he will not be deprived of the benefit of article 31. But where, as in the case of Mr Sorani, Mr Kaziu and Ms Asfaw, the refugee does not present himself to the authorities and has no intention of doing so, the very terms of article 31 show that it does not apply so as to entitle him to immunity from punishment, even for entering and being present in the country illegally.

112. Moreover, in terms of article 31, what the refugee has to do when he presents himself to the authorities is to advance a good reason to explain why he entered or was in their territory illegally. Suppose that Mr Sorani or Mr Kaziu had reached Canada, had entered using the false passport, but had subsequently presented himself to the appropriate authorities without delay. Although the points are interrelated, assume for the sake of the argument that he could be said to have gone "directly" to Canada. Nevertheless, in order to be entitled to the

protection of article 31 against prosecution for his illegal entry and presence in Canada, he would have had to explain why he had good reason to enter or be present illegally. One relevant question which the Canadian authorities might have asked is: why did you not present yourself to the British authorities and, in due course, ask them for a travel document which would have allowed you to enter Canada lawfully? In other words, even if the Canadian authorities had decided to grant them refugee status, Mr Sorani and Mr Kaziu might still not have fallen within the scope of article 31. Entitlement to refugee status and entitlement to impunity under article 31 are different matters and the relevant criteria are different. In these circumstances it cannot be assumed that Mr Sorani and Mr Kaziu would necessarily have been entitled to rely on article 31 in Canada. So the initial premise of Simon Brown LJ's argument - that they could have invoked article 31 in Canada - is not well founded. The conclusion – that they must therefore have been able to invoke article 31 to cover their offences en route in this country – is accordingly not well founded, either.

113. Furthermore, the requirement for a refugee to present himself to the relevant authorities without delay is quite specifically designed to ensure that refugees regularise their position and obtain official assistance rather than proceeding by illegal stratagems and using the illegal services of shady agents. So a failure to comply with the requirement cannot be brushed aside on the basis that the refugees would have been eligible for asylum in any event.

114. I would accordingly overrule this aspect of the decision in *Adimi*. I would further hold that article 31 of the Convention has no application to a refugee, such as Ms Asfaw, who has entered the United Kingdom unlawfully and who then, very shortly afterwards, uses a forged passport to try to leave, in order to travel to another country where she would like to claim asylum and settle. According to the scheme of the Convention, having entered a safe country which is a party to the Convention, she had to obey the laws of that country. If she wanted to travel on to the United States, she had to ask the British authorities for a travel document and had to try to persuade the United States immigration authorities to admit her. If that approach is regarded as unrealistic or as otherwise inappropriate for the world of today, then the necessary change can only be made by the Contracting States agreeing to amend the Convention and, in particular, article 2 – in a way that would profoundly affect its basic philosophy and have a significant impact on the integrity of the criminal law of the States.

115. That being the position, in my view, section 31(1), (3) and (4) of the 1999 Act are to be interpreted according to the ordinary meaning of the words in their context. Moreover, there is no reason why section 31(3) should have listed the offence under section 1(1) of the Criminal Attempts Act 1981. On the other hand, as I mentioned in para 77 above, I find it hard to understand why the basic offence, of knowingly entering the United Kingdom without leave, under section 24(1)(a) of the Immigration Act 1971, is not listed in section 31(3) or (4). Since the point does not arise in this appeal and it was not fully argued, I simply draw attention to the question.

116. The criticism which the Court of Appeal made of the approach of the prosecuting authorities was based on the arguments presented to it. I consider that, when the effect of article 31 of the Convention is properly understood, the basis of those criticisms falls away. It is for the prosecuting authorities, in consultation with the immigration authorities, to decide, in the usual way, whether it is in the public interest to prosecute a person in the position of the appellant and, if so, what the counts should be. Similarly, if the refugee pleads guilty or is convicted after trial, it is for the judge to decide what sentence is appropriate. The Court of Appeal's disposal by way of an absolute discharge in the appellant's case was based on a misunderstanding of the legal position and cannot therefore be used as a guide in future cases.

117. For these reasons I would dismiss the appeal. I need not deal with the various other points argued by counsel, since they would arise only if, contrary to my view article 31 applied. Since preparing this speech, I have had the advantage of considering the speech prepared by Lord Mance. I agree with it and am particularly grateful for his compelling analysis of the travaux préparatoires.

LORD CARSWELL

My Lords,

118. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. For the reasons which they give, with which I agree, I would allow the appeal and quash the appellant's conviction on count 2 in the indictment.

LORD MANCE

My Lords,

119. I have had the benefit of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Rodger of Earlsferry. I need not repeat their account of the factual and legislative background, but can go straight to the central issue raised before the House. This is whether the appellant was entitled to the protection of article 31(1) of the Geneva Convention and Protocol relating to the Status of Refugees in respect of her attempt, in order to leave the United Kingdom, to obtain services by deception contrary to section 1(1) of the Criminal Attempts Act 1981. On this, I have reached the same conclusion as Lord Rodger, with whose reasoning I also agree.

120. Article 31, headed "REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE", provides:

> "(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

121. Article 31 therefore gives refugees freedom from penalties on account of their illegal entry or presence, together with freedom to move within and to leave the country of refuge, in each case within limits. The

coupling of these two subjects is significant. The drafters of the Convention contemplated that refugees who unlawfully entered a country where they could claim asylum would do so without delay and would then have their situation regularised. Articles 26 and 28 had addressed the position of refugees lawfully within the territory of a Contracting State - article 26 providing that each Contracting State shall accord to such refugees the right to choose their place of residence and move freely within its territory, and article 28 (set out by Lord Rodger in his para 97) providing for the issue to refugees lawfully staying in such territory of travel documents for the purpose of travel abroad, and further providing that "The Contracting States may issue such a travel document to any other refugee in their territory" and "shall in particular give sympathetic consideration to the issue of such a document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence". Article 27 also provides that "The Contracting States shall issue travel documents to any refugee in their territory who does not possess a valid travel document".

122. Under article 31, refugees are only free from penalties "on account of their illegal entry or presence" within the relevant Contracting State's territory, and then only provided three conditions are satisfied: (i) they must have come "directly from a territory where their life or freedom was threatened in the sense of article 1", (ii) they must have presented themselves without delay to the authorities and (iii) they must show good cause for their illegal entry or presence.

123. In the present case, the appellant, Ms Fregenet Asfaw, according to her account, left Ethiopia to avoid further persecution there, flew to London airport Heathrow on an aeroplane which stopped briefly in an unknown Middle Eastern country and, having entered the United Kingdom at Heathrow on one false passport, intended to leave immediately on another false passport and to fly to and enter the United States (presumably illegally on her second false passport) and there claim asylum. Had she achieved that aim, the questions arising in the United States would have been (i) whether she had come directly from a country where her life or freedom was threatened, (ii) whether she had presented herself without delay to the authorities and (iii) whether she had good cause for her illegal entry or presence. One can assume that she would have satisfied condition (ii), but conditions (i) and (ii), which potentially overlap, raise questions of interpretation as well as application.

124. Let me assume that, in Ms Asfaw's case, an affirmative answer could have been given to all three questions in the United States after she had entered and passed through at least one intermediate state, the

United Kingdom. It remains the case that article 31 is not addressing freedom from penalties in that intermediate state. It does not need to do so. The refugee has, by definition, arrived at his or her final destination. The intermediate state and any question of penalties are irrelevant. The issue which is before the House only arises under article 31 if a refugee detected when seeking illegally to pass through an intermediate transit state is entitled there to invoke the freedom from penalties provided by article 31. Again, any such entitlement would necessarily depend on his or her being able to satisfy conditions (i), (ii) and (iii) (coming directly, presenting without delay and good cause); conditions (ii) and (iii) would present particular problems for a refugee whose aim was to transit the state without claiming asylum and who did not therefore claim asylum until detected trying to leave that state. But, even if those problems could be overcome (as the jury must in the present case have thought that they could be), the refugee would have also to show that any penalty was being imposed "on account of their illegal entry or presence" in the United Kingdom. Where the charge is one of illegal entry or presence, that will be possible; and in the case of some transit passengers in some states that may be the only charge that could lie. But if, in order to leave an intermediate state, a refugee commits a separate offence such as deceiving or attempting to deceive an airline, the question is whether article 31 offers any immunity. There is nothing on the face of article 31 to suggest that it was addressing this situation at all. The issue is whether it is nonetheless implicit in its aims, scope and language that such conduct should be covered by immunity.

125. The starting point for the interpretation of an international treaty such as the Geneva Convention is the Vienna Convention on the Law of Treaties 1969. Section 3, Interpretation of Treaties, of Part III contains these relevant provisions:

> "*Article 31*
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

126. The primary canon is thus interpretation in accordance with the ordinary meaning in context and in the light of the Convention's object and purpose. There is no suggestion in this case of any relevant agreement of other instrument made between any of the Contracting States in connection with or subsequent to the conclusion of the Convention. Nor was there made to the House any explicit suggestion of subsequent state practice establishing the meaning of the parties regarding the Convention's interpretation, although reference was made to views expressed by the United Nations High Commissioner for Refugees and by certain commentators which mention inter alia the practice of "some states". In many cases these views follow or are joined with a summary of, or a selection of citations from, the negotiations at the Conference of Plenipotentiaries in 1951 leading to the Convention. Details of these negotiations are available on the High Commissioner's website from which the House was given an extract of the final discussions relating to article 31, which took place at the

Plenipotentiaries' 35th meeting. Earlier discussions at the 13th and 14th meetings are also of interest. I set out an analysis of the course and effect of the three meetings in an appendix to this judgment. My noble and learned friends, Lord Bingham and Lord Hope, refer to certain aspects. The discussions are potentially relevant under article 32 of the Vienna Convention as supplementary means of interpretation "in order to confirm the meaning resulting from the application of article 31 [of the Vienna Convention], or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure …..".

127. The analysis in the appendix shows that the final text was drawn in order to cater for a particular category of refugees stopping in an intermediate country, identified by the then High Commissioner for Refugees: that is refugees, moving from a country of origin (country A) where they were at risk of persecution as a result of events occurring before 1 January 1951, reaching another intermediate country (country B) where they also found themselves at risk of persecution as a result of events occurring before 1 January 1951 and proceeding as a result to a final destination (country C) where they claimed asylum. Stoppage in intermediate country B was catered for in such circumstances by replacing the original insertion proposed by France ("coming direct from his country of origin") with the final text "coming directly from a territory where their life or freedom was threatened in the sense of article 1".

128. Where the refugee passes through intermediate country B, the "territory" referred to in the final version is thus that of the intermediate country B, not that of the country of origin A. However, the High Commissioner also identified a second category who he would have wished to see catered for: refugees not at risk of persecution in country B, but nevertheless (and, in the case of a country party to the Geneva Convention, wrongly) refused asylum there. During the 14th meeting, all present including the French representative, M Colemar, were prepared to cater for both categories of refugee identified by the High Commissioner (those at risk of persecution in the intermediate state and those refused asylum there). During the final 35th meeting, the French representative, now M. Rochefort, was not, it seems, content that the text of article 31 should offer immunity to the High Commissioner's second category. The United Kingdom's representative, Mr (later Sir Samuel) Hoare believed that the amendment proposed but ultimately withdrawn by the United Kingdom (see appendix para 153) would offer additional flexibility in the case of refugees coming through

intermediate countries. This was a flexibility that he also believed would be lost if the French amendment was instead accepted, as it was.

129. Had the United Kingdom's version been accepted, Mr Hoare clearly thought that the phrase "coming directly from the country of his nationality or of former habitual residence" could be interpreted widely enough to cover movement via intermediate countries in a wide variety of circumstances. But the course of negotiations shows that the actual final phrase "coming directly from a territory where their life or freedom was threatened in the sense of article 1" was chosen with reference only to the first category, that is refugees arriving via an intermediate country B provided that their life or freedom had been there threatened; and under the Convention as originally enacted its application was subject, furthermore, to the condition that any such threat arose from events occurring before 1 January 1951. Since the coming into force of the Protocol relating to the Status of Refugees of 31 January 1967, any restriction by reference to "events occurring before 1 January 1951" has gone. But there is some difficulty, in the light of the discussions at the 35th meeting, about treating the word "territory", in the final phrase "coming directly from a territory where their life or freedom was threatened in the sense of article 1", as apt to refer *both* to any intermediate country for the purpose of assessing whether life or freedom was there threatened *and*, if no such threat could be shown to exist, to the country of origin (country A) for the purpose of considering whether the stay in the intermediate country was a "short" transit period which should be ignored. The difficulty may, however, be capable of being surmounted by treating the refugee as "coming directly" from the original country of persecution in at least some circumstances where there is no more than a transitory stopover in an intermediate country, making it then irrelevant to consider whether there was a risk of persecution in that intermediate country. Some of the flexibility that Mr Hoare believed would be offered by the United Kingdom proposal would then be transposed to the final text as proposed by France, despite Mr Hoare's (and M Rochefort's) belief that it would not be. Such a solution would appear linguistically possible; it is also one that the delegates at the 14th meeting would, it seems, have been content to take, even though at least some of the delegates at the final 35th meeting appear to have thought that the language that they eventually chose marked a retreat.

130. Since 1951 the position of refugees travelling via intermediate countries has continued to occupy the attention of Contracting States and commentators. A valuable description of the early position is contained in Atle Grahl-Madsen's work *The Status of Refugees in*

International Law, vol I (1966) p 301, para 108 and vol II (1972), at pp 206-207, cited by my noble and learned friend Lord Bingham in para 12. Grahl-Madsen observes that "it is important to note that the practice of States in respect of a refugee "who only passes through the first country of refuge [where they are not threatened with persecution] without any delay or with only a minimum of delay" is more lenient than would be expected on the background of Mr Rochefort's ….. statements" at the 35th meeting of Plenipotentiaries. Germany, he says, does not penalise refugees travelling via Austria (presumably originating at that date in a country behind the Iron Curtain or from Yugoslavia). Belgium treats a refugee as coming directly if he arrives within a fortnight of leaving his country of origin. In France each case is treated on its merits, according to whether the refugee can show good cause. The United Nations High Commissioner advocates a test looking at whether the refugee has established residence in an intermediate country. A number of countries also concluded *refoulement* agreements in the 1950 and 1960s prohibiting return to an intermediate country unless the refugee had spent at least a fortnight there. Grahl-Madsen's opinion was thus that a refugee "who only passes through the first country of refuge without any delay or with only a minimum of delay" may normally claim the benefit of article 31 in the country where he finally arrives, that this applies "so that a person may actually travel through several countries until he eventually applies for asylum" and that "The implication is that if the refugee had ended his journey in any of the transit countries, he would have been able to invoke article 31(1) there, too".

131. In Chapter 3.1 of *Refugee Protection in International Law* edited by Feller, Türk & Nicholson, Professor Goodwin-Gill records (at pp 214-215) two occasions on which the UN High Commission for Refugees considered the phenomenon of "irregular" movements by refugees moving from a country in which they had already found protection. He noted that participating States had, while expressing concern, acknowledged that refugees might have justifiable reasons for such action. However, on the first occasion, Executive Committee Conclusion No 15 (XXX) 1979 said only that the authorities of the second country should "give favourable consideration" to an asylum request made in such circumstances where the refugee has left "his present asylum country due to fear of persecution or because his physical safety or freedom are endangered"; and on the second occasion Executive Committee Conclusion No 58 (XL) 1989, after repeating the same statement, added only that:

> "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. Where no such compelling circumstances exist, the use of fraudulent documentation is unjustified ….."

Neither Conclusion therefore supports the claim to immunity in the present case; on the contrary, the terms of each suggest that no such immunity was then conceived as existing.

132. The High Commissioner for Refugees has continued to support a generous approach to asylum claims made in a final destination by a refugee who has transited an intermediate country, as mentioned by Lord Bingham in para 13. The Guidelines issued by the High Commissioner's Office in 1992 and revised in 1999 state that "It is understood that this term ['coming directly'] 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". As Lord Rodger observes, the basis and scope of this understanding are not explained. Similarly, in a summary and commentary on the Travaux Préparatoires prepared in the 1990s by Dr Paul Weis who played an active role in the work leading to the preparation of the 1951 conference and served as head of the legal division of the Office of UNHCR until retirement in 1967, Dr Weis stated that "The term 'coming directly' refers, of course, to persons who have come directly from their country of origin or a country where their life or freedom was threatened, but also the persons who have been in an intermediate country for a short time without having received asylum there". Again, no specific basis for this last statement is given. In the light of what is said by Grahl-Madsen, state practice, relevant under article 31(3)(c) of the Vienna Convention, might have been argued to have a potential role. However, neither Grahl-Madsen nor the High Commissioner's Guidelines nor Dr Weis consider to what if any extent the feasibility of claiming asylum in an intermediate country has any role to play.

133. Chapter 3.1 in *Refugee Protection in International Law* represents the revised final text of what was originally a background paper on article 31 written by Professor Goodwin-Gill for a UNHCR round-table conference in 2001. At p 194 in the revised text appears this passage:

> "Refugees are not required to have come 'directly' from their country of origin. The intention, reflected in the practice of some states, appears to be that, for article 31(1) to apply, other countries or territories passed through should also have constituted actual or potential threats to life or freedom, or that onward flight may have been dictated by the refusal of other countries to grant protection or asylum, or by the operation of exclusionary provisions, such as those on safe third country, safe country of origin, or time limits. The criterion of 'good cause' for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account."

This passage refers only to the practice of "some states" and the intention which it asserts is hard to reconcile with the course of discussions and the ultimate agreement reached at the Plenipotentiaries' conference. It is clear that the Plenipotentiaries did not intend to leave the treatment of passage via intermediate countries to the criterion of 'good cause'. The phrase which they inserted and which begins "coming directly …. " was intended as a further limitation; and the limitation was focused on the first situation identified by Professor Goodwin-Gill, that is passage via a country or territory where the refugee was also subject to an actual or potential threat to life or freedom. However, even Professor Goodwin-Gill's wider approach concentrates attention on onward flight "dictated" by a risk of persecution in the intermediate country, by the refusal by intermediate countries to grant protection or asylum, or by the operation of exclusionary provisions. To that extent, his approach also requires more than a mere voluntary preference or choice to proceed to another destination.

134. The round-table conference led to conclusions set out at p 255 of *Refugee Protection in International law* and quoted by Lord Bingham in para 19. The reference to persons "who are unable to find effective protection in the first country or countries to which they flee" covers those at risk of persecution in the intermediate country (though may have been intended also to invoke the second category of refugee of concern to the High Commissioner at the Plenipotentiaries' conference). The further statements that "The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or were settled, temporarily or permanently, in another country" and that "The intention of the asylum seeker to reach a particular country of destination, for instance for family reunification purposes, is a factor to be taken into account when assessing whether s/he transited through or stayed in another country" seem to me to have been aspirational rather

than founded on any actual intention on the part of the drafting conference.

135. Finally, in *The Rights of Refugees under International Law* (2005) by James Hathaway, the author at pp 397-398 footnote 535 cites Dr Weis's statement quoted above, but identifies a decision of an American court (*Singh v Nelson* 623 F Supp 545 (1985)) where, he says, "a misreading of the drafting history led an American court to precisely the opposite conclusion" and an Austrian Administrative Court decision (VwGH 91/19/0187, Nov 25, 1991) which he describes as "equally inattentive to the contextualised meaning of 'coming directly'". In each decision the court rejected the application of article 31 where the refugee had transited an intermediate state where he was not at risk of persecution. During the course of the hearing before the House, I suggested that there must be jurisprudence on article 31 in other European jurisdictions. I regret that this area was not investigated, even to the extent of producing the Austrian decision mentioned by Hathaway. The commentary *Ausländerrecht* (2005) by Professor Dr Kay Hailbronner pp 28-29 indicates that German jurisprudence has understood the effect of article 31(1) to be that a refugee using an intermediate third country for transit without breaking his journey there (that is without any unjustifiably delayed stay there) would be regarded as "coming directly" from the persecuting state. But the commentary also states that the language and history of article 31(1) speak for an interpretation according to which a person is not to be treated as "coming directly" from a safe third state where the possibility existed of claiming protection from persecution, and that even a temporary factual transit stop in a safe third state in which there existed that possibility, and the possibility if necessary of seeking a visa for onward transit, would exclude the application of article 31(1).

136. Against this background, I turn to the only authority directly in point put before the House from any jurisdiction. That is the English Divisional Court decision in *R v Uxbridge Magistrates' Court, Ex p Adimi* [2001] QB 667 (Simon Brown LJ and Newman J). In oral submissions in that case, the Secretary of State (and it would seem the Director of Public Prosecutions) accepted that "whether a person who has come to the UK via another country has come directly is a question of fact and degree" (p 673C-D), and Simon Brown LJ recited further submissions that this would not be the case if the refugee could reasonably have been expected to claim asylum in the intermediate country or, still more restrictively, that "only considerations of continuing safety would justify impunity for further travel" beyond the intermediate country. Simon Brown LJ and Newman J rejected these

submissions on the basis that refugees have an element of choice as to where to seek asylum, that this entitles them to move via an intermediate safe country to a preferred final destination, and that "where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here [ie in an intermediate safe country] or elsewhere, that conduct should be covered by article 31" (p 677G-H).

137. That a refugee may have some element of choice is undoubtedly true. There may be a range of countries of refuge to which he or she can travel directly from the country of persecution. But that does not mean that a refugee has any entitlement to travel indirectly via an intermediate safe country to a final country of refuge, and still less, to my mind, does it mean that a refugee has any immunity in the event that she or he seeks to achieve this by breaking the law of the intermediate country in order to leave it. The broad aim of article 31(1), with its requirement of "coming directly from a territory where their life or freedom was threatened in the sense of article 1", was, as pointed out above, to counter any suggestion that refugees have a right to move voluntarily from one safe intermediate country to another and then claim asylum in the latter.

138. Simon Brown LJ referred in general terms to the travaux préparatoires and the writings of Grahl-Madsen, Goodwin-Gill, Hathaway and Weis as well as the UNHCR publications for the proposition that some element of choice is open to refugees as to where they can properly claim asylum; he concluded that any merely short term stopover en route cannot exclude the protection of article 31 and that the main touchstones by which exclusion from protection should be judged were "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 from which they were fleeing".

139. The reference in this passage to an *unsafe* intermediate third country seems inappropriate, since article 31 was drafted to cater for such a country as the very country from which refugee would be treated as "coming directly". The other suggested criteria find equally little resonance in the drafting history, although some, though not all, state practice would support the first. What is absent from the discussion in *Adimi* is reference to any responsibility on the part of the refugee to regularise his or her position in the intermediate state and to seek travel

papers there, if he or she wishes to move on to another destination. Mr Sorani had arrived from abroad at Heathrow, entered the United Kingdom on a false Greek passport and then sought to leave for Canada on a false Dutch passport (pp 674F-675C). Mr Kaziu had arrived from abroad at Gatwick, and the next day sought to leave for Canada with false documents (p 675C-G). With respect to their cases, Simon Brown LJ's reasoning was again on the basis that "refugees are ordinarily entitled to choose where to claim asylum" (p 687F). Assuming that their "short term stopover en route" would not break the requisite directness of flight, he said (p 687F-G) that

> "it must follow that these applicants would have been entitled to the benefit of article 31 had they reached Canada and made their asylum claims there. If article 31 would have availed them in Canada, then logically its protection cannot be denied to them here merely because they have been apprehended en route".

In my view, the suggested logic does not exist and is not supported by either the drafting history or the final text of the Convention.

140. Standing back from the detail, I agree with Lord Rodger (para 82) that article 31(1) of the Geneva Convention is not on its face concerned with offences committed in order to leave a safe intermediate country for a preferred final destination. Under article 31 of the Vienna Convention and as a matter of general principle, article 31(1) of the Geneva Convention falls to be read in its context and in the light of the Convention's object and purpose. The Convention's "social and humanitarian" aims reflected the United Nations' endeavours "to assure refugees the widest possible exercise of [the] fundamental rights and freedoms" that human beings should enjoy (see the Preamble to the Convention). The drafters were well aware that refugees might have family or other connections (e g cultural or linguistic) with countries other than those where they initially arrived from their country of persecution. Hence, as Lord Rodger has explained in greater detail, the detailed provisions for providing refugees with freedom of movement, identity papers and/or travel documents. At the same time, both the travaux préparatoires and the text of the final Convention demonstrate great concern carefully to limit the immunity granted under article 31(1).

141. On one view, the only situation in which the drafters accepted that a refugee might transit an intermediate country is where that

country itself gives rise to a risk of persecution for the refugee (furthermore, prior to 1967 Protocol, only a risk of such persecution arising as a result of events occurring before 1 January 1951). But that, for reasons which I have already discussed, is likely to be too limited an interpretation of article 31(1) – above all in the light of the previous general acceptance at the 14th meeting of Plenipotentiaries that the text should also cater for the High Commissioner's second category of refugee, that is those proceeding to a final destination after being refused asylum in an intermediate country. In its domestic legislation, the United Kingdom has in fact been prepared to accept that a still more generous, though still limited, interpretation and scope should be given to article 31(1). Section 31(2) of the Immigration and Asylum Act 1999 provides that:

> "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."

My noble and learned friend Lord Hope quotes Lord Williams of Mostyn in the House of Lords during the committee stage of the Bill leading to this Act, as describing the Bill's definition of "coming directly" as a "generous one". But Lord Williams said that in the context of debate on what became section 31(2) of the Act, and the restricted scope of the generosity involved is indicated by Lord Williams' immediately following words:

> "There must come a time when an individual has stopped running away – that is the article 31 situation – and has started travelling towards a preferred destination. We have tried to define this in subsection (2)".

142. I can accept that under article 31(1) of the Convention, and perhaps particularly under modern conditions, not every transitory stopover should exclude a refugee from the right to asylum in his or her final destination. It may well be possible, without linguistic distortion, to regard a refugee on an aeroplane stopping at an international airport from which passengers do not have to disembark as coming directly to the country of final destination (see para 129 above). The same is true of

a refugee who is required to disembark and remain in the international side of an airport as a transit passenger. The position is less obvious in the case of a refugee who disembarks and enters the intermediate country, before seeking to board the same (or more probably another) aircraft for an onward flight to the country of final destination. At least in the case where that final destination is the United Kingdom, section 31(2) of the 1999 Act demonstrates a view of article 31(1) narrower than that taken by the Divisional Court in *Adimi*.

143. But, whatever view is taken of the width of the phrase "coming directly" when considering the position of a refugee who has reached his or her final destination (country C), and even if one goes as far in this respect as the Divisional Court did in *Adimi*, it does not follow that article 31(1) provides immunity if such a refugee is apprehended seeking to leave the intermediate country by using false documents to deceive the relevant authorities or airline. Article 2 of the Geneva Convention provides that

> "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to the measures taken for the maintenance of public order."

Article 28 (in the case of refugees lawfully within a country) or article 31(2) (in the case of refugees unlawfully entering or present in a country) entitles such refugees to travel documents or facilities. Article 31(1) gives freedom from penalties on account of illegal entry or presence. That connotes freedom from penalties for use of false documents to enter or stay in a country where asylum could be and was claimed. But nothing in its history or language suggests that its drafters contemplated, or that article 31(1) covers or affords immunity in respect of, the use by refugees of illegal means in an unsuccessful attempt to leave an intermediate country, let alone one where such refugees were free both to claim and obtain asylum.

144. On the contrary, the Plenipotentiaries' discussions were focused on two situations: one, where a refugee was fleeing from an intermediate country in which his safety was threatened, the other where the intermediate country was refusing to grant him asylum - and so no doubt only too keen to speed his departure. In neither situation would provision for immunity in the intermediate country have seemed or been very realistic, and in any event the Plenipotentiaries were addressing

contexts where the refugee had successfully moved to a final destination and were dealing with immunity in respect of illegal entry or presence there. It might be suggested that a refugee who had no option but to use false documents to leave an intermediate country where his or her safety was threatened should, if apprehended while attempting to leave, enjoy immunity there on the ground that he or she had acted under necessity (however unrealistic it might be to think that such a country would in fact recognise such an immunity). But there can be no necessity for implying any such immunity in the present case, and moreover it would seem inconsistent with article 2 of the Geneva Convention to do so.

145. Unlike article 31(1), section 31(1) of the 1999 Act is not expressly limited to offences committed "on account of …. illegal entry or presence". But, construed as a whole and in the light of its clear intention to give effect to article 31(1), it should be so understood. I therefore agree with Lord Rodger (para 115) there was no reason why section 31(3) should have included section 1(1) of the Criminal Attempts Act 1981 in the list of offences which it contains. On the other hand, as he also points out, it is hard to understand why the basic offence of entering the United Kingdom without leave, under section 24(1)(a) of the Immigration Act 1971 is not listed in section 31(3) and (4).

146. It follows from the above, first, that I would dismiss this appeal and associate myself with Lord Rodger's further remarks in para 116 of his judgment, and, second, that it is also unnecessary for me to deal with the other points argued by counsel which would only arise if article 31 applied.

APPENDIX

147. At the start of the 13th meeting on 10 July 1951, the draft of article 26, as what became article 31 was then numbered, omitted any requirement that the refugee should come direct from anywhere, and included only provisos that "he presents himself without delay to the authorities and shows good cause for his illegal entry or presence". France proposed an amendment to insert the words "coming direct from his country of origin"; M Colemar, the French representative, pointed to the example of a refugee who had found asylum in France, and then tried to make his way unlawfully into Belgium, saying that "It was obviously impossible for the Belgium Government to acquiesce in that illegal entry, since the life and liberty of the refugee would be in no way in danger at the time". The President, Mr Hoeg, speaking as representative of Denmark, countered with the example of a Hungarian refugee living in Germany who "might, without actually being persecuted, feel obliged to seek refuge in another country", and suggesting that it was "reasonable to expect that the Danish authorities would not inflict penalties on him for ….. illegal entry" into Denmark in such a case, provided he could show good cause for it. Mr Hoeg was not explicit about what he meant by "obliged to seek refuge" or "good cause" in such a case, but it is significant that he concluded by saying that, if the French amendment was accepted, it would be necessary to replace the additional phrase suggested by the French delegation by the phrase "coming direct from a territory where his life or freedom was threatened". The French were amenable to this suggestion.

148. Nevertheless, at the next (14th) meeting, the discussion resumed on the French draft amendment "coming direct from his country of origin", which the United Nations Commissioner for Refugees, himself a former refugee, criticised as too narrow. It would not, he pointed out, cover his own case, as a refugee who "in 1944 …. had himself left the Netherlands on account of persecution and had hidden in Belgium for five days", and, "as he had run the risk of further persecution in that country, …. had been helped by the resistance movement to cross into France", from which "he had gone on into Spain, and thence to Gibraltar". He concluded that "Thus, before reaching Gibraltar, he had traversed several countries in each of which a threat of persecution had existed. He considered it very unfortunate if a refugee in similar circumstances was penalized for not having proceeded direct to the country of asylum", and it seems reasonably clear (though the transcript omits some words) that he went on to prefer replacement of the words "coming direct from his country of origin" by words such as Mr Hoeg had suggested. He then raised a second problem, that of refugees who

fled from a country of persecution direct to a country of asylum, where however they were refused the right to settle, although that country was a Contracting State, and to suggest that "Such refugees might possibly be covered if the words 'and shows good cause' were amended to read 'or shows other good cause'".

149. M Colemar responded to these points by saying that "France was not absolutely opposed to the illegal entry and residence of certain refugees" and was willing to consider inserting, instead of the phrase it had suggested, words such as "having been unable to find even temporary asylum in a country other than the one in which his life or freedom would be threatened". He said that "Such a change would meet the points which were causing the High Commissioner concern". The United Kingdom representative, Mr Hoare, wondered whether the original text "did not allow countries like France, which received refugees in great numbers, sufficient latitude", while also covering the fact that "as the High Commissioner had pointed out, there might be cases where a refugee could show good cause even though he had not fled direct from a country where his life was endangered". The French representative insisted that he must press his amendment, referring to the difficulty of defining the reasons which could be regarded as constituting good cause, and saying that it was "precisely on account of that difficulty that it was necessary to make the wording of paragraph 1 more explicit", and that "To admit without any reservation that a refugee who had settled temporarily in a receiving country was free to enter another, would be to grant him a right of immigration which might be exercised for reasons of mere personal convenience. It was normal in such cases that he should apply for a visa to the authorities of the country in question".

150. The Belgian representative wondered whether inability to find asylum in an intermediate state would be considered as sufficient alone to constitute "good cause". The High Commissioner expressed the contrary opinion that the French representative's latest suggestion would protect both the categories of refugee to whom he had referred. The United Kingdom expressed reservations about the onus of proof imposed on a refugee by the French proposal. The Belgian representative asked what was meant by "temporary asylum" and whether a Contracting State would be "able to impose penalties on a refugee who had stayed in another country for a week or a fortnight, and had then been obliged to seek asylum in the territory of the Contracting State in question", and he later proposed that the French draft be altered by replacing the phrase "having been unable to find" with "being unable to find", so as not to exclude "any refugee who had managed to find a

few days' asylum in any country through which he had passed". The discussion concluded by voting on and accepting this (with very minor modification) in the form "being unable to find asylum even temporarily in a country other than the one in which his life or freedom would be threatened".

151. By the time of the final meeting on this topic on 25 July 1951, the High Commissioner had had second thoughts about this insertion. He observed that

> "Although aware that that provision had been inserted in order to limit exemption from penalties to refugees who came to the receiving country from the country of persecution direct, or through another in which, for one reason, or another, they were unable to stay, he did not feel that the words he had quoted met that requirement. They would place on the refugee the very unfair onus of proving that he was unable to find even temporary asylum anywhere outside the country or countries in which his life or freedom would be threatened. As there some eighty States in the world, the difficulty of such a task required no emphasis. His personal view was that the words 'show good cause for his illegal entry or presence' covered the point, but since the general feeling of the Conference seemed to be that some specific provision was necessary, he suggested that paragraph 1 [of the original draft] be amended ….." [ie so as to conclude "and shows good cause for believing that his illegal entry or presence is due to the fact that his life or freedom would otherwise be threatened"].

152. M Rochefort, now representing France, said that France "wished to avoid having to accept any refugee from a neighbouring country who voluntarily decided to move to France, perhaps on the pretext that the neighbouring country concerned would no longer give him permission to reside there". The United Kingdom and the President supported the High Commissioner's amendment, the latter saying that, as regards "the imposition of punishment on refugees for clandestinely crossing the frontier, …. there he thought there had been no objection to the High Commissioner's interpretation, namely, that the refugee's illegal entry or presence must be proved to be due to the fact that his life [or] freedom would otherwise have been threatened", an interpretation which the High Commissioner immediately confirmed. At this point, M

Rochefort identified a different concern arising from the fact that the Geneva Convention as originally negotiated and agreed was limited to persecution occurring before 1 January 1951. The revised wording would, he observed, bind France to accept a refugee who had left his country of origin for a neighbouring country due to such an event occurring prior to 1 January 1951, and whose life had then been threatened in that neighbouring country by events occurring after 1 January 1951. The Swedish delegate noted that a threat to freedom in the neighbouring country might not involve persecution at all; it might for example be a threat of imprisonment for theft.

153. To meet the French point, Mr Hoare suggested the insertion of the phrase "coming directly from the country of his nationality or of former habitual residence", those being he noted the words used in paragraph A of article 1. M Rochefort, not surprisingly, observed that this insertion would be almost word for word that which the French amendment had proposed at the 14th meeting, but that "An intermediate formula had been suggested, namely "arriving directly from a territory where their life or liberty was threatened"; this he suggested would also be in accordance with article 1 and might be acceptable. The High Commissioner enquired whether the United Kingdom suggestion meant that only a refugee who came direct from his country of nationality or habitual residence would be covered, and that a "refugee who, coming from a country of persecution, entered a country after transit through a second country in which he had succeeded in hiding or which had refused him refuge, would be excluded". In other words, he raised, once again, the two points he had raised at the outset of the 14th meeting. Mr Hoare replied that he had intentionally made his suggestion restrictive. He would have liked to propose one of wider application, but said that

> "since the French representative was unwilling to agree that refugees entering from intermediate countries should be included, he had limited the scope of his text accordingly. He would however be willing to broaden it if that was possible."

The High Commissioner responded by pointing out that his suggestion had not been to broaden or narrow the article, but to relieve the refugee from the burden of proof that no country in the world was prepared to accept him, and that neither his own text nor the one now before the meeting (ie presumably the United Kingdom's) met the French representative's point (ie regarding events occurring after 1 January

1951). M Rochefort said that the High Commissioner's explanation put the whole problem squarely before the meeting:

> "Did the simple fact that a refugee, having left a country in which he had been persecuted, failed to obtain asylum in another, impose upon a third country the obligation of receiving him without having the right to impose penalties? Each country had to accept its frontier responsibilities, but the fact that an intermediate country refused to face its own could not deprive a third country of the right to take precautions against illegal entry".

He then suggested an insertion reading "coming directly from a territory in which his life or freedom would be threatened within the meaning of article 1, paragraph A, of this Convention". This, as matters transpired, mirrored in effect, and very closely in wording, the final text of article 31.

154. There was a further round of discussion before the final text was agreed. The President proposed to put before the meeting the High Commissioner's amendment sponsored by the United Kingdom, followed by the amendment introduced by the French. M Rochefort reiterated that he could not agree to the United Kingdom amendment, but suggested that the French amendment be amended by replacing the words "country of origin" with the words "country in which he is persecuted". Mr. Hoare agreed to withdraw the United Kingdom amendment, although he considered that it amply covered the French representative's difficulties and was

> "more flexible, inasmuch as it left to the Government of the country in question the decision whether the refugee had no alternative to entering the country other than endangering his life and liberty by remaining in the first country. The United Kingdom amendment made it possible to follow the general principle of the article, and at the same time allowed for a certain amount of flexibility in the case of refugees coming through intermediate countries, while still not obliging any State to accept the latter category when there was insufficient cause for their having chosen to enter its territory clandestinely".

He said that he could not vote for the French amendment, and evidently thought that the definition of refugee already agreed in article 1 covered "a refugee [who] left a country after narrowly escaping persecution, but without having actually been persecuted". M Rochefort indicated that this point could be met (as it was in the final text), but that

> "As a country of second reception, however, [France] could not bind itself to accept refugees from all the other European countries of first reception. There had to be some limit such as that of events occurring before 1 January 1951".

The United Kingdom amendment having been withdrawn, a revised version in the form of the final text of article 31(1) was voted on and agreed.