Neutral Citation Number: [2012] EWCA Crim 435

Case Nos: 201100828 B4; 201101553 B4; 201101552 B4 & 201101490 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT ISLEWORTH
HHJ MATTHEWS
T20107425

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2012

Before:

LORD JUSTICE HOOPER
MR JUSTICE WILKIE
and
MR JUSTICE STADLEN

- -

Between:

SARAN SINGH KAPOOR **NERMON SINGH** **DAVINDAR SINGH CHAWLA** **SUBIR SINGH SARNA**	**Appellants**
- and -	
THE CROWN	**Respondent**

- -

Mr Mark Seymour (instructed by **ABV Solicitors**) for **Saran Singh Kapoor**
Mr Shiraz Rustom (instructed by **Asghar & Co**) for **Nermon Singh**
Mr Neil Griffin (instructed by **ABV Solicitors**) for **Davinder Singh Chawla**
Mr S Aziz (instructed by **Mackenzie & Co**) for **Subir Singh Sarna**
Mr E Brown QC and Miss Alexandra Felix (instructed by The Appeals Unit, CPS) for **The Crown**

Hearing date: 1 March 2012

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Approved Judgment

Lord Justice Hooper:

1. On 14 January 2011 in the Crown Court at Isleworth the four appellants were convicted of conspiracy to assist unlawful immigration and three were convicted of a further similar conspiracy. They appeal those convictions with leave. They subsequently received total sentences ranging between 5 and 6 years' imprisonment, for which leave to appeal has also been given. A fifth defendant pleaded guilty to the two counts.

2. On the prosecution's case the conspiracies were intended to work in the following way:

> 1. The appellants, UK passport holders, would travel to India;
>
> 2. In India flights would be purchased in the appellants' names for travel from Mumbai to London with a stop in Bangkok;
>
> 3. The appellants would then check-in at Mumbai using their own documents and the new tickets. They were "through checked" and so would be given two boarding passes, one for the Mumbai to Bangkok flight and one for the Bangkok to London flight;
>
> 4. The appellants would then board the Mumbai to Bangkok flight;
>
> 5. Upon arrival in Bangkok the appellants would not board the Bangkok to London flight and subsequently left the airport;
>
> 6. The boarding cards for the Bangkok to London flight would be passed via an escort to the group seeking entry to the UK, "the entrants" who were Afghan nationals unconnected by family or similar ties to the appellants and who were not EU nationals[1];
>
> 7. The entrants would then board the Bangkok to London flight using the appellants' boarding cards and using false Indian passports in the names of the appellants complete with false UK visas to enable them to clear security before boarding the plane;
>
> 8. Once on the aircraft, the escort would take the documents back from the entrants.
>
> 9. The entrants would disembark at London and, as was intended, would claim asylum when they arrived at the immigration desk in the terminal at Heathrow;

[1] Nor nationals of what is described in the Immigration Act 1971 as the "Section 25 List of Schengen Acquis States".

> 10. On claiming asylum the entrants, as was intended, were unable to produce any passport or equivalent immigration document;
>
> 11. The appellants would then make their way back to London some time later.

3. In pursuance of the conspiracy, it was the prosecution's case that two successful entries were made into the UK and that a further entry was thwarted in Bangkok.

4. In the light of the verdicts, the jury must have accepted the prosecution's case.

5. Count 1 reads:

> Statement of offence
>
> Conspiracy to assist unlawful immigration to a member state, contrary to section 1 of the Criminal Law Act 1977
>
> Particulars of offence
>
> [The defendants] on a day before 9 December 2008, conspired together and with persons unknown to assist in unlawful immigration to a member state, namely the United Kingdom.

6. Count 2 was in identical form apart from the fact that 9 December 2008 became 29 December 2008.

7. Surprisingly there was no reference in the counts to the legislation which made it an offence to assist in unlawful immigration or to any legislation which, it was said, made the immigration unlawful. It was however clear from the opening which legislation the prosecution relied on.

8. The prosecution relied upon section 25 of the Immigration Act 1971. By section 143 of the Nationality, Immigration & Asylum Act 2002 the original section 25 (as amended over the years) was replaced with a new section 25 which created an inchoate offence and which (as subsequently amended), provided as at the date of the conspiracies:

> Assisting unlawful immigration to member State
>
> (1) A person commits an offence if he-
>
> (a) does an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union,
>
> (b) knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law by the individual, and

(c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union.

(2) In subsection (1) "immigration law" means a law which has effect in a member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to-

(a) enter the State,

(b) transit across the State, or

(c) be in the State.

(3) A document issued by the government of a member State certifying a matter of law in that State-

(a) shall be admissible in proceedings for an offence under this section, and

(b) shall be conclusive as to the matter certified.

(4) Subsection (1) applies to things done whether inside or outside the United Kingdom.

(6)[2] A person guilty of an offence under this section shall be liable –

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

(7) In this section–

(a) a reference to a member State includes a reference to a State on a list prescribed for the purposes of this section by order of the Secretary of State (to be known as the "Section 25 List of Schengen Acquis States"), and

(b) a reference to a citizen of the European Union includes a reference to a person who is a national of a State on that list.

(8) An order under subsection (7)(a)–

[2] There is no subsection (5) now.

> (a) may be made only if the Secretary of State thinks it necessary for the purpose of complying with the United Kingdom's obligations under the Community Treaties,
>
> (b) may include transitional, consequential or incidental provision,
>
> (c) shall be made by statutory instrument, and
>
> (d) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

9. Because the appellants were charged with a conspiracy to commit the section 25 offence of facilitation, the prosecution had to prove knowledge and not merely "reasonable cause to believe". (See *Saik* [2006] 2 AC 18)

10. The "immigration law", the breach of which the prosecution relied upon, was section 2 of the Asylum and Immigration (Treatment of Claimants) Act 2004. We set out section 2 below. It is sufficient at this stage to say that in 2004 by that Act and for the first time a new offence was created which punishes non EEA nationals entering into the UK without a passport or equivalent immigration document. The purpose of the section 2 offence is (in broad terms) to punish a person who comes to the UK and who has, by the time he presents himself at a leave to enter or asylum/human rights interview, divested himself of his passport without a permissible reasonable excuse and to deter such conduct.

11. The offence is punishable with a maximum custodial sentence of two years' imprisonment if prosecuted on indictment, whereas the section 25 offence is punishable with a maximum custodial sentence of fourteen years' imprisonment. That explains why the appellants received sentences ranging between 5 and 6 years' imprisonment.

12. As we have said, it was section 143 of the Nationality, Immigration & Asylum Act 2002 which replaced the old section 25 of the Immigration Act 1971 with a new section 25. Section 25 also inserted a new section 25A as well as new sections 25 B and C. The Explanatory Note to the 2002 Act explains the changes. The relevant part of the Note reads:

> 358 Under section 25(1) of the 1971 Act it is an offence for someone to be knowingly concerned in making or carrying out arrangements for securing or facilitating the entry into the UK of an illegal entrant or (if done for gain) an asylum-seeker. It is also an offence knowingly to assist a person to obtain leave to remain in the United Kingdom by deception. The maximum penalty for these offences is 10 years imprisonment and/or an unlimited fine. ...
>
> 359 Under section 25(2) of the 1971 Act it is an offence to "harbour" an illegal entrant, a person who stays longer than allowed by their leave or a person who fails to observe another

> condition of their leave. The maximum penalty for this offence is 6 months imprisonment and/or a fine of £5,000.
>
> 360 Section 143 repeals section 25 of the 1971 Act and replaces it with four new sections (sections 25, 25A and 25B and 25C). Section 25 makes it an offence knowingly to facilitate someone to breach the laws of *any* Member State, not just the United Kingdom. This is a measure required to enable the United Kingdom to comply with Article 27 of the Schengen Convention, and will also assist compliance with a European Directive defining the facilitation of unauthorised entry, transit and residence and its associated Framework Decision, which will replace that Article. The maximum penalty for the offence has been increased to 14 years' imprisonment or an unlimited fine or both. There is no longer a separate offence of "harbouring". This conduct is now included as part of the general offence.
>
> 361 ...
>
> 362 New Section 25A reproduces the offence which is presently section 25(1)(b) of the 1971 Act (namely, helping an asylum-seeker to enter the United Kingdom where this is done for gain). New section 25B makes it an offence to assist entry to the United Kingdom by a European citizen in breach of a deportation or exclusion order. New section 25C confers the same powers on courts to order the forfeiture of ships, aircraft and vehicles as exist presently, but extends the definition of an illegal entrant to include passengers trafficked contrary to the new offence in section 145 of this Act.

13. It is not necessary to set out the terms of Article 27 referred to in paragraph 360 of the Note, other than to say that, by virtue of the Article, the parties agree to impose penalties on any person who for the purposes of gain assists an alien to enter or reside within the territory of a contracting party contrary to the laws of that party.[3] The Directive being referred to in paragraph 360 is Council Directive 2002/90/EC of 28 November 2002 "defining the facilitation of unauthorised entry, transit and residence".[4] The Preamble reads in part:

> (1) One of the objectives of the European Union is the gradual creation of an area of freedom, security and justice, which means, inter alia, that illegal immigration must be combated.
>
> (2) Consequently, measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for

[3] As to the repeal of Article 27 see Article 5 of the Directive.

[4] Paragraph (7) of the Preamble provides that the UK and Ireland are taking part in the adoption and application of this Directive in accordance with the relevant provisions of the Treaties. The UK and Ireland were not parties to the 1985 Schengen Agreement which later became part of community law following the Amsterdam Treaty of 1997, albeit subject to important exceptions in favour of the UK and Ireland.

> the purpose of sustaining networks which exploit human beings.
>
> (3) To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of this Directive and, on the other hand, minimum rules for penalties, liability of legal persons and jurisdiction, which is the subject of Council framework Decision 2002/946/JHA of 28 November 2002[5] on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.
>
> (4) The purpose of this Directive is to provide a definition of the facilitation of illegal immigration and consequently to render more effective the implementation of framework Decision 2002/946/JHA in order to prevent that offence.

14. Articles 1 and 2 provide:

> 1. Each Member State shall adopt appropriate sanctions on:
>
> (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
>
> (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.
>
> 2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.
>
> Article 2
>
> Instigation, participation and attempt
>
> Each Member State shall take the measures necessary to ensure that the sanctions referred to in Article 1 are also applicable to any person who:
>
> (a) is the instigator of,
>
> (b) is an accomplice in, or

[5] The Decision is primarily dealing with penalties and the liability of legal persons.

(c) attempts to commit

an infringement as referred to in Article 1(1)(a) or (b).

15. As the Explanatory Note states and as Mr Brown QC accepts, the new section 25 was introduced in 2002 to assist compliance with the Directive.

16. It should be noted in passing that the new section 25 goes beyond Article 1 in a number of respects. Whereas Article 1(a) and (b) refers only to "intentionally" assisting, section 25 imposes liability on a person if he has reasonable cause for believing that the act facilitates the commission of a breach of immigration law (thus creating an offence punishable with 14 years' imprisonment) which can be committed negligently.

17. Secondly, Article 1(2) only requires the parties to adopt appropriate sanctions on any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens, whereas section 25 omits the requirement of "gain". Thus any person who facilitates another person's unlawful stay in the UK (or in another member state), the other conditions being satisfied, commits an offence against section 25 even if the facilitation is not done for gain. To this extent section 25 might be thought to be a draconian measure which is honoured, we suspect, more in its breach than in its observance. We note in passing that in *R. v. Javaherifard and Miller* [2005] EWCA Crim 3231, Ouseley J gives important guidance on what is likely and not likely to constitute facilitation of another person's unlawful stay in the UK.

18. We also note that section 25(2) of the 1971 Act, until its repeal by the 2002 Act, made it an offence, punishable with 6 months' imprisonment, to harbour an illegal entrant, or a person who stayed longer than allowed by their leave or a person who failed to observe another condition of their leave. We also note that, according to the Explanatory Note, "this conduct is now included as part of the general offence".

19. It is necessary at this point to make a reference to the new section 25A as introduced by the 2002 Act. As we have seen, Article 1(2) provided that:

> Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) [which relates to entering or transit] by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

20. Section 25A provides in part:

> Helping asylum-seeker to enter United Kingdom
>
> (1) A person commits an offence if—

> (a) he knowingly and for gain facilitates the arrival[6] in, or the entry into, the United Kingdom of an individual, and
>
> (b) he knows or has reasonable cause to believe that the individual is an asylum-seeker [defined in sub-section (2)].
>
> (3) Subsection (1) does not apply to anything done by a person acting on behalf of an organisation which—
>
> (a) aims to assist asylum-seekers, and
>
> (b) does not charge for its services. (Emphasis added)

21. This section applies to things done inside and outside the UK and is punishable in the same way as section 25, namely with a maximum of 14 years' imprisonment. (See section 25A (4))

22. We asked Mr Brown (who did not appear for the prosecution in the court below) why, on the facts of this case, the prosecution did not indict the appellants with the section 25A offence or a conspiracy to commit that offence. Mr Brown told us that the prosecution took the view that there was no or no sufficient evidence of "gain". We find that surprising, but we accept for the purposes of this appeal that there was no or no sufficient evidence of "gain". Because this view was taken, the prosecution chose to go by what may be described as the circuitous route of section 25 and section 2 of the Asylum and Immigration (Treatment of Claimants) Act 2004. Section 2 is long and complex. Although section 2 is not confined to asylum seekers, it principally affects them. We need to set much of it out:

> Entering United Kingdom without passport, etc.
>
> (1) A person commits an offence [punishable with a maximum custodial sentence of two years' imprisonment] if at a leave or asylum interview he does not have with him an immigration document which–
>
> (a) is in force, and

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[6] The meaning of "arrival" is discussed in *Javaherifard and Miller* para. 51. However, section 25A has since been amended by the UK Borders Act 2007, s. 29 to add the words "or the entry into" into the section. The Explanatory Note reads: "Section 29 amends the existing offence in section 25A of the 1971 Act to provide that a person commits an offence if he knowingly and for gain facilitates the entry to the United Kingdom, as well as the arrival in the UK, of an individual that they know or reasonably believe to be an asylum-seeker. This amendment ensures that acts committed after an asylum seeker has arrived in the United Kingdom but before they have entered will be covered by the offence."

(b) satisfactorily establishes his identity and nationality or citizenship.

(2) [Relates to dependent children]

(3) [Relates to person interviewed after entry]

(4) It is a defence for a person charged with an offence under subsection (1)–

(a) to prove that he is an EEA national,

(b) to prove that he is a member of the family of an EEA national and that he is exercising a right under the Community Treaties in respect of entry to or residence in the United Kingdom,

(c) to prove that he has a reasonable excuse for not being in possession of a document of the kind specified in subsection (1),

(d) to produce a false immigration document and to prove that he used that document as an immigration document for all purposes in connection with his journey to the United Kingdom, or

(e) to prove that he travelled to the United Kingdom without, at any stage since he set out on the journey, having possession of an immigration document.

(6) [Relates to person interviewed after entry]

(7) For the purposes of subsections (4) to (6)–

(a) the fact that a document was deliberately destroyed or disposed of is not a reasonable excuse for not being in possession of it or for not providing it in accordance with subsection (3), unless it is shown that the destruction or disposal was–

(i) for a reasonable cause, or

(ii) beyond the control of the person charged with the offence, and

(b) in paragraph (a)(i) " reasonable cause" does not include the purpose of–

(i) delaying the handling or resolution of a claim or application or the taking of a decision,

(ii) increasing the chances of success of a claim or application, or

(iii) complying with instructions or advice given by a person who offers advice about, or facilitates, immigration into the United Kingdom, unless in the circumstances of the case it is unreasonable to expect non-compliance with the instructions or advice.

(8)-(11) ...

(12) In this section–

...

"immigration document" means–

(a) a passport, and

(b) a document which relates to a national of a State other than the United Kingdom and which is designed to serve the same purpose as a passport, and

"leave or asylum interview" means an interview with an immigration officer or an official of the Secretary of State at which a person–

(a) seeks leave to enter or remain in the United Kingdom, or

(b) claims that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) as being incompatible with his Convention rights.

(13) For the purposes of this section–

(a) a document which purports to be, or is designed to look like, an immigration document, is a false immigration document, and

(b) an immigration document is a false immigration document if and in so far as it is used–

(i) outside the period for which it is expressed to be valid,

> (ii) contrary to provision for its use made by the person issuing it, or
>
> (iii) by or in respect of a person other than the person to or for whom it was issued.
>
> (14) Section 11 of the Immigration Act 1971 shall have effect for the purpose of the construction of a reference in this section to entering the United Kingdom.

23. Section 11 of the Immigration Act 1971 defines a number of terms used in the Immigration Act. At a risk of over-simplification, it can be said a person arriving at an airport or port with immigration facilities shall be deemed not to enter the United Kingdom whilst waiting to pass through immigration or whilst detained, temporarily admitted or released whilst liable to detention.

24. It follows from section 11 that an asylum seeker who is given temporary admission to enter the country by an immigration officer at an airport such as Heathrow so that his asylum claim can be determined, has not "entered" the UK for the purposes of the Immigration Act 1971 and will be not be an illegal immigrant until at least some other event occurs. Contrast the position of someone who crosses the border into the UK without passing through immigration control, see *e.g. Javaherifard and Miller,* para. 17 above.

25. A careful read of section 2 shows (amongst other things) that a person does not commit the offence if he produces a false immigration document and proves that he used that document as an immigration document for all purposes in connection with his journey to the United Kingdom, or if he produces no passport and proves that he travelled to the United Kingdom without, at any stage since he set out on the journey, having possession of an immigration document. It is, in particular, because of these defences, that we said that the purpose of the section 2 offence is (in broad terms) to punish a person who comes to the UK and who has, by the time he presents himself at a leave to enter or asylum/human rights interview, divested himself of his passport without a permissible reasonable excuse and to deter such conduct.

26. As we have seen, section 25 punishes the facilitation of a breach of immigration law. The principal issue in this appeal concerns the meaning of the words "immigration law". Section 25(2), as we have seen, provides that:

> "immigration law" means a law which has effect in a member State and which *controls*, in respect of some or all persons who are not nationals of the State, *entitlement* to-
>
> (a) enter the State,
>
> (b) transit across the State, or
>
> (c) be in the State.

27. We turn to this issue now.

Law of a state which controls entitlement to enter, transit, or be in the State

28. When asked by the Court Mr Brown said that meaning of the word "enter" in section 25(2) is governed by section 11 and that seems to receive support from *Javaherifard and Miller* (above para. 17), at paras. 12 and 46. We did not take up with Mr Brown whether that would be the same if the law of another member state was in issue.

29. Mr Brown submits that section 2 is an immigration law for the purposes of section 25. He points us to *R. v. Mohammed and Osman* [2007] EWCA Crim 2332; [2008] 1 WLR 1130, a section 2 case dealing with the defences. The Court quoted para. 2.1.2 of the Home office Guidance on the Act:

> "The offence is intended to discourage persons from destroying or disposing of their immigration documents en route to the United Kingdom. In particular to discourage them from doing so in order to conceal their identity, age or nationality in an attempt to increase the chances of success of a claim or application or to make consideration of their claim or application more difficult and/or to thwart removal… "

30. Sir Igor Judge P giving the judgment of the Court continued (para. 21):

> "The legislation is therefore directed to the exercise of proper control over those who seek to enter the United Kingdom."

31. Mr Brown accepts, of course, that the President was not considering the meaning of "control" in section 25(2) of the Immigration Act 1971. He also accepts that the absence of a passport is not determinative of whether a person will be given leave to enter the UK. He submits, however, that these observations support his proposition that section 2 is an "immigration law" in that it "controls" entitlement to enter the state. "Controls" in section 25(2) includes "regulates" and for the reasons set out in the Home Office Guidance the absence of a passport (whether valid or false) assists in the regulation of entitlement to enter the UK.

32. Mr Seymour, on behalf of all the appellants, contrasts the section 25(2) definition of immigration law with the general definition of immigration laws contained in section 33(1) of Immigration Act 1971 which provides:

> "immigration laws" means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands;

33. He accepts that that the alleged breach of immigration law for the purposes of section 25(2) need not constitute a criminal offence. In *Javaherifard and Miller* (above para. 17), the Court of Appeal had to consider the meaning of the expression "*controls entitlement to <u>be in</u>*" the UK. The Court of Appeal held that the fact that it is not an offence for an illegal entrant to stay after entry is immaterial since his staying involves a continuing breach of immigration law on his part. An illegal entrant who stays on in the UK without regularising his position, like, for example, an overstayer is unlawfully in the UK, see para. 50.

34. Reading *Javaherifard and Miller* as a whole, it seems to us that the Court is treating "entitlement" to enter or be in the UK as referring to whether a person is a lawful or unlawful entrant to the UK (see *e.g.* para. 51) or is lawfully or unlawfully in the UK.

35. Mr Seymour submits that the use of the expression *entitlement to enter* is only designed to capture particular types of immigration laws concerned with a person's *substantive/putative* right(s) of entry, as opposed to other immigration laws which are concerned with procedural aspects of the manner in which such *substantive/putative* right(s) of entry may be sought to be exercised.

36. In our view for the purposes of section 25(2) an immigration law is a law which determines whether a person is lawfully or unlawfully either entering the UK, or in transit or being in the UK. If a person facilitates with the necessary knowledge or reasonable cause to believe, the unlawful entry or unlawful presence in the UK of a person who is not a citizen of the EU, then he commits the offence.

37. It seems to us that this reflects what the Directive was seeking to achieve. We note the use of the words "illegal immigration", "unauthorised crossing" and "unauthorised entry, transit and residence" in the preamble. Article 1, less clearly, refers to the breach of the laws on the entry or transit of aliens and on the residence of aliens.

38. We also note that, if the respondent is right, then, on the facts of this case, section 25A can simply be bypassed. Section 25A limits the offence of facilitation to someone who knowingly and for gain facilitates the arrival in, or the entry into, the United Kingdom of an asylum seeker and excludes anything done by a person acting on behalf of an organisation which aims to assist asylum-seekers and does not charge for its services. Section 25A strikes a careful balance reflecting the obligation of the UK under the Refugee Convention. It would be strange if a person who facilitated the arrival into this country of an asylum seeker would not be guilty of an offence under section 25A designed specifically to deal with asylum seekers but guilty of the general offence in section 25. Given that an asylum seeker who presents himself to an immigration officer at an airport and claims asylum is not an illegal entrant or, at least for the time being and following temporary admission, not unlawfully in the UK, section 25 would, on our preferred interpretation not bite.[7] It would be strange if Parliament by enacting the 2004 Act intended to interfere with the balance achieved in 2002 when enacting section 25A.

39. We remind ourselves that section 25 is a penal statute carrying a maximum of fourteen years' imprisonment and, if the respondent is right, then section 25 would include within the definition of "immigration law" a vast amount of rules laid down in primary and delegated legislation both in this country and in other member states for the proper exercise of the decision whether to grant entry and leave, unconditional or conditional, further leave and citizenship etc.

40. For these reasons we would allow the appeal on the principal ground. We should add that the arguments before us ranged more widely than the arguments presented to HHJ Matthews, who upheld the prosecution's submission that the offence was one known to law.

[7] It would however bite if the asylum seeker enters the country illegally, as in *Javaherifard and Miller*.

41. The appellants conceded that, if we allowed the appeal, we were entitled to substitute convictions for conspiracy to commit the offence under section 2 of the Asylum and Immigration (Treatment of Claimants) Act 2004, subject to any other grounds of appeal.

42. Complaint was made of the judge's directions on *mens rea*. It is not necessary for us to deal with this ground but we make it clear that we see no merit in it. The judge gave careful written and oral directions tailored to the issues which the jury had to resolve.

43. Counsel for the appellant Kapoor complained of things said by counsel for the prosecution in her final speech about the defendant's failure to answer questions in interview and about alleged discrepancies between what Kapoor put in his defence statement and his evidence on oath. Both complaints rely upon the fact that the judge said before closing speeches that he would direct the jury that no adverse inferences could be drawn from the failure to answer questions or the alleged discrepancies. Leave was given in relation to the first complaint, but refused in relation to the second.

44. As we made it clear in the course of argument we had doubts about whether counsel for the prosecution should have made the comment the subject matter of the first complaint. Nonetheless the comment could not possibly render the conviction unsafe in the light, particularly, of the judge's directions on the point. As to the second complaint, we agree with Teare J that it is unarguable.

45. We therefore substitute convictions for conspiracy to commit the offence under section 2 of the Asylum and Immigration (Treatment of Claimants) Act 2004.

46. Taking into account submissions which we have received following the receipt of the draft judgment, we substitute for the sentences of six years' imprisonment sentences of two years' imprisonment and for sentences of less than six years' imprisonment sentences of twenty one months' imprisonment, all sentences to be concurrent.