Neutral Citation Number: [2021] EWCA Crim 1958

Case No: 202101585 B4
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CANTERBURY
His Honour Judge Weekes
T20190185
Mr. Recorder Roques
T20200254
Mr. Recorder Burns, Q.C.
T20200181
His Honour Judge James
T20200374

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2021

Before :

LORD JUSTICE EDIS
MRS. JUSTICE MAY
and
SIR NICHOLAS BLAKE

- -

Between :

SAMYAR AHMADII BANI	**Appellant**
- and -	
THE CROWN	**Respondent**
AL ANZI MOHAMOUD	**Appellant**
- and -	
THE CROWN	**Respondent**
FARIBOZ TAHER RAKEI	**Appellant**
- and -	
THE CROWN	**Respondent**
GHODRATALLAH DONYAMALI ZADEH	**Appellant**
- and -	

THE CROWN **Respondent**

- -

- -

Tim Owen QC and John Barker (assigned by the Registrar) for **Samyar Bani**
Tim Owen QC and Sean Kivdeh and Andreas O'Shea (assigned by the Registrar) for **Al Anzi Mohamoud**
Tim Owen QC and Aneurin Brewer (assigned by the Registrar) for **Fariboz Rakei**
Tim Owen QC and Kate O'Raghallaigh (assigned by the Registrar) for **Ghodratallah Zadeh**
Benjamin Douglas-Jones QC and Andrew Johnson (instructed by **CPS Appeals Unit**) for the **Prosecution in all cases**

Apart from Mr. Barker, no counsel appeared in any of these cases below.

Hearing dates : 14 and 15 December 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:00 on Tuesday 12 December 2021.

Lord Justice Edis :-

Introduction

1. In these four cases the Registrar has referred applications for leave to appeal against conviction to the full court. Al Anzi Mohamoud and Fariboz Rakei also seek leave to appeal against sentence, and these applications are also before us.

2. The cases have been grouped together because they all involve the same issue. Each of the four appellants is alleged to have steered a Rigid Hulled Inflatable Boat ('RHIB') from France towards the United Kingdom, which was carrying migrants. There is no connection between them apart from the fact that they were all dealt with at the Canterbury Crown Court charged with an offence under the same provision. All on board each of the four RHIBs were seeking to arrive in the United Kingdom without having been given prior leave to do so. None of those in the vessels was a citizen of a member state of the European Union. Each appellant was convicted of an offence contrary to section 25 of the Immigration Act 1971 ("the 1971 Act"). We have set out the relevant statutory materials in the appendix to this judgment for ease of reference, but for ease of comprehension, we will set out the nub of section 25, in its form at the relevant times (it has been amended subsequently to accommodate the departure of the United Kingdom from the European Union).

3. **25. 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 or attempted 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 or attempted 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.

4. The section 25 offence was considered by the Court (Edis LJ, Holgate J and HHJ Tayton QC) in *Kakaei* [2021] EWCA Crim 503 "*Kakaei*", judgment handed down on 8 April 2021. It is principally because of the explanation of the law in that decision that these appellants now seek to contend that their convictions were unsafe. For the reasons set out in that judgment, it is necessary for the prosecution to prove that a person charged under section 25 in cases like this did acts which facilitated the "entry" without leave into the United Kingdom of a non-EU citizen. "Entry" is a defined term. Section 11(1) provides, in part that the immigrant shall:-

> "be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do

> so as long as he is detained under the powers conferred by Schedule 2 to this Act or section 62 of the Nationality, Immigration and Asylum Act 2002 or on immigration bail within the meaning of Schedule 10 to the Immigration Act 2016."

5. This means that a person who disembarks at a port and remains within its "approved area" does not "enter" the United Kingdom. They will only do that when they leave the approved area. This will generally only happen if they are given leave to enter, or are conveyed into detention or granted immigration bail. In those circumstances no breach of immigration law occurs because a person is deemed not to enter the United Kingdom in those circumstances. The question common to these applications is how this aspect of the law should be dealt with in prosecutions under section 25 of the 1971 Act.

6. It is worth saying at the start of this judgment, that the prosecution in these appeals accept that *Kakaei* was rightly decided. Indeed, it was decided consistently with the submissions made by the prosecution to the court in that appeal. There is no real disagreement between Mr. Owen QC and Mr. Douglas-Jones QC about the meaning of the 1971 Act. The essential position of the prosecution in responding in these cases is that the Crown Court did proceed on a misunderstanding of the law, but the convictions should nevertheless be regarded as safe.

THE FACTS OF THE CASES

7. Three of the cases involve convictions by a jury, and in the fourth the applicant pleaded guilty.

The conviction cases

Samyar Bani

8. Samyar Bani was convicted on 7th November 2019 after a trial before His Honour Judge Weekes and a jury. On the same day he was sentenced to six years' imprisonment. He initially sought, and obtained, permission to appeal only against his sentence. On 28th January 2020, the Court (Holroyde LJ, Sir David Foskett and His Honour Judge Leonard QC) substituted a sentence of five years' imprisonment. He subsequently sought permission to appeal against his conviction, and requires a lengthy extension of time to do that.

9. On 1 June 2019, Mr. Bani was one of six individuals – five adults and one child – on board a RHIB which was observed crossing the English Channel by an R.N.L.I. lifeboat. A UK Border Force Coastal Patrol Vessel was directed to the RHIB and he was observed piloting it for approximately two minutes. Mr. Bani and the other individuals on the RHIB were taken aboard the Coastal Patrol Vessel and transported to Dover Marina.

10. Mr. Bani was initially served with a notice of liability for detention, but then provided with emergency accommodation in a hotel. We shall return to the terms of that notice.

11. Following the examination of a mobile phone seized from Mr. Bani upon his arrival in the United Kingdom, on 4th June 2019, he was arrested. The mobile phone was a central part of the prosecution case. The Judge summarised the relevant parts as showing that the handset user had been involved in the purchase of a RHIB in April and another in May, and had researched weather conditions in the Channel during the 48 hours or so prior to the relevant crossing on 1 June 2019. The jury could conclude that the appellant was the user of the handset and had facilitated that crossing in various ways including by buying the boat, and checking that the weather was likely to render it as safe as it could be, as well as by acting as helmsman.

12. On the following day, he was interviewed under caution, but made no comment in response to the questions that he was asked, save for providing a prepared statement that said:-

> "I understand that I am accused of assisting illegal entry into the UK of other who do not have leave to come here. I wish to say that I am a genuine asylum seeker and I do not accept that I have committed any such offence."

13. On 6 June 2019, he appeared before the Medway Magistrates' Court and was sent to the Crown Court at Canterbury to stand trial.

14. At a Plea and Trial Preparation Hearing on 10th July 2019, directions were made for consideration of Mr. Bani's application to stay the proceedings.

15. Although the indictment does not particularise the breach of immigration law alleged, in an e-mail to Mr. Bani's representatives dated 13th September 2019 that was uploaded to the Crown Court Digital Case System, a Senior Crown Prosecutor identified that the relevant immigration law was section 3(1)(a) of the 1971 Act, which provides that a person who is not a British Citizen:-

> "shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act."

16. On 27th September, Her Honour Judge Catherine Brown refused that application. The Judge noted on the Digital Case System as follows:-

> "2. Despite Mr Barker accepting that D does not have a defence in law to s25 charge, and despite me explaining the position to D including entitlement to credit on a plea, D maintains his plea of NG.
> 3. In the circumstances, D does not intend to serve a DCS and relies upon the Position Statement at D1."

17. The 'statement of position' dated 24th September 2019, stated that:-

> "…it was the purpose of all concerned in the boat to apply for asylum once they had been detained as they inevitably would be by the authorities."

18. Mr. Bani pleaded not guilty following the refusal of his application to dismiss the charge and was thereafter tried before His Honour Judge Weekes and a jury between 4th and 7th November 2019.

19. The defence case at trial was that (1) the organisation of the trip across the Channel was by the whole group and he was no more than a passenger himself and there was no evidence to contradict his motive for coming to the United Kingdom and no evidence of gain (it was conceded that this was not an element of the offence but contended that it should be considered); (2) that he had sourced and purchased the boat with others; (3) he had control of the tiller of the RHIB only for a matter of seconds once it was in UK waters; (4) he was a genuine asylum seeker. The applicant (who was of good character) gave evidence that he had fled Iran as a result of adverse experiences there. He had travelled through Turkey to Greece and claimed asylum in Greece unsuccessfully. Having paid an agent for identification documents he travelled to Germany where he was refused asylum and travelled on to France.

20. He had paid a man, Amin, for a boat for a previous attempt but the boat engine had failed but the money was not returned. With the exception of Mohammed Kamal Nejati, whom he had met in Greece and then stayed with for a while in France, he had met the remaining five men at the Calais jungle in France. Jointly they had arranged the expeditions themselves; sourced, paid for and got the RHIB to the beach and ready for the crossing. There were attempts prior to 1 June and he accepted that he had checked the weather forecast. Another man, Nima had piloted the boat across the Channel and he had "taken over for a very short space of time immediately prior to interception by the Coastguard and he'd taken the tiller, he said, because Nima had turned the engine off, but they'd been ordered to approach the Coastguard boat and so he had complied with the order". When they saw the Coastguard boat the RHIB was stationary. After they had been told to come closer, Nima didn't steer it as "I think that he would be in trouble" and so he had steered for 10 seconds. He didn't know how to drive and had collided with the Coastguard boat quite hard. "He did, however, accept that he was attempting to evade immigration controls at the ports and so that was the reason why he took the boat across the channel, but he said that had he been successful and had he landed in the UK, he would have contacted the police immediately", he wished to claim asylum. He said that they had waved at the Coastguard boat to attract attention.

21. In cross examination he said that he thought it would be ok for asylum seekers and he did not know that it would be a breach of immigration law. He was hopeful that the UK authorities "might listen to me and listen to my account and then they would decide". "I was hoping that it wouldn't be like the Greek authorities." He maintained that he would contact the police when he had landed as he was seeking asylum and that he was not intending to "disrespect or disobey the law in another Country". They had waved to try and attract the orange boat (R.N.L.I.) but another boat went towards it; he understood from the police that someone on the beach had called 999 and when they saw the Coastguard boat they were relieved. They had been filmed for 10 minutes and the clip shown was short.

22. In directing the jury orally and in writing, the Judge identified the elements of the statutory offence created by section 25 and then said this, in giving his oral explanation of his document:-

> "Element (a), that's did an act or acts: there a number of matters of conduct relied upon here by the prosecution, all of which, they say, could be said to have played a part in the overall act of transporting of the Iranian nationals into the United Kingdom on the day in question. These include playing a part in the research into the purchase and the actual purchase of the rigid hull inflatable boat, the RHIB, that was used to transport them; monitoring weather conditions in the English channel, with a view to seeing whether conditions were favourable; co-ordinating the meetings between those on the RHIB in the days before the 1 June; assisting in the movement of the RHIB to the coast; and physically taking the tiller of the RHIB for some or all of the time, to pilot it into UK coastal waters. Mr Bani does not dispute that he engaged in this conduct, but, as you know, as to the question of taking the tiller, he does dispute the length of time for which he had it. So that's then for element (a).

> Element (b): the issue for you is whether the acts, as in element (a), performed by Mr Bani that formed a part of this transportation, in fact, facilitated, i.e. made easier, no matter to what extent, provided that it was, the breach of the relevant UK immigration law - and you'll see there I've put a little footnote,
>
> > "It's not necessary for the prosecution to prove that the Iranian nationals actually were brought into the UK, although there is, as it happens, no dispute that actually the Iranian nationals had entered the UK coastal waters when the RHIB was intercepted."
>
> So, the question of whether it facilitated, made easier, the breach of the relevant UK immigration law, namely bringing illegal immigrants without permission to enter the UK into its territory. And there's a little footnote there, number 2,
>
> > "There is no need for the prosecution to prove that Mr Bani knew of the specific offence being committed or even that he knew it was an offence."
>
> Element (c): Mr Bani does not dispute that the Iranians on the RHIB were, as a matter of fact, not citizens of the EU.
>
> So, element (d)(1): Mr Bani must either have known that the acts he committed would facilitate, i.e. make easier, a breach of immigration law; or even if he did not, this element would still be proved, whether or not Mr Bani knew that they did, if a reasonable person in his position would have believed that the act facilitated a breach of immigration law.
>
> And then finally element (d)(2): Either Mr Bani must have known or even if he did not, a reasonable person in his position would have believed, whether or not Mr Bani knew that the others on the RHIB were not citizens of the European Union. And, in fact, Mr Bani accepts that he knew they were not EU citizens, so there is little dispute on that point."

23. So the judge directed the jury that a breach of immigration law would occur when the boat entered "UK coastal waters", as was the agreed legal position before him. That was wrong. The breach of immigration law would occur on disembarkation otherwise than at a port with an approved area where the migrants could remain until given leave to enter, detained or bailed. Whether they disembarked into such an approved area directly from their own boat or from a vessel in which they had been picked up by the United Kingdom authorities does not matter, as the prosecution has accepted before us. The jury was not directed that they should consider whether he might have intended that the other migrants would enter the United Kingdom without committing a breach of immigration law. He contends that this renders his conviction unsafe.

The grounds and response

24. The Grounds of Appeal say that the judgment in *R v Kakaei* [2021] EWCA Crim 503 disclosed a defence which was not known or appreciated by those providing advice and representation to the applicant. The migrants, with whom he had travelled and assisted

by steering the RHIB, had also been intercepted and processed by the authorities. *"The immediate question arose as to whether there had been a section 24 offence committed and whether that was known or whether the Appellant had cause to know that such offence was intended to be committed. In other words, what was the plan? [par 57 (i) and (ii) Judgement]".* An offence would only have been committed of the migrants had entered the UK and not disembarked at an "approved" area; a person will not have disembarked while detained under schedule 2 powers. In light of the applicant's intention to surrender to the authorities this would include the "likely possibility of being intercepted" and taken to an approved area, hence raising the question posed (but not argued) in paragraph [51] of the judgment. Thus, there were issues for the jury which, save for legal advice given to the applicant, would have been litigated at trial.

25. In reply, the Respondent contends that *R v Kakaei* [2021] EWCA Crim 503 does not represent a change in the law but concedes that the Judge did not properly direct the jury as to the law and so the application should be considered on this basis. It continues:-

> First, the Judge's directions to the jury contain no direction about the nature of the breach of immigration law it was said that MR. BANI was allegedly facilitating the beach of. The directions appear to be premised on the basis that a law was or would have been breached, and the live issue was simply whether or not MR. BANI was facilitating that breach. This appears to have involved the Judge making the same error that the Respondent accepted had occurred in *Kakaei* at [31).
>
> Second, whilst the Judge directed the jury (correctly) that it was not necessary for the jury to be satisfied that others had entered the United Kingdom, but also directed them that there was '*no dispute here that factually the Iranian nationals had entered the United Kingdom coastal waters when the RHIB was intercepted*'. Whilst this may have been agreed between the parties, and indeed may well have been factually correct, it was legally inconsequential. That the Iranian nationals had entered British waters was irrelevant, given that section 11(1) of the Act provides that a person entering the United Kingdom by ship shall be deemed not to enter the United Kingdom unless and until he disembarks, and section 11(3) has the effect of meaning that '*ship*' includes '*any floating structure*'.
>
> Third, and most significantly, the Judge did not direct the jury to consider the element summarised in *Kakaei* at [57]: whether the prosecution could prove '*that one or more of the migrants were intending to disembark at a location other than a recognised port of entry, or otherwise evade immigration control*'.
>
> The Respondent will invite the Court to consider, notwithstanding the identified issues, whether on the particular facts of this case, Mr. Bani's convictions can nevertheless be considered safe.
>
> In addition to the observations set out in *Kakaei* at [70], the Judge's summary of the evidence does not suggest that there was any credible basis on which the jury could have concluded that

the individuals on the RHIB either were or might have been aiming to arrive at an approved area of a port, or intending to be picked up by the Border Force at sea.

In particular, the Respondent suggests:

The contention made by then prosecuting counsel and summarised by the Judge in the transcript at 12G – that the footage of the interception makes clear that the that the occupants do not seem pleased and relieved to have been spotted by the Coastguard – is plainly correct. There is no attempt to summon assistance.

The circumstances in which Mr. Bani was travelling – in particular, at night – were entirely unconducive to seeking to enter a particular location or be detected by the authorities.

Mr. Bani's initial response to being asked whether he immediately approached a British flagged vessel for assistance was '*No, why should I do that?*'. That is entirely inconsistent with such a plan.

Whilst it was Mr. Bani's evidence that he had not sought to avoid detection by the British authorities, Mr. Bani accepted that his plan had not been to enter at a port:-

Q: The reason you took a boat across the channel was to avoid arriving at a port with immigration controls?

A: I tried to get on a lorry and come to the UK but it was unsuccessful. I had a near death experience. I can even show the picture that I was left in the fridge and you can check it on my phone.

Q: I'm suggesting that you decided to cross the channel on a boat to avoid going through a port either when you disembarked or left France or when you entered the UK.

A: Yes.

Q: You accept that.

A: Yes.

For this reason, the Respondent submits that the convictions are safe as the issues that the Judge failed to direct the jury on would have inevitably been resolved against Mr. Bani.

Mohamoud Al Anzi

26. Mohamoud Al Anzi was convicted on 18 February 2021 of one offence of assisting unlawful immigration contrary to section 25 of the 1971 Act after a trial before Mr

Recorder Burns QC and a jury. On the same day he was sentenced to three years and nine months' imprisonment.

27. On 10 June 2020, Mr. Al Anzi was one of twelve individuals onboard a RHIB which was intercepted crossing the English Channel by a UK Border Force Coastal Patrol Vessel. Mr. Al Anzi was one of at least two individuals who had steered the RHIB.

28. On the following day, Mr. Al Anzi was arrested for assisting unlawful immigration. He was cautioned and responded:

> "I don't understand what I have done wrong. I did it because I didn't have the money, so I steered".

29. He was interviewed under caution in the presence of a solicitor and with the assistance of an interpreter. He stated that he was a Kuwaiti national who had fled the country because he was wanted by the authorities as a result of taking part in anti-government protest. He had travelled to Germany, then to France. In France, he could not afford to pay to be taken to the United Kingdom by smugglers. A Kurdish Iraqi trafficker called Kakar took pity on him and allowed him free passage, but in return he was required to steer the RHIB. He steered for most of the journey, although four or five other passengers did so for periods to give him a rest. He did not know any of the other eleven passengers.

30. Mr. Al Anzi was subsequently charged with facilitation contrary to section 25 of the 1971 Act.

31. On 12 June 2020 he appeared before the Medway Magistrates' Court, where he did not indicate a plea. The justices allocated the case to be tried on indictment and he was sent to the Crown Court at Canterbury.

32. The initial Plea and Trial Preparation Hearing on 14 July 2020 was adjourned for Mr. Al Anzi to be further advised. At the adjourned hearing on 7 August 2020, Mr. Al Anzi was not arraigned due to an expressed intention to apply to dismiss the charge and for a stay of the proceedings as amounting to an abuse of the process of the court.

33. The application to dismiss was heard on 11 September 2020. A transcript of that ruling is not available, but the application was rejected. Mr. Al Anzi was arraigned and he entered a not guilty plea.

34. He was tried between 16th and 18th February 2021. In summarising the evidence to the jury, the Recorder stated that Mr. Al Anzi's evidence was that:-

> "…he believed that the other 11 on the boat were like him, i.e. without immigration papers, and therefore agreed that the other 11 were illegal immigrants entering in breach of UK immigration law. And it's agreed that he believed they were."

35. In his evidence at trial, he said that his interview was a lie. He said that he did not realise he was facing an immigration charge and thought he was being interviewed about his asylum claim. He also admitted that his defence statement was wrong and was wrong because he could not read or write and signed it without knowing its contents. His evidence at trial was that he paid Kakar £4,000 to cross the Channel and only steered the boat after an emergency and had travelled 14 hours from Calais to the beach where the departed. He was not the assigned driver, however the assigned driver made an error an hour from the French Cost and the boat

began to spin dangerously. He grabbed the tiller arm and stopped the boat spinning because water had been getting in to the boat and the driver was panicking He had seen the driver start the engine and worked out from that how to stop the boat. He bailed out water using an empty container and turned the engine back on. He then steered the boat towards the UK for around 20 or 3 minutes. The assigned driver then took over and drove the rest of the way. He spoke to some of the others on the boat, believed they also had no immigration papers like him and agreed that he believed them to be illegal immigrants entering in breach of immigration law. The photographs from Border Force showed the assigned driver steering the boat with him sat in the bottom of the boat. He accepted that the photographs from the French border force showed him driving the boat earlier

36. The Recorder directed the jury that they had to be sure of four elements, namely that Mr. Al Anzi (1) did an act or acts, (2) which facilitated the commission of a breach of immigration law, (3) by individuals who were not citizens of the European Union and (4) at the time he either knew, or objectively had reasonable cause to believe, that the act facilitated the commission of a breach of immigration law by those individuals and that those individuals were not citizens of the EU.

37. In relation to element (2), the Recorder directed the jury as follows:

> "5. The issue for you is whether the acts performed by the defendant in fact facilitated (i.e. made easier) the breach of the relevant UK immigration law, namely bringing illegal immigrants, without permission to enter the UK, into its territory. It does not matter the extent of the facilitation, provided that it did make it easier to breach the law to a more than minimal or trivial degree."
>
> "6. The Defendant said that his driving of the boat was not significant – it was just for 20-30 minutes of a 10 hour crossing and did not contribute to facilitating the illegal entry by the 11 others in to the UK or making that easier to any non-trivial extent. In essence he says that his part in driving the boat was so minimal that it did not help to bring the illegal immigrants into the UK".

The Grounds and Response

38. Only one ground of appeal is now pursued, which reads:-

> Intended arrival point and ***R v Kakaei*** [2021] EWCA Crim 503 – the offence in section 25 of the Immigrations Act 1971 Act could not have been committed because the applicant and those on board had sailed towards the United Kingdom intending either to be intercepted at sea by the UK authorities so they could immediately claim asylum or to arrive at an area in a port where they could present themselves to the immigration authorities for the purposes of claiming asylum.

39. The Respondent's Notice says this:-

> The Respondent accepts that there were inadequacies in the Recorder's legal directions.

> First, the Judge did not direct the jury about the nature of the breach of immigration law it was said that Mr. Al Anzi was allegedly facilitating the beach of. The directions appear to be premised on the basis that an immigration law either had been or would have been breached, and the live issue was simply whether or not Mr. Al Anzi was facilitating that breach ('*the issue for you is whether the acts performed by the Defendant in fact facilitated…the breach of the relevant UK immigration law*'). The Recorder simply describes the breach as '*bringing illegal immigrants, without permission to enter the UK, into its territory*'.
>
> This may well have involved the Judge making the same error that the Respondent accepted had occurred in *Kakaei* at [31), although it is not clear from the material available how or if the Recorder applied his mind to the issue.
>
> Second, the Recorder did not direct the jury to consider the element summarised in *Kakaei* at [57]: whether the prosecution could prove '*that one or more of the migrants were intending to disembark at a location other than a recognised port of entry, or otherwise evade immigration control*'.
>
> The Respondent will invite the Court to consider, notwithstanding these issues with the Recorder's summing up whether Mr. Al Anzi's convictions can nevertheless be considered safe. In addition to that general difficulties considered in *Kakaei* at [70], there was any credible basis on which the jury could have concluded that the individuals on the RHIB either were or might have been aiming to arrive at an approved area of a port, or intending to be picked up by the Border Force at sea. The extent of Mr. Al Anzi's evidence was that those onboard were '*crossing the seas and* [seeking to] *reach the UK*'.

Fariborz Taher Rakei

40. Fariborz Taher Rakei was convicted on 4 March 2021 after a trial before His Honour Judge James and a jury. On the same day he was sentenced to four years and six months' imprisonment.

41. Mr. Rakei seeks permission to appeal against his sentence, as well as his conviction, on the basis the sentence imposed is manifestly excessive.

42. In 2019, Mr. Rakei had been intercepted seeking to cross the English Channel. He claimed asylum, but instead of his asylum claim being processed in this jurisdiction, he was returned to Germany, where he had previously made a claim for asylum, on 28 November 2019.

43. On 7 September 2020, Mr. Rakei was one of thirteen individuals onboard a RHIB which was intercepted crossing the English Channel by a UK Border Force Coastal Patrol Vessel. Those onboard were conveyed to the Port of Dover. Mr. Rakei was found in possession of, amongst other items, a compass and three mobile telephones.

44. On 16 September 2020, he was arrested for assisting unlawful immigration. He was interviewed under caution in the presence of a solicitor and with the assistance of an interpreter. He admitted that he had piloted the RHIB during the crossing, but only did so under duress when immediately prior to the crossing commencing he was threatened by the smugglers who he had paid. He had tried to get assistance in piloting the RHIB from others, but he was the only one able to do so safely. Those onboard sought to obtain assistance both from passing ships and by calling 999.

45. He was subsequently charged with facilitation contrary to section 25 of the 1971 Act.

46. On 17 September 2020 he appeared before the Medway Magistrates' Court. The justices allocated the case to be tried on indictment and he was sent to the Crown Court at Canterbury.

47. At the Plea and Trial Preparation Hearing on 27 October 2020, Mr. Rakei pleaded not guilty. When arraigned, he added the words 'I am a victim'. The issue identified for trial was stated to be duress, which was confirmed in a defence statement filed on 7 November 2020.

48. He was tried between 2 and 4 March 2021. The only issue left for the jury to consider was duress, which through their verdict they plainly concluded that the Respondent had disproved.

49. He gave evidence in which he stated that he had previously travelled to the United Kingdom by crossing the Channel by boat. He had claimed asylum but this had been rejected as he had already claimed asylum in Germany. He was therefore returned to Germany where he lived for several years. He said that he wanted to try to come back to the United Kingdom as he had relatives living there. He stated that he had paid €1500 to people traffickers to travel to the United Kingdom. He was taken from Cologne to the French boarder where he lived in the Jungle near Dunkirk for a short period of time. He was then taken to the French coast to await the next part of the journey. He had not wanted to make the crossing again by boat as he thought that it was too dangerous however the traffickers told him that this was the only option available to him. He said that there were a number of traffickers, they were armed and they stated that he would be required to pilot the boat. He said that he was hit in the face with the handle of an axe by one of the men, dragged into the water, put onto the boat and told to steer it. He said that he was genuinely scared for his safety and those on board the boat. He thought that there were too many people on the boat and that the conditions were not ideal but felt that he had no choice but to steer the boat.

50. He started to steer the boat but due to the conditions, he got out and tried and turn back. He said that one of the traffickers hit him and told him to get back into the boat. He complained that it was getting too light to navigate and as a result he was given a compass. He said that the other occupants of the boat were crying and screaming and it was obvious that none of them could steer the boat. He knew that he could not go back as the traffickers effectively controlled the whole of the northern coast. He therefore felt responsible for making the journey and keep the others safe. He said that during the crossing, he asked some of the occupants to call 999, although this was in the context of seeking to be rescued when the boat encountered serious difficulty.

51. He accepted that he had previous military training, was a lifeguard and had a lot of experience at sea but denied that he had told the traffickers about this and denied that he had been given a cheaper passage if he offered to steer the boat. He stated that he could have discarded the compass and sat in a different part of the boat when they were

intercepted so that he would have been in the same people as the other occupants of the boat. However he had been truthful about being the captain and as a result the jury should consider that the entirety of his account could be relied upon.

The Grounds and Response

52. The Grounds of Appeal are as follows:-

> The Judge erred in his directions to the jury. The Court confirmed in the case of *R v Kakaei [2021] EWCA Crim 503* that if the migrants assisted by the appellant arrived "at a port with an approved area, then they would not commit the section 24 offence." It is submitted that this principle also applies to the applicant's case – as those on board had been delivered to an approved area within a port or entry, as long as they claimed asylum on arrival, there would have been no breach of an immigration law for the applicant to facilitate. There is good reason to think that the defence, if it had been raised, would quite probably have succeeded in the applicant' case. In support of this ground of appeal, the Court are invited to permit the applicant to call fresh expert evidence pursuant to section 23 of the Criminal Appeal Act 1968 from Ms Frances Timberlake. In her report dated 10th July 2021, she can give expert evidence in relation to the general experiences, expectations and understanding of migrants in northern France who attempt Channel crossings in small boats
>
> The Judge failed to give a number of standard directions and the cumulative effect of these failings amount to a serious omission which has rendered the applicant's conviction unsafe. It is submitted that the Judge should have directed the jury in relation to the following matters:
>
> a) The applicant's evidence should not have been considered differently from the other evidence in the case;
>
> b) The applicant's decision to affirm;
>
> c) The jury did not have to be bound by what he had chosen to include in the summary of the facts;
>
> d) They should disregard any comments that he made in relation to the case if they did not agree with them;
>
> e) A warning against prejudice and emotion before considering their verdict.

53. The Respondent submits as follows_

> The Respondent accepts that whilst Mr. Rakei did concede through Counsel that but for the defence of duress, the offence was made out, it is not at this stage clear whether that concession was made on the basis of a proper understanding of the offence.

> First, it is not clear that whether there was any consideration of what was required for there to have been a breach of section 24 of the Immigration Act 1971, which was the immigration law FR was alleged to have facilitated the beach of. As a result, the Judge and the parties may have made the same error that the Respondent accepted had occurred in *Kakaei* at [31].
>
> Second, it is not clear whether there was any consideration of the need for the prosecution could prove '*that one or more of the migrants were intending to disembark at a location other than a recognised port of entry, or otherwise evade immigration control*'.
>
> In the event that it is determined that the concession that duress was the only issue was not made on a proper interpretation of section 25, the Respondent will invite the Court to consider, notwithstanding that, whether Mr. Rakei's convictions can nevertheless be considered safe. The Respondent notes that the Mr. Rakei gave no evidence of an intention to arrive at a port or an initial intention to be intercepted at sea – the extent of his evidence was that he was given instructions to follow '*300 north*' on a compass. It was only in fear for the safety of those onboard that he sought to contact the authorities or gain the attention of other boats in other to seek help.

54. In fact, Mr. Rakei said this when being interviewed (the responses are summarised):-

> States he was just like any other passenger in the dinghy, he was given a compass, the 300 marker on the compass was pointed out and he was shown the lights across the Channel and told to head in that direction. Once they were away from the shore, the situation was so tense that he didn't have time to think of what to do or what he could do, he just headed in the one direction that he had been shown to go. He expressed his opposition to getting in the boat and heading off in those conditions, but they would not accept it. They were forced to leave the shore. He put all his energy into getting the dinghy safely here and thanks God he was able to do it. He emphasises that he is not guilty, he is not a collaborator with the smugglers, he is just another passenger on that boat.

55. It is submitted that this passage should be interpreted as Mr. Rakei saying that he was steering towards Dover.

The Guilty Plea case

Ghodratallah Zadeh

56. Ghodratallah Zadeh pleaded guilty on 22nd October 2020 to assisting unlawful immigration to the United Kingdom and seven days later was sentenced to twenty-four months' imprisonment.

57. Mr. Zadeh seeks to contend that the prosecution breached Article 31 of the Refugee Convention, as well as that he was wrongly advised that he had no defence available.

58. On 13th July 2020, Mr. Zadeh was intercepted by a UK Border Force Coastal Patrol Vessel whilst onboard an RHIB in the English channel. There were thirteen people on board (twelve adults and one child). The applicant was identified as the driver. They were all embarked on to the UK Border Force vessel and taken to the Tug Haven, Dover. The applicant was searched and a Swiss railcard, European health card and a "bum bag" containing a variety of tools were seized. He was asked why he had the tools and he said that "I was driving the boat" and "I helped drive it". Aerial footage corroborated Mr. Zadeh's admission that he had been at the helm of the RHIB. He had no identification documentation. The applicant's fingerprints were matched to an asylum claim in Switzerland. All migrants were issued with a form "Illegal entrant 101".

59. He was interviewed under caution later that day in the presence of a solicitor and with the assistance of an interpreter. He stated that he drove the boat three or four times, including immediately prior to the interception by the authorities, but asserted that other individuals onboard also did so. He accepted that he had tools on his person to assist in repairing the boat. He said that he didn't know how to pilot the boat, and the dealers on the beach explained the basics and they were told to head for Dover. He said that he paid the dealer €500 and that he would pay a further £500 through his family. The dealer gave him the tools in case something happened but he did not know how to use them. He was not intending to break the law but to obey it; he did not facilitate the other migrants' entry; they had brought themselves.

60. He gave an account as to his journey from Iran to the United Kingdom. He left Iran four years previously. His attempt to travel to the United Kingdom was a result of his application for asylum in Switzerland being refused.

61. When asked where he intended to stay in the United Kingdom, he replied that he was told that he would '*go to Dover*', and then a decision would be made by the authorities on where he would be transferred to.

62. He was subsequently charged with assisting unlawful immigration. On 12th June 2020 he appeared before the Medway Magistrates' Court. The justices allocated the case to be tried on indictment and he was sent to the Crown Court at Canterbury.

63. The initial Plea and Trial Preparation Hearing on 17th July 2020 took place in his absence. Defence counsel indicated an intention to apply to dismiss the charge. His Honour Judge Weekes commented in the sidebar on the Digital Case System that he considered the proposed application to be '*hopeless*'.

64. The application to dismiss was not pursued. On 18th October 2020 his solicitor, Martyn Hewett, wrote to him explaining that there was no basis upon which such an application would succeed.

65. On 22nd October 2020 Mr. Zadeh appeared before the Judge and entered a guilty plea on the following basis:

> '1. The defendant (now aged 236) was born in Tehran, Iran. He left Iran and travelled to Switzerland where he claimed asylum. A decision was not made for three years – June 2020. The application was refused (appendix A). The defendant was ordered to leave both Switzerland and the Schengen territory by

> 31st July 2020. He decided to travel to the United Kingdom to claim asylum.
>
> 2. The defendant met a dealer who could smuggle him into the UK for a fee. He met the other people in the boat for the first time on the beach in France at about 5am on 13th July 2020. They had to construct the boat together and then boarded it. Just before setting off the agent handed the defendant some tools as he was the closest to him.
>
> 3. During the voyage the defendant accepts that on three or four occasions he drove the boat for a short time as some of the passengers took turns. In doing so the defendant's sole purpose was to get himself to the UK to claim asylum but he accepts that in doing so he was assisting the others. He was not aware that such amounted to the criminal offence of assisting unlawful immigration to a member state'.

66. There is no record of whether the basis of plea was explicitly accepted, but Mr Recorder Roques, who sentenced Mr. Zadeh on 29th October 2020, stated in his sentencing remarks that he passed sentence on that basis

67. Mr. Zadeh was represented upon arraignment and when sentenced by counsel, namely Paul Jackson. Following the waiver of privilege, Mr Jackson made a short statement on 16th August 2021 in which he set out that:

> "Having received the instructions set out in the basis of plea, after anxious consideration I advised Mr Zadeh that as the law then seemed to me, he did not have a defence. Following my advice, he pleaded guilty on 22 October 2020."

Grounds and Response

68. The sole ground of appeal now pursued is this:-

> "The applicant was wrongly advised that he had no defence when he had a viable defence or in the alternative there was no prima facie case against him;
>
> There was no particularised breach of immigration law which the Crown has the burden of proving (section 25(1)(a)). The Crown must prove that the Defendant knew or had reasonable cause to believe that his actions facilitated the passengers' breach of immigration law (section 25(1)(b)); the fact of steering was of no consequence *(para 8.a.)*
>
> The applicant was an asylum seeker in intending to present himself to an immigration officer; an asylum seeker who lands at a port is not an illegal entrant."

69. The response from the Prosecution is as follows:-

> The indictment against Mr. Zadeh is one which the Respondent accepts could, and should, have been better drafted. There is no

basis, however, for contending that the failure to particularise the breach of immigration law renders Mr. Zadeh's conviction unsafe. If there has been a breach of immigration law, that the particular immigration law breached was not particularised cannot render the conviction unsafe.

Mr. Zadeh's reliance on *Kaile* [2009] EWCA Crim 2868 is misplaced. That defendant in that case did not plead guilty. The material issue was not the failure to particularise the breach of immigration law, but the failure of the Judge to direct the jury in relation to it. It may well be that the latter flowed from the former, but nevertheless it was the failure properly to direct the jury that rendered the convictions unsafe. In the instant case, there was no risk of a jury being improperly directed, because of Mr. Zadeh's guilty plea

Indeed, this case is no different to *Dhall*, where there had also been a similar failure to particularise the breach of immigration law and an appeal notwithstanding a guilty plea having been entered. The Court (Fulford LJ, Cox and Slade JJ) dismissed the appeal. There is no basis for the failure to particularise the breach resulting in a different outcome in this case. The question for this Court is, in the Respondent's submission, whether there was a breach of immigration law that was being facilitated.

Mr. Zadeh pleaded guilty and therefore the Respondent submits that this is a case where the *Boal* test applies.

The Respondent respectfully submits that there is no basis on which it could be said that Mr. Zadeh would quite probably have succeeded at trial in arguing that the Crown could not prove that he and those whose immigration he was facilitating intended to enter the UK other than at the approved area of a port of entry. The Respondent relies on *Kakaei* at [70].

The highest that Mr. Zadeh can put his case on his appeal is that Mr Jackson's advice was overly pessimistic. That is insufficient to render the conviction unsafe. This is not a case where if Mr. Zadeh had contested the case, he would quite probably have succeeded.

On the basis that the *Boal* test is not met, the Respondent submits the conviction is safe.

The oral submissions

70. In oral submissions before us, there was substantial agreement between Mr Owen and Mr Douglas-Jones on the underlying principles. We will set out that agreement in summary.
71. It was common ground that this court in *Kakaei* [2021] EWC Crim 503 was not identifying a novel departure in the interpretation of section 25 of the 1971 Act but was

affirming the constant jurisprudence since the Act came into force. As the law presently stands an asylum seeker who merely attempts to arrive at the frontiers of the United Kingdom in order to make a claim is not entering or attempting to enter the country unlawfully. Even though an asylum seeker has no valid passport or identity document or prior permission to enter the United Kingdom this does not make his arrival at the port a breach of an immigration law. Parliament altered the position in 2004 for those whose facilitated the entry of asylum seekers for gain. We are informed that the government is promoting legislative changes in the Nationality and Borders Bill introduced in the House of Commons on 6 July 2021 and now progressing through Parliament. We must deal with these cases on the law as it is today and was at the time the acts relied on occurred. The Government's appreciation of the current problem is set out in the Explanatory Notes published with the new Bill as follows:-

> 386. The offence of knowingly entering the UK without leave dates back to the original version of the 1971 Act. Entering the UK without leave is no longer considered entirely apt given the changes in ways in which people have sought to come to the UK through irregular routes.
>
> 387. This clause creates a new offence so that it encompasses arrival, as well as entry into the UK.
>
> 388. This will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don't technically "enter" the UK.
>
> 389. The definition of "immigration law" in section 25(2) of the 1971 Act is consequently amended to encompass arrival in the UK in addition to entry to allow for prosecutions of those who facilitate the arrival or attempted arrival of persons in breach of immigration law.

72. It is agreed that the true requirements of the law and the relevance of the distinction between entry and arrival was not alive in the minds of the Border Force officers who apprehended these appellants, processed their cases, interviewed them and caused them to be charged. The CPS has also accepted that insufficient scrutiny was given to this issue in preparation of the case for trial. The decision in ***Kakaei*** has resulted in new guidance to prosecutors issued on 8 July 2021.

73. Thus, the Home Office issued a number of the official documents, headed "Notice of Liability to Detention" which stated that the person concerned had entered the United Kingdom illegally because he did not have documentation or any other evidence of a right to enter. The document in Bani's case said:-

> "This notice is given to you because there is reasonable suspicion that you may be liable to removal or deportation from the United Kingdom.
>
> **Statement of Specific Reasons**
>
> You are specifically considered an illegal entrant to the UK as you were encountered in a private vehicle namely a RHIB which had recently arrived in the UK from France. You could not

> produce any travel document or provide any evidence of your lawful basis to be in the UK and have therefore entered the UK in breach of S.3(1)(a) of the Immigration Act 1971-Illegal Entrant."

74. Often the questions asked in interview under caution proceeded on this erroneous basis. This meant that the interview did not focus on ascertaining whether the person being interviewed had actually ever contemplated that an unlawful entry would occur.
75. The particulars of the offence in the indictment did not identify how immigration law was breached by the attempted entry. A generic reference to section 3 of the 1971 Act, which occurred in one case, did not identify to the defendant whether it was alleged he was facilitating an attempted unlawful entry because he intended to enter otherwise than at a port of entry or because he knew or had reasonable cause to believe that other migrants on the boat did not have the documentation to evidence a right of entry under the Immigration Rules.
76. This uncertainty was not clarified by prosecuting counsel at trial, and nor were defence counsel alert to the true legal position on what the elements of the offence were. The respective judges trying the cases were accordingly misled into believing that there was no defence available in law to these appellants or there was no issue taken that all the passengers in the various boats had entered or were attempting to enter unlawfully. In effect the only issue left to the jury in two of the trials was whether they were sure that the appellants were facilitating such unlawful entry, and in the third whether the prosecution had disproved duress.
77. Mr Owen further contended that not only were the various trials conducted on an erroneous basis but, in the light of the true position and the fact that each of these boats was intercepted by the authorities before the appellants and their passengers had disembarked in the United Kingdom, the Guidance issued by the DPP in July raised a doubt as to whether they would even have been prosecuted.
78. The Guidance says this:-

> "Where the evidence indicates an intention to head for shore and to land undetected, there should be no difficulty in proving an intended breach of immigration law. The same would apply where the boat seeks to evade capture or avoid assistance when seen by BF, as this would suggest an intention to enter the UK. Where the evidence indicates a dual intention when putting to sea; namely to head for shore, but diverting to BF if encountered, the existence of a secondary intention to be rescued if encountered would not remove the fact that there is an intention to 'enter' the UK. In those circumstances, it can be argued that the section 25 offence is prima facie committed by anyone who facilitates the journey to the UK. Other examples of cases involving organised facilitation using vehicles and boats which address some of these issues are Adams [1996] Crim. L.R. 593 (boat intercepted before entry made) and R v Eyck [2000] 1 WLR 1389 (facilitated persons discovered concealed in a van on a ferry). More generally, the act of facilitation against those controlling or piloting the boat is complete once assistance is given. Whether or not there is sufficient evidence to prosecute will depend on the facts of each individual case and the intention of those on the boat will be key to proving offences under section

> 25. In summary, to prosecute for an offence of section 25 in relation to those controlling or piloting a boat, there must be sufficient evidence to address assertions that the sole intention when putting to sea was to seek rescue by UKBF and claim asylum, or to head for a designated port in the UK to claim asylum."

79. He also points out the guidance to investigators to gather sufficient evidence to prove the requisite state of mind, including by conducting interviews with suspects specifically to explore their "intended destination".
80. It was common ground that the fact that a small boat had landed on a beach or other place other than a designated port was not conclusive of whether the facilitator knew or had reasonable cause or believe that those facilitated were intending to enter or attempt to enter in breach of the immigration laws, as a plan to surrender to border patrols in British territorial waters or to reach a designated port to submit a claim might be frustrated by unforeseen emergency.
81. The core issue in dispute between Mr. Douglas-Jones and Mr. Owen concerned cases of secondary or conditional intent. A person may hope or intend to encounter immigration officers at a designated port or on the high seas, but may also have engaged in the voyage across the Channel in unsuitable boats with a broader intent to land and disembark without first contacting the immigration authorities if they had not been encountered on route.
82. Mr Owen contended that a guilty verdict depended on the jury being sure that the facilitator knew or had reasonable to cause to believe that the passengers intended to enter by bypassing the authorities altogether. Mr Douglas-Jones disagreed and submitted that it was sufficient if the facilitators knew or reasonably believed that one of the outcomes contemplated by any of the passengers was disembarkation in the United Kingdom outside a designated port without first having encountered or contacted the immigration authorities.
83. This issue was reflected in the rival draft directions that have helpfully been submitted to us for consideration. Although Mr Owen relied on it, we have not found the decision in *R v. Adams* (1995) 24 August 1995,AB 235 236 unreported, to be of assistance to this aspect of the problem, as this authority was concerned with a different issue.
84. As to the admissibility of expert evidence on these issues, the parties were agreed that an expert might be able to give relevant and admissible evidence on issues of cultural context without usurping the role of the jury to decide questions of credibility, depending on the issues in dispute at trial and possession of the relevant expertise on matters. The principles were identified in R v *Ibrahimi* [2005] EWCA Crim (AB 382) at paragraphs 21 to 30.
85. In respect of the guilty plea of Mr. Zadeh, all the advocates were agreed that the test to be applied was the test identified in the case of *R v Boal* [1992] 1 QB 591, albeit that it was being applied in unusual circumstances. It was submitted that here was an admitted error by the defence advocate as to whether the defendant had a defence in law to the charge, but this was encouraged and compounded by the errors made by the investigators and the prosecution as to what the relevant breach of the immigration law was. This had resulted in the judges at Canterbury all taking the same view, which was no doubt within the knowledge of counsel who advised Mr. Zadeh, and accordingly the trial judge misdirecting the jury on the law and the issues. Ms. O'Raghallaigh following on for Mr. Zadeh explained that the alternative approach of an equivocal plea did not apply here as there was no defence case statement, or comments made at the

time of plea to throw doubt on his admission of guilt. She identified passages in his interview where he had indicated an intention to submit to the authorities at sea once the dividing line between the UK and France had been crossed and thus there was relevant evidence raising the defence if it had been identified as an issue in the case.

Discussion

86. We grant leave to appeal against conviction in each of the four cases and any necessary extensions of time. It is agreed that this is not a "change of law" case, and we accept that. As is clear from *Kakaei* the law had been established for a considerable period of time. We invited the Crown Prosecution Service to help us on how it came about that the law was misunderstood when investigating, charging and prosecuting these cases. It appears that when drone technology enabled interception of the small boats at sea more regularly, and the number of small boats also greatly increased, criminal investigations and subsequent prosecutions were launched for summary offences under section 24 of the 1971 Act and either way offences under section 25 without any careful analysis of the law and appropriate guidance to those conducting interviews, taking charging decisions, and presenting cases to courts. It appears also that the judges in the small number of courts where these cases are tried, and defence practitioners followed the flawed view of the law which developed without conducting analysis of their own resulting in an erroneous shared approach. Although this is obviously less than ideal, allocating blame is less important than sorting out the consequences. The fact that the offences were local to Kent no doubt meant that no national guidance was available from any of the usual training sources. Many other factors may also have contributed including the crisis developing in the Channel and the well-understood pressures on the criminal justice system which increased during the relevant period because of the pandemic. The complexity of the 1971 Act also made its contribution, as did the fact that it was not drafted with the current emergency in mind. We were grateful for the candid explanation we received from the Crown Prosecution Service and have been shown its new guidance, issued in July 2021 after *Kakaei*, which appears to us to represent a significant contribution to resolving these problems pending any new legislation. It is not, therefore, that the law has "changed". What has changed is its application in these cases which are limited to one geographical area within our court system. There is no enhanced test for extending time for seeking leave to appeal against conviction.

87. We will deal with these conviction appeals by first identifying and determining the common issues of law which were addressed orally and in writing by Mr. Owen on behalf of all four appellants, and Mr. Douglas-Jones on behalf of the prosecution. We will then apply those decisions to the individual cases.

The common legal issues

88. These cases concern crossings of the Channel in small boats by migrants from nations outside the EU who have travelled to the coast of France in order to make them. The allegation in each case is of facilitating a breach of immigration law by assisting the entry or attempted entry into the United Kingdom without leave. In each case the crossing was intercepted and the appellant and the passengers were picked up and conveyed into the United Kingdom under the orders of UK Border Force. In each case, all or at least most of the passengers and appellants claimed asylum very soon after this. This judgment is confined to considering the application of the 1971 Act to these facts.

The principal issues

89. It appeared to the court that the principal issues which required resolution were:-

    a. What is the mental element of the offence of facilitation? If the prosecution can prove an act by the appellant which facilitated the crossing, what must be proved as to the appellant's state of mind in relation to the attempted entry into the United Kingdom without leave? This is the key question which determines the viability of prosecutions under existing legislation in cases of this kind where there is no evidence that the facilitation was done for "gain", see section 25A of the 1971 Act.

    b. In what circumstances must the jury be directed about what amounts to "entry" into the United Kingdom, having regard to the terms of section 11 of the 1971 Act?

    c. If a direction is required, what form should it take?

    d. If the convictions in the first three cases by the verdicts of the jury are unsafe, what is the position in the case of the fourth appellant who pleaded guilty?

90. Formulating the important questions in this way means that three things which have been raised in argument do not involve difficult or complex questions and can be disposed of quickly. We will deal with these now.

Does *Kakaei* create an evidential burden or reverse the burden of proof ?

91. No. Paragraph 57 of the judgment in *Kakaei* sets out the elements of the defence case as formulated by prosecuting counsel and accepted by the court. It begins:-

> 57. Those elements were
>
> i) The prosecution could not prove that one or more of the migrants were intending to disembark at a location other than a recognised port of entry, or otherwise evade immigration control;

92. This correctly sets out the burden of proof. We assume that the court in *Kakaei* was familiar with the burden of proof in the criminal law, and we read the passage which has been drawn to our intention (paragraph [70]) with that assumption in mind.

93. In paragraph [70] of that judgment the court set out evidential difficulties which the defence would encounter in seeking to contend that the prosecution had failed in this respect. In adversarial proceedings the defence frequently seek to submit that the prosecution has failed to prove an element of the offence to the necessary standard. In doing so they do not assume any burden of proof at any level: they simply make a submission to the jury on the evidence in the case. To observe that such a submission is wholly unrealistic is not to impose a burden on the defence of any kind. The evidential difficulties in paragraph [70] apply particularly in connection with the claim that the crossing may have been designed to reach the approved area of a port. The court was not

there dealing with the question of a plan to be intercepted at sea by UK Border Force and conveyed into the United Kingdom by them. That possibility was dealt with in [71], as follows:-

> The alternative line of defence identified in interview was that actually the point at which he was steering was a point at which it was expected that the UK authorities would intercept the boat and pick up the migrants. If it was with the intention that this should happen that the appellant steered the boats, then the trial court would have to consider whether that amounted to facilitation of a section 24 offence by the others in the boat.

94. That hypothesis was not addressed further in *Kakaei*. It is now conceded that if the act of facilitation was done in order to assist a migrant whose sole objective was to be intercepted in this way, then no offence was committed because that would not result in "entry", as opposed to "arrival", without leave. It is obvious that the same level of evidential difficulty does not apply to this contention since these interceptions are a common occurrence.

95. In each of these cases a boat which is not capable of being accurately navigated was intercepted in the Channel having left France and travelled in the direction of England. Each vessel contained a number of migrants who claimed asylum when they arrived in England. In the absence of any evidence to the contrary, the jury would be entitled to infer that the migrants intended to land wherever they could, if they were not picked up on their way. The jury would also be entitled to infer that this was the intention of the helmsman who was the person attempting to give effect to this intention. That is why what a defendant says in interview or in the witness box is important. To make that obvious point is not at all the same as saying that there is any sort of burden on a defendant.

The expert evidence issue

96. In the case of Rakei, Mr. Brewer seeks to rely on the expert evidence of Ms. Timberlake who has extensive experience of working with migrants in various ways. This was dealt with by both leading counsel in their submissions, which he supplemented by making submissions which were specific to the case of his client.

97. Mr. Douglas-Jones accepted that evidence of this kind may be admissible depending on the issues which arise in particular cases. He did not accept that the entirety of the report of the witness was admissible in all cases or in any case. We consider that this is the right approach. It will be for trial judges to decide what evidence of this kind is necessary to assist the jury with relevant knowledge which is (1) relevant to a matter in dispute and (2) beyond the ordinary collective experience of a jury.

98. It is enough for us to say that we decline to receive it as fresh evidence because it was available (if it had been commissioned) at trial and does not afford a ground for allowing the appeal. It is likely that its relevant content would not have been disputed and that agreed facts would have dealt with any relevant questions at trial. We do not find any of the material helpful in deciding whether the conviction of Mr. Rakei is unsafe because a particular issue was not explored before the jury.

The failure to specify the immigration law which was to be breached in the Indictment

99. It is clear that this ought to be done, and that it was not done. This has no separate force as a ground of appeal. The failure arose out of, and contributed to, the faulty analysis of the requirements of a section 25 facilitation offence. In each case it was clear that the contemplated breach of immigration law was a breach of section 3(1)(a) of the 1971 Act, set out in the Appendix, which prohibits entry into the United Kingdom without leave. This is also an offence under section 24(1)(a) for the person who enters without leave. Perhaps if there had been focus on these provisions there would also have been a focus on the terms of section 11 which defines "entry".

Issue 1: the mental element

100. The starting point is section 25, read alongside sections 3 and 11.

> **25.---- 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 or attempted 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 or attempted 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.

101. In the present cases, the breach of immigration law alleged is entering the United Kingdom without leave. Entry into the United Kingdom without leave is a straightforward concept, complicated by the deeming provisions in section 11(1) of the 1971 Act. A person who arrives in the United Kingdom into the approved area of a port is deemed not to enter the United Kingdom until they leave that area. A person "who has not otherwise entered the United Kingdom" is deemed not enter as long as they are either detained or on immigration bail under the provisions referred to in the sub-section. A person may contact the UK Border Force before entering or at the point of entry and be given leave to enter, but if leave is not given then a breach of immigration law will occur on entry.

102. The offence is complete when the facilitating act is done. This will usually be before the outcome of a Channel crossing can be known. At the point of setting out many outcomes are possible, including being picked up and taken lawfully into the United Kingdom, landing on a beach, sinking, or being turned back by the French authorities.

103. The prosecution case is that at the time when the act of facilitation was done the facilitator and the migrants planned that they would steer towards England, perhaps a particular place in England, but would land wherever they could if they were not first intercepted. This would mean that they planned that the migrants would enter the United Kingdom unlawfully if that was the only way of entering the United Kingdom which proved possible. It is likely that in many cases this will be a realistic view of the evidence. If the jury is sure that this was the case, is that a proper basis for conviction?

104. We have been addressed about what has been described as *mens rea*, and by reference to the concept of conditional intent. This has an important role to play in offences committed jointly, see *R v. Jogee* [2016] UKSC 8, at [90]-[95]. We accept that this principle is relevant in deciding whether a plan which contemplates several different outcomes only one of which is a criminal offence, may nevertheless constitute a crime. Here, however, the mental element is defined by statute. What is required is a planned entry into the United Kingdom without leave, or an attempted entry without leave. The person planning to enter or attempting to enter is the person who is assisted by the facilitator. The offence is complete if at the time of doing the act which facilitates the plan the facilitator knows or has reasonable cause for believing that the act facilitates the commission of a breach or attempted breach of immigration law by (in these cases) entry into the United Kingdom without leave.

105. The offence is complete when the act of facilitation ("the act") is done with the necessary knowledge or reasonable cause for belief. The words "or attempted breach" in section 25(1) of the 1971 Act mean that it is an offence to facilitate a breach of immigration law at any stage in the plan which may result in such a breach. It does not matter whether the plan results in a breach of immigration law or not. It is an offence to facilitate any step in the journey which is more than merely preparatory to the breach. In these small boat cases the facilitator at the time of the act must be proved to have known or had reasonable cause to believe that the migrant who s/he was facilitating would enter the United Kingdom without leave if no other means of entry became possible. If those on a vessel set off intending to be intercepted, but also intend that if they are not intercepted then they will land on a beach, then the journey prior to interception will be an attempted breach of immigration law by them. If they are intercepted then the entry which actually happens will be lawful, but by then the offence has already been completed. If landing on a beach if necessary was within the plan of (one or more of) the migrants, then it would be open to the jury to conclude that the helmsman assisted an unlawful entry even if the boat was ultimately intercepted. In this situation the facilitator would have assisted an attempted breach of immigration law. If, on the other hand, the facilitator knows that the only way in which the migrant intends to enter the United Kingdom is by being brought ashore by the UK Border Force, then he will not be committing the offence, unless he has reasonable cause to believe that this will not be possible. If he is the helmsman, he will be the one putting the migrants' plan into action and the jury may conclude that he must therefore know what it is.

Issue 2: when must the "method of entry" issue be left

106. In all small boat cases. The issue formulated in the last two sentences of the previous paragraph is plainly live in all cases of this kind in the current circumstances, unless formally conceded by defence counsel with a correct understanding of the law. We would not expect that to be a frequent occurrence.

Issue 3: the form of the direction

107. The direction will closely follow the terms of the Act, and will say that the prosecution must prove that at the time when doing the alleged act of facilitation, the facilitator knew or had reasonable cause to believe that the migrant intended to enter the United Kingdom without leave if no lawful means of entry became available during the crossing. The lawful means of entry which might have become available were:-

    a. Arrival at the approved area of a port;

b. Interception by the UK Border Force and arrival thereafter at the approved area of a port;

c. Entry with leave granted by an immigration officer.

108. If, on the other hand, the prosecution fails to prove that the facilitator knew or had reasonable cause to believe that the migrant intended to enter the United Kingdom without leave if no lawful means of entry became available during the crossing, for example because he knew or had reasonable cause to believe that interception at sea by the United Kingdom authorities was the only planned method of entry, then the facilitator will be entitled to be acquitted.

Issue 4: the guilty plea case

109. In *Kakaei* at [67] the court identified the principles to be applied to appeals against conviction following guilty pleas allegedly entered because of bad legal advice. It may strictly have been unnecessary to the decision which was about a guilty plea following a legal ruling, but we see no reason not to follow it as representing the proper approach in guilty plea cases. However, in this case we have decided that the striking facts require a somewhat different approach. In truth, this guilty plea was not entered simply because counsel gave wrong advice. It was entered because a heresy about the law had been adopted by those who were investigating these cases, and passed on to those who prosecuted them, and then further passed on to those who were defending them and finally affected the way the judges at the Canterbury Crown Court approached these prosecutions.

110. This may be illustrated by comparing the case of Mr. Zadeh, who pleaded guilty, with that of Mr. Bani, who was convicted by the jury. The events of 27 September 2019 in Mr. Bani's case are set out at paragraph [16] above.

111. Mr. Barker appeared for Mr. Bani at trial and before us, and confirmed that he shared the same view of the law which almost everyone else involved in these cases appears to have held. We did not ask him to reveal the advice he gave to Mr. Bani, but it is clear enough from the circumstances. He made a closing speech to the jury with considerable care since he was addressing them on behalf of someone with no defence. Mr. Bani was therefore probably advised by counsel, and certainly advised by a judge that he had no defence to the Indictment. He refused to accept that advice and insisted on a trial. There are really only two differences between his situation and that of Mr. Zadeh:-

a. Mr. Zadeh acted reasonably in accepting the legal advice he was given.

b. Mr. Zadeh's defence in relation to the proposed means of entry into the United Kingdom was stronger than that of Mr. Bani.

112. In interview Mr. Zadeh said a number of relevant things, even though the issue was not being fully explored for the reasons which we have explained. He said

> A. So, it was a stressful situation and that, so um, the only thing is that when we were near the, what is called the border inside the water, for the free water as they call it?
>
> Q. The bit in the middle between France and England.
>
> A. Yes there's a line of, yes. So when we were near that, or I don't know if you pass that on or not, but the guys had

> phones in their hands and they were checking the locations. And then we saw the navy of UK coming towards us. T

113. We read this as meaning that the migrants were using their phones to make sure that they had crossed the sea border and so got beyond the point where they might be intercepted by the French authorities and returned to France. This was because they wanted to be picked up by the United Kingdom authorities and needed to carry on until they were across the sea border.

114. Later, Mr. Zadeh described what happened when the boat was intercepted, saying

> We were stopping and I was basically kind of sure we've finally got to the UK Navy and we are safe.

115. He also said when asked where he would stay in the United Kingdom

> Um, basically the dealer told us that you go to Dover and from there they will decide where they transfer you. So I don't know really know which city is good, so I'm just hoping I'm going to a good city.

116. This contrasts favourably on this issue with Mr. Bani's position, which we have summarised above. Mr. Zadeh was not asked what he had planned to do if the "UK Navy", actually a Coastal Patrol Vessel, had not intervened. On our analysis of the law, that is a key question. It is difficult to say in these circumstances whether his case may have been sufficiently persuasive to cause a jury to conclude that the prosecution had failed to prove its case on this issue. We would, however, consider it unjust in the particular circumstances of these cases, taken together, to say that unless Mr. Zadeh can show that he would probably have succeeded in this respect his conviction must be upheld as being safe. The role of the investigators and prosecutors in causing or permitting a false understanding of the law to become prevalent in the relevant court is central to this conclusion. The role of the judges in adopting that understanding is also important. In this situation, Mr. Zadeh was deprived of a fair opportunity to decide whether to plead guilty or not, knowing precisely what he was charged with and whether in law he was guilty of that charge or not.

117. The indictment in his case gave these particulars of offence:-

> GHODRATALLAH DONYAMALI ZADEH on the 13th day of July 2020 did an act, namely piloted an inflatable boat containing twelve other undocumented Iranian Nationals into the UK, which facilitated the commission of a breach of immigration law by an individual who was not a citizen of the European Union, knowing or having reasonable cause for believing that the act facilitated the commission of a breach of immigration law by that individual, and that that individual was not a citizen of the European Union.

118. The allegation that the Iranian Nationals were "undocumented" was there because everyone wrongly thought that this was enough to prove the offence. The indictment was the responsibility of the prosecution and was in this respect misleading. *R v. Boal* and the other cases which have followed it, do not, for obvious reasons, contemplate this situation which we hope is unique. We have reached the conclusion on the facts of these

cases that it would be wrong to treat Mr. Zadeh differently from the other appellants because he pleaded guilty, and they were convicted by the jury.

Conclusion

119. It follows from paragraph 103 above that these convictions are unsafe and must be quashed in due course when we have determined any applications for retrials. A matter which the prosecution must prove, that at the time of the facilitation the appellant knew or had reasonable cause to believe that his act was assisting entry or attempted entry into the United Kingdom without leave, was not properly investigated and was then not left for the jury to decide. We cannot accept the submissions of the prosecution that convictions are safe notwithstanding these failures. The errors were too fundamental for that. It is unnecessary to say any more about those submissions.

120. In these circumstances it is not necessary to consider Mr. Rakei's additional criticisms of the summing up in his case.

121. The prosecution has indicated that of these four cases it seeks a re-trial only in the case of Mr. Rakei. His case will be dealt with in accordance with the directions below, and his conviction is not yet formally quashed. We allow the appeals in the cases of Mr. Bani, Mr. Al Anzi, and Mr. Zadeh and quash their convictions now.

122. In the result the applications in relation to sentence fall away and we say nothing about them.

Directions

123. These cases and the other seven applications raising similar points currently pending in the Court of Appeal Criminal Division and any others which may have been listed by then (the additional cases) will be listed before this constitution on the first possible day in January 2022.

124. The Crown will issue in writing not later than 7 January 2022:-

    a. Its response to the additional cases, setting out its case on whether leave should be granted and, if so, whether the appeal should be allowed.

    b. Whether it seeks a retrial in respect of these four cases and any of the additional cases where it accepts the convictions cannot stand.

125. Those representing the appellants or applicants shall respond in writing not later than 14 January 2022.

126. Any applications for bail must be made in writing for the attention of Edis LJ and will be determined on the papers after receipt of a prosecution response which should be filed as soon as possible.

R. v. BANI, R v. AL ANZI, R v. RAKEI, R v. ZADEH

APPENDIX TO JUDGMENT OF COURT OF APPEAL 21 DECEMBER 2021

PROVISIONS OF IMMIGRATION ACT 1971 AS IN FORCE AT THE RELEVANT TIMES

3.— General provisions for regulation and control.

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;

…..

11.— Construction of references to entry, and other phrases relating to travel.

(1) A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained under the powers conferred by Schedule 2 to this Act or section 62 of the Nationality, Immigration and Asylum Act 2002 or on immigration bail within the meaning of Schedule 10 to the Immigration Act 2016.

(2) In this Act *"disembark"* means disembark from a ship or aircraft, and *"embark"* means embark in a ship or aircraft; and, except in subsection (1) above,

(a) references to disembarking in the United Kingdom do not apply to disembarking after a local journey from a place in the United Kingdom or elsewhere in the common travel area; and

(b) references to embarking in the United Kingdom do not apply to embarking for a local journey to a place in the United Kingdom or elsewhere in the common travel area.

(3) Except in so far as the context otherwise requires, references in this Act to arriving in the United Kingdom by ship shall extend to arrival by any floating structure, and "*disembark"* shall be construed accordingly; but the provisions of this Act specially relating to members of the crew of a ship shall not by virtue of this provision apply in relation to any floating structure not being a ship.

(4) For purposes of this Act *"common travel area"* has the meaning given by section 1(3), and a journey is, in relation to the common travel area, a local journey if but only if it begins and ends in the common travel area and is not made by a ship or aircraft which—

(a) in the case of a journey to a place in the United Kingdom, began its voyage from, or has during its voyage called at, a place not in the common travel area; or

(b) in the case of a journey from a place in the United Kingdom, is due to end its voyage in, or call in the course of its voyage at, a place not in the common travel area.

(5) A person who enters the United Kingdom lawfully by virtue of section 8(1) above, and seeks to remain beyond the time limited by section 8(1), shall be treated for purposes of this Act as seeking to enter the United Kingdom.

24.— Illegal entry and similar offences.

(1) A person who is not a British citizen shall be guilty of an offence punishable on summary conviction with a fine of not more than level 5 on the standard scale or with imprisonment for not more than six months, or with both, in any of the following cases:—

(a) if contrary to this Act he knowingly enters the United Kingdom in breach of a deportation order or without leave;

(b) if, having only a limited leave to enter or remain in the United Kingdom, he knowingly either—

(i) remains beyond the time limited by the leave; or

(ii) fails to observe a condition of the leave;

(c) if, having lawfully entered the United Kingdom without leave by virtue of section 8(1) above, he remains without leave beyond the time allowed by section 8(1);

(d) if, without reasonable excuse, he fails to comply with any requirement imposed on him under Schedule 2 to this Act to report to a medical officer of health, or to attend, or submit to a test or examination, as required by such an officer;

(f) if he disembarks in the United Kingdom from a ship or aircraft after being placed on board under Schedule 2 or 3 to this Act with a view to his removal from the United Kingdom;

(g) if he embarks in contravention of a restriction imposed by or under an Order in Council under section 3(7) of this Act;

(h) if the person is on immigration bail within the meaning of Schedule 10 to the Immigration Act 2016 and, without reasonable excuse, the person breaches a bail condition within the meaning of that Schedule.

(1A) A person commits an offence under subsection (1)(b)(i) above on the day when he first knows that the time limited by his leave has expired and continues to commit it throughout any period during which he is in the United Kingdom thereafter; but a person shall not be prosecuted under that provision more than once in respect of the same limited leave.

(3) The extended time limit for prosecutions which is provided for by section 28(1) below shall apply to offences under subsection (1)(a) and (c) above.

(3A) The extended time limit for prosecutions which is provided for by section 28(1A) below shall apply to offences under subsection (1)(h) above.

(4) In proceedings for an offence against subsection (1)(a) above of entering the United Kingdom without leave,—

(a) any stamp purporting to have been imprinted on a passport or other travel document by an immigration officer on a particular date for the purpose of giving leave shall be presumed to have been duly so imprinted, unless the contrary is proved;

(b) proof that a person had leave to enter the United Kingdom shall lie on the defence if, but only if, he is shown to have entered within six months before the date when the proceedings were commenced.

25.---- 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 or attempted 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 or attempted 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) 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)–

(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 EU 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.

25A Helping asylum-seeker to enter United Kingdom

(1) A person commits an offence if—

(a) he knowingly and for gain facilitates the arrival or attempted arrival in, or the entry or attempted 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.

(2) In this section *"asylum-seeker"* means a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under—

(a) the Refugee Convention (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999 (c. 33) (interpretation)), or

(b) the Human Rights Convention (within the meaning given by that section).

(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.

(4) subsections (4) and (6) of section 25 apply for the purpose of the offence in subsection (1) of this section as they apply for the purpose of the offence in subsection (1) of that section.