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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

D1

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Before: Stephens LJ, Treacy LJ and O'Hara J

TREACY LJ (delivering the judgment of the court)

Introduction

[1] Pursuant to leave of Colton J granted on 7 December 2017 the appellant appeals against her conviction for possession of a false identity document, without reasonable excuse, contrary to section 6(1)(a) of the Identity Documents Act 2010.

[2] On 2 March 2017, the appellant was arraigned and pleaded not guilty to one count of possession of a false identity document, without reasonable excuse, contrary to section 6(1)(a) of the Identity Documents Act 2010 (Count 1) and to a further count of seeking or obtaining leave to enter or remain in the United Kingdom by deceptive means – immigration – contrary to section 24A(1)(a)of the Immigration Act 1971 (Count 2).

[3] The appellant's trial ran from 6 April 2017 to 12 April 2017. On 12 April 2017 the applicant was found guilty of Count 1. The jury could not agree on a decision in relation to Count 2.

[4] This appellant contends that the jury failed to properly consider the statutory defence available to the defendant under section 31 of the Immigration and Asylum Act 1999 ("the 1999 Act") and/or failed to properly follow the judge's charge.

Background

[5] The following background is largely taken from the applicant's skeleton argument:

> 2. The appellant is an Iranian national. On the 24 September 2016 she arrived at Belfast City Airport from Amsterdam. She was accompanied by two other Iranian nationals, one of whom was the co-accused and his young sister who was a child. The co-accused had a successful 'No Bill' application entered on his behalf.
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> 3. None of the three Iranian nationals had attempted to proceed beyond the UK Border Agency ("UKBA") control. They had stopped in the entrance hall and UKBA staff approached them to offer assistance. The Applicant does not speak English. The co-accused, who spoke English, advised the UKBA staff member that they did not have any immigration, were refugees and were claiming asylum.
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> 4. The appellant's luggage was searched and she had cut-up pieces of an Israeli passport in her handbag.
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> 5. She was then interviewed by UKBA staff as part of an Initial Contact and Asylum Registration Form. This interview took place in a room at Belfast City Airport. The Applicant did not have any solicitor or legal representation and the Interview process was conducted using a speakerphone with an interpreter translating over the phone.
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> 6. The appellant claimed that she was seeking to convert from Islam to Christianity and feared for her safety from the Iranian Government. Her case was that she was seeking 'safe harbour' in the United Kingdom. One of the questions asked was had she ever been fingerprinted in the any country to which she replied 'no'. She had, in fact, previously been fingerprinted whenever she had applied for a UK Visit and a Student Visa in 2014 and 2015. This was the subject of Count 2.

7. The appellant was subsequently arrested and interviewed at Musgrave PSNI station. She did have legal representation and an interpreter at this interview.

Appellant's case at trial

[6] The appellant had lived and worked in Iran until she recently fled fearing for her safety. She stated that Iran is a Muslim country with strict religious laws. Any deviation from Islam can lead to imprisonment or death. She wanted to convert to Christianity and had visited a Christian church in Iran. She also had placed a Christian symbol in her bedroom at home. Her family were unhappy with her desire to become a Christian. About one month before she had arrived in Belfast she was informed that her life was in danger and had to escape.

[7] Whilst a Muslim she had previously made two formal applications to enter the UK. She had also made one other visa application which she voided before a determination was made.

[8] She was put in touch with a facilitator/agent ("the agent") in Iran who could get people to a safe county. Fearing for her safety she paid this person a lot of money (60 million Iranian toman) and he then made arrangements for her to safely leave Iran.

[9] She met the agent in Tehran and paid all of the money up front. He then brought her by bus to Turkey and he remained with her in Istanbul.

[10] During the time in Istanbul he took a passport photograph of the appellant. They stayed in the Aksaray neighbourhood in Istanbul for approximately the next 3 weeks until he had made the arrangements for further travel. She met the co-accused in Istanbul; as earlier stated both he and his sister were also seeking refuge in a safe county.

[11] The appellant did not know where she would be taken other than that it would be a safe country. The agent called her the night before leaving Istanbul, told her to be ready the next morning and that he would collect her. She was then taken to Istanbul airport by the agent where he provided fake Iranian and Israeli passports. The agent had obtained the fake passports and paid for all flights.

[12] The fake Iranian passport was used to fly out of Turkey and the appellant provided this to the officials at Istanbul airport. From Istanbul the agent had arranged two flights; from Istanbul to Amsterdam and then from Amsterdam to Belfast.

[13] The agent travelled on the airplane from Istanbul to Amsterdam. The appellant did not know that she was then going onward to Belfast. The agent did not travel onward. He took the fake Iranian passport from the appellant. She was in Amsterdam for only 2-3 hours before being told to get the onward flight to Belfast.

[14] She was given instructions by the agent to destroy the Israeli passport and then when she arrived in Belfast to seek asylum. The appellant was relying on the agent throughout and followed his instructions so as to get her to a safe country.

[15] The appellant arrived in Belfast City Airport with the co-accused and his sister. On arrival all 3 claimed that they were refugees and sought asylum. She was very frightened and did not expect that she would be arrested. She denied any suggestion that she was being deceptive or dishonest. Rather that she was and is a refugee seeking safe harbour.

Statutory defence

[16] A statutory defence exists under section 31 of the 1999 Act. It applies to both offences alleged on the bill of indictment and is an absolute defence.

[17] Section 31 of the 1999 Act provides 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 United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he-
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> (a) presented himself to the authorities in the United Kingdom without delay;
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> (b) showed good cause for his illegal entry or presence; and
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> (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.
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> ….
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> (6) 'Refugee' has the same meaning as it has for the purposes of the Refugee Convention."

[18] Her Honour Judge McCaffrey gave her charge to the jury on 11 April 2017. It had been brought to the court's attention that in *The Queen v Makuwa* [2006] EWCA Crim 175 the Court of Appeal gave guidance to trial judges on the way judges

should direct the jury when the section 31 defence is raised including their view that it may be helpful to the jury to give them directions on all these matters in writing.

[19] The trial judge summed up the case in the normal manner. In addition the jury were presented with a copy of written directions which had been furnished to counsel prior to their deployment. The written directions were a three page document plainly intended to assist the jury with its deliberations and in particular how to correctly apply the section 31 statutory defence.

Subsequent developments

[20] The jury began its deliberations on 11 April 2017. No verdicts were reached on that date and the jury were sent home for the evening. The following morning the jury were out again. The jury then returned a unanimous guilty verdict on Count 1 and indicated that a verdict could not be reached on Count 2. Further time was given to the jury but after the additional time the foreperson indicated that a verdict would not be reached on Count 2. The judge then discharged the jury and proceeded to sentence the applicant. The applicant was immediately sentenced on 12 April 2017 as she was pregnant and had already spent a significant period of time in custody on remand. She received a four month sentence for which she was time served. There is no appeal against the sentence in this case.

[21] As the applicant was being led to the cells to be processed and released a male entered the back of the courtroom. The applicant's solicitor, counsel and the court Farsi interpreter then began to walk out of the court. A male, who at that stage was not recognised as a member of the jury, approached and asked if the case was over. He was told it was.

[22] Outside the same court this male approached again. At this point the group leaving court realised this person had been a juror. He was emphatically told that he could not talk to the group and to move on. He responded by stating "how can that be it over, we did not get to consider the statutory defence". The solicitor for the appellant made a contemporaneous record of the approaches and what is alleged to have been said by the juror.

[23] The defence then made contact with the court clerk and with prosecution counsel. The defence sought to raise what had happened with the trial judge but she had left Laganside and could not be contacted. Another judge agreed to sit in court to hear what had happened. It was explained what had occurred and it was agreed that the matter should be sent back to the trial judge for her to decide what should happen.

[24] The next date for listing was Monday 24 April 2017 and the position was explained to the trial judge and following discussion the matter was adjourned to

28 April 2017 for all parties to consider the position. On that date the trial judge indicated that no enquiry should be made of the jury as the trial had concluded.

Grounds of appeal

Prohibition on adducing evidence about a jury's deliberation

[25] The original grounds of appeal were prefaced on the evidence of the approach made by the juror post-trial and his alleged comments. The appellant had lodged an application seeking the leave of this court to receive evidence pursuant to the Court's powers under section 25(1)(c) of the Criminal Appeal (NI) Act 1980. The evidence sought to be admitted was the contemporaneous record of the statements made by the juror after the end of the trial and referred to above. At the hearing before us Mr Duffy QC, for the appellant, conceded, in light of the authorities and the written submissions of the prosecution, that such evidence was inadmissible. Since the evidence which it was sought to introduce was evidence about the jury's deliberation it fell foul of the principle stated by the House of Lords in *R v Mirza and Others* [2004] UKHL 2, [2004] Cr. App. R. 8, *R v Davy* [2017] EWCA Crim. 1062 and *R v Adams* [2007] EWCA Crim. 1 This principle and its application are the subject of detailed consideration in Blackstone 2018 [paras D19.28 and D19.30 – D19.32]. In this appeal the concern raised by the defence is that, based on what the juror said after the completion of the trial, the jury might have misunderstood the direction they were given on the section 31 defence. However, as is now accepted, any inquiry into whether the jury understood the direction and therefore applied it properly is an inquiry into their deliberation which is forbidden. There are exceptions to this rule when inquiries can be made of a jury about exceptional *extrinsic* issues, such as improper third party influence on a juror, but there is no scope to inquire into the *intrinsic* issues of their deliberation. As far as the jury's' deliberations are concerned the prohibition is "*absolute*" (see *Mirza*) and "*sacrosanct*" (see *Davy*). In light of the appellant's concession the application to adduce the new evidence of the juror's comments was not pursued. However since the original grounds of appeal were expressly predicated on the juror's post trial comments the appellants sought and were granted leave to abandon that aspect and to amend their grounds of appeal to contend that the jury had failed to properly consider the applicable statutory defence under section 31 of the 1999 Act and/or failed to properly follow the judge's charge.

Written directions on the section 31 defence

[26] In our view the amended grounds are unsustainable and accordingly we reject both of them for the following reasons. The trial judge summed the case up in the conventional way and there is no suggestion that the she misdirected the jury in relation to either the applicable law or the relevant facts. The jury were, in addition, provided with written directions on the various elements relevant to the statutory defence under section 31 of the 1999 Act. In *The Queen v Makuwa* [2006] 1 WLR 2755 the Court of Appeal (Moore-Bick LJ, Lloyd Jones J and Judge Findlay Baker QC)

gave guidance on the way in which judges should direct juries in cases where the defendant seeks to rely on the statutory defence in section 31(1) of the 1999 Act [see paras 37-40]. At para 39 they expressed the view that "… it may be helpful to the jury to give them directions on all these matters in writing". In the present case the judge very properly furnished to experienced counsel for the prosecution and defence her draft proposed written directions on the section 31 defence. This procedure was adopted to give the parties the opportunity to make any relevant observations on the draft directions *prior* to their deployment. Neither counsel raised the slightest objection to the correctness or clarity of the directions. Whilst the failure of counsel to comment on such draft directions is not necessarily fatal to an appeal such failure is likely to affect the weight accorded to any alleged deficiency [see Blackstone 2018 para D18.25]. Further, at the conclusion of the summing up neither the prosecution nor the defence requisitioned the trial judge about any aspect of her summing up including the written directions which the trial judge had taken the jury through. Moreover there is no reason to suppose that this jury did not faithfully discharge its obligation to decide the case on the basis of the evidence in court and also in accordance with the directions of the trial judge. Indeed it is clear that this jury was paying very close attention to the case. For example, after the jury had retired they raised two questions with the trial judge. The first question that they asked was in the following terms "Please give clarification as to what constitutes without lawful excuse? The jury did not seek clarification of any other aspect of the judge's charge and plainly if there was anything which they thought required clarification there was no reason to suppose that this jury would not have sought it. Interestingly the jury also raised a second question which was "does a ripped up passport constitute a valid identity document?" It appears that it was this intervention by the jury which may have been the genesis for the further ground of appeal which the appellant's counsel sought to raise on the day before this court was due to sit to hear the appeal. The jury questions demonstrate the care and consideration with which they were approaching the case. Accordingly we conclude that the appellant has not established that this jury failed to properly consider the applicable statutory defence under section 31 of the 1999 Act and/or failed to properly follow the judge's written charge.

Raising a new ground before the Court of Appeal

[27] The appellant sought leave to argue that the conviction was unsafe on the additional ground that it was said that there was no evidence before the jury which was capable of establishing that the relevant items contained within Exhibit 10 (the damaged passport) amounted in law to an identity document for the purposes of section 6 of the Identity Documents Act 2010 or that the undamaged original document was in the possession of the appellant within the County Court Division of Belfast. Consequently it was contended the jury should have been directed that there was no evidence to establish possession of a false identity document within the County Court Division of Belfast.

[28] This point was not raised in the defence statement or at any point before or during the trial. It first emerged by way of e-mail on the day before this court sat to hear the appeal. The fact that the point was not raised at trial by either the prosecution or the defence or, indeed, the trial judge may reflect its lack of merit. Whether or not the court will allow a fresh point to be taken on appeal which could have been taken in the trial court will depend very much on the interests of justice and the circumstances of the particular case. There is a useful review of the approach of the appellate court to fresh grounds in Taylor on Criminal Appeals (2nd Ed.) at paras 9.49 et seq.). It is noted at para 9.54 that the Court of Appeal will hesitate before allowing a fresh point to be taken where the nature of the point required some investigation to have been carried out at trial. Had the new ground been raised in the court below it may well have influenced the conduct of the trial and certainly at least the cross-examination of the defendant. We therefore refuse leave. In any event, although it is unnecessary for our decision and without having heard full argument, we consider that there was evidence before the jury to establish possession of the false identity document within the County Court Division of Belfast. We also consider that the fact that the document had been (deliberately) damaged did not in the circumstances of this case render it incapable as a matter of law of being an identity document and that the appellant possessed the document as alleged in the indictment.

Unsafe verdict

[29] The relevant test before the Court of Appeal is whether the conviction is safe. The approach was set out in *The Queen v Pollock* [2004] NICA page 34 as follows:-

> **"1. The Court of Appeal should concentrate on the single and simple question 'Does it think that the verdict is unsafe'.**
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> **2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.**
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> **3. The court should eschew speculation as to what may have influenced the jury to its verdict.**
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> **4. The Court of Appeal must be persuaded that the verdict is unsafe but if having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."**

[30] Applying that approach and having regard to the reasons set out above we have not been persuaded that the verdict is unsafe on any of the grounds advanced nor does the court have any unease much less a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence. Accordingly for the above reasons the appeal must be refused.