



Home Office

# Section 31 Immigration and Asylum Act 1999: defence against prosecution

Version 5.0

This guidance is based on section 31 of the Immigration and Asylum Act 1999 and the 1951 Convention Relating to the Status of Refugees.

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# About this guidance

This guidance tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about the defence against criminal prosecution available to genuine asylum seekers under section 31 of the Immigration and Asylum Act 1999.

Section 31 of the Immigration and Asylum Act 1999 provides a statutory defence for refugees committing particular offences, providing they satisfy stated conditions. This guidance is based on article 31 of the 1951 Convention Relating to the Status of Refugees and section 31 of the Immigration and Asylum Act 1999, which brings the protection provided in article 31 into domestic law for certain specified offences.

It gives information on:

- prosecution in asylum cases
- referring cases to the Crown Prosecution Service (England and Wales) Crown Office Procurator Fiscal Service (Scotland), Public Prosecution Service (PPS) (Northern Ireland) for charging advice in cases where the suspect has also claimed asylum
- the defence section 31 of the Immigration and Asylum Act 1999 provides
- article 31 of the Refugee Convention 1951 on which this defence is based
- the House of Lords judgment in the case of *Asfaw*, which set out how article 31 and section 31 are to be interpreted
- the procedures you must follow when dealing with section 31 cases

For more information, see:

- [Section 31 of the Immigration and Asylum Act 1999](#)
- [UNHCR - Convention relating to the status of refugees](#)

The Home Office has a duty to safeguard vulnerable people and promote the welfare of children. For more information see: [Vulnerable adults and children](#).

Criminal Investigators in Immigration Enforcement must be aware of their obligations under the UK General Data Protection Regulation (GDPR) and Part 3 of the Data Protection Act 2018 see: [Data Protection CFI Policy and Data protection](#).

[House of Lords - R v Asfaw \(Appellant\) \(On Appeal from the Court of Appeal \(Criminal Division\)\) \(parliament.uk\)](#)

## Contacts

If you have any questions about the guidance and your line manager or senior caseworker cannot help you or you think that the guidance has factual errors then email CFI Operational Guidance, Risk and Compliance.

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance then you can email the Guidance Rules and Forms team.

## Publication

Below is information on when this version of the guidance was published:

- version **5.0**
- published for Home Office staff on **05 January 2024**

## Changes from last version of this guidance

- new chapter on legal and judicial interpretation of Section 31
- new and updated links
- housekeeping changes
- placed into updated guidance template

### Related content

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# What to do when considering prosecution in asylum cases

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office what they need to think about when considering prosecution in a case where the suspect claims or has claimed asylum.

The prosecution process you use for a person who has claimed asylum will be similar to that used for other types of prosecution cases.

The fundamental difference is there are likely to be extra actions you will need to consider, for example:

- whether the person is likely to benefit from a defence under section 31 of the Immigration and Asylum Act 1999
- if there is any extra information you need to provide to the Crown Prosecution Service (CPS) for cases in England and Wales or the Crown Office and Procurator Fiscal Service (COPFS) for cases in Scotland and Public Prosecution Service Northern Ireland (PPS) for Northern Ireland
- keeping in touch with the asylum caseworker and monitoring what is happening in the asylum case.
- if there is any action you will need to take once the asylum claim has been decided

If you suspect a person is likely to benefit from a defence under section 31 of the Immigration and Asylum Act 1999 you should:

- not arrest them
- refer to the statutory defences as outlined in [Section 31 Immigration and Asylum Act 1999](#)
- refer to statutory defences outlined in [Immigration | The Crown Prosecution Service \(cps.gov.uk\)](#)
- liaise with relevant asylum caseworkers if still considering a prosecution case
- refer to the [Crown Office and Procurator Fiscal Service \(COPFS\)](#) if you require further legal advice whilst considering a prosecution case
- refer to [Public Prosecution Service for Northern Ireland](#) (PPS) for Northern Ireland

## Recording a prosecution on CLUE

Officers and managers must ensure that all actions relating to the consideration of potential Section 31 cases are recorded on the decision and events register on CLUE.

## Recording a prosecution on Atlas

Criminal and Financial Investigation officers and managers must follow the instruction outlined in IOI CFI 06 23 CFI transition to using Atlas - Recording person alerts on Atlas on recording cases on Atlas.

### Related content

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# Referring a Section 31 prosecution case to a supervisor or chief immigration officer (CIO)

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about referring section 31 cases to a supervisor or chief immigration (CIO).

When referring a section 31 case you must:

- refer the case to your:
  - supervising officer or chief immigration officer (CIO) to help you decide on the appropriate course of action
  - local on-call CIO, supervising officer or his majesty's inspector (HMI) if you are working out of office hours
- not make the decision about whether a section 31 defence applies without discussing and agreeing the decision with your supervising officer or CIO, regardless of whether that person is, or is likely to be found to be, a refugee
- make a full record of the reasons for your recommendation in the decision record on CLUE:
  - you must confirm you have taken this guidance into account and include the name of the senior officer who authorised the decision

## Related content

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# Referring to the Crown Prosecution Service in asylum cases (England and Wales)

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about referring an asylum claimant to the Crown Prosecution Service (CPS) for a charging decision.

In all asylum cases you refer to the CPS you must give them as much information as possible; see: [Immigration | The Crown Prosecution Service](#) which may mean making some extra enquiries. You must:

- give the CPS as much information as you can about the person's status in the UK when you make your initial referral
- tell the CPS about the person's personal circumstances, for example:
  - their age, whether young or old and, in the case of age dispute cases, details of the Merton compliant age assessment - for more information, see [Assessing age](#)
  - details of any known or claimed medical, physical or psychological conditions
- find out the expected timescale for the asylum decision, once you know who the case owner is, and tell CPS straightaway
- make regular checks on what is happening in the asylum case by:
  - checking Atlas
  - keeping in touch with the asylum case owner
- update the CPS, especially in cases where the offender is detained or remanded in custody, if either:
  - there are any changes to their status
  - they make any other applications
- give the CPS information and advice about the removability of the offender and the country they come from, for example whether there are any:
  - documentation issues
  - returnability issues
- check the country-of-origin information, (COI), with the CPIT Team for the latest processes for documentation, timescales, and issues

For more information, see [Country policy and information pages](#).

If you are not sure what advice to give CPS:

- ask your supervisor for guidance
- do not give advice unless you know it is correct as you could be called to court to explain it
- do not give advice you are not qualified to give



If you give this information to the CPS at the earliest opportunity it will help them to decide if a charge is to be brought, or in some circumstances, if a prosecution should continue.

For more information see: [Immigration | The Crown Prosecution Service](#).

Although these checks are for asylum cases it is a good idea for you to make similar checks for any prosecution case you are dealing with.

#### **Related content**

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# Section 31 Immigration and Asylum Act 1999

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about section 31 of the Immigration and Asylum Act 1999 and gives a brief description of what each sub section covers.

This is how the UK government put legislation in place to make sure it meets the United Kingdom's obligations under article 31 of the [1951 Convention Relating to the Status of Refugees](#) (the Refugee Convention). Section 31 of the Act applies to certain specified offences. It tells you about the defence available to some genuine asylum seekers who have committed these offences when entering the UK.

It tells you the:

- exact nature of the criminal defence and who can benefit from it
- circumstances in which they can benefit
- offences to which the defence applies

To see the exact wording of the Act or article 31 of the 1951 Refugee Convention, see:

- [Section 31 of the Immigration and Asylum Act 1999](#)
- [UNHCR - The 1951 Convention relating to the status of refugees](#)

Section 31 (1) states there is a defence against prosecution for a refugee who:

- has come to the UK directly from a country where their life or freedom was threatened (as defined in the 1951 Convention Relating to the Status of Refugees)
- is charged with an offence section 31 applies to

if they can show they:

- presented themselves to the UK authorities without delay
- showed good cause for their illegal entry or presence
- claimed asylum as soon as was reasonably practical after arriving in the UK

Section 31 (2) states sub section (1) only applies to refugees who have travelled to the UK through another country if they can show they could not reasonably have expected to be **given protection** under the 1951 Refugee Convention in that country. Pre 28 June 2022.

[Section 37 \(1\)](#) of the Nationality and Borders Act 2022 (NABA) amended the wording to be expected to **have sought** protection under the refugee convention in that country. This amendment only applies to offences which are or alleged to have been

committed after 28 June 2022. See: para 6 [The Nationality and Borders Act 2022 \(Commencement No. 1, Transitional and Saving Provisions\) Regulations 2022](#).

Section 31 (3) (England, Wales, and Northern Ireland) tells you which offences benefit from a defence under section 31 in England, Wales and Northern Ireland. This applies to offences that are actually committed and ones that are attempted. The offences are:

<b>Legislation</b>	<b>The offence</b>
<a href="#">Part 1 of the Forgery and Counterfeiting Act 1981</a>	Forgery and connected offences
<a href="#">Section 26(1)d of the Immigration Act 1971</a>	Possessing false or making alterations to genuine leave documents.
<a href="#">Section 4(1) and Section 6(1) of the Identity Documents Act 2010</a> for offences committed after 21 January 2011.	Possessing false identity documents: <ul style="list-style-type: none"><li>• with improper intention</li><li>• without reasonable excuse</li></ul>
<a href="#">Section 24A of the Immigration Act 1971</a>	Seeking to obtain or obtaining leave to enter the UK, by deception.  Making sure they avoid, postpone or revoke (stop) any enforcement action, by deception.

[Section 31\(4\) \(Scotland\)](#) tells you which offences benefit from a defence under section 31 in Scotland. This applies to offences actually committed and ones that are attempted. The offences include:

- fraud
- uttering (presenting) a forged document
- seeking to obtain or obtaining leave to enter the UK, or seeking to make sure they avoid, postpone or revoke (stop) any enforcement action, by deception, section 24A of the Immigration Act 1971
- possessing false, or making alterations to genuine leave documents, section 26(1)(d) of the Immigration Act 1971
- section 25(1) or (5) of the Identity Cards Act 2006 for offences committed between 7 June 2006 and up to 20 January 2011
- section 4 or 6 of the Identity Documents Act 2010 for offences committed after 20 January 2011

For more information see:

[Crown Office and Procurator Fiscal Service - Policy on application of Sec 31 Immigration and Asylum Act 1999](#) and [Crown Office and Procurator Fiscal Service - Prosecution Policy and Guidance](#).

Section 31(4A) states that this section does not apply to an offence committed by a refugee in the course of an attempt to leave the United Kingdom.

Section 31(5) states a refugee who has claimed asylum is not entitled to this defence if they committed the offence after claiming asylum.

Section 31(6) says the term 'refugee' has the same meaning as in the 1951 Refugee Convention.

Section 31(7) states if the Secretary of State refuses an asylum claim, that person is not to be regarded as a refugee unless they show they are. The effect of this is the burden of proving to the court they are a refugee shifts onto the defendant.

Sections 31(8) and (9) relate to people who have been convicted of any offence in England, Wales, Scotland, or Northern Ireland, to which section 31 applies.

It allows the person to apply for a review to the:

- Criminal Cases Review Commission (England, Wales, and Northern Ireland)
- Scottish Criminal Cases Review Commission

and to request them to make a referral to the:

- Court of Appeal, (England, Wales, or Northern Ireland)
- High Court of Justiciary (Scotland)

The person can only do this if they:

- were convicted of the offence before section 31 came into operation
- did not argue that they were entitled to a defence under article 31 of the 1951 Convention Relating to the Status of Refugees at any time during the proceedings
- would have had a defence under section 31 of the Immigration and Asylum Act 1999 if it had been in force at the material (relevant) time

Section 31 (10) and (11) deal with the procedure to follow when new offences are to be included within the scope of section 31 in England, Wales, and Scotland.

For more information see: [Section 31 of the Immigration and Asylum Act 1999](#).

## **Related content**

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# Article 31 of the 1951 Convention Relating to the Status of Refugees

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about what being a signatory to the 1951 Convention Relating to the Status of Refugees means, and specifically what article 31 means.

The [1951 Convention Relating to the Status of Refugees](#) (the 'Refugee Convention') is the main legal document which defines:

- what a refugee is
- what their rights are
- the legal obligations of states that have signed up to the convention

As a signatory to the convention the UK has a duty to protect refugees who are in the UK, in line with the terms of the convention.

The convention was originally intended to deal with the situation after the end of the second world war. It was limited to people fleeing persecution from events that happened in Europe before 1 January 1951.

The only change to the convention since it was introduced is a protocol in 1967 which removed these restrictions, so it applies to:

- events that have occurred at any time
- in any country

See: [Protocol relating to the Status of Refugees.](#)

Article 31 of the convention deals with refugees who have entered or are present illegally in a country of safety.

Article 31 (1) says the contracting state (the state that has signed up to the convention) will not impose penalties on refugees due to their illegal presence or entry, if they:

- have come directly from a territory where their freedom or life was threatened in the sense of article 1, which is, they:
  - have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion
  - are outside their country of nationality or have no nationality and are outside their usual country of residence
  - are unable or unwilling to return to that country because of their fear
- have entered or are present in the country of safety without authorisation

providing they both:

- presented themselves to the authorities without delay
- showed good cause for their illegal entry or presence

Article 31(2) also says the contracting state will:

- not restrict the movements of such refugees unless it is necessary
- only apply restrictions until either:
  - their status has been regularised (decided)
  - they have obtained admission to another country
- allow refugees reasonable time and all necessary facilities to obtain admission into another country

As an investigator, you must:

- be aware this defence is available for refugees who enter or are present in the UK illegally, if they can show they have met the requirements of article 31(1)
- only restrict their movements if it is necessary, and then only for as long as necessary in line with article 31(2)

Under the Nationality and Borders Act 2022 (NABA) [Section 37\(4\)](#) states, regarding Article 31(1) of the Refugee Convention, that:

‘A penalty is not to be taken as having been imposed on account of a refugee’s illegal entry or presence in the United Kingdom where the penalty relates to anything done by the refugee in the course of an attempt to leave the United Kingdom.’

For more on how the defence is given effect through section 31 of the Immigration and Asylum Act 1999 and separately through Crown Prosecution Service (CPS) prosecution policy, see:

- [Section 31 of the Immigration and Asylum Act 1999](#)
- [Immigration | The Crown Prosecution Service](#)

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# Statutory defences and legal interpretation of Section 31 of the Immigration and Asylum Act 1999

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about the statutory defences and legal interpretation of Section 31 of the Immigration and Asylum Act 1999.

## Statutory defences

When applicable, criminal investigators should consider the following statutory defences:

- [Section 31](#) of the [Immigration and Asylum Act 1999](#) (IAA) – whether the immigration offence was committed as a necessary part of a refugee’s journey to the UK
- [Section 2](#) of the [Asylum and Immigration \(Treatment of Claimants, etc.\) Act 2004](#) – ‘reasonable excuse’ for failing to have an immigration document at a leave or asylum interview
- [Section 45](#) of the [Modern Slavery Act 2015](#) – whether an offender may have been forced, coerced or deceived into committing an offence who might be a victim of modern slavery

## Section 31 IAA

[Section 31](#) IAA provides a statutory defence for refugees committing particular offences, providing they satisfy stated conditions.

The applicable offences in England and Wales and Northern Ireland under section 31(3) are:

- part 1 of the [Forgery and Counterfeiting Act 1981](#) (forgery and connected offences)
- [Section 24\(a\)](#) of the [Immigration Act 1971](#) (use of deception to obtain or seek to obtain leave to enter or remain or to secure avoidance, postponement or revocation of enforcement action)
- [Section 26\(1\) \(d\)](#) of the Immigration 1971 Act (falsification of documents)
- [Section 4\(1\)](#) and [6\(1\)](#) of the [Identity Documents Act 2010](#)

The conditions that must be satisfied for the defence to apply are set out at section 31(1) and (2).

“Refugee”, defined in Article 1 of the Refugee Convention 1951, is a person who has left their own country owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion

or who, not having a nationality and being outside the country of their former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

For more information see: [The 1951 Refugee Convention | UNHCR](#).

Under [section 31\(5\)](#) of the [Immigration and Asylum Act 1999](#) a refugee is not entitled to this defence in relation to any offence committed after making a claim for asylum. Consequently, a defendant who enters the country either clandestinely or legally, claims asylum, and then obtains false documents for use in attempting to travel to another country, would be outside the scope of section 31.

Where asylum seekers arrive or enter using false documents (whether by boat, commercial airline or some other means), particular consideration will need to be given to which offences are charged. They will be prima facie (at first sight) guilty of both a section 24 offence and a false document offence. However, section 31 will only afford a defence to the false document offence. It is, therefore, incumbent on the investigator to highlight this issue and to assess section 31 considerations to enable the prosecutor to fully and properly consider how or whether to proceed.

## Legal and Judicial Interpretation of section 31

[Section 37](#) of the [Nationality and Borders Act 2022](#) (NABA) sets out the UK's interpretation of Article 31(1) of the Refugee Convention and the circumstances in which refugees who have entered a country illegally, or are present in a country illegally, are immune from penalties. Section 37(4) provides that a refugee will not be immune from the imposition of any penalty imposed where the penalty relates to anything done by the refugee in the course of an attempt to leave the UK.

Section 37(1) of NABA provides that a refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened, if they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.

Section 37 (2) of NABA **a refugee** is not to be taken to have presented themselves without delay to the authorities unless in the case of a person who became a refugee while they were outside the United Kingdom, they made a claim for asylum as soon as reasonably practicable after their arrival in the United Kingdom.

Relevant factors to assess when considering if a defence under section 31 is made out, having regard to section 37 include the following:

- What were the circumstances of their journey to and through the transiting country or countries? For example, if they were concealed in a lorry, did they have the opportunity to seek protection?
- looking at all the circumstances:
  - Was the person in the course of fleeing from persecution or indiscriminate violence?



- Were they in transit?
- Did they travel through a country/countries which are signatories to the Refugee Convention?
- How long did they stay in the transit country/countries?
- What were the reasons for delaying seeking protection?

In the case of [R v Asfaw \[2008\] UKHL 31](#) the House of Lords observed that it is permissible to charge a defendant both with an offence to which the section 31 defence applies and with an offence to which it does not. However, if the second charge is based on the same conduct and is included in an indictment in order to prevent the defendant from relying on the section 31 defence, there would be strong grounds for arguing that this is an abuse of process.

In [SXH v The CPS \[2017\] UKSC 30](#), the Supreme Court considered whether a suspect's entry into the UK as an asylum seeker and the decision to prosecute her for entering with false travel documentation (an offence which could attract the section 31 statutory defence) engaged [Article 8](#) of the ECHR. The Court held that the decision to prosecute did not engage Article 8 and that even if it was applicable the decision had not amounted to a breach of Article 8, observing that "it is difficult to envisage circumstances in which the initiation of a prosecution against a person reasonably suspected of committing a criminal offence could itself be a breach of that person's human rights".

## Burden and standard of proof

The Court of Appeal in [R v Mateta \[2013\] EWCA Crim 1372](#) provided a useful summary of the main elements of the defence, including the burden and standard of proof, as set out by the Court of Appeal in [R v Makuwa \[2006\] EWCA Crim 175](#), although these should be read in the light of the NABA:

The burden on the defendant as far as their refugee status is concerned is merely an evidential one i.e., they must adduce sufficient evidence to raise the issue. (See Makuwa [21, 38] for the elements that must be addressed and how the jury should be directed on them: a well-founded fear of persecution; fear based on one of the Convention reasons.) The prosecution must then prove beyond reasonable doubt that they were not a refugee. But in cases where the Secretary of State has refused an asylum application, the legal burden rests on the defendant to establish on a balance of probabilities that they are a refugee (see also section 31(7) IAA).

In respect of the matters in sections 31(1)(a), (b) and (c) and section 31(2), the defendant has a legal burden i.e., must prove on a balance of probabilities that:

- They did not stop in any country in transit to the UK for more than a short stopover; or, alternatively, they could not reasonably be expected to have sought protection under the Refugee Convention in countries outside the UK in which they were stopped; and
- They presented themselves to the authorities in the UK "without delay", unless it was explicable that they did not present themselves to the authorities during a

short stopover in this country when travelling through to the nation where they intended to claim asylum; and

- They had good cause for their illegal entry or presence in the UK; and
- They made a claim for asylum as soon as was reasonably practicable after their arrival in the UK, unless it was explicable that they did not present himself to the authorities during a short stopover in this country when travelling through to the nation where they intended to claim asylum.

## Referrals of potential Section 31 defences to the Crown Prosecution Service (CPS)

The Crown Prosecution Service (CPS) is reliant upon the Immigration Authorities for information relevant to an assessment of whether a defence under section 31 may apply. [SXH v CPS \[2013\] EWHC 71 \(QB\)](#) confirmed that it is “rational and proportionate that the CPS should depend upon the relevant agencies and departments to keep them informed”.

In all cases in which a section 31 defence may apply, the information relevant to an assessment should be provided as early as possible prior to charge and should include:

- any credible evidence that the suspect has a section 31 defence available to them - this should cover all the elements of the defence set out above, including whether they are a refugee and the outcome of any application for asylum

## Nationality and Borders Act 2022: Judicial interpretation of Section 31

In the case of [Mohamed & Ors, R. v \(Rev1\) \[2023\] EWCA Crim 211 \(02 March 2023\)](#) the Court of Appeal considered whether sections [30\(3\)](#) and [37](#) of the NABA provide a defence to a person who knowingly arrives in the United Kingdom without a valid entry clearance contrary to section [24\(D1\)](#) of the [Immigration Act 1971](#).

The court held that “Although Parliament took the opportunity in [Section 37\(5\)](#) of the 2022 Act to amend section 31, **none of the provisions in sections 30 to 37 of the 2022 Act are expressed as a defence to a criminal charge**. Instead, as the heading of those provisions suggests, and as is clear from their content, they are concerned only with the interpretation of article 1(A)(1), article 1(F), article 31(1) and article 33(2) of the Refugee Convention in the circumstances stated.” The court concluded that “There is no rule or principle of construction which could enable the court to construe sections 30 to 37 as creating a defence to a criminal charge”

## Refugee Status determined by the Home Office

The Crown Prosecution Service (CPS) position is that If a suspect is a refugee and the Home Office determines that the other conditions in the section 31(1) and (2) criteria are met, no charges should be brought.

Where CFI teams submit a case for charging advice on the basis that the section 31(1) and (2) conditions have not been met, prosecutors must carefully consider the evidence submitted. Pursuant to paragraph 4.6 of the [Code for Crown Prosecutors](#) (the Code), prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

If the suspect is not a refugee, the defence is not available, regardless of whether they fulfil the other conditions. It will be a matter for Immigration Enforcement to consider deportation/removal and Criminal and Financial investigators responsibility to refer the case to the CPS for a charging decision.

In accordance with paragraph 3.6 of the Code, prosecutors have a duty of continuing review and must take account of any change in circumstances, such as any further information that comes to light regarding the suspect's refugee status and asylum claim. CFI is responsible for providing those updates which might affect CPS consideration of their investigation.

## Refugee status yet to be determined

Where a suspect's refugee status is yet to be determined or is the subject of an appeal to the Immigration and Asylum Tribunal, it would normally be appropriate to await the outcome of the asylum proceedings before deciding on charge, if consideration is being given to charging one of the section 31(3) or 31(4) listed offences. This will usually be the case where CFI indicates that a decision will be made about a suspect's refugee status within a reasonable amount of time.

An undetermined asylum application is not a barrier to prosecution and prosecutors should consider all the circumstances of the case in deciding whether to await the outcome of the asylum application or to proceed to charge. Prosecutors should have sight of the suspect's screening interview and Immigration Enforcement reports. The following factors, for example, may be relevant:

- a time limit in which the offence must be charged, which might expire before the asylum determination
- a risk of the suspect absconding pending the asylum determination
- the suspect has already caused delay by, for example, providing multiple contradictory accounts, a period of absconding, or the deliberate destruction of identity documents to hinder enquiries into their country of origin

## Trial

In the event that a suspect is charged prior to determination of their refugee status, at the earliest possible court hearing, and prior to trial, the officer in the case should provide CPS with a written update on the defendant's refugee status.

If the defendant claims to be a refugee and no determination has been made, the CPS position is that while not accepting the claim or making any concessions in respect of their refugee status, the CPS will not seek to establish that they are not a refugee for the purpose of the criminal trial. In such cases there will be no issue for the jury to decide and no need to explain the term: [R v Makuwa \[2006\] EWCA Crim 175](#) [37].

The issue at trial, in terms of the statutory defence, will be insufficient evidence of compliance with one or more of the other conditions in [Sections 31 \(1\) and \(2\)](#) of the [Immigration and Asylum Act 1999](#).

For example, the defendant may or may not be a refugee. The defence and the court should be provided with a copy of R v Makuwa by the CPS, to ensure that all parties are aware of what facts give rise to a section 31 defence, the burden and standard of proof and how the jury should be directed.

## Appeals based on section 31

Section 31(8) makes the statutory defence retrospective in its application. A person who was convicted of an offence to which section 31 applies, before it came into force, but at no time during the proceedings for that offence argued that they had a defence based on Article 31(1), may apply to the Criminal Cases Review Commission.

There have been a number of appeals based on an accused's representative's failure to advise them about the availability of the section 31 defence: see Leveson LJ's comments in R v Mateta [24] and [R v AM and Others \[2010\] EWCA Crim 2400](#) [10, 56] on the obligations of defence representatives.

If a defence is likely to be raised, the CFI officer in the case should obtain evidence on the refugee status and asylum claim: see the sections above on determining a refugee's status.

### Related content

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# Referring to prosecutors in Scotland and Northern Ireland

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about referring an asylum claimant to the Crown Office Procurator Fiscal Service (COPFS) or the Public Prosecution Service Northern Ireland (PPSNI) for a charging decision.

In all asylum cases you refer to the COPFS or PPSNI you must give them as much information as possible, which may mean making some extra enquiries. You must:

- give the COPFS or PPSNI as much information as you can about the person's status in the UK when you make your initial referral
- tell the COPFS or PPSNI about the person's personal circumstances, for example:
  - their age, whether young or old and, in the case of age dispute cases, details of the Merton compliant age assessment - for more information, see [Assessing age](#)
  - details of any known or claimed medical, physical, or psychological conditions
- find out the expected timescale for the asylum decision, once you know who the case owner is, and tell the COPFS or PPSNI straightaway
- make regular checks on what is happening in the asylum case by:
  - checking case information database (CID)/Atlas
  - keeping in touch with the asylum case owner
- update the COPFS or PPSNI, especially in cases where the offender is detained or remanded in custody, if either:
  - there are any changes to their status
  - they make any other applications
- give the COPFS or PPSNI information and advice about the removability of the offender and the country they come from, for example whether there are any:
  - documentation issues
  - returnability issues
- check the country-of-origin information, (COI), with the Country Policy and Information team for the latest processes for documentation, timescales and issues

For more information, see: [Country policy and information](#).

If you are not sure what advice to give the COPFS or PPSNI:

- ask your supervisor for guidance
- do not give advice unless you know it is correct as you could be called to court to explain it
- do not give advice you are not qualified to give

If you give this information to the COPFS or PPSNI at the earliest opportunity it will help them to decide if a charge is to be brought, or in some circumstances, if a prosecution should continue.

Although these checks are for asylum cases it is a good idea for you to make similar checks for any prosecution case you are dealing with.

If you suspect a person is likely to benefit from a defence under section 31 of the Immigration and Asylum Act 1999 you should.

- not arrest them
- refer to the [Crown Office and Procurator Fiscal Service \(COPFS\)](#) if you require further legal advice whilst considering a prosecution case
- refer to [Public Prosecution Service for Northern Ireland](#) (PPS) for Northern Ireland if you require further legal advice whilst considering a prosecution case

### **Related content**

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# Procedures you must follow in section 31 cases

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about their roles and responsibilities and the procedures they must follow when dealing with an offender who could later rely on the section 31 defence.

Your role as an investigator or as a member of a criminal investigation team is restricted to:

- investigating the offence
- considering whether they meet the criteria at section 31(1) and (2) of the defence see: [Statutory defences and Legal interpretation of Section 31 of the Refugee Convention](#)
- where appropriate, providing evidence and information to the Crown Prosecution Service (CPS), the Crown Office and Procurator Fiscal Service (COPFS) or the Public Prosecution Service Northern Ireland (PPSNI) to help them decide:
  - if there is a defence under section 31
  - whether a charge should be brought

To read the CPS guidance on Section 31 and statutory defences, see: [Immigration | The Crown Prosecution Service](#).

## Related content

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# What to do if the section 31 defence does not apply

This page tells criminal investigators in Immigration Enforcement (IE) and suitably trained and accredited criminal investigators within the Home Office about what to do if they decide an offender, whose case has been referred to them, is not entitled to a defence under section 31, even if they are (or are later), found to be a refugee.

If you consider the section 31 defence does not apply, even if that person has already been, or is later likely to be, granted asylum, you must progress your investigation as normal by:

- arresting the suspected offender
- booking them into custody
- interviewing them under caution
- referring the case to the Crown Prosecution Service (CPS) for a charging decision (or reporting the case to the Crown Office and Procurator Fiscal Service (COPFS) for cases in Scotland)

For more information, see: [Statutory defences and Legal interpretation of Section 31 of the Refugee Convention](#).

You must give the CPS (or the Crown Office and Procurator Fiscal Service (COPFS) for cases in Scotland, or Public Prosecution Service for Northern Ireland (PPSNI) in Northern Ireland) full information about:

- the asylum application, whatever stage it is at
- the reasons why you think the section 31 defence does not apply even if the offender has been, or may later be, successful in that application:
  - you must include these reasons, in full, when you send your MG03 report to the CPS for charging advice, see MG03 report to CPS for a charging decision log and action plan – (Prosecution Manual, Section 3, Page 45)
  - in Scotland these reasons should be detailed in the remarks section of the standard prosecution report

For more information, see:

- [Statutory defences and Legal interpretation of Section 31 of the Refugee Convention](#)
- [Referring to the Crown Prosecution Service \(CPS\) in asylum cases](#)

The CPS will decide if a defence exists and if the offender is to be charged at that time. If they advise you there could be a defence under section 31, or they do not yet have enough evidence to make a charging decision you must follow the instructions in the 'What to do if the section 31 defence does or may apply' section.



If the CPS authorises charges, it is for them and the police to decide if the offender will initially be remanded in police custody or bailed, pending their first court appearance. The court then decides if any adjournments are appropriate pending the outcome of the asylum application.

In Scotland if you consider the section 31 defence does not apply post interview, after referral to your supervisor you should charge the offender in the normal way and make a recommendation to the police whether they should be held in police custody overnight pending their first court appearance or released on an undertaking to attend court at a later date. The Procurator Fiscal may subsequently decide to cancel the undertaking or appearance at court pending the outcome of the asylum application. Equally if the case proceeds to court the Sheriff may decide to adjourn proceedings to await the outcome of the asylum application.

You must maintain regular contact with the asylum case owner throughout the prosecution process to identify any changes you need to be aware of. You must advise the Crown Prosecution Service (CPS), the Crown Office and Procurator Fiscal Service (COPFS) for cases in Scotland or the Public Prosecution Service for Northern Ireland (PPSNI) for cases in Northern Ireland immediately if at any stage during your investigation or during any criminal proceedings, you:

- discover evidence suggesting the offender might be entitled to a defence under section 31
- receive an update or decision on the asylum application. If there is a grant of leave, the CPS (or COPFS or PPSNI) considers if it is in the public interest to continue with the prosecution

#### **Related content**

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