

# Additional chapter: Forgery and related offences

## Overview

The following offences under the Forgery and Counterfeiting Act 1981 are dealt with below:

- forgery;
- copying a false instrument;
- using a false instrument;
- using a copy of a false instrument,

all of which require the defendant to intend to induce somebody to accept the false instrument (or copy) as genuine (or as a copy of a genuine instrument) and by reason of so accepting it to do or not to do some act to his own or another's prejudice.

The treatment of these offences is followed by a description of offences relating to the custody or control of money orders, share certificates, cheques and various other instruments, or to the making, custody or control of a machine, implement or material designed or adapted to make such an instrument. The more serious version of each of these offences requires proof of the above intentions; the less serious version does not.

The chapter ends with a description of a special defence to a charge of one of the above offences which is available to a refugee.

**1** The Forgery and Counterfeiting Act 1981 (FCA 1981) is a codifying Act based largely on the Law Commission's report, *Forgery and Counterfeit Currency*.<sup>1</sup> The Act repealed the whole of the Forgery Act 1913, the whole of the Coinage Offences Act 1936, and a number of other statutory provisions, and abolished the common law offence of forgery. The FCA 1981, Pt I deals with forgery and related offences, and Pt II with counterfeiting. Like the Theft Acts 1968 and 1978, the Criminal Damage Act 1971 and the Fraud Act 2006, the FCA 1981 is a completely new code.

All the offences under the FCA 1981 mentioned hereafter are triable either way, the maximum punishment on conviction on indictment being 10 years' imprisonment (unless otherwise stated).

## Forgery

**2** This offence is defined by the FCA 1981, s 1 which states that: 'A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.'

### *Actus reus*

**3** The *actus reus* of this offence is **making a false instrument**. By the FCA 1981, s 9(2) this includes altering an instrument so as to make it false in any respect.

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<sup>1</sup> Law Com No 55 (1973).

### Instrument

4 For the purposes of s 1 and other sections in the FCA 1981, an 'instrument' is defined by the FCA 1981, s 8(1) as:

- (a) **any document, whether of a formal or informal character (other than a currency note);**<sup>2</sup>
- (b) **any stamp issued or sold by a postal operator (or a metered postage mark);**<sup>3</sup>
- (c) **any Inland Revenue stamp;**<sup>4</sup> or
- (d) **any disc, tape, soundtrack or other device on or in which information is recorded or stored by mechanical, electronic or other means.** To be 'recorded' or 'stored' the information must be preserved for an appreciable time with the object of subsequent retrieval or recovery.<sup>5</sup> Examples of items covered are microfilm records and information on computer discs, but not electronic impulses in a computer or its 'user segment' (which retains or stores information momentarily while the computer searches its memory, eg to check a password).<sup>6</sup> Unauthorised manipulation of such electronic impulses (by computer hacking or otherwise) is covered by the offence of unauthorised access to computer material, contrary to the Computer Misuse Act 1990, s 1.

Until 1987, a difficulty with this definition related to the word 'document' in (a). The Forgery Act 1913 and its predecessor dealt with the forgery of documents but did not define what constituted a 'document' for its purposes. However, judicial decisions suggested that if a thing was intended to have utility apart from the fact that it conveyed information or recorded a promise it was not a document;<sup>7</sup> a document for the purpose of the law of forgery was, it was thought, a writing which was only intended to convey information or record a promise. This view was based on a rationalisation of the difficult decisions in *Closs*<sup>8</sup> (where a picture falsely bearing the signature of a well-known artist was held not to be a document) and *Smith*<sup>9</sup> (where two of the judges held that wrappers made in the same distinctive form as those in which Borwick's baking powder was sold were not documents).

In their report, the Law Commission concluded that only things which conveyed two messages: a message about the thing itself (eg that it is a cheque) and a message to be found in its words or other symbols that is to be accepted and acted on (eg the message in a cheque to the banker to pay a specified sum), needed to be protected by the law of forgery. Thus, they sought to make clear that things like those in *Closs* and *Smith* were excluded from forgery by limiting the forgery of documents to 'instruments', which were defined as 'any instrument in writing whether of a formal or informal character'. In the view of the Commission, 'instrument' was the appropriate term to convey this meaning. However, although the new offence of forgery is concerned with making a false instrument, Parliament, in its wisdom, chose to change the proposed definition of 'instrument' and that is why the Act defines an instrument as including 'any document, whether formal or

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<sup>2</sup> FCA 1981, s 8(2).

<sup>3</sup> Ibid, s 8(3).

<sup>4</sup> As defined by the Stamp Duties Management Act 1891, s 27: FCA 1981, s 8(4).

<sup>5</sup> *Gold and Schrifteen* [1988] AC 1063, HL.

<sup>6</sup> Ibid.

<sup>7</sup> G Williams 'What is a Document?' (1948) 11 MLR 150 at 160.

<sup>8</sup> (1857) Dears & B 460.

<sup>9</sup> (1858) Dears & B 566.

informal'. This left open the question of the extent of the offence of forgery and left unanswered the difficulties attached to *Closs* and *Smith*.

In 1987, in *Gold and Schrifteen*,<sup>10</sup> the Court of Appeal adopted the Law Commission's view that only instruments containing both types of message needed to be protected by the law of forgery, a view which Lord Brandon, delivering the opinion of the House of Lords on appeal, referred to, obiter, with apparent approval.<sup>11</sup>

Applying the two-messages concept, paintings (even if purporting to bear the signature of an artist), a false autograph, and any writing on manufactured articles indicating the name of the manufacturer or country of origin, are not documents and therefore not 'instruments', whereas, eg, letters, wills, title deeds and cheques are. Of course, paintings and other things which are not 'instruments' are not necessarily beyond the reach of the criminal law if they are falsified, since their use (or attempted use) to deceive will usually involve an offence of fraud under the Fraud Act 2006, s 1 (or an attempt to commit such an offence).

### *False instrument*

5 The FCA 1981, s 9(1) provides an exhaustive definition of the word 'false' for the purpose of forgery and related offences. An instrument is false for this purpose:

- (a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or
- (b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or
- (c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or
- (d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or
- (e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or
- (f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or
- (g) if it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or
- (h) if it purports to have been made or altered by an existing person but he did not in fact exist.'

Although it is irrelevant, for the purposes of the above definition, whether the falsity in question is or is not material, the nature of the requisite ulterior intent to prejudice is such that an immaterial falsity will not normally suffice.

6 A crucial element in this definition is that, **to be false, an instrument must purport to have been made or altered in a way (specified in s 9(1)(a) to (h) above) in which it was not made or altered. An instrument is not false merely because it tells a lie (ie contains a false statement); it must tell a lie about itself and it must tell a lie about itself by purporting to**

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<sup>10</sup> [1987] QB 1116, CA.

<sup>11</sup> [1988] AC 1063 at 1071.

**have been made or altered in a way specified by the FCA 1981, s 9(1)**, ie to have been made or altered by (or on the authority of) a person who did not make or alter it (or authorise its making or alteration), or by otherwise purporting to be made or altered in circumstances in which it was not made or altered. This requirement, sometimes described as the requirement of automendacity, was made by the old law relating to forgery.<sup>12</sup> The wording of the FCA 1981, s 9(1) indicates that this continues to be a requirement of the law, and it was affirmed by the House of Lords in 1987 in *More*<sup>13</sup> that it does.

In *More*, D intercepted a cheque drawn in favour of 'MR Jessel'. D then opened a building society account in the name of Mark Richard Jessel and paid in the cheque. Later, D presented a withdrawal form, signed 'MR Jessel', for most of the amount paid in and was paid by the building society. D was convicted of the forgery of the withdrawal form. He appealed unsuccessfully to the Court of Appeal, which held that the form was a false instrument within s 9(1)(h), since it purported to have been made by an existing person who did not exist, notwithstanding that it did not tell a lie about itself because it was completed by the account holder (albeit he had chosen to be known by a false name). Allowing D's appeal, the House of Lords held that the form was not a false instrument because D was a real person. It was he who was the holder of the account and in that capacity he had signed the withdrawal form. That form clearly purported to be signed by the person who originally opened the account and in this respect it was wholly accurate. Consequently, the House of Lords held, the withdrawal form did not tell a lie about itself and was therefore not a false instrument.

7 Despite the affirmation in *More* of the requirement of automendacity, the decision of the Court of Appeal in *Donnelly*<sup>14</sup> in 1984 (which was not referred to by the House of Lords in *More*) appeared to remove its force. This is because that decision suggests that any instrument which tells a lie about a past fact tells a lie about itself and is false within the above definition.

In *Donnelly*, D was the manager of a jeweller's shop. He completed and signed what purported to be a written valuation of jewellery for insurance purposes. The certificate stated that D had examined the items in question. In fact, the items of jewellery did not exist and the valuation was intended to be used to defraud the insurance company. D was convicted of forgery and appealed to the Court of Appeal, which dismissed his appeal. The Court of Appeal's reasoning was that the valuation certificate, the instrument in question, did tell a lie about itself because (within s 9(1)(g), above) it 'purported to be made in circumstances in which it was not made'. However, that phrase must be read in the context of the rest of s 9(1)(g)<sup>15</sup> (which refers to the date on which, or the place at which, the instrument was made); consequently, it must refer to other circumstances directly related to the making of the instrument, eg the presence of witnesses. To give the phrase an unlimited meaning would render redundant all the other provisions set out in s 9(1)(a) to (h), since instruments covered by them and many other instruments telling lies would also be covered by it. In particular, any instrument telling a lie about a past fact would be a forgery because it would purport to be made after the fact occurred.

<sup>12</sup> *Re Windsor* (1865) 10 Cox CC 118 at 123, per Blackburn J; *Dodge* [1972] 1 QB 416, CA.

<sup>13</sup> [1987] 3 All ER 825, HL.

<sup>14</sup> [1984] 1 WLR 1017, CA. This decision was criticised by JC Smith [1984] Crim LR 491–492, but supported by Leng 'Falsity in Forgery' [1989] Crim LR 687 at 697–699.

<sup>15</sup> See, eg, *Pengelly v Bell Punch Co Ltd* [1964] 2 All ER 945, CA.

8 The status of *Donnelly* in the light of *More* was uncertain, given that the House did not refer to it in *More*. That uncertainty was increased by two decisions of the Court of Appeal in 1994, *Jeraj*<sup>16</sup> and *Warneford and Gibbs*.<sup>17</sup>

In the first of the two cases, *Jeraj*, D, a bank manager, signed a document on bank notepaper to the effect that he had received a certain letter of credit and that, on behalf of his bank, he had fully endorsed it. He could not have received the letter of credit or endorsed it, because it did not exist. Dismissing D's appeal against conviction for forgery, the Court of Appeal held that the trial judge had been correct in considering that he was bound by *Donnelly*, which (it said) had not been undermined by *More*. The Court of Appeal seems to have regarded the reasoning in *Donnelly* as applying in *Jeraj* (ie that the document was false within s 9(1)(g), above) because, since the letter of credit had never existed, the document had not been made after the letter had been received and endorsed, and therefore 'purported to be made in circumstances in which it was not made'. The Court went on to find a further point which, it said, did not turn on s 9(1)(g), viz that D's document was such as to represent that it, together with the letter of credit, amounted to some kind of articulated document, the letter of credit being subject to an endorsement by reason of D's document which was to be read with it. D's document thus told a lie about itself because it could not be an endorsement of a non-existent letter of credit. If this point did not turn on s 9(1)(g), and since there is no other paragraph in the FCA 1981, s 9(1) which is relevant, this explanation would seem not to involve the document telling a lie about itself in one of the specified ways. *Jeraj*, then, is noteworthy, not only for its affirmation of the standing of *Donnelly*, but also because of its statement to the effect that an instrument can be false if it tells a lie about itself in a way other than that specified in s 9(1). That statement's validity is dubious, to say the least.

In *Warneford and Gibbs*, where *Jeraj* was not cited, a differently constituted Court of Appeal held that *Donnelly* was wrongly decided and incapable of standing alongside *More*. D1 and D2 were charged with using a false instrument contrary to the FCA 1981, s 3. The alleged false instrument was 'a purported employer's reference', given to a building society in support of a mortgage application, relating to a person who had never been employed by the establishment in question. It was alleged by the prosecution that the reference was a false instrument within s 9(1)(g) because the fact that the person had never been employed by the establishment was a 'circumstance' in which the document on its face purported to have been made but was not in truth so made. The Court of Appeal allowed D1 and D2's appeals against conviction. It held that s 9(1)(g) was not to be construed so as to bring within its compass every document which contains a falsehood. The expression 'otherwise in circumstances in which it was not in fact made' in s 9(1)(g) referred to the circumstances of the making of the document, just as the references to date and places in s 9(1)(g) concerned the date and place of the making of the document. If, for example, it said, the document on its face purported to have been made in the presence of named individuals who were not in fact present, it would fall within s 9(1)(g). The lie had to relate to the actual circumstances of the document's making. A lie about other facts extraneous to the document did not suffice.

There was no way that *Jeraj* (approving *Donnelly*, and indeed going further) and *Warneford and Gibbs* (disapproving *Donnelly*) could be reconciled.

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<sup>16</sup> [1994] Crim LR 595, CA.

<sup>17</sup> [1994] Crim LR 753, CA.

9 In 2000, the conflict was resolved by the Court of Appeal in *A-G's Reference (No 1 of 2000)*<sup>18</sup> where the Court held that, in view of *Jeraj*, *Donnelly* was binding on it and that *Warneford and Gibbs*, *Jeraj* not having been cited, had to be regarded as wrongly decided. The Court of Appeal, however, sought to limit its effects. **It held that an instrument can be false within s 9(1)(g), on the basis that 'it purports to have been made or altered . . . in circumstances in which it was not in fact made or altered', if the past fact to which it falsely refers is one which was required to exist (or to have existed) before the instrument could properly (or honestly) be made or altered.** In this case, D, a coach driver, who was not taking a break, operated his tachograph machine in a way which indicated that he was taking a break and therefore that the coach was being driven by a second driver. As a result the tachograph sheet indicated that D was taking a break required by law when he was not, and that part of the sheet was therefore false. To make that part of the sheet it was essential for there to be a second driver during the period when the tachograph was operated in the second driver's position. At D's trial for forgery, the trial judge ruled that the tachograph sheet did not amount to a false instrument and D was acquitted. The Court of Appeal held that the tachograph sheet did amount to a false instrument within s 9(1)(g). Applying *Donnelly* and *Jeraj*, it held that *Donnelly* could be adopted without going so far as to make any instrument which told a lie about some alleged past fact a forgery. In *Donnelly*, it said, the falsity related to an event (an examination) which must have occurred before a genuine valuation could be made. A similar comment could be made about *Jeraj*; there had to be a letter of credit which could be endorsed before the note could honestly be written. The Court admitted that the same was true of the facts in *Warneford and Gibbs* (there had to be an employer/employee situation before an employer's reference could be written) but it took the view that the Court of Appeal in that case would not have formed its view as to the correctness of *Donnelly* if it had been aware of *Jeraj*. The Court of Appeal concluded that *Donnelly* could be justified on the basis that it decided that if the falsity related to some past fact required to exist before an instrument could be 'properly made or altered', and those circumstances did not exist, the instrument would tell 'a lie' about itself because it was saying that it was made in circumstances which did not exist.

In terms of the facts of the case, the Court of Appeal accepted that there would not have been a false instrument within s 9(1)(g) if the record had been produced by the driver writing it out, as opposed to being produced by the tachograph being operated. In the former case, the falsity would not have related to the making of the instrument, but simply as to its contents, whereas the tachograph record made continuously over the period indicated by the record was capable of being a false instrument during the period when it showed that the driver in question was not driving and that a second driver must therefore have been driving. To make that part of the instrument properly, it was essential for there to be a second driver during the period the tachograph was operated in the second driver position. There was no second driver and therefore the instrument was false. The circumstance which was false was that the record was made during a period when there purported to be a second driver who was driving.

Although *A-G's Reference (No 1 of 2000)* restricts *Donnelly* to some extent, that restriction still leaves *Donnelly* (as explained) with a wide ambit; there are many cases where it will be satisfied. Moreover, the Court of Appeal's explanation of *Donnelly* involves a highly artificial way of squaring that case with *More*, and one which gives rise to fine distinctions.

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[2001] 1 WLR 331, CA.

To state in writing, 'My examination of the painting has revealed that it is by Constable', when no examination has taken place, can render the document a forgery because of the lie about the antecedent circumstance which must have existed before the statement could properly be made, but a written statement, 'The painting is by Constable', cannot.

One thing which is surprising about *A-G's Reference (No 1 of 2000)* is that forgery (with all its complexity) was ever charged. It was, and still is, an either-way offence under the Transport Act 1968, s 99(5) knowingly to make a false entry on a tachograph record sheet.

### *Mens rea*

**10** The FCA 1981, s 1 states that **D must have the ulterior intent 'that he or another shall use [the false instrument] to induce somebody<sup>19</sup> to accept it as genuine', and the ulterior intent to induce that person 'by reason of so accepting it to do or not to do some act to his own or any other person's<sup>20</sup> prejudice<sup>21</sup>** these intents must exist when D makes the false instrument.<sup>22</sup> It follows that it is not enough simply to intend to induce a person to believe that an instrument is genuine. Thus, making a false birth certificate solely to induce the belief that one comes from a noble family is not forgery.

**D need not intend to induce another human being; it suffices that D intends to induce a machine to respond to the instrument as if it were genuine.<sup>23</sup>**

If D makes a false instrument with the necessary intent, it is irrelevant whether or not it is communicated to anyone, and it is irrelevant whether anyone is induced to accept the instrument as genuine or whether prejudice (within the meaning set out below) is caused, except perhaps in an evidential sense.<sup>24</sup>

Provided that the maker of the false instrument has the necessary intents at the time of making it, it is irrelevant that he has not at that time made up his mind about the method of communicating the false instrument to the victim.<sup>25</sup> It must be proved, however, as s 1 requires, that he intends *it* (the false instrument made by him)<sup>26</sup> to be used to induce somebody to accept *it* as genuine and intends to induce that person by reason of so accepting *it* to do something to his own or another's prejudice. This being so, the actual decision of the Court of Appeal in *Ondhia*,<sup>27</sup> where the point just made was stated, is difficult to accept. In that case D had on three occasions made false instruments with intent that his agent would receive a facsimile of each of them from him by fax and transmit it to V, anticipating that V would accept it and treat it as a duplicate of the false original. The Court of Appeal rejected D's appeal against conviction for forgery in respect of the three original false instruments. This is odd because, when he made each of the three original false

<sup>19</sup> It is not necessary that the person should be identifiable: *Johnson* [1997] 8 Archbold News 1, CA.

<sup>20</sup> Besides D's: *Utting* [1987] 1 WLR 1375, CA.

<sup>21</sup> It was accepted by the Court of Appeal in *Campbell* (1985) 80 Cr App R 47 that intention is required as to both elements. This has been affirmed in a number of subsequent cases, eg *Garcia* (1987) 87 Cr App R 175, CA, where it was stated in relation to the intent as to the second element that the question was whether D was aware of the prejudice alleged, and whether he intended it.

<sup>22</sup> *Ondhia* [1998] 2 Cr App R 150, CA.

<sup>23</sup> FCA 1981, s 10(3).

<sup>24</sup> *Ondhia* [1998] 2 Cr App R 150, CA.

<sup>25</sup> *Ibid* at 156.

<sup>26</sup> *Ibid*.

<sup>27</sup> [1998] 2 Cr App R 150, CA.

instruments, D did not intend to use *it* to induce anyone to do anything. He simply intended to use it to make a facsimile which could be used to induce someone to do something.

**11 The act or omission intended to be induced must be to the prejudice of the person induced or anyone else besides D.**<sup>28</sup> 'Prejudice' is exhaustively defined by the FCA 1981, s 10. Section 10(1) states that, for the purposes of the offences under the FCA 1981 described in this chapter, **an act or omission intended to be induced is only to a person's prejudice if it is one which, if it occurs:**

- **will<sup>29</sup> result:**
  - **in his temporary or permanent loss of property (including a loss by not getting what he might get as well as a loss by parting with what he has),<sup>30</sup>** as where a false cheque or will is made to cause another either to part with property or not to get property he might have got; or
  - **in his being deprived of the opportunity to earn remuneration or greater remuneration,** as where a letter falsely purporting to come from someone asked to give a character reference for an applicant for a job states that he is dishonest; or
  - **in his being deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration,** as where a false testimonial is made to obtain a contract for which a number of different tenders have been made and a genuine tenderer is deprived of what would have been his contract if it had not been for the false statement; or
- **will<sup>31</sup> result in somebody being given an opportunity:**
  - **to earn remuneration or greater remuneration from him,** as where a false testimonial or degree certificate is made in order to obtain a job or better pay in a job; or
  - **to gain a financial advantage from him otherwise than by way of remuneration,** as where a false aeroplane or theatre ticket is made in order to gain from him a flight or admission; or
- **will<sup>32</sup> be the result of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with his performance of any duty.** An example would be where a false tachograph record sheet is made to induce a relevant law enforcement officer to be satisfied with the compliance of the record with legal requirements. This last definition shows that the prejudice intended need not have any financial connotation at all.

An act which a person has an enforceable duty to do and an omission to do an act which a person is not entitled to do are to be disregarded.<sup>33</sup> Consequently, it is not forgery to make a false instrument to induce another to do what he is obliged to do, for example, to pay a debt, or to refrain from doing what he is not entitled to do.

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<sup>28</sup> *Utting* [1987] 1 WLR 1375, CA.

<sup>29</sup> I.e. 'must' and not merely 'may potentially': *Garcia* (1987) 87 Cr App R 175, CA.

<sup>30</sup> FCA 1981, s 10(5).

<sup>31</sup> I.e. 'must' and not merely 'may potentially': *Garcia* (1987) 87 Cr App R 175, CA.

<sup>32</sup> As for 'will', see previous note.

<sup>33</sup> FCA 1981, s 10(2).



Where the intended inducement to respond to the instrument as if it were genuine is of a machine (eg a cash dispenser at a bank), the act or omission intended to be induced by the machine is treated as an act or omission to a person's prejudice.<sup>34</sup>

**12** The above definition of the *mens rea* for forgery is an exclusive one. **Dishonesty is not an element of the offence.**<sup>35</sup> It follows, for example, that it is irrelevant that D believed that he was legally entitled to a gain which he intended to make as a result of falsifying the instrument. Thus, D commits forgery if, believing that he is legally entitled to property in the possession of another, he makes a false document of title to it in order to obtain the property. Indeed, it is not a defence in itself that D might actually have been entitled to have the property transferred to him if he had made a true claim (but not if he made a false statement). If, as would normally be so in such a case, the maker of a false instrument is proved to have had the two intentions he can be convicted of forgery.<sup>36</sup>

### Copying a false instrument

**13** By the FCA 1981, s 2:

'It is an offence for a person to make a copy of an instrument which is, and which he knows or believes to be, a false instrument, with the intention that he or another shall use it to induce somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.'

#### *Actus reus*

**14** The *actus reus* of this offence is **making a copy of a 'false instrument'**; the definition of these two words is the same as for the offence of forgery.<sup>37</sup> The fact that the instrument must be false but need not be forged means that a person who, with the necessary intent, copies a false instrument will be liable, even though the instrument may have been made innocently.

There are no limits on the method of making the copy. Photocopying a false instrument is an obvious and easy method.

#### *Mens rea*

**15** The *mens rea* required is that:

- **D must know or believe<sup>38</sup> that the instrument copied is false.**
- **D must have the ulterior intent that he or another shall use the copy of the false instrument to induce somebody<sup>39</sup> to accept it as a copy of a genuine instrument, and the ulterior intent to induce that person by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.<sup>40</sup>** The elements of

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<sup>34</sup> Ibid, s 10(4).

<sup>35</sup> *Campbell* (1985) 80 Cr App R 47, CA; *Horsey v Hutchings* (1984) *Times*, 8 November, DC.

<sup>36</sup> *A-G's Reference (No 1 of 2001)* [2002] EWCA Crim 1768.

<sup>37</sup> Paras 4–9.

<sup>38</sup> For guidance as to these terms, see paras 3.43 and 3.44.

<sup>39</sup> See para 10, n 19.

<sup>40</sup> By analogy with the FCA 1981, ss 1 and 3 (see paras 10 and 16), it is clear that an ulterior intention is required in both respects.

these ulterior intents have already been discussed in relation to forgery,<sup>41</sup> and what is said there applies equally here, except that references to 'false instrument' and 'as genuine' should be read as 'copy of a false instrument' and 'as a copy of a genuine instrument'. It follows from the present requirement that the present offence is not committed by making a copy of a false instrument if the copy-maker intends to represent it as a copy of a false statement.

### Using a false instrument or a copy of a false instrument

**16** By the FCA 1981, s 3:

'It is an offence for a person to use an instrument which is, and which he knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.'

D must be proved not only to have intended to induce somebody<sup>42</sup> to accept the false instrument as genuine, but also to have intended to induce that person by reason of so accepting it to do or not to do something to his or another's prejudice.<sup>43</sup>

The FCA 1981, s 4 provides a similarly worded offence of using a copy of an instrument which is, and which he knows or believes to be, a false instrument, with the intention of inducing somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

In the light of the explanations already given, no more need be said about these offences except to point out that 'use' is a wide term and covers (among other things) a person who offers, delivers, tenders in payment or exchange, or exposes for sale or exchange, an instrument or copy, as the case may be.

### Offences relating to money orders, share certificates, cheques etc

**17** The FCA 1981, s 5<sup>44</sup> provides a number of offences<sup>45</sup> relating to the following instruments:

- money orders;
- postal orders;
- United Kingdom postage stamps;
- Inland Revenue stamps;
- share certificates;
- cheques and other bills of exchange;
- travellers' cheques;
- bankers' drafts;
- promissory notes;
- cheque cards;
- debit cards;
- credit cards;

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<sup>41</sup> Paras 10 and 11.

<sup>42</sup> See para 10, n 19.

<sup>43</sup> *Tobierre* [1986] 1 All ER 346, CA.

<sup>44</sup> As amended by the Identity Cards Act 2006, s 44(2).

<sup>45</sup> The Identity Documents Act 2010, ss 4 to 6 provide similar offences in relation to false identity documents. The defence referred to in para 22 applies to such an offence or an attempt to commit it.

- certified copies relating to an entry in a register of births, adoptions, marriages, civil partnerships, conversions (of a civil partnership into a marriage) or deaths and issued by the Registrar General, the Registrar General for Northern Ireland, a registration officer or a person lawfully authorised to issue such certified copies; and
- certificates relating to entries in such registers.

Any such instrument is hereafter referred to as a 'specified instrument'.

**18** By the FCA 1981, s 5(1):

'It is an offence for a person to have in his custody or under his control a [specified instrument] which is, and which he knows or believes to be, false, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.'

'Custody' and 'control' are not explained by the Act, but it appears that 'custody' is intended to mean 'physical custody' and 'control' to import the notion of the power to direct what shall be done with the thing in question. The other elements of the offence have the same meaning as they have where they appear in FCA 1981, ss 1 to 4.

The relationship between this offence and some of those just described can be illustrated as follows. If D makes out a false cheque with intent to induce someone to accept it as genuine, and with intent to induce that person by reason of so accepting it to do something to his own prejudice, D commits forgery contrary to s 1. If D walks through the streets to a bank, with the false cheque, in order to cash it, D commits the present offence under s 5(1). If D then passes the cheque to a bank official in order to induce her to part with money, D commits the offence of 'using' contrary to s 3. Of course, it may be that different people will commit different offences in the cycle, as where the person who makes the false instrument gets other people to engage in the use of such false instruments.

**19** If the intents required for an offence under the FCA 1981, s 5(1) cannot both be proved, but custody or control of one of the specified instruments can be proved, D can be convicted of an offence under the FCA 1981, s 5(2). **By s 5(2), it is an offence for a person merely to have in his custody or control, without lawful authority or excuse, a specified instrument which is, and which he knows or believes to be, false.** The maximum punishment on conviction on indictment is two years' imprisonment.<sup>46</sup>

The only part of this offence which requires further elaboration is 'without lawful authority or excuse', which does not appear in s 5(1). D does not have the burden of proving this but merely has an evidential burden. A person who has a settled intention to take a false instrument to the police has a lawful excuse, even if he does not hand the instrument over at the earliest opportunity.<sup>47</sup> On the other hand, a solicitor in possession of a false instrument on behalf of a client in order to prepare his client's defence to a criminal charge does not have a lawful authority or excuse;<sup>48</sup> nor does a person who is in a state of indecision as to what to do with an instrument recently discovered to be false.<sup>49</sup>

**20** The FCA 1981, s 5(3) provides:

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<sup>46</sup> FCA 1981, s 6(4).

<sup>47</sup> *Wuyts* [1969] 2 QB 474, CA; *Sunman* [1995] Crim LR 569, CA (this case was concerned with a corresponding offence in relation to counterfeits).

<sup>48</sup> *Peterborough Justices, ex p Hicks* [1978] 1 All ER 225, DC.

<sup>49</sup> *Sunman* [1995] Crim LR 569, CA.

'It is an offence for a person to make or have in his custody or under his control a machine or implement, or paper or any other material, which to his knowledge is or has been specially designed or adapted for the making of [a specified instrument], with the intention that he or another shall make [a specified instrument] which is false and that he or another shall use the instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.'

This offence strikes at the would-be forger even before he starts to make a false instrument, and before he has got as far as committing attempted forgery.<sup>50</sup> Like an offence under FCA 1981, s 5(1), an offence under s 5(3) is a species of preparatory offence.

**21** The FCA 1981, s 5(4) is important where the intents required under s 5(3) cannot be proved, since it makes it an **offence for a person merely to make or have in his custody or under his control any such machine, implement, paper or material, without lawful authority or excuse**. This offence is punishable with a maximum of two years' imprisonment on conviction on indictment.<sup>51</sup>

### Special defence to forgery and related offences for refugees

**22** The Immigration and Asylum Act 1999 (IAA 1999), s 31(1) provides that it is a defence for a refugee<sup>52</sup> charged with one of the above offences under the FCA 1981<sup>53</sup> to show<sup>54</sup> that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention<sup>55</sup>), he:

- (a) presented himself to the authorities in the United Kingdom without delay;<sup>56</sup>
- (b) showed good cause for his illegal entry or presence in the United Kingdom;<sup>57</sup> and
- (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.<sup>58</sup>

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<sup>50</sup> Paras 14.120–14.129.

<sup>51</sup> FCA 1981, s 6(4).

<sup>52</sup> 'Refugee' has the same meaning as it has for the purposes of the Refugee Convention (as to which see n 55) (IAA 1999, s 31(6)), ie 'a person who has left his 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'. D has an evidential burden in respect of his refugee status; if he satisfies it the prosecution has to prove that he was not a refugee: *Makuwa* [2006] EWCA Crim 175. However, there is an exception where the Secretary of State has already rejected a claim to asylum by a person who claims a defence under s 31(1) because, by s 31(7), such a person is not to be taken to be a refugee unless he 'shows' that he is, which means that he has the burden of proof (ie the persuasive burden) to prove this: *Sadighpour* [2012] EWCA Crim 2669.

<sup>53</sup> Or an attempt to commit such an offence: *ibid* s 31(3).

<sup>54</sup> D has the burden of proof (ie the persuasive burden) in respect of the matters following 'shows' in *ibid* s 31(1)(a)-(c): *Makuwa*; *Sadighpour*. This is not incompatible with the presumption of innocence under the ECHR, Article 6(2): *Makuwa*.

<sup>55</sup> The Convention relating to the Status of Refugees (1951) and the Protocol thereto.

<sup>56</sup> Unless it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum: *Mateta* [2013] EWCA Crim 1372.

<sup>57</sup> 'Good cause' for illegal entry or presence will be satisfied by D showing that he was reasonably travelling on false papers: *Uxbridge Magistrates' Court, ex p Adimi* [2001] QB 667 at 679; *Mateta*.

<sup>58</sup> 'Unless it was explicable that he did not present himself to the authorities in the United Kingdom during a short stopover in this country when travelling through to the nation where he intended to claim asylum: *Mateta*. As soon as reasonably practicable' does not necessarily mean at the earliest possible moment: *Asfaw* [2008] UKHL 31 at [16], per Lord Bingham.

However, s 31(2) goes on to provide that if, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, s 31(1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.<sup>59</sup>

A refugee who has made a claim for asylum is not entitled to the defence provided by s 31(1) in relation to any offence committed by him after making that claim.<sup>60</sup>

#### **FURTHER READING**

*Arlidge and Parry on Fraud* (4th edn, 2014) (Arlidge, Milne and Sprenger (eds)) Ch 11

Arnhem 'Forgery and Negligence' (1988) 132 SJ 350

Leng 'Falsity in Forgery' [1989] Crim LR 679

ATH Smith *Property Offences* (1994) Ch 23

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<sup>59</sup> The fact that a refugee had stopped in a third country in transit is not necessarily fatal and may be explicable: the refugee has some choice as to where he might properly claim asylum. The main touchstones by which exclusion from protection should be judged are the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape: *Asfaw* at [15], per Lord Bingham; *AM* [2010] EWCA Crim 2400 at [9]; *Mateta*.

<sup>60</sup> IAA 1999, s 31(5).