

Prosecuting the Persecuted in Scotland:

Article 31 (1) of the 1951 Refugee
Convention and the Scottish Criminal
Justice System

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scottish
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years

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Head of Policy and Communications, Scottish Refugee Council,
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List of Abbreviations and Acronyms

AITCA 2004	Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
Art. 31 (1) / Article 31 (1)	Article 31 (1) of the 1951 United Nations Convention relating to the Status of Refugees
CCRC	Criminal Cases Review Commission
COPFS	Crown Office and Procurator Fiscal Service
CPS	Crown Prosecution Service
CTA	Common Travel Area
IA 1971	Immigration Act 1971
IAA 1999	Immigration and Asylum Act 1999
ICA 2006	Identity Cards Act 2006
IDA 2010	Identity Documents Act 2010
NCA	National Crime Agency
SCCRC	Scottish Criminal Cases Review Commission
Refugee Convention	1951 United Nations Convention relating to the Status of Refugees
UKBA	UK Border Agency
UKBF	Border Force
UKVI	UK Visas and Immigration
s31 / section 31	Section 31 of the Immigration and Asylum Act 1999

“A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.”

Travaux préparatoires of the 1951 UN Convention relating to the Status of Refugees.

“He arrived in the UK, and it’s quite humbling, because I’d asked him, ‘why have you come to the UK?’ Well, look, he’s got family here, and one of his reasons was, he said, ‘Well, it’s the UK, I know I’ll be safe here.’ And the first thing that happens to him when he arrives in the UK is, he’s put in handcuffs and told, ‘Listen, you might spend five years in jail for this.’”

Criminal defence solicitor in Stranraer representing a refugee arrested for possessing false documentation at Cairnryan Port in Dumfries and Galloway, February 2015.

Chapter 1 - Introduction

The UK as a signatory to the 1951 Refugee Convention is bound by Article 31(1) which states that contracting parties:

“shall not impose penalties on refugees on account of their illegal entry or presence” provided they are “coming directly” from the state where they are facing persecution, engage with the authorities “without delay” and have “good cause” for breaching immigration rules (UN General Assembly, 1951).

Prior to the mid-90s those arriving in the UK seeking international protection without proper documentation were primarily dealt with under administrative powers (Bye, 1999). From this point however the role of criminal law and the criminal justice system to punish immigration breaches increased significantly (Dunstan, 1998). This expansion included the prosecution of asylum seekers entering, being present or transiting the UK with fraudulent documents or for seeking to obtain services by deception. Criminal defence lawyers often advised clients to tender guilty pleas and rarely cited Article 31 (1) (Bye, 1999; Dunstan, 1998) resulting in sentences of between six and nine months imprisonment (Bye, 1999).

Following the landmark case of *R v. Uxbridge Magistrates Court And Another, Ex Parte Adimi*, [1999] EWHC Admin 765, Article 31 (1) was given restricted domestic effect in the United Kingdom under section 31 of the Immigration and Asylum Act 1999 by way of a statutory defence. In spite of the introduction of section 31 and ministerial assurances at the time that cases would not reach the criminal courts (*SXH v Crown Prosecution Service [2014] EWCA Civ 90*) those seeking asylum in England have nevertheless continued to be prosecuted and convicted with little or no respect to Article 31 (1) (Aliverti, 2013a, p.47; Holiday, 2014b; Dunstan 2014; Barrett, 2014).

The Criminal Cases Review Commission for England, Wales and Northern Ireland estimates that thousands of asylum seekers may have wrongfully been convicted (Israel, 2013). Even the most recent refugees to the UK including those fleeing Syria have ended up in the criminal courts for passport offences (BBC, 2015).

Criminalising asylum seekers has a deleterious effect. Aside from the psychological impacts of wrongful imprisonment (*SXH v Crown Prosecution Service [2014] EWCA Civ 90*), prosecutions can have a bearing on determining credibility within the asylum claim (ILPA, 2011) and now lead to a statutory presumption to deport for prison sentences over 12 months (*UK Borders Act 2007*). Individuals granted refugee status face difficulties in securing employment with a criminal conviction (Holiday, 2014a) and applications for settlement may be refused (Hollings-Tennant, 2015).

As a professional working for a refugee-assisting NGO in Scotland, I became particularly interested in how Article 31 (1), a UK obligation, was understood and implemented in Scotland, with its separate and distinctive legal system of criminal justice following the high profile case of *R v Mateta & Ors* [2013] EWCA Crim 1372 in the Court of Appeal in England. This case resulted in the sentences of five refugees, wrongfully convicted for offences related to their arrival in or exit from the UK, being quashed. My concern was that there may have been similar miscarriages of justice in Scotland.

Academic interest in the criminalisation of migration has grown considerably in recent years across a number of disciplines (Parkin, 2013). However, the specific intersection between the criminalisation of refugees for illegal entry or stay where there is a defence against penalisation has, to date, received very limited academic attention. There has been no scholarship on this important issue in Scotland. This research endeavours to answer the following question: to what extent and why are refugees in Scotland being prosecuted and convicted for illegal entry or stay without due regard to the protection offered by Article 31 (1) of the Refugee Convention?

Due to the novel and exploratory nature of the question, the research takes a socio-legal rather than a doctrinal or black letter approach. Empirical legal research can play a vital role in uncovering and understanding procedures and processes of legal systems and their impact (Genn, Partington and Wheeler, 2006). This study therefore focuses on revealing the processes by which criminal justice and immigration actors in Scotland consider compliance with Article 31 (1) rather than seeking to analyse the particular legal limitations of the defence.

The intended aim of this research is to shed light on and provide an original contribution to the understanding of Article 31 (1) in Scotland and the intersection of the UK immigration regime with Scotland’s criminal justice system. Methodologically, the research endorses qualitative approaches to the study of immigration and asylum law.

Chapters two to five provide the backdrop to the study, proceeding with a brief overview of the legal framework, a review of existing literature, the theoretical underpinnings of the research and the methods employed. Chapters six to eight form the crux of the research: presenting and analysing the findings on the extent of the phenomenon in Scotland (chapter six); the processes and actors involved in the initial decision to arrest refugees for illegal entry offences (chapter seven); and pre-court and court proceedings (chapter eight).

Chapter 2 - Legislative Framework

This chapter provides a brief introduction to the protection afforded by Article 31 (1), its domestic interpretation by the UK and how these measures relate to Scotland.

2.1 The Refugee Convention and Article 31 (1)

The 1951 UN Convention relating to the Status of Refugees (henceforth Refugee Convention) created a framework of rights and responsibilities for refugees under international law (Goodwin-Gill, 2001, p.2). Article 1 of the Refugee Convention ascribes a threshold which people seeking asylum must meet to qualify for the protection and rights the instrument offers. The Refugee Convention also extends two fundamental rights to those who have not yet been declared by a state as a refugee but who are nonetheless in the territory of that state. Article 33 sets out the fundamental principle of non-refoulement – the obligation on a state not to render a refugee back to the persecuting state from which they fled. Article 31 places a duty on states not to impose penalties on refugees if they have entered that state unlawfully'. In order for a state to meet its obligations it cannot return or penalise an individual for illegal entry until the merits of a claim for asylum are assessed (Goodwin-Gill, 2001, p.2).

Article 31 (1) states that: *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 territories without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence (UN General Assembly, 1951).*

As is clear from the text, those seeking protection should not be punished for circumventing immigration controls of the borders of a state or being present in a state unlawfully. Nonetheless, there are restrictions on the immunity from penalisation afforded by Art. 31 (1): the refugee has to be “coming directly” from a persecuting state, to present themselves “without delay”; and have “good cause” for breaching domestic law.

The drafters of the Convention conceived that refugees may not be in possession of valid documentation to enter another state in their pursuit of protection and they should not be subject to penalties for doing so (Goodwin-Gill, p.5). To ensure that the duty under Art. 31 (1) is met and penalties for illegal entry or stay are not enacted, states are required to adopt legislative or administrative measures, although many do not (Goodwin-Gill, p.5).

The following section considers how the UK interprets its obligation under Art. 31 (1).

2.2 Adimi and Section 31 of the Immigration and Asylum Act 1999

Article 31 (1) is incorporated into UK domestic legislation through s31 of the Immigration and Asylum Act 1999. The genesis of this legislative provision followed the significant High Court case in 1999, *R v. Uxbridge Magistrates Court ex parte Adimi* [1999] EWHC Admin 765. This case concerned an application for judicial review by three asylum seekers, A, S and K of decisions made by the Crown Prosecution Service (CPS) in England to prosecute them for arriving in the UK with false passports. The court held that the decisions were unlawful as they had been taken without due regard to Art. 31 (1).

The judgment made clear that the provision in Art. 31 (1) applied to ‘presumptive refugees’ equally as it did to refugees and immunity extended to both irregular entry and to the use of fraudulent documents. The court also found that the ambit of Art. 31 (1) included those in transit through the UK. The judgment also declared that responsibility should rest with the Secretary of State instead of the CPS and the courts as they concerned the administration of asylum rather than a need to punish criminal activity. Following the ruling, the UK Government enacted section 31 of the Immigration and Asylum Act 1999 which brought into force a statutory defence against a particular list of committed and attempted offences in England, Wales and Northern Ireland (s31 (3)) and in Scotland (s31 (4)).

In debating the measure during the passage of the Bill, the UK Government argued that prosecutions would be uncommon as asylum cases would be processed administratively. In the unlikely event of prosecutions s31 would act as a safeguard (Holiday, 2014b). By defining Art. 31 (1) as a statutory defence under s31 rather than as immunity against prosecution, responsibility to meet the obligation under Art. 31 (1) lies with the CPS in England, Wales and Northern Ireland and, by extension, the Crown Office and Procurator Fiscal Service in Scotland.

The listed offences where the defences applies in Scotland are of: fraud (s31 (4) (a)); uttering a forged document (s31 (4) (b)); seeking to obtain leave to enter the UK by deception (s31 (4) (c)), an offence under s24A of the Immigration Act 1971; and possessing false documents of leave or amending genuine documents (s31 (4) (d)), and offence under s26 (1) (d) IA 1971.

Offences at s3 (b) relate nowadays to specific document offences under s25 of the Identity Cards Act 2006, superseded by s4 and s6 of the Identity Documents Act 2010 for similar offences committed after 20 January 2011 (Home Office, 2014). Thus, the defence applies to criminal offences set out in both immigration legislation and non-immigration legislation. .

Chapter 2 - Legislative Framework

2.3 Sections 2 and 35 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

In 2004 the UK Government introduced two new criminal offences in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The offence at s2 of failing to produce an identity document at an asylum interview was devised to counter the perceived issue of individuals destroying passports en route to the UK. Section 35 created a criminal offence of not complying with the process of obtaining new identity documents to effect removal from the UK (Refugee Council, 2005). These offences are not within the limiting scope of s31; however they are within the ambit of Art. 31 (1) (Holiday, 2014a) and have a 'reasonable excuse' defence against prosecution.

2.4 English case law related to Article 31 (1) and Scotland

Since Adimi, there have been a number of important cases in the Supreme Court and Court of Appeal in England, for example, *Soe Thet v Director of Public Prosecutions* [2006] EWHC Admin 2701 which set the limitations to prosecutions under s2 AITCA 2004; *R v Asfaw* [2008] UKHL 31, concerning abuse of process and offences not specified in s31 IAA 1999; and *R v Mateta & Ors* [2013] EWCA Crim 1372, concerning the scope for appeal following incorrect legal advice and providing guidance on the term 'coming directly'.

However, the extent to which such cases are binding in the Scottish courts is contentious. Supreme Court decisions emanating from other jurisdictions may not be viewed as precedent. The highest criminal court in Scotland is the High Court of Justiciary and so, in general, the development of Scots common law in this area has been limited to precedent developed in Scotland even for UK-wide legislation (Health and Safety Executive, no date).

This chapter has provided context to the study by describing how Art. 31 (1) places an obligation on states not to impose penalties on refugees seeking protection who breach immigration rules to enter or be present in a state, or use false documentation to do so. In Scotland there are statutory defences available to refugees against prosecution for these behaviours. Responsibility in Scotland to meet the UK's obligations under Art. 31 (1) lies with the Crown Office and Procurator Fiscal Service.

Chapter 3 - Literature Review

Article 31 (1) has received limited academic attention in the literature from both doctrinal and socio-legal perspectives. There is no scholarship on the issue in Scotlandⁱⁱ. A recent extensive study of immigration and criminal law in the UK by Aliverti (2013a) has though assessed prosecution decision-making for immigration offences and proceedings before the criminal courts in England. In the research, Aliverti identifies beneficiaries of the s31 IAA 1999 and s2 AITCA 2004 defences as a particular population. The making of crimes under immigration law is a reserved matter for the UK Parliament; however the study does not extend analysis to Scotland, where prosecuting such offences is the responsibility of the Scottish criminal justice system. Nevertheless, due to the limited literature, this review draws significantly on this author's work which provides valuable contextual, methodological and theoretical underpinnings, whilst acknowledging the risks inherent in relying on limited texts. The review considers the available academic and grey literature thematically and covers: the growing criminal sanctions towards asylum seekers; knowledge of the Art. 31 (1) defence; the processes of criminalisation by immigration authorities, the police and the courts in England; and, finally, the extent of this phenomenon in England.

3.1 Increased criminal sanctions towards asylum seekers

In the UK, in recent years the number of criminal sanctions targeted has risen significantly. Whilst the criminalisation of migrants in the UK has a long history (Weber and Bowling, 2008) the last two decades in the UK have witnessed a sharp rise in immigration-related offences appearing on the statute books. Aliverti (2013b, p.4) finds that between 1905 - 1996, 70 criminal offences were created, whilst in the thirteen-year period between 1997 and 2010, 80 criminal offences were developed many of which were targeted at those seeking asylum in the UK. Asylum seekers were viewed by the Labour Administration as a 'bad' or 'unwanted' increasing population to be controlled (Mulvey, 2011). A central aim of the many measures the IAA 1999 introduced was to deter asylum applicants from the UK and criminal law had "a role to play in stamping out abuse of immigration control" (Home Office, 1998, no pagination). In parallel to the increasing resort to criminal law measures to deter entry, has been the expanding enforcement focus (UKBA, 2010) and policing role of the UK's immigration service, gaining increasing 'police-like' powers and targets for prosecutions. Thus, a principal reason why asylum seekers arriving in Scotland may be prosecuted for offences related to their illegal entry, or stay, is an increased array of UK offences and immigration officers equipped with increased, police-like powers to enforce them.

3.2 Knowledge of the Article 31 (1) defences

All of the available literature relating to Art. 31 (1) in the UK cites the lack of knowledge of the 'refugee defence' and its application amongst criminal justice actors as a central reason for refugees being wrongly convicted (Dunstan, 1998; Stoyanova, 2012, Aliverti, 2013a; Holiday, 2013).

In a study in Norway, the Norwegian Organisation for Asylum Seekers similarly finds an absence of awareness across the criminal justice system of Art. 31 (1) (Linha and Møkkelgerd, 2014, p.62). Thus, it is anticipated that knowledge of the defence by key actors in Scotland is likely to be a factor for prosecutions of asylum seekers in Scotland.

3.3 Police and immigration authorities in England and the decision to prosecute

Aliverti (2013a, p.59) states that immigration enforcement authorities, particularly Chief Immigration Officers of the UK Border Agency (now UK Border Force) play a pivotal role in deciding whether immigration breach should be criminalised. Immigration enforcement officials may employ administrative or criminal sanctions for the same offence and have significant discretion to follow due to a lack of clear and transparent rules. Key factors which may influence decision-making are practical, such as the likelihood of effecting administrative removal or resources. The location of where the migrant is intercepted can also have a bearing on the decision to prosecute. (Linha and Møkkelgerd, 2014, p.62).

In England, decisions to prosecute are made quicker at large airports, such as Heathrow, where immigration prosecution units are co-located alongside UK Border Force (UKBF) staff. As a result of these factors, Aliverti concludes that the system is inconsistent and unpredictable for the offender (2013). Outside of ports of entry, police officers exercising wider powers than immigration officers also identify and process immigration offenders (Jordan and Düvell, 2002, p.177). In these situations, the police may proceed with a criminal investigation or pass to the Home Office without any criminal action being taken forward. There is no data in England in relation to police proceeding against immigration offenders (Aliverti, 2013, p.62). Weber and Bowling (2004, p.205) find that compared to the police, immigration authorities will pursue low-level offences. In recent years, immigration officers have been bestowed with more police-like powers which have diminished the involvement of police officers. The impact this has had on prosecutions is unknown (Aliverti, 2013, p.64).

Chapter 3 - Literature Review

3.4 Prosecuting illegal entry and stay in the English courts

Goodwin-Gill (2001) in an analysis of Article 31 for UNHCR considers that the availability of advice is a factor in assessing the requirement that refugees approach national authorities *'without delay'* to fall within the protection of Art. 31 (1). However, the nature of Art. 31 (1) requires initiation by the asylum seeker or his or her legal representative for it to be effective (Stoyanova, 2012).

The CCRC notes that prosecutions for offences where Art. 31 (1) applies occur without sufficient advice from lawyers who are not conversant with the interplay between international and criminal law leading to guilty pleas and, ultimately, miscarriages of justice (Holiday, 2012). Aliverti similarly finds that there is a general unfamiliarity amongst defence lawyers and that s2 and s31 defences are *"barely raised"* (2013, p.92). Even on the very few occasions in which the defence is brought into play, clients most often tendered a guilty plea (2013, p.93). A rationale for this lack of awareness, she posits, is that regardless of the increased merging of immigration and criminal law and practice, there are continued *"rigid disciplinary divisions"* (2013, p.95) between these two areas of law. Thus the provision of legal advice is a critical element in ensuring refugees realise the protection afforded by Art. 31 (1) and are not penalised.

In relation to prosecutors, (Aliverti, 2013a, p.113) finds that the protection needs of the individual do not form part of prosecutors' deliberations whether it is in the public interest to proceed with a prosecution in cases involving refugees and illegal entry. Despite the fact that prosecution guidance exists, refugees continue to be prosecuted (Holiday, 2014b). Stoyanov (2012) likewise states that there are tensions between and within the criminal and asylum procedures when an individual is prosecuted for false documentation. She also notes that the criminal procedure turns the burden of proof onto the asylum seeker to prove they are a refugee when they are prosecuted. If found to be guilty of the offence, judges impose often strict sentencing to deter others, which contrasts with the way in which they are perceived by immigration authorities as low-level crimes (Aliverti, 2013a, p.113). In most cases when the defence is actually brought before the judiciary, the asylum seeker may not only have already been granted refugee status but they may have already been in and out of prison for a false document offence (Stoyanova, 2012).

3.5 The extent of prosecutions of refugees in England and Wales

As highlighted, there is no research into the operation of Art. 31 (1) in Scotland; as such the extent to which refugees are being wrongly convicted is also not documented. In relation to England, several articles have offered various estimations but no definitive response to the extent of wrongful convictions of refugees in England without due regard to Art. 31 (1), ranging from hundreds (Holiday, 2012) to thousands (Parliament. House of Lords, House of Commons, 2004; Bye 1999).

Aliverti (2013a, p.158) finds that immigration crime data is problematic. Historically, there has been a paucity of published UK Government data capturing the extent of prosecutions and convictions for immigration-related criminal offences which has not kept pace with the legislative fervor in this area. Whilst Magistrate Court and Crown Court prosecutions and convictions for criminal offences in immigration law are now published by the Home Office, Aliverti expresses concern about their reliability and potential under-reporting. Aliverti concludes by stating that these data problems underline the lack of concern and oversight of immigration crimes.

This review has provided a brief account of the very limited literature in relation to the practical application of Art. 31 (1) as a shield against wrongful prosecution. In relation to answering the research question it demonstrates that at a UK level there is a now a plethora of criminal offences targeted towards asylum seekers enforced by immigration officers with increased powers and discretion. Contextually, it highlights that there is limited knowledge amongst criminal justice bodies of the defence in other jurisdictions leading to wrongful convictions and knowledge of the extent of criminalisation for these offences is problematic. Nevertheless, there are significant gaps, such as the experiences of refugees themselves, and whilst most of the available literature pertains to the UK, in actual fact it only provides consideration of England. As such, this study adds to the limited body of knowledge on Art. 31 (1) as well as offering an original contribution to the understanding of the practical application of Art. 31 (1) in Scotland and the intersection of UK immigration legislation with Scotland's separate criminal justice system.

Chapter 4 - Theoretical Framework

This chapter proceeds with a brief discussion of the wide-ranging academic debates on the criminalisation of migration before situating the study within recent scholarship on one particular strand of this phenomenon: the role of criminal law in regulating immigration flows.

The portrayal of migrants as outsiders and criminals has historical roots as do measures to control their movement (Anderson, 2013; Weber and Bowling, 2008). However, the conflation of criminality with migration or '*crimmigration*' (Stumpf, 2007) has intensified in Europe over the last 30 years (Bigo, 2004; De Giorgio, 2010; Huysmans, 2006; Melossi, 2003). Marked by a trend to depict migrants as criminals, dangerous and unwanted drains on scarce resources, the criminalisation of migration encompasses ever-tightening border controls to deter entry and an increasing array of criminal and administrative sanctions targeted at those who breach those controls (Weber, 2007). For Melossi (2003) the stimuli behind criminalising discourses of migrants are times of social, political and economic crisis. This can be traced back to the societal dislocation of the mid-70s caused by globalisation forces and economic upheaval (Bigo, 2004; De Giorgio, 2010, Melossi, 2003).

Parkin (2013) identifies in academic and policy literature three distinct but interrelated categories of the '*crimmigration*' phenomenon: public, media and political discourses that construct migrants as persons of deviance and threats to national security; the expanding use of administrative detention; and the rise in criminal sanctions as tools of migration control. Parkin (2013) notes that whilst academic interest in the criminalisation of migration is accelerating in Europe the phenomenon has been well documented in the United States.

In American criminal law scholarship, the criminalisation of migration has been described as the asymmetrical integration of criminal justice norms into the realm of immigration proceedings, a sphere previously dominated by civil regulation (Legomsky, 2007). Legomsky's thesis is that a disproportionate focus on law enforcement has undermined the equally important goal of managing lawful immigration to the United States. This has resulted in a punitive and unyielding deportation regime which is overly harsh on immigration wrongdoers. He argues that this disproportionate focus on criminal justice norms has "*has virtually invited policymakers to abandon any sense of proportion*". (Legomsky, 2007, p.2) concluding that the immigration system should fall back within the sphere of civil regulation.

In Europe, Aliverti (2013a) has conducted the most comprehensive study of the increasing resort to criminal offences in the UK. While she similarly contests the role of criminal law within the UK's immigration regime, she provides a differing viewpoint. Her research argues that whilst a plethora of offences exists on the statute books criminalising immigration breaches, these are often not enforced in practice. She contends that criminal law primarily services a symbolic function to placate media and public concern that the government has strong control over immigration.

On a practical level, for the UK immigration authorities, criminal law serves as a deterrent but also has a regulatory function alongside immigration officers' administrative powers to manage '*undesirable*' migrants. Criminal proceedings are seldom embarked upon but when they are, they are often targeted at low-level offenders for whom expulsion is problematic and where a criminal conviction may expedite removal. Used in this instrumental and ancillary way to administrative powers to achieve immigration goals, Aliverti posits that:

"the criminalisation of migration appears to be a mundane, bureaucratic and repetitive exercise of criminal powers geared by convenience and efficiency in delivering outcomes rather than to represent a punitive rationale to sanction morally wrong conducts." (Aliverti, 2012, p.418).

For Aliverti, the victimless and non-serious nature of the offences, the disproportionate prison sentences handed out and the lack of safeguards, fail to meet the normative requirements of criminal law. As such, she concludes that criminal law should not be used within the realm of managing migration.

This study considers Aliverti's thesis in relation to the specific offences under question and how they are being used in Scotland. How frequent is recourse to the Scottish criminal justice system for immigration offences in relation to their symbolism? Is criminalisation in Scotland used instrumentally as an addition to administrative powers to achieve immigration goals by immigration officers and criminal justice actors? Is criminalisation a "mundane, bureaucratic and repetitive exercise?"

Chapter 5 - Methodology

This chapter sets out the methods of data collection and analysis employed in the study and the validity and reliability of the findings.

The research design took a mixed methods approach to explore both aspects of the research question: the reasons why refugees and people seeking asylum are prosecuted in Scotland with little regard to Art. 31 (1) and the extent to which these prosecutions are taking place. Using different methods in a socio-legal study allows for more in-depth knowledge of how the law, legal bodies and legal practice function in the complexities of the real world (Nielsen, 2010, p.951).

Four methods were employed: a review of academic and grey literature; analysis of secondary quantitative data sources; documentary analysis, including case law and policy guidance; and seven semi-structured interviews with experts. Each of these data sources is discussed in turn.

5.1 Quantitative data

Two primary statistical data sets are presented and analysed. These are: data received from the Scottish Government on prosecution and conviction rates for offences in Scotland where the statutory defence under s31 may be used; and data from the COPFS on prosecutions and convictions proceeded against for fraud-related charges and other offences at four Procurator Fiscal locations in Scotland. There is no publicly published data that would help assess the extent to which refugees and asylum seekers are convicted and prosecuted for document offences. Therefore, I approached both the Scottish Government and COPFS for assistance. Prior to the research project, I had been in contact with the Scottish Government Justice Analytical Services Division to inquire about data relating to the research question. I produced an Excel template with the specific offences listed under s31 (4) of the IAA 1999 Act and s2 and s35 of the AITCA 2004. This was sent to the Scottish Government in summer 2014 who duly completed the spreadsheet. In February 2015 I made a further request to update the data for the years 2012-2013 and 2013-2014. The data set covers the period: 2006-2014 and presents the data by main offence.

The second data is from COPFS. In March COPFS provided, upon request, an Excel spreadsheet containing data reports of fraud and other selected charges at four Procurator Fiscal locations situated near main entry points to Scotland: Paisley (Glasgow Airport), Aberdeen (Aberdeen Airport), Edinburgh (Edinburgh Airport), and Stranraer (Loch Ryan port and Cairnryan portⁱⁱⁱ). The data set covers the period from 2009 to 2014, except for data from Aberdeen (2009-2011).

Overall, there has been little manipulation of the data sets. Some data lines have been removed prior to analysis and presentation, for example all fraud cases in the Scottish Government data and specific fraud offences in the COPFS data, such as embezzlement, that would not engage the s31 defence. The limitations of the data are discussed in the findings. The data was analysed using Excel and is presented in graph form.

In April 2015 I met with an official from COPFS to discuss how the data is produced and to assess the data to ensure validity and reliability of the findings that are presented from their data. Due to the differences in how each of the two sets of data is created, the data has not been cross analysed.

The extent to which the population of offenders in the quantitative data were refugees was explored through the expert interviews.

5.2 Qualitative interviews

The principal method used for the study was semi-structured qualitative interviews. These were conducted concurrently with securing the quantitative data.

Qualitative approaches are often best suited to problems within legal systems as they assist in gaining insight and knowledge of patterns that can only be uncovered by in-depth qualitative methods Webley (2010, p.948). The rationale for selecting this method was to uncover the underpinning factors of why prosecutions and convictions are taking place. Seven expert interviews^{iv} took place between 2 February 2015 and 20 March 2015 with immigration and criminal justice professionals in Scotland. Four in-depth interviews were conducted with professionals in Scotland working in the field of immigration and asylum: an advocate specialising in immigration matters, a service manager from Scottish Refugee Council, a solicitor practising in asylum law, and a Chief Immigration Officer from the Home Office. The remaining three interviews involved professionals working in the criminal justice system in Scotland: an official working for the Scottish Criminal Cases Review Commission, a criminal defence solicitor and an Inspector from Police Scotland Border Command.

Purposeful sampling (Patton, 2002, p.45) was used to identify the particular respondents. Some respondents were known to me in my professional role at the Scottish Refugee Council and recruited directly. Other interviewees were identified by contacting the relevant bodies or through personal contacts in the organisations.

Chapter 5 - Methodology

Prior to each interview, the research information sheet and consent form was sent, included as appendix 2, and I spoke to the interviewees by telephone (6) or by email (1) to further clarify the purpose of the study and interview. All seven interviews were conducted face-to-face. An interview schedule was developed to structure the interviews and to provide for continuity in the questions posed.

Interviewees were handed a printed copy of the information sheet and consent form at the beginning of the interview and were assured of anonymity in the study. All the interviews were digitally recorded with the approval of each respondent and transcribed. Interviewees were sent a copy of their interview transcript and the opportunity to amend or ask for information not to be used.

Marshall and Rossman's (2010) six stages of thematic content analysis were used to analyse the data. The transcriptions were organised and themes and categories developed. The transcriptions were then manually coded. The data was subsequently reassessed to test the evolving themes and understanding and seek different accounts of the data. Finally, the analysis of the data was written up.

Issues such as interviewees' memory; positive presentation of their work and their organisation's work; and knowledge are potential factors that impact on the reliability of the findings.

5.3 Documentary data

The qualitative interviews were complemented by documentary data. These included: Home Office guidance on the application of s31 IAA 1999; prosecution guidance from the CPS, reports from the Independent Chief Inspector of Borders and Immigration and websites of Police Scotland and UKVI.

Case law on Art. 31 (1) and reported cases in Scotland of document offences were also included. Westlaw and Lexis Nexis databases were used to identify reported cases where there was reference to Art. 31 (1) or s31 in Scotland or false document offences. Three relevant cases were selected. Analysis of documentary material was incorporated into the analysis process used for the qualitative interviews. The qualitative results cannot claim to be devoid of objectivity. However, the steps taken in the research design in particular the use of material from different sources minimise concerns.

The research proposal was examined by the Ethics Committee of Glasgow Caledonian University approval was granted.

Chapter 6 - The extent of convictions of refugees in Scotland for illegal entry or stay

This chapter presents and analyses the statistical data sources to assess conviction rates for offences benefitting from Art. 31 (1) in Scotland before analysing qualitative data to consider the extent to which these convictions may have involved refugees.

6.1 Convictions for offences listed under s31 IAA 1999 and s2 and s35 AITCA 2004 in Scotland 2006-2014

Statistics were requested from the Scottish Government’s Justice Analytical Services Division for prosecution and conviction rates for offences benefitting from the statutory defence at s31 IAA 1999 and offences at s2 and s35 AITCA 2004. Conviction rates are presented in Figure 1.

The data indicates that between the period 2006-2014, there were at least 266 convictions for illegal entry or stay offences in Scotland benefitting in theory from the protection afforded by Art. 31 (1).

The data is highly problematic for a number of reasons. Firstly, it is impossible to disaggregate the data by nationality or location. This would assist in ascertaining if the offences took place and were proceeded against at ports of entry and to exclude UK and EU citizens who would not benefit from the s31 defence. Secondly, this figure does not include all offences which would benefit from the defence so there is under reporting. Thirdly, the data relates to the main offence and does not count ancillary offences. Fourthly, the data period does not include offences that occurred prior to 2006.

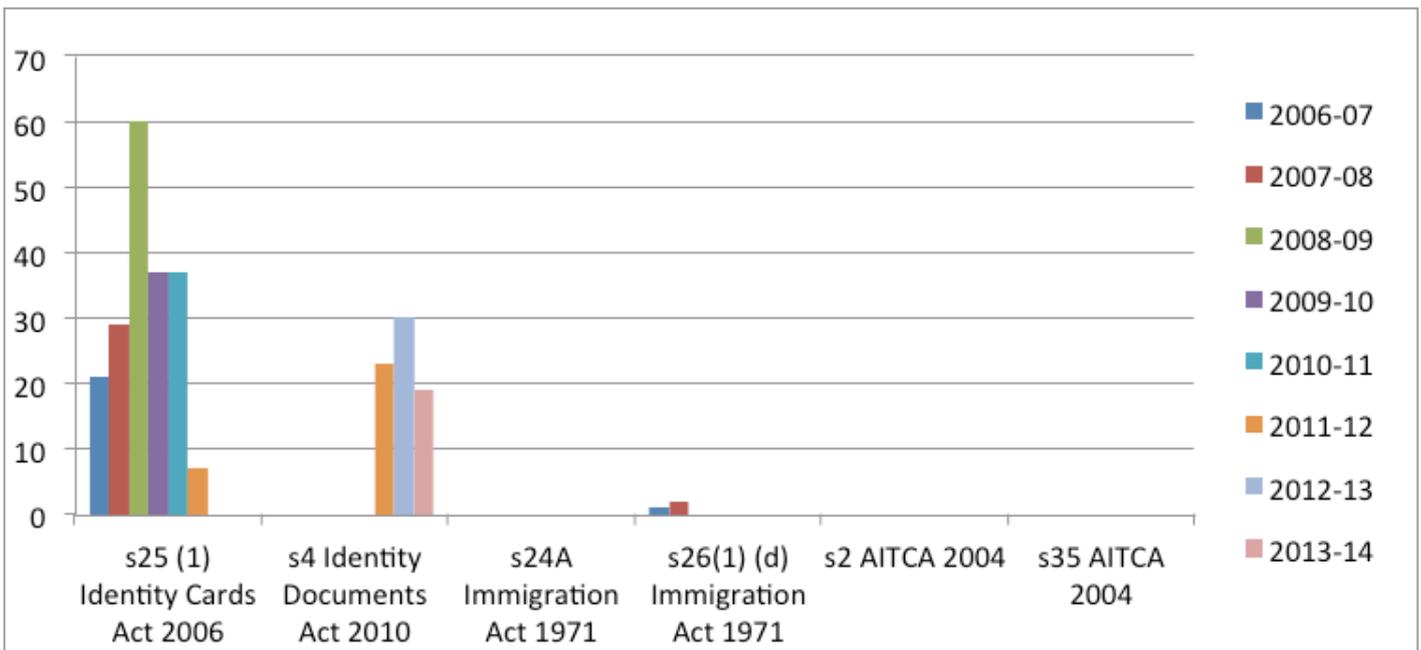


Figure 1 - Convictions for offences listed under s31 IAA1999 & s2 & s35 AITCA 2004

Chapter 6 - The extent of convictions of refugees in Scotland for illegal entry or stay

Notwithstanding these concerns, some conclusions from this data can be drawn. Firstly, convictions are taking place in Scotland for offences where the statutory defence under s31 may apply. Secondly, the number of convictions for these offences represents a small proportion of the total number of convictions in Scotland. For example, in 2009/2010 137,000 people were processed through the criminal courts - 88% (121,000) of whom were handed a sentence (Audit Scotland, 2011). Thirdly, the majority of reported convictions (263) occur for offences cited in non-immigration legislation, the ICA 2006 or IDA 2010, with offences under immigration acts accounting for a very small proportion of convictions (3).

In particular, it is of interest to note that there are no recorded convictions for offences at s2 and s35 AITCA 2004. Information notices warning of the offence under s2 are displayed prominently at the border control areas of Scottish airports. The lack of prosecutions and convictions is in stark contrast to England where there were 1,626 convictions of this offence in the Magistrate's Courts and 142 in the Crown Courts in England and Wales between 2005 and 2013 (Home Office, 2015). This finding lends weight to Aliverti's thesis that criminal offences in immigration legislation are rarely prosecuted indeed in relation to s2 and s35 AITCA 2004, not at all.

6.2 Convictions for fraud-related offences from four Procurator Fiscal locations 2009-2014

Figures 2-4 present data received from COPFS for the number of convictions for fraud-related offences between 2009 and 2014 in Procurator Fiscal locations serving four key entry points into Scotland: Paisley (Glasgow Airport), Stranraer (Loch Ryan and Cairnryan ferry terminals), Aberdeen (Aberdeen Airport) and Edinburgh (Edinburgh Airport).

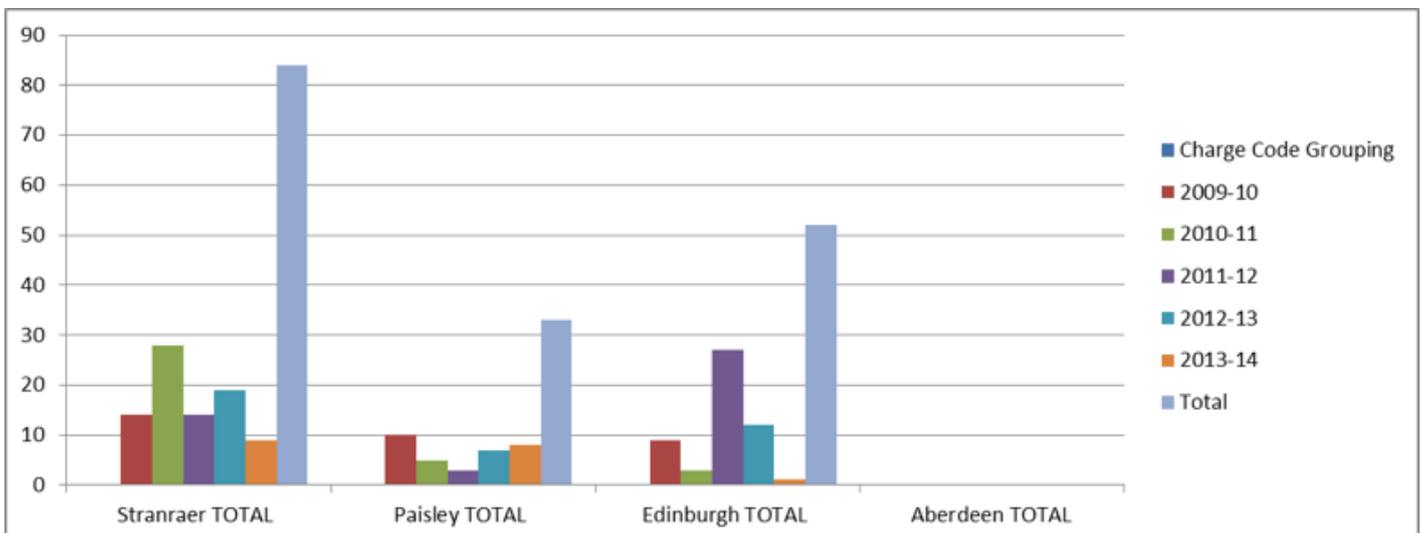


Figure 2 - Convictions at four Procurator Fiscal sites for offences under s31 IAA 1999

Figure 2 shows the total number of convictions for offences in these locations where the statutory defence at s31 IAA 1999 is relevant. Between 2009-2014, there have been a total of 169 convictions for offences where there is a statutory defence under s31 (Figure 2). Of these, the majority have taken place in Stranraer (84), followed by Edinburgh (52), then Paisley (33). No convictions have occurred in Aberdeen (data for Aberdeen is limited to the period 2011-2014). As shown in Figure 3, all of the offences at ports relate to document offences under the ICA 2006 and IDA 2010. There are no convictions for offences set out in immigration legislation that benefit from the s.31 defence.

The data does highlight in Figure 4 that there have been 35 convictions for the offence at s24 IA 1971 (1) (a) of entering without leave in the period 2009-2014. This offence alone does not attract the s.31 defence. However it is important to note that all of these immigration convictions have taken place in Stranraer with no convictions recorded at the airports (Glasgow, Edinburgh, or Aberdeen).

The overall limitation of this data is that it is not disaggregated by nationality similar to data from the Scottish Government. This makes it impossible to infer whether a s31 defence may have been relevant. The data demonstrates the conviction rate of offences where s31 may apply, but does not allow for consideration whether those convicted were refugees or were seeking asylum.

Nevertheless, these data issues and the absence of publicly available data in Scotland in relation to immigration crimes are a valuable finding in themselves, indicating that scrutiny of the application of Art. 31 (1) has not been an issue of concern in Scotland, echoing findings by Aliverti regarding overall immigration crimes in England (Aliverti, 2013b).

Chapter 6 - The extent of convictions of refugees in Scotland for illegal entry or stay

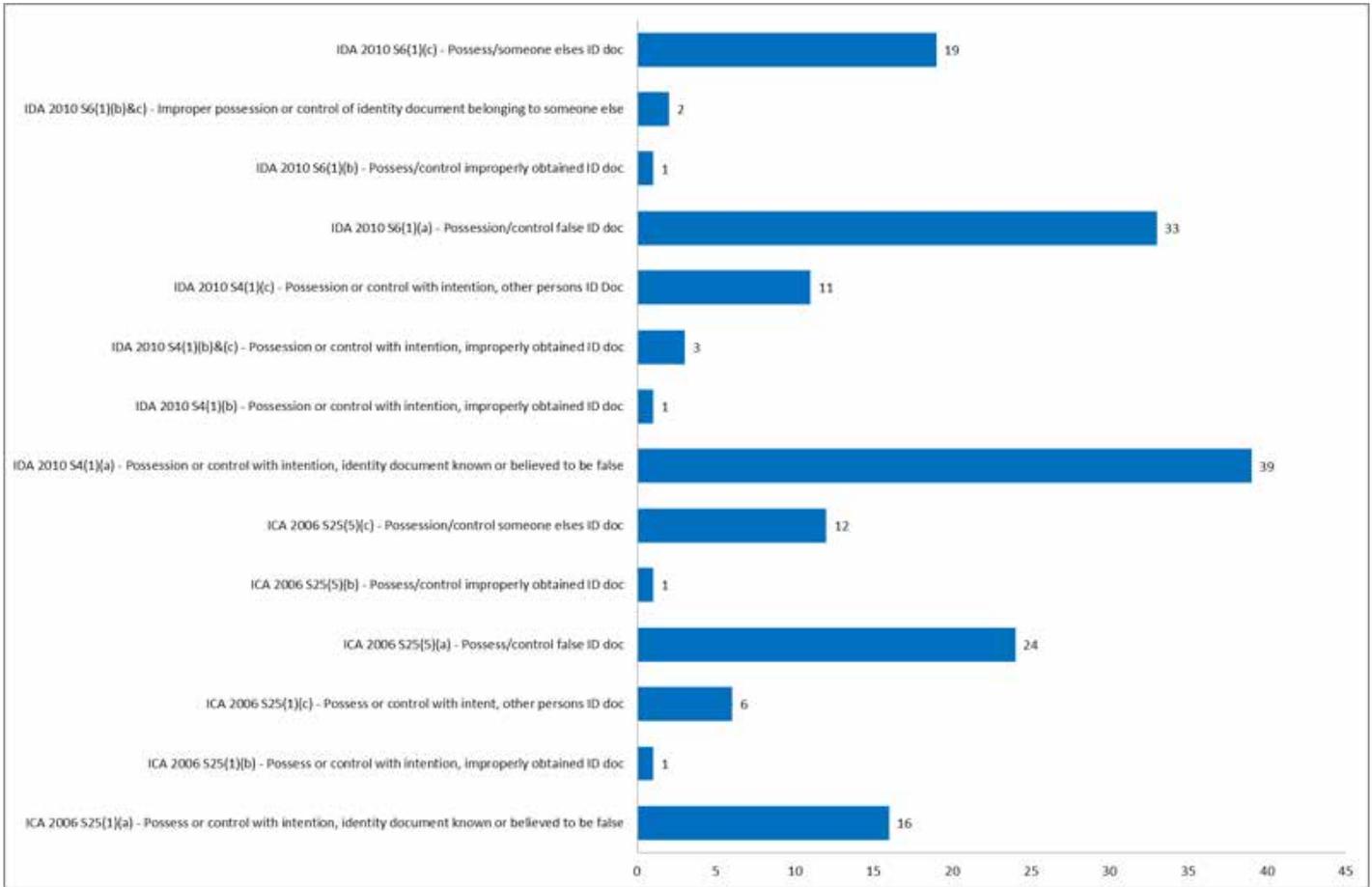


Figure 3 - Convictions at four Procurator Fiscal sites for offences under s31 IAA 1999 by offence

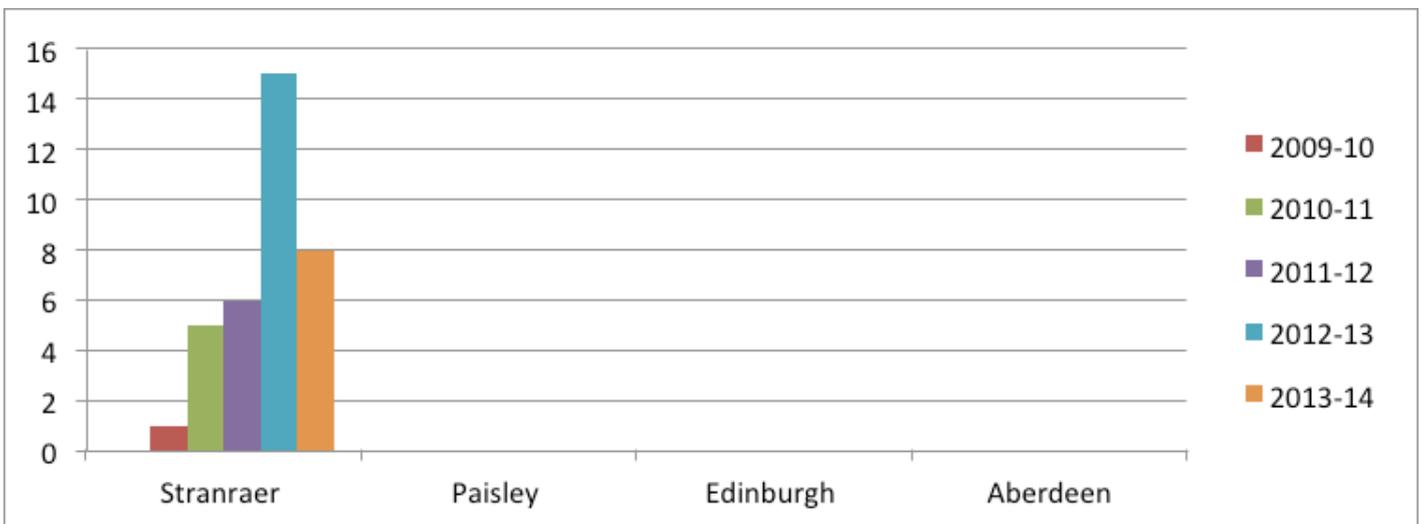


Figure 4 - Convictions under Immigration Act 1971 s24 (1) (a) - Entering the UK without leave to do so at four Procurator Fiscal sites

Chapter 6 - The extent of convictions of refugees in Scotland for illegal entry or stay

6.3 Qualitative perspectives on the extent of asylum seekers being the subject of prosecutions

Respondents were asked for their perspective on the scale of prosecutions for document offences to breach immigration controls in Scotland and the extent to which those offenders claimed asylum or claimed asylum at a later stage and would benefit from the s31 defence. Respondents also gave perspectives on the extent of the issue compared to the rest of the UK.

One respondent stated that:

"I think it's more likely to be more prevalent in England because of the routes, the airlines that travel direct into the big airports and the feeder countries that, you know, that they are receiving passengers from" (Respondent 7).

Scotland is not the first entry point to the UK for most people seeking asylum and thus it is likely that the number of cases of asylum seekers will overall be fewer.

Home Office data related to asylum applications made at ports or in-country in Scotland is not available (Border Force, 2012), however this is anticipated to be low as the majority of asylum seekers in Scotland will have applied at ports in England or at the Asylum Screening Unit in Croydon and will then be sent to Scotland.

One respondent gave a perspective on the extent of convictions involving refugees, stating that:

"I am aware of there being a reported case which was somebody arriving at Prestwick Airport. It's the only other case of any significance in Scotland. I have seen people who were carrying the adverse weight of a conviction who had entered through Aberdeen and I've seen somebody from Lerwick. Since becoming involved and talking about this, I have been told there are people who have been prosecuted and convicted who entered at Glasgow Airport and Edinburgh Airport" (Respondent 1).

Despite statistical sources suggesting that there have been no convictions in Aberdeen, the respondent here suggests otherwise. The extract also alludes to the fact that there are other cases at entry points to Scotland, namely Prestwick Airport and Shetland. The respondent also indicates that asylum seekers are being criminalised, explaining but this only comes to light when they have been prosecuted and are involved in deportation proceedings.

Another respondent highlights the fact that those prosecuted for document offences at port, in this case Stranraer, will not necessarily have a protection claim:

"You get people who've been overstayers, and they've had a visa and they've not left the country when required to do so. They're not going to be able to avail themselves of the defence. I would say a large proportion of the immigration offences coming through Stranraer will be people in that situation" (Respondent 3).

This respondent further discussed one case of an individual who claimed asylum but continued to be proceeded against, until the prosecution was suspended. He was subsequently recognised as a refugee.

Another respondent suggested that the population of offenders would include those proceeded against for using fraudulent documentation to seek employment:

"I think that use of forged and counterfeit documents to gain employment once people are here, is commonplace" (Respondent 7).

These offences, as the respondent states, will take place 'in-country' where the offender will not in these circumstances benefit from the s31 defence if the offence is committed after the claim for asylum'. However, it is impossible to qualify the respondent's statement with the available statistical sources.

The only two reported criminal cases concerning possession of false passports in Scotland refer to appeals to reduce the sentences of two individuals convicted for false document offences who were arrested in the community. *Alili (Elyes) v HM Advocate* [2008] HCJ 3 concerns an Algerian who was arrested in Edinburgh by the police and immigration fourteen months after entering the UK and who had in his possession a false French identity card. He pled guilty and was sentenced to four years. The High Court case was his appeal for a reduction in his sentence of imprisonment to one year and for the recommendation from the Sheriff for deportation. His appeal was allowed. The reason for him entering the UK was reported as seeking employment and no reference was made to any asylum claim.

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The second case, *Kunle (John Bamtefa) v HM* [2007] HCJAC 41, concerns a Nigerian national apprehended, not at a port, but, at a railway station in Aberdeen for possession of a false document. He admitted to entering the UK on a different false passport which he had to give back but was then supplied with another false passport he had in his possession when he was arrested. The case concerned an appeal against the Sheriff taking into consideration the offence of entering on a false passport in his sentencing when this was not the offence to which the accused was charged. One of the mitigating factors and the only documented reason for the individual being in Scotland put forward by the defence was the individuals' circumstances, stating that he "had fled Nigeria in fear of his life in a family dispute". However, no reference is made to any asylum claim or to the immigration authorities.

Refugees wrongly convicted without regard to s31 have recourse to the CCRC in England, Wales and Northern Ireland and the SCCRC in Scotland. Communication with the CCRC reveals since 2011 they have referred 19 cases to the Court of Appeal with convictions quashed in all but one of the cases. Thirty cases are currently under review, with another 32 referrals awaiting review. The Commission is averaging two to three referrals a month (Hawkins, 2015).

In relation to Scotland, the respondent from the SCCRC noted that:

"I think we've only had four cases that concern the 2010 or 2006 Acts in total. I have tried my best to get statistics and I'm going to give a health warning on this, because the way in which we categorise our cases means I have to be reliant on the memories of other legal officers".

The respondent went on to state that these applications were made by refugees themselves and have not been unsuccessful. Some conclusions can be drawn from this data albeit limited.

The numbers of applications to the SCCRC are significantly lower than in England and Art. 31 (1) has not been a particular area of focus for the SCCRC. This may indicate that wrongful convictions have not occurred in Scotland equally it could suggest a lack of awareness of the defence in Scotland. This is explored in the following chapters.

In short, the interview data suggests that a proportion of those convicted for offences related to their illegal entry or stay claimed asylum. However, the size of this population is unknown.

6.4 Chapter conclusion

This chapter has shown that according to Scottish Government data between 2006-2014, there have been at least 266 convictions in Scotland for offences where there is a statutory defence against prosecution. According to data from COPFS, 169 convictions have taken place in Stranraer, Paisley and Edinburgh. The majority of convictions, 84, have occurred in Stranraer. Both data sets show that the greatest numbers of convictions are for document-related offences rather than offences under immigration legislation.

There have been no convictions under immigration legislation in Paisley, Edinburgh and Aberdeen between 2009-2014 and there have been no convictions in Scotland since 2006 for offences at s2 and s35 of the AITCA. This supports the thesis that crimes in immigration legislation are rarely prosecuted, indeed, according to the data, very rarely in Scotland.

It is not possible from the statistical data to ascertain whether these offences were committed by refugees or people who claimed asylum at port or at a later date. Interview data would suggest that there are cases in Scotland where asylum seekers have been prosecuted and convicted. The extent of this is, however, not known. What is clear though, is that the absence of available statistical data demonstrates a lack of concern to the possibility that refugees in Scotland are being wrongly convicted.

Chapter 7 - Decisions to criminalise refugees for illegal entry or stay

This chapter addresses the actors and decision-making processes involved in instigating prosecutions for document offences related to illegal entry or stay in Scotland.

Who encounters document offenders?
How do they decide to prosecute or not prosecute?
Is consideration given to s31 of the IAA 1999?
Who reports the prosecution to COPFS?

This chapter presents and analyses the responses to these specific questions in relation to the research question.

7.1 Sites and actors in Scotland involved in arrests and reports to COPFS for offences related to illegal entry or stay

Refugees and those seeking asylum that fall within the protection of Art. 31 (1) arriving or seeking to transit through a Scottish port may encounter an immigration officer working for the UK Border Force (UKBF), the law enforcement division of the UK Government's Home Office, operating under immigration powers or powers to stop, detain, search and question under Schedule 7 to the Terrorism Act 2000. Equally, they may be detected by a police officer working for Border Policing Command, part of the Specialist Crime Division of Police Scotland operating under policing or Sch.7 powers.

Ports of entry to Scotland may be classified as designated ports under the Immigration Act 1971, such as Glasgow or Edinburgh International airports, or as domestic, 'in-country' ports which are part of the Common Travel Area (CTA)^{vi}, such as Cairnryan or Loch Ryan seaports in Dumfries and Galloway. In addition, individuals possessing false documents who are already in Scotland may fall within the ambit of s31 after having been arrested by a police officer or immigration officer for an immigration-related offence or non-immigration related offence. After a decision is made to arrest an individual, then the reporting agency to COPFS may be one of the Criminal and Financial Investigations Unit of the Home Office, Police Scotland or the National Crime Agency (Respondent 4; Respondent 7). Consequently, there is a nexus of actors, locations and powers involved in the initial engagement of those who may benefit from the s31 defence and the decision to prosecute.

The following sections seek to unravel these complexities. The first section analyses arrivals then transit through designated ports in Scotland. The next section examines 'in-country' encounters: Scottish ports in the Common Travel Area, focusing on Stranraer; and enforcement activities in Scotland.

7.2 Decision-making and actors at designated ports in Scotland

7.2.1 Arrival and the decision to employ administrative or criminal powers

At designated ports, those arriving in possession of false documents will encounter immigration officers of the Border Force. An individual stopped at the border without leave to enter or, entering by deception, may be detained and dealt with under administrative powers or be charged with a criminal offence.

One interviewee describes how administrative powers of removal are used for an individual stopped and in the possession of a false identity document:

"... so it would be referred by the Border Force officer to the Border Force higher officer, and they would authorise the refusal to enter and the removal. That would be done as soon as practical, so either the same day or if they need to be detained overnight, then the next available flight basically" (Respondent 7).

As pointed out by this respondent, refusing entry and administratively returning the individual to their country of origin or a third country can be processed very swiftly. Two of the respondents provided scenarios where the criminal route would be used for false document offenders:

"...if this was the fifth attempt you'd made coming into the UK and the last time it was a French, German, British passport, now it's an Italian card you've got, you're classed that you need to be dealt with" (Respondent 4).

"I think if Border Force are of the opinion, that if they take the decision, basically, that there is an administrative option that's going to lead to removal within a reasonable timescale, that's probably the route that they would go down, unless it's linked to more serious criminality" (Respondent 7).

These extracts indicate that the decision to use criminal law may be deployed to penalise recurring offenders, potentially if removal may be challenging or if the offence is linked to more serious criminal activity such as facilitation or trafficking. There is a degree of flexibility around how such decisions are made.

In a recent inspection into how UKBA and UKBF handle immigration and customs offences at the port of Dover and Manchester and Heathrow Airports, the Independent Chief Inspector of Borders and Immigration found that in comparison to customs offences, there was far greater discretion used by UKBF officers in deciding when to refer immigration offenders for criminal investigation (Independent Chief Inspector of Borders and Immigration, 2013).

Chapter 7 - Decisions to criminalise refugees for illegal entry or stay

In addition to this discretion there is also a lack of transparency evidenced by the fact that the referral criteria used by UKBF officers, the Standard Acceptance Criteria, April 2009, is not publicly available.

The data gathered in this area for this study is too limited to draw substantive conclusions in relation to the circumstances where Border Force staff in Scotland would decide to pursue a criminal conviction for an immigration offender. Nevertheless, what can be concluded is that there is opaqueness in decision-making substantiated by the lack of available published data found in the previous chapter.

And, as the previous chapter also demonstrates when the decision is made to criminalise rather than use administrative powers, offenders will be charged with document offences.

7.2.2 Knowledge of the s31 amongst Border Force staff in Scotland

Questioning of interviewees sought to establish if a claim for asylum made at the border had any impact on the decision to proceed with a prosecution to assess whether consideration is given to the statutory defences under s31 IAA 1999 or s2 AITCA 2004.

Home Office Guidance on s31 provides the process for how such cases should be considered in Scotland (Home Office, 2014). However this guidance is produced for Criminal and Financial Investigations officials to follow after a referral is made to them from UKBF staff at the border. The Home Office respondent remarked that since the creation of the Home Office CFI Team in Glasgow in 2008 there had been very few referrals from airports and none related to the application of s31. He stated further that document offenders have been processed by the police instead of by Home Office investigators.

The primary purpose of the team made up of immigration investigators and seconded police officers is to investigate organised immigration crime, such as individuals facilitating illegal entry. The respondent suggested in most instances the team would only receive a referral if the individual was potentially linked to more serious organised crime.

In terms of knowledge of s31 amongst UKBF staff the respondent stated that:

“Our people [immigration crime investigators] are aware of it [s31 defence], because if they go out of the office to deal with anything with Border Force, it’s something that we drill into them, that they need to consider this and it has to be among the considerations before we will take something on”.

The respondent from Police Scotland stated their involvement in cases in relation to document fraud cases at one particular airport and relationships with UKBF staff:

“If someone came down there and said there’s a young lady coming through, our experts had a look at it but they’re seeking asylum, I’d say there’s no real point in doing anything here. What’s the point in putting someone to court for that, so we’d have that debate around what was happening. I said, surely you’re going to go through the process of X seeking asylum. If she’s said to you now [she is claiming asylum] there’s no point in a criminal case going in. If we knew that, there’s no point in progressing to stage two. We would ask them to deal with the asylum side of business. If anything else came up from that, we’d look at it so if someone did declare there was asylum being sought, there’s a process to go down for that. I’m not sure of the paperwork they do for that but there’s a process; they deal with it”.

This would suggest that the decision-making in relation to an asylum seeker with false documentation at this location has been a negotiation between UKBF staff and police officers. The extract also identifies a clear distinction in responsibilities to dealing with asylum applicants with false documentation: Police Scotland will be responsible for proceeding with prosecutions for document offences; the UKBF will deal with the asylum application.

This respondent went on to say that they were unaware of any occasion when a prosecution proceeded at one of the airports at the same time as the individual had claimed asylum. Nevertheless, it is clear from the data that there have been a number of prosecutions for document offences at Glasgow and Edinburgh airports and data from other respondents suggest cases of asylum seekers in deportation hearings who had been criminalised for document offences at Scottish designated ports. It is unclear whether these individuals claimed asylum at the same time as being criminalised or at a later stage. As such, it is difficult to draw any firm conclusions on the awareness of the s31 defence amongst UKBF staff and whether this, to answer the research question, has led to prosecutions of document offenders who also claimed asylum at designated ports in Scotland.

Chapter 7 - Decisions to criminalise refugees for illegal entry or stay

7.2.3 Processing criminal cases of document offenders

The data shows that the police have been primarily responsible for processing the majority of offences at Scottish airports until recently:

"I think over the past five years, any referrals for criminal investigations involving document fraud have gone to Police Scotland. Certainly Edinburgh Airport, don't know about Glasgow, but I know that has happened at Edinburgh Airport on a regular basis" (Respondent 7).

As is clear, this function has not been handled by the Home Office criminal investigators who are the only agency in Scotland to have specific guidance on Art. 31 (1). The role of the police in processing these offences was described as being "just a middle man" (Respondent 4); by taking the information provided by UKBF, writing the report for the prosecution, arresting and detaining the offender. This role was not always welcome, as intimated by the Police Scotland respondent who was previously involved in processing such cases:

"We always felt it was wrong, we shouldn't be doing it because we had no involvement. It gave us a lot of additional work for no reason because we then get cited to court because we wrote the case, got the statements and we transported the prisoner who didn't say anything to us because he didn't speak English"

While there was initial contact with UKBF in relation to the initial decision to criminalise, the data suggests that as the police process the criminal cases there is then limited contact between them in relation to the immigration aspects of the case. One example cited concerned an individual who was arrested for document offences processed by the police and when in custody claimed asylum. The Police Scotland respondent stated it would be the responsibility of the Home Office to inform the court, not the police. The data explains that when a decision is made to use criminal law then the case is processed by the police in a routine and regular manner with a clear distinction drawn between the immigration and policing. This is also highlighted by the number of prosecutions for identity document offences at airports rather than offences in immigration law.

This was suggested by a respondent as one of several reasons, alongside the fact that there are no on-site Home Office criminal investigators at airports in Scotland, why there have been no prosecutions of the offence at s4 AITCA 2004 of failing to produce a passport at an asylum interview:

"Given that Border Force have been referring cases to the police service and I think the police have been happy to pick it up because the Identity Documents Act and previous ID Cards Act are relatively simple

offences to prove, so there's not a great deal of investigative effort required by the police picking them up, so they're happy to do them, or were. Section 2 is within the 2004 Act, I don't think they're probably even aware of it and as soon as anything mentions immigration within legislation, I think they tend not to want to have to deal with it" (Respondent 7).

Thus, the fact that responsibility has fallen to the police to process cases and the ease with which document offences can be investigated compared to crimes in immigration law is a key finding to explain why such crimes have not been proceeded at Scottish airports.

The role of the police to investigate and process document offences appears to have changed.

One respondent stated that since the inception of Police Scotland, Border Policing Command and the National Crime Agency (NCA) the role of writing cases for UKBF at has now passed to the NCA. However, the Home Office investigator stated that:

"there's a clear referral process for cases coming to us, so in theory now, we can start to pick up cases that in the past, the police have picked up".

This confusion also extended to dealing with offences related to transiting the UK. As case law in England has identified (*R v Mateta & Ors* [2013] EWCA Crim 1372), refugees have been wrongly convicted for document offences when transiting the UK for destinations including Canada. This phenomenon is also happening in Scotland as one respondent observed:

"There is a route just now that's proven people are transiting from the UK to Canada and using airports such as Manchester and Glasgow for whatever reason and they are using fraudulent/stolen documents" (Respondent 4).

Through the interviews there was some ambiguity about responsibility amongst the respondents for dealing with these particular offences as they took place landside as opposed to airside at airports.

What is clear is that for the NCA and Home Office CFI, low-level offenders are not a priority in their work with both agencies focussed on organised immigration crime, trafficking, facilitation and drugs importing (National Crime Agency, 2014). Whilst in theory the Home Office CFI would deal with such prosecutions and guidance is in place, it is less clear how the NCA is dealing with cases and whether there is any consideration of the s31 defence.

Chapter 7 - Decisions to criminalise refugees for illegal entry or stay

7.3 Decision-making and actors 'in-country'

7.3.1 Non-designated ports – Stranraer

There are many ports and small airports in Scotland which do not have a UKBF presence. A refugee or asylum-seeker arriving or transiting through these ports is unlikely to encounter an immigration officer. Responsibility in these locations falls to Police Scotland Border Command. For the most part this involves intelligence gathering and visits (Respondent 4), however Border Policing Command has a permanent presence in the two adjacent ferry ports on Loch Ryan policing ferry arrivals and departures to Northern Ireland (Police Scotland, no date).

The primary purpose of Border Policing Command is to keep:

“people safe at Scotland’s airports, ferry and seaports by countering the threat from international and domestic terrorism and the exploitation of borders and ports from serious and organised crime which can involve human trafficking, drugs and weapons within the port environment” (Police Scotland, no date).

The Home Office no longer has a presence in Stranraer and instead has officers located in Belfast (Independent Chief Inspector of Borders and Immigration, 2011).

As the quantitative data identifies, Stranraer is a location where arrests and prosecutions have occurred for offences where there is a defence at s31.

7.3.2 Dealing with immigration offenders in Stranraer

One respondent describes how officers deal with people with false passports at Loch Ryan and Cairnryan ports:

“Anyone who travels between Ireland and Scotland can expect the occasional random questioning. The police stopped him and said, “You look a bit foreign, can we see your passport?” so he produces his stolen French passport contrary to Section 4 of the Identity Documents Act 2010, an offence that carries a maximum prison sentence of ten years.

They say to him,

“This doesn’t look like you; the man in the passport looks different from you. Are you really he?” and he says, “Yes.” That’s perversion of the course of justice. Then they say to him, “Here’s a landing card for you to fill in,” and he fills it in with the details from the stolen French passport. That’s an offence under the Terrorism Act 2000 (Respondent 1).

Police Scotland’s main goal supported by powers to stop and search under the Terrorism Act 2000 is related to serious crime and terrorism control rather than immigration control.

Yet, as one respondent recognises they are just as responsible to ensure that refugees are not wrongly penalised for illegal entry:

“If that’s the first contact that they’ve had with a UK official, it doesn’t really matter that it’s a police officer, it’s their first contact with someone officially in the UK” (Respondent 7).

For offenders apprehended in Stranraer, the data suggests that the police take primary responsibility to investigate these types of criminal offences. As the Home Office respondent observes:

“I would say that there’s a regular stream of referrals from Stranraer, from Police Scotland to our document expert, so we’re not investigating the criminal case, but we have a document expert who examines documents and gives expert evidence in court just regarding the fact that it’s forged documents, counterfeit for reasons one, two, three, four, or whatever it is”.

As described here, the task of the Home Office has been to support criminal investigations through providing expertise in relation to fraudulent documents rather than to take the lead in the investigation. The Home Office also has a role in providing information concerning the immigration status of the offender. Police contact in Stranraer with the Home Office in relation to this function has been documented previously as problematic.

In 2010 the Independent Chief Inspector of Borders and Immigration conducted an inspection into abuse of the Common Travel Area (Independent Chief Inspector of Borders and Immigration, 2011). The report found that in seven cases, immigration status checks received from the Home Office were incorrect and that there was the potential for wrongful convictions.

Data from several of the interviews would suggest that all of the individuals who are stopped for document offences in Stranraer are proceeded against and are typically charged with similar identity document offences, the offence of entering the UK without leave to do so and charges under the Terrorism Act 2000, suggesting a regular pattern of practice.

There is no data publicly available on the number of asylum applications made at points of entry in Scotland (Border Force, 2012), so it is difficult to draw concrete conclusions. Nonetheless, in at least one case known to the researcher, the individual requested asylum at port after he was stopped for false documentation and the prosecution continued. Data from other respondents would suggest that a request for asylum made at the port will not impact on the decision to detain and prosecute.

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7.3.3 Awareness of Article 31 (1) by Police Scotland

Respondents were queried about Police Scotland's awareness of the s31 defence. One respondent with many years' experience of working for the police at Scottish airports said that:

"Prior to reading this [research information sheet], no. Didn't know it existed and I pride myself in knowing most things about it but didn't know there was a statutory defence for people of a certain status and for certain offences to have that defence" (Respondent 4).

Another respondent similarly indicated that there was unlikely to be awareness amongst Police Scotland Border Command and remarked that there was greater likelihood of prosecutions in cases dealt with by police officers. The statistical data evidencing that prosecutions in Scotland are more likely to occur in Stranraer, and the lack of any available guidance for the police or prosecutors would suggest that there is very little awareness that identify document offenders may be refugees and have a statutory defence against prosecution.

Whilst the focus here is on Stranraer, prosecutions of asylum seekers for identity document offences also take place 'in-country' as well as at ports. One respondent highlighted that although the likelihood of the defence being applicable in these circumstances was less as the offences related to illegal working, greater police involvement in these cases coupled with a lack of knowledge about immigration by police officers, posed a significant risk to individuals being convicted without due regard to Art. 31 (1).

7.4 Chapter conclusion

This chapter finds that there are different actors in place at different points of entry to Scotland. At international borders, it is unclear how UKBF make decisions to proceed with the criminal process to deal with document offenders and whether the impact of an asylum claim has any impact. The data shows that prosecutions for identity document offences are taking place at Glasgow and Edinburgh airports however it is unclear if consideration is given to s31 in these instances. Writing a case used to fall to Police Scotland who would take forward the cases in a routine manner.

Whilst Home Office Criminal Investigations are tasked with dealing with and have guidance in place for s31, referrals to this off-site team have been minimal. It is unclear how NCA are proceeding with such cases. However, this is not the primary focus of these agencies that are focussing on organised crime.

In Stranraer, where there have been the greatest number of cases of identity document offences, the police are processing these cases in a routine and systematic way.

With a lack of knowledge of the defence, primacy is given to the criminal process, with no consideration that the individual may or may not be seeking protection. The impact of this is that refugees entering the county are being criminalised without regard to the protection offered by Art. 31 (1).

Chapter 8 - Prosecutions and Convictions of refugees for illegal entry or stay

This chapter shifts attention to the prosecution process and presents and analyses the data in activity before and during Sheriff Court proceedings. It examines in turn the awareness and role of criminal defence solicitors, prosecutors and sheriffs in court proceedings.

8.1 Criminal defence solicitors

8.1.1 Awareness of the defence amongst criminal defence solicitors

In Scotland, an individual arrested for illegal entry will be represented by a publicly funded criminal defence solicitor on a duty rota scheme rather than an immigration solicitor (Respondents, 1, 3, 4 and 5). Similarly, to other professionals highlighted in the previous chapter, several respondents noted a lack of awareness amongst criminal defence solicitors of the availability of a statutory defence for offences of illegal entry or stay:

“The advising criminal solicitor simply wasn’t aware. Criminal solicitors just don’t know about this, even now” (Respondent 1).

“None of my colleagues in the local faculty have ever tried to use the defence. I wouldn’t... I don’t imagine that they know that it exists” (Respondent 3).

Section 31 is constructed as a statutory defence, not as immunity from prosecution as such it is incumbent on the refugee and solicitor to raise the defence.

As Stoyanova (2012) notes:

“The triggering of Article 31’s application depends on the initiation by the defendant / asylum-seeker’s legal advisor. If the legal advisor does not raise the issue, it is as if the issue does not exist”.

The lack of awareness by Scottish criminal defence solicitors in effect means that those charged with document offences in Scotland may be convicted, fined or imprisoned for offences for which they have a statutory defence against conviction.

Respondents offered several reasons for the lack of awareness, many of which are encapsulated within the following answer from this solicitor, primarily practising in immigration law:

Interviewer: In terms of Article 31, do you think there’s awareness of it within the legal community in Scotland?

Respondent: I’m not so sure about that. In my experience, we haven’t seen people being prosecuted for this type of offence. I would doubt it. I can’t tell you that for sure, but I would doubt it because the defence, just like in cases of trafficking, doesn’t come from the criminal legislation. It comes from humanitarian law or human rights law or other directives that have been signed up and I don’t think criminal defence solicitors will be up to speed on that type of thing, particularly if they’re not seeing it frequently or regularly. I would doubt it (Respondent 5).

Firstly, it is suggested that the lack of familiarity with statutory defences amongst criminal defence solicitors is attributed in part to the infrequent nature of these document offence cases in Scotland, a reasoning supported by the quantitative data. Secondly, a critical aspect which this respondent and other respondents point to is the compartmentalised nature of solicitors’ practice in Scotland. The fact that the right not to be penalised is derived from international human rights law and enacted as statutory defences in UK immigration legislation means that a solicitor practising in the field of criminal defence in Scotland will not be familiar with these provisions and therefore unable to advise clients of the s31 statutory defence against prosecution.

If the individual claims asylum and secures an immigration solicitor this will be after they have been convicted and are in prison, or in immigration detention. However whilst a solicitor practising in immigration or asylum law is likely to be more familiar with the Refugee Convention and Art. 31 (1), the criminal case will not be their primary focus, but instead attention will be placed on the substantive aspects of the asylum case.

As one respondent practising in immigration law notes:

“I would hope that they [immigration solicitors] would be more aware of it but things are still siloed. By that point, the immigration lawyer is probably just dealing with the asylum claim and the asylum process and will deal with the impact of the penalty or the prosecution in that rather than trying to join it up. That is the siloing of immigration law, criminal law” (Respondent 5).

“If you’re talking about a very short term custodial sentence or fine, it probably doesn’t impact that much on how you look at someone’s asylum claim. It’s something that happened, done, we’re now looking at this” (Respondent 5).

Chapter 8 - Prosecutions and Convictions of refugees for illegal entry or stay

As this respondent explains when the individual moves from the criminal into the immigration process, the aim for the immigration solicitor will be to dissuade attention from the potential impact that criminalisation has on the credibility of the asylum claim rather than attempting to challenge the grounds of the conviction.

These findings are an important factor in answering the question of why refugees are being convicted in Scotland without due regard to Art. 31 (1): the representatives charged with defending refugees against criminal prosecution in Scotland have no knowledge of the defence available and the representatives involved in asylum cases are unlikely to contest any subsequent conviction. Whilst criminal law has increasingly intersected with immigration law, professional practice has not followed suit.

8.1.2 Advising clients arrested for document offences

The engagement and communication that a criminal defence solicitor has with their client can also be problematic for a number of practical reasons. One respondent who had represented clients facing criminal charges for document offences highlighted the difficulties of communication in an account of first meeting clients:

“Well, what would happen is, they would be taken to court the next day and... it’s the court, I suppose, who says, they’re x, y and z in custody for the duty solicitor, and you’ll go into court, you’ll get the paperwork, and you’ll go and meet with them in custody to have a chat with them about what they’ve been charged with – and you’ll do that with the assistance of an interpreter. It can be very difficult explaining to individuals in that situation that they’ve been charged with offences that could result in up to five years in prison – that’s the sort of maximum sentence for... under solemn procedure – I don’t know if you’re familiar with criminal procedure, you’ve summary cases, which have 12 months’... maximum 12 months’ sentence, and solemn – the sheriff can give maximum five years’ sentence. These cases could come on what’s known as a petition, so that would mean that if it went to trial, it would be a sheriff and jury trial, as opposed to just the sheriff sitting on his own, and... the difficulty with that is, petition procedure, usually what happens is, you don’t make a plea of guilty or not guilty, you make what’s known as no plea, or declaration, and explaining all of that to these individuals is very difficult – they’re terrified. They don’t really see what they’ve done wrong, a lot of them will say, I haven’t assaulted anyone, I haven’t hurt anyone – how can you tell me that I’m possibly facing a period of five years in prison?” (Respondent 3).

As the interviewee describes, a criminal defence solicitor on a duty rota system has limited time in which to explain the complexities of the Scottish criminal justice system and the

potential outcome to a client who may not speak English and who is bewildered and fearful of their situation.

Financial pressures were also cited by respondents as an additional factor:

“The brutal truth is that the business model for the criminal legal aid solicitor is that it is in your interests to get the biggest number of people to plead guilty as quickly as possible and process them like a mill.” (Respondent 1).

Here it is suggested that there is a financial imperative for solicitors to process cases in a routine and bureaucratic way. What emerges through these findings is that there are practical, time and resource barriers to representation in these cases beyond knowledge of the defence and these may play a limiting role in advising clients.

8.1.3 Advising guilty pleas

The impact of a lack of awareness of s31, leads to criminal defence solicitors advising clients to tender a plea:

“They have no understanding or knowledge of this law so, routinely people are advised to plead guilty” (Respondent 1).

Advising a client to plead guilty was the main argument behind the only reported case in Scotland where Art. 31 and s31 were raised. The case, *Mboma v. Watson* [2013] HJAC 13 concerned an individual who had pled guilty after being advised by a duty solicitor in Ayr to do so for entering the UK on a false passport. After serving his sentence, he submitted a bill of suspension to the High Court of Justiciary to withdraw his guilty plea. The case was unsuccessful as the judges were persuaded that the s31 defence was not applicable because the individual had transited briefly in France before arriving in the UK.

In their opinion, he did not fall within the scope of s31 (2) - he was not able to demonstrate that:

“he could not have reasonably expected to be given protection under the Refugee Convention in the country he passed through”.

Analysis of the limitations of the s31 defence, including the requirement of “coming directly” is not within the scope of this study, however one interviewee noted in relation to this case that:

“Appeal courts are always deferential to courts of first instance, for good reasons. The courts of first instance are the ones who have the really difficult job to do and they don’t like to disturb them, undo the first instance decisions unless they absolutely have to. Because there’s no body of case law about this in Scotland, they didn’t feel they absolutely had to” (Respondent 1).

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It is implied here that first instance decisions in the lower courts would unlikely be overturned because of a lack of applicable Scottish case law. The relevance of *Mboma v. Watson* to this study is that there was no suggestion in the case that the criminal defence solicitor was aware of or advised his client of the potential of a s31 defence in the first place.

The respondent who had recently represented a client charged with document offences and raised the s31 suggested that criminal defence solicitors believed they were acting in the best interests of their clients:

“Before I worked at this firm [...] I didn’t know that defence existed, and when you dealt with these people, I suppose there was a mechanism for dealing with them, you would explain to people what they were charged with, and what you would do, thinking that you were doing your best for them, would be to negotiate a plea” (Respondent 3).

Such cases may be infrequent yet there is a sense that a pattern of practice exists in which solicitors are performing their role to what they perceive to be in the best interests of the client by seeking to negotiate down the charges and advise their clients to tender a plea. Data from written proceedings in the Sheriff Court was outside of the scope of the study. Nevertheless, the absence of published written cases and the perspectives of several respondents point to the fact that cases involving document offences have not gone to jury in Scotland in Sheriff Court, substantiating the findings that in illegal entry and document offence cases, solicitors have been routinely advising clients whether they may have an asylum claim or not to tender guilty pleas.

8.2 The Crown Office and Procurator Fiscal Service (COPFS)

Responsibility to prosecute crimes in Scotland lies with the Lord Advocate and the Crown Office and Procurator Fiscal Service (COPFS). Following submission of a report by Police Scotland or another competent agency, a Procurator Fiscal will make a decision in the public interest to proceed with a prosecution (McCallum, 2012).

8.2.1 Awareness of the defence by COPFS

One respondent acknowledging the difficulties facing criminal defence solicitors explained that responsibility should not rest solely with them:

“The prosecutors are in a much better position to be aware of the niceties and nuances of international public law than the kind of High Street, highly harassed, time-short and not very well-paid criminal legal aid solicitor who’s encountering people on a duty scheme” (Respondent 1).

As is suggested, those prosecuting on behalf of the Crown are better placed to understand the complexities and interplay between international human rights law and criminal law that the defence poses. Yet, as with other criminal justice actors, knowledge of the defence was uniformly perceived to be absent. One respondent involved in raising the defence in prosecution proceedings in a case in Stranraer explained that:

“...it was a monumental struggle to get the prosecutor to understand that there existed a potential defence under Article 31 of the Refugee Convention and domestic legislation. It was simply a blank wall of total non-understanding” (Respondent 1).

This lack of knowledge was also highlighted by another involved in the proceedings in this case:

“The reaction that I was met with by the Crown was just one of horror, of, what are you doing? This is ridiculous. You know, don’t waste our time with this” (Respondent 3).

As this respondent suggests the s31 defence was perceived as a blockage to regular practice in such cases and plainly novel to the local prosecutor. The same respondent offered a defence to this, explaining that:

“I guess if you’re a local Procurator Fiscal, how the Crown Office deals with immigration offences, and the interplay between that and Article 31 of the Refugee Convention’s probably not going to be the top of their priorities” (Respondent 3).

In common with criminal defence solicitors, the data suggests that knowledge of the defence by local Procurator Fiscals is non-existent. Moreover, as these extracts relate to Stranraer where there has been the greatest number of document fraud cases in Scotland, it may be assumed that there is a comparable lack of knowledge or experience of the defence in other Procurator Fiscal locations.

In England and Wales there is published guidance for prosecutors setting out when and how a prosecution should be proceeded in relation to Art. 31 (1) defences (CPS, no date). What emerged through the course of the fieldwork is that the Crown Office has until now not acknowledged the existence of the statutory defence: there has been no prosecution guidance for Procurator Fiscals in Scotland. Since the inception of this study, the Crown Office has recognised this gap and has committed to develop guidance for Procurator Fiscals on s31 cases. This is due to be published in 2015.

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The lack of Crown Office awareness and prosecutorial guidance in Scotland means that local prosecutors have operated without a clear policy in this complex area of refugee law. It can be therefore inferred that refugees resorting to false documents to enter Scotland in pursuit of asylum will have been seen through a criminal lens by the Crown Office as offenders to be processed and prosecuted rather than as individuals requiring protection.

In short, the UK's international obligation under Art. 31 (1) of the Refugee Convention in Scotland is not being met.

8.2.2 Interaction between COPFS and the Home Office

Whilst COPFS is responsible in Scotland for deciding whether a prosecution should proceed, they are nonetheless dependent upon the Home Office to furnish them with information on the offenders' immigration status to inform this decision. The CPS guidance for England and Wales reads:

It remains the case that the CPS is reliant upon the UKBA for information and evidence relevant to an assessment of whether a defence under section 31 may apply (CPS, no date).

This guidance states further that evidence should include whether the individual has claimed asylum and the outcome of that claim. It should also declare in the view of the Home Office whether the s31 defence is of relevance. If the defence is not pertinent, evidential information is still required to support that position (CPS, no date).

Consideration in the CPS guidance is also given to temporal issues in relation to the asylum claim and the decision to prosecute. In many instances a claim for asylum made coterminous with an arrest for offences related to illegal entry will take considerably longer to be determined. The guidance states that an unresolved asylum decision by the Home Office or Asylum and Immigration Tribunal should not necessarily prevent a prosecution being instigated. However, if the threshold of Art. 31 is met, it recommends that proceedings should not be considered until refugee status is determined. In brief, it is clear that the Home Office must supply evidential information to ensure the correct application of s31 by the prosecuting authorities.

The experience of one of the respondents in the study suggests that information from the Home Office did not meet this requirement in relation to one particular case being prosecuted. All that was provided by the Home Office was brief details to show that a claim for asylum had been registered.

According to the respondent, no information was given on the applicability of s31:

"What was being hinted at was that the Home Office were going to wait to see the outcome of the criminal prosecution. Given that one of those charges carried a maximum ten-year prison sentence and routinely results in two years' expectation that the accused would have been sentenced to more than a year's imprisonment and then the Home Office could've dealt with the asylum claim by deportation rather than removal and making it significantly harder for the person to establish his international protection plea" (Respondent 1).

Instead of informing the decisions to whether the defence applied as requisite, it is suggested in this case that the Home Office would wait for the prosecution to be concluded before the asylum claim would be decided in contravention of Art. 31 (1). This is one individual case and whilst no firm conclusions can be drawn, it does point to a lack of awareness of the defence from particular Home Office officials in Scotland involved in this specific case and clearly demonstrates the need for intelligence to be exchanged to ensure that wrongful convictions do not occur.

8.3 Sheriff Court

As indicated in the previous section, available data reveals that document fraud cases have not gone to jury in a Sheriff Court as offenders have pled guilty. In the one known instance where the s31 defence was raised in a Sheriff Court during the second proceedings of a bail application, one respondent noted that:

"It was a different Sheriff and even though the Sheriff in question was a former immigration judge, his initial response to being presented with the argument: "Actually, there is a defence here," was sheer incredulity" (Respondent 1).

Whilst data in the study is limited in relation to Sheriff Court judges, the views of this respondent, the available evidence that indicates document fraud cases have not gone to trial; and the lack of awareness amongst other criminal justice actors would suggest that first instance judges equally are unfamiliar with the s31 statutory defence.

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In relation to sentencing the literature finds that judges in the Magistrate's Court regularly imposed strict deterrent sentences in relation to what was perceived by the police and immigration officers as low-level offences (Aliverti, 2013a, p.113).

A respondent noted that document fraud cases were dealt with "robustly" in one jurisdiction by the Sheriff (respondent 4).

The two successful Court of Appeal cases discussed in the previous chapter for document offences relate to reductions in sentences; however there is limited data to indicate the severity of treatment by first-instance judges. Moreover, as it would appear cases have not been raised in first-instance criminal trials, it is impossible to consider how the asylum claim is considered within the criminal justice system in Scotland at this stage.

8.4 Chapter conclusion

This chapter has described how Article 31 (1) to date has simply not been a matter for consideration or concern within the criminal justice system in Scotland, both amongst those actors prosecuting offenders and those representing them. As a result of this unfamiliarity, criminal defence solicitors routinely advise guilty pleas. When the decision to prosecute is made, cases of document offences for illegal entry appear to be processed through the criminal justice system in a routine fashion with no consideration given to whether the individual has claimed asylum or not and the availability of the defence.

In summary, the intersection of Art. 31 (1) with the Scottish criminal justice system is highly problematic and the likelihood of wrongful convictions of refugees is significant in Scotland.

Chapter 9 - Conclusion

The study set out to explore the practical application of Article 31 (1) of the Refugee Convention, the right of refugees not to be penalised for illegal entry or stay, in the Scottish criminal justice system. It has identified the locations, processes and actors involved in decisions to prosecute illegal entrants; the extent to which convictions are taking place in Scotland for offences which benefit from the protection of Article 31 (1) and attempted to identify the extent to which these convictions involved refugees. The general academic literature is limited on how Article 31 (1) is applied in practice. This is the first study of the issue in Scotland.

The research sought to answer the following question: to what extent and why are refugees in Scotland being prosecuted and convicted for illegal entry or stay without due regard to Article 31 (1) of the 1951 Refugee Convention?

The main empirical findings were summarised within the respective empirical chapters: the extent of convictions in Scotland for illegal entry or stay; decisions to criminalise refugees; and convictions of refugees.

This section synthesizes the empirical findings to answer the research question.

- *Across the criminal justice system in Scotland there is a lack of knowledge:*

None of the criminal justice bodies and actors in Scotland has institutional knowledge of Art. 31 (1) and are not sensitised to the fact that immigration offenders may be refugees and have a statutory defence against prosecution. Once a decision is made to prosecute identity document cases, they are processed through the criminal justice system in a perfunctory fashion with little interaction with immigration or protection concerns.

For actors who are likely to have knowledge: immigration lawyers and Home Office Criminal Investigation staff, the issue is not of primary concern.

- *Police officers in Stranraer are acting as de facto immigration officers solely under policing powers*

Prosecutions in Scotland are more likely to occur for illegal entry and false document offences in Stranraer. The lack of any available guidance for the police or prosecutors suggests that there is very little awareness that identify document offenders may be refugees and have a statutory defence against prosecution.

The evidence indicates that in the event that an individual with false documents claims asylum, they will be prosecuted.

- *The true extent of how many refugees have been prosecuted and convicted in Scotland is not known*

Due to the lack of consideration of Art. 31 (1) in Scotland and limitations of the study, the extent to which refugees in Scotland have been wrongfully convicted is unknown. However, over the last five years there have been at least 266 convictions for illegal entry and document offences where there was a statutory defence against prosecution. Many are taking place at ports of entry. In at least one known instance the individual was a refugee and data from respondents suggests that a proportion of the convictions will have involved asylum seekers.

The findings of the study support the theoretical case that the use of criminal law in the sphere of migration management is used rarely in comparison to its symbolic effect and supports, albeit with limited data, the case that criminalisation is used instrumentally by immigration officers as a supplementary tool to impose immigration control. However, the research suggests that when employed by police officers acting as de facto immigration officers the balance shifts from criminal law being used as an additional measure to being the only one.

The research highlights the absence of COPFS prosecution policy and guidance for Art. 31 (1) defences but notes that this is in the process of being produced. However, the research points to the need for all key bodies in the Scottish criminal justice system to be equally made aware of these defences against prosecution to avoid future miscarriages of justice. To rectify any wrongful convictions that have taken place in Scotland, the SCCRC and COPFS should proactively identify cases. The Home Office should publish statistics on asylum applications made in Scotland and at Scottish ports. Clarity around which agency is responsible for investigating and dealing with criminal offences where the statutory defences are applicable is also required.

This study has provided an initial but valuable enquiry into how Art. 31 (1) interplays with the Scottish criminal justice system. Exploring the following as future research strategies could improve further understanding in this area:

- *doctrinal analysis of Art. 31 (1), its limitations and English case law in relation to Scots criminal law; and*
- *considering the voices of those impacted by criminalisation and issues of disclosure of asylum at the border.*

Chapter 9 - Conclusion

The research has offered an original exploration of an important human rights issue in Scotland conducted through an analysis of secondary statistical data, elite interviews and documentary data. As a consequence of the methodology, time and resources, there are data limitations.

For example, the study would have benefitted from a larger pool of respondents from other agencies such as UKBF, NCA, and the Procurator Fiscal Service as well as respondents from other locations in Scotland. Nevertheless, the study has provided a response to the research question.

Over sixty years ago the Refugee Convention created the right for a refugee not to be penalised for entering or being in a state illegally. Over 15 years ago this right was embedded in UK domestic legislation. Despite these protections, the persecuted are being prosecuted in Scotland.

Endnotes

- i. Article 31 (1) does not impose an obligation on states not to commence proceedings, simply that proceedings should not be determined and penalties imposed until the status of the refugee is decided (Hathaway, 2005).
 - ii. In-depth analysis of Article 31 (1) in the UK is currently being undertaken. Focus of this work will primarily consider the Article 31 from the perspective of how the law is operating in England, Wales and Northern Ireland.
 - iii. Loch Ryan port, operated by Stena Line and Cairnryan port, operated by P&O are two ferry terminals situated next to each other on Loch Ryan a few miles north of the town of Stranraer. There are sailings to and from Northern Ireland Prior to November 2011, ferries sailed directly into the port at Stranraer (BBC, 2011). An additional interview took place with officials from the Crown Office to discuss and verify the quantitative data.
 - iv. The category of fraud in Scotland includes seven specific offences under the Identity Cards Act 2006 (s25 (1) (a), s25 (1) (b), s25 (1) (c), s25 (5) (a), s25 (5) (b), s25 (5) (c) and s25 (d). Data was requested for s25 (1) thus includes figures for the first three offences but not for the offences s5 (a-c) where s31 could apply. Section 5 (d) relates to the possession of apparatus or material and is unlikely to be an offence where the s31 could apply. The list of fraud offences also includes five specific offences under the Identity Documents Act 2010 (s4 (1) (a), s4 (1) (c), s6 (1) (a), s4 (1) (b), and s6 (1) (c). Data was requested for s4 (1) thus includes the first two offences but not for later three which may fall within the scope of s31. Three offences under the Immigration and Asylum Act 1999 there are three fraud related offences (s106 (1) (a), s106 (1) (c), and s91 (1). The first two offences relating to dishonest representation in acquiring services could relate to illegal entry or stay and thus benefit from the s31 defence. Requesting additional data from the Scottish Government to rectify these omissions was not possible due to timescales of the study.
 - v. Section 31 (5) IAA 1999 does not extend the defence to any offence committed by a refugee after he or she has claimed asylum.
 - vi. The Common Travel Area (CTA) comprises the United Kingdom, Republic of Ireland, Channel Islands and the Isle of Man. An individual has freedom of movement in all parts of the CTA if they have been given leave to enter one part of it.
 - vii. Article 31 (1) was intended to apply and has been interpreted to apply to persons who have briefly transited other countries.
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Glossary

Asylum seeker	The term is not defined in international law but refers to an individual who has registered a claim for asylum and is awaiting a decision on whether their application qualifies for protection under the 1951 Refugee Convention.
Refugee	Someone whose application for asylum has been successful. They have been recognised as needing protection under the 1951 Refugee Convention because they have a well-founded fear of persecution in their home country for reasons of races, religion, nationality, membership of a particular social group or political opinion.
National Crime Agency	The National Crime Agency, formed 2013, is a UK- wide body that replaced the Serious Organised Crime Agency (Soca). The agency is tasked with dealing with major organised crime including drug and human trafficking and international fraud.
Police Scotland Border Command	Police Scotland Border Command, formed in 2013, is a unit of Police Scotland. It has responsibility to police Scotland's airports and ferry ports to counter terrorism, human trafficking and serious organised crime.
Border Force (UKBF)	Border Force is a division of the Home Office charged with controlling the UK's borders at airports and ports. Border Force was formerly part of the part of the UK Border Agency until 2012.
UK Border Agency (UKBA)	UKBA was created as an executive agency of the Home Office in 2008, bringing together immigration and border management functions into one agency. In 2013 its executive agency status ended and functions returned to the Home Office under two new divisions: <i>UK Visas and Immigration (UKVI) and Immigration Enforcement</i> .
Common Travel Area	The Common Travel Area (CTA) comprises the United Kingdom, Republic of Ireland, Channel Islands and the Isle of Man. An individual has freedom of movement in all parts of the CTA if they have been given leave to enter one part of
UK Visas and Immigration (UKVI)	UKVI is a part of the Home Office responsible for dealing with applications for entry, stay and settlement in the UK. The department also has responsibility for assessing asylum claims.
Immigration Enforcement	Immigration Enforcement is a division of the Home Office tasked with enforcing immigration law.

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Scottish Refugee Council is an independent charity dedicated to providing advice and information to people who have fled horrific situations around the world.

In 2015 Scottish Refugee Council celebrates 30 years of working to ensure that all refugees in Scotland are treated fairly, with dignity and that their human rights are respected.

To find out more, please visit our website:
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