IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/03800/B1
[2024] EWCA Crim 322

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 13th March 2024

B e f o r e:

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

MR JUSTICE GOOSE

MRS JUSTICE DIAS DBE

R E X

- v –

"A U S"

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Pippa Woodrow (instructed by **Colin Gregory of Bhatt Murphy Solicitors**) for the **Applicant**
Andrew Johnson (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

J U D G M E N T
(Approved)

Wednesday 13th March 2024

LORD JUSTICE HOLROYDE:

1. On 25th June 2010, in the Crown Court at Chelmsford, the applicant pleaded guilty to an offence of possession of a false identity document with intent, contrary to section 25(1) of the Identity Cards Act 2006. She was sentenced to 12 months' imprisonment.

2. She now applies for an extension of time of more than 12 years in which to apply for leave to appeal against her conviction on the ground that she was not advised that the statutory defence under section 31 of the Immigration and Asylum Act 1999 ("the section 31 defence") was available to her. Her application has been referred to the full court by the Registrar.

3. The court is asked to order that the applicant's name should be anonymised in any report of these proceedings. For that reason the case has been listed under the randomly chosen letters, AUS. The applicant was granted anonymity in immigration and asylum proceedings to which we shall refer, and the order in that regard of the First-tier Tribunal would plainly be undermined if this court were to take a different course. We are satisfied that it is necessary and appropriate in the circumstances of this case to depart from the important principle of open justice to the extent of granting anonymity and directing that the applicant be referred to as "AUS".

4. The court has been greatly assisted by the care with which this case has been prepared and presented. Miss Woodrow and those instructing her have been most assiduous and thorough in dealing with all aspects of the applicant's case.

5. On behalf of the respondent, Mr Johnson and those instructing him have been equally thorough and scrupulously fair. In the result, the respondent no longer opposes the

application.

6. Agreement between the parties does not conclude the issue, because it remains for the court to decide the outcome of the application. It does, however, mean that we can address relevant matters more briefly than would otherwise have been the case.

7. We summarise the relevant facts, including matters which are contained in statements by the applicant and the solicitor now representing her. Those statements are the subject of an application to adduce fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1968.

8. The applicant is a national of Somalia. She entered the United Kingdom via Stansted Airport on 14th June 2010 carrying a Dutch identification card which had been provided to her by an agent. She said that she had come to the UK because her family had gone; her two sons, aged 12 and 14 had been killed in an attack on their home; and she wished to claim asylum.

9. In a screening interview on the following day, she acknowledged that she had passed through other countries, but said that she wished to claim asylum in the UK because other Somalis lived here.

10. It is now apparent that the applicant had paid to the agent all the money she possessed in order to leave Somalia where she had been the victim of domestic abuse and where she and her family had been caught up in civil unrest. The agent had taken her initially to Dubai, then to Belgium for one night, and then to Germany. After four days she flew to this country with two other men. The agent did not advise her of any possibility of claiming asylum in any of those other countries.

11. The applicant was represented by counsel at her appearance in the Crown Court, but she does not recall having any detailed discussion with him. She says that she was not advised that a statutory defence was or may be available to her. Had she been so advised, she says, she would not have pleaded guilty.

12. The applicant claimed asylum, but on 1st July 2010 her claim was refused. An appeal to the First-tier Tribunal was dismissed. A deportation order was subsequently made against her, and her appeal against that order was dismissed.

13. Between 2010 and 2013 she made a number of human rights and protection claims, but all were unsuccessful. It appears that the fact that the applicant had given inconsistent accounts of her history counted heavily against her.

14. In 2018, solicitors representing the applicant in immigration proceedings obtained medical evidence in relation to scarring of her body, which was found to be consistent with her account of ill-treatment, including repeated burning with heated metal. The report also assessed her mental health. The author found the applicant to be suffering from severe depressive symptoms.

15. Later in 2018, the applicant applied to revoke the deportation order and made a fresh claim for asylum and leave to remain on human rights grounds. Those claims were refused by the Secretary of State for the Home department. The applicant gave Notice of Appeal to the First-tier Tribunal.

16. A further medical report in 2020 diagnosed a major depressive disorder, with current symptoms in the moderate to severe range, and post traumatic stress disorder. The author of the report attributed those findings to the cumulatively traumatic life events which the

applicant had experienced in Somalia and opined, importantly, that the applicant's anxiety and depression would certainly have contributed to her difficulty in disclosing all aspects of her history in the course of her asylum claims, and could account for omissions and discrepancies in her accounts of her experiences.

17. On 17th February 2021, the First-tier Tribunal allowed the applicant's appeal. The judge took into account the medical evidence and found that the applicant had been subject to abuse and violence in Somali, and would be at real risk of sexual or gender-based violence if returned. The Secretary of State unsuccessfully applied for permission to appeal against that decision.

18. On 15th July 2021, the applicant was accorded refugee status. She was granted refugee leave to remain for five years, but was warned that she remained liable to deportation and that her case may be reviewed in the future.

19. After the grant of leave to remain, the applicant's immigration solicitors referred her to the specialist criminal solicitors who now represent her. The applicant says that it was only then that she received specific advice as to the section 31 defence, to which we now turn.

20. At the time of the applicant's entry into the UK, section 31 of the 1999 Act provided:

> "**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.

…"

21. In *R(Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin) at [21], the High Court held that the terms of section 31 meant that the defence was only available to a refugee who stopped in another country if the refugee was able to show that he could not reasonably have been expected to be given protection under the Refugee Convention in that other country.

22. In May 2008, however, the House of Lords, in *R v Asfaw* [2008] UKHL 31, recognised that those who were 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].

23. 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. The operation of the section 31 defence, and the effect of earlier case law, was explained as follows by Leveson LJ (as he then was) in *R v Mateta* [2013] EWCA Crim 1372; [2014] 1WLR 1516 at [21]:

> "To summarise, the main elements of the operation of this defence are as follows:
>
> 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 Act 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 (section 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) 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. (section 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 parte *Adimi* at 679 H)."

24. At [22] to [24] Leveson LJ went on to state the following principles:

(a) Those representing defendants charged with possession of an identify 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 principles 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".

(d) If the defendant's case has bee considered by the First-tier Tribunal, it is appropriate for this court to assess the prospects of a successful defence by reference to the tribunal's findings: see *R v Sadighpour* [2013] 1 WLR 2725.

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

25. Applying these principles to the present case, the respondent makes the following concessions:

(1) At the time when the applicant pleaded guilty, the Secretary of State had not refused an asylum claim by her. She had provided sufficient evidence to raise the issue of whether she was entitled to refugee status. In those circumstances, and importantly, the burden was on the respondent to prove to the criminal standard that she was not a refugee. The respondent would not have been able to discharge that burden.

(2) The applicant would then have been able to discharge the burden on her of establishing on the balance of probabilities: (a) that she could not reasonably have been expected to be given protection under the Refugee Convention in

Dubai, since the United Arab Emirates is not a signatory to that Convention, and that her time in Belgium and Germany amounted to no more than short stopovers; (b) that she presented herself to the UK authorities without delay when she entered this country – this is so notwithstanding that she was using a false identification document; (c) that the circumstances in which she fled Somalia were as she has described them, and that accordingly she was reasonably using a false identification document and had good cause for her illegal entry.

(3) If the applicant had raised the section 31 defence, it quite probably would have succeeded.

(4) There is no evidence to undermine the applicant's statements that she was not advised of the section 31 defence at the time of her guilty plea. She could therefore show on the balance of probabilities that she was not properly advised.

26. In our judgment those concessions are properly made. It follows that the applicant is able to show that she did not receive the advice she should have received to the effect that she could advance a defence which would quite probably have succeeded. She has thereby suffered a clear injustice. She would not have pleaded guilty, served her sentence of imprisonment and suffered all the consequences of her conviction if she had been advised of the section 31 defence. The principles stated in *Boal* and re-affirmed in *Tredget* therefore apply to her case.

27. The issue of whether the court should grant the very long extension of time has been the subject of detailed written submissions on behalf of the applicant, which the respondent, after

careful reflection, has accepted. The following considerations are, in our view, relevant.

28. First, we refer to familiar guiding principles. In *R v Hughes* [2009] EWCA Crim 841 at [20], the court stated that an extension would be granted only where there is good reason to give it, and ordinarily where the defendant will otherwise suffer significant injustice. In *R v Thorsby* [2015] EWCA Crim 1 at [13], it was said that this court will grant an extension of time if it is in the interests of justice to do so:

> "… There are, however, several components that contribute to the interests of justice. The court will have in mind the public interest in the proceedings of the court generally, in particular in the finality of Crown Court judgments, the interests of other litigants, the efficient use of resources and good administration. However, the public interest embraces also, and in our view critically, the justice of the case and the liberty of the individual. …"

29. Secondly, the applicant has provided a comprehensive account of the reasons for the passage of so many years. For much of that time she was ignorant of the section 31 defence and ignorant of the possibility of an appeal. Although an appeal against conviction was mentioned at some stage by the solicitors representing her in her asylum claim, it is clear that they did not purport to give her any specialist advice and, understandably, waited until the successful conclusion of her asylum appal before referring her to her present solicitors.

30. Thirdly, the Supreme Court in *R v Jogee* [2016] UKSC 8 at [10] held that a conviction based on a faithful application of the law as it stood at the time can only be appealed by seeking exceptional leave to appeal out of time and that this court can only grant such leave if substantial injustice is shown. However, for the reasons we have indicated, this is not a case in which the applicant is relying on a change in the law. Rather she is relying on a failure to advise her as to the law as it had stood for two years before she appeared in the Crown Court.

In such circumstances it is sufficient for the applicant to show that a refusal of the extension of time would cause her significant injustice: see *R v Abdulahi* [2021] EWCA Crim 1629.

31. Fourthly, we are satisfied that a refusal of the necessary extension of time and the consequent refusal of leave to appeal would cause significant injustice to the applicant. Her leave to remain is limited in time, and she remains liable to deportation on the basis of her conviction of this offence. The uncertainty of her position imposes many restrictions on her and gives rise to continuing stress and anxiety. We conclude that in this respect also the concession made by the respondent is a proper one.

32. For those reasons we receive the fresh evidence, we grant the necessary extension of time, we grant leave to appeal, we allow the appeal, and we quash the conviction.
