R V UXBRIDGE MAGISTRATES COURT & ANOTHER EX PARTE ADIMI R V CROWN PROSECUTION SERVICE EX PARTE SORANI R V SECRETARY OF STATE FOR HOME DEPARTMENT EX PARTE SORANI R V SECRETARY OF STATE FOR HOME DEPARTMENT and ANOTHER EX PARTE KAZIU [1999] EWHC Admin 765 (29th July, 1999)

IN THE SUPREME COURT OF JUDICATURE CO/2533/98, CO/3007/98,
IN THE HIGH COURT OF JUSTICE CO/2472/98 & CO/1167/99
(DIVISIONAL COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 29th July 1999

B e f o r e :
LORD JUSTICE SIMON BROWN
and
MR JUSTICE NEWMAN
- -
R V UXBRIDGE MAGISTRATES COURT & ANOTHER
EX PARTE ADIMI
R V CROWN PROSECUTION SERVICE
EX PARTE SORANI
R V SECRETARY OF STATE FOR THE HOME DEPARTMENT
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& ANOTHER
EX PARTE KAZIU
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MS F WEBBER (instructed by Chistian Fisher, London WC1A 1LY) appeared on behalf of for Mr Adimi.
MR R HUSAIN (instructed by BM Birnberg & Co, London SE1 1NN) for Mr Kaziu
MISS S HARRISON (instructed by Stewart Miller, London N22 7DN) for Mr Sorani
MR S KOVATS & MR S GRODZINSKI (instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Secretary of State.
MR D PERRY (instructed by Crown Prosecution Service, Brent/Harrow/Uxbridge Branch, Middlesex HA1 1YH) appeared on behalf of the Director of Public Prosecutions and the Crown Prosecution Service.

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

Thursday, 29th July 1999

LORD JUSTICE SIMON BROWN:

1. The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. Escapes from persecution have long been characterised by subterfuge and false papers. As was stated in a 1950 Memorandum from the UN Secretary-General:

"A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge."

2. Thus it was that Article 31(1) found its way into the 1951 UN Convention relating to the Status of Refugees (the Convention):

"31(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."

3. The need for Article 31 has not diminished. Quite the contrary. Although under the Convention subscribing States must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents. Just when, in these circumstances, will Article 31 protect them? The precise ambit of the impunity lies at the heart of these challenges.

4. Each of these three applicants has fled from persecution in his home country. Each has been prosecuted for travelling to, or attempting to travel from, the UK on false papers. Each now claims to have been wrongly denied the protection conferred by Article 31.

5. The following brief summary of the individual cases must suffice.

6. Mr Adimi is an Algerian aged 31who on 1 October 1997 fled Algeria in fear of persecution by the GIA (an Islamic terrorist group). On 27 November 1997 he arrived at Heathrow by air from France (having, he says, reached France from Italy on 16 November) with a false Italian passport and identity card. The immigration officer was not deceived by these documents and Mr Adimi was refused leave to enter. He then claimed asylum (whether that night or the following morning is in dispute) but, that notwithstanding, he was arrested and charged. Initially he was charged under s.5(1) of the Forgery and Counterfeiting Act 1981 (possession of false documents with intent, maximum sentence 10 years) but later those charges were replaced by charges under s.5(2) of the Act (simple possession, maximum sentence 2 years). Unusually, as it appears, perhaps even uniquely, those representing Mr Adimi recognised the possibility of invoking Article 31 and on 24th January 1998 his case was adjourned for legal argument. On 15th April 1998, however, the Stipendiary Magistrate at Uxbridge refused his application for a stay and this challenge followed. Shortly afterwards the Secretary of State recognised Mr Adimi as a refugee and granted him indefinite leave to enter. The CPS nonetheless propose to continue the prosecution against him.

7. Mr Sorani is an Iraqi Kurd from the Kurdish "safe haven" in Northern Iraq. He is a 27 year old accountant and claims to have been detained and tortured by the Iraqi authorities because of his political opinions. Support for his account is to be

found in a report from the Medical Foundation for the Care of Victims of Torture. He says that he fled Iraq for Turkey on 15 June 1997 and, it being unsafe for him to remain there, arranged to travel to Canada where he has family. His case is that on 16 August 1997 he flew from Istanbul to Heathrow on a false Greek passport and, whilst in transit here, was provided by an agent with a false Dutch passport and an airline ticket. This ticket was purchased in the UK on 14 August and, in large part because of this, the respondents reject the applicant's account and believe that he had spent some time in the United Kingdom rather than flown in on 16 August. At all events, whilst checking in that day for the onward flight to Canada, he was stopped by airline officials and, his documents being found to be false, he was arrested and charged. On 18 August he pleaded guilty at the Uxbridge Magistrates Court to two offences: possession of the false Dutch passport with intent to use it as genuine, contrary to s.5(1) of the 1981 Act, and attempting to obtain air transport services by deception, contrary to s.1(1) of the Criminal Attempts Act 1981. He was sentenced to two concurrent terms of three months imprisonment. He claims that as soon as he realised that he would be unable to travel on to Canada he made it plain to an immigration officer that he was an asylum seeker but that the officer refused to entertain his claim. The Secretary of State does not accept this but acknowledges that in any event "it is likely the police would still have charged him with a passport offence." Following his release from Wormwood Scrubs on 30 September 1997, the applicant through solicitors made a formal application for asylum. Despite having been interviewed on 22 October 1997, his claim remains undetermined.

8. Mr Kaziu is a 27 year old Albanian who, until President Berisha's Democratic Party's fall from power in 1997, was the President's second bodyguard. He says that in September 1998 he discovered that he was wanted by the police for organising a military uprising against the new regime. On 18 December 1998 he and his wife (aged 20) fled to Greece on false Greek passports and then, three days later, came to England. They were intending to travel on to Canada to claim asylum there. On 21 December they successfully gained entry at Gatwick but, the next day, whilst attempting to board an aircraft at Heathrow for the onward flight to Canada, were discovered to be holding false documents and were promptly arrested and charged. On 23 December 1998 each pleaded guilty at Uxbridge Magistrates Court to the same two charges as Mr Sorani had faced. In their case, however, the sentences imposed were ones of six months imprisonment. Mr Kaziu accepts that he made no claim for asylum until 15 February 1999. He asserts, however, that the authorities had sufficient information to recognise his eligibility for refugee status, and points out that in any event an immigration officer, Mr Murphy, to whom he spoke on the night of his arrest, has deposed to "saying to him that he should go to the Home Office after the police and courts had dealt with him. As a Kosovan I assumed he would claim asylum." He was not, of course, a Kosovan but that apparently had been the officer's understanding. At all events, on

9 April 1999, about a fortnight after their release from prison, Mr and Mrs Kaziu submitted through solicitors a “self-completion questionnaire” in connection with their asylum claim. It remains undetermined.

9. As I understand the essential challenges before the court, they are these:

1. A challenge by Mr Adimi to the CPS’s decision to continue the prosecution against him (a) once it became clear that the Secretary of State had accepted responsibility for determining his asylum claim, and *a fortiori* (b) now that asylum has been granted.

2. A challenge by Mr Adimi to the Magistrates’ refusal to grant a temporary stay of the prosecution pending the Secretary of State’s determination of his asylum claim.

3. A challenge by Mr Sorani to what he contends was the immigration officer’s refusal to allow him to claim asylum until after the prosecution had taken its course.

4. Challenges by Mr Sorani and Mr Kaziu to the CPS’s decisions to prosecute them.

5. Challenges by Mr Sorani and Mr Kaziu (a) to the Secretary of State’s adoption of a policy whereunder refugees are prosecuted in false document cases irrespective of whether they have claimed asylum, alternatively (b) the Secretary of State’s failure to adopt a policy preventing such prosecutions at any rate until refugee status has been determined.

6. I understand the applicants to seek in addition various forms of declaratory relief.

10. At this stage, however, rather than address these specific issues, it seems to me altogether more profitable to stand back from the detail of the individual cases and to look instead at the position in the round. It must be appreciated that these three cases - grouped together for a single hearing because they raise different facets of a wider problem - represent but the tip of an iceberg of aggrieved asylum seekers. In the papers before us are various studies demonstrating clearly that since 1994 there has been a significant increase in the number of refugees arrested whilst seeking transit on forged travel documents through the UK to the United States or, more commonly, Canada, and this despite there being no apparent rise in the number of passengers stopped. As was noted by Richard Dunstan, previously a refugee officer

with Amnesty, now employed by the Law Society, in a 1998 article “United Kingdom: breaches of Article 31 of the 1951 Refugee Convention”:

"There can be little doubt that this pattern of the criminal conviction and imprisonment of would-be asylum seekers for their use of false travel documents is related to the imposition of financial penalties under “carrier sanctions” legislation in both the United Kingdom and North America. ... Of course, those attempting to flee persecution are often unable to obtain national passports from their own authorities and are, in any case, most unlikely to be able to obtain a valid visa for the destination country (as embassies, consulates and High Commissions will simply not issue a visa to any person revealing or suspected of having an intention to seek asylum). Accordingly, the widespread imposition of visa regimes on nationals of refugee-producing countries has forced such persons to resort to the use of forged travel documents (including forged visas) and unorthodox means of travel, often involving enforced stop-overs of varying duration in one or more transit countries and clandestine means of entry to, and exit from, such countries. Inevitably, such forged travel documents (and associated means of unorthodox travel) have become increasingly available (usually at a considerable price) from criminal profiteers."

11. In looking at the position in the round I shall consider first the true reach of Article 31, second how the protection it is designed to afford to refugees may perhaps best be achieved, and third, whether (and if so how) any existing failure to afford the protection is challengeable under domestic law.

12. First, however, I pause to note one striking fact. The respondents acknowledge that, until these challenges were brought, no arm of State, neither the Secretary of State, the DPP, nor anyone else, had apparently given the least thought to the United Kingdom’s obligations arising under Article 31. The Secretary of State’s stance is that the responsibility for prosecuting people found in possession of false passports lies not with him or the immigration service but rather with the police and the CPS. He neither encourages nor instigates such prosecutions. Generally speaking the immigration service is only involved insofar as an officer may be asked to express an opinion on the validity of particular travel papers. If a passenger claims asylum, then certainly the immigration service becomes involved in processing that claim. That, however, is treated as discrete from any criminal prosecution that may be brought for travelling on false documents. So far as the police and CPS are concerned, no consideration had ever been given to the immunity provided by Article 31. Until Mr Adimi’s counsel took the point in the Magistrates Court, no one involved in the criminal justice system ever addressed their mind to the problem. Plainly this is a most unsatisfactory state of affairs and, indeed, this is apparently now recognised by Mr Perry who appears for the DPP

and the CPS, and Mr Kovats who appears for the Secretary of State. We are told that once our judgments have been given, a “multi-agency group” is being convened to examine this whole issue. It will include representatives of the Home Department, the CPS, the police, the Law Society and Magistrates Courts Clerks.

The Scope of Protection under Article 31

13. I confess to embarking upon this section of the judgment with some trepidation. We have been provided with a great wealth of material bearing on this question, not all of it entirely harmonious. There being, however, no international tribunal able to rule authoritatively on the true construction of the Convention, the task necessarily falls to us. Indeed it is agreed by all parties that we should decide the matter.

14. I begin by reminding myself of Lord Lloyd’s dictum in Adan v Home Secretary [1999] 1 AC 293 at 305:

"I return to the argument on construction. ... we are here concerned with the meaning of an international Convention. Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel. ... It follows that one is more likely to arrive at the true construction of Article 1A(2) by seeking a meaning which makes sense in the light of the Convention as a whole and the purposes which the framers of the Convention were seeking to achieve, rather than concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach. But having said that, the starting point must be the language itself."

15. What, then, was the broad purpose sought to be achieved by Article 31? Self-evidently it was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law. In the course of argument my Lord suggested the following formulation: “Where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by Article 31.” That seems to me helpful.

16. That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt. Nor is it disputed that Article 31’s protection can apply equally to those

using false documents as to those (characteristically the refugees of earlier times) who enter a country clandestinely. There are, however, within the text of the Article certain expressed limitations upon its scope and these clearly require consideration. To enjoy protection the refugee must (a) have come directly from the country of his persecution, (b) present himself to the authorities without delay, and (c) show good cause for his illegal entry or presence. Let me consider each of these conditions in turn.

(a) "Coming directly "

17. The respondents accept that a literal construction of "directly" would contravene the clear purpose of the Article and they accordingly accept that this condition can be satisfied even if the refugee passes through intermediate countries on his way to the United Kingdom. But that is only so, they argue, provided that he could not reasonably have been expected to seek protection in any such intermediate country and this will not be the case unless he has actually needed, rather than merely desired, to come to the United Kingdom. In short it is the respondents' contention that Article 31 allows the refugee no element of choice as to where he should claim asylum. He must claim it where first he may: only considerations of continuing safety would justify impunity for further travel.

18. For my part I would reject this argument. Rather I am persuaded by the applicants' contrary submission, drawing as it does on the travaux préparatoires, various Conclusions adopted by UNHCR's executive committee (ExCom), and the writings of well respected academics and commentators (most notably Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis), that some element of choice is indeed open to refugees as to where they may properly claim asylum. I conclude 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.

19. It is worth quoting in this regard the UNHCR's own Guidelines with regard to the Detention of Asylum Seekers:

"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."

20. Having regard to Article 35(1) of the Convention, it seems to me that such Guidelines should be accorded considerable weight. Article 35(1) provides:

"The contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, ... in the exercise of its functions and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

(b) <u>“Present themselves without delay”</u>

21. This time let me start with the UNHCR’s Guidelines:

"... given the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanistically applied or associated with the expression ‘without delay’."

22. Again the respondents contend for what seems to me a very narrow construction of this condition. What is required of the refugee, they contend, is “a voluntary exonerating act”. Generally speaking they submit that an asylum seeker can reasonably be expected to claim asylum as soon as he arrives at passport control. If instead he maintains his deception and is caught presenting false travel documents, there will have been no voluntary exonerating act and the condition will not be fulfilled. It is, indeed, on this basis that the respondents contend that Mr Adimi falls outside the protection of Article 31.

23. Again I cannot accept the argument. Although the respondents find their concept of a voluntary exonerating act in a passage in Grahl-Madsen’s work *The Status of Refugees in International Law* (Vol. II, 1972) at page 219, the real mischief against which this particular condition is aimed appears from the very next paragraph:

"... exemption from penalties according to Article 31(1) may not be claimed if the refugee has chosen to stay in a country of refuge for a protracted period without presenting himself to the authorities. If he eventually learns that he is about to be discovered and for that reason gives himself up, he cannot rely on the provisions of Article 31(1)."

24. On the previous page, however, appears this:

"A person crossing the frontier illegally may have reasons for not giving himself up at the nearest frontier control point or to a local authority in the border zone. If he succeeds in finding his way to the capital or another major city and presents himself to the authorities there he must be deemed to have complied with the requirement and the same ought to apply if he was unsuccessful but could show that such was his intention."

25. If Mr Adimi's intention was to claim asylum within a short time of his arrival even had he successfully secured entry on his false documents, then I would not think it right to regard him as having breached this condition.

c. "Good Cause"

26. All counsel agree that this condition has only a limited role in the Article. It will be satisfied by a genuine refugee showing that he was reasonably travelling on false papers.

How Best to secure Article 31?

27. In a written submission made to the court in Mr Sorani's case, the UNHCR say of Article 31(1):

"This obliges Contracting States not to apply the relevant provisions under domestic penal law to refugees and asylum seekers. If necessary, they have to amend domestic penal law or prosecution instructions/practice in order to ensure that no person entitled to benefit from the provisions of Article 31 shall run the risk of being convicted."

28. That accords with Grahl-Madsen's comment at page 211 that Article 31 "obligates the Contracting States to amend, if necessary, their penal codes or other penal provisions, to ensure that no person entitled to benefit from the provisions of

this paragraph shall run the risk of being found guilty (under municipal law) of an offence."

29. As already stated, the United Kingdom has done nothing to comply with this obligation. It cannot be suggested - indeed I do not think it is suggested - that compliance is achieved merely by pointing, as the respondents do, to

(a) the possibility on certain facts of raising a substantive defence of necessity or duress of circumstances - see R v Abdul-Hussain [1999] Crim LR 570. This defence applies only in cases of imminent peril of death or serious injury to the defendant and is manifestly narrower than that afforded by Article 31.

(b) the defendant's right to invite the court to stay the prosecution on grounds of abuse of process. To this I shall return.

(c) the fact that the Code for Crown Prosecutors, issued by the DPP under s.10 of the Prosecution of Offences Act 1985, requires prosecutors to decide, once a case passes the evidential test of realistic prospect of conviction, if a prosecution is needed in the public interest. The history of these prosecutions and others like them suggests that whether the offence was committed in the context of escape from persecution, or whether or not an asylum claim has been made, plays not the least part in determining the public interest. On the contrary, as appears from the terms in which characteristically these defendants come to be sentenced, the very fact that false documents are presented by refugees in flight appears to count against them. A report by Liz Hales, published by the Cambridge Institute of Criminology, cites as a typical comment by Magistrates:
"This serious offence is becoming too prevalent and it is in the public interest that you are sent to prison."

30. As already indicated, the respondents agree that steps must now be taken to ensure that Article 31 protection is accorded its proper place in domestic law and practice. What, then, is the appropriate way forward? The parties before us have advanced widely different contentions as to this. Essentially they are as follows.

The Applicants

31. The applicants submit that in the case of all refugees apprehended with false documents, whether on entry or in transit, there should be no prosecution rising out of the possession or presentation of such papers until the Secretary of State has determined the asylum claim. Immigration officers, instead of being instructed as

at present to minimise their involvement in these cases - their role being confined largely to authenticating documents - should instead be alert to identify all asylum seekers, recognising as such any case “where it appears to the immigration officer as a result of information given that he [the immigrant] may be eligible for asylum” - the wording of paragraph 75 of HC 251 (the old rules).Although the new rule (paragraph 327 of HC 395) defines an asylum applicant merely as someone claiming that it would be contrary to the Convention to require him to leave the United Kingdom, the Secretary of State still very properly regards that definition as including cases within the old rule.

32. Whilst examining the asylum claim, submit the applicants, the Secretary of State should at the same time determine whether Article 31 applies to exclude liability for any linked offence. So far from this being inconvenient or requiring immigration officers to carry out inappropriate police functions, as the respondents assert, the applicants point to a very substantial degree of overlap between the considerations which the Secretary of State will need to have in mind when deciding respectively (a) asylum and (b) immunity. Paragraph 5(3) of Schedule 2 to the Asylum and Immigration Appeals Act 1993 (as substituted by s.1 of the Asylum and Immigration Act 1996), which dictates what cases may be subjected to the accelerated special appeals procedure, provides that one such circumstance is where:

"... on his arrival in the United Kingdom, the appellant was required by an immigration officer to produce a valid passport and ... (b) he produced a passport which was not in fact valid and failed to inform he officer of that fact."

33. Rule 341 of HC 395 is yet more closely in point:

"341. In determining an asylum application the Secretary of State will have regard to matters which may damage an asylum applicant’s credibility if no reasonable explanation is given. Among such matters are:

(i) that the applicant has failed to apply forthwith upon arrival in the United Kingdom ...

(ii) that the applicant has made false representations either orally or in writing;

(v) that the applicant has lodged concurrent applications for asylum in the United Kingdom or in another country."

34. Accordingly, in the course of deciding an asylum claim, the Secretary of State will necessarily have regard to the very sort of considerations central to the determination of a refugee's entitlement to immunity under Article 31.

35. Such an approach, moreover, would guard against the risk that an asylum claim may be rejected precisely because of a conviction from which arguably the asylum seeker should have been immune: Richard Dunstan's article quotes a refusal letter which expressly relies upon the complainant's application for asylum having been delayed until after his conviction at Uxbridge Magistrates Court for the use of a forged passport and deception for which he was sentenced to 21 days imprisonment.

36. The Secretary of State, moreover, through his experience in this field, has an altogether greater knowledge of the background material relevant to these cases than the CPS (or the Magistrates Courts) could reasonably hope to acquire. This is so not only with regard to safe third countries but also in connection with refugees' concerns and practices such as may bear upon the issue of whether they have presented themselves without delay.

37. The applicants, indeed, go so far as to suggest that the Secretary of State's substantive decision on asylum should itself be determinative of whether the Article 31 immunity applies. True, they acknowledge, there is not a perfect match between the issues raised on the two matters, but this, they suggest, would be one way of cutting the Gordian knot and little if anything would be lost by deciding not to prosecute in those cases where, despite the eventual recognition of refugee status, the refugee's conduct falls strictly outside the ambit of Article 31 protection.

The Respondents

38. The respondents for their part canvas a very different approach. Their proposal is that, following this judgment, written guidance should be given to the CPS upon the true ambit of Article 31; the police should be instructed to bring to the attention of the CPS any material which may be relevant in any particular case; the Law Society should take steps to ensure that defence solicitors become aware of the position (the duty solicitors instructed respectively by Mr Sorani and Mr Kaziu clearly knew nothing of Article 31), and Magistrates Courts clerks will likewise be alerted to possible Article 31 implications where a defendant makes an equivocal

plea. If, despite future efforts to ensure that only those falling outside the protection are prosecuted, any defendant hereafter claims immunity, the route by which he would do so is an application to stay the prosecution (a permanent stay rather merely than a temporary stay pending the Secretary of State's determination of the asylum claim such as was sought in Mr Adimi's case). It is, submit the respondents, the prosecuting authorities and the judicial authorities hearing criminal proceedings, rather than the Secretary of State, who bear primary responsibility for ensuring the UK's compliance with Article 31. Despite the non-incorporation of Article 31 into domestic law, they contend, it would be open to the trial court (and thereafter, if necessary, any appeal court) to ensure that Article 31 is honoured. On an abuse of process application for non-compliance, the court would hear the relevant evidence and determine the factual issues. The propriety of criminal proceedings as a forum for determining Article 31 immunity is supported by Grahl-Madsen:

"By prohibiting the imposition of penalties, Article 31 does not prevent a refugee from being charged or indicted for illegal frontier crossing or unlawful presence, if one of the purposes of the proceedings is to determine whether Article 31(1) is in fact applicable."

The Problems

39. I have to say that certain difficulties seem to me to attend either side's approach. On the applicants' approach, not merely is there some mismatch between the issues, but in certain cases the immunity should surely apply even where asylum is refused - where, for example, the Secretary of State returns the applicant to a safe third country, or where perhaps the applicant is granted exceptional leave to remain rather than asylum. Their approach would also inevitably delay the bringing of any prosecution - presumably, indeed, in some cases beyond the date of the Secretary of State's decision until any appeals or challenges were disposed of. Unless, moreover, a scheme were devised to allow for some form of final certification by the Secretary of State (binding on the defence as well as the Crown) the Secretary of State's determination might still leave the asylum seeker with a second bite of the cherry, the right to contest his prosecution.

40. But to my mind there are still greater disadvantages in the respondents' proposed solution. In the first place, it strikes me as surprising that the defendant's sole safeguard against conviction contrary to Article 31 should be by way of abuse of process application: an invitation to Magistrates, in a case where guilt under UK law is not disputed, to confer upon the defendant an immunity required to be accorded only under international law. Mr Perry's suggested analogy with pleas in bar under the State Immunity Act or as a result of Parliamentary privilege or when contending that a child is below the age of criminal responsibility, I find

unconvincing: in all of these, immunity sounds clearly in domestic law. That said, R v Horseferry Magistrates Court ex parte Bennett[1994] AC 42, the authority principally relied on by the respondents (and, indeed, by Mr Adimi too insofar as Miss Webber seeks to challenge the Magistrates' refusal of a stay in his case) provides at least an arguable basis for the Magistrates assuming an abuse of process jurisdiction in this class of case, providing always that they are to be regarded as an appropriate fact finding tribunal for the purpose.

41. The second reason why I am unhappy at the notion of resolving an Article 31 dispute by an abuse of process application is that, as the respondents themselves assert, the defendant upon such an application has to establish the abuse on the balance of probabilities. I would prefer Article 31 protection to operate by way of a defence: where it is invoked the burden should be upon the prosecution to disprove it. Certainly it would be appropriate to proceed to conviction only in the clearest cases.

42. Third, I am troubled about the prospect of busy Magistrates trying issues as difficult and sensitive as those which arise under Article 31. It is suggested that they could acquire the necessary specialist expertise and no doubt with training they could. One wonders, however, whether such duplication of expertise would be worthwhile. Moreover, not only Magistrates will need to be trained, so too will the CPS and duty solicitors.

43. Fourth, and finally, it would seem to me clearly preferable if possible to avoid any prosecution at all rather merely than look to the remedy of a stay once it appears that immunity may arise under Article 31. I do not go so far as to say that the very fact of prosecution must itself be regarded as a penalty under Article 31 - the passage already cited from Grahl-Madsen strongly argues the contrary. But there is not the least doubt that a conviction constitutes a penalty and that Article 31 impunity is not afforded, as at one point Mr Kovats suggested it would be, simply by granting an absolute discharge. The gravity of a conviction for a refugee needs little emphasis: as a UNHCR letter before us notes, "their criminal record prevents them from joining their families - mostly in Canada or the United States - in a regular way."

44. Overall there seem to me strong reasons why the Secretary of State rather than the CPS should assume responsibility for deciding when asylum seekers should be

prosecuted in this class of case. Decisions should depend more upon considerations arising out of the proper administration and control of immigration and asylum than upon the need to suppress and punish criminal activity generally.

45. Given that the respondents now propose to give full effect to Article 31 protection, the court is entitled to ensure that its true scope has been properly understood - See Lord Hope's speech inR v Secretary of State ex parte Launder [1997] 1 WLR 839 at 867:

"If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention [there the ECHR] which he himself says he took into account, it must surely be right to examine the substance of the argument."

46. Similarly, it seems to me that were we to conclude that the respondents' proposals themselves fail to satisfy the UK's obligations under Article 31, then we should so declare.

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

48. But, that said, in drawing up the guidance now to be given to the CPS, the respondents will surely wish to reflect generally upon the wisdom of prosecuting and imprisoning refugees for the use of false travel documents. Is this really a just and sensible policy? One cannot help wondering whether perhaps the increasing incidence of such prosecutions is yet another weapon in the battle to deter refugees from ever seeking asylum in this country. This, however, the respondents deny. They suggest that the deterrent effect they seek is legitimate. Immigration control, they argue, is prejudiced in cases where an intending asylum seeker fails to present himself as such at the frontier. He may thereby escape the attention of the

authorities altogether or, even if he presents himself voluntarily later, he may have become better able to present an embellished or false claim (whether substantively or as to the route taken to get here). I find this argument unconvincing. Most asylum seekers who attempt to enter the country before making their claims will do so for the reasons suggested by UNHCR rather than with a view to falsifying their claims with the assistance of friends and contacts here. And the premium placed by the benefit system upon refugees claiming asylum on entry rather than after entry already represents a significant sanction against late claims. In any event, the respondents' argument provides no justification whatever for prosecuting refugees in transit.

49. There are additional considerations too. The almost inevitable outcome of any asylum claim will be either (a) the grant of refugee status (or, if there are compelling reasons other than fear of Convention persecution for not removing the applicant, exceptional leave to remain), or (b) a rejection of the claim whether substantively or by a refusal to entertain it on safe third country (or Dublin Convention) grounds followed routinely by removal. If sanctuary is to be granted, it seems somewhat unwelcoming first to imprison the refugee. If however it is to be refused, is it not best simply to remove him without delay.

50. Such an approach, moreover, appears to accord with the immigration services' own practice in false document cases. Part III of the Immigration Act 1971 makes full provision for criminal proceedings in this context. S.24 creates a number of offences including that of illegal entry. S.26 provides for various general offences including, under sub-section 1(c), that of making a false statement or representation to

an immigration officer on examination, and, under sub-section 1(d), an offence where someone "uses for the purposes of this Act, or has in his possession for such use, any passport ... or other document which he knows or has reasonable cause to believe to be false." All these are summary offences punishable with imprisonment for not more than six months. Yet apparently only one prosecution has ever been brought under s.24 for illegal entry and that was before an asylum claim was made, and there have been none under s.26. Why then, one wonders, should it be thought appropriate to resort to the general criminal law (carrying, as it does, altogether heavier penalties) to deal with these cases?

51. Having regard to all these considerations, I would express the earnest hope that decisions to prosecute, not least for offences under the general criminal law rather than under Part III of the Immigration Act, will be made only in the clearest of

cases and where the offence itself appears manifestly unrelated to a genuine quest for asylum.

Past failures to give effect to Article 31

52. The first question to be addressed with regard to the respondents' past failures is whether the prohibition imposed by Article 31 upon Contracting States is to be regarded as enforceable against them in domestic law.

53. The 1951 Convention (apart from Article 33) has not been formally incorporated into English law. Albeit, therefore, the respondents accept that Article 31 would have been relevant to a decision to prosecute had it, and facts suggesting its relevance, been drawn to the attention of the CPS, they contend that it has not otherwise given rise to enforceable rights under English law.

54. In challenging that contention the applicants rely first upon a passage in Lord Keith's speech in R v Home Secretary ex parte Sivakumaran [1988] 1 AC 958 at 990:

"The United Kingdom having acceded to the Convention and Protocol, their provisions have for all practical purposes been incorporated into United Kingdom law."

55. As Lord Keith pointed out, the 1983 rules provided that "where a person is a refugee full account is to be taken of the provisions of the Convention ... ." The first primary legislation to deal with asylum seekers was the 1993 Act. S.2 provided that:

"Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

56. Second, the applicants contend that the UK's ratification of the Convention itself created a legitimate expectation that its provisions would be followed. In this connection they pray in aid the Court of Appeal's decision in R v SSHD ex parte Ahmed and Patel [1998] INLR 570 where, at page 583, Lord Woolf MR said this:

"I will accept that the entering into a Treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely.

Subject to any indication to the contrary, it could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the Treaty. This legitimate expectation could give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which this country had undertaken."

57. I would accept this argument. By the time of these applicants' prosecutions, at latest, it seems to me that refugees generally had become entitled to the benefit of Article 31 in accordance with the developing doctrine of legitimate expectations - see too in this regard Hobhouse LJ's judgment in ex parte Ahmed and Patel at page 591. True it is that s.2 of the 1993 Act is by its terms strictly concerned only with the immigration rules. Parliament can hardly have intended, however, that those entitled to claim asylum under the rules should nevertheless still be prosecuted in contravention of the Convention.

58. I return finally, therefore, to the individual cases before us to consider whether these particular applicants were properly entitled to immunity under Article 31 and, if so, what if any relief, declaratory or otherwise, should follow.

Mr Adimi

59. The respondents contend that Mr Adimi falls outside the protection of Article 31 on two grounds, first because he did not come directly to the UK but instead, on his own case, came via Italy and France, in either of which they say he could and should have sought asylum; second, because he did not present himself as a refugee without delay but instead tried on arrival to pass himself off as an Italian.

60. As to the first, Miss Webber points to the Secretary of State having now granted asylum - which, she suggests, is shown by contemporaneous correspondence to have been because neither Italy nor France recognise as refugees those like Mr Adimi in flight from non-State persecution. The Secretary of State, however, disputes this, maintaining that the only reason why Mr Adimi was granted asylum rather than returned to France or Italy under the Dublin Convention was because, given the doubt as to whether he ever entered Italy, both countries would have been entitled to dispute his return. The Magistrate, it is said, ruled against a stay simply on the ground that Mr Adimi's journey was not direct. No reasons for his ruling were given.

61. For my part, whether or not Mr Adimi travelled through Italy, I would conclude that he probably satisfied the condition of "coming directly" to this country, as I construe that condition. Certainly it cannot clearly be demonstrated that he did not. As to the requirement that he present himself without delay, I have already said enough to indicate that in my view Mr Adimi probably satisfied this condition too, irrespective of whether he claimed asylum on the night of his arrival or not until the following morning.

62. I would accordingly hold that Mr Adimi should be exempt from penalty under Article 31. That being so, it must surely follow that the prosecution still outstanding against him will be discontinued. I cannot think that any other orders are required in his case. Least of all is it necessary to address the difficult question raised as to whether it may be appropriate in a case like this to quash the decision of the CPS to institute or continue the prosecution.

Mr Sorani and Mr Kaziu

63. 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 UK 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 UK for a limited time only and are on the way to seek asylum elsewhere.

64. 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 UK 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 UK 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.

65. 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" (see the Rules above). It is not suggested, moreover, that the making of a claim would have made any difference to the course of events.

66. 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. In their cases, however, it is too late to avoid penalty: both have already been convicted and served their sentences. What, then, should be done? It is not suggested that this court can properly quash the convictions. (Mr Sorani, I should note, has an appeal against conviction outstanding in the Isleworth Crown Court, leave for which was granted by the Crown Court out of time on 20 January 1999.) Nor in my judgment is it appropriate for this court, following the convictions, now to quash the CPS's decision to prosecute - even assuming, which I have already said is a difficult question, it would otherwise be appropriate to do so.

67. As for the broader challenges advanced by these applicants to the Secretary of State's adoption of a wrongful policy (or failure to adopt a proper policy) towards these cases, I would decline to grant any form of declaratory relief. Rather I would let our judgments speak for themselves, with a view to ensuring that the mistakes of the past are not repeated in future. It must be hoped that these challenges will mark a turning point in the Crown's approach to the prosecution of refugees for travelling on false passports. Article 31 must henceforth be honoured.

68. Mr Justice Newman:

69. I agree with my Lord's interpretation of the scope of Article 31(1) of the Convention. A strict linguistic interpretation points to the character of the illegality being the fact of presence or entry "without authorisation". On this interpretation the illegality of the means, whereby entry or presence without authorisation had been achieved, would be outside it. No one contends for such a limited interpretation. The Convention is a living instrument, changing and developing with the times so as to be relevant and to afford meaningful protection to refugees

in the conditions in which they currently seek asylum. Apart from the current necessity to use false documents another current reality and advance, occurring since 1951, is the development of a readily accessible and worldwide network of air travel. As a result there is a choice of refuge beyond the first safe territory by land or sea. There have been distinctive and differing state responses to requests for asylum. Thus there exists a rational basis for exercising choice where to seek asylum. I am unable to accept that to recognise it is to legitimise forum shopping. As to the other considerations identified by my Lord's judgment,

(a) the question of future protection and
(b) whether any failure to afford protection to the Applicants has been established,

70. I propose to defer stating my conclusions until I have set out my views on the matters of principle to which the applications give rise. To confront the issues, I consider the key question to be: Which arm of state has responsibility for securing that effect is given to Article 31(1) of the Convention? No one has submitted that it can be disregarded.

71. The Applicants have advanced three routes to it being accorded status in domestic law:

1. Incorporation.
2. Legitimate Expectation.
3. The informing of the exercise of a relevant discretion.

72. The Respondents did not accept there had been incorporation, made no submissions about legitimate expectation and submitted that the exercise of discretion by the DPP whether to prosecute could, in limited circumstances, be informed by it. Otherwise it was for the courts.

Incorporation

73. It is submitted that the United Kingdom, having acceded to the Convention and Protocol, the provisions have for all practical purposes been incorporated into United Kingdom law. Reliance is placed on the dicta of Lord Keith in *R. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT ex parte SIVAKUMARAN* [*[1988] AC 958*](#) . In that case, the House of Lords were concerned with the correct test to be applied in determining whether asylum seekers are entitled to the status of refugee. That in turn gave rise to an issue, turning upon the

proper interpretation of Article 1.A(2) of the Convention, which provides that the term ‘refugee’ applies to any person who:-

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

74. Lord Keith stated:-

"The United Kingdom having acceded to the Convention and Protocol, their provisions have for all practical purposes been incorporated into United Kingdom law."

75. No person is within Article 31(1) unless he or she is a refugee (which includes presumptive refugee). Whichever arm of state has to give consideration to an individual’s claim to protection will have to be satisfied on refugee status. So far as determining entitlement to refugee status, the House of Lords repeated in *SIVAKUMARAN* what had been said in *R. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT ex parte BUGDAYCAY* *[1987] AC 514* , namely that it was not for the Court but for the Secretary of State alone. The principle underlying this conclusion was expressed by Lord Templeman at *page 537* :-

"Applications for leave to enter and remain do not in general raise justiciable issues. Decisions under the Act are administrative and discretionary rather than judicial and imperative. Such decisions may involve the Immigration Authorities in pursuing enquiries abroad, in consulting official and unofficial organisations and in making value judgements. The only power of the Court is to quash or grant other effective relief in judicial review proceedings in respect of any decision under the Act of 1971 which is made in breach of the provisions of the Act or the Rules thereunder or which is the result of procedural impropriety or unfairness or is otherwise unlawful ..... Where the result of a flawed decision may imperil life or liberty a special responsibility lies on the Court in the examination of the decision-making process."

76. Even if Article 31 had been incorporated, which in my judgment it has not, it would be curious if status under Article 31 was for the courts but under the 1971 Act it was not.

77. I am not persuaded that the dicta of Lord Keith can be taken to extend beyond the provisions which bore upon the Secretary of State's responsibility to determine refugee status. That is what the case was all about and what Lord Keith obviously had in mind when referring to the then Immigration Rules made under Section 3(2) of the Immigration Act 1971 which contained the following:-

"16. Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the status of refugees. Nothing in these Rules is to be construed as requiring action contrary to the United Kingdom's obligation under these Instruments....."

78. Nor do I consider the argument for incorporation for "practical purposes" is assisted by Section 2 of the Asylum and Immigration Appeals Act 1993 enacted after the case of *SIVAKUMARAN,*which constitutes a legislative advance in the exact area, requiring that for "practical purposes" be substituted, "all purposes". It provides in its material part:-

"2. Nothing in the Immigration Rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

79. I accept the submission made by Mr Kovats for the Secretary of State that the suggested route via the Immigration Rules does not lead to incorporation. Neither the 1993 Act or for that matter the Asylum and Immigration Act 1996 affected or altered the Immigration Rules in a manner relevant to the imposition of penalties in criminal proceedings.

Legitimate Expectation

80. Neither the Secretary of State nor the Director of Public Prosecutions advanced argument on this particular topic. In my judgement, if regard and effect is to be paid to Article 31(1) of the Convention it depends principally upon this principle. In *R. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT ex parte AHMED and PATEL [1998] INLR 570* the Court of Appeal held that the entering into of a treaty by the Secretary of State could give rise to a legitimate expectation

on which the public in general were entitled to rely because, subject to any indication to the contrary, ratification could be a representation that the Secretary of State would act in accordance with any obligations which he accepts under the relevant treaty. Such a legitimate expectation could, the Court went on to hold, in turn, give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which the United Kingdom had undertaken. The conclusion has not been doubted. It received the unanimous approval of the Privy Council in *THOMAS v. BAPTISTE* *[1999] 3 WLR 249* and I take it to be firmly established that treaty obligations assumed by the executive are capable of giving rise to legitimate expectations which the executive will not under municipal law be at liberty to disregard.

81. A seminal judgment of the High Court of Australia in the case of the *MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS v. TEOH [1995] 183 CLR 273* . has influenced the jurisprudence. Mason C.J. and Deane J. said:-

"..... ratification of a Convention is a positive statement by the executive of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention ..... The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated Convention into our municipal law by the back door."

82. It is not in dispute that the 1951 Convention was designed to alleviate the plight of asylum seekers and was driven by humanitarian considerations. The Convention addresses not the population at large but a particular class of person and comprises positive statements about the way in which they will be treated. It would be hollow indeed if those who, having acted so as to become members of the contemplated class and having exposed themselves to the risks and dislocation of becoming refugees are without remedy to obtain some measure of protection in accordance with the Convention. Mere ratification may not be enough but in this case there is more. There has been a large measure of incorporation, and it is not in dispute that there have been ministerial statements of compliance with the terms of

the Convention and a practice of compliance. The very argument in this case has reflected an attitude of comprehensive compliance.

83. Unlike the law and practice in connection with the European Convention on Human Rights, at issue in *R. v. DIRECTOR OF PUBLIC PROSECUTIONS ex parte KEBILENE & ORS [1999] 3 WLR 175* , British law and practice in connection with the 1951 Convention has assumed that the Convention should be given practical effect.

84. No argument was advanced as to whether the facts gave rise to a substantive legitimate expectation. That being so, it being a developing area (see *R. v. NORTH EAST DEVON HEALTH AUTHORITY ex parte COUGHLAN, CA Transcript 16 July 1999*), absent argument I propose to express no view.

The Informing of the Relevant Discretion

85. If, as in my judgement is the case, these Applicants can establish a legitimate expectation that protection under Article 31(1) would be afforded to them, then the approach to be derived from*R. v. HOME SECRETARY ex parte LAUNDER [1997] 1 WLR 839* and *R. v. MINISTRY OF DEFENCE ex parte SMITH [1996] QB 517* adds little to the position. The Respondents' approach went no further than an acceptance that a decision maker (the DPP) might in certain circumstances have to take account of Article 31(1), otherwise it was for the judicial authorities. Contrary to general principle no member of the executive was required to do so. No authority was cited in support of this novel approach and I shall therefore turn to examine it.

The Secretary of State's Position with Regard to Article 31(1)

86. The position can be summarised as follows. It was submitted on his behalf that the Convention had not been incorporated into English law, but it was accepted that Article 31 of the Convention may be relevant to a decision to prosecute. It was submitted that it had no relevance to any discretion he had to exercise in connection with asylum seekers and it follows he has to date paid no regard to it. The Secretary of State and the Director of Public Prosecutions were separately represented in the proceedings but nevertheless submitted a joint Skeleton Argument. From that I take it that the common position is that the relevant decision-making process upon which the content of the Article can impact is the

discretion of the Director of Public Prosecutions in deciding whether to prosecute. It was submitted that if in his consideration of the public interest in pursuing a prosecution material was brought to his attention showing “unequivocal Article 31 circumstances”, then it was highly likely that he would make a decision not to prosecute. Put more specifically, his discretion would be informed where it appeared to him unequivocally that the alleged offender was a person to whom the protection of Article 31 applied. It was submitted that where the evidence did not establish an unequivocal case there was no duty to have regard to Article 31. This position inexorably led to a submission in a Supplementary Skeleton Argument and Note after the close of argument to the following effect:-

"It is the prosecuting authorities, and the judicial authorities hearing the criminal proceedings, not the Secretary of State, who have the primary responsibility of complying with Article 31 of the Convention. But, if it were drawn to the Secretary of State’s attention that prosecutions were proceeding which appeared to be contrary to the terms of Article 31 of the Convention, the Secretary of State would draw this to the attention of the CPS - DPP." (Supplementary Skeleton)

"Which body should determine the facts for the purposes of taking account of Article 31? The court hearing the criminal proceedings." (Note)

87. It was not submitted that the court should merely determine the facts but that, having done so, it should exercise its judicial powers so as to comply with Article 31. In my judgment the approach of the Secretary of State and the Director of Public Prosecutions is constitutionally flawed.

88. On the assumption that I am right in concluding that a legitimate expectation on the part of asylum seekers that they will receive due consideration as to whether they should be given protection is made out, I am unable to accept that the primary responsibility for complying with the Article falls upon either the Director or the judicial authorities. As to the Director’s constitutional position, Lord Bingham (C.J.) stated in *ex parte KEBILENE* in the course of considering legitimate expectation:-

"Statements by ministers concerning the future conduct of themselves and their officials can found no legitimate expectation concerning the future decisions of the Director since he, like the law officers, acts wholly independently of the executive when making decisions on the conduct of criminal proceedings. It is his public duty and responsibility to exercise his own independent judgement. He cannot be

bound by any statement made on behalf of the executive, and no reasonable person alert to his constitutional role could expect him to be so bound."

89. Under our constitution the courts of law are charged with the responsibility of enforcing the law and where criminal offences have been committed, imposing penalties in accordance with the justice of the case. Judicial discretion in sentencing cannot take account of a legitimate expectation derived from executive action, let alone have its decision dictated by the expectation. I am unable to follow how an individual asylum seeker who has committed an offence within the jurisdiction can assert any private right to have the law applied to him in a way which differs from other offenders by relying upon the terms of an international convention. As Lord Oliver stated in *J.H. RAYNER LTD v. THE DEPARTMENT OF TRADE [1990] 2 AC 418 @ 499* :-

"It is axiomatic the municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law."

At *page 500* he stated:-

"..... as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, while it embraces the making of treaties, does not extend to altering the law conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are the prerogative of the Crown, but also because as a source of rights and obligations, it is irrelevant."

90. The suggestion that the formidable weight of these principles can be overcome by limiting any judicial enquiry to an abuse of process application, in my judgement, falls foul of the same principle. Where the facts are equivocal and the Director of Public Prosecutions has instituted a prosecution against an asylum seeker, for the court to determine whether or not he falls within Article 31(1) can only mean that he will be invoking the jurisdiction of the court to stay the proceedings by praying in aid rights he enjoys by virtue of the Convention. The suggestion that the factual inquiry should be assumed to be confined to an abuse of process application merely avoids the stark conflict which would arise if the court,

being sure of guilt, had no discretion in sentencing and by reason of Article 31 was required to impose no penalty. Reliance upon the availability of the concept of abuse of process was advanced by reference to case law and I turn to that.

The Scope of the Concept of Abuse of Process

In *R. v. HORSEFERRY ROAD MAGISTRATES COURT ex parte BENNETT [1994] 1 AC 43* , the scope of the concept of abuse of process was taken a stage further. Lord Griffiths stated:-

"Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the Appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept the responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

91. A little later Lord Griffiths observed:-

"In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been the knowing party."

92. Lord Oliver, who dissented, commenced his speech with this passage:-

"It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all. But it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime. Absent any suggestion of unfairness or oppression in the trial process, an application to the court charged with the trial of a criminal offence (to which it may be convenient to refer by the shorthand expression ‘a criminal court’), whether that application be made at the trial or at an earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason."

93. Just as the majority of the House of Lords found cogent reason to interfere in *ex parte BENNETT* , so the Divisional Court in *ex parte KEBILENE* concluded that the Director of Public Prosecutions should have paid regard to the future prospect that the passing of the Human Rights Act would lead to the convictions obtained being vulnerable and most likely to be quashed on appeal. In both cases the court was exercising its supervisory role. Contrary to the above cases, the submissions on these applications do not ascribe an overseeing role to the courts but pass responsibility to the courts for the decision making process in all but unequivocal cases.

94. In my judgment, there is no support for the suggestion that in a case where the facts are equivocal as to whether a person falls within Article 31(1) and where the Director of Public Prosecutions decides to prosecute, the court can be the decision maker and grant or refuse relief. In my judgment whether a person is entitled to benefit according to Article 31(1) of the Convention, must depend upon an executive decision granting or refusing him protection. That does not exclude the Director from all impact from the Article. He will not act irrationally in circumstances where the facts do not impel a particular conclusion. If the facts impel a conclusion but none has been reached, the Secretary of State should reach it. If the facts give rise to an arguable claim to protection under the Article, the Secretary of State should determine the claim. A prosecution prior to determination could be stayed pending determination. In the absence of an offender being able to come before the court and lay a basis for challenging a decision to prosecute on the grounds that he has a *prima facie* case for being granted protection by the executive the court can give no relief. Where relief has been refused by the Secretary of State and the prosecution is authorised, the offender could not be prevented from raising the facts as a defence (duress or necessity) or in mitigation but the court will not be adjudicating upon Article 31. I have no doubt that in a situation where a case for immunity in accordance with Article 31(1) is made apparent to the magistrates, but there has been no executive decision, the court should stay its hand. But that will not involve the court enquiring into the merits beyond deciding whether to grant a stay pending a decision by the executive. In the eighteenth century it was not uncommon for those who were accomplices to crime to be promised a pardon in return for giving evidence to secure the conviction of their fellow criminals. In *REX v. RUDD [1775] (1COWP.331),* Lord Mansfield observed, in such a case where Mrs Rudd applied for a writ of *habeas corpus*, having already given evidence as an accomplice and being ready to give further evidence to assist in convicting her partners in crime, as follows *@ page 334* :-

"If she had such a right, we should be bound *ex debito justitiae* to bail her. If she had not such legal right, but yet came under circumstances sufficient to warrant the

court in saying, that she had a title to a recommendation to the King for a pardon, we should bail her for the purpose of giving her an opportunity of applying for such pardon."

95. In my judgment the principle has long been recognised that a court will stay its hand in circumstances where somebody is before the court and there are sufficient facts to conclude that by virtue of some right in that individual there may be immunity from the proposed prosecution. Similarly, if the decision to prosecute is flawed in accordance with public law principles, the court will act to see that the decision should be reconsidered. This brings me to the next issue, namely, the character of the protection under Article 31(1).

The Character of the Protection under Article 31(1)

96. To be relieved of the consequences of criminal wrongdoing is to be pardoned. In *RUDD* Lord Mansfield concluded that the defendant could not claim a pardon as of right (that is, pardons promised by proclamation or given under statute or earned by the ancient procedure of approvement) but he stated:-

"There is besides a practice, which indeed does not give a legal right; and that is where accomplices having made a full and free confession of the whole truth, are in consequence thereof admitted evidence for the Crown and that evidence is afterwards made use of to convict the other offenders. If in that case they act fairly and openly, and discover the whole truth, though they are not entitled as of right to a pardon, yet the usage, lenity and the practice of the courts is to stop the prosecution against them and they have an equitable title to a recommendation for the King's mercy."

97. There is an echo of this in the need for the refugee to act "without delay" and to show "good cause" for his conduct.

98. The procedure of approvement has been overtaken by the practice of granting immunity from prosecution. The nature and effect of a pardon " ..... is to clear the person from all infamy, and from all consequences of the offence for which it is granted ....." The case to which I have referred show that a pardon was effective to prevent prosecution. In *REG. v. BOYES [1861] 1 B&S 311,317* it was held that the beneficiary of a pardon could be called upon to incriminate himself because he merited no protection: "the effect of which [the pardon] was to make him a new man, and consequently to bar any proceedings by or in the name of the Crown".

99. There is recent authority which shows that where a pardon has been granted, which cannot be relied upon because a condition of the pardon has been breached, it may, nevertheless, be an abuse of process to prosecute (see *A.G. TRINIDAD & TOBAGO v. PHILLIP [1995] 1 AC 396;* see also *PHILLIP v. DPP [1992] 1 AC 545* where the nature and effect of a pardon were considered).

100. For the above reasons I feel driven to conclude that the way forward is dictated by principle and to this extent only differ from the judgment of my Lord.

101. The above considerations lead me to the following conclusions:-

1. The protection contemplated by Article 31 is, if afforded, in the nature of a pardon or grant of immunity from suit. Such relief lies with the executive to grant and is not within the class of immunity granted by the Director of Public Prosecutions.

2. A legitimate expectation that the executive will consider whether to afford protection requires no request from the refugee for the duty upon the Secretary of State to consider the position to arise. He should do so whenever the facts disclosed to him give rise to an arguable case for consideration.

3. His decision will be capable of challenge by judicial review, but if protection is not accorded, subject only to any defence of necessity or duress, the refugee can only raise the facts in mitigation.

4. It must be for the Secretary of State to decide whether he deals with the claim to refugee status before or at the same time as the Article 31 issue. Having regard to the overlap between the subject matter of each of the two decisions good administrative practice may point to a simultaneous process.
5. Where refugee status is recognised that will be a highly relevant factor in deciding whether to accord protection under Article 31. As my Lord indicated in the course of argument it is not obvious what interest would be served in prosecuting a refugee who is given leave to remain. Different considerations may apply to one refused leave to remain. In any event the decision whether to prosecute will be for the Director having the benefit of the Secretary of State's decision.

6. The court will be required, probably in rare cases, to consider whether an arguable case for Article 31 is available, where the refugee asserts a claim for protection which the Secretary of State had no cause to consider. If no credible case is made out the court will be entitled to reject the application and refuse a stay pending a determination by the Secretary of State.

Entitlement to Relief on these Applications

102. Mr Sorani and Mr Kaziu have been convicted and served sentences of imprisonment. Both cases disclosed a case for eligibility to be treated as refugees and in the light of our conclusions on interpretation both had a case for being granted protection under Article 31 which received no consideration at all. Quashing the convictions is not open to us. There is no clear case for quashing the decision to prosecute.

Mr Adimi

103. I share all my Lord's views about his case. Although the decision is for the Secretary of State, I would expect him to follow the conclusion these judgments dictate. The Director of Public Prosecutions will then be required to discontinue the prosecution.

104. LORD JUSTICE SIMON BROWN: For the reasons given in the judgments which have already been handed down, we allow these applications. As we have explained, we have not thought it necessary or appropriate to make specific orders or declarations, but rather we let our judgments speak for themselves. We recognise, of course, that our views differ as to whether what the Respondents propose for the future would or would not strictly comply with the law. Given, however, that both of us express a strong preference for what may be called the Secretary of State solution, we would expect the Respondents to give careful consideration as to how they propose now to give effect to Article 31.

105. We have been given a list of corrections which appear to be largely of a formal character.

MS WEBBER: Yes.

106. LORD JUSTICE SIMON BROWN: Are they agreed on all sides? Have you had a chance, Mr Kovats and Mr Perry, to look at all this?

MR KOVATS: My Lord, yes.

107. LORD JUSTICE SIMON BROWN: Are they all correct?

108. MR KOVATS: My Lord, apart from two minor points. On page 1, lines 31 and 32, there should be myself and Mr Grodzinski, instructed by the Treasury Solicitor for the Secretary of State and Mr Perry, instructed by the Crown Prosecution Service and not by the Treasury Solicitor.

109. LORD JUSTICE SIMON BROWN: Is he strictly for the Crown Prosecution Service or for the Director? I actually never know who are supposed to be the Respondents in these cases. Are they discrete creatures?

110. MR PERRY: My Lord, technically speaking, no, because the acts of the Crown Prosecution Service are the acts in the name of the Director, but given that the titles of these actions were brought against the Crown Prosecution Service, we proceeded, but your Lordship has accurately stated it in your judgment.

111. LORD JUSTICE SIMON BROWN: You are instructed by the Crown Prosecution Service for the Crown Prosecution Service. Should we not say for the Director of Public Prosecution and the Crown Prosecution Service?

MR PERRY: My Lord, yes.

112. LORD JUSTICE SIMON BROWN: Are there any other matters that need specifically to be mentioned, or can we just hand the note of corrections to the shorthand writer and ask her to incorporate them?

113. MS WEBBER: My Lord, there is only one matter that I draw specific attention to, which is the misspelling of my learned friend, Mr Husain's, name. The reason I draw attention to it is because ----

114. LORD JUSTICE SIMON BROWN: Where did we get it wrong: on the title page?

MS WEBBER: My Lord, yes.

115. LORD JUSTICE SIMON BROWN: There is only one "s". I am sorry.

116. MS WEBBER: It is just that there is another counsel with the same name but with two "s", and he does not wish to be confused with that.

117. LORD JUSTICE SIMON BROWN: He is quite right. It is a problem I used to be plagued with myself.

118. MS WEBBER: My Lord, the other matter I should draw specific attention to is that the case of Adimi is, in fact, also against the Crown Prosecution Service, not just the Uxbridge Magistrates. That was by way of amendment.

119. LORD JUSTICE SIMON BROWN: That is perfectly right. Again, shorthand writer, at the very top of the title page it should read: "R v Magistrates' Court and Another".

120. MS WEBBER: I do have an application for costs against the "other", that is the Crown Prosecution Service.

121. LORD JUSTICE SIMON BROWN: You are all legally aided, are you?

122. MS WEBBER: My Lord, yes, but, of course, these days with cut budgets -----

123. LORD JUSTICE SIMON BROWN: As you noticed, we made the Order in the last case, so you apply against the Crown Prosecution Service. Are there any other applications to be made?

124. MISS HARRISON: My Lords, on behalf of Mr Sorani, we make an application for costs. We appreciate that our case was against both the Secretary of State and the Crown Prosecution Service and that that, therefore, means the difficult issue that in a sense is left open with the strong indications, certainly from your Lordship, as to who is responsible for the fact that my client was not prosecuted is raised by this question of costs. We submit that as it was consistent with submissions made before your Lordships that it was the Secretary of State who had the primary responsibility, and that in the first place costs should be awarded against the Secretary of State. Alternatively, there was a case, we submit, clearly before the Crown Prosecution Service following Mr Sorani's interview that the Crown Prosecution Service should have been on notice as to his possible ----

125. LORD JUSTICE SIMON BROWN: The answer is that you are applying for costs and it would be a matter of indifference as to which party you got them from so long as you get them.

126. MISS HARRISON: My Lord, certainly.

LORD JUSTICE SIMON BROWN: Mr Husain?

127. MR HUSAIN: My Lord, I also have an application on behalf of the my client.

128. LORD JUSTICE SIMON BROWN: You are in the same position as Miss Harrison?

MR HUSAIN: My Lord, yes.

129. LORD JUSTICE SIMON BROWN: Who goes first? Mr Kovats?

130. MR KOVATS: My Lord, can I say something on behalf of myself and Mr Perry? Assuming that your Lordships are considering that an Order for costs is appropriate, we would invite your Lordships simply to order an award of costs against the Secretary of State and the Crown Prosecution Service without distinguishing between them, and we will work it out amongst ourselves as to who actually pays.

131. As to the award of costs, clearly the Applicants have succeeded largely. Whether or not your Lordships thinks a certain percentage should be awarded, I leave it up to your Lordship, and I make no submissions as to that.

RULING AS REGARDS COSTS

132. LORD JUSTICE SIMON BROWN: We think it is appropriate to make the Order for costs in this case. We make it in all cases simply against the Secretary of State and the Director of Public Prosecutions without distinction, leaving it to them to decide how precisely to fund it.

133. MS WEBBER: My Lord, and legal aid taxation?

134. LORD JUSTICE SIMON BROWN: And, of course, legal aid taxation in all cases. We are most grateful for the assistance we had from all of you in these interesting and not altogether easy cases.