Neutral Citation Number: [2021] EWCA Crim 503

Case No: 202002487 B2
202100475 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CANTERBURY CROWN COURT
His Honour Judge O'Mahony
T20200116

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2021

Before :

LORD JUSTICE EDIS
MR JUSTICE HOLGATE
HER HONOUR JUDGE TAYTON QC,
sitting as a judge of the Court of Appeal Criminal Division

- -

Between :

THE CROWN
- and -
FOUAD KAKAEI **Appellant**

- -
- -

Aneurin Brewer (assigned by the Registrar) for the **Appellant**
James Marsland (instructed by **the Crown Prosecution Service Appeals Unit**) for the **Respondent**

Hearing dates : 25 March 2021

- -

Approved Judgment

Lord Justice Edis :

Introduction

1. On 4th September 2020 in the Crown Court at Canterbury, His Honour Judge O'Mahony determined a legal issue before trial. As a result of his ruling the appellant changed his plea to guilty to two counts, numbered 1 and 3 on the indictment, of assisting unlawful immigration to a member state contrary to section 25(1) of the Immigration Act 1971. These counts alleged that he had piloted a boat across the channel containing illegal migrants on two occasions, 24 July 2019 and 29 December 2019. Count 2 alleged that he had also committed a similar offence on the 12 December 2019. This was ordered to lie on the file in the usual terms.

2. In separate proceedings before the justices he had pleaded guilty to an offence contrary to section 24 of the 1971 Act which alleged that his own entry into the United Kingdom (UK) on 29 December 2019 had been unlawful. He received a sentence of 4 months imprisonment in respect of that offence on 31 December 2019.

3. On 21st January 2021 he was sentenced to 26 months imprisonment on each count concurrently by HHJ Weekes, and further ancillary orders were made.

4. Leave to appeal against conviction was granted by the full court. He also applies for leave to appeal against sentence, his application having been referred to the full court by the single judge.

5. At the conclusion of the hearing we announced that this appeal would be allowed, and that we would give our reasons on a later date. This we now do. We also directed that the parties should serve written submissions on whether or not we should order a re-trial and we will deal with that issue after this decision has been handed down.

6. The appellant was represented before us by Mr. Aneurin Brewer, as he was before the Crown Court. The respondent is represented by Mr. James Marsland, who did not appear below. We are very grateful to both counsel for their assistance in this case. In particular, we would like to thank Mr. Marsland for correcting the position taken by the prosecution below and doing so in time to enable Mr. Brewer to respond to the position now adopted in answer to this appeal.

7. We have set out the relevant provisions of the Immigration Act 1971 in the Appendix to this judgment.

The proceedings below and the facts

8. The appellant pleaded guilty on a factual basis set out in a Basis of Plea and the sentencing judge accepted that basis.

9. The background is set out in the appellant's Defence Case Statement:-

> "Over the second half of 2019, following the refusal of his asylum claim in Denmark in April 2019, the Appellant, along with other migrants, repeatedly attempted to enter the UK as genuine asylum seekers on numerous occasions including on 24 July, 12 and 29 December 2019 as alleged. He will say that over

> that period he made near nightly attempts to enter the UK and was routinely detained by the UK and French authorities. He will say that, save for the period when he was detained in the UK, he resided in migrant camps and slept rough in the area of Dunkirk.
>
> "With respect to his crossings of the British Channel on 24 July and 29 December 2019, he will say that the crossing was planned and arranged by others and he, like the other migrants aboard, paid agents to be allowed passage on the vessel. He will concede that at some point during the journeys across the Channel he helped to steer the vessel. However, he will say that a number of the occupants of the vessel took turns to steer the vessel at various points during the journey. He will say on the second occasion he initially refused to help steer the boat and was allowed to be a passenger on that basis but eventually did assist when it became clear to him during the crossing that the other passengers could not safely steer the vessel and he became convinced their lives were at risk if he did not assist. He will say he believed all the other passengers on both occasions to be genuine asylum seekers like himself who intended to present themselves to the authorities immediately on disembarkation to claim asylum."

10. Elements of this appear in the Basis of Plea, which reads as follows:-

> 1. Mr Kakaei will plead guilty to counts 1 and 3 on the indictment to the following limited extent. He will accept that he facilitated the entry of the other migrants on the boat with him only by, along with many of those aboard, helping to pilot the vessels.
>
> 2. Mr Kakaei will deny that he had any financial motive to assist with the piloting of the vessels and that he in fact paid a people smuggler like all the other migrants on board for the opportunity to try and cross the channel on those two occasions.
>
> 3. Mr Kakaei will say that he believed that all the migrants aboard on both occasions, including himself, would surrender to the UK border authorities and claim asylum immediately on disembarking in the UK.
>
> 4. Mr Kakaei will say that he is a genuine refugee who was forced to flee from his home country of Iran due to his sexuality.

11. The prosecution evidence showed that on 24 July 2019 the appellant and 26 migrants were stopped by UK Border Force officers as they attempted to cross the British Channel from France in a rigid hull inflatable boat (RHIB). The appellant was seen operating the rudder of the vessel. The 26 migrants were undocumented and made applications for asylum immediately after disembarking from the vessel. The appellant was searched and found to be in possession of £210 in cash and a Samsung smart phone. He refused to provide the PIN number for this phone and declined to make an

application for asylum. He was subsequently returned to Denmark where a previous application for asylum had been refused.

12. On 29 December 2019, the appellant and 10 migrants were intercepted by UK Border Force officers whilst attempting to cross the channel in the same manner as they had on 24 July 2019 and again with the appellant operating the rudder of the vessel. On this occasion, the appellant did make an application for asylum along with the other 10 migrants that had accompanied him. The basis for the appellant's claim was that he was at risk of persecution in his native Iran as a result of his sexuality. The investigators also noted that the appellant was in possession of a mobile telephone, 2 further SIM cards and an SD card in his possession. He refused to provide the PIN number for his phone to the investigators, although they were subsequently able to access it. He was the only person on the vessel who had a mobile phone, although he says that this was because other people on board threw their devices overboard. None of the occupants of the boat had any documentation.

13. The appellant was interviewed under caution on 29 December 2019 and 13 March 2020. He stated that he had travelled to the UK in order to claim asylum and had brought the other migrants with him but he denied that he had done so for financial gain. He stated that he had piloted the boat for part of the journey but denied that he had been the sole person in charge of the boat for the July crossing. He accepted that he was the only person who piloted the boat during the December journey but only because no one else knew how to do so. He stated that he had not claimed asylum in July 2019 as the authorities had told him that that he would be unable to claim asylum in the UK as a result of the fact that his claim had been refused in Denmark.

14. All involved, therefore, were travelling from a safe country, France, to the UK on both occasions. No-one had any documentation. The appellant pleaded guilty, as we have said, to the offence of unlawfully entering the UK on 29 December 2019, contrary to section 24 of the 1971 Act.

15. The two relevant counts on the Indictment had been amended before the judge's ruling to specify the breach of immigration law relied on: they now said:-

> STATEMENT OF OFFENCE
>
> ASSISTING UNLAWFUL IMMIGRATION TO MEMBER STATE, contrary to section 25(1) of the Immigration Act 1971.
>
> PARTICULARS OF OFFENCE
>
> FOUAD KAKAEI on [date] assisted the illegal entry of persons who were not citizens of the European Union which facilitated the commission of an attempted breach of immigration law by those individuals, namely entering the United Kingdom without leave contrary to section 24 of the Immigration Act 1971, knowing or having reasonable cause for believing that the act facilitated the commission of a breach of immigration law by those individuals and that those individuals were not citizens of the European Union."

16. There was no evidence that any other entrant on either occasion had been convicted of an offence under section 24, but neither was there any evidence that any of them had any more right to enter the UK than he had on that second occasion to which his conviction related. The judge proceeded on the basis that this conviction would have been admissible in any trial to prove that the appellant's entry into the UK on 29 December 2019 was unlawful, and, by extension, that all other entries by occupants of these two vessels on both occasions were also unlawful. That would have been a matter of fact for the jury to decide, if there had been a trial, in the light of any evidence adduced by the parties at trial which might explain why that inference should not be drawn.

17. Although, therefore, this case has features which enable a consideration of the general state of the law, it also has a particular feature which other cases may lack. There was evidence of unlawfulness derived from the appellant's own plea of guilty on 31 December 2019.

The proceedings before the judge and his ruling

18. Unfortunately, the proceedings before the judge were not formulated in such a way as to assist him in his task. It appears that counsel for both sides believed that there was a conflict of authority in this court, and that this required the judge to make a ruling of law at the pre-trial stage. The prosecution case was that the appellant had no defence even on his own case, and the defence wanted to know whether this was right. They wanted it decided in advance of the trial so that if his defence was excluded as a matter of law he could plead guilty. That appears to have been the common understanding of counsel and of the judge, although it was not formulated in this way. That was to lead to some lack of clarity in the outcome, as we shall see.

19. Mr. Brewer submitted that the case of *R v Kapoor* [2012] EWCA Crim 435 applied to the present case. He submitted that if a person who had no right to come into the country appeared at a port and immediately claimed asylum, there was no breach of immigration law. As a result, in the present case, the appellant would not be guilty of the offence of assisting in the attempted breach of immigration law.

20. Counsel who then appeared for the Prosecution submitted that the facts of the present case had to be distinguished from *Kapoor* which concerned a very different factual scenario and a different section of 1971 Act, (section 11). The guidance which applied to this case was derived from *R v. Bina* [2014] EWCA Crim 1444. As the illegal entrants had no documents, they would have been committing a section 24 offence which would have formed the basis of the allegation that the appellant was assisting unlawful immigration.

21. After setting out the facts of the three counts he was then considering, the judge said this:-

> The development of this case in terms of the legal process is that, following all those facts, the indictment has now been amended. Arguments centred, at least initially, on whether this was a *Kapoor* situation or whether it is a situation which comes within the court's thinking in *Bina*, but the thinking in *Bina* is clear, and that is the court there considered definitively that (inaudible) the

fact that you are guilty of a section [25A] offence does not exempt you from liability under section 25.

There is a further issue, which is, I think agreed now to be a matter for the jury. Certainly, I think it is and I rule it is. If the defendant, as he has admitted, piloted the boat at times during the course of its carriage across the Channel, is that de minimis or facilitating unlawful entry. But the argument before me doesn't visit that matter, it appears to be accepted – and I am grateful for the very helpful arguments on both sides, particularly from Mr Brewer but also [counsel who then appeared for the prosecution]. That's not what I have to decide because it seems to be accepted that section 24 does not exempt you – guilt in that – from section 25.

So it boils down to a discrete issue and that is this. The defendant is charged with assisting – and here's the word – unlawful immigration. The particulars are that, in each case, he attempt – assisted in the attempted breach of immigration law and – and the question is, therefore, and the issue, "Would the illegal entrants have been committing an offence, either as an attempt or, if it was the completed matter, the full offence?" And that's the legal matter that I have to rule on now, which I am invited to do.

Put in simple terms, if it's a *Kapoor* situation, the answer is no. If it's a section [25A] *Bina* situation, the answer is yes. The – Mr Brewer, on behalf of the defendant, submits, not only in his written submissions but orally also, that *Kapoor* is the leading case which applies here; that, if a – a person has no right to come into this country, per se, appears at a port, at a country, and immediately surrenders to – to a breach – to claim asylum, that there is no breach of immigration law and that *Bina* merely adds a gloss to that, that section [25A] doesn't of itself mean that it's not also section 25 and that would be a matter for the jury if they concluded that it may have been the case that the illegal entrants per se were not in breach of immigration law because of the *Kapoor* application.

Counsel on behalf of the prosecution, says really quite simply that the illegal entrants would have committed a complete section 24 offence had they disembarked. The case of *Kapoor* must be distinguished because it is fact-specific and very different from this situation and that the clear guidance is from the case of *Bina*.

In particular, *Kapoor* was based on the specific legislation of the Immigration Act of 1971, section 11, referred to a disembarking entrant, and it's indicative, says the Crown, the flight there was one that had come from Bangkok to London and that immigration officials were involved at the point of

> disembarkation and that it's indicative here that the defendant was coming from one member state to another, not seeking asylum from France; that there is a strong inference that the – the craft was not heading for a port where UK border officials, immigration officials, would be present in order to receive claimants for asylum.
>
> But the (inaudible) – I appreciate you can't interpret that – of *Kapoor* is that, under the 1971 Act and on the particular facts, if you are entering for the specific purpose of surrendering to the authorities and claiming asylum, that that does not amount to unlawful entry, but my conclusion, as a matter of law, and I so rule, is that, in respect of this issue, the Crown is correct and that, at the height of the evidence of course - because this could still be a jury trial - that the defendant was assisting unlawful immigration, leaving aside the *de minimis* point, because the illegal entrants would have been committing a section 24 offence.
>
> They have no documents and it's not without significance the defendant himself pleaded guilty to a section 24 offence in respect of what is now count 3, and that's my ruling.

22. The *de minimis* point the judge refers to is the submission on behalf of the appellant that his actions in piloting the boat, and doing nothing more, could not amount to facilitation of the unlawful entry of the other migrants in the boat. The content of the Defence Statement, see [9] above, was designed to set out the facts on which this is based. That submission was abandoned before us by Mr. Brewer as being completely hopeless. It was, however, treated by the judge as a matter which would be determined by the jury if the appellant did not plead guilty.

The grant of leave

23. The ground on which leave was given is as follows:-

> "The Judge erred in ruling that the present case could be distinguished from *R v Kapoor [2012] EWCA Crim 435*. The ratio in that case precisely covered the situation in the present matter. It is submitted that if the migrants had been intending to surrender and claim asylum immediately upon disembarking they would not have breached immigration law and the only applicable offence would have been one contrary to section 25A of the Immigration Act 1971 if a financial motive could have been established. It is submitted that the Judge erred in accepting the prosecution's submission that *R v Bina [2014] EWCA Crim 1444* applied to the present case. The fact that the appellant had himself pleaded guilty to an offence of illegal entry contrary to section 24 of the 1971 Act was wholly irrelevant to the question that the Judge had to resolve. It is submitted that contrary to the judge's ruling, the appellant's case did amount to a defence in law. In ruling as he did, the Judge deprived the appellant of a

> realistically viable defence before the jury and therefore made an acquittal all but legally impossible. As a result of this error the appellant's conviction by his own plea is unsafe *(R v Chalkley [1997] EWCA Crim 3416)."*

24. The reason why the full court gave leave is explained in its ruling given by Popplewell LJ:-

> "The argument before the judge was concerned in particular with the relationship between s.11, 24, 25 and 25A of the 1971 Act. The applicant relied in particular on the decision of this court in *Kapoor* [2021] 1 WLR 3569, whereas the respondent relied in particular on the subsequent decision of this court in *Bina* [2014] 2 Cr App R 30. The judge based his ruling against the applicant on *Bina*. Against the background of the tension between the decisions in *Kapoor* and *Bina* and the interrelationship between the sections of the 1971 Act to which we have already referred, we have concluded that it is arguable that the judge was wrong. In addition, given the prevalence of this type of offending and the potential practical consequences, there is an obvious need for clarity."

25. Before the full court, the respondent made a concession which has now been withdrawn, following the instruction of Mr. Marsland. It said:-

> "The respondent concedes that the judge's ruling deprived the applicant of any defence such that he is able to argue that if the ruling was wrong his convictions on Counts 1 and 3 are unsafe."

26. In a skeleton argument dated 16 March 2021, Mr. Marsland, has fundamentally recast the position of the prosecution. He says that the judge's ruling on the issue he was asked to decide was wrong, but withdraws the concession that it deprived the appellant of any defence and so he should nevertheless be held to his pleas of guilty.

27. It is therefore agreed that the decision of the judge was wrong, and the issue before us is what the consequence of that is. In view of the terms on which leave was given, we should set out our view of the correct legal position, even though it is now agreed. It is apparent that the judge did not have the benefit of the legal analysis advanced before us by Mr. Marsland and that, if he had, things would have turned out differently.

The correct legal position on the ambit of sections 25 and 25A of the Immigration Act 1971

28. In his recent skeleton argument, agreed by Mr. Brewer, Mr. Marsland analyses the authorities in a way which accords with our understanding of their meaning. We shall set that out below. In essence, he says that because of section 11 of the 1971 Act a person who arrives at a port or airport with an approved area where people are held pending consideration of their entry into the UK, is deemed not to enter the country until they leave that area. Such arrangements are familiar to anyone who travels by air. Entry into the UK does not occur on arrival, it occurs on passing through passport

control and customs and exiting the approved area into the airport. He therefore submits that if the plan was to arrive at a port, and to claim asylum before leaving the approved area in that port, then that arrival would not constitute entry and so no offence could be committed under section 24 of the Immigration Act 1971.

29. He cites *R v. Naillie* [1993] AC 674, *R v. Adams* [1996] Crim LR 593, and *R v. Javaherifard* [2005] EWCA Crim 3231 in support of that distinction between arrival and entry for the purpose of the Immigration Act 1971.

30. He then submits that *Kapoor* and *Bina*, the only cases placed before the judge, were merely illustrations of this principle. *Kapoor* was a case where the migrants travelled on a flight and would inevitably be held within an approved area and would not be deemed to enter the UK under section 11 of the Immigration Act 1971. *Bina* was a case where the immigration law which was to be breached was the law of Spain and nobody was intending to claim asylum in Spain, so the distinction between "arrival" and "entry" was irrelevant. That offence was complete before anyone arrived in the UK.

31. The judge decided that the arrival of the migrants in the UK would inevitably involve the commission of an offence under section 24 and he was wrong about that, Mr. Marsland accepts. That would depend on whether that arrival was at a port with an approved area which the migrants did not leave before claiming asylum. The submission before the judge of the prosecution that it depended on whether the migrants had documents or not (see the passage at the end of his ruling) was simply wrong in law.

The Immigration Act 1971

32. We have set out the provisions of sections 11, 24, 25 and 25A of the Immigration Act 1971 in full in the appendix to this judgment. They are set out as they were at the relevant time. Section 25 has since been substantially amended because of the UK 's departure from the EU.

33. Section 24 creates a number of summary offences which may be committed by a person who is not a citizen of the UK. The relevant one in this case is knowingly entering the UK without leave. The prosecution case was that all those on the boats on both journeys committed this offence, and that the appellant facilitated that by piloting the boat.

34. Section 25 is the section under which the appellant was indicted. It creates an offence where a person 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, and 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 knows or has reasonable cause for believing that the individual is not a citizen of the European Union.

35. Section 25A creates a similar offence where a person knowingly and for gain facilitates the arrival or attempted arrival in, or the entry or attempted entry into, the UK of an individual, and he knows or has reasonable cause to believe that the individual is an asylum-seeker.

36. The offences under section 25 and 25A are triable either way, and, if tried on indictment, carry maximum terms of 14 years' imprisonment.

The short point

37. The question posed by the full court when granting leave is whether, given the terms of section 25A, an offence cannot be committed under section 25 where the person whose entry into the UK is facilitated is an asylum seeker. If that is right, then the only offence which can be committed in respect of those seeking to enter as asylum seekers in good faith is that under section 25A, which requires proof that the assistance was provided for "gain". That is the issue which arises from what it describes as the tension between *Kapoor* and *Bina*.

38. The broader issue is whether, and in what respects, the judge's ruling was wrong and whether the case falls into any of the categories of case where this court may allow an appeal despite the fact that the convictions follow guilty pleas.

The authorities on the 1971 Act

39. We have considered four decisions on the proper construction of the Immigration Act 1971. In date order these were *Sternaj v. DPP* [2011] EWHC 1094 (Admin), *R. v. Kapoor* [2012] EWCA Crim 435; [2012] 1 WLR 3569, *R. v. Dhall (Harpreet Singh)* [2013] EWCA Crim 1610, and *R. v. Bina* [2014] EWCA Crim 1444; [2014] 2 Cr. App. R. 30. The full court identified a tension between *Kapoor* and *Bina* to which we will turn after summarising the effect of each of the decisions.

40. In *Sternaj*, the Divisional Court considered the issue which is before us. Laws LJ at paragraphs 18 and 19 said:-

> "The overall submission here is that the legislative scheme of Sections 25 and 25A is to the effect that a person who facilitates or seeks to facilitate the entry into the United Kingdom of an asylum seeker may only be proceeded against under Section 25A, and in that case the prosecution have to prove that it was done for gain. It is also said that Section 25 must be referring to the immigration law of a European Member State other than the United Kingdom (see paragraph 38 (a) of the skeleton argument), and that there could have been no offence contrary to Section 25 on the facts here because Edmir's son, being only 2, cannot himself have been guilty of any offence and so has not committed a breach of immigration law within the meaning of Section 25 (1) (a).
>
> "19. There is nothing in these two subsidiary submissions. There is nothing whatever to suggest that the first is the case…."

41. And at paragraph 21 and 22:-

> "21. I return to the principal point on the relation between Section 25 and 25A. In my judgment it is not possible to conclude, by reading Section 25 and 25A together, that only Section 25A covers a case where the third party is an asylum seeker. Section 25A would in my judgment apply in the case of an asylum seeker who arrives in or enters the United Kingdom

> without any breach of immigration law being committed by the third party at all. It is plainly principally directed at traffickers of asylum seekers.
>
> "22. Section 25, by contrast, is concerned with facilitation of the commission of breaches of immigration law."

42. *Kapoor* involved an alleged conspiracy to assist Afghans to enter the UK on a flight from Bangkok to London using false documentation to board the flight, with the plan of disposing of the documentation during the flight, arriving without any documentation, and claiming asylum. The prosecution claimed that this was a breach of an immigration law, because of the terms of section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. This creates an offence of being at a leave or asylum interview without a valid immigration document. The court held that this was not an "immigration law" for the purposes of section 25 of the 1971 Act, saying:-

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

43. This conclusion was based on the construction of section 25(2) of the 1971 Act which defines "immigration law" for the purposes of that section. It derived support from the Council Directive 2002/90EC of 28 November and *R v. Javaherifard* [2005] EWCA Crim 3231; [2006] Imm AR 185.

44. Further support for it was identified in the following paragraph:-

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

45. In *Dhall (Harpreet Singh)* the Court of Appeal had occasion to consider the meaning of "immigration law" again for the purposes of section 25 of the 1971 Act. It was held that sections 1(2) and 3(1)(b) of the 1971 Act constituted an immigration law for that purpose, and that the fact that they had not been identified as such in the proceedings in the Crown Court did not invalidate the conviction. This decision essentially applies the same definition to the term "immigration law" in section 25 as had *Kapoor*.

46. In *Bina* the Court of Appeal was considering a case in which it was alleged that there was a conspiracy to facilitate the breach of an immigration law of Spain, and other European countries, in order to secure the entry of Iranian nationals with the intention that they would then travel to the UK where they intended to claim asylum. There was evidence that the conspirators made a substantial financial gain by their activity, which includes the provision of false documents for use by the asylum seekers at different stages of their journey. It was commercial "people trafficking". For reasons which are not clear from the judgment, the prosecution indicted two conspiracies, Count One alleged a conspiracy to breach section 25 and Count Two a conspiracy to breach section 25A. There were also convictions for two substantive section 25A offences, as Counts Three and Four. The judgment is on the application for leave to appeal against conviction. The part which is relevant to the present case related to Count 1, and was summarised and dealt with as follows by McCombe LJ giving the judgment of the court:-

> "16. We turn to the arguments, principally of law, raised on the proposed conviction appeal. First, it is submitted that the judge erred in failing to accede to the defence submission of no case to answer. Behind that broad submission there are three points. First, it was submitted that the judge was wrong to conclude that the offence in s.25(1) of the 1971 Act can be committed where the individual, whose breach of immigration law is hypothetically facilitated, is an asylum seeker or proposed asylum seeker. It is submitted that the Crown evidence indicated that all the individuals concerned fell into that category. Secondly, it is argued that the judge was wrong in failing to find that the offence in count 1 had been wrongly charged as a conspiracy to commit the s.25(1) offence, rather than as an offence under s.25A of the Act (helping an asylum seeker to enter this country). Thirdly, [an immaterial submission is summarised].
>
> "17. The first point can be dealt with in our judgment shortly. There is nothing whatsoever in s.25 of the 1971 Act to indicate that the individual non-national of the European Union, whose breach of the immigration law has been facilitated, needs to be a person who is not an applicant for asylum. In our view it is plain that there is no such limitation. Unfortunately, even persons who in the end are found to have genuine asylum claims have sometimes committed breaches of immigration law on securing entry to an EU state. The statute, in our judgment, is aimed at those who facilitate such illegal entry. On the face of the statute there is no such limitation as that for which Mr Kivdeh contends.

> "18. In the course of his robust submissions to us this morning, Mr Kivdeh helpfully referred us to *R. v Kapoor* [2012] EWCA Crim 435; [2012] 2 Cr. App. R. 11 (p.125), in which the judgment of the court was given by Hooper LJ [the court then set out the passage from *Kapoor* at [38] set out above].
>
> "19. As Mr Kivdeh pointed out to us, those cases were specific cases of immigrants who presented themselves on arrival to immigration officers, as the last passage of the judgment in *Kapoor* indicates. On the contrary, in this case what was alleged by the Crown was not the presentation of individuals to immigration officers in Spain saying "We want to go to the United Kingdom to claim asylum"; the case for the Crown was simply that facilitation was carried out to get people into Spain (as Mr Kivdeh put in his argument on sentence) through the use of forged documents. Therefore, the distinction made in *Kapoor* in our judgment does not apply to the instant case.
>
> "20. We turn to the second point. It is, in our judgment, no answer to the offence charged that there may have been a parallel offence of conspiracy to commit an offence under s.25A. That may well have been the case. But it was, in our judgment, no objection to the preferment of a charge of conspiracy to contravene s.25(1)."

Discussion and conclusion on sections 25 and 25Aof the 1971 Act

47. The judge in his ruling dealt with submissions from the prosecution which sought to equate the present case with *Bina* and to distinguish *Kapoor*. The defence submissions were a mirror image of that. The defence position appears to have been that *Kapoor* is authority for the proposition that a person who arrives in the United Kingdom without leave but who intends to make a claim for asylum as soon as he can after arrival commits no offence under section 24 of the 1971 Act, wherever in the United Kingdom that arrival takes place. It is not, therefore, an offence under section 25 to facilitate him. The facilitator can only be prosecuted under section 25A which requires proof of gain.

48. We do not accept that analysis of the authorities. It appears to us that there is no doubt that both *Kapoor* and *Bina* were correctly decided, in their result although there is a tension between paragraph [38] of *Kapoor* and *Bina*. An offence under section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 is not a breach of an "immigration law" for the purposes of section 25. It is unnecessary to go beyond the plain words of section 25(2) of the 1971 Act to reach that conclusion. The passage contained in paragraph [38], which is the gravamen of this appeal, was not necessary to the decision. The decision of the Divisional Court in *Sternaj* was not binding on the Court of Appeal Criminal Division as matter of precedent, but it was certainly persuasive. It does not appear to have been cited to the court in *Kapoor*. We venture to suggest that if it had been the Court in *Kapoor* would probably not have departed from it in order to make a point in support of a conclusion which was clearly correct without it. At all events, it is open to us to treat paragraph [38] of *Kapoor* as *obiter dicta* and not to follow it. *Kapoor* was based on the fact that the asylum seekers would arrive on a flight and never leave the reserved part of the airport for the purposes of section

11of the 1971 Act. That is why, in that case, the prosecution sought to rely on the subsequent breach of the 2004 Act as the breach of immigration law for the purposes of the section 25 offence. It was not necessary to consider the terms of section 25A to conclude that this was misconceived.

49. The distinction of *Kapoor* in *Bina* on the facts is not available to us in this case. Paragraph 3 of the Basis of Plea set out above puts that beyond doubt. However, paragraph 17 of *Bina* does not depend on that distinction. In *Bina* the offence was committed when a breach of Spanish immigration law was committed, and the issue of whether arrival in the UK would or would not be deemed to constitute entry into the UK for the purposes of section 11 and 24 of the 1971 Act simply did not arise for decision.

50. There is therefore no tension between *Kapoor* and *Bina* save as to the *obiter dicta* contained in paragraph [38] of *Kapoor*. On that question *Bina* is to be preferred since the rejection of the submission that the fact that the migrants were intending to claim asylum in the UK at some point long after the section 25 offence was complete in Spain was a defence to the allegation of conspiracy to breach section 25 of the 1971 Act was necessary to the decision and plainly correct.

51. Both *Kapoor* and *Bina* appear to us to have been correct in their result, and examination before the judge of the legal reasoning in those cases, as well as the factual positions, would have shown this, and also illustrated the correct answer to the present case. That answer is that the judge should not have given the ruling he did, and should probably not have given any ruling of law at that stage at all. Whether this appellant had a defence in law on the facts as he asserted them to be was a nuanced question which would have been better determined at trial in the light of the way in which he conducted that defence, and of the evidence which emerged about it. The question was whether there was any material before the court to show that the passengers on these journeys would have committed an offence under section 24 if they had carried out the plan which the appellant had facilitated by piloting the boats. It was later agreed in the basis of plea that they planned to disembark and surrender to the UK Border authorities and claim asylum immediately. Whether that constituted an offence under section 24 would depend on where they arrived in the UK. If it was at a port with an approved area, then they would not commit the offence. Consideration would also have to be given at trial to an alternative possibility (raised by the appellant in interview), which was that they actually intended to be picked up at sea and hoped to be brought into the UK by UK officials. We have heard no argument on whether that constitutes a breach of section 24 by those entering the UK in that way, and whether in consequence facilitation of it constitutes an offence contrary to section 25.

The effect of the judge's ruling

52. Because the live issue before us is whether the convictions are safe given that the appellant entered guilty pleas, it is necessary to say something further about the ruling.

53. This case demonstrates the care which is required when dealing with legal issues before trial. The law is summarised in Archbold at 4-151. The power to determine points of law before trial, other than in a preparatory hearing, is found in sections 39-40 of the Criminal Procedure and Investigations Act 1996. In *R v. Marshall Coombes and Eren* [1998] 2 Cr App R 282, 285 this court said this:-

> "Before considering that remaining ground we permit ourselves to make certain observations as to the procedure adopted in the lower court. It is beyond question that an appeal will lie from a conviction entered upon a plea of guilty where that plea is a consequence of an earlier incorrect ruling in law. (See *D.P.P. v. Shannon* (1974) 59 Cr.App. R. 250, [1975] A.C. 717.) We were told that in this case the judge was asked to rule upon the relevant matters of law under section 40(1) of the Criminal Procedure and Investigations Act 1996 at a pre-trial hearing. We were further told by counsel that little thought had been given to the procedure to be followed. The statute enables rulings of law, binding unless and until discharged, to be made before a plea is entered or a jury sworn, which in appropriate cases is a great advantage. It will, however, be important to ensure that the facts are fully and accurately before the Court, something which cannot always be achieved without oral evidence. Where oral evidence is not required it is preferable, if not essential, for the agreed facts to be written down if only because the ruling may become the subject of an appeal."

54. We agree with that, and would add also that it would almost always be wise for the court to have an application before it in which it was absolutely clear what it was being asked to do, by whom, and for what purpose. With great respect to the judge, it is not always clear from his ruling whether he was deciding a submission of no case to answer, or dismissal application, taking the prosecution case at its highest, or whether he was ruling that even on his own evidence, taken at its highest, the appellant had no defence in law to the charges he faced. He expresses his final conclusion in favour of the prosecution as one reached "on the height of the evidence of course – because this could still be a jury trial." What was clear, though, is that he regarded factual matters as being of importance to the outcome. We can identify these as follows:-

i) The judge did entirely understand the point in *Kapoor* and suggested that it was important, his word was "indicative", that the migrants were coming from France, and that the craft "was not heading for a port where UK border officials, immigration officials, would be present in order to receive claimants for asylum". He was no doubt right about the significance of these alleged facts, but the intended place of entry by the migrants was a matter of evidence, and therefore for the jury. He was not entitled to make any factual findings about it.

ii) The judge plainly regarded the guilty plea of the appellant to the section 24 offence with which he was charged in relation to the count 3 journey to 29 December 2019 as important. He does not explain why. Had he done so, he would have been driven to conclude that its potential significance was a matter for evidence and argument in a trial. The burden of the submissions before the judge on behalf of the appellant was that he was not guilty of the section 24 offence, and neither was anyone else in the boat. Mr. Brewer made the optimistic submission that the guilty plea should be excluded as irrelevant, or because it would have an adverse effect on the fairness of the proceedings, under section 78 of the 1984 Act. The correct legal analysis was that its importance

was a matter of fact for the jury having heard evidence as to why it was entered. We shall return to this at the end of this judgment.

55. The effect of the ruling in fact was that the appellant was advised to plead guilty to counts 1 and 3 because he was advised that the judge had withdrawn his defence to those counts, leaving only the *de minimis* issue open. As we have said, the appellant was advised that this was hopeless. This appeal is not based on the suggestion that this last piece of advice was incompetent, and it clearly was not. Steering the boat is a pretty clear case of facilitation, many people would think.

The safety of the convictions

56. Mr. Marsland has helpfully analysed the appellant's case as having three potential routes to acquittal. We accept that analysis and will adopt in below in expressing our conclusions. Mr. Marsland accepts that the ruling removed the first two of them but submits that it left the third open for the appellant to run if he wanted to. That is a controversial matter to which we shall have to return. It explains the withdrawal of the concession made before the full court by his predecessor.

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;

ii) In any event, the appellant did not know and had no reasonable cause to believe, that the migrants were intending to commit an offence under section 24;

iii) The appellant's actions in being one of a number to help pilot the boat were *de minimis* in terms of "facilitation" and did not amount to the offence under section 25.

58. Mr. Marsland relies on *R v. Asiedu* [2015] 2 Cr App R 8, and submits that the appellant should have relied on the third of these points before the jury, and says that if convicted he could appeal on the basis that the first and second was wrongly taken from him by the judge. Pleas were instead offered on a reduced basis, in which count 2 was left to lie on the file and his Basis of Plea was accepted. It is submitted that the appellant took a beneficial course to him and should now be held to it.

59. This would be more persuasive if it had been the prosecution position consistently throughout these proceedings. However, the Form RN was submitted to the Court of Appeal in November 2020 and was drafted by counsel who appeared for the prosecution before the judge. It makes the concession recorded by the full court and quoted above. This, we think, reflects the way in which the matter was dealt with by the prosecution in the Crown Court as well. Having succeeded on their argument, they took the view that the appellant had nowhere to go but to plead guilty.

60. We asked Mr. Marsland whether the Basis of Plea amounted to an admission of an offence in law. He said that it did, although accepted that the ruling which had been secured by the prosecution creates a difficulty in that submission. That is a realistic position in our judgment, because the fact is that the document does not set out precisely

what breach of immigration law the other migrants had committed or planned to commit, or how their conduct or plan would amount to a breach of section 24 of the 1971 Act as alleged in the amended indictment. That breach is not identified in anything which has ever emanated from the appellant. It comes only from the judge's ruling.

61. Mr. Brewer agrees with Mr. Marsland's analysis of the legal issues so far as the legality of the arrival of the migrants in the UK is concerned. He now advances the submissions we summarise at [62]ff below on this part of the appeal, which go to the consequences for the safety of the conviction of the guilty pleas following the judge's ruling.

62. He points to paragraph 2.2 of the Defence Case Statement, set out above, and paragraph 5 and following of the prosecution document of 8 August 2020, as defining the issue for the judge. It was clear that the prosecution submitted that arrival into UK waters without documents would amount to an offence. This would not and could not be right, he says, but the judge so ruled. He says that the appellant's plea to the section 24 offence was entered in error.

63. He thus submits that the effect of the ruling was to remove all viable defences from the appellant because the one which it left open, whether the conduct amounted to facilitation, was not arguable. The admitted conduct of the appellant by piloting the boats amounted to facilitation as a matter of law. This line of defence, called "*de minimis*" by the judge, was, we are told, not run before the jury because the appellant was advised it was hopeless. This distinguishes the present case from *Asiedu.*

64. If that is wrong, then it is submitted that the conviction is unsafe relying on the approach to convictions based on guilty pleas in *R v. Boal* [1992] QB 591. He was deprived by the judge's ruling of a defence which would very probably have succeeded and the conviction is therefore unsafe. The point is made that there is no evidence that the boats were not heading to a recognised port of entry, although, inconsistently with this, the suggestion is also made that it was obvious to the migrants that they would be interdicted during the crossing. If that is true, then they may not actually have been heading anywhere except to such place as they would be picked up by the UK authorities and led to safety.

Discussion and conclusion on safety of convictions

The proper approach in this court to the guilty pleas

65. We have had to consider a line of authority culminating in *R v. Asiedu* [2015] EWCA Crim 714; [2015] 2 Cr. App. R. 8 as to the consequences of the fact that these pleas followed this ruling. In this respect the position has moved on from that before the full court, the Crown having withdrawn its earlier concession.

66. In *Asiedu*, Lord Hughes, giving the judgment of the Court of Appeal Criminal Division, said that there were two principal situations where a guilty plea is no bar to an appeal. The second is where the proceedings against the appellant were an abuse of process such that they should not have been taking place at all. This does not arise here. As to the first category he said, at paragraph 20:-

> "It does not follow that a plea of guilty is always a bar to the quashing by this court of a conviction. Leaving aside equivocal or unintended pleas (which do not concern us here), there are two principal cases in which it is not. The first is where the plea of guilty was compelled as a matter of law by an adverse ruling by the trial judge which left no arguable defence to be put before the jury. So, if the judge rules as a matter of law that on the defendant's own case, that is on agreed or assumed facts, the offence has been committed, there is no arguable defence which the defendant can put before the jury. In that situation he can plead guilty and challenge the adverse ruling by appeal to this court. If the ruling is adjudged to have been wrong, the conviction is likely to be quashed. Contrast the situation where an adverse ruling at the trial (for example as to the admissibility of evidence) renders the defence being advanced more difficult, perhaps dramatically so. There, the ruling does not leave the defendant no case to advance to the jury. He remains able, despite the evidence against him, to advance his defence and, if convicted, to challenge the judicial ruling as to admissibility by way of appeal. If he chooses to plead guilty, he will be admitting the facts which constitute the offence, and it will be too late to mount an appeal to this court. For this important distinction see *R. v Chalkley [1998] 2 Cr. App. R. 79; [1998] Q.B. 848* , which on this point is clear law. That was a case in which the defendants had failed to persuade the trial judge to exclude evidence pursuant to s.78 of the Police and Criminal Evidence Act 1984 , and, faced with evidence which they judged to be difficult to overcome, had pleaded guilty, indeed in explicit terms which made it clear that they now admitted the conspiracy to rob which was charged. Giving the court's judgment, Auld LJ said this at 94 and 864:
>
> > "Thus, a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of plea to guilty in such circumstance would normally be regarded as an acknowledgment of the truth of the facts constituting the offence charged."

67. We would add a third such category, which can perhaps be viewed as an extension of the first. Where a person has pleaded guilty following legal advice which deprived him of a defence which would probably have succeeded that is a proper ground for regarding the conviction as unsafe, see *R. v. Boal* [1992] 1 QB 591, which has been frequently applied: see for example the recent case of *R. v. P.B.L.* [2020] EWCA Crim 1445. The test for this approach to guilty pleas in this court is not the same as *Chalkley*. *Chalkley* requires a situation where the ruling on law means that the appellant has no defence

even on the most favourable view of the facts from his or her point of view. If that ruling is wrong, then the conviction will probably be held to be unsafe even if the chances of the jury accepting that such a view of the facts was possible appear to the court to be low. Where the plea follows legal advice that advice may concern factual or legal issues, or commonly mixed issues of fact and law, but its effect must be to deprive the appellant of a defence which would probably have succeeded. No doubt the difference arises, at least in part, from the fact that a defendant is required to accept and follow the legal rulings of the trial judge, but has a choice as to whether to accept legal advice, and, indeed, whether to continue to retain the lawyer giving it. The reasons for choosing to accept advice may not always be capable of proof, and they may also involve many factors.

That approach applied to this case

68. In this case, there was no focus on the precise means by which the migrants would arrive in the UK and whether they would be deemed not have to have entered it at that point by reason of section 11 of the Immigration Act 1971. On one view of the facts, the boat would land wherever it landed and the occupants would enter the UK unlawfully at that point. They would not be able to arrive at a port and then:-

> "…remain in such area (if any) at the port as may be approved for this purpose by an immigration officer.."

69. Section 11(1) of the 1971 Act would not on that basis operate to deem that their arrival by boat did not amount to entry into the UK. They would commit the summary offence of entering the UK without leave.

70. In order to show that this provision assisted him, the appellant would have to persuade the court that he intended to deliver the occupants of the boats directly into the approved area of a port. Given the circumstances of these journeys it is easy to see why he might encounter a problem doing that. These boats are very difficult to steer in the conditions in the Dover Straits for which they are completely unsuitable, and the task of entering an approved area of a port would have been very difficult. It would not have been assisted either by the evidence that when intercepted these boats were not heading towards any port with an approved area, or any port at all. Further, his case is that he was only steering the boats with others on the first occasion, and because no-one else could do so on the second occasion. He suggested in interview that on the first occasion he was told to aim for a particular landmark on shore but that is all he said about his intended course. That account is quite inconsistent with the pilot of the vessels having a fixed plan to aim for a particular port with an approved area which he could reach and enter. Had that been the plan, it is likely, the jury may think, that he would have mentioned in interview which port he was aiming for.

71. 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.

72. Although the appellant's guilty plea on 31 December 2019 to an offence under section 24 appears to close off these lines of defence at least in respect of the second journey, the judge did not fully articulate its evidential significance. By section 74 of the Police and Criminal Evidence Act 1984 the conviction was evidence that the appellant had entered the UK unlawfully on the second occasion. By extension that evidence applied to everyone else in the boat in that occasion because they were all, as it might be put, in the same boat. However, even as far as the appellant's guilt is concerned that conviction is not conclusive. It proves that his entry was unlawful "unless the contrary is proved", see section 74(2). The judge made no ruling on its evidential status so far as the guilt of others in the boat are concerned in December, and the conviction does not relate to the first journey at all. The judge was therefore wrong in law to hold, to the extent that he did, that the effect of the earlier conviction was to remove the first two lines of defence from the appellant.

73. So far as the first two lines of defence are concerned, these were withdrawn by the ruling of the judge and on a wrongful basis. Here, there is no requirement that the defence which was wrongly withdrawn would probably have succeeded. It might have done, or it might not. It appears to us that a closer focus was required than occurred in the Crown Court on how in fact the migrants intended that their journey would end, and on the lawfulness or otherwise of that conduct.

74. That is the position so far as the first two lines of his defence are concerned. His third, what was called the *de minimis* point, was and is regarded as hopeless on the facts by his counsel. His pleas to counts 1 and 3 did not deprive him of a defence which would probably have succeeded in that respect and given that the *Boal* test applies here, the loss of that line of defence (which the judge left open) cannot found an appeal. However, we do not accept the prosecution submission that the fact that this line of defence was left open by the judge when he wrongly removed the real defences in this case means that the convictions must be regarded as safe. We do not, of course, doubt *Chalkley* and *Asiedu*. On the contrary, we have no doubt they are right. But we do consider that the lack of clarity on the facts of this particular case about the scope and meaning of the ruling is important. The prosecution position, which was until recently that it did close down all possible lines of defence, illustrates precisely the lack of clarity this appellant faced when deciding how to respond to the ruling. We do not consider that it is in the interests of justice to allow the prosecution to withdraw the earlier concession and to run the present argument. The time for clarity about that was before the pleas were entered.

75. This could be viewed, therefore, as a mixed case where the three lines of defence were removed by a combination of correct legal advice and an incorrect legal ruling. Although the judge left one line of defence open, in truth he deprived the appellant of the only viable line of defence. Viewed in this way, the case falls within *Chalkley* rather than *Boal*. When we say "viable" we do not hide the difficulties it involved from the appellant's point of view but as we have said, where the defence is removed by an erroneous legal ruling by the judge, its factual merits are usually immaterial: the appellant was entitled to the verdict of a jury on the factual issues.

Conclusion

76. For these reasons we concluded that the appellant's convictions were unsafe and should be quashed. The question of whether to order a re-trial is complex, largely because the

appellant is due for release from his sentence on 14 April 2021. If convicted again after a trial he might receive a somewhat longer sentence because there will be no credit for a plea. If he is remanded in custody pending the re-trial he will certainly have served his sentence before that second trial starts. There is a real possibility that he would be held in this country pending trial for far longer than it will take to deport him if there is no re-trial. We therefore invited the Crown to consider the public interest in a re-trial in consultation with the Home Office who will be able to assist with explaining the practical consequences of a conviction at a re-trial and the likely course of events if no re-trial is ordered. The lists at Canterbury are likely to be full and there is a substantial backlog of cases awaiting trial throughout the country. We will receive these submissions and decide the question now.

Post-Appeal events

77. The court directed a re-trial which was held at Canterbury Crown Court and resulted in the acquittal of the appellant on 13 May 2021.

78. The order postponing publication of this judgment until the conclusion of the re-trial has therefore come to an end and this judgment may now be published.

R. v. FOUAD KAKAEI

APPENDIX TO JUDGMENT OF COURT OF APPEAL 8 APRIL 2021

ss. 11, 24, 25 and 25A of Immigration Act 1971 as in force in 2019

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.