IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 201803391 C1
[2024] EWCA Crim 307

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 16th January 2024

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE GARNHAM

MR JUSTICE ANDREW BAKER

R E X

- v -

ISMAIL OMAR MUSA

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Mr R A Amarashinha appeared on behalf of the Applicant

Mr A Johnson appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 16th January 2024

LORD JUSTICE HOLROYDE:

1. On 18th February 2008, in the Crown Court at Manchester Minshull Street, the applicant pleaded guilty to an offence of possession of an identity document with intent, contrary to section 25(1) of the Identity Cards Act 2006. He was sentenced to ten months' imprisonment. That sentence has been served. He now applies for an extension of time of about ten years and five months in which to apply for leave to appeal against his conviction on the ground that he was wrongly advised to plead guilty when the statutory defence under section 31 of the Immigration and Asylum Act 1999 ("the section 31 defence") was available to him. His application has been referred to the full court by the single judge.

2. The facts of the offence can be summarised briefly. The applicant, now aged 40, is a Somalian national. He says that his ethnicity is that of a Benadiri of the Bandhabow subclan, a minority clan in Somalia. He left that country in February 2008, at a time of civil war. On his account, his mother paid an agent to arrange his travel. Over a period of about three days he flew initially to an unknown country, using a false passport provided by the agent, and then to Belgium. He was there provided with a different false document, using which he flew from Brussels to Manchester. On arrival in Manchester he was detained and questioned through an interpreter. He said that he was a refugee and had come to the United Kingdom to find peace. He was subsequently charged with the offence.

3. The applicant was represented in the criminal proceedings by counsel and solicitors. The applicant has waived legal professional privilege, and we have seen a detailed attendance note of a conference at court in which the applicant gave his account and was advised about the strength of the prosecution case and about the reduction in sentence for those who plead guilty. The applicant's case is that he was not advised of the section 31 defence. The

attendance note records, however, that counsel asked for the proceedings to be put back for a time specifically so that she could consider the paragraph in Archbold dealing with that defence. The applicant has not indicated whether he was given any further advice thereafter.

4. We must next summarise the relevant events over the following decade.

5. The applicant claimed asylum, on the basis that if returned to Somalia he would be persecuted by reason of his ethnicity. His claim was refused by the Secretary of State for the Home Department. He appealed to an immigration judge. He gave evidence that members of his family had been murdered by a majority clan, and that on two occasions he had been detained, beaten, tortured and treated as a slave. He said that he was only released when his mother paid money. He called two witnesses who gave evidence purporting to confirm his clan membership.

6. In a decision promulgated on 1st December 2009, the immigration judge found that the two witnesses were untruthful and had been recruited by the applicant to give false evidence on his behalf. The judge also found a number of inconsistencies in the applicant's own accounts. The judge further noted that the Bandhabow speak a different dialect from that used by the majority clans. The applicant had, however, declined to participate in a language test, despite knowing that an adverse inference might be drawn from his refusal. The judge concluded that the applicant was a Somali from the Mogadishu area. He found that the applicant had failed to discharge the burden of showing that he was a Benadin and that he had suffered ill treatment. The judge concluded that the applicant had not shown that he was at risk on return to Somalia, and dismissed the appeal on asylum, humanitarian protection and human rights grounds.

7. The applicant made an unsuccessful attempt to challenge that decision in the High Court.

8. It seems that the applicant then travelled to Norway to join a woman who either is, or was at one time, his wife, and their young son. He applied for asylum in Norway, but was refused and transferred back to the United Kingdom. He made further submissions to the Secretary of State for the Home Department, but they were not accepted as amounting to a fresh claim.

9. In April 2011 the applicant was apprehended at Dover attempting to leave the United Kingdom using a false passport. He was convicted of a further offence of possession of an identity document with intent ("the 2011 offence") and was sentenced to 18 months' imprisonment with a recommendation for deportation. We have been given no information as to whether, in the course of that prosecution, any legal representative or anyone else alerted him to the existence of the section 31 defence. Given that the applicant has to persuade the court to grant a very long extension of time, we regard that as a significant omission.

10. In October 2011 a deportation order was made against him. The applicant sought, unsuccessfully, to appeal against that decision to the First-tier Tribunal and thereafter on appeal to the Upper Tribunal.

11. In 2015 the applicant again left this country and tried to enter Denmark. He was again returned to the United Kingdom. Thereafter, he made a number of attempts to have his deportation order set aside on the basis that he was a victim of torture. None of these was successful.

12. However, in 2016 the Home Office accepted that his latest representations amounted to a fresh asylum and human rights claim, which enabled him to appeal to the First-tier Tribunal. At the hearing before that Tribunal, he adduced expert evidence from three witnesses: a

psychiatrist, Dr Sinha, whose report of 18th August 2015 considered the scarring of the applicant's back and limbs and opined that it was "highly consistent" with the torture which the applicant had described; and Dr Hoehne, a country expert whose report dated 1st April 2016 addressed conditions in Somalia. In a decision promulgated on 30th September 2019, a judge of the First-tier Tribunal allowed the appeal on humanitarian and human rights grounds. The judge accepted that the evidence as to scarring supported the applicant's account of ill-treatment and accepted that the applicant suffered from paranoid schizophrenia with symptoms documented since 2017. He did not, however, accept the entirety of the applicants evidence and in particular did not find him to be a refugee. The judge's conclusion in that regard, at paragraph 84 of his decision was:

> "I do not find on the evidence before me, even taken at the highest, that this appellant had established that he has a well-founded fear of persecution for reasons protected by the Refugee Convention even on the lower standard applicable. His claim to asylum must, therefore, fail even on the evidence taken at its highest."

13. An appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal was dismissed. The applicant accordingly has the benefit of the decision establishing an exception to automatic deportation, and has remained in the United Kingdom. We have been given no information as to whether or not leave to remain has subsequently been granted.

14. We turn to the present application. The applicant seeks to adduce the reports of Dr Sinha and Dr Hoehne as fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1968.

15. At the time of the applicant's guilty plea, the material terms of section 31 of the 1999 Act were as follows:

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

(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he —

(a) presented himself to the authorities in the United Kingdom without delay;

(b) showed good cause for his illegal entry or presence; and

(c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

(2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that 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 —

…

(aa) section 25(1) or (5) of the Identity Cards Act 2006;

…

…

(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.

…"

16. Mr Amarasinha submits on behalf of the applicant that the guilty plea before the Crown

Court should be treated as a nullity because the applicant was not advised about the availability of that defence. Relying on the proposed fresh evidence, he submits that if the section 31 defence had been put forward, it had a good chance of success. He argues that the prosecution would not have been able to prove to the criminal standard that the applicant was not a refugee, and the applicant would have been able to establish on the balance of probabilities all the other elements of the defence. Mr Amarasinha relies on the decision of a Divisional Court in *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667. That decision, later approved by the House of Lords, is said by Mr Amarasinha to have been one which, if properly researched by counsel appearing in the Crown Court, would have led her to advise the applicant that he had a viable defence. On those grounds it is submitted that the conviction is unsafe.

17. Mr Johnson opposes the appeal on behalf of the respondent. He submits that the applicant has failed to show that he would suffer substantial injustice if he were not granted the extension of time and leave to appeal for which he applies. Mr Johnson further submits that, in any event, the applicant is not a refugee and the section 31 defence could not have succeeded.

18. We are grateful to both counsel. Although we have summarised their respective submissions extremely briefly, we have considered all the points made in writing and orally on both sides, and we have considered the proposed fresh evidence de bene esse.

19. Counsel have helpfully drawn to our attention a number of decided cases. In relation to the section 31 defence, we must mention the following.

20. In *R (Pepushi) v CPS* [2004] EWHC 798 (Admin), Thomas LJ (as he then was) emphasised that under section 31(2) the defence is available to a person who stops in another

country "only if" the refugee shows that he could not reasonably be expected to be given protection under the Convention in that other country. Thomas LJ continued as follows:

> "31. … The words 'only if' make it clear that the circumstances are limited to those set out. There is no room to apply the scope of Article 31 as interpreted and declared by this Court in *Adimi;* we are bound to apply the narrower provisions of section 31, even if in so doing it has the consequence that the UK is in breach of international obligations under a human rights treaty."

21. That decision was cited in paragraph 25-228d and 25-228e of both the 2007 and 2008 editions of Archbold. In May 2008, however, the House of Lords in *R v Asfaw* [2008] UKHL 31 recognised that those who are fleeing from persecution may have to resort to deceptions such as the use of false travel documents, and held that the section 31 defence may be available for offences committed in the course of a flight from persecution "even after a short stopover in transit": see in particular the speech of Lord Bingham at [26]. As this court confirmed in *R v Ordu* [2017] EWCA Crim 4, that decision of the House of Lords was a change of law in relation to the proper construction of the section 31 defence.

22. In *R v Mateta* [2013] EWCA Crim 1372, [2014] 1 WLR 1516, at [21] Leveson LJ (as he then was) gave the following explanation of the operation of the section 31 defence:

> "i) The defendant must provide sufficient evidence in support of his claim to refugee status to raise the issue and thereafter the burden falls on the prosecution to prove to the criminal standard that he is not a refugee (section 31 Immigration and Asylum At 1999 and *Makuwa* [26]) unless an application by the defendant for asylum has been refused by the Secretary of State, when the legal burden rests on him to establish on a balance of probabilities that he is a refugee (s. 31(7) of the Asylum and Immigration Act 1999 and *Sadighpour* [38] – [40]).
>
> ii) If the Crown fails to disprove that the defendant was a refugee (or if the defendant proves on a balance of probabilities

he is a refugee following the Secretary of State's refusal of his application for asylum), it then falls to a defendant to prove on the balance of probabilities that

> a) that he did not stop in any country in transit to the United Kingdom for more than a short stopover (which, on the facts, was explicable, see (iv) below) or, alternatively, that he could not reasonably have expected to be given protection under the Refugee Convention in countries outside the United Kingdom in which he stopped; and, if so:
>
> b) he presented himself to the authorities in the UK "without delay", unless (again, depending on the facts) it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum;
>
> c) he had good cause for his illegal entry or presence in the UK; and
>
> d) he made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom, unless (once again, depending on the facts) it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum. (s. 31(1); *Sadighpour* [18] and [38] – [40]; *Jaddi* [16] and [30]).

iii) The requirement that the claim for asylum must be made as soon as was reasonably practicable does not necessarily mean at the earliest possible moment (*Asfaw* [16]; *R v MA* [9]).

iv) It follows that the fact a refugee stopped in a third country in transit is not necessarily fatal and may be explicable: the refugee has some choice as to where he might properly claim asylum. The main touchstones by which exclusion from protection should be judged are the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape (*Asfaw* [26]; *R v MA* [9]).

v) The requirement that the refugee demonstrates "good cause" for his illegal entry or presence in the United Kingdom will be satisfied by him showing he was reasonably travelling on false papers (*ex p. Adimi* at 679 H)."

At [22] to [24] of the judgment, Leveson LJ went on to consider the principles and case law

relating to the legal advice which should be given about the section 31 defence. In summary, he stated:

> (a) Those representing defendants charged with possession of an identity document with intent are under a duty to advise them of a possible section 31 defence, so that the defendant can make an informed decision whether to advance that defence;
>
> (b) This court can entertain an application for leave to appeal against conviction on the ground that a guilty plea was a nullity;
>
> (c) However, it is not sufficient for a defendant who has pleaded guilty merely to show that some of the advice he received was wrong or that a possible defence was overlooked: the principle stated in *R v Boal* [1992] QB 591 is that this court will only intervene "most exceptionally", and only where the court "believes the defence would quite probably have succeeded and concludes, therefore, that a clear injustice has been done".

The *Boal* principle has recently been reaffirmed by this court in *R v Tredget* [2022] EWCA Crim 108.

23. In *R v Elemi* [2022] EWCA Crim 1428, this court held that the section 31 defence only applies to refugees, not to those who are only entitled to humanitarian protection.

24. We turn to case law relevant to this court's decision as to whether to grant an extension of time where an appeal is based on a change in the law. In *R v Jogee* [2016] UKSC 8 at [100] the Supreme Court held that –

> "… where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such a leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken."

25. Finally, in *R v Ordu* at [20] this court held that in cases to which that principle applies:

> "… the continuing impact of a wrongful conviction on an applicant will be highly material in determining whether its continuation involves a substantial injustice."

26. Having considered those decisions, and having reflected on the submissions of counsel, we have reached the following conclusions.

27. First, we accept the respondent's submission that this is a change of law case. The applicant therefore needs not only to show good reason why the court should grant the very long extension of time which he seeks, but also to demonstrate that substantial injustice would be caused if that extension, and leave to appeal, were not granted. In our judgement, he is unable to do so.

28. The starting point for the applicant's submissions is that the advice he received from his legal representatives in the Crown Court was seriously deficient, in that counsel failed to advise him of the possible defence under section 31, and that he was thereby deprived of an informed choice as to whether he should seek to advance that defence. But counsel cannot be criticised for advising him on the basis of the law as it then stood, and as it was summarised in the then current edition of Archbold. We are not persuaded that, viewed on that basis, counsel's advice as to plea was deficient. If the applicant had advanced the section 31

defence, and if he was in fact a refugee, he would have had to show that he could not reasonably have expected to be given protection under the Refugee Convention in Belgium. There is nothing in the material before us to suggest that he could have done so. It follows that it is not possible for the applicant to bring himself within the *Boal* principle by showing that he was deprived of a defence which would quite probably have succeeded and that he has thereby suffered a clear injustice.

29. Furthermore, the applicant has not shown that substantial injustice would be caused if his applications for an extension of time and for leave to appeal are not granted. In our view, he faces two substantial difficulties in this regard. First, as we have noted earlier in this judgment, he now has the benefit of the First-tier Tribunal decision in 2016 and has been able to remain in this country. The suggested adverse consequences of his conviction remaining in place have therefore not in fact occurred. Secondly, this appeal relates only to his conviction in 2008. Whatever may be the outcome of this appeal, he has not challenged his conviction of the 2011 offence, and it was that later conviction which resulted in the deportation order which he successfully challenged before the First-tier Tribunal. We accept Mr Johnson's submission that it is difficult to discern any prejudice suffered by the applicant as a result of this conviction, which he does not in any event suffer as a result of the 2011 conviction.

30. In those circumstances, the applicant has not persuaded us that he would suffer substantial injustice if his conviction stands.

31. Even if we had reached a different conclusion on that first aspect of the case, there is a second reason why an appeal cannot succeed. Applying the principles to which we have referred, we must consider the prospects of a successful defence by reference to the findings of the First-tier Tribunal. Although the applicant succeeded in some respects before that

Tribunal, the judge did not find him to be a refugee. The applicant's position in relation to his asserted refugee status is that the Secretary of State for the Home Department has refused his asylum claim; the immigration judge in 2009 dismissed his asylum claim; and the First-tier Tribunal judge in 2016 similarly rejected his asylum claim. If the applicant sought to advance the section 31 defence, the burden would be on him to prove that he was probably a refugee. In the light of the findings of the two specialist judges who have considered his position, we see no realistic prospect that he could do so. We are not persuaded by the submission of Mr Amarasinha that we should nonetheless give the applicant the benefit of a chance that a non-expert jury might have come to a different conclusion.

32. We emphasise that the expert evidence on which the applicant seeks now to rely was considered by the First-tier Tribunal judge, but did not alter the decision at [83] of his judgment that even if the applicant was from a minority clan, which the judge considered to be highly questionable, there was nothing to indicate that he would be targeted for persecution on any of the grounds covered by the Refugee Convention.

33. It follows that, in our judgment, any attempt by the applicant to advance the section 31 defence would fail at the first stage of the *Mateta* approach. It also follows that the proposed fresh evidence, although capable of satisfying the other criteria in section 23 of the 1968 Act, is not capable of affording a successful ground of appeal.

34. For those reasons, we decline to receive the expert reports as fresh evidence. We refuse the applications for an extension of time and for leave to appeal against conviction.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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