

# SECTION 31 OF IMMIGRATION AND ASYLUM ACT 1999 & ARTICLE 31 OF THE 1951 UN CONVENTION

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## Table of Contents

### 1 Introduction

1.1 Application of this instruction in respect of children and those with children

### 2 Section 31 of the Immigration and Asylum Act 1999

### 3 The *Hussain* judgment

### 4 The *Pepushi* judgment

### 5 Operation of section 31 of the 1999 Act

### 6 Offences to which Section 31 applies

### 7 Who is a refugee?

### 8 Good cause for illegal entry

### 9 “Without delay” and “as soon as reasonably practicable”

### 10 “...Stopped in another country outside the United Kingdom...”

### 11 Section 31 of the Immigration and Asylum Act 1999

# 1 Introduction

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The 1951 United Nations Convention relating to the Status of Refugees (“the Convention”) recognises that people trying to escape persecution may not be in a position to comply with the requirements for legal entry into the country of refuge, such as possession of a national passport and/or a visa. Such people often rely upon the use of false documents and unusual means of travel.

Article 31 of the Convention provides that refugees should not have any penalties imposed upon them as a consequence of entering or being present in the country of refuge illegally in order to seek sanctuary, provided that:

they travel to the country of refuge directly from the territory where they fear persecution; present themselves to the domestic authorities without delay; and show good cause for their illegal entry or presence.

Article 31(1) does not give a definition of penalties, but the drafters of the Convention appear to have had in mind measures such as fine and imprisonment. Article 31(2) does allow for administrative detention. It does not exclude detention where it is necessary to investigate the circumstances of entry or to obtain further information. This is distinct from detention as a penalty for illegal entry, which is prohibited where entry was justified.

The text of Article 31 is as follows:

*31(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 authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

*31(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 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.”*

Section 31 of the Immigration and Asylum Act 1999 (“the Act”) is Parliament’s interpretation of what Article 31 of the Convention requires. The section sets out the circumstances in which a refugee has a defence (based on Article 31 of the Convention) to a charge for certain specified offences.

## 1.1 Application of this instruction in respect of children and those with children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

## 2 Section 31 of the Immigration and Asylum Act 1999

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Section 31 of the Act introduced a new statutory defence for those charged with certain offences, including various offences under the Forgery and Counterfeiting Act 1981 and the offence of obtaining or seeking to obtain leave by deception (section 24A of the Immigration Act 1971). Section 31 represents Parliament's interpretation of what is required by Article 31 of the Refugee Convention, and as such it supersedes the wider interpretation of Article 31 given by the High Court in the case of *R v Uxbridge Magistrates Court and another, ex parte Adimi* [2000] QB 667.

To qualify for protection under section 31 of the Act a person must fulfil the following criteria:

he or she must have come to the UK directly from a country where his or her life or freedom was threatened (within the meaning of the 1951 UN Convention);

be a refugee within the meaning of the 1951 UN Convention (see paragraph 6 for more information on this);

show good cause for his or her illegal entry or presence (see paragraph 7);

have presented himself or herself to the authorities in the UK without delay ("without delay" is not defined in the Act but see paragraph 8);

make a claim for asylum as soon is reasonably practicable after arrival in the UK (see paragraph 8);

show that, if he or she stopped in another country outside the UK having left the country where his or her life or freedom was threatened, he or she could not reasonably have expected to be given protection under the 1951 Convention in that country (see paragraph 9);

claim asylum **after** committing the offence from which he or she seeks protection from conviction. (Once someone has claimed asylum then there can be no continuing justification that the act was necessary in order to lodge a claim for asylum.)

### 3 The *Hussain* judgment

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In *R (on the application of Hussain) v Secretary of State for the Home Department and others* [2001] EWHC Admin 555 the Divisional Court held that the courts and the Crown Prosecution Service (“the CPS”) are necessarily obliged to have regard to the terms of section 31 of the Act as laying down authoritatively the nature of the UK’s obligations under Article 31 of the Convention. The primary focus for the CPS following the enactment of section 31 has to be upon the law to be found in section 31 and not the law in relation to Article 31 to be found in the *Adimi* judgment.

## 4 The *Pepushi* judgment

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Reinforcing the decision in *Hussain*, the Divisional Court further ruled in *R (on the application of Gjovalin Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin) that there was “no room for legitimate expectation that the claimant is entitled to the wider provisions of Article 31 now that Parliament has enacted s.31.” The Court held that section 31 contained the law which must be applied in domestic proceedings even though the scope of the statutory defence is narrower than its protection afforded by Article 31 of the Convention. Section 31 of the 1999 Act is reproduced at **the end of this AI**.

## 5 Operation of section 31 of the 1999 Act

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The decision in *Pepushi* makes it clear that in the UK section 31 of the Act contains the protection to be afforded to refugees. Section 31 is Parliament's interpretation of what Article 31 of the Convention requires. A person who falls outside the scope of the section 31 defence is liable to prosecution.

Neither does Article 31 have any bearing on offences not specifically mentioned in section 31(3) and (4) of the Act. The correct approach is that the protection afforded to refugees is found solely in section 31 of the Act and that there is no scope, in any case, for superimposing on the statutory protection the protection contained in Article 31 of the Convention.

Only refugees will be able to rely on the statutory defence in relation to the use of false documents or deception, so those who are refused asylum but granted limited leave to enter or remain on grounds of Humanitarian Protection or Discretionary Leave cannot rely on this section, unless they can show that, notwithstanding the refusal of asylum, they are in fact a refugee (see section 31(7) of the Act).

Section 31 does not assist people who, whilst refused asylum, initially claimed in good faith unless they can show that, notwithstanding the refusal of asylum, they are in fact a refugee (see section 31(7) of the Act). *See also 7(b) below.*

The defence does not apply to refugees who stopped *en route* to the UK in a safe third country. A refugee must present himself or herself to the UK authorities without delay and claim asylum as soon as reasonably practicable after arrival. It is initially a matter for the caseworker's individual judgement, based upon all the facts, whether it would have been reasonable for someone to have claimed asylum in a country in which they stopped *en route*, and also if any delay in applying for asylum in the UK is reasonable. Ultimately only the courts can decide whether the refugee's actions were reasonable.

The section 31 defence does not apply where the offence occurs after the date of the asylum claim. (Once someone has claimed asylum then there can be no continuing justification that the act was necessary in order to lodge a claim for asylum.)

The role of the Home Office is restricted to advising the CPS on whether a potential defendant is entitled to protection under section 31. It is always for the CPS to take the final decision as to whether there is sufficient evidence and whether it is in the public interest to proceed with a prosecution. If it appears likely that a claimant would be granted asylum, then prosecution would probably not be considered to be in the public interest; however, this is a decision for the CPS.

The defence only applies in relation to a limited number of offences.

## 6 Offences to which Section 31 applies

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Section 31(3) sets out the offences (and any attempt to commit an offence is also covered) to which the section applies:

forgery and connected offences (Part I of the Forgery and Counterfeiting Act 1981);  
deception (section 24A of the Immigration Act 1971);  
falsification of documents (section 26(1)(d) of the Immigration Act 1971).

In Scotland, the offences (and attempted offences) are (by virtue of section 31(4)):

fraud;  
uttering a forged document;  
deception (section 24A of the Immigration Act 1971);  
falsification of documents (section 26(1)(d) of the Immigration Act 1971).

The offence must have been committed or attempted in order to enter the UK to claim asylum. The defence does not apply to any offences committed **after** the subject has applied for asylum in the UK. For example, someone who enters clandestinely, claims asylum and then obtains a forged UK passport which he or she tries to use to travel on to another country is outside the scope of section 31 - and indeed of Article 31.

In respect of all other offences, the defence in section 31 is not available.

[Back to contents](#)

## 7 Who is a refugee?

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Section 31 applies to “refugees” (as opposed to “asylum-seekers”). . A refugee is a third country national or stateless person who falls within Article 1(A) of the Geneva Convention and to whom regulation 7 of the “Refugee or Person in need of International Protection (Qualification) Regulations 2006” does not apply. Section 31(7) states that where someone has been refused asylum, he or she is taken not to be a refugee unless he or she can show otherwise.

There are three categories of person who may seek protection under section 31.

- (a) People who have been granted asylum either by the Secretary of State or following an appeal to the Asylum and Immigration Tribunal (AIT). These people are entitled to the defence, provided that they meet the other conditions for protection (they have come directly to the UK, committed the offence before claiming asylum etc.)
- (b) People who have been refused asylum by the Secretary of State. Section 31(7) states that these people are not refugees, and are therefore outside the scope of the defence, unless they can show that they are refugees. This might be by means of an appeal to the AIT or by persuading the criminal court hearing the case that the decision was wrong. In cases where an appeal to the AIT is outstanding, it would normally be appropriate to await the outcome of that appeal before proceeding with a prosecution, unless the person falls outside the scope of the defence for another reason.
- (c) People who have not yet received a decision on their claim for asylum. It is not yet possible to tell whether these people are refugees for the purposes of section 31. This is because of the declaratory nature of refugee status (the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status paragraph 28 explains that recognition of refugee status does not make a person a refugee, but declares him to be one). In these cases, it would normally be appropriate to await the Secretary of State’s decision on the asylum claim before proceeding with a prosecution (and then only if it was considered to be in the public interest to do so), **unless** the person falls outside the scope of the defence for another reason.

It follows that a person allowed to remain for a limited period under Humanitarian Protection or Discretionary Leave provisions will not be entitled to rely on the section 31 defence (unless he can show that he is a “refugee”). Neither will a person whose appeal to the AIT has been refused on asylum grounds but allowed on other grounds such as human rights (again, unless he can show that he is a “refugee”).

## 8 Good cause for illegal entry

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Essentially, good cause for illegal entry by a refugee is for the express purpose of making a claim for asylum. A refugee will have been proven to have had good cause whereas a failed asylum-seeker will not.

Sometimes, a person might enter the country illegally for a purpose other than asylum (to work illegally, for instance) but then approach the Home Office to lodge an asylum claim, citing events which have happened in their own country since their arrival (such as a coup) as justification. Such people would not, however, have good cause for their illegal entry, irrespective of the merits of their claim.

## 9 “Without delay” and “as soon as reasonably practicable”

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The test is that the refugee "presented himself [or herself] to the authorities in the UK without delay (and) claimed asylum as soon as reasonably practicable after his [or her] arrival..."

Caseworkers have to conduct a balancing exercise when deciding what constitutes “without delay” and what is “as soon as reasonably practical”. What constitutes “without delay” and “as soon as reasonably practical” is very much a question of fact and degree. **It will be different in every case depending upon the particular circumstances of the case.**

Caseworkers will need to look at the reason for not claiming at the port and the subsequent delay. Ultimately it is for the courts to decide whether any particular act or failure to act by a claimant for asylum is reasonable in the circumstances of the particular case.

This is a non-exhaustive list of factors that UK Border Agency caseworkers and those involved in prosecution work in the Immigration Service should take into account in assessing whether a claimant presented him or herself to the authorities “without delay” and whether he or she claimed asylum “as soon as reasonably practical”:

- What opportunities did the claimant have to claim asylum on arrival in the UK? An individual who is interviewed at port and does not claim asylum at that time is very unlikely subsequently to be entitled to protection under section 31. A delay of just a few minutes may be too long to be able to rely upon the statutory defence if the claimant failed to claim asylum when he had the opportunity to do so, to an immigration officer, on arrival.

An individual who presents a false or forged passport to the immigration officer on arrival and persists with the claim that the document is rightfully his or hers and/or genuine, and who claims asylum at a later stage, is unlikely to be entitled to protection under section 31.

Were there most exceptional circumstances (e.g. death or serious illness in the family) that prevented the claimant from presenting himself or herself to the authorities sooner?

Was the claimant under stress, and if so to what degree, because of the presence of, or threats from, an agent or facilitator?

A delay might be reasonable if a claimant’s dependants were following him or her to the UK using the same route and the principal claimant wanted them to reach the UK so that they could all claim asylum together. If detected by the police or UK immigration authorities in the meantime, then the claimant would be expected to fully disclose the reasons for waiting and to then make a claim without further delay.

It could be argued that some people are not aware that they should have claimed asylum on arrival at the port, so might enter the country by deception, and claim shortly afterwards (perhaps visiting a police station or UK Border Agency). As the only acceptable reason for making such an entry to the UK is to make an asylum claim, it follows that only a person who intended to claim asylum before arrival would qualify for section 31 protection.

Where persons are encountered trying to embark on false documentation, the caseworker/officer dealing should consider the opportunities the asylum-seeker has had to lodge their claim.

When a person's intention is to claim asylum, but he or she delays in doing so solely for the purpose of approaching a lawyer or a voluntary organisation first, he or she is unlikely to be entitled to rely on the protection afforded by section 31.

A person who commits an offence listed in section 31 having already made a claim for asylum is not entitled to the protection afforded by that section.

This list is not exhaustive but is intended as a guide that UK Border Agency caseworkers and those involved in prosecution work in the Immigration Service should take into account in deciding whether the claimant is likely to be able to rely on protection under section 31 of the Act. **In every case, all the relevant facts and circumstances must be taken into consideration in determining whether it is likely that a person will be entitled to the protection afforded by section 31 of the Act.**

## 10 "...Stopped in another country outside the United Kingdom..."

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Refugees are not required to have come directly from their country of origin. If they have not done so and it has not been possible to consider safe third country action under section 33 of, and schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 full consideration is given to the merits of the asylum claim. Section 31(2) of the 1999 Act states that if a refugee stopped in another country outside the UK while *en route* to this country, the defence in section 31(1) only applies if the refugee shows that he or she could not reasonably have expected to be given protection under the Convention in that other country.

Whenever an asylum-seeker legally enters a foreign country that is a signatory to the 1951 Convention, even if for a limited period only, he or she could have made an asylum claim in that country. Other asylum-seekers will enter third countries illegally, perhaps crossing a land border from their own country to a neighbouring country. They should then claim asylum in that country if it is both safe and practical to return them. This will depend upon clear evidence of admissibility to the third country. It may be that there is an absence of endorsements in the passport. If that is the case it will probably not be possible to persuade a third country that they should deal with their asylum claim. ***For further information on return to third countries see the AI on [Safe Third Country Cases](#).***

The asylum-seeker may have been in transit through the third country and might not have come into contact with immigration officials and might not therefore have had the opportunity to make an asylum claim. Under these circumstances, and taking into account all the information available, it may be that the claimant is entitled to the protection afforded by section 31 as previously interpreted by the British courts. In this situation caseworkers will need to ensure that the third country is a signatory to the 1967 protocol to the Convention.

***Further enquiries:*** Further enquiries about section 31 should be made in writing via a Senior Caseworker to the Asylum Complex Advice Team. This does not apply to staff in INEB for whom separate arrangements have been made.

## 11 Section 31 of the Immigration and Asylum Act 1999

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**31.** - (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-

- (a) Part I of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);
- (b) section 24A of the 1971 Act (deception); or
- (c) section 26(1)(d) of the 1971 Act (falsification of documents).

(4) In Scotland, 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.

(5) A refugee who has made a claim for asylum is not entitled to the defence provided by subsection (1) in relation to any offence committed by him after making that claim.

(6) "Refugee" has the same meaning as it has for the purposes of the Refugee Convention.

(7) If the Secretary of State has refused to grant a claim for asylum made by a person who claims that he has a defence under subsection (1), that person is to be taken not to be a refugee unless he shows that he is.

(8) A person who-

- (a) was convicted in England and Wales or Northern Ireland of an offence to which this section applies before the commencement of this section, but
- (b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1),

may apply to the Criminal Cases Review Commission with a view to his case being referred to the Court of Appeal by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(9) A person who-

- (a) was convicted in Scotland of an offence to which this section applies before the commencement of this section, but
- (b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1),

may apply to the Scottish Criminal Cases Review Commission with a view to his case being referred to the High Court of Justiciary by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(10) The Secretary of State may by order amend-

- (a) subsection (3), or
- (b) subsection (4),

by adding offences to those for the time being listed there.

(11) Before making an order under subsection (10)(b), the Secretary of State must consult the Scottish Ministers.

# Document Control

## Change Record

Version	Authors	Date	Change Reference
1.0	SP	26/02/07	New web style implemented
2.0	JC	13/11/08	Re-Branding only
3.0	CC	26/10/09	Children's Duty reference added