The Court of Appeal and the Criminalisation of Refugees

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in collaboration with the CCRC

with the support of QMUL

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Acknowledgements and Declaration

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[1] The CCRC Research Committee is chaired by Professor Cheryl Thomas; the Board consists of Dr Sharon Persaud (CCRC Commissioner), Professor David Ormerod QC (Law Commission), Paul Harris (Managing Partner, Edward Fail, Bradshaw & Waterson) and Francis Fitzgibbon QC, (22 Essex Street Chambers).

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Refugees are convicted and imprisoned in the UK of offences of irregular entry and stay contrary to international refugee law and domestic criminal law. They tend to plead guilty on legal advice[2] and tend not to appeal their convictions. Since 2002, refugees have applied to the CCRC for review of their convictions. The CCRC has referred convictions of refugees to the Court of Appeal since 2007,[3] finding that exceptional circumstances exist to get over the hurdle of no appeal. In 2016, the Court of Appeal advised the CCRC that the problems raised by these cases was now well understood, that the CCRC ought not to find that exceptional circumstances existed in these cases as a matter of routine, that the Court of Appeal was able to deal with the cases and refugees should therefore apply direct to the Court and not to the CCRC. The CCRC revised its policy on exceptional circumstances and now directs refugees who apply to the CCRC to apply direct to the Court out of time.

This exploratory study examines whether refugees who are directed by the CCRC to apply to the Court of Appeal actually go on to do so. The study concludes that most refugees in this situation do not appeal their convictions (over 85%). Of those that do (about 14%), most are unsuccessful. Of the 35 refugees examined in the study who had applied to the CCRC before or after the *Nori* case but who were caught by the CCRC's new policy, only one has successfully appealed his conviction (less than 3% of the 35).

The findings of the study are that the Court of Appeal's approach after *Nori* does not protect refugees and has implications for refugees, the CCRC and the Court

[2] 120+ refugees have applied to the CCRC for a review of conviction since 2002. Of these two pleaded not guilty, one may have pleaded not guilty and the rest pleaded guilty.
[3] It has referred convictions to Crown Courts since 2005, the first asylum referrals being the four cases in *R v A, A, N and S (Iran and Libya)* [2005] Unreport CCRC Ref Isleworth Crown Court.

itself. The study reveals various reasons why refugees do not appeal their convictions and the lack of success when trying to do so. Refugees lack knowledge about the legal and criminal justice system. Refugees do not see themselves as criminals; and they bear a sense of shame and stigma that they are seen as such which has the potential to severely impact their lives. There is also a lack of knowledge by actors in the criminal justice system of the relevant law, particularly in complex cases, and insufficient resources in terms of people or organisations who can give accurate and timely assistance to refugees.

The impact of *Nori* on the CCRC is that it has undermined its function as a miscarriage of justice organisation with the result that it is failing to apply its policy consistently on exceptional circumstances. The approach of the Court of Appeal in *Nori* reflects a social practice of criminalisation which makes it harder for refugees to overturn their convictions and therefore prolongs the penalisation which is contrary to article 31(1) of the Refugee Convention. The Court and the CCRC are inconsistent in their application of ‘exceptional circumstances’ in no appeal cases. The findings suggest that further research is needed to identify the extent of the problem and assess how the situation might be improved.

1. Introduction

> *I came, it was a bright future in my mind and I saw [laughs] something different. That doesn't mean that I was against the decision, that I am not happy. No! For all my respect for the British law … this is up to them not up to me to decide. But I expected something different!*
> *[Refugee 43]*

> *I was not aware that this, when you come to a country for **help**, they would **arrest** you. They would put you in prison. That's the thing that never convinced me that I have got a crime in this country.*
> *I [had] just lost my family. They were assassinated.*
> *[Refugee 53]*

1.1 Introduction to the project and report

This report examines the situation of refugees in England and Wales who are prosecuted to conviction for irregular migration in circumstances which are contrary to the mandatory requirement in international refugee law that refugees *not* be penalised for irregular entry or presence in a country.[4] The Court in *R v YY and Nori* [2016] EWCA Crim 18 ('*Nori*') stated that refugees who had been convicted of offences of irregular migration but who had not appealed their convictions and were now out of time to do so need no longer apply to the CCRC.[5] Instead refugees in this position could go straight to the Court of Appeal. The Court also suggested that the CCRC ought to change its policy on exceptional circumstances as in the Court's view, the CCRC appeared to be applying exceptional circumstances as 'a matter of routine'. The CCRC changed its policy on exceptional circumstances after the *Nori* case (see further at **2.4.3**). The research question - *Does the approach of the Court of Appeal after R v Nori protect refugees from criminalisation?* - investigates whether refugees are appealing direct to the Court and the outcomes; and evaluates the impact of *Nori* on refugees and on the decision-making of the CCRC and the Court. The CCRC identified the research topic as one that is important to its functioning as a reviewer of miscarriages of justice.

[4] Article 31(1) of the 1951 Refugee Convention is discussed at 2.1. This report is focussed on refugees but the prosecution of other migrants also raises serious legal and human rights concerns, Cathryn Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees* (UNHCR Division of International Protection 2017) 8.
[5] The relevant paragraphs, 38 to 45, are reproduced below at Appendix 1.

The report first introduces its methodology. There then follows an analysis of the background of the prosecutions of refugees, the law involved and the research to date in this area. This section also gives an outline of the CCRC, including its policy on 'exceptional circumstances' in cases where there has been no previous appeal and the judgment in *Nori*. Section 3 examines 36 CCRC cases (involving 35 refugees), a few reported cases and three interviews of refugees to identify outcomes for refugees and impact. The findings and conclusion are identified in section 4.

1.2 Methodology

The research question asks whether the approach of the Court of Appeal after *Nori* protects refugees from criminalisation by examining the effect of the *Nori* decision on refugees and the impact on decision-making by the CCRC and the Court of Appeal. The study uses Lacey's methodology of criminalisation.[6] Lacey describes criminalisation as being a useful umbrella concept which can be used for the 'overall framework for study of criminal law and of the criminal justice and penal processes'.[7] The research study draws on the distinctions which Lacey makes in conceptualising criminalisation.[8] The study uses criminalisation as pattern or outcome (describing what has been criminalised)[9] by outlining the formal criminalisation (legislation and judicial decisions) as well as the substantive criminalisation (the prosecution) of refugees). The patterns of criminalisation for refugees are the same whatever the offence although immigration offences tend to attract lower sentences of imprisonment. A key pattern is that between the 1990s and about 2006, refugees tended to be prosecuted in magistrates' courts but from about 2006, refugees are increasingly being prosecuted in Crown Courts. This has implications for the Court of Appeal which increasingly deals with appeals of refugees from the Crown Court.

Criminalisation as pattern or outcome is the background of the report which is considered in section 2. The focus of the study is on criminalisation as a social practice, that is, the study in section 3 examines who is doing the criminalising on both a formal level (Court of Appeal decisions), as well as 'in action', that is, the

[6] N Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72 Mod L Rev 936.
[7] ibid 936, fn 2.
[8] ibid 938.
[9] ibid 943.

practices and policies of the Court of Appeal and the CCRC. This mixture of doctrinal and socio-legal research may be described as 'as an 'external enquiry into the law as a social entity'[10] as it relates to the criminalisation of refugees and therefore also has a law reform purpose. This 'external enquiry' represents 'an evaluation of the effectiveness' of the protection afforded to refugees by the Court of Appeal.[11]

1.2.1 Data collection methods and procedures

The research team worked in collaboration with the CCRC in obtaining data relating to refugees convicted of irregular entry and stay; and CCRC policy on exceptional circumstances.

1.2.1.1 CCRC cases and policy

CCRC case data was analysed to identify refugees who were informed by the CCRC between March 2016 and July 2018 that the CCRC was unable to review their convictions. Data was located via five sources:

a) a CCRC research report on the approach of the CCRC after the *Nori* case completed by interns, dated 14 September 2017, identified nine refugees who applied to the CCRC between April 2016 and September 2017.[12]
b) a request by Dr Holiday for a list of applicants who had applied to the CCRC between September 2017 (the date of the intern report) and April 2018 resulted in a list of 111 applicants convicted of 'fraud' and 'immigration' offences. Of these, seven were refugee cases with four convictions in the magistrates' courts. Of the two remaining Crown Court convictions, two were re-applications to the CCRC and were included in the research (cases 48 and 10; and 13 and 12). The third is under CCRC review and was not included in the research because the refugee had already appealed.
c) a CCRC note about Crown Court no appeal cases after *Nori*, dated 1 April 2016, identified various cases, thirteen of which were included in the research (Cases 14 – 23, 42 and 43). These cases applied to the CCRC between 2012-2015. Other

[10] P Chynoweth, 'Legal Research' in L Ruddock and A Knight (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 30.
[11] ibid 28-30.
[12] These were Cases 1 – 9.

cases, dating from 2013 and 2014, were not included due to time constraints. However, these should be examined in any further research.

d) the note at c) referred to a trawl of Crown Prosecution Service (CPS) cases from which a smaller list of cases of interest was compiled by the CCRC. These cases were not examined due to time constraints. However, three of them are included at c).

e) a further request by Dr Holiday for applications made by refugees from April 2015 to April 2016 resulted in a list of 104 'fraud' and 'immigration' cases. Of these, 23 were refugee cases. Ten were Magistrates' Court cases. The remaining thirteen were included in the research (Cases 45-46, 48-51, 53, 55-56, 58-61).

There were a total of 36 cases (with 35 refugees) who applied to the CCRC before or after the *Nori* case who were caught by the CCRC's change in policy on exceptional circumstances. These were not the total number of cases as not all refugees who had applied prior to April 2015 were included. It should also be noted that this report focuses on Crown Court cases and not Magistrates' Court cases. The cases were categorised into various overlapping groups, for example, according to gender, type of offence, defences available, length of sentence, country of origin and whether legally represented. The status of the refugees was also analysed to determine the proportion of recognised refugees or those who had been granted some other status, those whose claims were ongoing (asylum seekers) and those whose claims seem to have ended. Cases were also categorised according to whether they had applied to the CCRC before or after *Nori*; and whether refugees had been approached by the CCRC as a result of the CPS trawl. CCRC policy on exceptional circumstances was also examined (at **2.42-2.4.4**).

1.2.1.2 Data about appeals

A Freedom of Information request was made to the Ministry of Justice (MoJ) to identify refugees applying to the Court of Appeal but the MoJ was not able to provide these figures due to the time it would have taken. However, the CCRC was able to interrogate the dataset through the Criminal Appeals Case Tracking User System (CACTUS) to identify which refugees had applied to the Single Judge for leave to appeal, which renewed their applications to the full Court of Appeal and

which were successful in having their convictions quashed. This information was then shared with the research team. The cases of refugees who went on to appeal their convictions to the Court of Appeal were considered in terms of legal representation, legal advice, the outcome of the appeal and other factors. In addition, seven Court of Appeal cases reported since *Nori* have been considered (see **3.3**).

1.2.1.3 Interviews

Three refugees were interviewed after full ethics approval was obtained from QMUL. Refugees who were suitable for interview were identified as being those convicted in the Crown Court of a relevant offence; who had been rejected by the CCRC between March 2016 and July 2018 and directed to the Court of Appeal; who had either been granted refugee or some other status; and who appeared to have sufficient English. There were 19 of these refugees. They also represented a mix of offences, male and female and range of countries of origin.

These refugees were contacted by the CCRC by letter and provided with detailed information sheets, the content of interview questions as well as a copy of the consent form. Refugees were invited to contact Dr Holiday by email if they wished to participate in a 30 minute interview. Nine initial letters were sent to refugees from which there was one response. A further ten letters were sent to refugees by the CCRC from which there were two responses. All threee responses led to interviews being conducted, two in London and one in Wales. Prior to the interviews, Dr Holiday went through the information sheets and answered questions about the interviews. The refugees signed the consent forms prior to the start of the interviews. Opportunity was given to opt out of the research or ask further questions about the project. No incentive was offered to the refugees other than the ability to contribute to research on an issue that had affected them and which might result in developments in the criminal justice system.

The interviews were recorded and transcribed by Dr Holiday. Due to the small number of interviews, the transcripts were examined by identifying themes using Excel. Topics in the interviews focused on the extent of the knowledge of their convictions, the criminal justice system (the CCRC, the appeal process, the Court of Appeal and how to appeal) and any impact the convictions had had on their lives. The participants were also asked about what they might need to help them to appeal their convictions. Refugee details have been kept confidential, and personal details

anonymised. The participants are referred to by number and they cannot be identified in the report. The research team has followed the strict requirements for data storage, usage and archiving as required by QMUL's Ethics of Research Committee. Given the vulnerability of refugees and asylum seekers and the practice in asylum cases not to identify them, we have chosen to refer to most of the criminal cases by initials only (this is already done with some cases, eg *R v AM, MV, RM, MN* [2010] EWCA Crim 2400). However, we have used names where the cases are commonly known (as in *R v Uxbridge Magistrates' Court ex parte Adimi (2001) QB 667* or *R v Asfaw* (2008) UKHL 31).

Refugees 43 and 53 wanted assistance from the CCRC and Dr Holiday advised them to go to the Court of Appeal. Some weeks after the interviews, Refugees 43 and 53 were given details of three solicitors with expertise in this area.[13]

[13] These were Bhatt Murphy, Bindmans and Wilsons Solicitors.

2. The prosecution of refugees: Background

> *when I was in the jail, my solicitor sent to me [a] letter. I couldn't get anyone to interpret me that [letter] to me … I didn't know how to read it. You know,.. it was very difficult. …… in a simple way I was like a blind[man], a deaf[man], just they took me from place to place and I didn't know.*
> *[Refugee 59]*

The background to this research lies in article 31(1) of the 1951 Refugee Convention which is a fundamental principle of non-penalisation which provides a broad and flexible means of individual human rights protection for refugees. The centrality of Holiday's doctoral work for this research is first identified which is followed by a brief overview of the relevant international refugee law and the national law in England, Wales and Northern Ireland.[14] The case of *ex parte Adimi* is outlined, the first case in the UK which considered the prosecution of refugees in the context of article 31(1) of the Refugee Convention. National criminal law gives effect to article 31(1) via defences: a 'refugee defence' in section 31 of the Immigration and Asylum Act 1999 ('the 1999 Act') and a 'reasonable excuse' defence contained in some of the offences of which refugees are convicted. The most common offences are then identified. The CCRC's involvement in the prosecution of refugees is outlined including an examination of 'exceptional circumstances' and the *Nori* case.

2.1 Holiday's doctoral work

There is an extensive literature on the 'criminalisation' of refugees (and other migrants), particularly in Europe,[15] as well as on article 31 generally, particularly in relation to article 31(2) which relates to detention.[16] The literature is more limited on

[14] The law in Scotland is similar but it has a separate legal system with a separate CCRC.
[15] Eg, Elspeth Guild, *Criminalisation* (Council of Europe Commissioner for Human Rights 2009); Joanna Parkin, 'The Criminalisation of Migration in Europe' (2013) 61 CEPS Paper in Liberty and Security in Europe; Valsamis Mitsilegas, *The Criminalisation of Migrants in Europe. Challenges for Human Rights and the Rule of Law* (Springer 2014).
[16] Eg, GS Goodwin-Gill, 'Article 31' in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law* (CUP 2003); Emily Flahive, 'National Identity Crisis: The Politics of Constructing National Identity and Mandatory Detention of Asylum-Seekers in Australia and Japan' (2007) 23 Journal of Japanese Law 139; Julia Mink, *Detention of Asylum Seekers in Hungary. Legal Framework and Practice* (Hungarian Helsinki Committee 2007); James C Hathaway, 'Why Refugee Law Matters' (2007) 8 Melbourne J Int L 89; Thomas Hammarberg, 'States Should Not Impose Penalties on Arriving Asylum Seekers' (2008) 20 Int J Refugee L 364; Hungarian Helsinki Committee, National Police HQ and UNHCR, *Report on the Border Monitoring Program 2008-2009*

explorations of the prosecution of refugees for 'illegal entry or presence'.[17] The first research on the failure of the UK to take article 31(1) into account in the prosecution of refugees was in 1996 and 1998.[18] This has been supplemented by empirical research in Hungary,[19] of Aliverti on immigrants generally in England and Wales[20] and Christie on refugees in Scotland.[21] The most extensive research on article 31(1), however, is Holiday's doctoral work.[22]

Holiday's doctoral thesis investigated why refugees are criminalised without any - or insufficient – regard to article 31(1). She explored the criminalisation of refugees through criminal law theory and principles of criminalisation. Academic writing has hitherto generally been concerned either with article 31(1) from an international refugee law perspective[23] or with the use of national law in the enforcement of immigration offences.[24] While international refugee law academics tend to consider the national criminal law of states on a formal rather than an empirical level, academics focusing on national laws tend to ignore the situation of refugees or particular groups of migrants and focus on immigration offences rather than non-immigration offences.

Holiday's research argued that Spena's spurious *Täterstrafrecht* theory provides a good explanation for why refugees are prosecuted for these offences: they are prosecuted for who they are and the situations they find themselves in rather than for what they have done.[25] The international context explores the historical background, development, meaning and application of article 31(1). The domestic context identifies formal and substantive criminalisation in England and Wales between 1793-2016. The institutional responses (of Parliament, the police, Crown Prosecution Service, Home Office, and the judiciary) to article 31(1) reveals a patchwork of

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(UNHCR 2010); Global Detention Project, *Immigration Detention in the Gulf* (GDP 2015); Costello (n 4).

[17] Goodwin-Gill (n 16); G Noll, 'Article 31' in A Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, A Commentary* (OUP 2011); Costello (n 4).

[18] Liz Hales, *Refugees and Criminal Justice?* (University of Cambridge 1996); Richard Dunstan, 'Breaches of Article 31' (1998) 10 Int'l J Refugee L 205.

[19] Hungarian Helsinki Committee, National Police HQ and UNHCR (n 16).

[20] Ana Aliverti, *Crimes of Mobility* (Routledge 2013).

[21] Gary Christie, 'Prosecuting the Persecuted' (Scottish Refugee Council 2016).

[22] The thesis was supervised by Professors Mitsilegas and Guild, QMUL. Yewa Holiday, *The Criminalisation of Refugees in England and Wales in the Context of Article 31(1) of the 1951 Refugee Convention* (Brill 2019).

[23] Goodwin-Gill (n 16); Noll (n 17); Costello (n 4).

[24] Aliverti (n 20).

[25] Alessandro Spena, 'Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law' (2014) 8 Crim Law and Philos 635.

protection which undermines article 31(1) protection. Holiday also explored 115 CCRC cases and identified that all but one of the refugees pleaded guilty on the advice of solicitors and barristers, the defences were rarely used and were never raised during police interview. She concluded that an important part of the cause of the criminalisation of refugees in countries such as the UK which incorporate article 31(1) as a defence may lie in the conceptualisation of article 31(1) as a defence which is aired during the trial rather than as a form of immunity or plea in bar to trial which would prevent a trial from taking place at all (as in the case of diplomatic immunity).

A feature which has particular relevance for this study is the changing pattern of criminalization in the courts. From the 1990s to about 2006, prosecutions largely took place in Magistrates' Courts (with exceptions such as refugees arriving at Gatwick Airport who tended to be prosecuted at local Crown Courts). Where there were appeals, these were to the Crown Court. However from 2006, indictable only offences[26] were introduced in addition to summary[27] or either way offences[28] (for example in section 4 of the Identity Documents Act 2010 which replaced section 25(1) of the Identity Cards Act 2006). Whereas up to 2006, refugees were prosecuted under the Forgery and Counterfeiting Act 1981 in the Magistrates Court, after 2006 they were increasingly prosecuted in Crown Courts as well as Magistrates' Courts.

2.2 Article 31(1) of the 1951 Refugee Convention[29]

While the Refugee Convention is not a human rights treaty in the sense that its provisions do not apply to all, its provisions invoke human rights for asylum seekers and refugees.[30] This report applies the combined interpretative approach[31] in article

[26] These can only be tried in the Crown Court.
[27] These can only be tried in Magistrates' Courts.
[28] These may be tried in Magistrates' or Crown Courts.
[29] 'Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137' (n 56).
[30] Vincent Chetail, 'The Relations between Refugee Law and Human Rights Law – a Systemic Perspective' <http://www.sas.ac.uk/videos-and-podcasts/politics-development-human-rights/relations-between-refugee-law-and-human-rights> accessed 15 October 2014.
[31] Ian Brownlie, *Principles of International Law* (5th edn, OUP 2001) 633; Goodwin-Gill (n 16) 185-252; James C Hathaway, *The Rights of Refugees* (CUP 2005) 48; GS Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Clarendon Press 2007) 366-68; Jane McAdam, 'Interpretation of the 1951 Convention' in Andreas Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, A Commentary* (OUP 2011) 82-83.

31 of the Vienna Convention on the Law of Treaties 1969 ('the VCLT')[32] to the interpretation of article 31(1) of the Refugee Convention. This approach mandates that states interpret treaties 'in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose' (art 31(1) VCLT).[33] The context for the purposes of interpretation includes the preamble, annexes and related agreements (art 31(2) VCLT) and article 31(3) VCLT provides for the consideration of any subsequent agreement between the parties including subsequent practice and applicable relevant rules of international law. Article 32 governs 'supplementary means of interpretation' such as the treaty's preparatory work. This may be resorted to where this confirms the meaning resulting from the application of article 31 VCLT[34] or to determine meaning when the interpretation under article 31 VCLT 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'.[35]

The approach followed includes the adaptation of international law to present-day circumstances, as exemplified in article 38 of the Statute of the International Court of Justice ('SICJ'). [36] This includes international conventions, international custom 'as evidence of a general practice accepted as law' and the general principles of law recognised by civilised nations. Judicial decisions and the teachings of publicists (or international law academics and practitioners) are a 'subsidiary means' for determining international law.[37]

The Convention and its Protocol have no international court or other mechanism to deal with an individual complaint.[38] The concurrent approach combined with a

[32] 'Vienna Convention on the Law of Treaties 1155 UNTS 331'; Arts 31, 32 reflect customary international law and are used for interpreting treaties predating their conclusion. VCLT is not retroactive in effect, Brownlie (n 31) 608.
[33] Brownlie (n 31) 632-36, 637; McAdam (n 31) 85; The 'aims and objects,' 'teleological' or 'purposive' approach focuses on the treaty's object and purpose. It is more common in 'constitutional' treaties, eg UN Charter 1945, ibid 82; Hathaway (n 31).
[34] T Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in A Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a Commentary* (OUP 2011) 48-9.
[35] Working papers are less favoured in international law because if new states are bound by the 'informal understandings of the drafters', this would 'unduly privilege the interpretive positions of the original signatories'; and earlier drafts of a treaty and commentaries may be 'selective and easily manipulated'. Nevertheless, the use of travaux préparatoires is a usual feature of interpretative disputes over treaties. Recourse to the working papers is in any case always important when resolving ambiguities, 'General Principles of International Law' (2006) 1 Int Jud Monitor.
[36] ICJ, *The International Court of Justice Handbook* (6th edn, ICJ 2014) 99.
[37] ibid 97-99.
[38] While the Convention and its Protocol 'act as a compass' for the regulation of refugee law at national and regional level, there is no 'uniform international practice or single interpretation' of the

view of the wider context is required because the Convention is of the normative type and article 31(1) concerns a fundamental principle of human rights protection for refugees.

Article 31(1) states,

> The Contracting State 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.

Article 31(1) was drafted because it was accepted that refugees often did not have the necessary papers for travel because their states of nationality persecuted them or they had to leave suddenly and that due to their 'precarious' position,[39] they were dependent on others to help them in their flight from persecution.[40] Even where refugees had passports, as for example, in some cases before and during the Second World War, refugees were denied entry to countries and therefore had to resort to other means.[41]

Article 31(1) is a mandatory norm of protection for refugees which includes asylum-seekers (at least until they have been determined not to be refugees in a fair refugee determination procedure).[42] It provides that refugees fleeing persecution shall not be penalised on account of irregular entry or presence provided that they come within the criteria of 'coming directly' (or requiring protection), they make themselves known to the authorities without delay and show good cause. The protection is very broad: penalisation may include prosecution to conviction, fines, imprisonment,[43] summary deportation,[44] the delay, obstruction or denial of access to

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Convention and states may have differing interpretations of the same terms, McAdam (n 31) 77; *SSHD ex parte Adan and others* [2000] UKHL 67.

[39] UN ECOSOC, 'A Study on Statelessness' [1949] E/1112, E/1112/Add.1 9-16, 24.

[40] 'Statement of van Heuven Goedhart (UNHCR), UN Doc. A/CONF2/SR.35 (1951)'.

[41] Einarsen (n 34) 45; Morten Kjaerum, 'Temporary Protection in Europe in the 1990s' (1994) 6 Int'l J Refugee L 444, 448; Randall Hansen, 'Visas' in Matthew J Gibney and Randall Hansen (eds), *Immigration and Asylum: from 1900 to the present* (ABC-CLIO 2005) who described visas as a 'mechanism of exclusion' in the 1930s, 667-68.

[42] Goodwin-Gill (n 16) 193; Noll (n 17) 1252; Costello (n 4) 10-17.

[43] Goodwin-Gill (n 16); Noll (n 17) 1262-64.

asylum and channeling those who arrive without proper documentation into 'an inferior refugee procedure'.[45] The focus here is on prosecution to conviction. It is important to note that article 31(1) has no restriction in terms of the offences to which it might be applicable (as long as the other criteria are fulfilled).

Costello has noted that the phrase 'coming directly' is the most 'contentious element' of article 31(1).[46] However, the consensus of the drafters was that only those who had been granted refugee status or another form of permanent protection would be excluded from the protection of article 31(1) if they subsequently moved to a country using irregular means.[47] In *ex parte Adimi*, the High Court of England and Wales noted three considerations in the context of 'coming directly…'. These were the length of stay in the transit country, the reasons for delaying there and whether or not the refugee was protected there from the persecution they were fleeing. Refugees may also exercise choice where to seek asylum due to the differing responses of states to requests for asylum.[48]

The 'coming directly…' provision is about whether or not an asylum-seeker is able to obtain protection in an intermediate country. It is not about the way in which the refugee reaches the country of asylum. Factors which militate against protection include poor asylum reception and detention conditions,[49] civil war,[50] no refugee determination procedure[51] or a procedure which excludes non-Europeans, as in Turkey,[52] being in transit,[53] fear of return to the country of persecution or dependence on an 'agent'.[54] Some countries have dispensed with the provision entirely, for example, Spain.[55] In Canada, section 133 of the Immigration and Refugee Protection Act 2001 states that a person who has claimed refugee protection and 'who came to

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[44] Goodwin-Gill (n 16) 189, 195-96; Noll (n 17) 1262; Costello (n 4) 32-33.
[45] *B010 v Canada* [2015] SCC 58 [57].
[46] Costello (n 4) 29.
[47] 'Statement of van Heuven Goedhart (UNHCR), UN Doc. A/CONF2/SR.35 (1951)' (n 40); Goodwin-Gill (n 16) 218-19.
[48] *R v Uxbridge Magistrates' Court ex parte Adimi* (2001) QB 667; Costello (n 4).
[49] *MSS v Belgium and Greece* App No 3069609 21st January 2011 Eur Court Hum Rights; Global Detention Project, *The Uncounted: The Detention of Migrants and Asylum-Seekers in Europe* (GDP 2015).
[50] *R v S and D (Cameroon)* [2012] Unreport CCRC Ref Isleworth Crown Court.
[51] *R v M and A (Somalia)* [2010] Unreport CCRC Ref Isleworth Crown Court.
[52] *R v M and others* [2013] EWCA Crim 1372.
[53] *R v HHM* [2011] EWCA Crim 3304.
[54] *R v Asfaw* [2008] UK HL 31.
[55] Noll (n 17) 1257, fn 62.

Canada *directly or indirectly* from the country in respect of which the claim is made' may not be charged with an offence connected to irregular entry or presence.[56]

Article 31(1) also requires asylum-seekers to bring themselves to the attention of the authorities without delay.[57] No strict time limit is to be applied as the delay depends on the circumstances of the particular case.[58] Article 31(1) will therefore apply to refugees who have spent a long time in a country if there is a good reason for the delay[59] and those who have not had a chance to seek regularisation of their status,[60] for example, because they arrived in a lorry or shipping container. This situation must however be distinguished from those cases where the person is not trying to find the means to continue the journey. Where a refugee remains in a country for a long period of time, for example a year, with no intention of contacting the authorities, but then learns she or he is about to be discovered and for that reason gives him or herself up, article 31 (1) cannot be invoked.[61] Factors to be considered in an assessment of delay include access to legal advice,[62] fear of authority figures, language barriers, advice from smugglers, the fear of removal to the country of persecution, reunion with family members,[63] age and mental deficiency.[64]

The requirement of showing good cause is generally satisfied if the asylum seeker can show that she or he was reasonably travelling on false papers, had to resort to subterfuge or there were good reasons for delay.[65]

Article 31(1) does not prevent the charging of an asylum-seeker as long as no conviction is imposed on any person found to be a refugee who complies with the other requirements of article 31(1).[66] A general policy to prosecute asylum-seekers will 'almost inevitably' lead the State into a breach of its international obligations.[67] Additional circumstances which would make a penalty of prosecution would be where there is a failure to interpret article 31(1) in a flexible way which gives effect to its

[56] The offences relate to document offences, misrepresentation, possession, forgery and identity fraud under IRPA and the Canadian Criminal Code. The emphasis is the authors'.
[57] Costello (n 4) 27-32.
[58] *R v Uxbridge Magistrates' Court ex parte Adimi* (n 48); Goodwin-Gill (n 16) 217; Costello (n 4).
[59] *Ministry of the Interior v Felicitas LJ* [1982] 86 ILR 504.
[60] Atle Grahl-Madsen, *Commentary* (rev edn, UNHCR 1997).
[61] ibid; Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 166.
[62] Goodwin-Gill (n 16) 219.
[63] ibid.
[64] *R v H* [2008] EWCA Crim 3117.
[65] Costello (n 4) 30-32.
[66] Goodwin-Gill (n 16); Hathaway (n 31) 407.
[67] Goodwin-Gill (n 16).

protective function and which takes account of the way in which refugees travel in their flight from persecution, for example, by denying the application of article 31(1) to transit or by requiring asylum seekers to act in the same way as the ordinary traveller. A large number of guilty pleas which suggest a policy of prosecuting without considering the refugee context or a presumption of prosecution would transform prosecution into penalty.[68] Where there is ignorance - or little awareness – by prosecuting authorities of article 31(1) protection, the presumption must be that prosecution is a penalty.

State parties must amend their penal codes or the criminal law to ensure that no person *entitled* to the benefit of article 31(1) runs the risk of being found guilty of an offence.[69] As Goodwin-Gill has stated, 'Refugees are not required to have come directly from their country of origin' and 'the real question is whether effective protection is available for the individual…'.[70]

2.3 National Law

2.3.1 *R v Uxbridge Magistrates ex parte Adimi*

Ex parte Adimi involved four refugees, one of whom was convicted of possessing a false passport when he tried to enter the UK to claim asylum and three of whom were convicted of possessing false passports and attempting to obtain services of deception when they were stopped in transit intending to seek asylum in Canada. This was not the first prosecution of these offences in the UK.[71] However, *ex parte Adimi* was the first time a UK court examined the reach of article 31(1) in the context of the prosecution of refugees. The High Court held that it was unlawful to prosecute refugees for offences relating to irregular entry and presence where that prosecution had taken place without regard to the protection from the imposition of penalties

[68] Yewa Holiday, 'Penalising Refugees' (*EU Law Analysis*, 19 July 2014) <http://eulawanalysis.blogspot.co.uk/2014/07/penalising-refugees-when-should-cjeu.html> accessed 19 July 2014; Christie (n 21).
[69] Goodwin-Gill (n 16) 187.
[70] ibid 218.
[71] Eg, *R v T* [1998] 1 Cr App RS 372; *R v O* [1999] 1 Cr App RS 230; *R v S* [1999] 1 Cr App RS 490. The first reported cases were appeals against sentence from Lewes Crown Court (Gatwick airport). There were no cases at this time from Isleworth Crown Court as the cases from Heathrow airport were dealt with at Uxbridge Magistrates' Court.

contained in article 31(1).[72] The court proposed the following formulation, 'Where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by [article 31(1)]'.[73] It observed that the broad purpose sought to be achieved by article 31(1) was 'to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law'.[74]

Lord Justice Simon Brown noted the combined effect of visa requirements and carrier's liability which had made it nearly impossible for refugees to travel to countries of refuge without false documents; and that refugees would often not be able to obtain relevant papers from their own government.[75] The Court held that there was 'no doubt' that article 31(1) applied to both refugees and asylum seekers. Refugees had some element of choice as to where they might properly claim asylum given the 'distinctive and differing' state responses to requests for asylum.[76] Any 'mere short term stopover en route' to such intended sanctuary would not forfeit the protection of article 31(1).

In cases involving transit, the factors to be taken into account included the length of stay in the intermediate country; the reasons for delaying there (even a substantial delay in an unsafe third country being reasonable were the time spent trying to acquire the means of travelling on); and whether or not the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing. The court concluded that no voluntary exonerating act was required as argued for by the CPS and Home Office. They had stated that a refugee had to claim asylum as soon as she or he arrived at passport control. In relation to three of the refugees, the Home Office and CPS had argued that because they were trying to exit the country, they could not be said to be trying to claim asylum in the UK and therefore did not come within article 31(1). They argued that they had never intended to present themselves, least of all without delay, to the immigration authorities. However, the court

[72] The questions raised by the refugees in *Adimi* about the relationship between the asylum process and criminal prosecution; and whether article 31(1) is the responsibility of the Home Office or the CPS were left unanswered, *R v Uxbridge Magistrates' Court ex parte Adimi* (2001) QB 667 673, 682E-683D, 684A, 692C-D. These issues are not considered here; For further analysis see, Yewa Holiday, *The Criminalisation of Refugees in England and Wales in the Context of Article 31(1) of the 1951 Refugee Convention* (Brill 2019).
[73] *R v Uxbridge Magistrates' Court ex parte Adimi* (n 48) 677 (Newman J).
[74] ibid 677.
[75] ibid 674.
[76] ibid 688.

concluded that these arguments were unsustainable. Simon Brown LJ observed that as refugees were ordinarily entitled to choose where to seek asylum, and a short term stopover en route in a country where the traveller's status was in no way regularised would not break the requisite directness of flight, it must therefore follow that they would have been able to claim the benefit of article 31(1) had they reached Canada and made their claims there. In that case, logically, article 31(1) protection could not be denied them in the UK merely because they were stopped en route. The Court therefore interpreted transit in the UK as an aspect of 'coming directly…'.

2.3.2 The Defences

Article 31(1) is given effect in UK national law by way of two defences, one directed at refugees (including asylum seekers) in section 31 of the 1999 Act ('the refugee defence') and the other at *anyone* who has a reasonable excuse, for example, for not producing an immigration document on entry to the UK or at an asylum interview under section 2 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 ('the reasonable excuse defence'[77]). Parliament's intention in enacting the refugee defence was to ensure that refugees were not penalised for offences of unlawful entry and presence (see ***2.3.2.1***). Its intention in relation to the reasonable excuse defence was somewhat different: to deter people from hiding their identity by disposing of identity documents[78] or from claiming asylum in circumstances where they had already been recognised as refugees elsewhere (see ***2.3.2.2***).[79] Nevertheless, the reasonable excuse defence was not intended to criminalise those who were, in fact, refugees.

[77] Ss 35, 2004 Act, 25(5), 2006 Act and 6, 2010 Act have reasonable excuse defences. There is no guidance or case law on the use of the 'reasonable excuse' defence in criminal legislation in relation to refugees.
[78] 'HC Deb 17 December 2003, Vol 415, Col 1587' 1593-94; 'SC Deb 8 January 2004 Cols 10-80' 23; 'HL Deb 15 March 2004, Vol 659, Col 49' 56-57 (Baroness Anelay), 59 (Lord McNally), 120-21 (Baroness Scotland); Home Office, *First Draft of Guidance for s 2 Asylum and Immigration (Treatment of Claimants Etc) Act 2004, Home Office Letter 21 September 2004 and Guidance on the 2004 AI(TC)A 2004, Excerpt on Section 2, Entering UK without Passport Etc* (Home Office 2004) para 2.1.2; see also 'Prosecution under Section 2: Failure to Produce Immigration Document (Home Office 11 March 2014)' 4.
[79] 'HC Deb 1 March 2004, Vol 418, Col 616', 618 (Beverley Hughes).

2.3.2.1 The refugee defence

The refugee defence was created as a direct consequence of the *Adimi* case and was modelled on article 31(1). It was inserted in October 1999 into the Immigration and Asylum Bill which had already been debated in Parliament.[80] Section 31 provides a defence for 'a refugee' charged with one of the offences listed in section 31(3) or (4). In England, Wales and Northern Ireland, these are Part 1 of the Forgery and Counterfeiting Act 1981 ('the 1981 Act') (such as using a false passport (section 3)), the possession and use of identity documents belonging to others under sections 4 and 6 of the Identity Documents Act 2010 ('the 2010 Act') (which replaced offences in section 25 of the Identity Cards Act 2006) and sections 24A (obtaining or seeking to obtain leave to enter or remain) and 26(1)(d) (possession of false passport) of the Immigration Act 1971 ('the 1971 Act'). The list can be extended.[81]

Section 31(1) provides that a refugee, charged with a relevant offence, 'having come to the [UK] directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention)' has a defence if he or she comes within the remaining article 31(1) criteria of presenting him or herself to the authorities without delay and showing good cause. Additionally, the section requires that the refugee 'made a claim for asylum as soon as was reasonably practicable after…arrival in the [UK]'. The section applies only to the refugee who 'stopped in another country outside the [UK]' if the refugee 'could not reasonably have expected to be given protection under the Refugee Convention in that other country'.

Section 31(5) provides that a refugee who has made a claim for asylum cannot rely on the defence 'in relation to any offence committed by him after making that claim'. Section 31(6) provides that the meaning of the term 'refugee' is the same as that in the Refugee Convention while section 31(7) states that where an asylum claim has been refused by the Secretary of State, 'that person is to be taken not to be a refugee unless he shows that he is…'.

Parliament intended section 31 to act as 'a statutory safety net for asylum seekers by giving a defence to certain fraud-related criminal offences'.[82] Due to the

[80] 'Explanatory Notes to Immigration and Asylum Act 1999' para 106, 113. It was debated in the Lords on 29 June, 28 July, 18 October and 2 November but there was no time for debate in the Commons.
[81] As noted by the Attorney-General, 'HL Deb 18 October 1999, Vol 605, Col 747' 858; 'HL Deb 2 November 1999, Vol 606, Col 783' 785.
[82] 'Letter from Lord Bassam of Brighton, Parliamentary Under Secretary of State, Home Office to Baroness Williams of Crosby, House of Lords, 8 November 1999'.

administrative arrangements in place, 'the matter [would] not come to court in the first place'.[83] No indication was given 'of an intention to derogate from the international obligations of the UK as fully expounded in *Adimi*, as would be expected if that was the legislative intention'.[84] The court in *Adimi* was clear that refugee included asylum seeker and applied to those in transit[85] and Parliament did not retreat from this position. Baroness Williams of Crosby had specifically asked whether the interim CPS instructions (issued after *Adimi*) applied to those in transit as she wanted to know whether it was henceforth unlikely that such people would be prosecuted rather than allowed to continue on their journey and be dealt with by the Canadian authorities. A response from Lord Bassam, Parliamentary Under Secretary of State, responded that the instructions would apply to those in transit and that the defence would also apply depending 'on the circumstances of the individual case'. He continued that the administrative arrangements would 'ensure that … the matter will not come to court in the first place. The defence created by the new clause is a safety net for any cases that are not identified by these arrangements'.[86]

2.3.2.2 The reasonable excuse defence

Ex parte Adimi stated that the protection of article 31(1), as well as applying to those using false documents, also applied to those 'characteristically the refugees of former times, who entered a country clandestinely'.[87] Section 2 of the 2004 Act applies to these refugees who are unable to produce an immigration document on entry to the UK or at an asylum interview. Instead of adding this offence to the list in section 31(3) of the 1999 Act, a 'reasonable excuse' defence was created by Parliament in section 2.

The effect of the reasonable excuse defence is that a refugee will have a defence under section 2(4)(c) (which applies to the non production of an immigration document on entry to the UK) or (6)(b) (which applies to the non production of an immigration document at an asylum interview) if she or he has a reasonable excuse for not being in possession of a genuine document. This will be so even though the refugee travelled on false documents. The refugee will have a defence under section

[83] ibid.
[84] *R v Asfaw* (n 54) [25], [29].
[85] 'HL Deb 2 November 1999, Vol 606, Col 783' (n 81) 786-87.
[86] 'Letter from Lord Bassam of Brighton, Parliamentary Under Secretary of State, Home Office to Baroness Williams of Crosby, House of Lords, 8 November 1999' (n 82).
[87] *R v Uxbridge Magistrates' Court ex parte Adimi* (n 48), 677-78 (per Simon Brown LJ).

2(4)(d) if she or he travelled on false documents *and* is able to produce them. Thirdly, a refugee will have a defence under section 2(4)(e) if she or he can prove that at no stage did the refugee travel to the UK without documents at all (whether genuine or false). There are certain restrictions to the reasonable excuse defence in section 2(7). The deliberate destruction or disposal of a document is not a reasonable excuse unless it was done for a 'reasonable cause' (subsection (7)(a)(i)) or it was 'beyond the control of the person charged with the offence' ((7)(a)(ii)).

Beverley Hughes, the then Minister for Citizenship and Immigration, emphasised that 'never having had a document would be a reasonable excuse'. She also stated that it was not directed at those 'with some evidence of experiences testifying to their claim to be refugees and in need of asylum' but intended for those 'who we believe have deliberately destroyed their documents'.[88] The Home Affairs Committee (HAC) noted the Minister of State had confirmed that where a refugee could not obtain 'legitimate travel documents', and had travelled on false documents, the refugee would not be committing any new offence by travelling on false documentation provided that this was not destroyed.[89] The Committee further noted that 'If somebody has a credible reason for destroying their documents, that will be taken into account'.[90]

The Parliamentary debates noted that refugees rarely had their own passports and it was virtually impossible to obtain passports in some countries, such as Somalia and the Democratic Republic of Congo (DRC).[91] Statelessness was an issue.[92] It was noted that agents provided asylum seekers with false passports and told people to destroy them.[93] Lord Bassam recognised that there would be 'rare circumstances' where even if the person had destroyed or disposed of their document, they would nevertheless have a reasonable excuse. The broader context would therefore need to

[88] 'SC Deb 8 January 2004 Cols 10-80' (n 78) 44; 'HAC, Asylum and Immigration (Treatment of Claimants Etc) Bill (HC 2003-04 109)' para 20.
[89] 'HAC, Asylum and Immigration (Treatment of Claimants Etc) Bill (HC 2003-04 109)' (n 88) para 20.
[90] ibid para 21.
[91] 'HC Deb 17 December 2003, Vol 415, Col 1587' (n 78) 1628; 'SC Deb 8 January 2004 Cols 10-80' (n 78) 17.
[92] 'SC Deb 8 January 2004 Cols 10-80' (n 78) 15-17, 36.
[93] 'HC Deb 17 December 2003, Vol 415, Col 1587' (n 78) 1640.

be considered by immigration officers.[94] Parliament did not intend that those seeking protection should be prosecuted.[95]

The Parliamentary Standing Committee, which was concerned about the position of refugees, was assured that they would not be arrested or prosecuted if they arrived with no documents.[96] It would not be the case that the issue of the defence would not be considered until the case reached court. 'It could rarely be the case that prosecuting someone who has produced a document, albeit not immediately when asked, or is quite clearly someone who would never have had one, would be in the public interest' even were there sufficient evidence to support a prosecution, 'which itself is doubtful'.[97]

It seems clear that the intention behind the reasonable excuse defence in relation to refugees was to give effect to article 31(1) protection for refugees, that is to exempt refugees from prosecution. It is, however, unclear why Parliament considered it necessary for a person to reveal the false documentation since the aim of the legislation was to prevent the hiding of identity. The failure to produce false documents could not be said to hide identity as the documents would not represent the person's true identity.

Unlike section 2, there has been no recognition of the relevance of article 31(1) in relation to section 35 of the 2004 Act (which criminalises the failure to co-operate in one's own deportation) although the Parliamentary Human Rights Joint Committee (HRJC) was concerned about governmental abuse of power in demanding information and cooperation which could be used to facilitate a person's deportation, thus creating a serious danger to wrongly refused asylum seekers or relatives in the home country.[98]

2.3.3 Some problems with the defences

There are problems with both defences including their limited application, prosecution guidance, the extent to which asylum seekers can benefit from them and

[94] 'HL Deb 18 May 2004, Vol 661, Col 650', 662; 'HL Deb 5 April 2004, Vol 659, Col 1595', 1640 (Baroness Scotland).
[95] 'HL Deb 18 May 2004, Vol 661, Col 650' (n 94) 660-63.
[96] 'Letter from Beverly Hughes, MP, Minister of State, Home Office to Mrs Marion Roe MP and David Taylor, MP, House of Commons, 14 January 2004'.
[97] 'SC Deb 8 January 2004 Cols 10-80' (n 78) (Beverley Hughes).
[98] 'HRJC, Asylum and Immigration (Treatment of Claimants Etc) Bill (2003-04, HL 35 HC 304)' para 79.

their interpretation by prosecution, Home Office and the courts. Some of these difficulties are detailed at **Appendices 2 and 3**.

2.4 The Criminal Cases Review Commission

An independent CCRC for England, Wales and Northern Ireland was established under section 8 of the Criminal Appeal Act 1995 ('the 1995 Act').[99] CCRCs have since been formed in Scotland (in 1999) and Norway (in 2004)[100] and a Bill has been introduced in New Zealand to create a CCRC there.[101] The CCRC is the main organisation working on cases involving criminal miscarriages of justice. However, university-led Innocence Projects and Law Clinics also contribute to work on wrongful convictions or miscarriages of justice.[102]

The CCRC's function is to review convictions and sentences in cases conducted on indictment (Crown Courts) and summarily (Magistrates' Courts); and also from the Court Martial and Service Civilian Court.[103] It can refer Magistrates' Court cases to the Crown Court, Crown Court cases to the Court of Appeal and cases from the Court Martial and Service Civilian Court to the Court Martial Appeal

[99] Andrew Ashworth, *The Criminal Process. An Evaluative Study* (Clarendon Press 1995) 11-14; Clive Walker and Keir Starmer (eds), *Miscarriages of Justice. A Review of Justice in Error* (Blackstone Press Ltd 1999); John Weeden, 'The Criminal Cases Review Commission (CCRC) of England, Wales and Northern Ireland' (2012) 80 U Cin L Rev 1415; Stephanie Roberts and Lynne Weathered, 'Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission' (2009) 29 Oxf J Leg Stud 43; on the Northern Ireland situation, see Siobhan M Keegan, 'The Criminal Cases Review Commission's Effectiveness in Handling Cases from Northern Ireland' (1998) 22 Fordham Int'l L J 1776; and Hannah Quirk, 'Don't Mention the War: The Court of Appeal, the Criminal Cases Review Commission and Dealing with the Past in Northern Ireland' (2013) 76 MLR 949.

[100] The Scottish CCRC was set up on the recommendation of the Sutherland Committee on Appeals Criteria and Alleged Miscarriages of Justice (www.sccrc.org.uk); for the setting up of the Norway CCRC, see www.gjenopptakelse.no; Weeden (n 99) 1418; On the SCCRC, see Lissa Griffin, 'International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission' (2013) 21 Wm & Mary Bill Rts J 1153; and Fiona Leverick, James Chalmers and Fergus McNeill, 'Part of the Establishment? A Decade of the Scottish Criminal Cases Review Commission' (2010) 27 Scots Law Times 147; on Norway's CCRC, see Ulf Stridbeck and Philos Svein Magnussen, 'Prevention of Wrongful Convictions: Norwegian Legal Safeguards and the Criminal Cases Review Commission' (2012) 80 U Cin L Rev 1373.

[101] Andrew Little, 'Significant Step to Correct Miscarriages of Justice' (*Beehive.govt.nz*, 27 September 2018) <https://www.beehive.govt.nz/release/significant-step-correct-miscarriages-justice> accessed 13 October 2018.

[102] Eg, Roberts and Weathered (n 99); Griffin (n 100); Lissa Griffin, 'Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence' [2009] U Tol L Rev 107; Michael Naughten, 'The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System' (2012) 58 Crim L Q 207.

[103] S 321 and Sched 11, Armed Forces Act 2006.

Court[104] if it decides that there is 'a real possibility' that the appeal court will quash the conviction or reduce the sentence.[105] Section 11(6) of the 1995 Act provides that the Crown Court's power to increase a sentence on a normal appeal does not apply in the case of CCRC referrals. For a conviction, the 'real possibility' must arise from argument or evidence which was not raised at trial or on appeal or from exceptional circumstances.[106] In determining whether there is a 'real possibility', the CCRC must consider whether the conviction is safe and therefore must consider the Court of Appeal's view of what constitutes a wrongful conviction or miscarriage of justice.[107]

Where there has been no appeal, the CCRC may only make a reference in relation to a conviction if, in addition to the real possibility test, there are exceptional circumstances which are to be defined on a case by case basis,[108] and which must be guided by what it considers the Court of Appeal's position to be on this term.[109] Where an appeal has been determined or where an application for leave to appeal has been refused by the Single Judge or by the full Court of Appeal, this obviates the need for exceptional circumstances. Likewise if an application for leave to appeal out of time is refused by the Registrar or by a Single Judge of the Court of Appeal or where an applicant has formally abandoned the appeal or application for leave to appeal to the Court of Appeal. The CCRC has powers to obtain information from public bodies under section 17 and from private bodies under section 18A.[110] It has other powers under sections 19-24, including the power to appoint an Investigating Officer to conduct enquiries.

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[104] Ss 9-12 1995 Act.
[105] S 13.
[106] S 13(2).
[107] *R v Hickey* [1997] EWCA Crim 2028; see also CAA 1968; Richard Nobles and David Schiff, 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal' [2005] Crim L R 173; and Graham Zellick, 'The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective' [2005] Crim L R 937 ibid; Graham Zellick, 'The Criminal Cases Review Commission and the Court of Appeal: The Commission's Perspective' [2005] Crim L R 937 where the relationship is described as of 'critical importance', 937; David Ormerod, 'Case Comment. Appeal: Change in Law since Conviction – Court of Appeal's Approach to Conviction under Previous Law' [2008] Crim L R 50 who has said the CCRC and the Court 'cannot be seen to exist in conflict', 54; M Sato, C Hoyle and NE Speechley, 'Wrongful Convictions of Refugees and Asylum Seekers: Responses by the Criminal Cases Review Commission' (2017) 2 Crim L R 106.
[108] Roberts and Weathered (n 99), 49; CCRC, *Formal Memorandum. Exceptional Circumstances* (CCRC 2015); CCRC, *Formal Memorandum. Exceptional Circumstances* (2018).
[109] Gareth Underhill and DC Ormerod, 'Case Comment, Appeal: Criminal Appeal Act 1995 s 9 – Reference by the Criminal Cases Review Commission' [2004] Crim L R 60, 61.
[110] Inserted by CCRC (Information) Act 2016 (in force 12 July 2016) which brings it into line with the SCCRC.

The CCRC proactively addresses 'members of vulnerable groups' who require its services.[111] For example, in relation to people with learning disabilities/difficulties it introduced an Easy Read application form in 2012 to make it easier for prisoners to apply to the CCRC. This resulted in an annual increase in applications from 900 to about 1500.[112] Since 2012, it has also focused on other vulnerable groups including women in prison, refugees and victims of human trafficking, young people (with a particular focus on young people from black and minority ethnic communities) with some limited work on older prisoners and the Irish Travelling/Roma community. For example, in relation to its work for young people, the CCRC has designed posters, business cards, created a Youtube video and held focus groups for young people; in relation to its work on refugees and victims of human trafficking it has designed leaflets and liaised with the CPS in trying to determine how many refugees have been wrongfully prosecuted. The CCRC also regularly contacts and visits stakeholder organisations to discuss aspects of its function, powers and work.

The CCRC has opened its casework files to researchers and universities 'in order to assist projects exploring topics of practical use and interest' and in 2014/15 established a Research Committee to identify potential areas of research, commission external research, consider unsolicited research proposals and monitor the progress of ongoing research projects.[113] In 2018 it established an Advisory Board which advises the Research Committee. The creation of the Research Committee and the Advisory Board underlines CCRC interest in independent analysis of its case review; and its desire to use research to improve its performance and feedback to stakeholders and the wider criminal justice system.[114]

The CCRC has reviewed refugee cases since 2002. The first four referrals (of Magistrates' Court convictions) were reviewed together and quashed by the Crown Court in 2005. The first referral to the Court of Appeal was in 2007.[115] In 2012, the CCRC became aware of potentially large numbers of wrongfully convicted refugees and victims of trafficking and added these groups to the vulnerable groups it was already working with. The CCRC has referred about 37 Magistrates' Court cases involving refugee convictions to Crown Courts (between 2005 and 2018). The CCRC

[111] CCRC, *Corporate Plan 2015-2018* (CCRC 2015) 7.
[112] CCRC, *Business Plan 2016-2017* (CCRC 2016).
[113] CCRC, *Annual Report and Accounts 2014/15, HC 210* (HM Stationery Office 2015) 37-38.
[114] Eg Sato, Hoyle and Speechley (n 107).
[115] Mr Osman in *R v Mohammed and Osman* [2007] EWCA Crim 2332.

has referred about 19 refugee convictions to the Court of Appeal (between 2007 and 2016).

2.4.1 The *Nori* case

The CCRC can refer convictions to the Court of Appeal where it considers that there is a real possibility that the Court will quash the conviction. Defendants must already have appealed unless there are exceptional circumstances. It appears that refugees do not generally appeal their convictions because they have usually been prosecuted and advised to plead guilty in the absence of any reference to the defences either by the defence or police/immigration or CPS. They apply to the CCRC because they have not appealed in time. If the CCRC finds exceptional circumstances, it may refer their cases to the Court.

However, in the *Nori* case, the Court of Appeal stated that refugees who had not appealed these convictions in time need no longer apply to the CCRC for review of their convictions. The Court concluded that if the CCRC was applying its policy on exceptional circumstances 'as a matter of routine', it was not using resources effectively. Refugees could instead apply direct to the Court of Appeal. The jurisprudence of the Court meant that the Registrar was well placed to refer such cases to the full Court (paragraphs 38 – 45).[116]

The Court noted that in the 2013 case of *Mateta*, the court had recognised 'the very real contribution made by the CCRC to this area of the law.'[117] It wondered whether this recognition in the *Mateta* case had 'been taken as an encouragement to the CCRC, given the increased number of referrals which concern asylum seekers convicted of identity document offences'. The Court noted that the CCRC 'advertise for such cases' and 'will pursue them'[118] on the basis that there are exceptional circumstances. The Court specifically adverted to section 13(1) of the Criminal Appeal Act 1995 and section 13(2) which states,

> Nothing in subsection (1)…(c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify it.

[116] Paragraphs 38-45 are at Appendix 1.
[117] *R v M and A (Somalia)* (n 51).
[118] This may represent a misunderstanding of the CCRC's work with vulnerable stakeholder groups.

The Court also observed that the jurisprudence in this area was developed in cases which were pursued through the traditional route of the Court of Appeal rather than through the CCRC, citing *R v Asfaw* [2008] 1 AC 1061, *R v Kamalanathan* [2010] EWCA Crim 1335, *R v Ali Rezi Sadighpour* 2012] EWCA Crim 2669 and *R v Jaddi* [2012] EWCA Crim 2565. However, it should be noted that the CCRC referral of *Osman* in 2007 has contributed to the jurisprudence in relation to the reasonable excuse defence. The Court noted that the Registrar was able to require waiver of privilege and delay could be avoided (citing cases *R v Sadiqi & Misini* [2014] EWCA Crim 2479, *R v Ghorbani* [2015] EWCA Crim 275 and *R v NH* [2015] EWCA Crim 649). The Court also noted that a referral under section 20 of the Criminal Appeal Act 1968 was possible in relation to groundless appeals, citing *R v Davis & Thabangu* [2013] EWCA Crim 2424.

The Court was of the view that 'if the exceptional procedure available to the CCRC is being deployed as a matter of routine' when such cases could be referred directly to the Court of Appeal, it was not using resources efficiently. The Court of Appeal considered that miscarriage of justice cases where there *had* been a previous appeal would be delayed. The Court 'encourage[d]' the CCRC,

> to review the criteria which are used to justify exceptional reasons for investigating and referring when there has been no prior appeal. It may be that when apprised of these cases (whether as a result of campaigns to reduce miscarriages of justice or otherwise), a triage system can be adopted which investigates only those cases that have been to the Court of Appeal or are appeals from the magistrates court. Those cases which have not exhausted rights of appeal to the Court of Appeal can be passed on to the Criminal Appeal Office for examination and, if appropriate, referral.

The Court was careful to state that it was not criticising the CCRC but rather keen to ensure that only those cases in which there was 'no available means of redress other than through the CCRC' were 'investigated and dealt with as expeditiously as possible'. As a result of this case, the CCRC changed its policy on exceptional circumstances and now directs refugees in this situation (who have a conviction for irregular entry or stay in a Crown Court but who have not appealed) to apply for leave to appeal direct to the Court of Appeal.

2.4.2 Exceptional circumstances before *Nori*

Prior to the *Nori* case, the Commission's Formal Memorandum on exceptional circumstances identified some core principles, including that it was 'vital' that the CCRC 'does not, other than for compelling reasons, usurp the conventional appeals process'.[119] The CCRC considered the impact of reviewing 'no appeal cases' on applicants who had satisfied the previous appeal criterion and noted that a decision to review or refer a 'no appeal' case would therefore be 'rare' (paragraph 9). The Memorandum observed that circumstances would not generally be exceptional unless not to refer would be 'contrary to the interests of justice' (paragraph 10) and the fact that a real possibility exists did not constitute exceptional circumstances (paragraph 8). A further principle was that the production or potential production of fresh evidence which amounted to a real possibility was 'not necessarily an exceptional circumstance.' Context was important and each case was to be 'assessed on its own facts' with relevant factors including 'the source and sensitivity' and possibility of onward disclosure of the fresh evidence (paragraph 9). Where a real possibility was raised that there had been a change in the common law since conviction, an applicant to the CCRC would generally be advised to make an application for leave to appeal direct to the Court of Appeal (paragraph 14).

The Memorandum also set out a non-exhaustive list of what might constitute exceptional circumstances. This included two categories of exceptional circumstances: those which were extraneous to the case (such as terminal illness suffered by the applicant or a witness or a mental illness which placed the applicant at a 'serious disadvantage') and those which centre on evidence (for example, where prosecuting authorities raised concerns about the evidence in a case, where there was new scientific or other evidence, where the Commission's powers might secure relevant information, the applicant was linked with co-defendants whose cases had been or were to be referred and where an applicant's case was 'linked to other cases by a common nexus such as a material witness, a criticized expert or a point of law'.[120] Even where cases fell within one of these 'illustrative categories,' each case was to be individually assessed before a decision was reached as to whether the circumstances were so exceptional as to justify a review and a reference.

[119] CCRC, *Formal Memorandum. Exceptional Circumstances* (n 108).
[120] ibid para 15.

In 2015, the CCRC issued guidance to legal representatives[121] which included a section on exceptional circumstances.[122] This interpreted these as being 'circumstances where an applicant can only make progress without assistance'. Examples included where public body material had to be obtained which the applicant was unable to obtain directly due to the sensitivity of the material.

2.4.3.1 Exceptional circumstances in refugee referrals to the Court of Appeal

Prior to *Nori*, the reasons given for finding exceptional circumstances in these cases were that:

a) the case was contrary to the interests of justice;
b) the case was linked by a common nexus to others;
c) one of the CCRC's functions was to provide feedback on systemic issues, that is, the failure of defence representatives; and police, prosecuting authorities, the Home Office and the courts in overlooking the defences available;
d) inability by the applicant to pursue an appeal due to the complexity of the issues;
e) the use by the CCRC of its statutory powers to obtain public body material and it was doubtful the applicant could have obtained the full extent of the material; and
f) the use by the CCRC of its statutory powers to obtain public body material which would not have been disclosed to the applicant.

Figure 1 (below) follows the same letter numbering as the reasons given above. Of the 19 cases referred to the Court of Appeal, two made no mention of exceptional circumstances[123] and it was not possible to identify four of the cases in the timeframe. Of the 13 other cases, nine focused on the interests of justice, the nexus with other similar cases and the CCRC's function in providing feedback to the criminal justice system. These three issues were all strongly linked. One case referred to the interests

[121] CCRC, 'Guidance for Legal Representatives'.
[122] ibid 2-3.
[123] These were the cases of *Osman* and *Mulugeta*. The Court of Appeal did not refer to exceptional circumstances in its judgments.

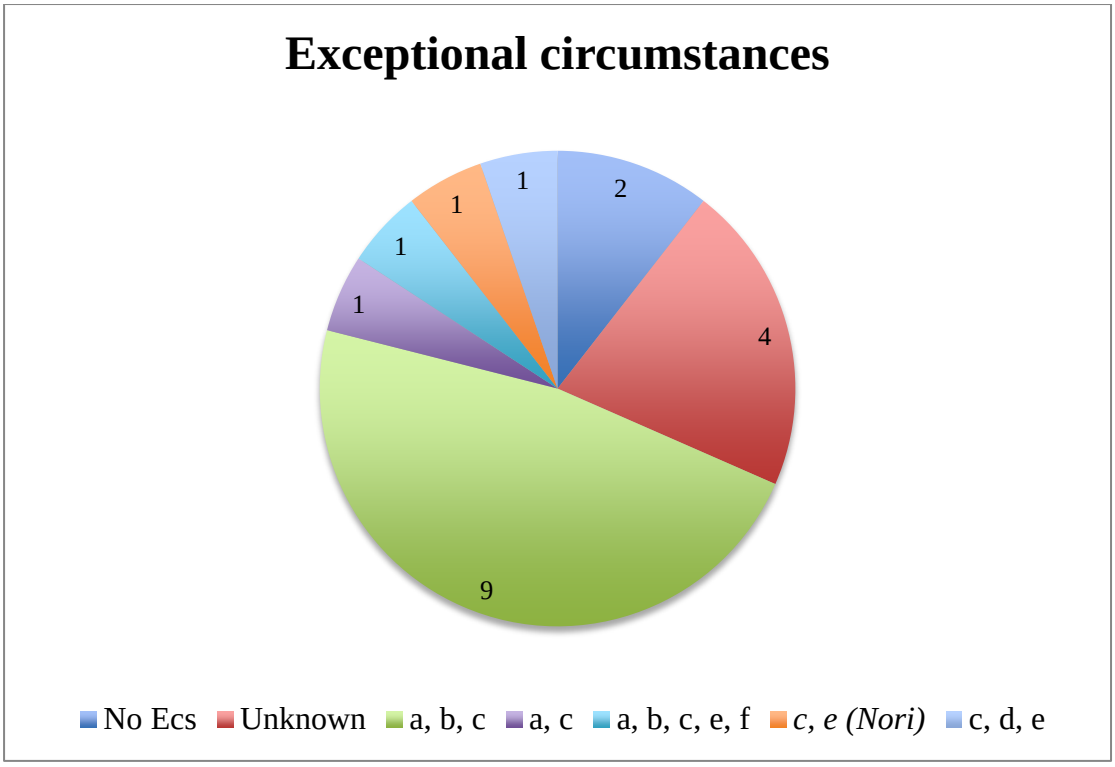

Figure 1 **Exceptional circumstances in referral cases to the Court of Appeal**

of justice and the CCRC's function without mentioning the nexus with other cases. One case referred to the fact that the applicant would be unable to pursue his appeal without the CCRC due to the complexity of the issues and three of the cases referred to the CCRCs powers in obtaining information which applicants were either unlikely or unable to obtain.

2.4.3 Exceptional circumstances after *Nori*

The most recent version of the CCRC's casework policy on exceptional circumstances restates virtually the same core principles as was the case before *Nori* with one new principle.[124] The rarity of the decision to refer a case where there has been no appeal[125] has become a 'relatively unusual' matter;[126] the requirement to be

[124] CCRC, *Formal Memorandum. Exceptional Circumstances* (n 108) paras 6-12; cf CCRC, *Formal Memorandum. Exceptional Circumstances* (n 108) 9-14.
[125] CCRC, *Formal Memorandum. Exceptional Circumstances* (n 108) para 9.
[126] CCRC, *Formal Memorandum. Exceptional Circumstances* (n 108) para 6; However, the CCRC, 'Exceptional Circumstances Checklist' states that exceptional circumstances 'are very special reasons and they are rare. There are no automatic exceptional circumstances. We decide on the facts of each case'.

'contrary to the interests of justice'[127] has become 'contrary to the public interest'.[128] The new principle is that where the basis of an appeal is likely to rely on new expert evidence, exceptional circumstances 'will not arise on the basis of an assumption or an assertion that the applicant (or their representative) will not be able to, or cannot, secure access to relevant exhibits (or other material) required for testing'. The applicant must supply evidence to demonstrate that all reasonable steps have been taken to secure access but that these have failed'.[129] In relation to the illustrative examples, relevant changes include an emphasis that 'each case will be assessed on its own merits' and that where an applicant's case is linked to other cases by a common nexus, the CCRC's involvement must be 'in the public interest'.[130]

While there is no reference in the Formal Memorandum to asylum cases, these type of cases are referred to in a useful casework note on exceptional circumstances which follows the illustrative examples of the Formal Memorandum but with an additional example of 'asylum/immigration/human trafficking cases'. This notes that before *Nori*, the CCRC found exceptional circumstances arising where 'there [were] possible s 31 defence issues on false passport cases or reasonable excuse defences in no passport offences which arise from the applicants' status as a refugee'.[131] Further, where the potential referral point 'raises issues of wider importance to the criminal justice system', the CCRC should consider whether this might constitute exceptional circumstances.[132] The note importantly stresses the need for consistency in identifying and defining exceptional circumstances to ensure that the CCRC is 'scrupulously fair' to each applicant.

CCRC staff are asked as a starting point, to consider whether no appeal cases raise issues which potentially need the CCRC's special powers, where, for example, 'there is a realistic prospect of finding something new which will make a difference and which applicants cannot access' or 'serious mental health issues' where applicants are unable to understand their case sufficiently well to explain to the CCRC what has gone wrong. The checklist also notes that a note of the reasoning as to whether there are any potential exceptional circumstances should be recorded.

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[127] CCRC, *Formal Memorandum. Exceptional Circumstances* (n 108) para 10.
[128] CCRC, *Formal Memorandum. Exceptional Circumstances* (n 108) para 7.
[129] ibid para 10.
[130] ibid para 13 and subpara 13(ix).
[131] Peter Taylor, *Casework Guidance Note on Exceptional Circumstances* (CCRC 2018), Some categories identified by the Commission, para 5.
[132] ibid, Exceptional circumstances - pure legal argument, para 2.

Since *Nori*, the CCRC now informs refugee applicants convicted in the Crown Court and who have not appealed to apply directly to the Court of Appeal for leave to appeal their convictions. The new policy position is that 'new applications in respect of refugees where there has been no appeal' will generally be issued 'with a negative decision at the earliest possible stage' explaining that they need to apply to the Court of Appeal. However, the CCRC will continue to 'take account of any exceptional circumstances which appear to arise in each individual case'.[133]

2.4.4 Exceptional circumstances and the Court of Appeal[134]

There are few Court of Appeal cases which have considered 'exceptional circumstances' in CCRC references where there has been no appeal. In *R v Simmons* [2018] EWCA Crim 114, the Court of Appeal found exceptional circumstances existed due to the necessity of the CCRC to 'conduct extensive investigations and use their powers to extract material from various official bodies' (paragraph 15). The Court of Appeal noted,

> We recognise, as did the [CCRC], that the scope for a solicitor to do what was in fact necessary in this case would have been limited, time-consuming and costly. It was in those circumstances that the [CCRC] itself decided to investigate the case. It has been unnecessary to refer to the full panoply of materials placed before us, but we agree with the view taken by the [CCRC] that this is indeed an exceptional case.[135]

The Court also noted its regret that it had taken so long for the injustice to be remedied. Mr Simmons had been convicted in 1976. As it was a CCRC reference, the Court of Appeal did not need to consider the length of time during which Mr Simmons had not appealed. Had Mr Simmonds been required to apply directly to the Court of Appeal, he would have had to apply for leave out of time and explain why he had not appealed in the intervening period.

The *Simmons* case may be contrasted with *R v Callaghan* [2010] EWCA Crim 2725 where the Court did not consider that there were any exceptional circumstances. The CCRC had argued for their existence on the basis that it had obtained relevant

[133] ibid, judicial guidance on exceptional circumstances.
[134] This section draws on a useful casework note for CCRC staff which identifies relevant Court of Appeal cases on the nature of exceptional circumstances, ibid.
[135] *R v Simmons* [2018] EWCA Crim 114 [16].

social services material which the appellant could not have obtained (the Court was skeptical of this). In the Court's view, there was nothing in the new material 'of a compelling nature so as to warrant a reference on the basis of exceptional circumstances'. It is difficult to ascertain the differences in these cases other than that in one the Court was persuaded by the reference point and therefore accepted that there were exceptional circumstances.

In *Nori*, the Court suggested that the CCRC need not review refugee cases but ought to direct these cases to the Court. Similarly, the Northern Ireland Court of Appeal in *Harte and Roberts*[136] has suggested that the CCRC need no longer review Northern Ireland no appeal cases from the Troubles era as the Court is able to deal with these cases. The Court stated, '…even where there has been considerable delay or a defendant had initially taken the decision not to appeal, an extension of time could well be granted where the merits of the appeal were such that it would probably succeed'.[137] Historically in Northern Ireland cases, the CCRC took the view that exceptional circumstances were arose from the changed legal and political climate and that the issues, particularly in relation to young offenders, were issues of public importance.[138]After *Harte and Roberts*, the CCRC considers whether applicants require the assistance of the CCRC.

The Court of Appeal referred to the *Nori* case in a refugee case referred to the Court by the CCRC just before *Nori* was heard.[139] The court noted that *Nori* had

> discouraged references by the [CCRC] in cases where no right of appeal had been exercised, both for reasons of efficiency and cost. The decision to refer this case cannot be criticised but we trust that, for the future, the message has been understood.

[136] *R v Harte and Roberts* [2016] NICA 57.
[137] *ibid [4]*.
[138] *R v Fitzpatrick and Shiels* [2009] NICA 60.
[139] *R v PK* [2017] EWCA Crim 486.

3. The prosecution of refugees: Refugee cases

For me as a person, … I feel shy … when I see crime because I'm not that person who make[s] crime. I'm a pharmacist you know. I used to work as a pharmacist in my country. I respect all people. I don't want to … tick that [box], yes, I [committed a] crime. For me, it's something very big. Because I'm not a criminal. … A criminal is something very bad [from] my point of view … so when they put me in this [prison], …I feel bad to be honest with you. Yeah, that's making me, I mean very sad.
[Refugee 43]

I went with the handcuff like a criminal. Someone who commits crime……
It wasn't … a conviction. It wasn't a crime that similar as other offence[s]. It was an immigration matter, that was the way I was explained it by the lawyers at the time I was arrested in this country when I first came here. So I was convinced that I have not committed any crime in this country……
I've never been arrested in my entire life. I've never attacked someone, I've never stolen anything. I've never committed murder. Even in [my country], a country that was in a serious civil war, I didn't know [crime], didn't put my fingers on that bad, evil conflict.
[Refugee 53]

3.1 Refugee cases at the CCRC

In total 38 cases of refugees who were convicted of offences of irregular entry and stay were examined. These involved 35 refugees: two refugees re-applied to the CCRC after applying for leave to appeal against their conviction;[140] and one refugee applied in relation to two convictions two years apart (under section 35 of the 2004 Act).[141] Case 49 was not reviewed by the CCRC. It was closed about four months prior to the *Nori* case but on grounds similar to *Nori*, that is, that there were no exceptional circumstances. This case has been included. The cases therefore involved a total of 35 refugees (with 36 convictions). 34 of the refugees pleaded guilty and one may have pleaded guilty but there is insufficient information to be sure.

The origin of the 35 refugees can be seen in **Figure 2** (below). Nearly 49% of the 35 are from Africa and the Middle East, 43% are from Asia and 9% are of

[140] Cases 10 and 48 involve the same person as do 12 and 13.
[141] Case 45.

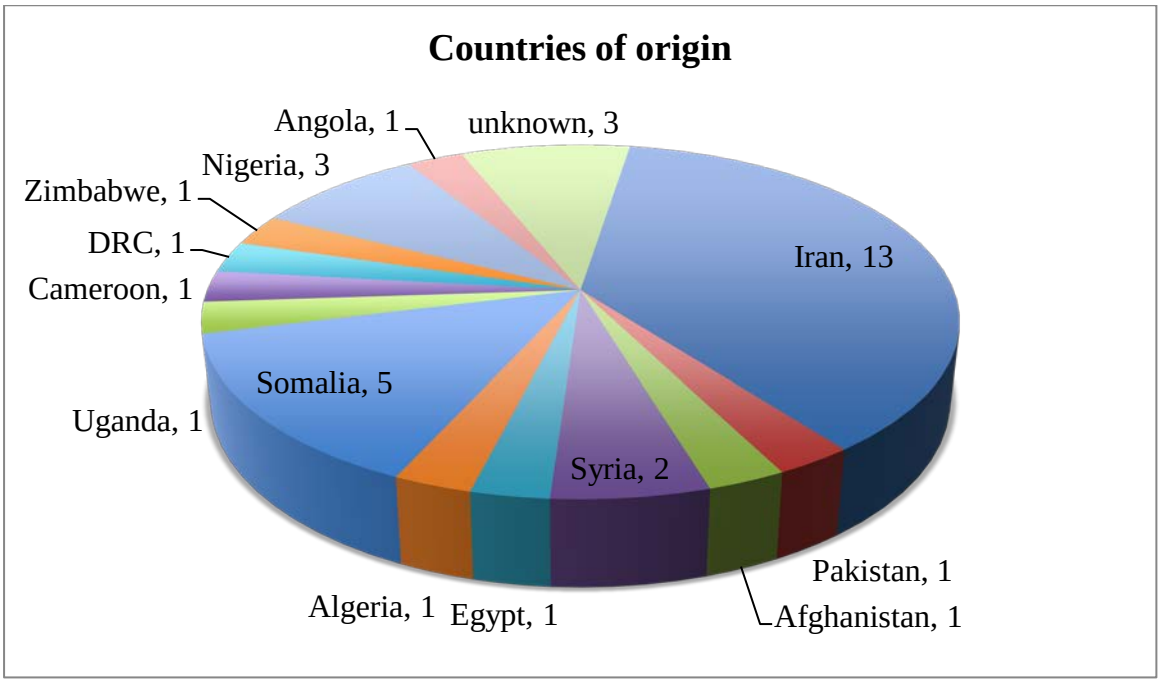


Figure 2 **Countries of origin mainly Africa and Asia**

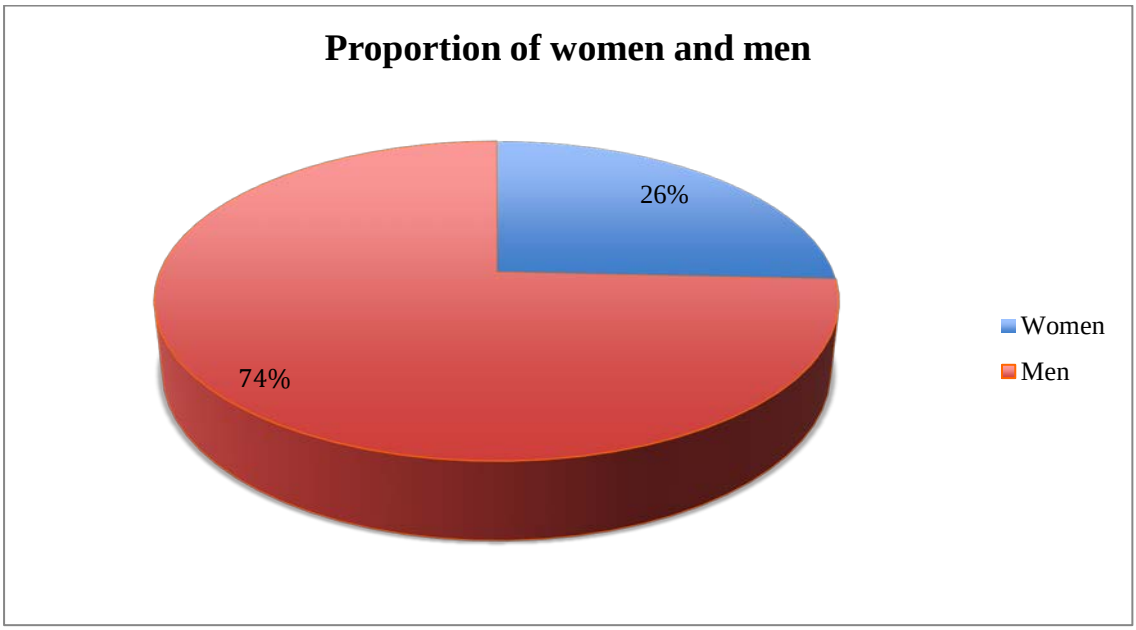


Figure 3 **Percentage of women and men among the 35 refugees**

unknown origin.[142] A feature of most of the cases is the paucity of information available. It was therefore not possible to identify origin in all cases. The percentage of women and men is 26% and 74% (**Figure 3** above).

Figure 4 (below) shows that twenty four refugees were convicted of false passport offences under section 3 of the 1981 Act[143] (x 1), section 25 of the 2006 Act (x 15)[144] and section 4 of the 2010 Act (x 8).[145] Eleven were convicted of offences under sections 2 (x 10)[146] and 35 (x 2)[147] of the 2004 Act. There are two anomalies. One of those convicted of failing to produce a passport under section 2 was also convicted, unusually, of an offence under section 105 of the 1999 Act (making a false representation).[148] A refugee convicted of an offence under section 3 of the 1981 Act

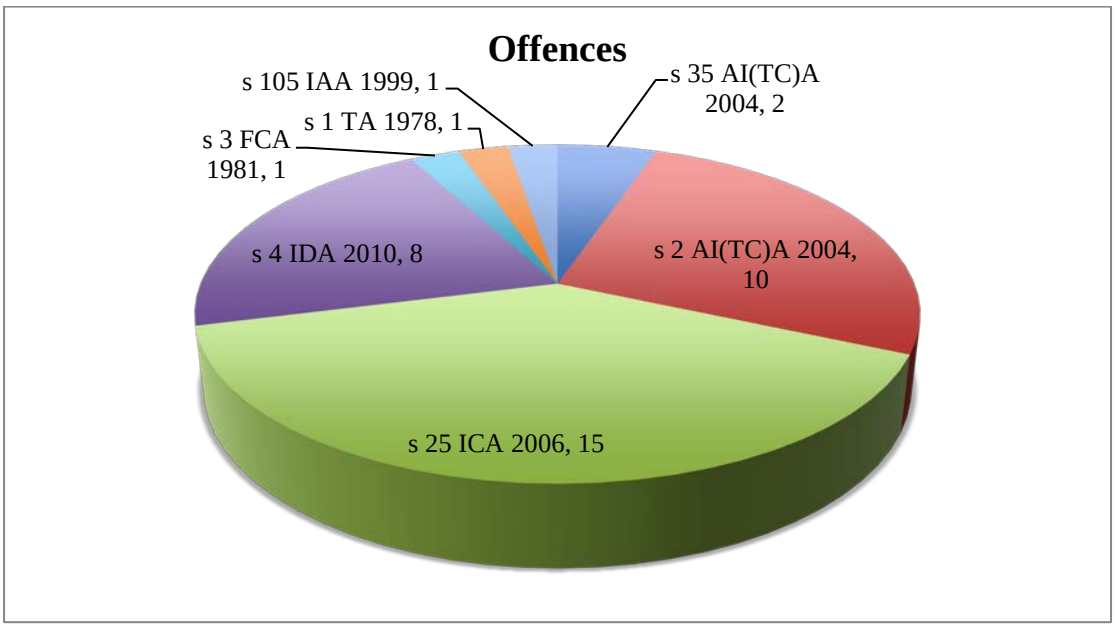


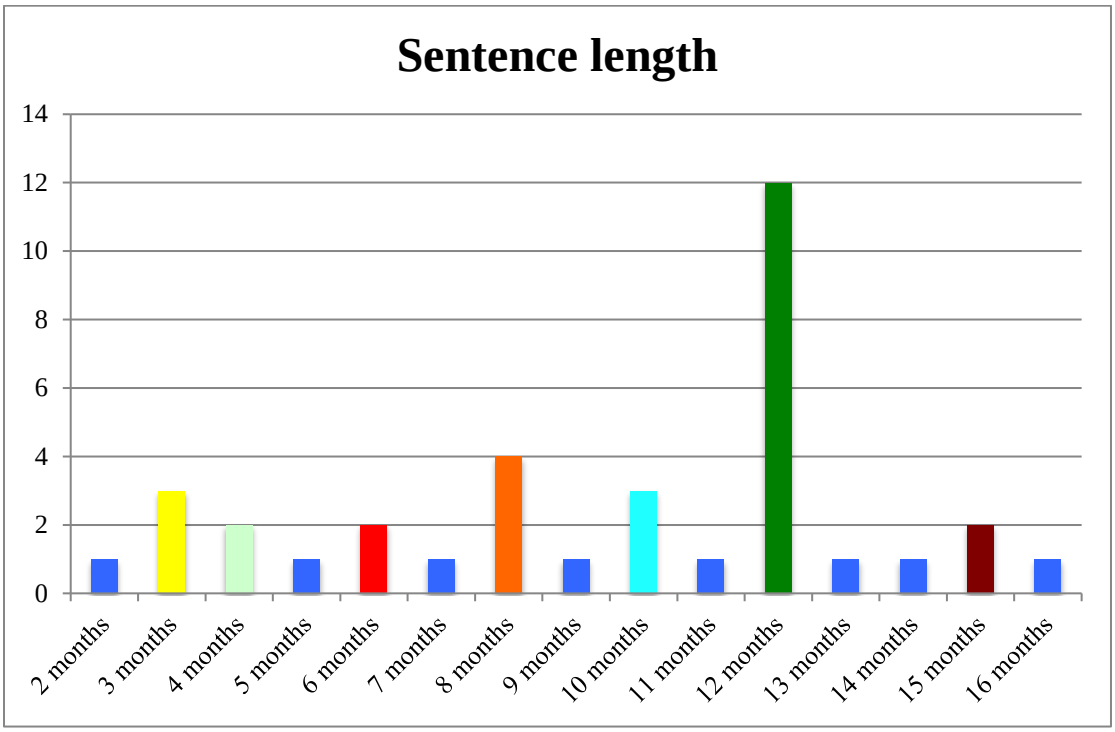
Figure 4 **Number of refugees convicted of offences under Forgery and Counterfeiting Act 1981, Identity Cards Act 2006, Identity Documents Act 2010, Theft Act 1978, Immigration and Asylum Act 1999 and Asylum and Immigration (Treatment of Claimants etc) Act 2004**

[142] The origin is reflected in the fact that the main refugee producing countries are in Africa (Somalia and South Sudan) and Asia (Myanmar, Afghanistan and Syria), IOM, 'Two-thirds of all refugees come from just 5 countries' (*Twitter*, 13 September 2018) < https://twitter.com/UNmigration/status/1040135765861261313/video/1> accessed 16 September 2018.
[143] Case 5.
[144] Cases 1, 2, 3, 6, 10, 12, 14, 15, 16, 18, 21, 22, 23, 48, 56 and 60.
[145] Cases 8, 19, 20, 49, 55, 58, 59 and 61.
[146] Cases 4, 7, 9, 17, 42, 43, 46, 50, 51 and 53.
[147] Case 45.
[148] Case 43. The authors have not previously encountered this offence in refugee cases.

was also convicted of obtaining services by deception under section of the Theft Act 1978.[149] Prior to 2006, it was relatively common for refugees to be convicted of a second offence of attempting to obtain services by deception (for those in transit trying to get on a plane to go elsewhere), a situation which was addressed in the 2008 case of *R v Asfaw*.[150]

Sentences ranged from two to 16 months imprisonment. Sentences for no passport offences ranged from two to eight months' while sentences false passport type offences ranged from seven to sixteen months' imprisonment (**Tables 1 to 3**).

Table 1 **Sentence length**



[149] Case 5. The authors have not previously encountered this offence in refugee cases. The case is unusual due to the fact that it was heard in the Crown Court and the long sentence.
[150] The House of Lords held that pursuing a charge under the Criminal Attempts Act when this was charged with an offence to which the refugee defence applied and which arose from the same circumstances was an abuse of process, *R v Asfaw* (n 54).

Table 2 **Sentence length for false passport type offences**

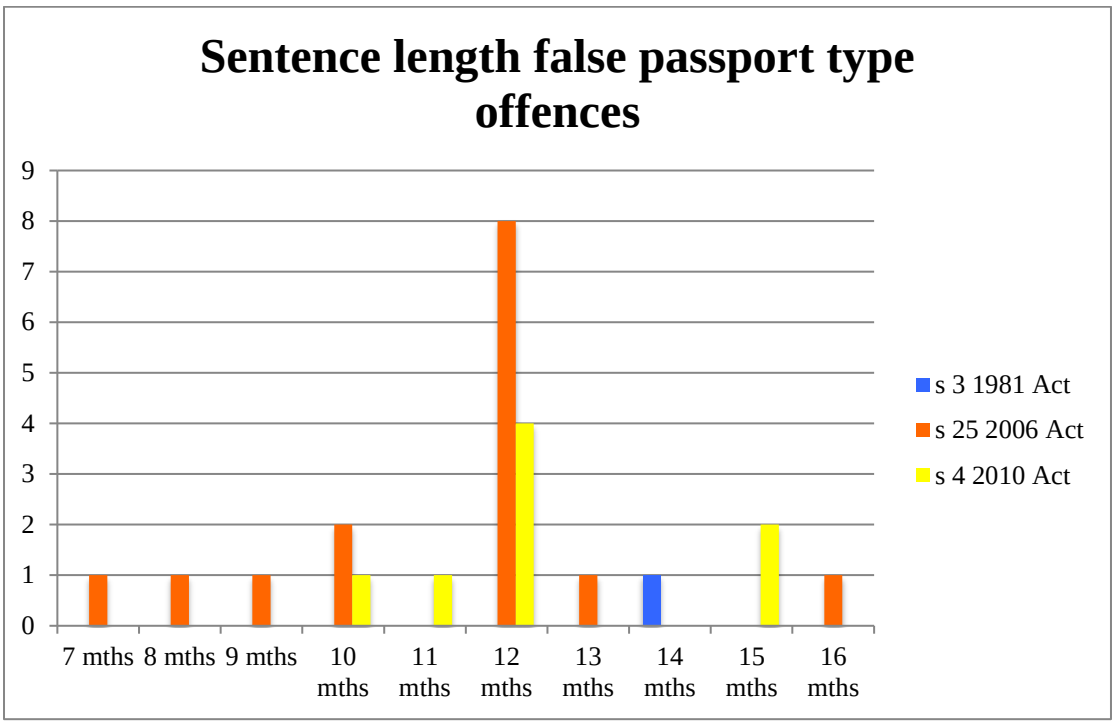


Table 3 **Sentence length for no passport type offences**

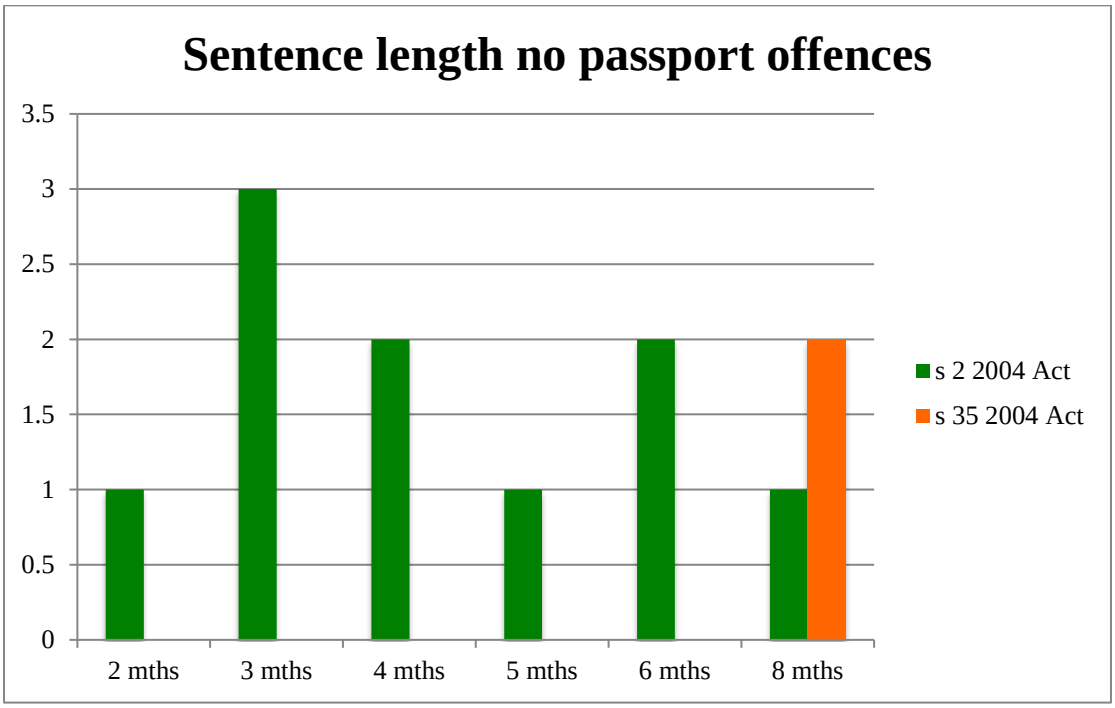
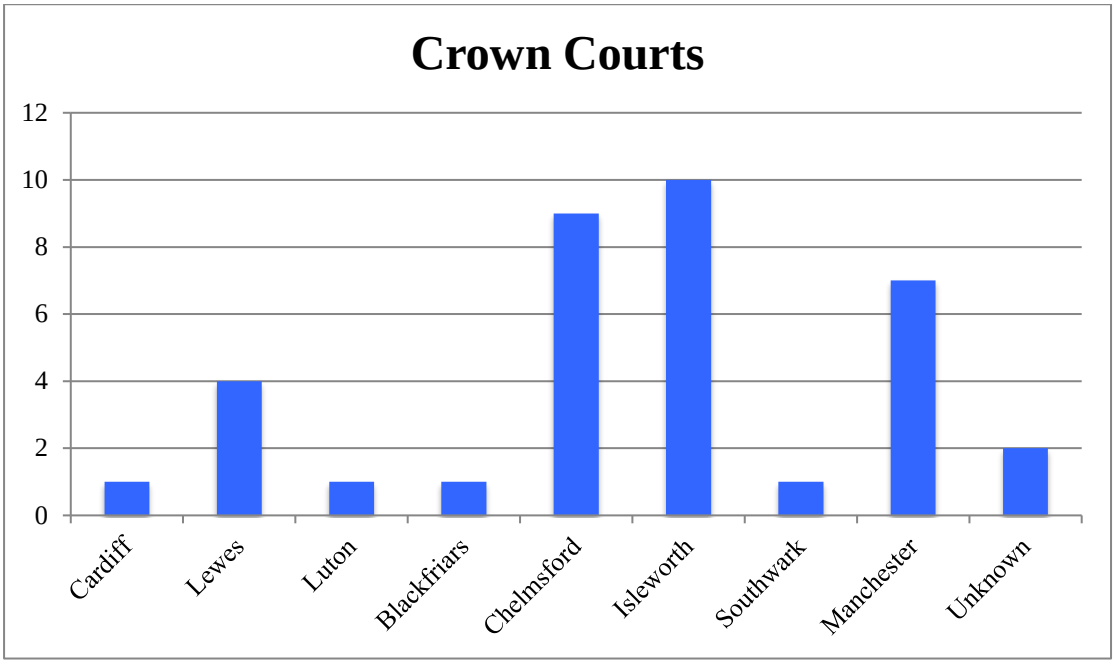


Table 4 (below) shows that most refugees were convicted at Chelmsford, Isleworth and Manchester Crown Courts. The unknown courts relate to the convictions for failing to co-operate in one's deportation.[151] **Figure 6** (below) shows the defences

Table 4 **Location of Crown Courts where convicted**



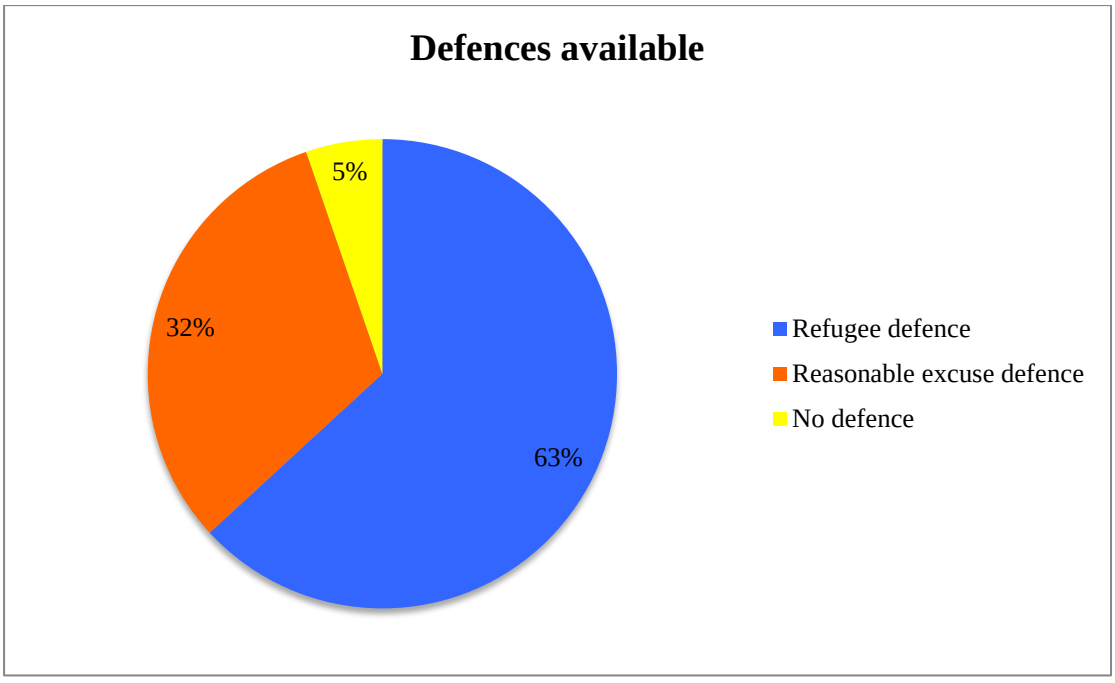


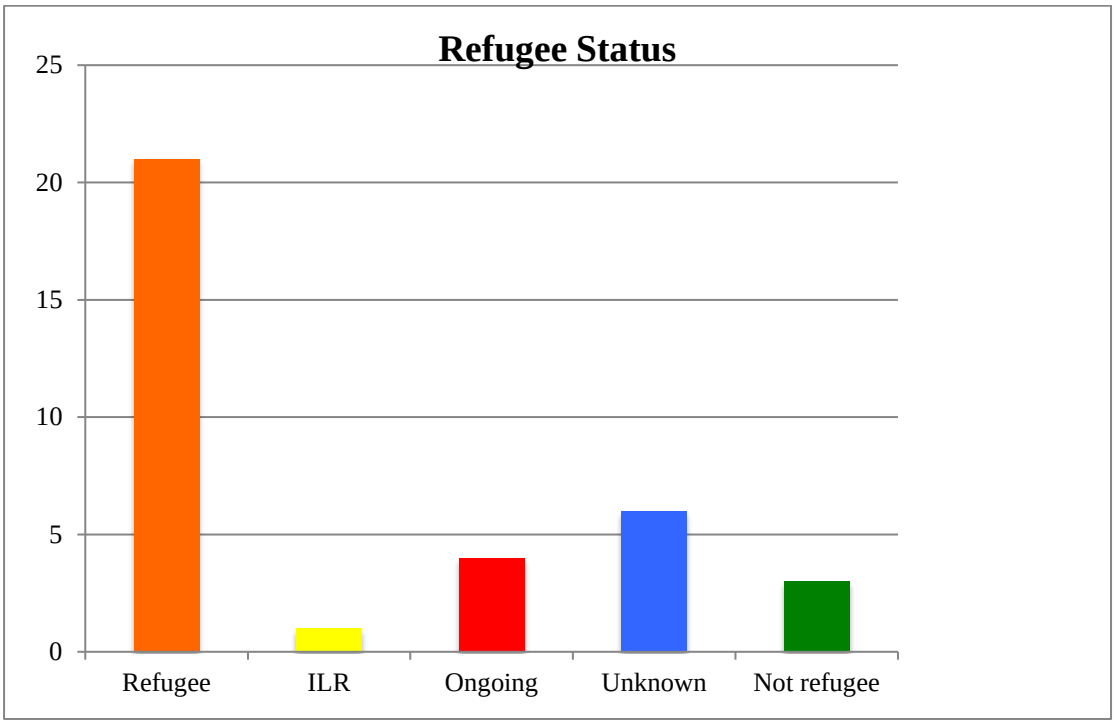
Figure 5 **Defences available to the refugees (depending on offences)**

[151] S 35 2004 Act.

available. The refugees convicted of offences of failing to produce a passport (section 2) or failing to co-operate in their removal (section 35) would have had a reasonable excuse defence available. The remaining refugees were convicted of offences to which the refugee defence applied. The offences of false representation and obtaining services by deception (both charged in addition to an offence to which one of the refugee defences applied) are not subject to the refugee defence. However, as was noted above, the case of *R v Asfaw* would be applicable.

21 of the 35 refugees have been granted refugee status (see **Table 5** below) representing 60%.[152] One had been granted indefinite leave to remain on the basis of Home Office delays and the poor prospect of removal (3%). The merits of the asylum claim could not therefore be excluded in such a case. In five cases, the asylum claim appeared to be ongoing (11%), in six cases, the outcome was unknown (17%) and three cases had been deemed not to be refugees (9%). It was not known whether this latter group had asylum claims ongoing due to the lack of information. The cases of

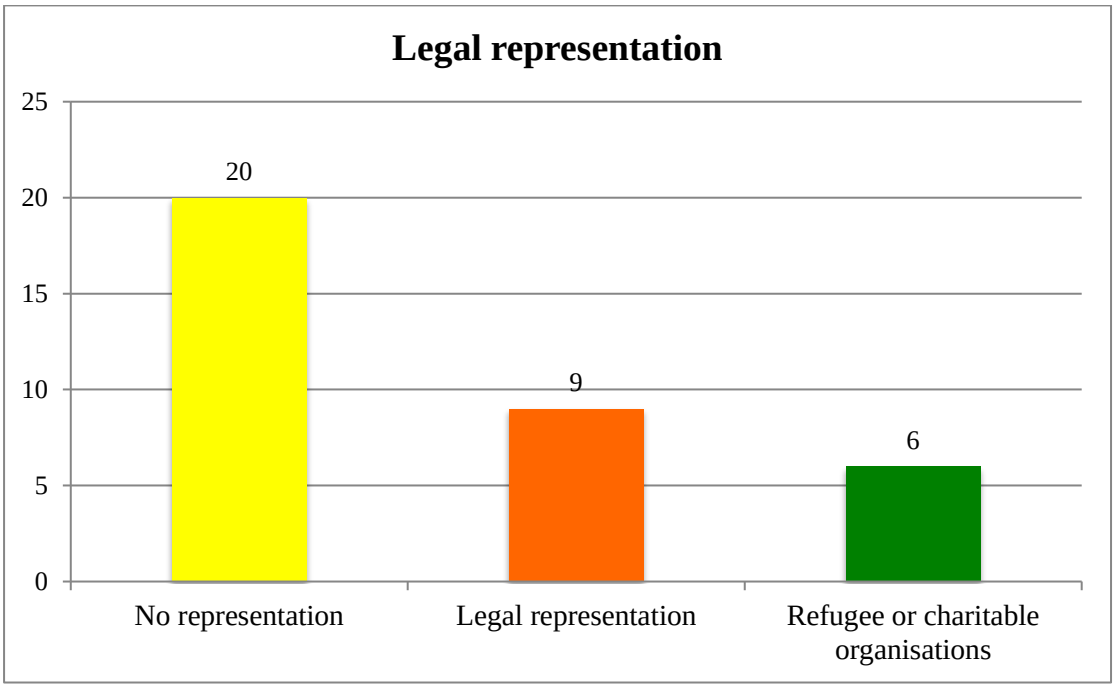
Table 5 **Refugee Status**



[152] These include what appear cases of humanitarian status and asylum *sur place*. These have been included as it is not necessary to show that one is a refugee under the reasonable excuse defence; it may be possible for a person to show that s/he is refugee under s 31(7) of the 1999 Act; and a full understanding of the context of the asylum case is required.

those without refugee or other settled status would have to be analysed further as in many cases, there was not sufficient information in the cases to determine whether refugee status had been granted or whether a case could be made to show that the person was, in fact, a refugee (in the context of the refugee defence). As less information is kept by the CCRC on these cases due to the fact that they are directed to the Court of Appeal, it was not possible to ascertain the strength of the cases on the information available.

Table 6 **Legal representation**



Of the 35 refugees, it was possible to note that some had suffered severe mental trauma resulting in PTSD, rape and torture in the country of origin (23%). One of the refugees had suffered mental trauma in the country of origin and also in the UK. However, there was insufficient information to know whether such issues arose in the remaining cases. At least one case seemed to involve a refugee who was also a victim of human trafficking. One was concerned about liability for deportation as a result of a sentence of 12 months' imprisonment which he said was impacting on his asylum claim.

20 of the refugees had no representation when they applied to the CCRC (**Table 6**). Six were assisted by refugee or charitable organisations but this was help in writing a letter to the CCRC rather than adequate representation. The remaining 9 refugees (26%) who had representation included solicitors who merely acted as a postbag and who did nothing for their clients after sending the application to the CCRC. Of the cases examined, 23 of the refugees had applied before the *Nori* case and 12 after *Nori*.

3.2 Appeals to the Court of Appeal

Five refugees appealed to the Court of Appeal after they were directed there by the CCRC. All had been convicted of false passport type offences under either section 25 of the 2006 Act or section 4 of the 2010 Act at Chelmsford, Lewes and Manchester Crown Courts. They pleaded guilty and received sentences of imprisonment of between 10 and 16 months (averaging 13 months). Their convictions took place between 2007 and 2015. There were four males and one female.

Figure 6 on page 50 shows that only one refugee has had his/her conviction quashed (Case 59) and one (Case 14) has an appeal outstanding. Both these cases were legally represented and Case 14 benefitted additionally from a CCRC statement of reasons. One of the three who was unsuccessful also appears to have been legally represented. He was the only one of the five who had legal representation on application to the CCRC. All those who were legally represented took less than a year to appeal to the Court of Appeal.[153] Five refugees out of 35 represents 14.3% of refugees applying to the Court of Appeal after being directed there by the CCRC. Less than 3% of the 35 successfully appealed their conviction (20% of those who applied direct).

3.2.1 Case 14

Case 14 was one of two cases considered by the CCRC at its first committee after the *Nori* case. The committee decided that exceptional circumstances no longer existed. The two cases were therefore not referred to the Court of Appeal. Instead, the

[153] See **3.4** for the interview with 59.

CCRC sent Statements of Reasons to the applicants explaining why their cases would not be referred but explaining how they could go about appealing their convictions. They were also given the names of three firms of solicitors as potential sources of representation.[154] The second case to be considered by the CCRC at the same committee has not applied to the Court of Appeal.

Case 14 was referred to the Full Court of Appeal by the Single Judge in May 2017. The Single Judge noted that the application required an extension of time of over seven years 'for which no satisfactory explanation has yet been given, in particular as to the period to 2014, when the applicant approached the [CCRC]'. The Single Judge also noted that it was, however, a case where the CCRC had expressed the view that there was a real possibility that the conviction would not be upheld by the Court of Appeal if it were referred and where the CPS had indicated that if the application for an extension of time was granted, they 'might not seek to argue that the conviction was safe'. It was noted that in 'these highly unusual circumstances' it was best to refer the case to the full Court. The full Court gave permission to appeal in October 2017 but the appeal remains outstanding. It is worth noting that had there not been a CCRC statement of reasons, the Single Judge may not have referred the case to the full Court of Appeal as there was no explanation given for the delay of over seven years.

3.2.2 Case 59

Refugee 59 applied for leave to appeal in February 2017 after being informed by the CCRC in April 2016 that he would have to apply to the Court of Appeal himself. In September 2017 his application was referred to the full Court of Appeal by the Single Judge who noted that there were arguable grounds of appeal. His conviction was quashed by the Court of Appeal in June 2018. For more information on why and how he appealed, see the Interviews of Refugees at **3.4**.

[154] The firms, all in London, were Bhatt Murphy, Bindmans and Wilsons.

Case	Legally Rep'd	Factors					Time CCRC to COA	Result
		Delay	**Legal advice**	**Defence**	**Refugee**	**Transit**		
48	No	9 years + no explanation or evidence for delay	Fanciful assertions	None			1 year (April 2016 to April 2017)	Refused. Not renewed. Re-applied to CCRC.
58	Yes		Not advised	Applies	Yes	Yes. But not short stopover, delay and asylum claim not soon enough	7 months (April to November 2017)	Refused. Not renewed.
13	No						2 years (May 2016 to April 2018)	Ineffective grounds. Re-applied to CCRC (ineffective).
14	Yes	Benefit of Statement of Reasons sent to applicant by CCRC setting out why conviction ought to be quashed.					6 months (April to October 2016)	Permission granted. Appeal outstanding.
59	Yes	See interview.					10 months (April 2016 to February 2017)	Conviction quashed.

Figure 6 Cases of refugees advised to apply directly to the Court of Appeal since *Nori*

3.2.3 Case 58

Refugee 58 applied for leave to appeal in November 2017 but was refused leave to appeal by the Single Judge in June 2018. The Single Judge proceeded on the basis that 58 was not advised about the defence, that he was a refugee and that he was in transit to Canada. However, the Single Judge was of the view that taking into account the cases of *R v Mateta* [2013] EWCA Crim 1372, *R v Z* [2016] EWCA Crim 877 and *PK* [2017] EWCA Crim 482, he would not have 'quite probably' succeeded in discharging the legal burden to show that his stopover was a short one. The Single Judge considered that since he had been in the UK for 7½ weeks he had not presented himself to the authorities without delay. The Single Judge went on to note that even had he been persuaded that he would succeed with the refugee defence, he would not have granted leave but would have referred the application to the Full Court of Appeal due to the 'length of the extension of time sought'. Refugee 58 has neither renewed the application to the full Court of Appeal nor re-applied to the CCRC.

3.2.4 Case 48

Refugee 48 applied for leave to appeal in April 2017. The application was refused by the Single Judge in November 2017 on the grounds that no reasonable explanation was given for delaying more than nine years before appealing against conviction; there was no evidence that mental health problems had prevented the lodging of an appeal; allegations that he had been 'forced' to plead guilty and that his legal representatives had advised him 'improperly' had 'no reasonable basis' and rested 'solely on fanciful assertions made…more than 9 years after the event'; and that it was clear from the trial papers and trial barrister's observations that there was no defence 'including no possible defence' under the refugee defence. The application was not renewed. However, Refugee 48 renewed his application to the CCRC in 2017.

3.2.5 Case 13

Refugee 13 applied for leave to appeal in April 2018 but the grounds were deemed to be ineffective by the Court in June 2018.[155] Refugee 13 must have wrongly believed that this 'ineffective' appeal was a refusal of leave by the Court as she subsequently renewed her application to the CCRC. The CCRC has deemed the re-application ineligible (because an ineffective appeal is no appeal).

3.2.6 Other features

The appeal cases suggest that even where a refugee could demonstrate that his or her conviction is unsafe, the Single Judge would be unlikely to grant leave or would refer the application to the full Court of Appeal due to the length of time since conviction. The cases also suggest that the law in this area is not necessarily being applied correctly. For example, while in relation to case 58, it was accepted that the refugee was in transit, instead of assessing the reasons for the stopover in the UK, the Single Judge used his presence in the UK to query whether he had presented himself to the authorities without delay. However, refugees in transit on the way to somewhere else do not intend to claim asylum in transit countries and they should be accorded the benefit of article 31(1) if they would be able to claim that benefit in the country of eventual asylum (as had been noted in *Adimi*)[156].

Another feature of the cases is the delay involved after refugees apply to the CCRC. Refugee 14 applied to the CCRC in 2014. In 2016, he was told to go to the Court of Appeal. His case has been with the Court of Appeal since October 2016. Refugee 58 applied to the CCRC in November 2015 and was refused leave to appeal at the Court in November 2017. After being told by the CCRC in 2016 to go to the Court of Appeal, Refugee 14 wrote to the CCRC expressing his unhappiness and stating that he knew nothing about the law in the UK when he arrived. He said, 'I had no solicitor who can advise me to make an appeal and I had no idea anything about related to Appeal because I was new to the UK and I did not know the law of the UK'. In one case where a charity was representing an applicant (Case 7), the charity

[155] In such a case the Court has no file and no papers as they do not open a file in such circumstances.
[156] See **2.3.1** above.

asked for advice on how to appeal after being informed of the requirement to apply to the Court of Appeal direct.

3.2.7 Exceptional circumstances

Of the cases considered in this report, most were directed to the Court of Appeal by the CCRC after *Nori*. One case (Case 49) was a pre-*Nori* case but has been included as it was not reviewed on the grounds that there were no exceptional circumstances. CCRC policy and guidance on exceptional circumstances, taken as a whole, is excellent in terms of its principles, illustrative non-exhaustive examples, focus on fairness for the individual applicant and concern with consistency. However, the CCRC does not appear to apply exceptional circumstances adequately in refugee cases. The cases reveal various problems relating to the assessment of exceptional circumstances.

In the cases researched, most did not identify the reasons for finding or not finding exceptional circumstances, apart from citing *Nori*. For example, in Case 4, it was noted that as it involved a Crown Court conviction, there were no exceptional circumstances after *Nori* in these circumstances and therefore the case should be treated as a no appeal decision. No one in the review of this case appeared to consider whether there were, in fact, any exceptional circumstances. There were no specific references to CCRC policies or any consideration of the non-exhaustive list of illustrations and in no case was it considered whether there were any exceptional circumstances outside the non-exhaustive list. In one case, it was difficult to discern any information about the background of the applicant and it was not known whether she had been recognised as a refugee (Case 6). In another case where there was sparse information and the applicant did not speak English, it was noted that ‘the Court's decision in *Nori* makes it very clear that there are extremely limited circumstances in which we should be considering such applications instead of the Court of Appeal’. The CCRC translated its response to the applicant in her own language.[157] Further, the reference to exceptional circumstances in the cases reveals a restrictive understanding of the term which was not consistent (except in its restrictiveness) among cases and did not deal fairly with refugee applicants. The CCRC was not proactive in its

[157] Case 8.

approach to exceptional circumstances and expected applicants to raise these.[158] The fact that none were raised or that there appeared to be none on the application seemed to be used to conclude that there were none. There was no analysis in most cases either on an individual case basis or on a group basis.

Refugee 2 stated that he knew others who had been sentenced for less than 12 months and raised issues about his asylum claim. He applied to the CCRC because he was concerned about his liability for deportation as he had a sentence of 12 months and this was affecting his asylum claim. A letter sent with the application stated that a passport was supplied to the person so he could flee his country of origin. The CCRC noted that it was not known why he wanted or needed to flee the country and that his concerns about sentence and asylum did not raise any exceptional circumstances and 'neither can I discern anything else which would constitute exceptional circumstances'.[159] In most of these cases, no material had been obtained under CCRC powers and therefore the information available was limited.

It should be noted that refugees convicted of criminal offences constitute a fraction of those convicted every year. It is not known how many refugees are convicted annually of irregular entry and stay offences but it is unlikely to be as high as 500 people a year (the estimated number in 1998[160]). In 2017, the police recorded 5.2 million offences. Refugee cases, as a proportion of all crime would then constitute between 0.019 to 0.008%. The CCRC has received 24,040 applications (including ineligible applications)[161] since its establishment in 1997.The exact figure for refugee cases is unknown but perhaps lies in the region of 120 to 150 cases at the CCRC since 1997. Refugee cases as a proportion of CCRC applicants represent 0.62% to 0.71%. Refugee cases are therefore a relatively unusual group of cases in terms of their numbers. They are also relatively unusual in terms of the fact that they mostly plead guilty.

3.2.7.1 Problems with the cases

Issues in the cases which might fall to be considered under exceptional circumstances include factors connected to understandings of the law and the legal

[158] Eg, Case 12/13 was asked to provide exceptional circumstances.
[159] Case 2.
[160] Dunstan (n 18).
[161] From CCRC statistics <https://ccrc.gov.uk/case-statistics/> accessed 14 August 2018.

and factual complexity of the cases on the one hand and factors relating to the refugees on the other.

Many of the cases were legally and factually complex. It was not clear that all CCRC reviewers fully understood the law as it applied to these cases.[162] For example, three refugees had been convicted of failing to produce a (genuine) passport under section 2 of the 2004 Act prior to the cases of *Thet* and *Mohammed and Osman*[163] in 2004 to 2006 (Cases 4, 17 and 53). This was at a time when refugees were treated as if the reasonable excuse did not apply to them and they were advised to plead guilty. It was noted by the CCRC in one of these cases that the case was old and that it would therefore be difficult to get hold of papers in the case. However, the CCRC ought to know from previous referrals in this type of case that prior to *Thet*, solicitors routinely advised refugees and asylum seekers to plead guilty; and that it was prosecution policy to pursue such cases. Refugee 53 in his interview stated,

> at the time I arrived, a lawyer told me that unfortunately they just, put into place this law to arrest *anyone* who come to this country with false or without passport. And you are one of the first.[164]

Refugee 53 was convicted in December 2004 and therefore was convicted within three months of section 2 of the 2004 Act coming into force.[165] The refugee interviews (at **3.4**) reveal that there is a lack of knowledge about these cases by both the refugees themselves and solicitors generally. In relation to the other eight cases involving section 2 offences (representing convictions between May 2008 and June 2010) the CCRC did not always interpret the law correctly when it assessed the cases (prior to the *Nori* case). Refugee 43 stated that he had been to see several solicitors (since *Nori*) about his conviction for a section 2 offence and all had told him that there was nothing in his case or that the case was weak and he would not get legal aid.[166] The CCRC did not consider the law when assessing exceptional circumstances because it referred to the fact that *Nori* had stated that the law was well known in this type of case and that therefore there were no exceptional circumstances. [167]

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[162] Some reviewers are excellent but overall there was some inconsistency in understanding and approach.
[163] See Appendix 3 for details of these cases.
[164] Interview with Refugee 53, 'Appealing Refugee Convictions after Nori' (26 June 2018).
[165] Sections 2 and 35 came into force on 22 September 2004.
[166] Interview with Refugee 43, 'Appealing Refugee Convictions after Nori' (21 June 2018).
[167] Case 4.

Another factor is that the vast majority of section 2 offences were convicted in the Magistrates' Court with sentences commonly being no more than six months' imprisonment. Those Crown Court convictions at the CCRC (four at Isleworth and six at Chelmsford) involving section 2 offences are therefore highly unusual. This may have been because some areas had a policy of trying these cases in the Crown Court rather than the Magistrates' Court.[168] This is another disparity which the CCRC may have wished to consider as a factor in considering whether or not exceptional circumstances existed.

It should be noted that although article 31(1) is applicable in all these types of cases, the criminal law is not uniform in this area. It varies according to the offence, the defences operate differently and in some cases, there is no defence. Some cases are more complex than others. For example, transit cases are generally complex. These include cases where refugees are trying to seek asylum in a country other than the UK as well as cases where a failed asylum seeker is trying to leave the country. In terms of the latter scenario, the only example of a case where a refugee has successfully appealed a conviction is via a CCRC referral.[169] This was a magistrate conviction which was referred to the Crown Court. It concerned a refugee trying to leave the UK and abuse of process by public authorities. It also concerned mental health issues. Such a case therefore raises issues of public interest. An old 2005 case which looked similar to this was not assessed in terms of exceptional circumstances even though it was noted that it bore similarities to the Magistrates' Court referral (Case 5). It was simply noted that as the conviction was in the Crown Court, the refugee could appeal himself. The fact that the conviction was in the Crown Court at a time and in an area when a conviction in the Magistrates' Court would have been the norm, one of the convictions was for an unusual offence and the sentence length was far higher than the norm at the time also point to a complex and unusual case. Despite the unusual nature of this case, this was not considered in terms of exceptional circumstances.

Due to the complexity of some of the cases, it would seem that it would be necessary for the CCRC to obtain material in order to properly assess whether there were exceptional circumstances. However, there was very little information available

[168] In the 1990s, refugees arriving at Gatwick airport were always tried at the Crown Court but those arriving at Heathrow were generally tried in the Magistrates' Court.
[169] *R v L (Somalia) (reference to the Crown Court by the CCRC)* [2015] unreported.

for many of the cases. The CCRC had exercised its powers in the older cases but had not generally not done so in over half the cases examined. The CCRC is able to obtain Home Office material including information about the asylum claim and refugee or other status; health and hospital records where relevant; as well as police, CPS and court records. The lack of information about cases undermines the ability of the CCRC to determine whether exceptional circumstances exist.

As noted above (**3.1**, page 47), 23% of the cases raise questions about serious mental health issues because there are references to torture,[170] rape leading to hospitalisation[171] and other evidence of trauma in circumstances amounting to persecution under the Refugee Convention.[172] There are also references to PTSD[173], complex PTSD,[174] trafficking[175] and sometimes mental health issues have been raised by solicitors. In none of these cases were mental health issues adequately assessed as to whether or not they might amount to exceptional circumstances even where the refugee had provided evidence of mental health issues or where a solicitor or the refugee had indicated this was available.[176] For example, in Case 21, the refugee's representatives were told that the case was being closed post *Nori* because that case referred to 'the law now being settled in this area and the CCRC's statutory powers of investigation are not required because the court can itself obtain the necessary material'.

One of the factors to be taken into account according to the CCRC's policy and guidance on exceptional circumstances is whether an applicant can appeal without help. This includes whether an applicant can make him or herself understood. In case 49, the refugee was unrepresented and raised issues about immigration detention rather than prosecution. The CCRC wrote to the applicant asking about his case. When no response was received, the case was closed despite the fact that he was clearly a refugee who had been convicted of an offence of irregular entry. The CCRC concluded there were no exceptional circumstances (without identifying what had been considered). Since it was a pre-*Nori* case, the applicant was not informed about

[170] Cases 9, 12 and 13.
[171] Case 21.
[172] Case 7.
[173] Case 53.
[174] Case 9.
[175] Case 56.
[176] Cases, 7 12 and 13. Refugee 7 had no English.

applying to the Court of Appeal. The CCRC did not proactively consider whether or not there were exceptional circumstances in line with its policy.

Individually, cases may raise issues of public interest. For example, at least two of the refugees (both convicted in 2009) stated that they had been told by the Home Office in prison that their asylum claims would not be dealt with until criminal proceedings had finished. They said that this meant they pleaded guilty. Both have been recognised as refugees and were convicted of an offence under section 2 of the 2004 Act. In the circumstances, this would appear to raise issues of abuse of process but this has not been considered by the CCRC.

While the refugee cases may individually flag up issues which require a more thoughtful and nuanced approach to the assessment of exceptional circumstances than is currently being conducted by the CCRC, it is important to note that these cases as a group also raise factors which ought to be considered in an assessment of exceptional circumstances notwithstanding *Nori*. Firstly, the cases, as a group, raise issues of public interest. While the CCRC recognises this, it could do more to identify the precise reasons why the cases raise concerns of public interest. The cases involve refugees who are protected by article 31(1) of the Refugees Convention and which the *Adimi* case concluded ought not to be prosecuted without any reference being made to article 31(1). The refugee defence was intended as a safety net so as to give effect to the broad purpose sought to be achieved by article 31(1), that is, 'to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law'.[177] Twenty years after *Adimi* and the introduction of the refugee defence and 15 years after the reasonable excuse defence, refugees continue to be prosecuted without any or any adequate reference to article 31(1). This is a matter which ought to be considered in the context of exceptional circumstances. Considering the refugees *as a group* does not undermine the CCRC's policy and guidance on exceptional circumstances.

Secondly, and related to the first point, is that this group is made up of refugees. If you are a refugee, this means that you have been recognised to be a person who has been persecuted on one of the five grounds in article 1A of the Refugee Convention. This is not tangential to the conviction but the very crux of why refugees are exempt from prosecution. The raison d'être of article 31(1) is a form of

[177] *R v Uxbridge Magistrates' Court ex parte Adimi* (n 48) 677.

immunity for refugees because they are persecuted by governments on specified grounds and are outside their country of persecution. Mr Adimi was persecuted on political grounds because his state, Algeria, failed to protect him from persecution by a terrorist organisation. Mr T was persecuted by his state, Eritrea, because he was worshipping privately as a Jehovahs Witness. As a consequence he was made to do slave labour. Mr H was found to have been persecuted by his country (Cameroon) simply for being gay. In Cameroon this results in torture. L was persecuted for political reasons by Somalia and was raped and tortured as a result.

The fact of persecution for a Convention reason (or other related reason in the case of humanitarian protection, gross humans rights violations or fleeing from war) coupled with a flight from such persecution in the course of which the refugee commits an offence of irregular entry or stay is what exempts them from prosecution. The exceptional circumstances relating to refugees exists due to the group. The reasons why there are exceptional circumstances in one case will mean that there are normally exceptional circumstances in all cases.

The CCRC could determine that the specific problems noted of the relatively small number of refugees who have been wrongly convicted are sufficient to justify applying exceptional circumstances in all cases without having to scrutinise individual cases for exceptionality. These problems include trauma/PTSD/mental health problems; language; ignorance of the law and legal system; unavailability of sufficient lawyers who know the law in the context of immigration, police and prosecuting authorities who appear to overlook the defences; legal and factual complexity requiring investigation from public bodies; and abuse of process.[178] These problems when considered against the fact that this group are refugees (including asylum seekers) who ought to be protected against prosecution raise issues of public interest. It is noteworthy in this context that the Supreme Court in *SXH* held that the *prosecution* of a refugee did not result in a breach of Article 8 rights.[179] This makes it all the more important for refugees to be able to have their wrongful convictions quashed without unnecessary obstacles.

Prior to *Nori*, the CCRC identified exceptional circumstances for varying reasons (see **2.4.3.1**). Many of the cases included issues relating to the public

[178] There may in addition be exceptional circumstances for individual refugees over and beyond the general exceptional circumstances which apply in all such cases.
[179] *SXH v CPS* [2017] UKSC 30.

interest/interests of justice (though this was left largely undefined) and the fact that they were a group of cases connected by the fact that defence lawyers failed to advise in relation to the relevant defences and police, immigration and prosecuting authorities also overlooked the existence of the defences. Other cases interpreted exceptional circumstances as including the inability of an applicant to deal with the complexity of a case and the CCRC's statutory powers which meant applicants were unlikely or unable to obtain material. In none of the cases, did the CCRC follow the approach suggested above.

Making a note that there are no exceptional circumstances does not demonstrate that exceptional circumstances have, in fact, been considered. The Court of Appeal's suggestion in *Nori* that the CCRC was applying exceptional circumstances 'as a matter of routine' seems to have been converted into a failure by the CCRC to apply exceptional circumstances in a clear, consistent and reasoned manner.

In only one case, Case 51, were exceptional circumstances raised in the application to the CCRC. These included insufficient understanding of English to represent himself; inability to obtain information without the assistance of the CCRC's special powers as his case was complicated and complex; inability to obtain legal aid; and lack of means to afford solicitors. The CCRC's response was that not being able to afford a lawyer and having no legal aid did not amount to exceptional circumstances. The other issues do not appear to have been addressed despite the fact that inability to understand the complexity of a case and the CCRC's statutory powers have been given as exceptional circumstances in previous referrals (see **2.4.3.1**). The solicitor's letter to the CCRC outlined their understanding of what had happened at the trial. It was stated that at first Refugee 51 pleaded not guilty. His barrister made representations as to why he was not guilty and the prosecution then made representations as to why he was. The Judge asked to look at the defence skeleton and told Refugee 51 that if he pleaded guilty, he would reduce the sentence to five months or less. The barrister then advised him to plead guilty but only after he asked the judge to confirm in court that he would be sentenced to five months or less. The judge refused to do this. Refugee 51 pleaded guilty and was sentenced to four months' imprisonment. At the end of the hearing, the judge said Refugee 51 was welcome to the UK and that he should now be a law abiding citizen; and that he understood the situation in the country of origin. Although the barrister said he had a defence,

Refugee 51 did not understand what the defence was. His application for settlement was refused in 2013 and he had been dismissed from a previous job because of the criminal conviction.

Case 51 is indicative of some of the problems in this area. It is not a complex or complicated case. At the time Refugee 51 was convicted, the cases of *Thet* and *Mohammed and Osman* had been decided (see **Appendix 3** and fn 271). Further, Refugee 51 came from Somalia. These were all matters which clearly demonstrate that he should never have been prosecuted and that his prosecution was likely to have amounted to an abuse of process. Yet he has suffered a wrongful conviction for over ten years, despite being a recognised refugee, which prevents his settlement and eventual obtaining of British citizenship and he has difficulties in working. He has been refused legal aid. He does not have sufficient command of English (which would involve an understanding of legal concepts including the cases of *Thet* and *Mohammed and Osman*) to take his case direct to the Court of Appeal. The CCRC has declined to find exceptional circumstances and directed him to the Court of Appeal. There is realistically no way forward for this refugee to get his conviction quashed. It would seem in these circumstances that the approach of the Court of Appeal in *Nori* has had a devastating impact on refugees in situations similar to Refugee 51. The exceptional circumstances bar has been set so high that it is difficult to think of how a refugee might be able to demonstrate exceptional circumstances if Refugee 51 does not meet that hurdle. The approach also undermines the rule of law as the UK fails to abide by its international commitment to the Refugee Convention, including article 31(1).

3.3 Reported cases

Of seven refugee cases heard by the Court of Appeal since *Nori*, three were referred by the CCRC prior to *Nori*[180] and four went to the Court of Appeal direct (without going first to the CCRC).[181] In three of the cases, the refugee was not represented[182] and two of these were successful at quashing their conviction (*R v*

[180] *R v Arash Zaredar* [2016] EWCA Crim 877; *R v Chikho* [2016] EWCA Crim 2300; *R v PK* (n 140).
[181] *R v Ordu* [2017] EWCA Crim 4; *R v Mirahessari and Vahdani* [2016] EWCA Crim 1733; *R v MM* [2016] EWCA Crim 1326.
[182] *R v Ordu* (n 182); *R v Arash Zaredar* (n 181); *R v MM* (n 182).

Zaredar and *R v MM*). A factor in this success was that the appeals were unopposed. Further, *Zaredar* was a CCRC reference and therefore had the benefit of a reasoned Statement of Reasons. The Court of Appeal observed,

> This is yet another instance when unhappily an appellant was deprived of legal advice as to the statutory defence under section 31. As it seems to us, the Law Society should be appraised of this judgment and encouraged, as a matter of professional training and conduct to draw this issue to the attention to its members. With respect, there really is no excuse for continuing professional failures in [this] regard. The statutory defence should be raised and, if need be, disputed as soon as possible. It should not need to be left to appeals out of time or the Criminal Cases Review Commission to remedy matters after the event.[183]

The unsuccessful refugee was not granted an extension of time (of eight years and three months since his conviction). The Court stated that there was no 'substantial injustice' to the refugee as quashing the conviction would 'make no real difference to the applicant's life at all'.[184] The remaining two decisions involved refugees who were represented, one after a reference by the CCRC[185] which was successful. The other involved two unsuccessful appeals against conviction for an offence under section 36 of the Malicious Damage Act 1841 for walking through the Channel Tunnel.[186] The CCRC references were therefore all quashed. Of the four who went direct to the Court, only one was successful.

3.4 Interviews of refugees

Two of the three refugees interviewed were convicted of failing to produce a passport.[187] One of these was also convicted of fraudulent misrepresentation under section 105 of the 1999 Act. The third refugee was convicted of a false passport type offence.[188] The sentences ranged from 5 to 12 months imprisonment. They all pleaded guilty. All three were recognised to be refugees or were granted humanitarian protection very quickly within 6-12 months of their arrival. Interviews of the three refugees reveal three broad issues which interrelate and work to prevent them from overturning convictions after *Nori*. These are a lack of knowledge of the criminal

[183] *R v Arash Zaredar* (n 181) [20].
[184] *R v Ordu* (n 182) [33].
[185] *R v Chikho* (n 181).
[186] *R v Mirahessari and Vahdani* (n 182).
[187] S 2 2004 Act.
[188] S 4 2010 Act.

justice system and UK systems; a belief that what they have done is not criminal; and a lack of appropriate resources and assistance. One refugee who managed to get his conviction overturned did so due to his determination, perseverance and luck in meeting someone who was knowledgeable about these cases. The three themes appear to operate for refugees in a way which differentiates them from other defendants.[189] They are interrelated and at their core is their status as refugees – this explains why they know nothing about another country's legal system; because they are refugees escaping persecution they do not perceive themselves as criminal (which is supported in law by article 31(1)); and the lack of resources and assistance stems from the lack of knowledge and expertise about article 31(1) of the 1951 Refugee Convention.

3.4.1 Lack of knowledge of criminal justice system

None of the refugees understood how the criminal justice system worked either at the time they were convicted or now.[190] At trial, they had insufficient knowledge of English to understand what was happening. Nor could they deal with correspondence from solicitors and the Home Office on their own.[191] Refugee 59 could read some English but none of the refugees could understand legal English. Refugee 59 describes what happened at his trial,

> At the court or when my barrister came in, he represented me at the court he said, okay, you will not be asked anything. Just you… the judge will ask you, are you guilty? You will say, Yes, I am guilty, that's it. And I will speak on behalf of you. He just took a quick very quick … [mitigation] about my case [for sentence]. And we went all this through, you know. I didn't know [that I was convicted of having] … improper intention….
> Recently, I know this is the intention with which I was accused … . What I remember is the barrister…the solicitor said to me, this is very known case. You entered the country with [false passport] and which is like a guiltiness. So, you'll be sentenced. And that's it, you know. I like, give up so I went through the whole system.

Refugee 53 said of his arrival, '…a lawyer told me that unfortunately they just, put into place this law to arrest *anyone* who come to this country with false or without

[189] This does not detract from the fact that other defendants may also encounter obstacles to appeal; and that there may be specific factors for other groups.
[190] Interview with Refugee 43 (n 167); Interview with Refugee 53 (n 165); Interview with Refugee 59, 'Appealing Refugee Convictions after Nori' (7 July 2018).
[191] Interview with Refugee 59 (n 190).

passport. And you are one of the first'.[192] He also complained that he had been '*interrogated*' and put under '*pressure*' in the airport at a time when he was ill. It was noted that refugees did not know their rights, they were in a weak situation and scared of everything, 'they are not in a normal situation …. First after a difficult journey, you come here they will take you to the judge and the station…you see police around you. It's not, you're not [in] a normal situation'.[193] In prison, Refugee 59 had to get another prisoner to translate a letter from his solicitor. He thought that the solicitors should have found someone to explain the law to him. He also had to rely on a detainee to write to the Home Office when he received a letter from them. This made Refugee 59 very dependent on a person who could have jeopardised his safety by misusing his personal information. He had asked an immigration officer to find a solicitor for him but no assistance arrived. Refugee 59 stated,

> They unjustly put you in the jail. And then you know because the refugee [who] doesn't speak English doesn't know anything, can't find any help. ……in the end gives up.

The nature of the conviction as a type of fraud,[194] the fact that an 'improper intention, was shown making the offence more serious[195] or that the conviction is a criminal offence (as opposed to immigration matter)[196] was not fully recognised by the refugees. Failing to recognise that the refugee has a criminal conviction can lead to making incorrect statements. For example, Refugee 53 did not fully appreciate that he had a conviction until he was brutally attacked seven years after he was convicted when he made a claim for criminal injuries compensation. He stated he had no criminal convictions. He was then denied compensation as he had made a false statement.

None of the refugees knew they had a right to appeal. One refugee waited for his barrister who said he would let him know what was happening after he was sentenced but he never came.[197] All three discovered the existence of the CCRC in markedly different ways (see also **Figures 7-9** below). Refugee 53's application to the

[192] Interview with Refugee 53 (n 165). S 2, 2004 Act came into force in September 2004. Refugee 53 was convicted in December 2004.
[193] Interview with Refugee 59 (n 190).
[194] ibid.
[195] ibid.
[196] Interview with Refugee 53 (n 165).
[197] Interview with Refugee 59 (n 190).

	Timeline					
Case	**June 2010**	**Dec 2010**	**2015**	**February 2016**	**March/April 2016**	**April 2016 to June 2017**
43	43 convicted of s 2 (2004 Act) and s 105 (1999 Act) offences	Refugee or refugee like status granted	CCRC write to 43 explaining they can review conviction. 43 contacts CCRC agreeing to this. (43's memory of timing)	CCRC write to 43 explaining they can review conviction. 43 contacts CCRC agreeing to this.	Around this time 43 calls CCRC asking about case. CCRC explain change in law and they cannot review case. CCRC write to 43 explaining *Nori* case and he will have to go direct to Court.	Contacts 3-4 solicitors. '*They said no. You have no chance and one of them even told me if you go to the court judge might give you more sentence … **more** than 6 months … I said no, … I'm not gonna take this risk … most … said no, we [can't] help you cos your case is very weak ….*' One solicitor sent him to another… One said *we can go further but I'm not giving you any guarantee. You can go further but [the office] also said legal aid will not fund you with this case. …* If they got legal aid, they would fund, otherwise not. A friend of his was convicted and sentenced to a year but he managed to get his conviction quashed. He saw his solicitor, '*He said no your case is different because I don't know what he explained. He said no the case is different. In fact, we both came in the same way and he was holding a false passport and I had no false passport so my sentence was less than him. I didn't use any false documents to enter the United Kingdom'*. Unable to appeal on own because: Language not good enough No experience Need a solicitor or CCRC Scared and did not want to take risk of increased sentence or be returned to prison. ('*the solicitor, he told me – when he say the judge is gonna say, what good is the point? Why are you coming to [us]? we make all of us busy again and I want to squash this conviction for no reason so I'm gonna increase the sentence. **As he explained** to me.'*)

Figure 7 Timeline for Refugee 43

	Timeline							
Case	**Dec 2004**	**2005**	**2011**	**2013**	**2015**	**Mar 2016**	**Aug 2016**	**2016-2017**
53	53 convicted of s 2 (2004 Act) offence	Refugee or refugee like status granted	Brutally attacked in London. Applied for criminal injury compensation (CICA) but because he believed he had never committed a crime (but was an immigration matter), he stated he had no criminal convictions. CICA unable to provide compensation because he provided a false statement.	British citizen	Applied to CCRC for review of conviction after being advised by CAB and criminal lawyer after attack and failure of CICA to grant compensation.	CCRC write to 53's solicitor explaining *Nori* case and he will have to go direct to Court.	53 telephones CCRC asking about case. Not received letter from solicitor. Further letter sent to 53 in August.	Gave up. • He had no lawyer. Needs a proper lawyer. • no legal aid • not working. Was not well for a long time and only just recovering. • expense

Figure 8 Timeline for Refugee 53

Case	Feb 2015	Aug/Sept 2015	2015 to Jan 2016	Jan 2016	Apr 2016	2016	Feb 2017	19 Jun 2017
59	59 convicted s 4 (2010 Act) offence.	Went from prison to a detention centre. Online he read about a similar case in The Guardian. Took down the person's details.	Tried to find the person via a university friend and someone else who gave him the number of the person in the newspaper. The person in the newspaper gave his details to the Guardian writer. The writer contacted 59 and gave his number to the CCRC. The CCRC then contacted 59.	Refugee or refugee like status	CCRC write to 59's solicitor explaining *Nori* case and he will have to go direct to Court. 59 was puzzled and did not know what to do. Refugee places and immigration solicitors did not specialise in these cases. One day accompanied friend to a solicitor to act as an interpreter. In fact there was an interpreter present and 59 explained his case to him. The interpreter told him to go to Asylum Justice as they might be able to help.	Went to Asylum Justice where he spoke to Ruth.[198] She knew about these cases (said this was *totally wrong*') and recommended 2 or 3 firms who could help him. She said he should go to London as perhaps firms in Cardiff did not have enough information about these cases. Contacted solicitor by email and they were able to help him.	Leave to appeal received by Court of Appeal.	Conviction quashed.

Figure 9 Timeline for Refugee 59

[198] Ruth Brown, Legal Director of Asylum Justice.

CCRC came about as a result of his rejection for criminal injuries compensation. He was advised by a Citizens Advice Bureau to apply to the CCRC in order to try to overturn his conviction. He then instructed a solicitor who applied initially to the CCRC but did not do any further work on the case as the solicitor did not have legal aid. Refugee 43 did not apply to the CCRC. Instead the CCRC wrote to him and informed him that they could review his case which might lead to a quashing of his conviction: 'it was like very good news for me'.[199] He was concerned about whether his sentence could be increased and was pleased to discover that it would not if he went via the CCRC. Refugee 59's route to the CCRC was circuitous. In detention, he looked online to learn about his conviction and discovered an article in *The Guardian* about someone, from the same country of origin, who had also been convicted and who had had his conviction quashed. After being released from detention, he eventually managed to contact the person who put him in touch with the Guardian writer. The writer then contacted the CCRC on his behalf. Representation by lawyers familiar with this area of law was not a feature of any of the cases at the stage of application to the CCRC.

The refugees did not understand how the CCRC worked, its relationship with the Court of Appeal or how cases got from the CCRC to the Court.[200] They understood the CCRC to be a kind of intermediary[201] which helped in processing grounds of appeal and contacted previous solicitors.[202] One refugee stated he had to sign 'various forms such as waivers … which was very *bizarre*' and believed the CCRC was part of the Court system.[203] The refugees mentioned the high cost of solicitors and how it was beyond their means.[204] They were unclear whether the CCRC dealt with the appeal or whether on deciding that the refugee had a right of appeal, the refugee would then have to find a solicitor.[205] It was thought that the CCRC did not have sufficient power to challenge the Court of Appeal.[206]

The refugees found it confusing to be told by the CCRC that they would have to go direct to the Court of Appeal. Two found this out by telephone before they

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[199] Interview with Refugee 43 (n 167).
[200] Interview with Refugee 43 (n 167); Interview with Refugee 53 (n 165); Interview with Refugee 59 (n 190).
[201] Interview with Refugee 53 (n 165).
[202] Interview with Refugee 59 (n 190).
[203] Interview with Refugee 53 (n 165); also Interview with Refugee 59 (n 190).
[204] Interview with Refugee 53 (n 165).
[205] Interview with Refugee 43 (n 167); Interview with Refugee 59 (n 190).
[206] Interview with Refugee 53 (n 165).

received any letter,[207] 'To be honest with you, I didn't understand very well what happened. But at least I understand that they can't help me any more'.[208] At this stage, Refugee 53 gave up - he had no lawyer, no legal aid, he was not working and he had only just recovered from being unwell.

3.4.2 Belief that not criminal

All three were surprised that they had been convicted and were disturbed at finding themselves turned into criminals. While Refugee 53 and 43 continued to have a criminal conviction (for about 14 and ten years respectively), Refugee 59 had a criminal conviction only for about three years. As Refugee 59 had had his conviction quashed and this had happened relatively quickly, he did not dwell on this. Refugee 43 noted that he understood refugees normally to come to the UK without documents in lorries or using false documents but he stated that he respected British law and apologised for 'doing something bad in this way'. Both Refugee 43 and 53 observed that they had been trying to save their lives. Refugee 53 was less sanguine about British law and this may have been connected with the length of time he had had his conviction coupled with health problems which he considered had resulted in discrimination.

3.4.3 Lack of appropriate resources or assistance

At every stage, the refugees were failed by the criminal justice system. They were all advised to plead guilty in circumstances where it was unclear that they understood what they were pleading to. Refugee 59's conviction has been quashed. The convictions of 43 and 53 (both failing to produce a passport under section 2) ought also to be quashed as both can clearly show a reasonable excuse. In the case of Refugee 53, his was one of the first convictions for section 2 and was therefore prior to the cases of *Thet* and *Mohammed and Osman* which clarified the law in this area.[209] Refugee 43's convictions occurred after these cases and yet he was also convicted. While he also has a conviction for an offence under section 105 of the

[207] Interview with Refugee 43 (n 167); Interview with Refugee 53 (n 165).
[208] Refugee 43.
[209] Nevertheless it was clear from debates on section 2 that it was never Parliament's intention to prosecute those who were fleeing persecution, see **2.3.2.2** and **Appendix 3**.

1999 Act, it would seem that an argument similar to that made in *Asfaw* could be made. Refugee 59 noted that there should be legal advice at airports, prisons and detention centres. He was told that there was nothing in his case by his trial solicitors, immigration solicitors when he was in detention and also solicitors he approached after release.

The failings of the criminal justice system continue to persist after the CCRC referred these refugees to the Court of Appeal. Two of the refugees approached solicitors who were unable to assist them because they were told they did not have a defence. **Figure 7** shows that Refugee 43 went to see a number of solicitors about his conviction. Most of them were unable to help. They said that the judge would increase the sentence as there was no reason to quash the conviction. This was something which particularly scared him. While one said that there may be a possibility, he said it was a weak case and his office raised the unlikelihood of being able to obtain legal aid. Refugee 43 did not pursue going to the Court of Appeal on his own because he considered his language was not good enough, he had no experience of doing this, he felt that he needed a solicitor (which he could not afford) or the CCRC and he was frightened or scared that in any case the sentence would be increased or that he would be returned to prison. He was also told by one solicitor that his case was different from another case where a refugee conviction had been quashed.

The refugees valued the CCRC because they saw it as a government body which they respected for its professionalism and independence, its knowledge of these types of cases and they valued it for its public nature as it was an organisation not out to make money (like solicitors).[210] They felt that in order to progress their appeals they needed 'proper'[211] lawyers or the CCRC. Both Refugees 43 and 53 spontaneously asked if there was any way the CCRC could take their cases again and review them. When the CCRC told Refugee 53 they could do nothing for him, 'it was very bad'. He thought 'the only thing to do now is to leave the country'. Refugee 59 enjoyed the services of a 'proper' lawyer when he appealed his conviction who got legal aid and explained every step so he knew what was happening. Even so, he was scared that the trial lawyer might try and prosecute him 'for accusing him of

[210] Interview with Refugee 43 (n 167).
[211] Interview with Refugee 53 (n 165).

something wrong'. He carried on with the appeal because it was 'the only way' to rid himself of the conviction.

3.4.4 Impact on the refugees

All the refugees had studied and worked and were very keen to do well and better themselves. Refugee 59 was also keen that other refugees should have their convictions quashed as his was. However, despite their ability to work and study, this has come at a cost. Refugee 53 had worked in various jobs and had obtained a Masters in International Trade Law. Nevertheless his traumatic experiences of persecution in his home country, the brutal attack on him in London and subsequent life events were all compounded by his conviction and he appeared to have suffered severe mental health problems. That he had achieved a Masters and had been accepted by a university to study for a PhD was testament to his determination.

The impacts noted by the refugees included difficulties in applying for and obtaining work and the concomitant impact of having to acknowledge having a conviction when applying for work.[212] It was simply not possible to apply for some jobs due to the conviction, for example, becoming a policeman or working in security.[213] It was felt that employers would say a job was not available if a person had a conviction.[214] Refugee 53 had had to sign a document that he would not harm any clients when he was given a job as an interpreter. Job agencies were not interested in what type of conviction one had just the fact of conviction.[215] Taking out insurance or applying for loans was also difficult or not possible.[216] An integration loan for refugees of £500 was not open to those with convictions.[217] While the refugees were able to study, having a conviction did not leave a good impression.[218] Applying for anything from the Home Office such as a travel document, indefinite leave or British citizenship was made more difficult with a conviction.[219]

[212] Interview with Refugee 43 (n 167); Interview with Refugee 53 (n 165); Interview with Refugee 59 (n 190).
[213] Interview with Refugee 59 (n 190).
[214] Interview with Refugee 43 (n 167).
[215] Interview with Refugee 59 (n 190).
[216] Interview with Refugee 43 (n 167); Interview with Refugee 59 (n 190).
[217] Interview with Refugee 59 (n 190).
[218] ibid.
[219] Interview with Refugee 43 (n 167).

These difficulties made them feel 'hopeless and sad'[220] that they had been convicted. Refugee 43 felt his conviction would be with him until he was dead and Refugee 59 described the conviction as 'like a little ball [and chain] on your hands and your legs'. This contrasted with the reaction of people in authority who were surprised that refugees were convicted of such offences. Despite the sadness of their situation, the refugees tried to make the best of things. Refugee 43 stated,

> so far thank god, I'm not breaking the law. I'm doing very well apart from that conviction so I'm doing my best to be a positive person in this community. Looking after people as much as I can, to look after my family, to do everything right and that's the thing that happened, it happened just when I arrived. When I arrived it happened and I swear I had no idea that this is a crime and that this is against the law. I have no idea.

The fact of having been to prison also had an impact. Refugee 43 was disturbed that he had 'met criminals and saw horrible things' and felt he continued to 'suffer from those days'. There was also a spiritual dimension for Refugee 53 who said that his belief in God had prevented him killing himself. He said that quashing his conviction would help him,

> to be clean ……this is affecting my health. I feel guilty that I committed a crime in this country. And [this] is always in the back of my mind that I committed crime in this country. So I want to be clean.

For Refugee 59, the conviction delayed his asylum claim. Another impact was that Refugee 59 was unable to correct his date of birth which the Home Office had got wrong in its paperwork. He felt that the Home Office did not trust that he was telling the truth when he asked them to change it due to his conviction. Refugee 59 was the only one of the three who was able to articulate the need to do something about the situation of refugees in the same position as himself,

> The other question… [the] most important thing now is for refugees because some of them now maybe they don't have enough information, they have the right to appeal or… So I don't know, there should like be a push like how to deal with these cases. … They should like …know more about these cases.

[220] Eg ibid.

4. Findings and Conclusion

> *I want justice. That's what I want justice to everything that I suffered in this country. All of the discrimination I been through from organisations. I think that the court, I think that the criminal justice system is to blame with this.*
> *[Refugee 53]*

4.1 Findings

The findings of this research are that the Court of Appeal's approach after *Nori* does not protect refugees. If the intended consequence was that refugees would continue to be protected and that wrongful convictions be quashed, it has not had this effect. It seems from this study that refugees are not appealing their convictions direct to the Court of Appeal. The Court of Appeal's approach appears to have had the unintended consequence of diminishing the state's protection against penalisation under article 31(1) for refugees. *Nori* has had impacts on refugees, the CCRC and the Court of Appeal.

4.1.1 Refugees

The approach has impacted on refugees. Refugees have a lack of knowledge of the criminal justice system due to their unfamiliarity with the UK legal system. The UK legal system and rule of law are entirely unfamiliar. They appreciate and value the UK – all three were emphatic about this -but this sets up a conflict with the situation they find themselves in. Their unfamiliarity with the legal system is compounded by a lack of English. For example, they may be unable to read letters from their lawyers (as with Refugee 59), have to rely on unsuitable people to translate for them or help them and they do not understand what happened at their trial. They therefore have no idea about appeal. This is linked with their belief that what they have done is not criminal. This ties in with article 31(1) as the point of article 31(1) is to provide immunity from prosecution. There are also insufficient resources and assistance which refugees can draw on in trying to overturn their convictions. Case 59 had to go to London for appropriate legal advice but he had been advised about which firms to approach. Cases 43 and 53 were unable to find anyone to assist effectively in London either in relation to their application to the CCRC or going to the Court of

Appeal. The refugees interviewed view the CCRC very favourably because they see it as part of government or the court system and therefore as reliable and dependable. They do not understand why it is no longer able to review their convictions.[221]

These factors serve to prolong these refugees' experiences of being wrongly convicted. Only 5 of 34[222] refugees went to the Court of Appeal and of these only one conviction has been quashed. Two of these five have re-applied to the CCRC (although one of the re-applications is ineffective).[223] Where refugees go to the Court of Appeal and their applications for leave to appeal are refused, they can then re-apply to the CCRC as they have appealed. This will add to the delay in quashing their convictions. The approach of the Court after *Nori* has the effect of diminishing the life chances of refugees and the contribution they can make to the UK. Although Refugee 53 is a British citizen, he seems to have made the decision to leave the UK and study for a doctorate elsewhere due to his difficulties in getting his conviction quashed.[224]

4.1.2 The CCRC

Nori has also had an impact on the CCRC. It undermines its function as a miscarriage of justice organisation which has referred about 37 cases to the Crown Courts and about 19 to the Court of Appeal. These cases are not traditional miscarriage of justice cases. This is because article 31(1) cases ought not to be prosecuted at all. Nevertheless, the CCRC has fulfilled an important role in ensuring that the boundary between safe and unsafe convictions protects refugees convicted of irregular entry and stay.

Nori also appears to have undermined the CCRC's confidence in applying its policy on exceptional circumstances in refugee cases. The way in which it has applied exceptional circumstances is marred by inconsistency which in some cases leads to the failure to review cases and the closure of cases which could be referred on a variety of exceptional circumstances grounds. For example, some refugees did not apply to the CCRC but were approached by it and asked if they wanted their convictions reviewed. They were then told that the CCRC was no longer able to do so because of the *Nori* case. There was no independent assessment of whether

[221] ibid; Interview with Refugee 53 (n 165).
[222] One refugee was not advised to go to the Court of Appeal.
[223] The re-application of one has been deemed ineligible due to ineffective grounds at the Court.
[224] Interview with Refugee 53 (n 165).

exceptional circumstances existed given the fact that the CCRC had invited them to apply.

The *Nori* approach also creates disparity between refugees convicted in the Magistrates' Court and those convicted in the Crown Court which is not in the public interest. For the former group, the CCRC is the only mechanism for refugees to get an appeal to the Crown Court. When the *Adimi* case was heard in 1999, the vast majority of refugee cases were tried in the Magistrates' Courts. However, with the introduction of offences in the 2006 and 2010 Act, refugees are increasingly facing conviction in Crown Courts (where the appeal is to the Court of Appeal). This means that increasing numbers of refugees are unlikely to have their convictions quashed if they have to apply direct to the Court of Appeal.

It was suggested above at **3.2.7.1** that the CCRC could decide that the specific problems faced by refugees who have been wrongly convicted are sufficient to justify applying exceptional circumstances in all cases without having to scrutinise individual cases for exceptionality. These problems when considered against the fact that this group are refugees (including asylum seekers) who ought to be protected against prosecution raise issues of public interest. This does not necessarily offend against *Nori* as this does not amount to an 'automatic' finding of exceptional circumstances. Instead such an approach would recognise the particular concerns raised by these small group of cases based on the research noted in this report as well as the wider findings of Holiday's doctoral research. The cases all raise similar issues and concerns which merit treating the cases as a group although this does not exclude additional reasons for finding exceptional circumstances in an individual case. Further, this is not an approach which the CCRC has previously followed. While in many cases, it has identified three broad factors (interests of justice, a nexus with other cases and failings in the criminal justice system in relation to the overlooking of the refugee defences by the defence and prosecution), these factors are not as specific and do not fully reflect or identify the problems and concerns with these cases.

It should also be noted that the Court of Appeal in *Nori* used the conditional (*'if the exceptional procedure available to the CCRC is being deployed as a matter of routine … resources are not being deployed as efficiently as possible'*).[225] While the CCRC found exceptional circumstances to exist in these cases, this is related to the

[225] *R v YY and Nori [2016] EWCA Crim 18* [41].

nature of the cases themselves. However, the CCRC could identify more rigorously and in more detail the nature of the exceptional circumstances raised by these cases as a group as suggested above. It does not seem to be the case that the CCRC found there to be exceptional circumstances 'as a matter of routine' without any basis in the cases or circumstances of the refugees.[226]

4.1.3 The Court of Appeal

The impact of *Nori* on the Court of Appeal damages not only refugees but also the integrity of the Court. For refugees, the Court of Appeal is some unattainable ideal. Although *Nori* stated that the law is now known, this is undermined by the experience of the three refugees who were interviewed as well as the approach of the Court to those who have tried to appeal. While the intention of *Nori* seems to have been a desire by the Court to ensure that the CCRC's resources were deployed efficiently, a side effect of the *Nori* approach is that refugees are simply not reaching the Court of Appeal. While this undoubtedly saves CCRC and Court of Appeal resources, it undermines the function of the CCRC as noted above. *Nori* has, in effect, introduced procedural barriers to appeal for refugees which ignore the refugee context and therefore make it harder for them to succeed. For example, the Court has in two of the five cases where refugees applied for leave to appeal to the Court noted that there has been no explanation for the delay involved. It is noteworthy that the Northern Ireland Court of Appeal in *Haarte and Roberts* specifically referred to the question of delay. This was not mentioned in *Nori.* By removing the safety net of the CCRC from refugees, they now have to overcome the hurdle of the length of time since their convictions when they did not appeal. For those refugees who arrived relatively recently, this will not be a big hurdle but since these cases historically were not dealt with correctly, many refugees have to explain why they have not appealed for 8 or 9 years or longer. Some of the refugees were convicted over ten years ago. Their answer is that they did not know they could appeal. An additional answer, given the interviews, is that solicitors are still turning refugees away who may have good grounds to appeal. Without an understanding of the nature of these cases and the

[226] In two of the cases, no mention was made of exceptional circumstances.

problems faced by this group, refugees such as Case 58 will be turned away by the Court of Appeal without the safety of their convictions being assessed.

Despite its suggestion that it can 'examine' refugee cases (para 43, *Nori*), the Court is not a miscarriage of justice organisation like the CCRC which has a statutory remit to investigate cases. The Court does not have to hear cases; it can direct the CCRC to investigate cases (under section 15 of the 1995 Act). The leave to appeal boundary policed by the Court is of a different order from the safety boundary which is policed by the CCRC (and the Court). It seems that refugee cases are now assessed not in terms of the merits of their cases but whether they meet certain procedural barriers.

The effect of *Nori* is that the particular circumstances of refugees is not being taken into account. Refugees are being treated as other defendants when their situation and the nature of their offence is qualitatively different.[227] It is this qualitative difference which marks them out.

4.2 Implications

The research has implications for help for refugees as well as for further research. There needs to be training of solicitors, including duty solicitors, barristers, and police and prosecutors in relation to the law in these cases, including the law in relation to complex cases. It is not known whether the prosecutions of refugees has reduced over time. There is evidence that the rate of prosecution of offences under section 2 of the 2004 Act has diminished. In 2016, there were a total of five convictions, three in the Magistrates' Court and two in the Crown Court, for this offence compared to 30-61 convictions between 2012-2015, 84-170 between 2008 to 2011 and 268 to 499 between 2005 to 2007.[228] The reduction may reflect changes in prosecution practice or may be a reflection in migratory trends connected with the practices of smugglers and agents who arrange refugee journeys. Nevertheless, there would seem to remain a large number of convicted refugees who require assistance

[227] To be clear, the offences noted here are only those which come within article 31(1) of the Refugee Convention. In relation to 'ordinary crimes' such as murder, assault and theft, refugees are in exactly the same position as other defendants.
[228] Home Office, *Detention Data Tables, 2005-2016, 24 May 2018* (Home Office 2018). It is not known how many of these convictions were/are refugees.

and advice in assessing cases for appeal in relation to section 2 offences and also offences under the 1981, 2006 and 2010 Acts.

The findings suggest that a larger study interviewing a greater number of refugees as well as a number of criminal justice personnel such as judges and court officials and lawyers would help to identify the extent and the nature of the obstacles faced by refugees and why they face them. This study does not consider the situation in the Magistrates' Court where the *Nori* case does not apply. However, the Court of Appeal's decision in *Ordu* which held convictions should not be quashed where this would make no difference to the applicant, also has implications for the criminalisation of refugees.[229] Further research could therefore extend the study to include Magistrates' Courts to identify and capture any obstacles to justice for refugees.

It is not only refugees who migrate in irregular ways. Victims of human trafficking may be forced to commit offences of irregular entry and stay. Low skilled migrants may be unable to find lawful ways to migrate to countries for work. Further research could explore the impact such migration might have on criminal justice. There is already evidence at the CCRC that victims of human trafficking are prosecuted for offences connected to their status as trafficked victims. There are also other migrants who have been convicted of offences connected to trafficking and smuggling, in particular, in relation to the smuggling of family and friends.

4.3 Conclusions

This study demonstrates the systemic failures in the criminal justice system which prevent justice for refugees. The criminal law contains a number of offences which when used against refugees result in over-criminalisation. This includes offences commonly used against refugees such as failing to produce a passport on entry to the UK under section 2 of the 2004 Act (subject to a reasonable excuse defence) and using an identity document with improper intention under section 4 of the 2010 Act (subject to the refugee defence). Further offences used against refugees include offences under the Theft Act 1978, making false a statement under the 1999 Act and even an old offence under the Malicious Damage Act 1861 (section 36). None of the defences apply to these offences despite the fact that they are committed

[229] *R v Ordu* (n 182) [33].

in exactly the same circumstances as the more common passport related offences. The research shows that the refugees in this study have been prosecuted to conviction despite the UK's obligations under article 31(1). All the refugees were prosecuted before their asylum claims were assessed.

Prosecuting people in the course of their flight from persecution undermines refugee protection. As noted in **2.2**, article 31(1) came into being because refugees often do not have the necessary papers for travel because their states of nationality persecute them, they have to leave suddenly or they have to depend on friends and agents to arrange their journeys of escape. Even where they have passports, refugees are often unable to meet states' visa requirements. They must to resort to deception. This is underlined by the testimony of the refugees themselves. Refugee 53 stated, *'I was not aware that this, when you come to a country for **help**, they would **arrest** you. They would put you in prison…'*. Refugee 43's view was that *'A criminal is something very bad …… so when they put me in this [prison], …I feel bad to be honest with you. Yeah, that's making me, I mean very sad'*. Refugee 59 summed up his participation in the trial thus, *'in a simple way I was like a blind[man], a deaf[man], just they took me from place to place and I didn't know'*. It is in this context that the effect of *Nori* must be viewed.

The approach of the Court of Appeal in *Nori* reflects a social practice of criminalisation which makes it harder for refugees to overturn their convictions and therefore prolongs the penalisation which is contrary to article 31(1) of the Refugee Convention. The approach in *Nori* has resulted in the differential consideration of refugee cases according to whether their trial took place in the Magistrates' Court or the Crown Court or when they applied to the CCRC and were lucky enough to have their cases reviewed. It has contributed to inconsistent and uneven applications of exceptional circumstances by the CCRC as even those who suffer serious mental health issues or who have particularly complex cases or who were invited by the CCRC to apply for a review of their cases are not adequately assessed in relation to exceptional circumstances.

The CCRC needs to review its assessment and application of exceptional circumstances in refugee cases to ensure that it is acting in accordance with its statutory remit. It needs to ensure that it is not finding exceptional circumstances as a matter of routine as warned about in *Nori*. However, it also needs to ensure that it is

not habitually excluding the assessment and application of exceptional circumstances as seems to have occurred in many of the cases in this study.

If you sink in the water, even if you see like air, you will catch it.
[Refugee 59]

most important thing now is for refugees because some of them now maybe they don't have enough information, they have the right to appeal or… So I don't know, they should like be a push like how to deal with these cases. [Because] … people are convicted with these [offences]. They should like…they should like…know more about these cases…yes.
[Refugee 59]

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Appendix 1 Paragraphs 38 to 45 of the *Nori* case

The position of the CCRC

38. Before leaving the case, it is appropriate to say something of the role of the CCRC. In *Mateta*, the court recognised (at [57]) the very real contribution made by the CCRC to this area of the law. It may be that these comment has been taken as an encouragement to the CCRC, given the increased number of referrals which concern asylum seekers convicted of identity document offences. We were told that the CCRC advertise for such cases and (as is the case in both these references) will pursue them irrespective of the fact that the case has not previously been before the Court of Appeal on the basis that there are exceptional circumstances. In that regard, it is to be noted that s. 13(1) of the Criminal Appeal Act 1995 specifically provides that a reference shall not be made unless "(c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused". That is subject to s. 13(2) of the Act which is in terms (inter alia):

> "Nothing in subsection (1)…(c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify it."

39. Cases referred by the CCRC in which there had been no previous appeal (as in these two cases) include *R v Zondo* [2014] EWCA Crim 1501, *R v Sadeghi* [2014] EWCA Crim 2933 and *R v Shabani* [2015] EWCA Crim 1924. On the other hand, the jurisprudence in this area was developed in cases which were pursued through the traditional route of the Court of Appeal: see *R v Asfaw* [2008] 1 AC 1061, *R v Kamalanathan* [2010] EWCA Crim 1335, *R v Ali Rezi Sadighpour* 2012] EWCA Crim 2669 and *R v Jaddi* [2012] EWCA Crim 2565.

40. The result of the jurisprudence of the court is that, these days, the Registrar regularly refers cases to the full court where cases of this type have been lodged. The Registrar is more than able to require waiver of privilege (which was necessary in one of the cases in this appeal notwithstanding the intervention of the CCRC) and delay can be avoided: see *R v Sadiqi & Misini* [2014] EWCA Crim 2479, *R v Ghorbani* [2015] EWCA Crim 275 and *R v NH* [2015] EWCA Crim 649. Where the process of the court is being abused, a referral under s. 20 of the Criminal Appeal Act 1968 is also possible: see *R v Davis & Thabangu* [2013] EWCA Crim 2424.

41. This list of cases is not intended to be exhaustive but it is an indication that if the exceptional procedure available to the CCRC is being deployed as a matter of routine as the CCRC takes on cases that can be referred directly to the Court of Appeal, resources are not being deployed as efficiently as possible. More important, detailed consideration of other cases of alleged miscarriage of justice (which have previously exhausted all rights of appeal) is being delayed while these cases are being subject to detailed analysis when they could go directly to the Court of Appeal where they will be processed efficiently by the Criminal Appeal Office.

42. We recognize that appeals from the magistrates court to the Crown Court after a plea of guilty have to be processed through the CCRC because of the constraints placed on the Crown Court (sitting on appeal) in relation to unequivocal pleas of guilty: see s. 108(1) of the Magistrates' Court Act 1980 and decisions such as R v McNally 38 Cr App R 90 and S v Recorder of Manchester [1971]. Thus, in these circumstances, the Crown Court is limited to a consideration of matters apparent to the magistrates and, if a plea was equivocal, bound to remit: see s. 48(2) of the Senior Courts Act 1981. A reference by the CCRC in relation to a conviction by the magistrates, however, requires the case to be treated for all purposes as an appeal against conviction "whether or not he pleaded guilty": see s. 11(2) of the Criminal Appeal Act 1995. Thus, the intervention of the CCRC is essential.

43. That is not, however, the case in the Court of Appeal. In the circumstances, we would encourage the CCRC to review the criteria which are used to justify exceptional reasons for investigating and referring when there has been no prior appeal. It may be that when apprised of these cases (whether as a result of campaigns to reduce miscarriages of justice or otherwise), a triage system can be adopted which investigates only those cases that have been to the Court of Appeal or are appeals from the magistrates court. Those cases which have not exhausted rights of appeal to the Court of Appeal can be passed on to the Criminal Appeal Office for examination and, if appropriate, referral.

44. None of this is to be taken as a criticism of the CCRC. Rather, it is an attempt to ensure that those cases in which there is no available means of redress other than through the CCRC are investigated and dealt with as expeditiously as possible. That may not be possible (or could be less possible) if other cases which could have been passed directly to the Criminal Appeal Office are themselves taking time and effort to investigate and process.

45. Needless to say, this point of principle has not affected the court's consideration of these particular appeals although in the circumstances which we have outlined, both are dismissed.

Appendix 2 Some problems with the refugee defence

Limited offences

The refugee defence (in England, Wales and Northern Ireland) *only* applies to the offences noted in **2.3.2.1**.[230] In Scotland, the defence additionally applies to fraud and uttering a forged document (section 31(4)(a) and (b) of the 1999 Act). The refugee defence is not available to a refugee who commits an illegal entry offence under section 24 of the 1971 Act or who is charged with an offence of attempting to obtain services by deception under section 1(1) of the Criminal Attempts Act 1981. Many refugees in transit have been convicted of this offence usually with an offence under the Forgery and Counterfeiting Act 1981.[231] Nor does the refugee defence apply to the failure to provide a passport on entry to the UK (an offence under section 2 of the 2004 Act). Instead section 2 has a reasonable excuse defence. The limited nature of the defences in UK domestic law can be seen in the Channel Tunnel cases. These refugees were convicted of causing an obstruction to an engine or carriage using the railway under section 36 of the Malicious Damage Act 1861 which is not an offence to which the refugee defence (or a reasonable excuse defence) applies.[232] Section 6 of the 2010 Act has both a refugee defence and a reasonable excuse defence available. There is no guidance or case law on the use of the 'reasonable excuse' defence in criminal legislation in relation to refugees. There is therefore a patchwork of protection for refugees which is more restrictive in its scope than article 31(1).

Guidance

Scotland's Crown Office Procurator Fiscal Service (COPFS) has produced guidance which accurately reflects the broad scope of article 31(1).[233] It begins with the Convention and article 31(1)[234] and sets out why article 31(1) is needed.[235] It

[230] The House of Lords found the list 'perplexing' in *R v Asfaw* (n 54).
[231] In 2008, the House of Lords held that pursuing a charge under the Criminal Attempts Act when this was charged with an offence to which the refugee defence applied and which arose from the same circumstances was an abuse of process, ibid.
[232] *R v H* [2015] unreported; *R v Mirahessari and Vahdani* (n 182).
[233] COPFS, 'Policy on Application of Section 31 of Immigration and Asylum Act 1999 in Respect of Refugees or Presumptive Refugees'. The CPS guidance is not dealt with here in any detail. It fails to reflect the full breadth of article 31(1).
[234] ibid paras 1-3.
[235] COPFS, 'Policy on Application of Section 31 of Immigration and Asylum Act 1999 in Respect of Refugees or Presumptive Refugees' paras 4, 5 where it quotes *Asfaw*, para 9, and *Adimi* in stating that

makes clear that there is no limit to the offences to which article 31(1) is applicable and states that section 31 will be applied in relation to offences falling outside the list in section 31(4). It includes, for example, perverting the course of justice, sections 2 and 35 of the 2004 Act and section 24 of the 1971 Act.[236] The guidance is therefore relevant to all potential offences which may be used against asylum seekers. It states that there are 'three key principles' which prosecutors must apply. These are that prosecutors must proactively consider whether the section 31 defence applies (whether or not this has been raised, for example, by the defence), they must take 'a purposive and not a prescriptive approach' to the interpretation of the section, taking into account 'the reasons why refugees … may not fit exactly within the terms of the defence but why the defence may still be applicable' and decisions to prosecute 'not least for offences under the general criminal law, rather than under [immigration legislation], should be made only in the clearest of cases and where the offence itself appeared manifestly unrelated to a genuine quest for asylum'.[237]

It accepts that the principle of non-penalisation should apply to those who require protection on grounds other than asylum, for example, humanitarian protection, those who would have been recognised as refugees had their claim been decided in a timely manner but the situation in their country has since changed, human rights grounds or statelessness.[238] It further states that even when the section 31 criteria are not strictly met, consideration should be given as to whether or not it is in the public interest to prosecute taking into account the personal circumstances and characteristics of the accused, including, 'signs of fear or anxiety', 'distrust of the authorities', 'evidence of violence or threats of violence … or claims of torture or other trauma', 'signs or information that the individual's movements are … controlled by an agent' or the person is 'taking instructions from an agent'.[239]

The effect of such guidance is that refugees in Scotland have greater protection than refugees in England, Wales and Northern Ireland. This is because

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refugees 'may have to resort to deceptions of various kinds ... in order to ... escape' and that the purpose is 'to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law'.

[236] ibid paras 17, 24-26.

[237] COPFS, 'Policy on Application of Section 31 of Immigration and Asylum Act 1999 in Respect of Refugees or Presumptive Refugees' para 11. The last principle is from *Adimi*.

[238] ibid paras 35-36.

[239] ibid paras 26-29.

guidance in the UK has historically been patchy, divided between the CPS and the Home Office, and overly restrictive in its analysis.[240]

Coming directly and transit

A further difficulty is with the phrase 'coming directly…'. What is important is whether the asylum seeker is able to gain protection in intervening countries. Section 31 has two glosses to the article 31(1) criteria. The first is subsection (2) which has been characterised as a restriction on 'coming directly…'. [241] However, it is more accurately seen as an aspect of it. [242] It merely spells out what is required by article 31(1). In the debates on section 31(2), the Attorney General did not mean that every refugee who passed through a third country would be prosecuted – but that the UK was entitled to limit 'forum shopping'[243] or 'deciding that one will accept an offer of safety in country B or C, but not in country A'.[244] The Scottish guidance on section 31 states that the provision is intended to exclude only those who had been recognised as refugees in other countries or who have been granted some other form of protection.[245] The House of Lords in *Asfaw* concluded that section 31(2), although 'arguably' narrower, was to be interpreted broadly in line with the purposes of the Convention rather than be given a limited interpretation.[246] What is important therefore is whether the refugee has found protection.

In *Kamalanathan*,[247] the Court of Appeal noted that in *Asfaw*, the refugee was in transit at the airport for three hours. In *Kamalanathan*, the transit period was one month. The Court was restrictive in its approach to the period of transit in the UK (although it described it as 'generous') stating, 'A person could be, for example, making a short stopover or be still in the course of flight, if he had to be concealed in

[240] Holiday (n 22).
[241] Eg, Eileen Bye, 'Putting Right an Asylum Wrong' [1999] LSG 36; *R (on the application of Badur) v Birmingham Crown Court and others* [2006] EWHC 539 (Admin) [19]; *R (on the application of Pepushi) v CPS* [2004] EWHC 798 (Admin); Ana Aliverti, *Crimes of Mobility* (Routledge 2013) 46.
[242] In *Ma'Alin* (n 499), the Court applied the *Adimi* guidelines to the question of s 31(2) showing that this subsection was treated as an aspect of coming directly. The Court noted that the evidence was that she was not a free agent until she was at the last airport in Germany because she was under the control of an agent, [28].
[243] 'HL Deb 2 November 1999, Vol 606, Col 783' (n 81) 785.
[244] ibid 785. CPS guidance has noted that family reunification was relevant to the exercise of choice as was reliance on an agent where a refugee may have little or no choice, CPS, *Policy: Immigration, 22 December 2009* (CPS 2009).
[245] COPFS (n 233) para 22.
[246] *Asfaw* (n 42); This was followed by *R v AM* (n 972) para 7.
[247] *R v Kamalanathan* [2010] EWCA Crim 518.

the intervening country whilst he was being pursued by foreign agents'. In such circumstances, the Court envisaged that the time 'could be very much more than the 3 hours' in *Asfaw*.[248] There is, however, no requirement that the asylum seeker or refugee be pursued into the UK (or other intervening country) by 'foreign agents'. While similar circumstances have occurred in another CCRC case,[249] it had been accepted prior to this case that periods of two to three months in the UK did not take the person outside article 31(1) protection.[250] However, these cases were Crown Court appeals and were in any case not brought to the Court of Appeal's attention. Although the Court used the foreign agent only as an example, it is a restrictive example and does not conform to the usual reasons why refugees spend periods of weeks and longer in a transit country. The Court thought that the 'real question' was whether, in all the circumstances, the person was in 'the course of a flight… making a short-term stop over … [or] in transit'.

The Court refused to accept the asylum seeker's account, arguing that it had been embellished and was not evidenced by documentation, for example, that the agent had not been paid by the uncle. It is difficult to see how this could be evidenced as agents are generally acting unlawfully and are unlikely to provide helpful evidence in such cases. The asylum seeker had said that the agent had told him that he could not claim asylum in the UK because his uncle was expecting him in Canada and that he had not said this in his immigration interview because he had been told by the agent not to say anything. The requirement by the Court for documentary proof from the refugee to explain such transit periods undermines the protective purpose of article 31(1).

The Court of Appeal failed to realise that refugees may spend long periods in transit due to the nature of their 'precarious situation' and their dependence on smugglers. In so doing, the Court failed to give effect to article 31(1). As noted in *Adimi*, what is important is that what is being done in the transit period (whether that is in the UK or elsewhere) is that the asylum seeker or refugee is trying to acquire the means to continue. If the person would be able to invoke article 31(1) where s/he arrived, as would have been the case in *Kalamanathan*, s/he should also be able to

[248] ibid para 4.
[249] For example, in *R v A, A, N and S (Iran and Libya)* (n 3) where two of the refugees were pursued from their country of origin to Denmark, where they had claimed asylum and lived for about 2 years.
[250] ibid; In *Adan* (n 939), the refugee worked in a transit country for three months to obtain the means to pay for his onward travel.

invoke it in the UK. It is important that transit in the UK is interpreted as an aspect of 'coming directly…' and not as being relevant to the phrase 'without delay'. This is reflected in Newman J's dictum in *Adimi* that 'Where the illegal entry or use of false documents **or delay** can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by [article 31(1)]'.[251]

A consideration which may be important in such cases is the potential overlap with trafficking. Trafficking is a possible feature of some of the CCRC cases and some reported cases.[252] If a person is required to work in the UK by an agent because s/he does not have sufficient funds to continue the journey, for example, to Canada, this should not deprive the person of article 31(1) protection. If a person does not have sufficient funds to continue to their intended destination, they remain under the control of an agent. While the Court of Appeal is happy to accept this in the context of transit elsewhere,[253] it seems reluctant to do so when the transit period is in the UK.

As soon as reasonably practicable

The second gloss is in section 31(1)(c) which contains the phrase 'as soon as was reasonably practicable after his arrival in the United Kingdom'. This is best seen as a gloss on the phrase 'presenting themselves without delay' in article 31(1) as the idea of claiming asylum within a reasonable period is already envisaged within the phrasing in article 31(1). This is supported by the Attorney-General who stated that the phrase contained both an objective and a subjective element.[254] One must come to an objective view about what was subjectively reasonably practicable. The Attorney-General gave an example of someone suffering from the consequences of torture.[255] An ordinary person was in a different situation from someone who had been tortured and therefore section 31 was a 'flexible and appropriate' response.[256] Since section 31 does not apply to the ordinary person, it is always important to consider the particular circumstances of the refugee. The courts have given a broad interpretation to the

[251] *R v Uxbridge Magistrates' Court ex parte Adimi* (n 48) 677 (Newman J).
[252] Eg, *Sadighpour* (n 1076).
[253] *R v Mateta* (n 494).
[254] 'HL Deb 18 October 1999, Vol 605, Col 747' (n 81) 858.
[255] It must also be relevant if a person fears torture.
[256] 'HL Deb 18 October 1999, Vol 605, Col 747' (n 81) 858; 'HL Deb 2 November 1999, Vol 606, Col 783' (n 81) 784.

additional element, in keeping with article 31(1), and stated that regard should be had to age[257] and 'the asylum seeker's state of mind including his state of mind resulting from any information or instructions given by the agent who facilitated his entry'.[258]

Showing that a person is a refugee after a negative determination

Section 31 incorporates two additional elements in subsections (5) and (7). Section 31(7) states that where an asylum seeker has had a negative determination, the person must 'show' that she or he is a refugee to the satisfaction of the criminal court. Section 31(7) therefore raises issues relating to the burden of proof of refugee status.[259] The burden on the refugee in refugee determination procedures is to the lower standard of 'real likelihood'. [260] However, the effect of the Court's reasoning in *Makuwa*, *Sadighpour* and *Mateta*[261] is that the burden on the defendant is a legal one and therefore the standard of proof on the refugee to show that she or he is a refugee under section 31(7) is on the balance of probabilities. This is a higher standard than the standard of proof in refugee proceedings.

Where a refugee has been recognised as such by the Secretary of State, this will be on the lower refugee standard. When the conviction of that refugee is appealed, that refugee determination will stand for the criminal court. However, where there has been a negative determination, but the person is able to show to the satisfaction of the criminal court that she is, in fact, a refugee and therefore entitled to the section 31 defence, this must be on the balance of probabilities. The requirement that a person show that she or he is a refugee in subsection (7) is a restriction on the broader scope of section 31 which applies to asylum seekers and deprives them of the benefit of article 31(1). Section 31(7) effectively requires a refugee to jump through

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[257] *H* (n 514).
[258] *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWHC 2507 (Admin). This was not considered in the context of the refugee defence but in terms of whether procedures operated by the Home Office in relation to screening interviews were fair; COPFS (n 429) has identified several factors to be taken into account, including trauma, paras 26-29.
[259] *R v Fabian Evans* [2012] EWCA Crim 2220 [18-19], [30].
[260] Brian Gorlick, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status' [2002] New Issues in Refugee Research, UNHCR Working Paper No 68 11-12. Gorlick also includes 'serious possibility', 'good reason', 'valid basis', 'reasonably possible' and 'real or reasonable chance or likelihood'; see also UNHCR, 'An Overview of Protection Issues in Europe: Legislative Trends and Positions Taken by UNHCR' (1995) 1 UNHCR European Series 35-36; UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR 2001) 3.
[261] *R v Makuwa* (n 244); *R v Sadighpour* (n 258); *R v M and others* (n 52).

hoops: to show that she or he is a refugee on a higher burden of proof standard, before showing that she or he comes within subsections 31(1) and (2).

There may be those who can show that they are refugees to the normal refugee status determination standard but not to the higher standard of 'on a balance of probabilities'. It is also inconsistent with the fact that refugees cannot be recognised to be such by a criminal court.[262] A finding by a criminal court cannot bind the Secretary of State. Certainly, section 31(7) cannot be used to argue that section 31 only applies to refugees. Even where a criminal court is persuaded that a failed asylum seeker is a refugee, that person remains an asylum seeker until they are recognised as such by the Secretary of State. This also underlines the futility of the section as well as the confusion caused to criminal lawyers trying to interpret section 31(7).

In criminal law, this burden of proof is the norm when a defendant has to prove an element of a defence and it is a protection for the defendant. It is, however, inappropriate, in cases involving refugees who have committed an offence of unlawful entry or presence. This is because of the nature of the claim being made by the refugee. The principle of non-penalisation is a fundamental principle of international refugee law and is a type of human rights claim.

Committing an offence *after* claiming asylum

Section 31(5) illustrates a further difficulty with the drafting of section 31. *Asfaw* considered that this section referred to cases where refugees committed offences such as theft or robbery or criminal offences which had nothing to do with a flight from persecution.[263] In relation to these crimes, there is no justification for any prohibition on the imposition of penalties simply because a person is a refugee. However, in the sentencing case of *K v Croydon Crown Court*, the Court took a

[262] This point was raised by defence counsel at para 32, in *Evans* (n 1074). It was dismissed by the Court.

[263] Lord Rogers referred to s 31(5) as being consistent with article 2 '…the [Convention] was not designed to create an Alsatia where refugees could commit crimes with impunity. So they cannot avoid punishment if they steal food on the pretext that they need it to feed themselves or their children, or if they break into a house to provide themselves or their children with accommodation, or they use a forged ticket to travel by bus or train to the docks in order to get a ship to another country, or if, to catch a flight, they take a taxi to the airport and run off without paying the fare. In each and all of these situations, article 31 is quite deliberately silent and article 2 applies'', '*R v Asfaw* (n 54) [95].

different view of section 31(5) analysing it so restrictively as to deprive asylum seekers of the principle of non-penalisation.[264]

K was a young person, interviewed with no appropriate adult or solicitor present, and whose undisputed account was that she entered the UK under the control of an agent; was persuaded to make a false claim for entry clearance earlier under the agent's influence; and had denied the earlier application as a result of suggestions from the agent. The girl was excluded from the benefit of the defence because she had apparently committed her offence about an hour after she had claimed asylum. [265] She was prosecuted under section 24A of the 1971Act because she had answered that she had not sought to enter the UK before. This was untrue as she had made a prior entry clearance application. She pleaded guilty.

On appeal against sentence, the High Court noted that if K had made her deceptive remark 'in the course of making the claim for refugee status' she would have had 'a good defence'. Unfortunately, neither K's lawyers – nor the court – appeared to appreciate the significance of her undisputed account for the section 31 defence. The question she answered was part and parcel of the claim for asylum and should have been seen as a continuing act. Such an interpretation would have reflected the aim of article 31(1) and Parliament's intention in exempting refugees from penalisation in section 31. While section 31(5) may be interpreted as it was in *Asfaw* to exclude ordinary crimes, it was wrongly interpreted in *K v Croydon Crown Court* because neither her lawyers (who presumably advised her against running a section 31 defence at trial or appeal) nor the court took into account the situation she found herself in as an asylum seeker, including her experiences, her age, trauma and reliance on an agent.

CPS guidance states in relation to section 31(5) that section 31 is only applicable if a person claimed asylum after having committed the offence from which she or he seeks protection from conviction, 'Consequently, a defendant who enters the country either clandestinely or legally, claims asylum, and then obtains false documents for use in attempting to travel to another country, would be outside the scope of section 31'. However, section 31(5) may be interpreted in a way which protects refugees. In this way it comes into play crucially for those who commit an

[264] The Court analysed subs (5) in the context of sentence and not conviction which was not appealed, *K* (n 939).
[265] See ibid, paras 5-9.

offence *after* making a claim for asylum. Such a case may, for example, concern a refugee who claims asylum but whose claim is rejected. Fearing that she or he will be forced to return to the country of origin, the refugee gets hold of a false passport and attempts to escape to another country to claim asylum there. At the airport, the person is stopped, arrested, prosecuted and convicted. Subsequently, the state recognises the person to be a refugee.[266] This type of scenario is recognised in the Scottish guidance which states that although such a person 'would be outside the scope of section 31', 'there may be circumstances in which a broad interpretation should be adopted', for example in the scenario outlined above.

[266] This occurred in *R v L (Somalia) (reference to the Crown Court by the CCRC)* (n 170). The conviction was quashed by the Crown Court.

Appendix 3 Some problems with the reasonable excuse defence

Section 2 of the 2004 Act

In *Soe Thet*,[267] the Court held that any reference to an 'immigration document' in section 2 is to *a valid document* applying to the immigrant in question and is to be contrasted with a 'false immigration document' as defined in subsection (13).[268] Mr Thet had a reasonable excuse for not providing a genuine passport at an asylum interview as the Burmese authorities would not have provided him with one.[269]

In *Mohammed and Osman*, the Court considered reasonable excuse under section 2(4)(c) (production on entry).[270] The refugees were unable to obtain passports in Somalia. [271] They were unable to produce false travel documents to immigration officers as these had been returned to agents. Both refugees succeeded under section 2(4)(c) as it would have been open to the jury to find that their excuses for not having obtained a genuine passport were reasonable. The Court, however, concluded that they did not have a defence under section 2(4)(e)[272] because to hold otherwise would be to 'frustrate the purpose of the legislation'.[273] The Court concluded that in relation to subsection (4)(d),[274] a defendant is required to produce the false documents relied on.[275] In relation to subsection (4)(c), the person must show she or he has a reasonable

[267] *Thet* (n 939).
[268] ibid [16-17]; and *R (on the application of Khalif) v Isleworth Crown Court* [2015] EWHC 917 Admin [4].
[269] *Thet* (n 939) [16-24].
[270] *R v Mohammed and Osman* (n 115) [2-4]. Mr Osman's case was the CCRC's first refugee referral to the Court of Appeal.
[271] Because 1] there was no issuing authority (Ms Mohammed] and 2) a passport or visa had not been applied for and everything had been arranged by the agent (Mr Osman), ibid [7], [13]. In fact, there has been no passport issuing authority in Somalia since 1991; Further, the UK has not recognised Somali passports since July 2005, 'Prosecution under Section 2: Failure to Produce Immigration Document (Home Office 11 March 2014)' (n 78); The CPS state in 'Legal Guidance: Statutory Defences to the Offences in the [2004] Act, Downloaded 4 July 2016' that Ms Mohammed did not know where to go for a genuine passport but this is obviously mistaken. Somalis are simply not able to obtain genuine documents; This was noted in 1996 by Hales (n 18).
[272] Ie, the journey to the UK was completed without at any stage being in possession of an immigration document.
[273] *Mohammed* (n 88) [34]; *Khalif* (n 1106) [6].
[274] Ie, producing a false immigration and proving that it was used for all purposes on the journey to the UK.
[275] *Mohammed* (n 88) [26], [36].

excuse 'for not being in possession of a genuine document' although, in accordance with *Thet*, the defence extends to the defendant who enters using a false document.[276]

Mohammed is therefore authority for the proposition that section 2(13) does not define a 'false immigration document' by contrast with an 'immigration document'. Rather, a 'false immigration document' is a sub-species of an 'immigration document'.[277] An immigration document is a false immigration document if certain conditions are satisfied. Therefore, in relation to the defence in section 2(4)(c), this encompasses both a genuine and a false immigration document. If *either a valid or false immigration document* has been destroyed or disposed of the refugee must prove that he had reasonable grounds for doing so. *Mohammed* therefore provides that a defence under section 2(4)(c) is available where a refugee can show that he acted reasonably, for example, in returning a false immigration document to the agent who travelled with him or her.[278] This also applies to the defence in subsection (6)(b). Where the person is under the control of an agent or dependent on the agent for the travel arrangements, this would be a reasonable ground.

Mohammed, however, does not require the production of the false passport under subsection (4)(c) or (6)(b). This is only required for the defence under (4)(d). This was followed by the Court in *Asmeron* which stated that while the production of a false immigration document may provide a separate defence under section 2(4)(d), non-production of such a document does not vitiate a defence available under subsection 4(c).[279] This argument was also made in *El Hudarey*.[280] The case of *Mohammed* was not referred to in *Asmeron* although it was in *El Hudarey*.[281]

Mohammed is therefore a gloss on *Thet*. Although it appears to narrow *Thet*, the court's conclusion in relation to section 2(4)(c) in fact mirrors *Thet* even though, as in *Thet*, the refugees had travelled on false documents which they had returned to an agent. It would seem that where the refugee has a reasonable excuse for not producing a genuine passport, there is no need to produce the false one on which the refugee actually travelled or indeed explain why the false passport was returned. This result is a confusing one although it ensures the protection of refugees. The situation is further confused by *Khalif* where the High Court appeared to argue that a refugee is

[276] ibid [36].
[277] ibid [37].
[278] ibid [33-37].
[279] *Asmeron* (n 939) [24]; see also *R v Kapoor and others* [2012] EWCA Crim 435.
[280] *El Hudarey* (n 939).
[281] ibid [9].

required to produce the false document he travelled on when arguing a reasonable excuse defence under subsection (4)(c) or (6)(b).[282]

Identity

The cases reveal difficulties with the legislation which can result in the penalisation of refugees. *Mohammed* acknowledged that it was 'unsurprising' that refugees sometimes arrive with false or no documents due to fear and persecution.[283] However, the Court said there had to be '[a] reasonable compromise' between necessary control over entry and arrangements for 'genuine' refugees as opposed to 'bogus' refugees. In order to discover the 'bogus' ones, the UK had to examine '…each and every document used to gain entry, whether genuine or false' as this might

> provide valuable information to the authorities responsible for border controls, not least in the context of bogus claims, because combined with other information in the possession of the authorities, they may at least reveal the applicant's true country of origin.[284]

This was stated in the context of the cases of two refugees whose identities were not in question. The use of deception or false passports or lack of documentation or the disposal of the passport (usually by returning this to the agent) cannot identify whether the refugee is 'bogus'. Indeed, following *Thet* and *Mohammed*, an asylum seeker will have a defence under subsection (4)(c) or (6)(b) and is not required to produce a false passport. Neither does the defence in subsection (4)(e) require the production of any kind of document. These defences cannot therefore contribute to control over entry in the terms referred to in *Mohammed*. The defence in subsection (4)(d) requires the production of a false passport but this cannot tell the official whether the asylum seeker is 'bogus' as a false passport cannot be evidence in relation to the identity of the asylum seeker.

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[282] *R (on the application of Khalif) v Isleworth Crown Court* [2015] EWHC 917 Admin; The CPS guidance in this area is confusing, for example, it mixes up the case of *Khalif* with *Mohammed and Osman* which it does not name 'Legal Guidance: Statutory Defences to the Offences in the [2004] Act, Downloaded 4 July 2016'.
[283] *Mohammed* (n 88) [21].
[284] ibid [21].

A further difficulty with section 2 is that if identity and nationality may be determined by other documents in the possession of the refugee such as identity cards, driving licences or even copies of the genuine passport or the refugee can establish his or her country of origin, this does not undermine the aim of the legislation.[285] None of the reported cases or those considered at the CCRC involve refugees trying to disguise their identities. However, in all these cases, refugees were convicted, usually on a guilty plea.

Defence under section 2(4)(d)

A further difficulty with the legislation is the nature of the defence under section 2(4)(d). An asylum seeker will have a defence if she or he travelled on a false document and can produce the false document. However, if the asylum seeker did so, she or he would be liable to prosecution for an offence of possessing a false passport or identity document.[286] The fact that no offence has been committed under section 2 of the 2004 Act is cold comfort to the presumptive refugee.[287]

Sentencing

A related point is that the CPS guidance notes that it would be inconsistent for lesser sentences to be imposed for not having a travel document under section 2 as opposed to having a forged document (under the 2010 Act), as this would create an incentive to commit section 2 offences.[288] The CPS refers to the guideline case of *R v Kolawole* as being relevant. In *Kolawole,* 12 – 18 months was deemed to be an appropriate sentence for use of a false passport for a person of good character on a guilty plea. The CPS guidance states that in such a situation, an offender who travels on forged documents would be in a better position if he destroyed those documents as opposed to actually producing them. This supports the argument above that if the

[285] This was referred to in *Thet* (n 939) [25-26]; *Wang* (n 939); see also *R v Da Hua Weng and Guo Xing Wang* [2005] EWCA Crim 2248.
[286] Eg, under s 26(1)(d), 1971 Act, Part 1, 1981 Act s 25, 2006 or ss 4, 6, 2010 Acts.
[287] There could be an argument that given the existence of the defence under s 2(4)(d), it is an abuse of process to prosecute a refugee under the 2010 Act when this would deprive the refugee of the defence under s 2. If it is a defence under one Act for a refugee to produce a *false* immigration document and to prove that she or he used it as an immigration document for all purposes in connection with the journey to the UK, is it an abuse of process to prosecute a refugee under another Act?
[288] 'Legal Guidance: Statutory Defences to the Offences in the [2004] Act, Downloaded 4 July 2016' (n 279).

refugee produced the false document she or he would be prosecuted under the 2010 Act rather than be understood to have a defence under section 2(4)(d).

Sentences for section 2 offences are traditionally lower than those involving false passports. However, this cannot create an incentive for asylum seekers or refugees.[289] Refugees are fleeing persecution and, even supposing they were aware of the offences and the sentence differential, they will hardly be swayed from committing offences of unlawful entry and presence. It is precisely because of the 'peculiar situation' of refugees that such offences are committed. The CPS guidance shows no understanding of this situation.[290] Further, the *Kolawole* case concerned a person who was found with two false passports after police searched his car. It therefore has no relevance to the penalisation of refugees. The CPS guidance reveals no concern with the principle of non-penalisation. Rather it seeks to increase that penalisation by arguing for increased sentences.

Section 2(7)

Section 2(7) is confusingly drafted. Refugees complying with the demands of facilitators or agents are usually doing so in relation to *false* immigration documents and not genuine documents. Since the false documents have generally been provided by the agent in circumstances where the refugee may not even know the route of escape and the agent is in control, it would seem unreasonable to require that the refugee keep the document in these circumstances. In any case, following *Thet* and *Osman*, it would seem that the relevant document for subsection (7) is a genuine rather than a false document. Refugees with genuine documents may be required to hand these over to agents or facilitators who demand these as part of the price of arranging the escape.[291] In these circumstances, refugees ought to be able to argue that they had a 'reasonable excuse' because the disposal of the document was 'beyond the passenger's control' being a necessary precondition for the escape.[292]

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[289] Aliverti deals with the idea of deterrence in relation to such crimes, Aliverti (n 20).
[290] 'Legal Guidance: Statutory Defences to the Offences in the [2004] Act, Downloaded 4 July 2016' (n 279).
[291] This was the case in *R v Asmeron* (n 287); *R v YY and Nori [2016] EWCA Crim 18* (n 225); cf *R v El Hudarey* (n 288), where, owing to persecution, the refugee felt unable to travel on his own genuine passport and therefore left Libya on a false passport so that he would not be stopped on leaving the country.
[292] Holiday (n 22).

However, in *YY and Nori*, the Court applied section 2 restrictively to a refugee from Iraq who stated to an immigration officer at a screening asylum interview on arrival that he had handed his genuine passport to an agent in Ankara and he did not know whether he had travelled on his genuine or false passport to the UK because the document was held by the agent. A pre-sentence report stated that the refugee had said his genuine passport had been used to reach the UK (this was disputed by Mr Nori who stated that there must have been an issue of miscommunication). The report writer continued,

> He could not explain why, if that was the case, he did not use it and purchase his own air tickets, once in Syria, as opposed to paying another extortionate amount. During his interview, I was not totally convinced by [his] explanation with regards to events surrounding his arrival in the UK. I am of the view that [he] was fully aware of the consequences of entering the UK without a passport.[293]

Quite apart from the fact that it was irrelevant, if he was a refugee, whether or not Mr Nori was aware of the consequences of entering the UK without a passport, he clearly did not travel to the UK on his own passport. He was an Iraqi national and therefore would have required a visa.[294] Since he was an asylum seeker, he would have found it virtually impossible to obtain a visa since a visa national has to show that she or he will return to the country of origin. This an asylum seeker is evidently unable to do. The report writer's failure to understand why Mr Nori did not buy his own tickets and arrange his own travel, which was accepted by the Court, demonstrates a lack of knowledge and understanding by both probation[295] and the courts about the 'peculiar situation' of refugees when fleeing persecution.[296]

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[293] *R v YY and Nori [2016] EWCA Crim 18* (n 225) [27]. It is rare for there to be a pre-sentence report when sentencing refugees. The authors are aware of less than a handful of such cases.

[294] In 2007, when Mr Nori entered the country the UK refused 40-45% of visa applications from Iraqi nationals. Iraq had a far higher rate of visa refusals than any other country in the Middle East, including Iran and the Yemen, 'Immigration Statistics (Home Office 26 May 2016)'.

[295] This general lack of knowledge is to be contrasted with the specific knowledge of probation officers 'on the ground' at London prisons in the 1990s and at Uxbridge Magistrates' Court since the 1990s, see Hales (n 18); and 'Email from Court Officer, National Probation Service to Nick Hammond (10 August 2012)'.

[296] Although the Court of Appeal accepted that a jury might have accepted Mr Nori's account rather than the report writer's account, the Court then went on to accept the report writer's account because there was no evidence which 'satisfactorily addressed' why Mr Nori had not used the family passports to purchase their own tickets 'or why he was prepared to pay a very substantial amount of money to an agent', *Nori* (n 66) [27-28], [35].