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Smuggling of Asylum-seekers and Criminal Justice

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Abstract:

The objective of this paper is to demonstrate the legal implications for asylum-seekers flowing from their resort to falsified documents as a method of gaining access to the territory of asylum countries. Article 31(1) of the Refugee Convention is supposed to act as a shield against punishment for illegal entry. However, the paper identifies four issues relating to the application of Article 31 which make the functioning of the shield difficult. The first issue relates to the procedure of applying Article 31 and in particular the interrelationship between the refugee status determination procedure and the criminal procedure initiated as a result of usage of false document. The second issue is how immigration control rationale permeates the criminal procedure and results in reversal of the burden to the detriment of the defendant/asylum-seeker. The third issue relates to the unavailability of proper legal advice and the ensuing repercussions for applying Article 31's shield. And lastly, the application of the shield could be so belated that by the time when Article 31(1) is under consideration by appropriate judicial authority, asylum-seekers might not only have been recognized as refugees, but they have already been convicted and served the sentence. Thus, the system is designed in such a manner that immigration control prevails and indeed breaches are sanctioned.

Keywords: *refugees, asylum-seekers, human smuggling, false documents, criminal offences, Article 31(1) of the Refugee Convention, availability of legal advice*

Introduction

In light of the border controls raised by the countries of destination and the adaptivity of borders to sift out undesirable migrants, asylum-seekers falling with that category, individuals seeking protection have been forced into illegal channel for migration. This channel is operated by facilitators - human smugglers. One of the techniques used by the facilitators is provision of forged documents which can ensure exiting countries, travelling through transit countries and eventually reaching and having access to the territory of countries of destination. State authorities are “fighting back” and they have introduced a panoply of criminal offences in relation to using falsified documents in breach of immigration control rules. Examples of such offences include: illegal entry; obtaining or seeking to obtain leave to enter by means of deception; not being in a possession of identification documents at leave or at the asylum interview. This direction is undertaken under the assumption that punishing the immigrants will deter them from resorting to forged documents and in general from using smuggling services which deterrence is necessary for sustaining proper immigration control. The justification for these criminal law measures is that unlawful entry undermines the national legal order and that the immigration control is prejudiced. In the words of the authorities it has to be ensured that “people are deterred from using forged documents in a way which undermines the whole system of immigration control and these offences and others like it are prevalent [so] that public interest requires deterrent sentences for them”.¹

The objective of this paper is to demonstrate the legal implications for asylum-seekers flowing from their resort to falsified documents as a method of gaining access to the territory of asylum countries. Article 31(1) of the Refugee Convention is supposed to act as a shield against punishment for illegal entry. However, the paper identifies four issues relating to the application of Article 31 which make the functioning of the shield difficult. The first issue relates to the procedure of applying Article 31 and in particular the interrelationship between the refugee status determination procedure and the criminal procedure initiated as a result of usage of false document. The second issue is how immigration control rationale permeates the criminal procedure and results in reversal of the burden to the detriment of the defendant/asylum-seeker. The third issue relates to the unavailability of proper legal advice and the ensuing repercussions for applying Article 31’s shield. And lastly, the application of the shield could be so belated that by the time when Article 31(1) is under consideration by appropriate judicial authority, asylum-seekers might not only have been recognized as refugees, but they have already been convicted and served the sentence. Thus, the system is designed in such a manner that immigration control prevails and indeed breaches are sanctioned.

¹ *Regina v. Fregenet Asfaw* [2006] EWCA Crim 707, para.23.

The following UK cases: *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*,² *R v. Liliane Makuwa*,³ *R v. MMH*⁴ and *R v. Abdulla Mohamed and Others*,⁵ implicate the above designated problems and provide a basis for their further investigation. All of the selected cases are from the United Kingdom since this is a jurisdiction offering very comprehensively argued cases in relation to Article 31 of the Refugee Convention.

Before proceeding, the following deflationary point is due. The paper is not interested in the conditions (“coming directly”, “present themselves without delay”, “good cause”) which have to be met for Article 31(1) to be applicable.⁶ What the paper is interested in is the *procedure* for ensuring compliance with Article 31(1), the limitations within that procedure which operate to the detriment of asylum-seekers and the justifications for these limitations.

1. Institutional and Temporal Contradictions between the Asylum and the Criminal Procedures

Article 31(1) of the Refugee Convention stipules that

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

² *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*. [1999] EWHC Admin 765; [2001] Q.B. 667. United Kingdom: High Court (England and Wales) [*hereinafter* Adimi].

³ *R v. Liliane Makuwa* [2006] EWCA Crim 175 [*hereinafter* Makuwa].

⁴ *R v. MMH* [2008] EWCA Crim 3117.

⁵ *R v. Abdulla Mohamed and Others* [2010] EWCA Crim 2400.

⁶ These conditions have been subject of analysis in *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*. [1999] EWHC Admin 765; [2001] Q.B. 667. United Kingdom: High Court (England and Wales) 29 July 1999 [*hereinafter* Adimi]. See also Guy Goodwin Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalisation, Detention, and Prosecution, in *Refugee Protection in International Law: UNHCR Global Consultations on International Protection*, edited by Erika Feller, Volker Turk and Frances Nicholson, Cambridge (2003), p. 185-252 [*hereinafter* Goodwin Gill]; Gregor Noll, Article 31(Refugees Unlawful in the Country of Refuge) in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol A Commentary*, edited by A. Zimmermann, Oxford University Press (2011) p. 1246 [*hereinafter* Gregor Noll].

Goodwin-Gill has argued that

In most cases, only if an individual's claim to refugee status is examined *before* he or she is affected by an exercise of State jurisdiction (for example, in regard to penalization for "illegal entry"), can the State be sure that its international obligations are met. Just as a decision on the merits of a claim to refugee status is generally the only way to ensure that the obligation of *non-refoulement* is observed, so also is such a decision essential to ensure that penalties are not imposed on refugees, contrary to Article 31 of the 1951 Convention.⁷

In other words, the obligation to carry out proper asylum procedure is implied in Article 31.⁸ Until it is determined in a final decision that a particular asylum-seeker is not a refugee, the benefits of Article 31(1) must be afforded.⁹ At the same time, it has also been commented that Article 31 does not prevent the initiation of criminal proceedings.¹⁰ In the words of James Hathaway

Indeed, there is not even a duty to refrain from launching a prosecution against refugees for breach of immigration laws. ...It is therefore lawful for a government to charge an asylum-seeker with an immigration offense, and even to commence a prosecution, so long as no conviction is entered until and unless a determination is made that the individual is not in fact a Convention refugee.¹¹

⁷ Goodwin Gill, p.187.

⁸ Gregor Noll, p.1251.

⁹ James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005) p.389 [*hereinafter* James Hathaway].

¹⁰ "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, of one of the purposes of the proceedings is to determine whether Article 31(1) is in fact applicable. ... On the other hand Article 31 obliges 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. And if proceedings should have been instituted against a refugee, and it becomes clear that his case falls under the provisions of Article 31(1), the public prosecutor must be *duty bound* [my emphasis] to withdraw the case or else see to that the refugee is acquitted." See Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol.II Asylum, Entry and Sojourn, A.W.Sijhoff Leiden (1972), p.210-211. "In the case of asylum-seekers, proceedings on account of illegal entry or presence should be suspended pending examination of their request." See Paul Weis, *The Refugee Convention, 1951: the Travaux Préparatoires analysed*, Cambridge (1995), p.303. In *Adimi*, Lord Justice Brown stated that "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 ... But there is not the least doubt that a conviction constitutes a penalty ..."

¹¹ James Hathaway, p.407.

From an institutional and temporal perspective, the relation between the refugee status determination procedure and the criminal proceedings launched due to use of false documents in breach of immigration laws, remains ambiguous. Which institution within the state should be responsible for ensuring the fulfillment of the state's obligations under Article 31? Is it to be left entirely to the discretion of the prosecuting authorities to decide whether or not to raise charges and/or to proceed with the prosecution against asylum-seekers?¹² How will that decision relate to the refugee status determination procedure in terms of time frame? The Refugee Convention does not give answers to these questions; thus leaving a wide margin for states to decide how to apply Article 31.

There is a way of reconciling the two procedures: in case charges have already been raised, the criminal proceedings should be suspended for the time when the refugee status is under consideration. However, states are far from willing to give up or postpone prosecution for immigration related crimes. Lord Justice Simon Brown must have been aware of these complexities since he left the problem of procedure ultimately unresolved when he delivered his opinion in the case of *Adimi*.¹³ The parties in the case raise the question of how is to be ensured that refugees are not punished and which state institution is to ensure compliance with Article 31(1). In *Adimi*, the applicants argue that there should be no prosecution arising out of possession or presentation of false documents until the asylum claim is determined. In addition, the authority examining the asylum claim (the Secretary of State in the case of UK) should simultaneously determine whether Article 31(1) applies. The applicants point out that there is "a very substantial degree of overlap between the considerations which the Secretary of State will need to have in mind when deciding respectfully (a) asylum and (b) immunity [under Article 31(1)]." Justice Simon Brown was not convinced by this line of argument. He indicated that a disadvantage ensuing from the applicants' position was that there could be *delays* in bringing of

¹² In *Sofineti v. Judge Anderson and Ors* [2004] IEHC 440 (18 November 2004), the High Court of Ireland stated that Article 31 of the Refugee Convention is not part of the domestic law and there cannot be legitimate expectations that its provisions can be successfully invoked to oust the right of the Director of Public Prosecutions to perform his duty. Thus the decision as to whether or not to prosecute the applicant is a matter for the Director of the Public Prosecutions. Another case by the High Court of Ireland: *Siritanu v. The Director of Public Prosecutions and Anor* [2006] IEHC 26 (02 February 2006) confirms that the prosecution of asylum-seekers is left to the discretion of the prosecuting authorities which, in practice, fail to apply Article 31 of the Refugee Convention.

¹³ The case of *Adimi* has been referred to as "one of the most thorough examinations of the scope of Article 31 and the protection due." See Goodwin Gill, p. 203. The case was about the prosecution of three individuals who traveled on false documents. Mr Adimi was an Algerian who fled Algeria due to fear of persecution; he travelled to UK with false passport which was identified as false and he was charged with possession of false passport. Although he was recognized as a refugee, the Crown Prosecution Service continued with his prosecution. Mr Sorani fled Iraq, while in transit in UK to his flight to Canada, it was found that he was in possession of false documents and was charged. Mr Kaziu was Albanian feeling his country who was found to be in possession of a false passport whilst attempting to board an aircraft at Heathrow to Canada.

criminal proceedings, which could be particularly poignant if prosecution could be brought only after exhaustion of appeal possibilities on the refugee case.

On the question of how is to be ensured that refugees are not punished and which institution is to ensure compliance with Article 31(1), the respondents (the Secretary of State, the Director of the Public Prosecutions and the Crown Prosecution Service) in *Adimi* held the position that “it is 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”. Thus, basically, the application of Article 31 will depend on prosecutorial discretion.¹⁴ Justice Simon Brown did not expressly reject that position. He made it clear that he could not go this far as to conclude that the “respondents’ proposals themselves fail to satisfy the UK obligations under Article 31.” Concurrently, he expressed his preference that “Article 31 protection to operate by way of a defence: where it is invoked the burden should be upon the prosecution to disprove it.” The ultimate conclusion from Justice Simon Brown judgment in *Adimi* is that there should be “a procedure to ensure that those entitled to its protection [Article 31’s protection] are not prosecuted, *at any rate to conviction* [my emphasis], for offences committed in their quest for refugee status ...”

The above presented arguments points to the reluctance of the state to postpone the exercise of its criminal jurisdiction when it has to fulfill its obligations under the Refugee Convention, namely, determining those who fall within the refugee definition so that the state can honor the *non-refoulement* obligation and not punishing them for their illegal entry. This is not a tension between two bodies within the state: the prosecuting authorities and the body responsible for making decisions on refugee claims. As it is obvious from the *Adimi* case, the Secretary of State: the body responsible for the conduction of refugee status determination procedure,¹⁵ took the stance that the issue of criminal prosecution of refugees should be left to the discretion of the prosecuting authorities. It is a conflict between, from the one side, the state’s interests to exercise criminal jurisdiction which within the present context pursues the objective of sanctioning breaches of immigration control, and from the other side, the asylum-seekers’ interests, who try to invoke and to rely on that same state’s obligations under the Refugee

¹⁴ For further insights into the position of the Secretary of State, the Director of the Public Prosecutions and the Crown Prosecution Service (the respondents) in the *Adimi* case, see the speech of Justice Newman. Their position was that “if in his [Director of the Public Prosecutions] 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* the he would make a decision not to prosecute [my emphasis].” Thus, if this submission is to be followed, the question of whether the individual is a refugee and the question of whether as a result of that he/she should be punished will be contingent on the discretion of the prosecuting authorities.

¹⁵ *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)*, [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147, United Kingdom: House of Lords, 16 December 1987, Judgement Lord Templeman.

Convention. And after all, it is not an irreconcilable conflict between the two set of interests; they are not mutually exclusive since there is a way of accommodating both. Namely, the only thing a proper application of Article 31(1) will ask the state to do is to *postpone* the criminal jurisdiction. The criminal jurisdiction is still to be effectuated in case it is determined that the asylum-seeker is not a refugee or in case it is determined that although he/she is a refugee, one of the conditions of Article 31(1) has not been fulfill; for example, the refugee has not presented himself/herself “without delay to the authorities”.

2. Shifting the Burden to the Asylum-seeker in the Criminal Proceedings for the Purpose of Upholding Immigration Control

The response to *Adimi* was incorporating Article 31(1) of the Refugee Convention into the UK domestic legal order. The incorporation resulted in Section 31 of the 1999 Immigration and Asylum Act [hereinafter 1999 Act]. Section 31 stipulates that:

(1) It is a defence for a refugee charged with an offence to which this section applies¹⁶ to show that, having come to the UK 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 UK 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 UK.

...

(6) “Refugee” has the same meaning as it has for the purpose 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 Section 31(3) of the 1999 Act says that “In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under – (a) Part I of the Forgery and Counterfeiting Act 1981 (forgery and connected offences); (b) section 24A of the 1971 Act (deception); or (c) section 26(1)(d) of the 1971 Act (falsification of documents)”

As was indicated in the previous section of the paper, first, Article 31 of the Refugee Convention leaves a wide margin for states to decide how to apply it and second, *Adimi* did not give a concrete answer as to the relationship between the refugee status determination procedure and the criminal proceedings. Therefore, it is necessary to scrutinize what legislative choices in terms of procedure were made with Section 31. Section 31 introduces a defence.¹⁷ As a matter of analysis, “a crime” is thought to consist of three elements: *actus reus*, *mens rea* and absence of a valid defence.¹⁸ Thus, if the prosecutor succeeds to prove beyond reasonable doubt the *actus reus* and *mens rea* of the crime of, for example, using a false instrument with the intention of inducing somebody to accept is as genuine¹⁹ and the defendant/asylum-seeker shows that the elements of the defence as established in Section 31 are applicable, then the person will be acquitted and the purpose of Article 31 of the Refugee Convention will be achieved: “The Contracting States shall not impose penalties”. Section 31 clearly puts the burden on the defendant/asylum-seeker to *show* the elements of the defence in the criminal proceedings. This corresponds to the language of Article 31 of the Refugee Convention which also says that the refugees have to “*show* good cause for their illegal entry [my emphasis].” What is specific about Section 31 is that the showing of good cause has to happen within the criminal procedure since it is framed as a defence to specified criminal offences. Since it is not yet established whether the defendant/asylum-seeker is actually a refugee with the procedure designated to make this establishment (the refugee status determination procedure), the establishment is incorporated in the criminal procedure.

As a general rule, the defendant has an evidential burden to raise any evidence which suggests the possible availability of defence. This means that the defendant has to raise the issue of the availability of defence and submit some evidence, however weak, so that the judge can decide to leave the issue for consideration by the jury.²⁰ If the defendant discharges that burden, then the prosecution assumes the burden of proving beyond reasonable doubt that the relevant defence is *not* available in this case.²¹ Pursuant to this general rule the defendant is burdened only with raising the issue of availability of defence. However, there are exceptions to the rule: when a statute explicitly or implicitly modifies the burden imposed on the defendant. Then, the

¹⁷ Archbold Criminal Pleading, Evidence and Practice 2009, Sweet and Maxwell, 25-225.

¹⁸ Simester and Sullivan’s Criminal Law Theory and Doctrine, 4th edition, 2010, Hart Publishing, p.661.

¹⁹ Using a false instrument with the intention of inducing somebody to accept is as genuine is contrary to section 3 of the UK Forgery and Counterfeiting Act 1981.

²⁰ Card, Cross and Jones Criminal Law, 19th edition, Oxford University Press (2010), p.122.

²¹ Simester and Sullivan’s Criminal Law Theory and Doctrine, 4th edition, 2010, Hart Publishing, p.58.

defendant will have not simply evidential, but legal/persuasive burden to prove the elements/conditions of an available defence. The result is that the defendant has to prove the exculpatory elements of the defence on the balance of probabilities (more likely than not to be true).²² Where does Section 31 stand in this quagmire of re-shifting burdens and different thresholds of burdens of proof?

As Section 31 of the 1999 Act is framed, four points deserve particular attention. First, as was already mentioned, Article 31 of the Refugee Convention was incorporated on a national level as a defence in the criminal proceedings already started against the asylum-seeker. Second, the defence is applicable to a refugee, not a person claiming to be a refugee. Third, there are other specific elements/conditions to be met in order for the defence to be available: (1) having come directly; (2) from a country where his life or freedom was threatened (within the meaning of the Refugee Convention); (3) presented himself to the authorities in the UK without delay; (4) showed good cause for his illegal entry or presence; (4) made a claim for asylum as soon as was reasonably practicable after his arrival in the UK. Fourth, besides stating that it is for the refugee to “show”, Section 31 of the 1999 Act does not introduce further clarity as to the types of burden of proof imposed on the refugee and the prosecution.

The next step in the analysis is the case of *R v. Liliane Makuwa* where the choices which found expression in Section 31 and described in the previous paragraph were under discussion.²³ Liliane Makuwa arrived on 15th January 2005 at Heathrow airport from DRC with her two children. She presented herself to an immigration officer, who discovered that the passport that she had tendered had been tampered with (the original photographs were removed and replaced with those of Makuwa and her children). Makuwa insisted that the passport was hers until she was confronted with evidence to the contrary. The next day she was interviewed; she explained that she had fled DRC out of fear for her personal safety and she claimed asylum; the dangers in her country compelled her to present false documents in an attempt to gain entry in the UK. Five months later on 20th May 2005, she was convicted of (1) using a false instrument with the intention of inducing somebody to accept it as genuine and (2) two counts of facilitating an illegal entrant: her two children.²⁴ She was sentenced to 12 months imprisonment. She appealed against the conviction before the Court of Appeal (Criminal Division).

The Court of Appeal’s judgment in *R v. Liliane Makuwa* is quite complex and for the purposes of facilitating the narrative it has to be first explained that the Court of Appeal makes

²² Simester and Sullivan’s *Criminal Law Theory and Doctrine*, 4th edition, 2010, Hart Publishing, p.57; Card, Cross and Jones *Criminal Law*, 19th edition, Oxford University Press (2010), p.119.

²³ *R v. Liliane Makuwa* [2006] EWCA Crim 175.

²⁴ The statutory defence in Section 31 does not apply to the second count. The second count of facilitating illegal entrant is contrary to Section 25(1) of the Immigration Act 1971 and no defence is available as to this crime.

the following order for considering the elements of the defence under Section 31: (1) who has the burden of proof in regard to the refugee status (para.24-26); (2) who has the burden of proof in regard to the “Other matters” (para.27-36). These “Other matters” are the other elements of the defence: (i) having come to the UK directly (ii) from a country where his life or freedom was threatened (within the meaning of the Refugee Convention) (iii) presented himself to the authorities without delay (iv) showed good cause for his illegal entry or presence (v) made a claim for asylum as soon as was reasonably practicable after his arrival in the UK.

2.1. Refugee status determination in the context of criminal proceedings

As to the refugee status, the defence counsel in *Makuwa* argued that the responsibility of determining whether a person is to be recognized as a refugee rests exclusively on the Secretary of State and anyone who has claimed asylum and invokes the defence provided in Section 31 of the 1999 Act must be assumed to be a refugee until the Home Secretary has determined his application for asylum.²⁵ However, the defence’s argument was of no avail. The Court of Appeal firmly stated in *R v. Liliane Makuwa* “We are unable to accept that submission.”²⁶ The Court of Appeal held that the criminal law (Section 31) is framed in such a manner that an element that has to be considered during the criminal trial in order to establish the defence is whether the defendant is a refugee. If the opposite were to be true, then, in the opinion of the Court of Appeal, Section 31 would not refer to “a refugee”, but to “a person charged with a relevant offence who claims to be a refugee”.²⁷

²⁵ *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 18.

²⁶ *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 19. In confirmation to this position, the UK Border Agency Asylum Policy Instructions say that “The role of the Home Office is restricted to the CPS [Crown Prosecution Service] on whether a potential defendant is entitled to protection under section 31. It is always for the CPS to take the final decision as to whether there is sufficient evidence and whether it is in the public interest to proceed with a prosecution. If it appears likely that a claimant would be granted asylum, then prosecution would probably not be considered to be in the public interest; however, *this is a decision for the CPS* [emphasis added].” available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/section32andarticle31.pdf?view=Binary> [last accessed 12 May 2012].

²⁷ *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 19-22. This pronouncement in *Makuwa* is irreconcilable with the statement by Justice Brown in *Adimi* that the protection of Article 31 of the Refugee Convention extends “not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith.”

2.2. The standard of proof for raising the issue of refugee status

As to who carries the burden to prove the refugee status, the Court of Appeal concluded: “provided that the defendant can adduce sufficient evidence in support of his claim to refugee status to raise the issue, the prosecution bears the burden of proving to the usual standard that he is not in fact a refugee.”²⁸ This means that the defendant has merely an evidential burden; once this evidential burden is discharged, the prosecution has to prove beyond reasonable doubt that the defendant is not a refugee.²⁹ There are at least two problems with this resolution. The first problem is that the evidential burden imposed on the defendant includes reaching some degree of likelihood that the defendant is a refugee. The following remark is pertinent at this junction: “It is one thing to designate a burden as evidential; it is another to “quantify” the “amount” of evidence one needs to discharge it. ... The difficulty here is that the object of proof is itself a degree of probability rather than an objective fact.”³⁰ The refugee status is not yet a fact since the refugee status determination procedure is not yet completed. The defendant is put in a position to argue and submit evidence in support of his/her asylum claim. However, how much evidence is the defendant/asylum-seeker supposed to submit just to raise the issue of the defence and to what evidential threshold? The Court of Appeal in *Makuwa* states that “if the defendant bears the burden of proving that he is a refugee ... it is sufficient for him to show that there is a *serious possibility*³¹ that he would suffer persecution for a Convention reason if he were returned to the country of his nationality ... [emphasis added].”³² Accordingly, the defendant has to discharge the standard of “serious possibility” just to raise the issue of the statutory defence. If this standard is not met, the issue of the defence will not be left to the jury for consideration.

²⁸ *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 26.

²⁹ Macdonald’s *Immigration Law and Practice*, 8th edition, Vol.1, LexisNexis, p.1224.

³⁰ Ben Fitzpatrick, *Burden of Proof: immigration – using false instrument – statutory defence*, *Criminal Law Review* (2006), p. 917.

³¹ In *R. v. Secretary of State for the Home Department ex parte Sivakumaran* (1988) 1 All ER 193 (HL), it was established that the standard of proving that a person will face well-founded fear of being persecuted is serious possibility, which is a lower standard than balance of probabilities (more likely than not). See the speech of Lord Diplock at p.994. The standard as also been framed as “reasonable degree of likelihood”.

³² This extract suggests that “even though the burden is merely evidential, the *object of proof* to which the evidential burden attaches, i.e. that of which evidence has to be raised, is a “serious possibility” of persecution” See Ben Fitzpatrick, *Burden of Proof: immigration – using false instrument – statutory defence*, *Criminal Law Review* (2006), p. 917.

2.3. Arguing that the defendant is not a refugee by the prosecution – preemptive denial of refugeehood plus danger of self-incrimination

The second problem relates to the imposition of a burden on the prosecution to prove beyond reasonable doubt that the defendant is *not* a refugee. On the surface, this choice could appear to be favorable for the asylum-seeker. However, is it not a distortion of the idea of refugeehood? The distortion could lie in the fact that the prosecuting authorities have to argue that an individual is *not* a refugee. This gives at least two reasons for concern. The first concern relates to the nature of the case: the case is about a person who is likely to be a victim of human rights violations. The submission of arguments within criminal proceedings that in fact he/she is not a refugee, but a criminal, before that same person has had the chance to argue his asylum claim in front of the designated authorities amounts to preemptive denial of refugeehood. Secondly, the fundamental prohibition on self-incrimination could be implicated. It is the individual claiming asylum who knows why he/she fled his/her country and/or is afraid to go back; within the refugee status determination procedure what the asylum-seeker says should, if possible, be used for his/her favor.³³ While, within the criminal proceedings initiated as a result of usage of false document, the story of the asylum-seeker will be utilized by the prosecuting authorities against him/her. This implicates the prohibition on self-incrimination.

2.4. Immigration control in the context of criminal proceedings

The story does not end if the defendant/asylum-seeker submits sufficient evidence to raise the issue of Section 31's defence, and the prosecution fails to prove beyond reasonable doubt that he/she is not a refugee. There are further complications. As was indicated in the beginning there are other elements to be established so that the defence is applicable. The Court of Appeal in *Makuwa* ruled that as to the other elements the burden is shifted to the defendant/asylum-seeker. This burden is not merely evidential, but a legal burden, which means that the defendant/asylum-seeker has to prove on the balance of probabilities the other elements of the Section 31's defence. This means that he/she has to argue his/her innocence which could implicate the presumption of innocence (Article 6(2) of the European Convention on Human Rights).

Most importantly, the justification for this reversal of the burden of proof deserves particular attention. The justification lies in the objective of maintaining proper immigration control.

The mischiefs at which these statutory provisions [forgery and connected offences, deception and falsification of documents] are aimed are many and various, but the

³³ See Henrik Zahle, *Competing Patterns for Evidentiary Assessment in Proof, Evidentiary Assessment and Credibility in Asylum Procedures* edited by Gregor Noll, Martinus Nijhoff Publishers (2005), p.15.

principle mischief that Parliament must have had in mind when enacting section 31(1) was the use of false passports and other identity papers by those who are not entitled to enter the UK in order to obtain entry. It has been recognized both in Strasbourg and in this country that there is a legitimate public interest in the implementation of a lawful immigration policy which may provide a justification for measures that would otherwise involve infringement of Convention rights, provided that their effect is not disproportionate to the aim which they seek to achieve [...] The facts that claims for refugee status of many of those who seek asylum in this country are ultimately rejected as unfounded underlines the importance of maintaining effective immigration control.³⁴

In the same spirit, the Court of Appeal adds that

We are accordingly satisfied that the infringement of Article 6(2) [of the ECHR] is justifiable in this case since it represents a proportionate way of achieving the legitimate objection of maintaining proper immigration control by restricting the use of forged passports which are one of the principle means by which they are liable to be overcome.³⁵

The reasoning of the Court of Appeal is disturbing for the following reasons. The principle aim of Section 31 of the 1999 Act should be incorporation of Article 31 of the Refugee Convention. Article 31 has been included because the drafters were well aware that refugees might have to breach immigration control to access the territory of the country of destination. The breach of immigration control rules is viewed as possible implication from the quest for asylum. What the Court of Appeal does when interpreting Section 31 is actually finding a way to sanction breaches of immigration control. The reasoning in *Makuwa* gives a cause for concern not only for the reversal of the burden of proof, but also because it seems to have reversed the rationale of Article 31 of the Refugee Convention.

In support of the argument that the defendant/asylum-seeker should carry the legal burden of proving the elements of the defence available in Section 31 of the 1999 Act, the Crown Prosecution Service argued that

... if the defendant bore no more than an evidential burden in relation to them [matters necessary to be proven by the defendant to take advantage of the statutory defence], the Crown would be at serious disadvantage and the effectiveness of the

³⁴ *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 33.

³⁵ *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 36.

legislation relating to the use of false passports to obtain entry would be seriously undermined.³⁶

The Court of Appeal accepted this argument and further elaborated on it:

... it would be difficult, if not impossible, for the Crown [the Crown Prosecution Service] to prove that the defendant's life or freedom had *not* been threatened in the country from which he had come; in most cases, it would be difficult, if not impossible, for the Crown to prove that he had *not* presented himself to the authorities in the UK without delay; in many cases it would be difficult to show that he had *not* shown good cause for his illegal entry or presence or that he had not made a claim for asylum as soon as was reasonably practicable after his arrival in UK [emphasis added].³⁷

After reading these lines, one would immediately react that it is more than understandable that it will be difficult, if not impossible, for the prosecution services to prove that the asylum-seeker's life and freedom had not been threatened in the country from which he had come. After all, *this is not their job*. This job, respectively this kind of determinations, is done through a separate procedure – refugee status determination procedure, executed by bodies within the state with the necessary capacity and expertise.³⁸ It is within that procedure where it is determined what might happen if the asylum-seeker is sent back. In addition, within that procedure there are specificities.³⁹ Within the refugee status determination procedure the authorities have a duty to assist in the decision making, to investigate and to ascertain relevant facts.⁴⁰ They also have the duty to forward information, which may correct, question or even refute information coming from the applicant. In addition, “they [the authorities] are not parties which can take a partisan position selecting only such information which may cause rejection and thus limit immigration.” It has been noted that “... the legal position of the authorities may be provisionally described as

³⁶ *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 34.

³⁷ *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 36.

³⁸ The ECtHR when dealing with cases of *non-refoulement* attaches importance to the knowledge and experience of the national bodies reviewing asylum claims. See for example, *Vilvarajah and Others v. The United Kingdom*, ECtHR, Application No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Judgment of 30 October 1991, para.114.

³⁹ “... the distribution of roles, the production of proof, the assessment of credibility and the weighing of evidence in asylum cases raises a cluster of very specific issues and concerns ...” See Gregor Noll, Introduction: Re-mapping Evidentiary Assessment in Asylum Procedures *in* Proof, Evidentiary Assessment and Credibility in Asylum Procedures *edited by* Gregor Noll, Martinus Nijhoff Publishers (2005), p.2.

⁴⁰ See *R.C. v. Sweden*, ECtHR, Application No.41827/07, Judgement of 9 March 2010, para.53.

entailing a burden of producing information ...”⁴¹ As a consequence of the above quoted ruling, issues related to the asylum claim are decided within criminal proceedings, which could be very problematic.

The insertion of refugee status determination within criminal proceedings results in a contradictory statement in the *Makuwa* judgment, which remains unaddressed by the judges. From the one side, “... provided that the defendant can adduce sufficient evidence in support of his claim to refugee status to raise the issue, *the prosecution bears the burden of proving to the usual standard* [beyond reasonable doubt] *that he is not in fact a refugee* [emphasis added]”.⁴² From the other side, at another point in the same judgment it is stated “In almost all cases it would be *very difficult*, if not impossible, for the Crown [Crown Prosecution Service] to prove that the defendant’s life or freedom had *not* been threatened in the country from which he had come [emphasis added].” It is far from comprehensible what the difference is between arguing that somebody is not a refugee and arguing that his/her life or freedom had not been threatened in the country of origin. One way of resolving the contradiction is by suggesting that the Court of Appeal does not really mean it when it says that the prosecution has to prove “to the usual standard” that the defendant is not a refugee.

3. Unavailability of Legal Advice and the Potential Meaninglessness of Raising Article 31’s Protection

As was already clarified, the procedure for applying Article 31 of the Refugee Convention within the UK context is of such a character that the defendant has to raise the issue that he/she is a refugee within the already commenced criminal proceedings. Normally, this requires proper legal advice. The cases of *R v. MMH*⁴³ and *R v. Abdulla Mohamed and Others*⁴⁴ demonstrate possible complications in relation to the availability of legal advice. In *R v. MMH*, the defendant was a child asylum-seeker from Magadishu, who was charged with the offence of possession of a

⁴¹ Henrik Zahle, *Competing Patters for Evidentiary Assessment in Proof, Evidentiary Assessment and Credibility in Asylum Procedures* edited by Gregor Noll, Martinus Nijhoff Publishers (2005), p.19-20.

⁴² *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 26. Section 31(7) of the 1999 Act provides that “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.” This section is interpreted to the effect that “The fact that the statute casts a burden on the defendant under these circumstances [if the Secretary of State has refused to grant a claim for asylum] to show that he is a refugee tends to support the conclusion that he does not bear that burden under other circumstances.” para.25.

⁴³ *R v. MMH* [2008] EWCA Crim 3117.

⁴⁴ *R v. Abdulla Mohamed and Others* [2010] EWCA Crim 2400.

false identity document.⁴⁵ As was explained in the previous section of the paper, Section 31 of the 1999 Act offers a defence. However, in this case the asylum-seeker did not receive proper legal advice as to the existence of the defence. At the criminal trial, he pleaded guilty and was sentenced to 10 months imprisonment. That conviction was passed on the conclusion that he was over 21. It was only subsequently established that he was below 18. This case exposes one of the problems concerning the procedure of applying state's obligations under Article 31 of the Refugee Convention. The triggering of Article 31's application depends on the initiation by the defendant/asylum-seeker's legal advisor. If the legal advisor does not raise the issue, it is as if the issue does not exist.

The case of *R v. Abdulla Mohamed and Others* involved four asylum-seekers charged for presenting false passports; they pleaded guilty and were sentenced to respectfully 12, 12, 15 and 8 months imprisonment. They were not advised on the possibility of mounting a defence as asylum-seekers. In 3 of the cases, the UK Court of Appeal concluded that there were reasonable prospects for a successful defence. It emphasized the significance of legal advice: "It is thus *critical* for those advising defendants charged with such an offence make clear the parameters of the defence (including the limitations and potential difficulties) so that the defendant can make an informed choice whether or not to seek to advance it [emphasis added]."⁴⁶ Most importantly, the Court of Appeal made the general remark that:

These cases are characterized by allegations that those advising illegal entrants to this country have simply *failed* to ensure that the scope of the potential defenses to an allegation of breach of s.25 of the 2006 Act [possession of false identity documents] have fully been explored. If the circumstances and instructions generate the possibility of mounting a defence under s.31 of the 1999 Act, there is simply no excuse for a failure to do so and, at the same time, properly to note both the instructions received and the advice given. If these steps are taken, cases such as the four with which the Court has just dealt, will not recur and considerable public expense (both in the imprisonment of those convicted and in the pursuit of an appeal which will involve evidence and waiver of privilege) will be avoided [emphasis added].⁴⁷

It is positive that court in *R v. Abdulla Mohamed and Others* appealed to legal representative to be aware and apply when the circumstances allow Section 31. However, the following paradox has not received due attention. How to reconcile the problem exposed in *R v.*

⁴⁵ See Section 25(1) and (6) of the UK Identity Cards Act 2001.

⁴⁶ *R v. Abdulla Mohamed and Others* [2010] EWCA Crim 2400, para.10.

⁴⁷ *R v. Abdulla Mohamed and Others* [2010] EWCA Crim 2400, para.56.

Abdulla Mohamed and Others regarding access to legal advice and, in particular, access to legal advice of good quality with the following policy instruction: “When a person’s intention is to claim asylum, but he or she delays in doing so *solely* for the purpose of approaching a lawyer or a voluntary organization first, he or she is unlikely to be entitled to rely on the protection afforded by section 31”⁴⁸ The combined interpretation of *R v. Abdulla Mohamed and Others* and the policy instruction suggests that if an asylum-seeker “wastes time” and tries to be “smart” searching for a lawyer or an organization that he/she believes could provide him with proper advice, he/she will not benefit from the protection of Section 31. It also suggests that if an asylum-seeker does not manifest any agency in searching for a proper legal advice, he/she might still not be “rewarded” by the host state since as the case of *R v. Abdulla Mohamed and Others* demonstrates, he/she will most likely not again benefit from Section 31. As early as 1996, it was reported that solicitors of immigrants appointed for the criminal charges relating to usage of false passports for entering UK, were hardly aware and helpful in regard to the immigration/asylum aspects of the cases.⁴⁹ This unawareness explains why asylum-seekers are not advised as to the availability of a defence under Section 31.

There is another similarly striking problem here: by the time it is established that an asylum-seeker should not be convicted for his/her resort to false documents, he might have already served the sentence.⁵⁰ The boy from Magadishu in *R v. MMH* was sentenced to 10 months imprisonment.⁵¹ The Court of Appeal quashed the conviction; however, as it is clear from the ending paragraphs of the judgment at the time when the conviction was quashed, the boy has already served the 10 months imprisonment. The situation was similar with Fregenet Asfaw, an Ethiopian asylum-seeker charged with two criminal offences whose factual basis was identical: using a false passport and attempting to obtain services by deception.⁵² Asfaw served the sentence on the second count, although she was recognized as a refugee.⁵³ Accordingly, at the end of the day breaches of immigration control by refugees do not remain without sanctions.

⁴⁸ See UK Border Agency Asylum Policy Instructions, Section 31 of Immigration and Asylum Act 1999 and Article 31 of the 1951 UN Convention, available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/section32andarticle31.pdf?view=Binary> [last accessed 12 May 2012]

⁴⁹ See Liz Hales, *Refugees and Criminal Justice? Cropwood Occasional Paper* No.21, University of Cambridge Institute of Criminology (I would like to thank the Cambridge Institute of Criminology for sending me this paper).

⁵⁰ The review of the UK cases demonstrates that usual sentence is in the range of about 12 months.

⁵¹ *R v. MMH* [2008] EWCA Crim 3117, para.8.

⁵² *R v. Fregenet Asfaw* [2006] EWCA Crim 707; *R v. Asfaw*, [2008] UKHL 31, 21 May 2008.

⁵³ *R v. Asfaw*, [2008] UKHL 31, 21 May 2008, Lord Bingham, para.6.

Lastly, without any intention of entering into a debate on immigration and asylum statistics, it is the right junction to draw the reader's attention to the following pronouncement in *Makuwa*: "The facts that claims for refugee status of many of those who seek asylum in this country are ultimately rejected as unfounded underlines the importance of maintaining effective immigration control."⁵⁴ The court obviously takes note of the number of rejected asylum applications. No note is, however, taken of how many refugees have to go through criminal trials while at the same time arguing their asylum claims. Similarly, no note is taken of how many refugees have to serve sentences for using false documents in the exercise of their right to seek asylum when in fact states have adopted an obligation not to punish them. These questions seem to be irrelevant. However, they are very relevant because non-punishment for illegal entry is not a benefit extended to the refugees. Article 31 of the Refugee Convention says that "The Contracting States *shall not* impose penalties," which clearly means that the state parties have adopted clear obligation not to impose penalties. The right corresponding to this obligation is held by the refugees.

Conclusion

Asylum-seekers find themselves caught in between the immigration control system and the criminal justice system. The focus of this paper was on the criminal justice side and how it is supported and reinforced by the immigration control rationale. The purpose of Article 31 of the Refugee Convention is, under certain conditions, to "safe" refugees from the criminal system or at least to mitigate its effects on refugees. This purpose is of particular relevance when access to territory is hardly possible without breaching immigration rules, which breach is also qualified as criminal offences. This paper demonstrates that the choices made in the United Kingdom both by the legislator and the court as to how to incorporate Article 31 in the domestic legal order lead to accumulation of problematic elements. When these choices are made, immigration control and sanctioning breaches of immigration rules seem to be of pivotal role. First, the idea of suspending the criminal prosecution while the refugee status determination procedure is ongoing has been rejected. Second, as a consequence of this, considerations of asylum-related issues are inserted in the criminal procedure since pursuant to Section 31 proving that the defendant is a refugee who comes from a country where his/her life or freedom is threatened functions as a defence to the criminal charges. Third, this leads to all kinds of complications: arguing a refugee case within a criminal trial when in fact there is a separate procedure for that with its specificities; submission of evidence that the defendant is not a refugee by the prosecution before the refugee case itself is decided; self-incrimination; shifting of burden of proof. Fourth, once asylum-seekers are in the cogs of the criminal system, they do not receive help as to the asylum aspects of their cases which results in inapplicability of Article 31 of the Refugee Convention.

⁵⁴ *R v. Liliane Makuwa* [2006] EWCA Crim 175, para. 33.

The paper suggests that the criminal proceedings should be suspended until the refugee status is determined. Further elaboration on this suggestion is necessary. When delivering his judgment in *Adimi*, Justice Simon Brown objected to the idea of suspension since, in his opinion, there could be *delays* in bringing of criminal proceedings.⁵⁵ It has to be recognized that in case of suspension there will inevitable be delays in moving forwards with the criminal prosecution since that prosecution has to be suspended until the asylum claim is ultimately decided. This suspension of proceedings might eventually result in delays in the imposition of punishment in case of conviction. It could be, however, suggested that we should look at the issue from a broader perspective and do a balancing exercise. On the one side of the scale, the following considerations are pertinent: (1) asylum seekers are, in fact, “punished” for their resort to false documents within the refugee status determination procedure: production of a document that is not a valid passport as if it were is a behavior damaging the claimant’s credibility;⁵⁶ (2) asylum-seekers who have entered the country illegally through the usage of false documents are anyhow detained (this is immigration/administrative detention), which means that people with undetermined identity do not usually go around freely in the host state’s society, which should alleviate security concerns and should render pre-trial detention unnecessary.⁵⁷ On the other side

⁵⁵ Justice Simon Brown pointed to another disadvantage: there could be cases when immunity should apply even when asylum is refused (in cases of return to safe third country or in cases of granting exceptional leave to remain rather than asylum). The adoption of this argument against the applicants’ position is strange. It is absolutely true that it might not be just and humanitarian for a state to impose criminal punishment to individuals refused asylum, but granted other forms of complementary protection. However, it should be kept in mind that states have undertaken obligations of non-penalization only in regard to refugees. Most importantly, what Justice Simon Brown’s argument does is juxtaposing two groups, namely refugees and individuals eligible for other forms of protection, and saying that the first group should not benefit from something because the second group will not benefit either.

⁵⁶ See UK Border Agency Asylum Policy Instructions, Considering the Protection (Asylum) Claim and Assessing Credibility, available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/asylum-assessing.credibility.pdf?view=Binary> [last access 12 may 2012]

⁵⁷ The UNHCR’s position is that detention of asylum-seekers is admissible “... to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum.” See Executive Committee Conclusion No. 44 (XXXVII) 1986, para. b. The term immigration detention is used to designate deprivation of liberty under administrative law for reasons that are directly linked to the administration of immigration policies. See Galina Cornelisse, *Immigration Detention and Human Rights. Rethinking Territorial Sovereignty*, Martinus Nijhoff Publishers (2010), p.4. In practice, there seems to be a crosscheck between (1) administrative/immigration detention and (2) pre-trial and/or post-conviction detention due to criminal offences related to usage of false documents. For example, in the case *R v. Kasra Rostamkhany* [2007] EWCA Crim 3426, which was about an asylum-seeker sentenced to 8 months imprisonment for usage of false passport, the Court of Appeal noted “His detention for immigration purposes was in effect a *dual detention*. Whatever sentence was imposed he would remain in custody until his asylum application was processed. There was no recommendation for deportation [emphasis added].”

of the scale is the problem pointed by Justice Simon Brown that there will be delays in the criminal proceedings. What could be the negative impact from the delay itself? The asylum-seeker will be anyway most probably in administrative detention; in case he/she is not, most likely there will be no reason to keep him/her in pre-trial detention either. Neither is the interest of the host state to deport a failed asylum-seeker harmed; after all, the host state has the incentive to initiate deportation as soon as possible regardless of the criminal prosecution for usage of false passport. At this point we have to also make a distinction between the smugglers and the immigrants using smuggling services. There could be strong interest to punish the smugglers; but in cases of failed asylum-seekers who have used false documents the interest of the county of destination is to deport them.⁵⁸ Thus, if we balance the above described scales, delays in criminal proceedings for the crime of using false documents pales in the face of the harm done due to imposition of criminal punishment on refugees who should not be punished.

⁵⁸ Article 5 of the UN Protocol against the Smuggling of Migrants stipulates that migrants should not be criminally prosecuted for being an object of human smuggling.

Bibliography:**UK Case Law**

R v. Fregenet Asfaw [2006] EWCA Crim 707

R v. Uxbridge Magistrates Court and Another, Ex parte Adimi. [1999] EWHC Admin 765; [2001] Q.B. 667. United Kingdom: High Court (England and Wales)

R v. Liliane Makuwa [2006] EWCA Crim 175

R v. MMH [2008] EWCA Crim 3117

R v. Abdulla Mohamed and Others [2010] EWCA Crim 2400

R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening), [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147, United Kingdom: House of Lords, 16 December 1987, Judgement Lord Templeman

R v. Kasra Rostamkhany [2007] EWCA Crim 3426

Other National Case Law

Sofinetti v. Judge Anderson and Ors [2004] IEHC 440 (18 November 2004)

Siritanu v. The Director of Public Prosecutions and Anor [2006] IEHC 26 (02 February 2006)

ECtHR's Cases

Vilvarajah and Others v. The United Kingdom, ECtHR, Application No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Judgment of 30 October 1991

R.C. v. Sweden, ECtHR, Application No.41827/07, Judgment of 9 March 2010

Books

James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005)

Atle Grahl-Madsen, *The Status of Refugees in International Law, Vol.II Asylum, Entry and Sojourn*, A.W.Sijhoff Leiden (1972)

Paul Weis, *The Refugee Convention, 1951: the Travaux Preparatoires analysed*, Cambridge (1995)

Archbold Criminal Pleading, Evidence and Practice, Sweet and Maxwell (2009)

Simester and Sullivan's Criminal Law Theory and Doctrine, 4th edition, Hart Publishing (2010)

Card, Cross and Jones Criminal Law, 19th edition, Oxford University Press (2010)

Macdonald's Immigration Law and Practice, 8th edition, Vol.1, LexisNexis

Galina Cornelisse, Immigration Detention and Human Rights. Rethinking Territorial Sovereignty, Martinus Nijhoff Publishers (2010)

Chapters in Books

Guy Goodwin Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalisation, Detention, and Prosecution, *in* Refugee Protection in International Law: UNHCR Global Consultations on International Protection, *edited by* Erika Feller, Volker Turk and Frances Nicholson, Cambridge (2003)

Gregor Noll, Introduction: Re-mapping Evidentiary Assessment in Asylum Procedures *in* Proof, Evidentiary Assessment and Credibility in Asylum Procedures *edited by* Gregor Noll, Martinus Nijhoff Publishers (2005)

Gregor Noll, Article 31(Refugees Unlawful in the Country of Refuge) *in* The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol A Commentary, *edited by* A. Zimmermann, Oxford University Press (2011)

Henrik Zahle, Competing Patterns for Evidentiary Assessment *in* Proof, Evidentiary Assessment and Credibility in Asylum Procedures *edited by* Gregor Noll, Martinus Nijhoff Publishers (2005)

Articles

Ben Fitzpatrick, Burden of Proof: immigration – using false instrument – statutory defence, *Criminal Law Review* (2006)

Liz Hales, Refugees and Criminal Justice? *Cropwood Occasional Paper* No.21, University of Cambridge Institute of Criminology

UNHCR Documents

Executive Committee Conclusion No. 44 (XXXVII) 1986

Others

UK Border Agency Asylum Policy Instructions, Section 31 of Immigration and Asylum Act 1999 and Article 31 of the 1951 UN Convention, available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/section32andarticle31.pdf?view=Binary>

UK Border Agency Asylum Policy Instructions, Considering the Protection (Asylum) Claim and Assessing Credibility, available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/asylum-assessing.credibility.pdf?view=Binary>