THE APPELLANT'S NAME AND ANY IDENTIFYING PARTICULARS ARE SUPPRESSED PURSUANT TO S 129T OF THE IMMIGRATION ACT 1987. THERE IS TO BE NO SEARCH OR COPYING OF THE COURT FILE WITHOUT THE LEAVE OF A DISTRICT COURT JUDGE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA746/2009
[2010] NZCA 522

BETWEEN	X (CA746/2009) Appellant
AND	THE QUEEN Respondent

Hearing: 27 October 2010

Court: Hammond, Arnold and Stevens JJ

Counsel: C B Cato for Appellant
F J Sinclair for Respondent

Judgment: 18 November 2010 at 4 pm

JUDGMENT OF THE COURT

A The appeal is allowed and the convictions set aside.

B There will be no order for a retrial.

C The appellant's name and any identifying particulars are suppressed pursuant to s 129T of the Immigration Act 1987. There is to be no search or copying of the Court file without the leave of a District Court Judge.

REASONS OF THE COURT

(Given by Hammond J)

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Introduction

[1] This is an appeal against two convictions for possessing a false passport.

[2] The notice of appeal was filed over three months out of time. The explanation given was that Mr Cato for the appellant received a signed copy of the notice of appeals soon after sentencing and mistakenly believed that trial counsel had filed a copy. Trial counsel had not. Late filing has not prejudiced the respondent. In those circumstances we grant the application for an extension of time to file the notice of appeal.

[3] The appellant's name and any identifying particulars are suppressed pursuant to s 129T of the Immigration Act 1987. There is to be no search or copying of the Court file without the leave of a District Court Judge.

Background

[4] The appellant, X, arrived at Auckland with his wife and four children on 28 November 2005. He and his family are Syrian nationals. They travelled to New Zealand via Lebanon, Doha and Australia. X and his wife presented false Belgian passports in their own names, his wife's passport also naming their children, to the immigration officers at Auckland International Airport. On their arrival cards

they claimed to be Belgian citizens wishing to visit New Zealand as tourists for 14 days only.

[5] The false passports were detected by the technology in place at the Airport. X was then interviewed by an immigration officer. During the interview he claimed that he and his family were asylum seekers. He claimed refugee status on the grounds that he was wanted by Syrian authorities for stealing and destroying politically sensitive materials from the office of a high-ranking military official after he had performed plumbing work in that office.

[6] X was declined refugee status by the New Zealand Immigration Service, on the basis that he had fabricated that story. His claim thereafter proceeded to the Refugee Status Appeals Authority (RSAA). Neither the appellant nor his family have been granted refugee status.

[7] However, in March 2010 the Removal Review Authority (RRA) held that it would not be contrary to the public interest to allow the family to remain in New Zealand. It directed that they be granted residence permits. The RRA, although acknowledging the untruthfulness of the plumbing story, also accepted that in the early 1990s X had in fact been detained and beaten by Syrian authorities.

[8] Two charges of possessing a false passport knowing it to be so and without reasonable excuse were laid against the appellant on 30 November 2005. That prosecution was then (properly) suspended until after the most recent of the appellant's unsuccessful appeals to the RRA.

[9] The appellant was convicted after trial by jury in the District Court at Manukau in July 2009. Judge Wade presided. X was subsequently sentenced to two years and three months imprisonment.[1] He now appeals against his convictions.

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1 *R v [X]* DC Manukau CRI-2007-092-339, 26 August 2009.

The issue on appeal

[10] The issue raised by this case is whether an unsuccessful claimant for refugee status can avail themself of the "reasonable excuse" defence to a charge of possessing a false passport under s 31(1)(f)(ii) of the Passports Act 1992. This issue in turn involves consideration of the scope of art 31 of the Refugee Convention (the Convention).[2]

[11] The basis of the appeal is that the trial Judge misapprehended the law on this issue, and materially misdirected the jury. It is submitted that the convictions should be set aside, and that there be no order for a new trial.

[12] Another subsidiary issue was raised in written submissions as to whether the decisions of the RSAA in respect of the appellant's claim for refugee status and the reasons for those decisions were admissible against the appellant. Indeed, a 2006 decision of the RSAA was included in the case on appeal before us. As it happens, it is unnecessary for us to decide this issue and we decline to make any observations about it except peripherally in the concluding section of this judgment.

Can an unsuccessful claimant for refugee status avail themselves of the "reasonable excuse" defence to a charge of possessing a false passport?

The Passports Act

[13] The charges against X were laid under s 31(1)(f)(ii) of the Passports Act, which relevantly provides:

> (1) Every person commits a crime who–
>
> ...
>
> (f) *Without reasonable excuse*, has in his or her possession or under his or her control within New Zealand–
>
> ...

[2] Convention Relating to the Status of Refugees (which came into force on 22 April 1954).

> (ii) A document purporting to be a passport issued by or on behalf of the Government of any country other than New Zealand that he or she knows or has reason to suspect is not such a passport.
>
> (Emphasis added.)

[14] The appellant submits that "a person who presents a false passport in the genuine belief that he or she is entitled to refugee status should be entitled to advance the defence even though refugee status is declined". The argument is that at the time of presenting a false passport, at which point it becomes apparent that the person is in possession of a false passport, the asylum seeker may have a genuine belief in their refugee status and should thus be protected by the Convention. The argument runs that such circumstances provide a "reasonable excuse" for the purposes of s 31(1)(f)(ii).

[15] The Crown responds that the Convention only concerns people who are refugees "in the sense of Article 1". That is, the Convention only applies in respect of those who fall within the definition of "refugee" as provided by art 1 of the Convention. Thus, according to the submission, people who are eventually found not to have refugee status do not enjoy the protection of the Convention.

Some of the difficulties refugees face when seeking asylum

[16] Difficulties arise when offences such as those under s 31(1)(f) are applied to asylum seekers. That is because, as Simon Brown LJ noted in *R v Uxbridge Magistrates' Court, Ex p Adimi* (*Adimi*),[3] refugees fleeing from persecution in their home country are usually in no position to do so in a legally orthodox way. They are often forced to resort to false immigration papers including passports.

[17] The evidence of an immigration officer at the appellant's trial was that in his experience three out of four asylum seekers presented with false documentation. Genuine refugees are therefore on the face of it highly susceptible to criminal liability for offences such as those prosecuted in this case. But to criminalise genuine refugees in that way is to rub salt into the wound.

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[3] *R v Uxbridge Magistrates Court, Ex p Adimi* [2001] QB 667 at 673-674.

[18] It is for that reason that the Convention by art 31 provides the following:

> 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.

[19] Thus, art 31 grants refugees an amnesty against the penal consequences of their otherwise illegal entry or presence until their status is regularised or they obtain admission to another country. Its purpose is "to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law".[4]

[20] This article has force in New Zealand's domestic law insofar as it is incorporated by s 129D of the Immigration Act 1987, which provides:

> **129D Refugee Convention to apply**
>
> (1) In carrying out their functions under this Part, refugee status officers and the Refugee Status Appeals Authority are to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention.

[21] The Convention forms schedule 6 of that Act.[5] While the provisions of the Convention are expressed by s 129D to apply only to refugee status officers and the RSAA, it appears the practice has been that prosecutions against asylum seekers for possession of a false passport are only advanced after the formal process denying the asylum seeker such status has concluded. That is as it should be. It would be contrary to the Convention to prosecute and convict under s 31(1)(f)(ii) those who present false passports yet who are later granted refugee status. This practice also accords with the general principle expressed by Cooke P in *Tavita v Minister of*

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4 *Adimi* at 677.

5 It also forms schedule 1 of the Immigration Act 2009, which is not yet in force.

Immigration[6] to the effect that ordinarily it should be presumed that the Executive intends to be bound by its international obligations.

The authorities

[22] In *R v Zanzoul*,[7] this Court considered the very argument advanced before us: that even though the appellant in that case had his claim to refugee status declined, he was entitled to the benefit of the reasonable excuse defence to a charge under s 31(1)(f) because he had had a genuine belief that he would qualify for refugee status. The appellant had tried to enter New Zealand on the strength of a false Australian passport.

[23] The Court did not accept his argument because it lacked a factual basis. The evidence was that the appellant in that case had first left Syria in 1987 and exited and entered Syria many times on his Syrian passport, without any apparent trouble. On that evidence there was nothing to link the possession of a false Australian passport with his claim for refugee status. It was irrelevant to the question of whether he had a genuine belief he may have had a claim to refugee status.[8] However, this Court left open the question "whether a claim to refugee status which is ultimately dismissed could, in some circumstances, nevertheless provide a basis for a reasonable excuse defence to a charge under s 31(1)(f)".[9]

[24] The Supreme Court, in declining to grant leave to appeal in that case said, albeit obiter:[10]

> ... we are ... prepared to assume that by reason of Article 31 of the Refugee Convention it might be an abuse of process to charge a refugee with a passport offence where the passport has been used as a means of putting the refugee in a position to claim refugee status.

[25] In the High Court, there is an oral judgment of William Young J in *AHK v Police*.[11] In that case an Iranian citizen had arrived in this country holding a false

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6 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).
7 *R v Zanzoul* CA297/06, 6 December 2006.
8 At [28]-[29].
9 At [32].
10 *Zanzoul v R* [2008] NZSC 44 at [11].
11 *AHK v Police* [2002] NZAR 531 (HC).

French passport. He was charged under s 31(1)(f) and pleaded guilty. Young J upheld his appeal against conviction on the ground that his plea had been entered on the basis of a mistake. But the Judge reasoned that "[i]f it is, indeed, the case that the appellant is a true refugee, then that might well constitute a reasonable excuse"[12] and "that the charge will be withdrawn. In any event, his claim to refugee status may well result in a reasonable excuse defence being successful if the case proceeds to trial."[13]

A reasonable excuse?

[26] As the Crown correctly submits, in general the evidential threshold for a defence of "reasonable excuse" is low. And once the defence is put in issue, it is for the prosecution to negative it beyond reasonable doubt.

[27] We consider that in principle a person with a genuine belief in their status as a refugee could be considered to have a reasonable excuse for the purposes of s 31(1)(f). That is, because of the circumstances facing asylum seekers as outlined above, it may be objectively reasonable for them to carry false documentation, regardless of whether they are granted asylum or not. We add that the genuine belief must be bona fide. A genuine belief that one will successfully attain refugee status held simultaneously with the knowledge that in fact one is not entitled to refugee status will not give rise to a reasonable excuse. In the end, these questions are all questions of fact. As the Crown very properly conceded, X's arrival interview and his account of a brush with the Syrian intelligence service was enough to put "reasonable excuse" in issue: the Crown then had the burden of proving that it was not objectively reasonable for the appellant to think that he could be regarded as a refugee in this country. Whether an accused has such a belief is a question of fact.

The Judge's directions

[28] However, the Judge directed the jury on "reasonable excuse" in these terms:

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12 At [9].
13 At [12].

> ... Now, [defence counsel's] argument says that because he was being treated as a refugee claimant on the day he came here ... then on that date he had a reasonable excuse and it's unfair to prosecute him because the law cannot be retrospective. In other words, the law can't make what has happened in the past illegal when it was lawful at the time. I beg to differ. There's a flaw in this argument because the reality is this.
>
> According to the experts who judge claims for refugee status such as the [RSAA], this gentleman is not a genuine refugee at all. He has been a bogus refugee from day one, ever since he arrived [in 2005]. The fact that it has taken time to determine that he is a bogus refugee is neither here nor there. He says the RSAA and he's had three goes now at trying to persuade them to the contrary, that they have said he is not a genuine refugee, he is not entitled to be here, he is not a real refugee.
>
> So that means that although a genuine refugee would have a reasonable excuse and anybody who claims to be a refugee can have a reasonable excuse for as long as it takes to determine the application, once that application has been determined, then that's the end of the matter and it's conclusive. That he was not a genuine refugee and therefore, did not have a reasonable excuse.
>
> You see, if it were otherwise, anyone at all could come here on false documents, perhaps they're wanted for some serious crime they've committed in their own country and they could come here on a false document and say: "I'm not really a bank robber at all, I want to be a refugee and although I'm travelling on these false documents, you can't prosecute me for that because I'm a refugee" ... So if the law were to be anything else, people could come here with impunity.

[29] In the question trail provided to the jury, the fourth question was: "Are you sure the accused had no reasonable excuse for possessing the document?" The jury were directed that it had to answer "yes" to this question (along with three others asked of them) in order to convict.

[30] Just over an hour into its deliberations the jury returned with a question to the Judge. It asked:

> With regard to the question of "no reasonable excuse" does the law require we only consider legal/refugee status?

[31] The Judge responded:

> What is or is not a reasonable excuse is for you to determine because you are the Judge of fact...
>
> Your question is a factor for you and for you alone, but certainly the fact, as I have directed you, that his claim for refugee status was rejected, means that he no longer can be treated as a refugee or as a refugee claimant, so that

> defence will not avail, it is for you to decide whether for any other reason you think appropriate is a reasonable excuse or not and that is a matter for you, not for me.

[32] There was also a comment from the Judge in his redirection that the only basis of a reasonable excuse proffered by the defence was refugee status.

Conclusion

[33] We note that the Crown felt obliged to submit that "the appeal appears to have some merit", although whether that is actually so is of course ultimately for the Court to decide.

[34] The most sympathetic interpretation of the Judge's summing up and his response to the jury question is that he was endeavouring to explain that the appellant was not protected by art 31 of the Convention given he was found to never have been a refugee. However, as the Crown rightly accepts, the jury may well have interpreted the direction to mean that there could be no reasonable excuse for possessing a false passport if one was not, at law, a refugee.

[35] In our view, the Judge's summing up and response to the jury question amounted to material misdirections. Having identified the question the jury was required to answer, the Judge effectively answered it for them, in a particular way. Thereby the Judge did not properly leave the factual question for the jury.

[36] Moreover, the Judge's own conclusion as to the correct answer was reached on the basis of a misapprehension of the nature of RSAA decision-making, especially as it stands in contrast to criminal justice processes. The RSAA's evaluation that the appellant was not a refugee was not equivalent to an exclusion of the defence of reasonable excuse.[14] Notwithstanding the appellant's failure to gain refugee status, there may still have been a factual basis available to the jury, not excluded by the prosecution to the required standard, that would have allowed it to uphold the defence of reasonable excuse and deliver not guilty verdicts. Specifically, the jury may have acquitted on the grounds that there was at least a

reasonable doubt that the appellant had a bona fide belief in his claim to refugee status as a consequence of being detained and beaten by authorities in the early 1990s. The jury was not left that possibility to consider.

[37] We allow the appeal and set aside the convictions. There will be no order for a retrial. That is because the appellant was sentenced to two years three months imprisonment on 26 August 2009 and has since been released on parole.

Solicitors:
Crown Law Office, Wellington for Respondent

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[14] See *Attorney-General v Tamil X* [2010] NZSC 107 at [35]-[37] as to the nature of "fact-finding" by the RSAA.