

Immunity of refugees from prosecution

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considers the House of Lords' interpretation of state obligations

In May 2008 the House of Lords found by a 3-2 majority that a refugee who arrives in the UK from a country of persecution and who presents false documentation for the purpose of obtaining onward travel to a preferred country of refuge, is entitled to immunity from prosecution (*R v Asfaw* [2008] 3 All ER 775). In contemplating the State's obligations under art 31(1) of the 1951 Convention Relating to the Status of Refugees, their Lordships held that immunity must be extended to all charges arising from the incident in question, regardless of whether the domestic legislation (s 31 of the Immigration and Asylum Act 1999 (1999 Act)) expressly prohibited prosecution on the charge faced by the refugee.

The House cited both the statutory imperative in the 1999 Act to comply with the country's international obligations as well as the humanitarian aims on which the 1951 Convention was founded, to justify the creative interpretation of s 31. Given the additional limitations inherent in the current wording of s 31 additional artistic licence may be required in the future to maintain compliance.

Where a refugee relies on fraudulent documentation to enter New Zealand, and subsequently is charged with a criminal offence, then under both the Immigration Act 1987 (1987 Act) and changes proposed to it in the form of the 2007 Immigration Bill (2007 Bill), no statutory exemption from prosecution exists. This note considers whether this omission renders New Zealand — both currently and following adoption of the Bill — in breach of its international obligations; as recognised by the House of Lords, as stated in the 1951 Convention and assumed by Parliament in s 129A of the 1987 Act and cl 113 of the 2007 Bill).

UK POSITION AND THE HOUSE OF LORDS

Asfaw was a student activist who, in fleeing persecution in Ethiopia, relied upon a false passport to attempt to travel to America via the UK. Airline staff discovered the fraud as Asfaw attempted to check in at Heathrow for the onward section of her journey. Following apprehension, Asfaw made a claim for asylum and in 2007 was granted refugee status by the Home Office. As a result of the attempted use of a forged passport Ms Asfaw was charged, and subsequently acquitted by a jury, under s 83 of the Forgery and Counterfeiting Act 1981. Despite opposition by the defence on the basis that s 31 of the Immigration and Asylum Act provided the accused with immunity a second charge was laid under s 51(1) of the Criminal Attempts Act 1981. Counsel's submission was rejected, on the basis that s 51 was not specifically included in s 31. Ms Asfaw was convicted and sentenced to nine months' imprisonment.

House of Lords decision

On appeal to the House of Lords, the question was posed that: "If a defendant is charged with an offence not specified in s 31(3) of the Immigration and Asylum Act 1999, to what extent is he entitled to rely on the protections afforded by art 31 of the 1951 United Nations Convention Relating to the Status of Refugees?" (para [1]). The majority of Lords Bingham, Carswell and Craighead, in allowing the appeal and quashing the conviction, found the answer lay in the humanitarian objectives of the Convention to the extent necessary to "protect refugees from ... criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution" (para 9).

To meet this burden, and following a similar prosecution reviewed in *R v Uxbridge Magistrates' Court, ex p Adimi* [1999] 4 All ER 520 that was criticised by the UNHCR as being in breach of art 31, Parliament enacted s 31 to address the "serious lacuna in domestic legislation which failed to give any immunity against criminal penalties in accordance with art 31" (para [23]). Article 31 provides that:

contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization.

To the extent the refugee is "charged with an offence to which s 31 applies" UK law now provides for immunity from prosecution.

The trial court in *Asfaw* held that the fact that charges under the Criminal Attempts Act 1981 were not listed meant s 31 immunity was not available to the accused. The view of the House was that "someone who comes within Article 31 should have a defence under s 31" (para [67]) regardless of whether the charge was explicitly included.

Reasoning

Ultimately, the finding in favour of the accused was based on grounds of abuse of process, whereby the several charges laid related to the same set of circumstances. The House considered the inherent factual link between the charges had led to an abuse of process in pursuing the second charge, despite earlier acquittal on the first charge.

The 1951 Convention does not displace the sovereign right of states to legislate in accordance with domestic asylum policy. Article 31 provides only a caveat to that prerogative. To permit prosecution, following acquittal on charges arising from the same factual circumstances and for which immunity was available under s 31, would have effectively

displaced the UK Parliament's prerogative in implementing art 31. The House considered this would inhibit substantive compliance with the State's Convention obligations and acted in allowing the appeal to pre-empt this.

Article 31 is hailed as an important tool for assisting refugees in "the continuing course of a flight from persecution" (para [26]). The decision in *R v Asfaw*, to attach primacy to its implementation, illustrates the House of Lords is likewise proving an effective weapon in the arena.

NEW ZEALAND POSITION

Immigration Act 1987

In their mutual dissent, Lords Earlsferry and Mance argued that unless the accused was "coming directly" to the country of refuge, immunity could not be invoked. Their Lordships would have dismissed the appeal on the grounds that as the UK was intended merely as a point of transit the accused could not escape prosecution. This position is contrary to UNHCR Guidelines that contend that art 31 immunity is available to asylum seekers that have reached their ultimate destination and while in transit to it. Furthermore, their Lordships' view must be considered in light of the context of the decision. Amongst other factors cited to deny the extension of art 31 to transiting asylum seekers was the EU matrix that regulates the shared burden of asylum protection amongst Member States, eg the Dublin Convention designates the state responsible for a particular asylum seeker. As highlighted above the objective of art 31 is to assist asylum seekers, rather than to inhibit the state in implementing asylum policy. Accordingly, for Lords Earlsferry and Mance, the humanitarian objective of the Convention is achieved, but only where immunity is provided to the asylum seeker at the ultimate destination and by the receiving state.

In light of New Zealand's geographic isolation, it is difficult to envisage a situation where an asylum seeker would merely transit in New Zealand before ultimately seeking refuge in a third country, except perhaps Australia. For this reason, the potential implications of the decision lie in the majority decision and the extent to which the current and proposed legal response to asylum seekers, who obtain entry by fraudulent means, is in line with international obligations; as interpreted by the House of Lords.

The New Zealand government has, like its UK counterpart, made an express statutory commitment to "meet its obligations under the Refugee Convention" (s 129A of the 1987 Act) and for that purpose the Convention is attached as a Schedule to the Act. The strength of this commitment, and its humanitarian objective, continues under the Immigration Bill that replicates the prior commitment (cl 113) while also, for the first time, acknowledging express obligations under the 1984 Torture Convention and the 1966 International Covenant on Civil and Political Rights (ICCPR). The Human Rights Foundation of New Zealand considers that while this expression of beneficent support to asylum seekers is important, its substantive countenance is less assured citing criticism by the UN Committee Against Torture of the government's failure to include an express prohibition against refoulement pursuant to art 3 of the 1951 Convention.

Reference to the ICCPR and Torture Convention as international obligations owed to asylum seekers, beyond those encapsulated in the 1987 Act, provides a concession, albeit unconscious, that there are gaps in the statutory protection framework. The question arises whether these omissions include the failure to implement art 31 immunity.

It is an offence under s 142(1)(c) when a person:

without reasonable excuse, produces or surrenders any document or supplies any information to an immigration officer or visa officer or refugee status officer knowing that it is false or misleading in any material respect.

The Parliamentary Select Committee on the Immigration Bill considered the "reasonable excuse" proviso had led to "difficulty obtaining convictions for this serious offence". To overcome this difficulty the Committee recommended removal of the "reasonable excuse" justification, while at the same time advocating reference to the Refugee Convention in order "to recognise that the offence does not limit the application of art 31.1 ... in any way" (Commentary on the Immigration Bill, p 29).

The House of Lords in *Asfaw* recognised that the imperative of Convention-based protection necessitated specific implementation of art 31 immunity. As with the situation in the UK prior to the introduction of s 31 into the 1999 Act, s 142 of the 1987 Act does not provide express immunity from prosecution in New Zealand. The failure to do so has the potential to frustrate fulfilment of the assumed responsibility to facilitate "flight from persecution" and to breach the State's obligations to recognise bona fide refugees, provide asylum from persecution and maintain the prohibition on refoulement (arts 1 and 33, Refugee Convention, ICCPR and Torture Convention).

Ironically, the penalty for offending that would otherwise be immune from prosecution pursuant to art 31, has the potential to expose an asylum-seeker to deportation. Migrants remain susceptible to deportation for up to ten years following award of a residence visa when subsequently convicted of an imprisonable offence (s 91). Accordingly the offending that enables asylum-seekers to enter into the country, including the presentation of fraudulent documentation, may theoretically justify the government in ordering expulsion. The UNHCR recognised this potential and urged the government to adopt a test of good faith effectively protecting individuals whose actions, while illegal in fraudulently presenting or failing to present documentation, were legitimate in motivation ("Review of New Zealand's Immigration Act 1987" Submission of the UNHCR, Section 12, para 28(iii)).

Sensibly, the humanitarian motivated discretion afforded to authorities in exercising the power of deportation combined with the international prohibition on refoulement mitigates the threat posed by this legislative anomaly. However the debate on the extent to which "security" concerns have legitimately influenced drafting of the current Bill encourage caution in dismissing the postulated scenario as academic (in all senses of the word). Furthermore, and as criticised by the Committee Against Torture, New Zealand has not expressly enacted the refoulement prohibition. In contrast to the active implementation of Convention obligations by the UK Parliament the failure of the New Zealand government to give expression to these protections is noted.

Immigration Bill 2007

In drafting the Immigration Bill, the opportunity arose for Parliament to elucidate its specific obligations under the 1951 Convention, as currently encompassed in the generalised commitment under s 129A of the 1987 Act. Clause 3 states that the Bill aims to ensure "compliance with specified immigration-related international obligations" while the purpose of Part 5 is to codify this pledge as it relates to "certain obligations"

under not only the 1951 Convention but also the Torture Convention and the ICCPR (cl 113). Despite this, the Government's pledge to uphold its international responsibilities to migrants remains equivocal.

The context in which the 2007 Bill was drafted, in close proximity to the decision rendered by the Supreme Court in *Zaoui v Attorney-General* [2006] 1 NZLR 289, must be borne in mind. Arguably, Parliament's motivation was characterised by the desire to consolidate control over the entrance of asylum seekers into New Zealand, rather than actively facilitating the "continuing course of a flight from persecution". The inclusion of provisions such as the "Advance Passenger Processing" system, that increases the responsibility borne by passenger carriers in relation to their role in transporting individuals into the country (cll 86 to 88), and the extended powers of detention over new arrivals (cll 274 to 275) support this claim.

Contextual influences on the drafters of the 2007 Bill may render the failure to implement, expressly, the protections under art 31 of the Convention, rational. In replicating the 1987 Act the Bill fails to specifically provide for immunity from prosecution. This is despite the continued designation in cl 305 that provision of fraudulent documentation on arrival in New Zealand constitutes an offence punishable by imprisonment and/or a monetary fine. This is also regardless of the cumulative effect of cll 305 and 150 that maintain the lingering anomaly that could see an asylum seeker who was granted legal status be subsequently deported for the very actions that enabled their arrival in the country.

Continuing reliance on the discretion of authorities on whether or not to prosecute is mitigated in the late amendment, to cl 329, prior to the Bill's first reading. The UNHCR recommended to the Parliamentary Select Committee that "inclusion of appropriate safeguards into the Bill to ensure that international standards of reception and treatment are maintained for asylum-seekers, including the non-punishment of refugee and protected person claimants for illegal entry in accordance with art 31 of the 1951 Refugee Convention" was needed (Submission by UNHCR to the Transport and Industrial Relations Committee on the New Zealand Immigration Bill 2007 (20 November 2007) Recommendation 9). Clause 329 thus provides "no proceedings ... may be brought if the documents or information are supplied in the circumstances to which art 31.1 of the Refugee Convention applies".

While a measure of self-protection by the government cannot be criticised, a comparison with the more progressive approach in the UK renders an aspersion of insularity against Parliament more appropriate. The decision of the House of Lords was in a context where the potential security risk faced in the UK is intensified by the volume of migrants and geographic proximity for would-be asylum seekers. The lingering deficit in the express adoption of international obligations under the framework for asylum protection in New Zealand is, by contextual comparison, unsustainable.

A broader consideration of the 2007 Bill lessens concerns that Mr Zaoui has proven to be the security threat envisaged by authorities — not to the country but to asylum seekers whose future entitlement protection was potentially prejudiced. While the regime of express protections remains limited the class of asylum seekers intended to benefit from the government's generic commitment to its international obligations has widened. A combination of international awareness of the deficit in protection for asylum seekers who do

not fall within the 1951 Convention definition of "refugee" and the requirement that EU Member States act accordingly (EU Qualifications Directive) led the UK to extend the statutory scope of protected parties. The UNHCR recognised this imperative when it submitted to the UK Select Committee on Home Affairs that art 31 of the 1951 Convention applied equally to refugees and asylum seekers. It is therefore in accordance with international practice that the 2007 Bill likewise extends the category of beneficiaries and includes as "protected persons" those individuals fleeing persecution as defined under the Torture Convention and the ICCPR.

INTERNATIONAL OBLIGATIONS

The 2007 Bill expands the category of asylum seekers designated as beneficiaries of protection in compliance with international obligations, as stated under the 1951 Refugee Convention, the ICPPR and the Torture Convention. The decision in *Asfaw* casts an unfavourable comparative light on this sole concession. The UK has not only adopted a similar extension of asylum beneficiaries but, pursuant to the judgment in the House of Lords, primacy is given to the humanitarian aims of the 1951 Convention when interpreting the State's obligations owed to protected persons.

The rights' protection regimes envisaged under both the ICCPR, the obligations of which are codified for the first time under the Immigration Bill, and the Refugee Convention seek a balance between the sovereign prerogative of States and the need to protect individuals vulnerable to an erroneous exercise of power by States. Article 31 expressly forbids the imposition of penalties on individuals for actions and omissions in the context of self-help measures taken in the "flight from persecution". The ICCPR arguably requires the imposition of "penalties" must be commensurate to both the crime and the purpose of the law in question. Pre-eminent asylum scholar Guy Goodwin-Gill argues the art 31 prohibition against penalty includes both criminal and administrative sanctions. This note suggests that when the Convention's traditional subservience to State autonomy is set aside in light of the increasing emphasis on its humanitarian aims, an even broader interpretation of prohibited "penalties" is justified.

To criminalise those actions necessary in seeking asylum attaches a stigma that ultimately can frustrate the asylum seeker's integration; for example a criminal record can impinge upon employability. Article 31 seeks to facilitate the "continuing course of a flight from persecution" and the "flight" ends on arrival at the destination, which for asylum seekers is in the community to which they seek to belong and participate. Any hindrance on participation, such as the stigma arising from a criminal conviction, would therefore breach the State's obligations under art 31 in its purest form.

A gentle reminder is offered to the New Zealand government that despite the progressive definition of protected beneficiaries in the Immigration Bill, a significant deficit in the implementation of its international obligations under the 1951 Convention continues. In warning against the imposition of criminal penalties despite the lack of express domestic provision for immunity, the House of Lords has presented a threshold against which satisfaction of the State's international obligations may be measured. However if the above analysis is correct then both the UK and New Zealand must be vigilant to ensure the substantive scope of art 31 is assured. □