



## **A Curate's Egg?**

*R v Asfaw (UNHCR intervening) [2008] 1 AC 1061*

By Thomas de la Mare

Article 31 of the Convention and Protocol relating to the Status of Refugees (“Article 31”) is a relatively simple provision to understand. It recognises that asylum seekers often have to resort to subterfuge to escape the place in which they are persecuted. They might have to travel under false papers, in a false name, giving false reasons for travel. Its plain purpose is to require signatory states to provide immunity from the general or specific immigration provisions of their criminal law relating to the use of false documents to asylum seekers engaging in such practices for the purposes of flight.

Against this backdrop the decision of the House of Lords in *R v Asfaw (UNHCR intervening)* [2008] 1 AC 1061 is something of a curate’s egg. The case concerned facts that are almost quotidian in an asylum context. The Appellant, an Ethiopian national, was travelling on false papers. She was on her way to the United States where she had family and where she intended to claim asylum. Her travel route involved passing through Heathrow, an inevitable hub for so many long haul journeys. In transit, she switched from the false Ethiopian passport the agent who had facilitated her escape had provided to a false Italian passport. This was detected by the clerk at the airline check-in desk and she was arrested at the departure gate attempting to board the flight. She was charged and tried with two counts: using a false instrument (i.e. the forged passport) contrary to the Forgery and Counterfeiting Act 1981; and attempting to obtain transport services by deception, contrary to the Criminal Attempts Act 1981. Precisely the same facts were relied upon for both counts. She was acquitted of the first count because it was listed in section 31; but convicted of the second because it was not. Section 31 was the provision by which the United Kingdom implemented its obligations under Article 31.

The Appellant, supported by the UNHCR, made two points. First, she advanced a purposive approach to construing Article 31. The immunity it conferred should necessarily cover transit, so often a feature of asylum seeking, and thus should also cover the use of false papers to exit the short-term transit country to the state of intended refuge. Secondly, she contended that section 31 of the Immigration and Asylum Act 1999 should be read down, either because Article 31 had been incorporated into domestic law (even though section 31 was, by omission of other offences, unambiguously inconsistent with it) or because she had a legitimate expectation, or because to charge for a general offence arising from the same facts as a specific offence effectively immunized by section 31 would be an abuse of process.

On the one hand, the 3:2 decision of the majority (Lords Bingham, Hope and Carswell) that Article 31 should be generously and purposively construed and that it would be an

abuse of process to prosecute her for general offences not listed in section 31 when she was immunized from specific forgery offences is to be welcomed. On the other hand, the conservative reasoning of the majority as to the effect of the relevant international law, namely Article 31, is something of a setback to attempts to make more liberal use of international law as an aid to the purposive construction of domestic statutes.

The use of the abuse of process argument has the strong resemblance of doing by the backdoor what the majority was unwilling to do by the front, namely accepting that the obvious incoherent and imperfect section 31 list of offences should be construed in accordance with the Article 31 obligation so as to include general as well as particular offences that could arise from the same facts. That is assuredly what the ECJ would do in any like case in that part of asylum law governed by Community Law.

The reasoning of the minority (Lords Mance and Roger), finding in favour of a narrow or “black-letter” reading of Article 31, such that it did not extend to offences upon exit from (as opposed to entry to) a transit state is yet more problematic and may be indicative of future difficulties in the use of international law in domestic proceedings.

What is left unaddressed is the scandalous situation that arose in *R v Makuwa* [2006] 1 WLR 2755 where the protection offered by Article 31 and section 31 was circumvented by the device of prosecuting a mother for assisting her children (all asylum seekers) to travel to the UK (it was not even a transit case) on false papers, a non-listed offence. It is to be hoped that in the light of the majority ruling prosecutions of this type, in the plainest breach of the UK’s international obligations, will never be brought again.

*Michael Fordham QC and Shaheed Fatima appeared for the UNHCR*