Neutral Citation Number: [2019] EWCA Crim 1953

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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES
HHJ C. KEMP
Indictment No T20137294

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/11/2019

Before:

LORD JUSTICE FULFORD VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
MR JUSTICE JAY
and
SIR HENRY GLOBE

- -

Between:

RICHARD OSAGIE IDAHOSA — **Appellant**

- and –

REGINA — **Respondent**

- -
- -

Raza Halim (instructed by **Kesar & Co Solicitors**) for the **Appellant**
Benjamin Douglas-Jones QC (instructed by **CPS, Appeals and Review Unit**) for the **Respondent**

Hearing date: 7th November 2019

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Approved Judgment

MR JUSTICE JAY:

Introduction

1. On 12th July 2013 at the Crown Court at Lewes before HHJ Kemp Mr Richard Idahosa ("the Appellant") pleaded guilty to possession of an identity document with improper intention, contrary to section 4(1) and (2) of the Identity Documents Act 2010 ("the 2010 Act"). On the same occasion he was sentenced to 15 months' imprisonment. He appeals against his conviction with the leave of the Full Court granted on 2nd May 2019.

2. Leave was granted, together with the necessary extension of time, because it is arguable that the Appellant was not advised that he had a potential defence under section 31 of the Immigration and Asylum Act 1999 ("the 1999 Act"): namely, that he was a refugee in transit in the UK seeking to claim asylum in Canada. Although the Appellant has long since served his sentence of imprisonment, his conviction is not spent for the purposes of the Rehabilitation of Offenders Act 1974, and in his witness statements he has explained the difficulties that he has faced in obtaining suitable employment in this country.

3. The Appellant entered the UK lawfully on a tourist visa on 17th April 2013 and attempted to leave on 11th June, some 54 days later, on someone else's passport. It is his case that he had no intention of claiming asylum in this jurisdiction but would have done so on arrival in Canada had he been permitted to board the plane.

4. The essential issues in this appeal are, first, whether the Appellant was properly advised by his Counsel on 12th July 2013 about the potential section 31 defence; and secondly, whether he can show on the balance of probabilities that it was explicable that he did not present himself to the immigration authorities because he was only here on a short-term stopover en route to Canada where he intended to claim asylum.

5. Given that the appeal raises disputed questions of fact which could not fairly be resolved on written evidence alone, we heard evidence from the Appellant and from Ms Fiona Rowling of Counsel. It was agreed at the Bar that we should hear from Ms Rowling first.

Relevant Legislative Provisions

6. Section 4 of the 2010 Act provides:

> "**Possession of false identity documents etc with improper intention**
>
> (1) It is an offence for a person ("P") with an improper intention to have in P's possession or under P's control—
>
> (a) an identity document that is false and that P knows or believes to be false,

> (b) an identity document that was improperly obtained and that P knows or believes to have been improperly obtained, or
>
> (c) an identity document that relates to someone else.
>
> (2) Each of the following is an improper intention—
>
> (a) the intention of using the document for establishing personal information about P;
>
> (b) the intention of allowing or inducing another to use it for establishing, ascertaining or verifying personal information about P or anyone else.
>
> (3) In subsection (2)(b) the reference to P or anyone else does not include, in the case of a document within subsection (1)(c), the individual to whom it relates.
>
> (4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine (or both)."

7. Section 31 of the 1999 Act, as amended, provides in material part:

> "**Defences based on Article 31(1) of the Refugee Convention.**
>
> (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom 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 United Kingdom 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 United Kingdom.
>
> (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (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) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under—
>
> …

(aa) section 4 or 6 of the Identity Documents Act 2010;"

Chronology of Events

8. We now set out a chronological narrative of key events in this case drawn from the documents that have been made available.

9. The Appellant was born in Benin City, Nigeria on 2nd July 1965. He grew up there and obtained a BSc in Political Science. He married in 2000 and has three children born between 2001 and 2007.

10. In October 2012 the Appellant's Nigerian passport was stamped with a multiple-entry tourist visa for the UK, valid for two years.

11. On 17th April 2013 the Appellant lawfully entered the UK at Heathrow Airport using his Nigerian passport. His plane had stopped for two hours in Istanbul where he remained airside.

12. On 11th June 2013 the Appellant was arrested at Gatwick Airport after attempting to board a flight to Ottawa. He was found in possession of a ticket and a British passport in the name of Sunday Egbefe Afigod. We should explain that British citizens do not require visas for tourist visits to Canada (hence the absence of such a visa in the British passport the Appellant was using on 11th June 2013) whereas Nigerian nationals do and must apply from there (hence his inability to use his own passport).

13. The Appellant was interviewed at Crawley Police Station where he was represented by the duty solicitor, Mr Timothy Spooner. He received no advice from him as to the merits of his case because, as Mr Spooner's detailed and helpful attendance note makes clear, "client declines to give any instructions or to discuss case or any possible defence". The Appellant confirmed a Dagenham address and told Mr Spooner that it was his firm wish not to answer questions at interview through fear of self-incrimination. Subject to any possible section 31 defence, about which the Appellant probably had no idea at that stage, he was after all guilty.

14. On 12th June the Appellant appeared at Crawley Magistrates Court represented by Mr Geoff White acting as local agent for Neumans LLP. It is clear from Mr White's letter to his principals dated 13th June that no advice was given beyond that there was no point applying for bail. An application for a representation order was made, and the case was sent by the Magistrates to Lewes Crown Court.

15. On 25th June Mr Jega Krishnasamy of Neumans LLP sent Ms Rowling's clerk instructions by email. These included Mr White's letter dated 13th June and the advance disclosure.

16. On 2nd July Jega Krishnasamy sent four letters to the Appellant at Lewes prison. One of the letters stated that he was yet to take detailed instructions and "as soon as we are in receipt of [a] full set of papers from the Prosecution I'll attend to you for the purpose of taking detailed instructions". This never happened. However, Mr Krishnasamy did provide his preliminary view as to the strength of the Prosecution case as follows:

> "In consideration of the CPS's evidence to date and without assessing evidence that you may have in support of your case, I will have to assess the Prosecution case against you as extremely strong."

He then provided seven reasons in support of that assessment none of which touched on the potential application of section 31 of the 1999 Act. He reiterated, however, that after detailed instructions had been taken he could then advise further as to the strength of his case and "the ability of your defence to stand up to questioning from the Prosecution".

17. There is no evidence we have seen showing that Jega Krishnasamy's letters to the Appellant were sent to Ms Rowling, and she was not asked about that when she gave evidence.

18. The preliminary hearing had been fixed for 12th July 2013. On that occasion the Appellant was represented by Ms Rowling who, in line with usual practice in this sort of case, was not attended by her solicitors. What was discussed between barrister and client is disputed by each of them, but following his arraignment the Appellant pleaded guilty. The transcript records the following part of Ms Rowling's plea in mitigation:

> "He went through the right channels, it would appear, as a visitor and certainly there is nothing recorded against him in the past and made an application in respect of a visa but your Honour I am instructed it wasn't his intention to stay in this country but to go to Canada. I am raising this because my learned friend and I have discussed the implications of this because of some of the more recent authorities but it is right to say that his intention was to go to Canada. He has not sought asylum in this country nor did he for one moment think he would be entitled but there are concerns and I say this in the face of his acknowledgement of this, his sexual orientation and that is why he was going to Canada. I know not what the outcome of that might have been but he has acknowledged that he was wrong to use those documents and it was a false document."

19. Upon the conclusion of the proceedings, Ms Rowling reported the outcome to her solicitors. Her brief written note recorded that the Appellant pleaded guilty and was sentenced to 15 months' imprisonment "with automatic deportation". That was not wholly correct.

20. Mr Krishnasamy's letter to his client dated 24th July recorded as follows:

> "Prior to the hearing you had a conference with Counsel and you were advised on the strength of Prosecution evidence against you, credit for early plea, the likely sentence and on the law and court procedure. Thereafter, Counsel took your instructions for the purposes of mitigation."

Unless the bundle before us is incomplete in some way, it is not clear on what material these assertions were based.

21. On 2nd August the Appellant wrote to Mr Krishnasamy indicating his dissatisfaction with the length of sentence imposed. On the same day Ms Rowling provided a slightly longer note stating that she could not support an appeal against sentence.

22. On 20th August the Appellant provided a lengthier document to his solicitors setting out a "chain of events". In that document he stated that on 18th June he had claimed asylum when an immigration officer, Mike Stepek, visited the prison; and he was advised to see him again after his court hearing on the criminal matter. As for the events of 12th July:

> "… I appeared at Crown Court at Lewes, represented by Ms Fiona Rowlin [sic] a solicitor from your firm, during our conference I explained the circumstances of my using the false document was to go seek asylum in Canada, my asylum claim with the immigration officer at the prison, and how he has advised me to see him again after my court date; and that I didn't know using a false document to travel was a criminal offence, I thought it was an immigration offence.
>
> She advised me that since I have admitted to the use of the false identity documents unfortunately I do not have a defence and that any of the circumstances I have raised will not be considered a mitigating factor, so it will be wise for me to plead guilty …
>
> Now to the main issue, at no time did any of the solicitors advise me that an asylum seeker or a refugee could have a defence against the use of false identity document in order to facilitate his travel to the country where he intends to claim asylum."

23. On 25th September Ms Rowling emailed Mr Krishnasamy with her comments on the Appellant's communication. She said this:

> "I have read the attachments in the above matter. I am also aware of the recent authority on this point [this being the case of *R v Mateta* which had been sent to the Appellant by Mr Krishnasamy on 29th August]
>
> When I represented the defendant at the preliminary hearing it was on the basis that he was already aware of the defences available. Indeed we discussed those matters including how long he had been in the country before arrest and his indication that he was to make a claim in Canada having stayed in England without raising it with authorities here. I am aware that he was making that claim in view of his sexual preferences notwithstanding his family circumstances. The court was informed of those facts.

> I gave advice in the circumstances as they were presented at the time. I was instructed that he wished to plead guilty aware as he was that it would mean credit for plea."

24. By late 2013 the Appellant had instructed fresh solicitors, Kesar & Co Solicitors. On 6th December Ms Ellie Bonner of that firm telephoned Mr Krishnasamy for his initial account of what had happened. Ms Bonner was told that Counsel had been tasked to take "full instructions" from the Appellant on the day of the hearing. She was also told that the Appellant did not inform his previous solicitors that he was a refugee until after 12th July.

25. In January 2014 Ms Bonner pressed Ms Rowling for her account of what had happened, in particular whether she had applied her mind to section 31. Our papers do not include any evidence of a written reply, but there could well have been a phone call. On 3rd March 2017 Mr Shkar Kider of Kesar & Co Solicitors emailed Ms Rowling as follows:

> "… My colleague Ms Ellie Bonner had contacted [you] on a number of occasions previously requesting your attendance notes in relation to this case. I understand that you have informed Ms Bonner that you had never advised the client prior to his plea and you solely represented him to forward a plea in mitigation. We have notes from Neuman LLP confirming that they had not taken instructions from the client. This raises concerns about whether the client was competently represented …
>
> With that in mind could you kindly go through your records and provide me with a copy of the instructions you had received in this case and your written attendance notes …"

26. On 3rd March Ms Rowling replied as follows:

> "You have my documents from the case to refer to. If I can assist you in any way please do not hesitate to call me."

And then on 14th March:

> "Documentation was provided some years previously in this matter. Given the age of these proceedings I regret I am unable to assist further."

27. There was further and increasingly persistent inquiry made by Kesar & Co Solicitors of Ms Rowling seeking her explanation of what happened and why. On a number of occasions she replied to the effect that she had already supplied such documentation as she had. There was then a complaint to the complaints team at Ms Rowling's chambers. On 3rd July 2017 her Head of Chambers wrote to Kesar & Co Solicitors in these terms:

> "As I understand matters, Mr Idahosa's case was that he had been in this country for some months, and that his intention was

> to travel in due course to Canada. It is clear from the material that I have seen that he was made fully aware of the potential statutory defence, both before the hearing, and at it; and the difficulties that the factual circumstances of his case caused in successfully pursuing the issue.
>
> He was fully advised, and he chose to plead guilty, as was his right. Ms Rowling tells me that this came as no surprise to her, as the solicitors had indicated that this would be his likely stance …"

28. In the meantime, on 3rd June 2015 the Home Office granted the Appellant refugee status for a five-year period. On 31st March 2016 the CCRC stated that it could not support his case in the light of this Court's judgment in *YY and Nori* [2016] EWCA Crim 18.

The Appellant's Evidence

29. The Appellant has filed witness statements dated 31st October 2017 and 9th May 2019.

30. According to the Appellant's first statement, he did not meet his solicitor, "Jega", before the hearing on 12th July 2013. His account of his pre-court encounter with Ms Rowling is that she did not appear to have been given any prior information about his case. He had been expecting to meet Jega and at the time he believed that Ms Rowling was an employee of Neumans LLP. He explained the circumstances of his case to her, and that he had been trying to use the passport to travel to Canada to seek asylum. In answer to her question, he also said that he had met an immigration officer at the prison, had told him that he wanted to claim asylum, and that Mr Stepek advised him to wait until after his criminal case had been decided. Furthermore:

> "Based on this [i.e. the account of his circumstances] Counsel advised that I plead guilty. I asked if she could explain that [i.e. his intention to claim asylum in Canada] to the Judge as a mitigating circumstance so that I would get less time in prison. She told me that this is not what the court would consider a mitigating circumstance. She was mainly concerned about the plea. She asked me how I was going to plea[d] and advised me that the prison time would be reduced if I gave an early guilty plea. Considering I had been arrested with the passport, I agreed to plead guilty."

31. According to his second witness statement, he had to leave Nigeria as his homosexuality had been revealed (he had said in his asylum interview that his wife found him in bed with a man) and it was not safe for him to remain. His partner, Abu, already had a visa to travel to Canada. The Appellant states that he decided to travel to the UK first because he needed to leave in a hurry, he already had a UK visa, and an application for a Canadian visa from Nigeria could take up to four months. Abu introduced him to an agent, known to him as "Czar", who would make the arrangements on the back of a payment of the Naira equivalent of £1,000.

32. On arrival in the UK, the Appellant states that he contacted Czar who, after a four-day delay, put him up in a flat in Brixton whilst arrangements were made for his travel documents and an available date for the flight. Specifically:

> "Getting a "suitable flight" as he put it was one of the reasons for the delay, plus the travel document. Prior to arriving in the UK, the agent never told me there was going to be any delay. I had been under the impression that I would be travelling to Canada immediately. I had no control over this.
>
> …
>
> I did not [leave the flat] except to meet the agent on Saturdays when he would tell me what was happening. … I was so consumed with thoughts of joining Abu in Canada that the wait seemed like eternity. All I did was watch TV, sleep and eat. There were two other persons in the flat, they were always working so I did not see much of them. I did not even unpack my bag. I was hoping every day would be the day I got the call from the agent to tell me I was leaving."

33. In his oral evidence the Appellant was adamant that he received no advice from Ms Rowling on the section 31 defence and that had he done so he would have exercised that defence.

34. In cross-examination it was put to the Appellant that Mr Spooner's detailed attendance note dated 11th June 2013 made no reference to any intention to claim asylum in Canada (cf. the Appellant's witness statement). The same point was made in connection with Geoff White's letter dated 13th June. The Appellant was clear that he did raise the asylum issue on both these occasions and said that the note and letter are incorrect.

35. The Appellant did agree with the entry in the attendance note, "client confirms address given in Dagenham". He said that he has a relative in Dagenham who had lived there for twenty something years, and that he provided this relative's address. He had done the same when arrested.

36. The Appellant said that he told Ms Rowling that he is gay, that he had not intended to stay in the UK, and therefore had no intention of claiming asylum here even though it is a safe western country. He repeated that when he told Ms Rowling about his intention to claim asylum in Canada, she said that this was not a mitigating circumstance. The Appellant denied that Ms Rowling discussed with him the implications of his wish to claim asylum in Canada. He said that there was no discussion at all about how long he had been in the UK, and that he did not tell Ms Rowling that he was waiting in Brixton for travel documents.

37. The Appellant denied that he had heard of section 31 and the case of *Mateta* before Jega sent him a copy of the latter in August 2013.

38. In answer to the question, "if you had been advised that you technically had a defence but it would mean being remanded for a number of months and running the risk of a

longer sentence, what would you have done?" the Appellant said that he would still have run it. We should observe that there is no evidence that Ms Rowling in fact advised along these lines, but the question was relevant to the issue of causation, and we have considered the Appellant's answer in the context of what we conclude at §76 below.

39. Finally, the Appellant said that his conference with Ms Rowling lasted about 15 minutes.

Ms Rowling's Evidence

40. Ms Rowling was called to the Bar in 1980 and practises exclusively in criminal defence work. She told us that the location of her chambers in Lewes means that she is well acquainted with cases such as this and the scope of the section 31 defence.

41. Following the standard waiver of privilege by the Appellant, on 18th December 2017 Ms Rowling provided a brief account of what happened. She stated that on 12th July 2013 the case of *Mateta* "was before the Appeal Court", and the authority was reported on 30th July. It set out the parameters of the section 31 defence. The Appellant's instructions to her were that he had been in the country for some time (in July 2019, Ms Rowling said that this was "some months"), he had not previously raised the issue of asylum, and did not believe that he was entitled to it in the UK. Furthermore:

> "As indicated in that correspondence I attended a preliminary hearing unattended on instructions for a plea of guilty …
>
> I do not accept that advice was not given in relation to the defence in relation to the circumstances as then presented. Further my instructions were that the factual reasons for the use of the documents in the instant offence were not as suggested now. I have made clear throughout that I have no documents from those instructing me in this case and cannot assist as to their position other than my recollection of those instructions."

42. On 10th June 2019 Ms Rowling provided a slightly more detailed account. She says that she had very little by way of formal instructions: she was told that the Appellant had given no explanation concerning the allegations and that he had made a no comment interview. Her only instructions were to the effect that this was going to be a guilty plea.

43. Ms Rowling's recollection was that *Mateta* had been reported in The Times "approximately within 48 hours before the hearing". She says that she was aware of that authority and the potential parameters of the section 31 defence. Furthermore:

> "The Appellant was also aware of this new authority. Indeed, we discussed it when I met him, and the merits of it as providing a defence, as opposed to taking the option of pleading guilty. So, potentially there was a defence open to

> him, and this I did discuss with him. I am totally confident that the Appellant was fully aware at the hearing of the authority, and I discussed the implications of running the defence with him … Ultimately, the Appellant, having been fully advised, decided that he did not want to take the chance of running the potential defence, and gave instructions to me that he wished to plead guilty."

44. Ms Rowling was then provided with an agreed list of questions, and she answered these on 1st July 2019. The following matters emerge:

(1) She was aware that the Appellant had spoken with an immigration officer and had been served with a notice. She was not aware of the content of that conversation.

(2) She was not told of the Appellant's relationship with Abu and the reasons for his coming to the UK and "escaping" to Canada. Instead, the Appellant indicated to her that he was going to Canada through choice not necessity, and her belief was that his family would later join him there.

(3) She was told that the Appellant had been in Dagenham. The Appellant did not suggest that he was waiting for a passport to be arranged.

(4) The Appellant could not give any explanation for the fact that the "detail" he was now giving (on 12th July 2013) had not been communicated to anyone before.

(5) She did advise the Appellant as to the strengths and weaknesses of the section 31 defence. This was based on "the length of stay, the reasons for delay whether refugee status sought". As for the first of these matters, "it was not a short stopover that was explained in any way by him being in flight".

(6) She recalls that the prosecutor had a copy of *Mateta* in court. Ms Rowling's recollection that she had a discussion with the prosecutor about "the potential threat of negligence in any identity documents case given that authority".

(7) She denies speaking to Ms Ellie Bonner and had she done so she would never have said that she did not advise the Appellant before his plea and that she solely represented him to advance a plea in mitigation.

45. In her oral evidence Ms Rowling was clear that the decision in *Mateta* was available notwithstanding that the date judgment was delivered was 30th July 2013. Her recollection was that her opponent drew it to her attention or may even have been in the Court of Appeal during the course of the legal argument. She said that it "loomed large" but did not appear to alter the legal landscape. She said that the Appellant was also aware of the potential defence but could not say from where his information or knowledge came. Ms Rowling said that the Appellant did not explain why he had been in the country for some months and what he was doing during that period. Her discussion with the prosecutor, which is touched on in the transcript of her plea in mitigation, was "around" the length of time he had been here. There was a "disconnect", as she put it, between the Appellant's apparent wish to travel to Canada and the length of time he had been here, as well as what he had been doing here.

46. In cross-examination, Ms Rowling agreed that she had kept no notes of her conference with the Appellant and that the brief attendance note she provided to her solicitors on the day of the hearing made no reference to the content of any discussions she may have had. Although she may have been under the impression that the Appellant would be pleading guilty, she said that it is commonplace that circumstances could change because something might arise. She was adamant that she did advise on the section 31 defence, and that it was the Appellant instructing her that his intention had been to claim asylum in Canada which generated the possibility of that defence. Ms Rowling also said that although asylum was mentioned, what she was being told was "slightly confusing" because the Appellant's trip to Canada appeared to be for family reasons.

47. Finally, Ms Rowling estimated the conference with the Appellant to have lasted some 20-30 minutes. Her recollection was that she saw him in the cells before going into court.

Relevant Authorities

48. Section 31 of the 1999 Act was intended to give effect to Article 31 of the Convention Relating to the Status of Refugees, 1951 which provides:

> "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. 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 regularized 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."

49. *R v Uxbridge Magistrates Court, ex parte Adimi* [2001] QB 667 was decided in the Divisional Court (Simon Brown LJ and Newman J) on 29th July 1999 before the 1999 Act was debated in Parliament, and therefore turned on the direct application of Article 31 rather than any provision of domestic law. It was held that neither a short term stopover en route to an intended sanctuary, nor a failure to present a claim immediately on arrival, should preclude reliance on Article 31. As for the first category of case, Simon Brown LJ (as he then was) said this:

> "I use the term transit passenger here not in a technical sense to mean only passengers who throughout have remained airside of the United Kingdom immigration control (even then, if discovered with false documents, they will be brought landside

> for that reason) but rather to mean passengers who have been in the United Kingdom for a limited time only and are on the way to seek asylum elsewhere. …
>
> … If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum, and that a short term stopover en route in a country where the traveller's status is in no way regularised will not break the requisite directness of flight, then it must follow that these applicants would have been entitled to the benefit of Article 31 had they reached Canada and made their asylum claims there. If Article 31 would have availed them in Canada, then logically its protection cannot be denied to them merely because they have been apprehended en route." [at 687C-G]

50. A literal reading of section 31 of the 1999 Act would not cover those seeking to leave the UK. Given that the section was passed following *Adimi* and with a view to bringing our domestic law in line with international treaty obligations, it has been given a purposive construction, one broad enough to bring within its scope individuals leaving the UK in the continuing course of a flight from persecution, even where there was a short stopover in transit in this country: see *R v Asfaw* [2008] 1 AC 1061 at §26 (Lord Bingham) and §65 (Lord Hope). In that case the stopover lasted for only three hours and Ms Asfaw did not leave the airport.

51. In *R v Kamalanathan* [2010] EWCA Crim 1335, Thomas LJ (as he then was) giving the judgment of the court stated at §§4-7 that the length of any permissible stopover was a question of fact (see also *R v Sadighpour* [2013] 1 WLR 2725 at §49) and could be very much longer than three hours. The defence failed on the facts of that case because the evidence was to the effect that the appellant intended to claim asylum here.

52. In *R v Mohamed (Abdulla)* [2011] 1 Cr. App. R. 35 Leveson LJ (as he then was) giving the judgment of the court observed:

> "It is thus critical that those advising defendants charged with such an offence make clear the parameters of the defence (including the limitations and potential difficulties) so that the defendant can make an informed choice whether or not to seek to advance it." [at §10]

53. Further, at §§11-13 Leveson LJ addressed the circumstances in which guilty pleas could be treated as nullities for the purposes of appeals against conviction. He made clear, following the approach in *R v Boal* [1992] 95 Cr. App. R. 272, that this Court should intervene only most exceptionally: where the facts are so strong as to demonstrate that there has been "no true acknowledgement of guilt with the advice going to the heart of the plea", and where the Court assesses that the defence would quite probably have succeeded such that a clear injustice has been done.

54. Finally, §9 of Leveson LJ's judgment warrants express mention:

> "Although the full scope of s. 31 of the 1999 Act was not determined by *Afsaw*, Lord Bingham did make clear that in order to satisfy the requirement of s. 31(1)(c) the claim for asylum must be made as soon as was reasonably possible (which did not necessarily mean at the earliest possible moment: see para. 16). Second, the fact that a refugee had stopped in a third country in transit was not necessarily fatal: he affirmed the observations of Simon Brown LJ in *Adimi* (at page 678) that refugees had some choice as to where they might properly claim asylum and that the main touchstones by which exclusion from protection should be judged were the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape: see also *R. v MMH* [2008] EWCA Crim 3117 at paras 14-15."

Section 31(1)(c) addresses the situation where the asylum applicant comes to this country with the intention of claiming asylum here. In such circumstances, the claim must be made timeously. However, this part of the sub-section is not dealing with the state of affairs which obtains in the present case: where the Appellant had no intention of claiming asylum here and was treating the UK as a staging-post for his true destination. Moreover, Leveson LJ's second observation is directed to the scope of section 31(2): where the individual who intends to apply for asylum here passes through a third country in transit to the UK. Again, it is not directly applicable to the facts of the instant case. As *Asfaw* makes clear, a literal construction of section 31 would create difficulties for asylum seekers in like case to this Appellant, and it is only a generous, purposive construction of that provision which enables it to embrace situations where the UK is being treated in effect as a transit country.

55. In *R v Mateta* [2014] 1 WLR 1516 an extempore judgment was delivered by Leveson LJ on 30th July 2013. We do not consider that this case lays down any new law, although it provides a valuable and succinct encapsulation of the relevant principles. At §16 Leveson LJ confirmed that section 31 may apply to situations where a person is arrested following an attempt to leave the UK following a short stopover here. Later, Leveson LJ reiterated that the section was not limited to situations where a person was intent on claiming asylum here but might apply, depending on the facts, if he can demonstrate on the balance of probabilities that:

> "… it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum." [at §21]

56. We would add that the remaining main elements of the statutory defence as itemised by Leveson LJ at §21 are satisfied by the Appellant: in particular, his asylum claim has been accepted by the Home Office.

57. Finally, at §24 Leveson LJ summarised the main elements of a defendant's entitlement to advice:

> "i) There is an obligation on those representing defendants charged with an offence of possession of an identity document with improper intention to advise them of the existence of a possible section 31 defence if the circumstances and instructions generate the possibility of mounting this defence, and they should explain its parameters (*R v MA* [10])."
>
> ii) The advisers should properly note the instructions received and the advice given (*R v MA* [56]).
>
> iii) If an accused's representatives failed to advise him about the availability of this defence, on an appeal to the Court of Appeal Criminal Division the court will assess whether the defence would "quite probably" have succeeded (*R v MA* [13]).
>
> iv) It is appropriate for the Court of Appeal to assess the prospects of an asylum defence succeeding by reference to the findings of the First Tier Tribunal (Immigration and Asylum Chamber), if available (*Sadighpour*) [35])."

58. On the topic of erroneous advice in particular, our attention has been drawn to other authorities including *R v Z* [2013] EWCA Crim 1181 and *R v PK* [2017] EWCA Crim 486. It suffices that we record that *R v Z* was a case where the section 31 defence was not ignored by Counsel but this Court on the exceptional facts before it nonetheless quashed the conviction on the footing that the guilty plea was a nullity. As the Vice President of the Court of Appeal Criminal Division, Hallett LJ, observed:

> "… [E]xceptional cases can include cases of erroneous legal advice. It is conceded that the appellant faces a high hurdle in inviting this court to quash a conviction following a guilty plea. The principle in *R v Boal* [1992] 95 Cr. App. R 272 still applies. Only in the most exceptional cases will the court be prepared to intervene.
>
> The President of the Queen's Bench Division recently revisited the test for holding a plea of guilty as a nullity in *Boateng* [2016] EWCA Crim 57. He endorsed the *Boal* principle and emphasised that the court would only intervene where the defence would quite probably have succeeded and where the court is satisfied a clear injustice has been done." [at §31]

59. In *R v PK*, Sir Brian Leveson PQBD endorsed the checklist which had previously been set out by this Court in *R v Dasjerti* [2011] EWCA Crim 365. Tailoring it to the circumstances of this particular case, it seems to us that it may be adapted as follows:

(1) should the Appellant have been advised about the possibility of availing himself of the section 31 defence?

(2) was he so advised?

(3) in the alternative to (2), if *some* advice was given, are the facts so strong as to show that the plea of guilty was not a true acknowledgement of guilt?

(4) in the event that the Court should conclude either that Counsel gave no advice at all or, alternatively, that her advice was erroneous and went to the heart of the guilty plea, would the Appellant have had good prospects of being able to advance the section 31 defence successfully: on the facts of this case, of establishing on the balance of probabilities that it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to Canada where he intended to claim asylum?

60. Sub-paragraph (4) above is a case-specific adaptation of item (4) in the *Dasjerti* checklist. We should add that this sub-paragraph is designed to address the possibility that the Appellant was given erroneous advice as to the potential application of section 31 to his case. What we are calling the first issue captures sub-paragraphs (1)-(3) above; the second issue engages sub-paragraph (4).

The First Issue

61. The first issue is whether the Appellant was properly advised by his Counsel on 12th July 2013 about any potential section 31 defence.

62. Mr Raza Halim submitted that Ms Rowling's account is not consistent with the limited information she was able to provide in 2013 and later in 2017, and does not chime happily with the mitigation advanced. There is a complete absence of contemporaneous documentation. She is wrong about *Mateta* because it was not heard until 30th July 2013, with judgment being given on the same day. Mr Halim invited us to conclude that Ms Rowling gave no advice as to any potential defence under section 31 and submitted that his client's plea is a nullity.

63. Mr Douglas-Jones submitted that we should accept Ms Rowling's evidence over the Appellant's. He pointed out that it may reasonably be inferred from her plea in mitigation that the section 31 issue was at the very least touched on, contrary to the Appellant's adamant denial that this was so.

64. Mr Douglas-Jones further submitted that there is an interrelation between the first and second issues, notwithstanding the sequencing recommended by *Dasjerti*, because the ultimate question here is whether a clear injustice has arisen in the light of the Appellant's guilty plea. Whatever the quality of Counsel's advice, if on these facts the Appellant's defence did not have good prospects of success, the inquiry should end there.

65. In our view, although Mr Douglas-Jones' submission as to the interconnection between the first and second issues has force, it remains appropriate to retain their separation for present purposes, in conformity with the *Dasjerti* checklist.

66. It is obvious that both the Appellant and Ms Rowling have been hampered by the absence of contemporaneous documentation. The Appellant's first witness statement on this topic said nothing more than that he explained that he had been trying to use

the passport to travel to Canada. He was under no duty whatsoever to make a written record and no doubt lacked the wherewithal to do so; it was incumbent on Ms Rowling, on the other hand, to do precisely that: see §24 of *Mateta*. Her attendance note was completely devoid of information beyond the fact of the Appellant's guilty plea and his sentence. Ms Rowling's first substantive account given on 25th September 2013 asserted that the Appellant was "already aware of the defences available" but there was nothing in her papers which so indicated. She did, however, say that in that first account she was made aware of both the intended asylum claim and the length of time he had been there.

67. It is simply not possible to resolve all the evidential conflicts and arrive at a version of what happened on 12th July 2013 which entirely fits together. For example, the Appellant states that he told Ms Rowling that he had claimed asylum when Mr Stepek visited Lewes prison in June. Ms Rowling now agrees that she was aware that the Appellant had spoken to an immigration officer and "had been served with a notice". It does seem wholly plausible that the Appellant told Ms Rowling that he had made an asylum claim, but that does not correspond in any way with the terms of her plea in mitigation. We do not think that Ms Rowling could have misrepresented her client's instructions. This conflict of evidence is better left unresolved.

68. The reality is that when she arrived in the cells in Lewes Crown Court shortly after 9:30am on 12th July 2013 Ms Rowling had received no prior instructions from the Appellant (he had given none), and – for reasons which we will make clear - this was a somewhat unusual case. We entirely accept Ms Rowling's evidence that she had considerable experience in cases of this sort and must have been aware of the potential applicability of the section to people in short-term transit seeking to leave the UK. She has not been helped by her recollection that *Mateta* was available on 12th July, but she is right in observing that it merely restated the law. There was a discussion between her and the prosecutor about "recent authorities" and their precise identity does not really matter. This was an unusual case because the Appellant was lawfully in the UK (that much Ms Rowling clearly did elicit) and did not want to claim asylum here despite having the full opportunity and ready wherewithal to do so.

69. Before we address the ramifications of this, we should say that there are some unsatisfactory features about the Appellant's evidence. He is adamant that the possibility of a defence, as opposed to a plea in mitigation, was never raised. His credibility has been damaged by his assertion that he informed both Mr Spooner and Mr White about his intention to claim asylum in Canada: there is strong evidence as to the former that he did not, and we make a similar finding in relation to the latter. On the other hand, his evidence that he asked Ms Rowling whether the fact that he was travelling to Canada to claim asylum was a "mitigating circumstance" and was informed that it was not seems compelling. It is difficult to accept that even an intelligent and resourceful man could have made that up, although we appreciate that it is not inconsistent with the section 31 defence having been mentioned before issues of potential mitigation arose. It does lend support to the proposition that Ms Rowling's primary focus was on the issue of plea and mitigation. Moreover, we cannot accept that the Appellant was "already aware of the defences available" before the conference even began. Not merely were no instructions taken from him, there is no evidence that he was so aware; and we have noted that he sought a copy of *Mateta* from his solicitors subsequently.

70. Our overall impression of Ms Rowling is that she was a truthful and conscientious witness who has sought before us to provide her best recollection of what happened. However, her failure to make a proper record has at the very least created the possibility of entirely non-deliberate ex post facto reconstruction and rationalisation. Her account has evolved somewhat since September 2013, in 2017 she said that she could not assist beyond what the documents recorded, and these events must have played and replayed in her mind on numerous occasions before she came to Court to give evidence.

71. On balance, we conclude to the appropriate evidential standard that there was *some* exchange between Ms Rowling and her client which led her at least to apply her mind to the section 31 defence. The reference in the transcript to a discussion between counsel as to the implications of the Appellant's intention to claim asylum in Canada "because of some of the more recent authorities" is consistent only with a discussion between them about the potential applicability of section 31. This discussion must have taken place after the conference in the cells, but we find that it is likely that the springboard for it was some prior exchange between Ms Rowling and her client. Overall we find that Ms Rowling was told not merely about the Appellant's aspirations vis-à-vis Canada (from which she appears to have drawn the inference that he was not entitled to claim asylum here), but that he had been in the UK for a significant period of time on a lawful basis ("he went through the right channels").

72. However, the fact that Ms Rowling applied her mind, probably quite briefly, to the possible application of section 31 does not mean that she told the Appellant that he might have a defence. At its very lowest, her mindset was that the Appellant would probably be pleading guilty, and we consider that Ms Rowling has vacillated somewhat between saying that she was expecting a guilty plea and believing that it would be a guilty plea. She needed to understand the background circumstances in order to advance a plea in mitigation, and the transcript shows that she was aware of the bare bones.

73. We accept Ms Rowling's evidence that even in cases where a guilty plea had been intimated it is "commonplace" that circumstances change, but the default position here was that this case would not be proceeding to the next stage. In our judgment, in line with the Appellant's evidence, Ms Rowling did not tell the Appellant that he might have a defence because she did not believe that any such defence could possibly succeed. From her perspective the problems seemed numerous: the Appellant's failure to apply for asylum here and her understanding that he believed he was not entitled to it; the Appellant's family circumstances; the Appellant's apparently inexplicable wish to go to Canada where he would be seeking asylum; her understanding that he was in fact going to Canada out of choice and not through necessity. We do not think that the parameters of section 31 were made clear to the Appellant, and in our view he was not given the opportunity to make an informed choice.

74. In any case, the Appellant's scanty instructions should have generated further inquiry from Ms Rowling. Tellingly, she said in evidence that these instructions left her "slightly confused". The source of that confusion was not apparently that this gay man had a family in Canada but, as we have already said, may well have arisen because she could not square the Appellant's failure to claim asylum in this jurisdiction together with her inferential conclusion that he believed he was not entitled to it with

his intention to claim asylum in Canada. We have mentioned other matters which further sowed the seeds of this confusion. We would add that we are sure that the Appellant did not tell Ms Rowling in terms that his family would be joining him in Canada, and it also goes without saying that a genuine asylum seeker – and the Appellant's claim has been accepted by the Home Office – travels out of necessity not choice. The only element of election pertains to the matter of forum. Simon Brown LJ stated in *Adimi* that refugees are ordinarily entitled to choose where to claim asylum (at 687F). That proposition is addressed in other authorities, and the Home Office would no doubt propose a more nuanced position, but for present purposes we leave the matter there.

75. In our judgment, Ms Rowling concluded from what she had been told, that the section 31 defence was a non-starter, and she ran the point past the prosecutor for her peace of mind. We accept her evidence that she came to this conclusion without (inappropriately) disbelieving her own client, but the "disconnect" she has identified was not properly explored, probably because in her estimation the Appellant had told her nothing which displaced the presumptive state of affairs, that he would probably be pleading guilty. The solution to the apparent disconnect would have been to probe the Appellant by asking a question or two. The Appellant would then have explained that he had been waiting for his papers. This would have resolved the apparent conundrum, sufficiently at least for the purposes of giving proper advice on the potential application of section 31.

76. Had Ms Rowling gone further, it remains possible that the Appellant would not have given the account he has now provided. An indication that he might not lies in Ms Rowling's understanding that the Appellant had been in Dagenham rather than Brixton. It is not clear from the Appellant's cross-examination whether he accepted that he gave that address to Ms Rowling rather than to others, and she may have seen it referred to in the advance disclosure. The better view is that the Appellant did give Ms Rowling the Dagenham address. However, we cannot extrapolate from this that the Appellant would probably have withheld from Ms Rowling his evidence that he was waiting in this country day-by-day for the requisite papers to arrive. Had he understood that Ms Rowling's exploration was directed to the possibility of a defence, there would have been no reason for him not revealing that, particularly when it was probably the truth.

77. As was explained by this Court in *R v Z*, guilty pleas following erroneous advice can be regarded as nullities only where the facts are so strong as to show that the plea of guilty was not a true acknowledgement of guilt; the advice must go to the heart of the plea. For the reasons we have given, we have reached the conclusion that the present case fulfils this stringent criterion. Nonetheless, that without more is insufficient for the Appellant's purposes. The Court will only intervene where the defence would probably have succeeded and upon being satisfied that a clear injustice has been done.

78. This leads us to the second issue.

The Second Issue

79. The second issue is whether the Appellant can prove on the balance of probabilities that it is explicable that he did not present himself to the immigration authorities during the course of a short stopover in this country.

80. Mr Halim submitted that we should accept his client's evidence and find that he had no idea how long he would have to stay in Brixton but believed that he would be receiving the go-ahead from the agent at any time. He urged us to apply a benevolent, purposive construction to section 31 in the light of the authorities.

81. Mr Douglas-Jones accepted that the circumstances of the Appellant's arrest show that he was travelling to Canada when the *actus reus* of the offence was committed and that he could have established that he was going there to claim asylum. However, the point here is that the Appellant stopped for almost two months in a safe, English-speaking country where he could have claimed asylum without difficulty. Accordingly, this could not be envisaged as a short-term stopover by a person transiting the UK.

82. In our view there is a consistent line of authority supporting three clear propositions:

(1) "in transit" does not bear a technical meaning.

(2) For section 31 to apply, the stopover must be short-term and/or for a limited period.

(3) The Court's inquiry will always be case-sensitive, and the distinction between a stopover and even a temporary stay, legal or otherwise, must be a question of fact and degree.

83. We are not aware of any case where the defence has successfully operated in connection with a putative stopover as long as 54 days. We are also unaware of any case where a defendant has been lawfully in the UK during the period of his stopover, regardless of its length, although we agree with Mr Halim that this in itself can make no difference to the applicability of section 31 read in conjunction with Article 31. For obvious reasons, we wrestle with the proposition that a person could be here for so long, and on the face of things may not be acting promptly, yet might still avail himself of the provision.

84. The requirement that an asylum-seeker apprehended when leaving the UK must have been here only on a short-term stopover in order to avail himself of the defence is not expressly derived from section 31 or indeed Article 31 of the Convention, but the same point could be made regarding the application of these provisions to departing asylum claimants in the first place. The latter application flows from the purposive construction favoured by the majority in *Asfaw*, and where exactly that construction leads in a case such as this is debatable. Is there a further requirement to act with reasonable promptness, in line with the general tenor of Article 31? In our view, it is unnecessary definitively to answer this question because we are minded to proceed on the following basis, being one which is unfavourable to the Appellant on the law.

85. An individual fleeing persecution is not obliged to claim asylum in the UK on arrival. However, as and when it becomes apparent to him or her that s/he will not be able to leave in the near future, there is a strong argument that at that point the defence is no

longer available. The right option then would be to apply for asylum here, or to present oneself to the authorities and seek in effect Article 31.2 protection. This approach to the section is consistent with the overall philosophy of Article 31 that asylum seekers should act with reasonable expedition.

86. Did it become apparent to the Appellant that he would not be leaving the UK in the near future? This brings into question his overall credibility. His account is that he was waiting in Brixton with his bag packed awaiting the go-ahead from the agent which he believed could be forthcoming at any time. *If* this account were true, we would hold on these certainly atypical facts that the Appellant should be treated as having been on a short-term stopover.

87. We have already commented that the Appellant's credibility should be called into question as regards what happened on 11th and 12th June, but credibility is not a monolithic entity. There are two factors which point strongly in the Appellant's favour. First, the account he gave to the immigration officer at his asylum interview was detailed, compelling and accepted by the Home Office as being substantially true. Secondly, it does seem clear that the Appellant genuinely wanted to claim asylum in Canada in order to be with his partner, he had no wish or reason to remain here, and it is credible that he was strung along by his agent who was no doubt unwilling or unable to provide a likely timeframe for departure beyond giving emollient assurances. We do not think that Mr Douglas-Jones' cross-examination dented the Appellant's account in connection with these crucial questions.

88. It follows that we are driven to conclude that the Appellant did have good prospects of establishing that it is explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum.

Disposal

89. This appeal is allowed, and the Appellant's conviction must be quashed.