

# Life in crime



Can it be right that a reverse burden of proof is placed on an asylum-seeker? David Rhodes discusses *R v Makuwa*

**HOW DOES A REFUGEE SHOW THAT SHE HAS** been raped in a foreign land as part of a campaign of ethnic cleansing or tortured in a foreign prison for her political affiliations? These were questions that the Court of Appeal did not answer satisfactorily in the case of *R v Makuwa* [2006] EWCA Crim 175, when it held that a reverse burden on the defendant was a justifiable infringement of the presumption of innocence. The case also seemed to introduce a new standard of proof. Can this be right?

Immigration crime is a new and fast-developing area of the law, and our criminal courts are now routinely imprisoning would-be asylum-seekers for offences of having either false documents or no documents.

Those fleeing persecution are rarely granted visas for their travels. By necessity, they must enter the UK by some unorthodox means. Often this involves the use of false passports. Sometimes, asylum-seekers are told to return the false document to an agent after arrival, but before claiming asylum.

In the current political climate, the government is keen to deter the destruction or disposal of immigration documents and the use of false identities. Under s 2 of the Immigration and Asylum (Treatment of Claimants) Act 2004, it is an offence to present oneself at an immigration interview without valid documentation. Routinely, defendants receive immediate 'deterrent' custodial sentences of up to five months.

According to our international law obligations under Art 31 of the Refugee Convention 1951, Britain should not impose criminal penalties on refugees on account of their illegal entry or presence.

That Convention right has been largely replicated as a statutory defence to some immigration offences under s 31 Immigration and Asylum Act 1999. Subsection (1) provides: "It is a defence for a refugee charged with an offence... to show that, having come to the UK directly from a country where their life or freedom was threatened... he (a) presented himself to the UK authorities without delay; (b) showed good cause for their illegal entry or presence; and (c) made a

claim for asylum as soon as reasonably practicable after his arrival."

This appears to impose on the defendant the burden of proving the statutory defence, even requiring proof that he is a 'refugee', which is defined in the Refugee Convention as a person fleeing their home land "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group etc".

The Court of Appeal in *Makuwa* agreed this imposes reverse burdens of proof and went on to decide to what extent and standard the reversal should be imposed and whether it was a justifiable infringement of the presumption of innocence under Art 6(2) ECHR.

The appellant argued that it was for the Home Secretary, not the jury in a criminal trial to determine whether a person was a "refugee". The jury should assume that the defendant was a refugee and go straight on to ask whether he had satisfied the limbs of the statutory defence. The Court of Appeal disagreed. That was not how Parliament worded the defence. It was first for the jury to decide if the defendant was a 'refugee'. If not, he would not be able to avail himself of the defence.

In immigration law, however, it is not necessary for an asylum claimant to satisfy the authorities on the balance of probabilities that his fear of persecution is well founded. Why should he be held to a different standard in a criminal trial?

The Court of Appeal answered this by saying the defendant should meet the same standard as in his asylum claim – ie, it was sufficient for him to show that there is a "serious possibility" that he would suffer persecution if returned to his homeland.

Two problems arise. Firstly, showing a well founded fear of persecution is partly subjective (fear) and partly objective (well founded). Surely, the Crown has greater resources than the defendant to show that the fear of persecution in Country X is well founded.

Secondly, and more importantly, this seems to introduce a new standard of proof into the criminal trial – "a serious possibility". It is lower than the balance of probabilities (the

legal burden) and higher than the burden of raising the issue (the evidential burden). The Court of Appeal clarified the issue by saying that the defendant need only raise the issue of refugee status and it was for the Crown to disprove beyond reasonable doubt.

But in order to raise the issue of refugee status, there must be a "serious possibility" of persecution. Confused?

The Court of Appeal then went on to say that having passed this hurdle, it was for the defendant to prove to the balance of probabilities (the legal burden) each of the three limbs of the statutory defence.

This is crucial because those limbs include proving that there is "good cause" for the defendant's illegal entry or presence and that they came from a country where their life was threatened. Surely the "good cause" is that they are fleeing persecution and had to sneak into the UK on a false passport or get killed. So the defendant is back to square one – faced with proving the veracity of his asylum claim in a criminal trial to the balance of probabilities.

The Court of Appeal applied the case of *Sheldrake v DPP* [2004] UKHL 43 and concluded that the reverse burden was a justifiable infringement on Art 6(2), because it was not imposed on an essential element of the offence. Indeed, the statutory defence was an extra defence available only to refugees. Moreover, these matters were well within the defendant's knowledge, whereas it would usually be difficult, if not impossible, for the Crown to adduce positive evidence to disprove. As such "the Crown would be at a serious disadvantage".

The criminal trial has now become a forum for assessing the merits of an asylum claim. Again, I return to the question with which I began. How does the defendant go about showing that she was raped or tortured in some corner of a foreign field? And could she be convicted if there is a reasonable doubt but not a "serious possibility"? Now that's what I call a serious disadvantage.

David Rhodes is a barrister practising from Doughty Street Chambers