

JERSEY / JUDGMENT

Merikhi -v- AG [2016] JRC 202 (07 November 2016)

[2016] JRC 202

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JUDGMENT

THE BAILIFF: 1. On 7 th July, 2016, I heard an appeal from the appellant in relation to conviction before the Assistant Magistrate on one count, namely that not being a British citizen he entered the Bailiwick of Jersey without leave, contrary to Section 24(1)(a) of the Immigration (Jersey) Order 1993 (the "1993 Order"). The circumstances were unusual. The appellant had instructed his advocate late in the afternoon of 6 th July to apply to abandon the appeal. He was informed that as it was a criminal matter he nonetheless had to appear in court. As he is now resident in England, he had to take the ferry at 9pm on 6 th July which he did. He subsequently informed his advocate that as he was in court anyway he wished to pursue the appeal. Both parties agreed that I could sit without jurors for the purposes of the appeal against conviction and for procedural issues arising out of the appeal against sentence. Having heard the parties, I dismissed the appeal against conviction with reasons to follow. This judgment contains those reasons. 2. The appeal against sentence was subsequently heard before this Court over which Commissioner Sir Michael Birt presided. The appeal was dismissed for reasons contained in the Court's judgment of 4 th October, 2016 (Merikhi-v-AG

[2016] JRC 187). I gratefully adopt paragraphs 3 to 12 of the Royal Court's judgment on that occasion, which sets out the relevant facts. The only gloss upon those is that whereas neither the prosecution or the defence were able to inform the court at the time the appeal against sentence was heard, as to whether the appellant had been given leave to enter the United Kingdom for a period of two years or five years, by contrast I was told on 7 th July that leave to enter and remain had been given for a period of five years, expiring on 5 th July, 2021, the leave having therefore been given on th July, 2016. 3. After the appellant had been initially detained by Customs and Immigration officers at Elizabeth Terminal he was seen by three duty advocates - first of all in detention at the harbour, secondly in the Magistrate's Court on 1 st February, 2016, when he reserved his plea, and thirdly in the Magistrate's Court on nd February, 2016, when a guilty plea was entered. Legal aid was granted subsequently. On the next appearance in court he indicated that he wished to apply to change his plea but leave to do so was refused. The appeal against conviction turns on whether the Assistant Magistrate should have given leave. Advocate Landick was at pains to emphasise that no criticism was made of the advocate on the duty advocate

scheme. The submissions of Advocate Landick on this appeal can best be summarised as an attempt to enter upon new ground which the defence counsel on the duty roster could not at short notice have been expected to consider. 4. The offence under Section 24(1)(a) of the 1993 Order is entering the Bailiwick without leave, not being a British citizen. The Order makes provision at Section 31 for a number of defences based on Article 31(1) of the UN Convention and Protocol relating to the status of refugees. It was not in dispute before me that this Convention has been ratified by Her Majesty's Government in the United Kingdom on Jersey's behalf and it is therefore binding on the United Kingdom on behalf of Jersey. Article 31 of the Convention is in these terms:- "Refugees unlawfully in the country of refuge The contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The contracting states shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The contracting states shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country." 5. Based on this Article, Section 31 of the Immigration and Asylum Act 1993, extended to Jersey under the 1993 Order, provides for defences as follows:- "(1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the [Bailiwick of Jersey] directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention) he - (a) presented himself to the authorities in the [Bailiwick of Jersey] without delay; (b) showed good cause for his illegal entry or presence; and (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the [Bailiwick of Jersey]. (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the [Bailiwick of Jersey] sub-section (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country. (3) The offences to which this section applies are those - (a) of fraud, (b) of uttering a forged document; (c) under Section 24A of the 1971 Act (deception), or (d) under Section 26(1)(d) of the 1971 Act (falsification of documents), and any attempt to commit any of those offences." 6. It is not in dispute that the appellant had not uttered a forged document, neither was he charged with an offence under Sections 24A or 26(1)(d) of the 1971 Act. 7. Advocate Landick did contend on his behalf however that sub-paragraph (a) of Section 31(3) applied. This submission was made upon the basis that the appellant could have been charged with fraud contrary to the customary law of Jersey. It was said that in effect he had made or cooperated in an implied representation to Customs and Immigration officials that the car in which he was hidden only contained one person, which is to say the driver; alternatively the representation was by way of concealment of a material fact, namely his presence. Advocate Landick conceded that the argument could only succeed if I found that the conduct of the appellant could have been

charged as fraud and in that context he urged that the driver was under a duty to tell the Immigration and Customs officials that there was someone in the boot of the car. There was a general duty to comply with the law, and this bound all entrants to the Bailiwick to present themselves to Immigration officials. The obligation particularly lay on the driver in this case because she was related to the appellant and she was aiding and abetting his entry without leave. Indeed she knew he was there and had pleaded guilty to an offence under Section 25, namely that of facilitating the entry of a person who had no leave to enter. She was his agent in making the representation but in any event Advocate Landick contended that the appellant had made the representation by concealment. 8. The Assistant Magistrate took the view that it was evident that there was no false representation - or indeed any representation - made by the appellant, and furthermore there was nothing to suggest actual prejudice to another. For this reason the Assistant Magistrate considered that the ingredients of the offence of fraud as determined by the Court of Appeal in *Foster v AG*

[1992] JLR 6 , did not exist. 9. Advocate Landick submitted that the defence which he wished to advance represented a development of the law of fraud, rather than a new offence as such. Before I turn to that, it is apposite to remind myself of the dictum of Le Quesne JA in *Foster* . At page 26, he said this:- "It is not easy to draw a general rule from local cases of criminal fraud because it is very rare to find in the records any reasons for the court's decision. Nevertheless, in our judgement, the cases cited to us justify the proposition that to establish criminal fraud it is necessary to show that the defendant deliberately made a false representation with the intention of causing thereby - and with the result in fact of causing thereby - actual prejudice to someone and actual benefit to himself or somebody else." 10. In support of his argument, Advocate Landick referred to the case of *R v Asfaw* (United Nations High Commissioner for Refugees Intervening)

[2008] 1 AC 1061 . That case concerned an Ethiopian national, intending to claim asylum in the United States of America, who left Ethiopia travelling by air on a false Ethiopian passport with the help of an agent. They arrived in the United Kingdom and passed through Immigration control, the agent presenting the passport on her behalf. The appellant had been left alone at the airport for approximately an hour until the agent returned with a false Italian passport and a ticket for a flight to Washington DC. When the appellant presented the Italian passport at the airline's check in desk for the onward flight, the security official recognised it to be false and informed the police. The appellant was arrested at the departure gate as she attempted to board the aircraft, and during the following police investigation she indicated her wish to claim asylum. She was charged with using a false instrument with intent contrary to Section 3 of the Forgery and Counterfeiting Act 1981 and with dishonestly attempting to obtain air transportation services by deception contrary to Section 1(1) of the Criminal Attempts Act 1981 . The first of these charges was one to which the defences under Section 31 of the Immigration and Asylum Act 1999 applied and the appellant accordingly contended she was entitled to immunity from criminal penalties for using false documentation in that respect. She

raised a preliminary objection to the second count that although the offence charged was not included in the list of offences to which Section 31 applied, the immunity provided by Article 31 of the Convention nonetheless remained available to her. When the judge rejected that objection, she pleaded guilty, and her not guilty plea on the first count was accepted by the jury which acquitted her. 11. The matter went to the House of Lords where the appeal was allowed by a majority, Lord Rodger of Earlsferry and Lord Mance dissenting. The majority (Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Carswell) held that the Convention was to be given a purposive construction consistent with its humanitarian aims which included the protection of refugees from the imposition of criminal penalties for infractions of the law reasonably or necessarily committed in the course of their flight from persecution. The short term stopover in an intermediate country en route to the country of intended refuge did not prevent the application of this purposive construction on the facts of the case before them; and it was held that Section 31 of the Immigration and Asylum Act 1999 was intended to give effect to Article 31(1) of the Convention and should not be read as limited to offences attributable to illegal entry or presence in the United Kingdom but should provide immunity, if the other conditions of the section were satisfied, from the imposition of criminal penalties for offences attributable to a refugee's attempt to leave the country in the continuing course of a flight from persecution, even where there had been a short stop over. As the jury had acquitted the appellant on the first count, it must have been satisfied on the defence advanced in that connection and therefore it had been an abuse of process to prosecute her to conviction on the latter count. At page 1097, paragraph 63, Lord Hope of Craighead said this:- "It is often just a matter of convenience whether the charge in cases of this kind is framed in Scotland as one of uttering a forged document or as one of fraud. But in this case, as the appellant had reached the stage of attempting to obtain services by tendering the false passport, attempted fraud would probably have been regarded as the better alternative; Gordon, the Criminal Law of Scotland, Third Ed (2000), para 18.35. The important point is that, on either alternative, in Scotland the defence under Section 31 would have been available. The exact matching of statutory offences in England and Wales with common law crimes in Scotland is at best very difficult, and more often than not it is virtually impossible. But no sensible reason can be given for thinking that Parliament intended, in this context, that the same conduct on either side of the border should be treated differently." 12. In similar fashion, Advocate Landick contended that it could not have been intended by the 1993 Order that what would not be an offence in Scotland should be an offence in Jersey. He urged that the statute should be construed consistently with the treaty obligation, and that the appellant should have been permitted to change his plea given that he had a real defence to advance, on the basis of *Asfaw*, that his prosecution was an abuse of process. In that connection, he submitted that it was obvious that Section 31 of the 1993 Order contained a drafting error because it should also have included offences under Section 24. I should treat the section as containing that drafting error, and put it right. Indeed, Lord Roger of Earlsferry, dissenting in *Asfaw*, had said this at page 1101, paragraph 77:- "Two points about Section 31 can be made straightaway. First,

the offence of entering the United Kingdom unlawfully, contained in Section 24 of the Immigration Act 1971, is not listed under Section 31(3). Nor is the offence of attempting to obtain services by deception, contrary to Section 1(1) of the Criminal Attempts Act 1981. While, for the reasons I shall give, the omission of the second provision is entirely understandable and correct, as presently advised, I am at a loss to understand why the first of these provisions has been omitted from the lists in Section 31(3) and (4), since Section 24, like Section 24A, falls foursquare within the terms of Article 31 of the Convention. Article 31 is designed indeed for precisely that kind of offence." 13. In order to pursue the appeal against conviction, the appellant needs to have leave to withdraw his guilty plea. He submitted that it was entered without a full understanding of the applicable law in this area, given the defence which was available to him. In *AG v Durkin and Others*

- [2004] JRC 068, the Royal Court allowed the pleas to be changed, although they were held to be equivocal. Where there was an unequivocal plea, the court stated that:- "There is clear authority that the law of Jersey in this respect is similar to that in England, namely that, although there is a discretion to allow withdrawal of an unambiguous guilty plea and its substitution by a plea of not guilty, this is a discretion to be exercised very sparingly, particularly where the plea is entered with the benefit of legal advice (see *AG v O'Brien* (12th May 1985) Jersey Unreported) approving a number of English cases including *R v Drew*
- (1985) 2 All ER 1061. For a recent decision confirming there is such a discretion and it is a matter for the trial judge which will not be interfered with by the Court of Appeal unless the judge has misdirected himself or the decision is wholly unreasonable, see *R v Sheikh*
- (2004) EWCA Crim 492." 14. I now turn to whether, on the facts which are very largely admitted, any reasonable defence might have been open to the appellant; and in that context I consider first the possibility that the appellant could have been charged with fraud, and secondly whether any defence of abuse of process was reasonably open to him. Foster Fraud 15. Advocate Landick told me that the appellant considered himself a presumptive refugee, and indeed noted that three days earlier he had been given a five year permit to stay in the United Kingdom. In the circumstances the appellant did not consider that he had done anything criminally wrong, and he was apparently upset by Advocate Landick's categorisation of his conduct as fraud. Nonetheless Advocate Landick contended that the conduct in question could have been so charged, and that therefore the purposive construction of Section 31(3) was that it covered the current position. 16. It was submitted that I should consider what the position would be where a man with false documents was driving a vehicle with a second man with no documents in the boot of the vehicle. It was submitted that there was no logical reason why the one should have protection under Section 31 and the man in the boot should have none. I consider that to be ingenious, but ultimately I am not persuaded. It may well be that in those circumstances, the Attorney General might have exercised his discretion not to prosecute the man in the boot upon the

basis that no distinction between the driver and the boot man could be validly drawn; or if he had been prosecuted, the court might have looked at all the circumstances and imposed a nominal penalty only on the man in the boot. That is not the same thing however as a conclusion that it would be possible to have charged the man in the boot with fraud. What distinguishes the present case from *Asfaw* is that in that case there were clearly representations which were made - the appellant presented the false passport to enter the country and presented a further false passport to leave the country. In each case she was representing her entitlement to travel lawfully. By contrast, it is impossible to see what representation was made in the present case. The facts were that the car arrived and proceeded through passport control. No representation was made there. There was no suggestion that the driver had been asked to confirm that she was the only passenger, or that any express or implied representation was made. At the customs shed area, the driver was asked to pull over and asked to open the boot of the car where the appellant was found. An official opened the boot, but the appellant has no knowledge as to who unlocked it. On these facts, it simply does not appear to me to be possible to say that there was any representation at all, yet alone a false representation. In those circumstances, the offence of fraud could not have been properly charged. 17. I do not have to decide it, because of my conclusion in relation to the lack of a representation, but I have serious doubt as to whether it could really be asserted that there was any detriment

- actual prejudice to someone - linked to the representation. Arguably, it perhaps might have been said that there was prejudice to the community as a whole. I am very doubtful about any link to such representation, but as I say I do not have to decide it. Abuse of Process 18. I start by noting that Section 31(10) of the 1993 Order provides that:- "The States may by regulations amend sub-section (3) by adding offences to those for the time being listed there." 19. Advocate Landick rightly accepted that this provision was against him - if the States could add offences to the ambit of Section 31(3), and have not done so, why should the Court? 20. I can well see that there may be circumstances where it could be said to be an abuse of process to charge under Section 24, given the Convention. What I do not see however is that it is necessarily always the case that it would be an abuse of process, and to reach that conclusion is, for me, a step too far for the Court to take. If it is right that it is not always an abuse, as I believe is the position, then on this appeal the fact that that was not an argument put to the Assistant Magistrate is significant. 21. My judgement is that the terms of Section 31 are straightforward and admit of no difficulty in construction. I remind myself that in *Benest v Le Maistre*

[1998] JLR 213, the Court of Appeal was considering the effect of the European Convention on Human Rights (before it became part of the domestic law of the Island under the Human Rights (Jersey) Law 2000) and the International Covenant on Civil and Political Rights in connection with the obtaining by a party of an *acte à peine de prison* against another party. At page 218, Southwell JA said this:- "Mr Begg's first submission was that in light of the European Convention on Human Rights, the International Covenant on Civil and Political Rights and other treaties to which, through the United Kingdom on behalf of

Jersey, Jersey has acceded, this Court ought to develop Jersey law by, in effect, abolishing the right to obtain an acte à peine de prison. None of the treaties has yet been incorporated into the domestic law of Jersey, although there are some proposals for the incorporation of the ECHR. Accordingly their relevance for the purposes of Jersey law cannot be put higher than it was put by the English Court of Appeal in *Derbyshire CC v Times Newspapers Limited* [1992] QB770: (a) to resolve ambiguities in legislation; (b) in considering the principles on which the court should exercise a discretion; and (c) when the common law is uncertain. As I pointed out to Mr Begg at the commencement of the hearing, these are principles which can readily be accepted as applicable in Jersey law....."

22. In my judgement, there is nothing ambiguous in the terms of Section 31(3) of the 1993 Order; even if the omission of a reference to Section 24 were to be thought an error, it is for the legislature to resolve by the use of the regulation making power in sub-section (10).

23. In the circumstances I do not consider that the Assistant Magistrate was wrong to disallow the application for a change of plea, and the appeal against conviction accordingly fails.

24. As to sentence, it was noted that the notice of appeal was filed on 29th June, 2016, out of time. Crown Advocate Maletroit did not oppose an extension of time given that leave to enter and remain for five years had been given on 5th July. Accordingly I gave leave to appeal sentence out of time and directed that the appellant need not be present for the hearing of the appeal against sentence, although of course he could be so present if he wished.

25. I cannot leave this matter without adding that I agree with the Court's comments on the sentencing appeal at paragraph 18. It is not at all clear that a defence under Section 31 would have been available on the facts of this case even if Section 31 applied to charges under Section 24. The appellant spent some time in France before coming to the Island - accordingly it is difficult to say that he came directly from Iran. Furthermore Section 31(2) provides that the statutory defence does not apply where the refugee has stopped in another country unless he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country - but France is a party to the Refugee Convention and it is unclear how the appellant could show that he could not reasonably have expected to be given protection in that country under the Convention as he would expect it to be given in the United Kingdom. Authorities *Immigration (Jersey) Order 1993. Merikhi-v-AG*

[2016] JRC 187 . *Foster v AG*

[1992] JLR 6 . *R v Asfaw* (United Nations High Commissioner for Refugees Intervening)

[2008] 1 AC 1061 . *Forgery and Counterfeiting Act 1981. Criminal Attempts Act 1981. Immigration and Asylum Act 1999. AG v Durkin and Others*

[2004] JRC 068 . *Benest v Le Maistre*

[1998] JLR 213 . *Human Rights (Jersey) Law 2000. Page Last Updated: 10 Nov 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII*

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Prepared on 28 October 2026 · Esheria