



Neutral Citation Number: [2023] EWCA Crim 1521

Case No: 202303383 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CANTERBURY
HIS HONOUR JUDGE JAMES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2023

Before :

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE FARBEY
and
HER HONOUR JUDGE MORELAND

Between :

ABDUL BASSET YENEC IBRAHIM AHMED **Appellant**
- and -
REX **Respondent**

Mr James Burke (instructed by **Haskells & Co**) for the **Appellant**
Daniel Bunting & Stacey Holland (instructed by **CPS Appeals & Review Unit**) for the
Respondent

Hearing dates : 19 December 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice William Davis :

1. On 19 December 2023 we heard the appeal of Abdul Basset Ahmed. We allowed his appeal and reduced his sentence from 2 years' detention to 18 months' detention. We said that we would provide written reasons for our decision at a later date. These are our reasons for allowing the appeal.
2. On the morning of 15 August 2023 Abdul Basset Ahmed, an 18 year old male born in May 2005, was one of 59 migrants who entered UK territorial waters on board an overcrowded rigid inflatable boat. The boat had travelled from France. None of those on board was a UK national. When the boat was first seen by a Border Force vessel, Ahmed was at the tiller of the boat. He was controlling the speed and direction of the boat. After about 10 minutes, the migrants were transferred to the Border Force vessel and taken to Dover. Ahmed was arrested on suspicion of assisting unlawful immigration and of attempting to arrive in the UK without a valid entry clearance.
3. Ahmed was interviewed later the same day. He said that he previously had lived in Sudan. In April 2023 he had left Sudan intending to come to the UK. He had feared for his life in Sudan due to the Janjawid militia. He had travelled overland through Libya to Tunisia. From Tunisia he had travelled by boat to the island of Lampedusa which is located about halfway between Tunisia and Sicily. It is part of Italy. Ahmed explained that, on the crossing to Lampedusa, he had learnt how to pilot a boat at sea. He was transferred to a camp in Italy. He left that camp and made his way to the French coast near Calais. By now he had only €600. He was due to pay more for his passage to the UK. When he met the organiser of his passage 2 days before he was due to leave, he was offered a discount if he agreed to pilot the boat which was due to transport him across the Channel. Ahmed admitted that he had piloted the boat which had been provided by the smuggler for the whole of the crossing up to the point at which the Border Force had intercepted the boat. Ahmed said that he knew that he was coming illegally to the UK. He was aware that the other people on the boat also had no legal basis for entering the UK. He said that he was not aware that he had committed a specific offence when he had piloted the boat.
4. Ahmed appeared before Folkestone Magistrates' Court on 16 August 2023. He pleaded guilty to attempting to arrive in the UK without a valid entry clearance contrary to section 24(D1) of the Immigration Act 1971 as amended. He was committed for sentence to the Crown Court at Canterbury. He was sent for trial on a charge of doing an act to facilitate the commission of a breach of UK immigration law by a non UK national contrary to section 25(1) of the Immigration Act 1971. No indication of plea was given at the point of sending. On 18 September 2023 Ahmed made his first appearance at the Crown Court. He pleaded guilty to assisting unlawful immigration into the UK. On 21 September 2023 he was sentenced by HH Judge

James to 2 years' detention in a young offender institution for the offence of facilitating unlawful immigration and 8 months' detention for attempting to arrive in the UK without a valid entry clearance. Those sentences were ordered to run concurrently. Ahmed now appeals against the total sentence of 2 years' detention with the leave of the single judge.

5. The offence contrary to section 24(D1) of the 1971 Act is of relatively recent origin. It was introduced by the Nationality and Borders Act 2022. The maximum sentence for an offence contrary to section 24(D1) is 4 years' custody. The predecessor offence under the 1971 was illegal entry into the UK for which the maximum sentence was 6 months' custody. The 2022 Act increased the maximum penalty in respect of an offence contrary to section 25(1) from 14 years' custody to life imprisonment. The relevant provisions came into force on 28 June 2022. They apply to offences committed after that date: see Schedule 2 of the Nationality and Borders Act 2022 (Commencement No. 1, Transitional and Saving Provisions) Regulations 2022.
6. The Sentencing Council has yet to issue guidelines in relation to immigration offences. Such guidelines are currently in the course of being prepared. A consultation guideline will be issued in the spring of 2024. It is unlikely that there will be a definitive guideline in force before the end of 2024. In *Ginar* [2023] EWCA Crim 1121 this court, pending the introduction of a definitive guideline by the Sentencing Council, gave general guidance in relation to the sentencing of adult offenders for an offence contrary to section 24(D1) where a small boat had been used. We propose to do the same in relation to the offence of facilitating unlawful immigration.
7. As the Resident Judge of the Crown Court at Canterbury, HH Judge James has dealt with a significant number of cases of the kind with which we are concerned. The first case involving someone who had to be sentenced by the judge for an offence contrary to section 25(1) where the increased penalty applied concerned a man named Ashri Mohamed. The judge set out his reasoning in considerable detail. He did not do so in order to set out a guideline or to establish sentencing principles. He directed himself by reference to *Blackshaw* [2011] EWCA Crim 2312 at [20]. Rather, because he was likely to sentence more cases of this type in the future given the location of his court, he set out the approach he took to give an indication of how he would sentence similar cases in the future until more definitive sentencing guidance became available. He was concerned particularly with offenders who themselves were seeking to gain entry to the UK without leave. As the judge observed, those responsible for orchestrating the use of small boats as a way of entering the UK rarely if ever are prosecuted. In sentencing the appellant the judge said that he proposed to adopt in his case the same general approach he had set out in sentencing Ashri Mohammed.
8. In that case the judge said that the fact that the small boat was intercepted before it reached shore would not have any real effect on sentence. He set out the factors he considered to be relevant to the assessment of harm and culpability. The harm factors related to generic matters such as the cost to the public of managing the phenomenon of migrants trying to enter without leave and the danger to shipping in the Channel. The judge identified personal financial gain, organisational involvement and exploitation of others as significant in relation to culpability. He concluded that immediate custody would follow save in an exceptional case. Personal factors which

had to be considered would include whether the offender was fleeing oppression or conflict and the age of the offender. The judge said that the increase in the maximum sentence effective in respect of offences committed after 28 June 2022 should not have a significant effect where the facilitating consisted solely of piloting a boat and the passengers were willing

9. Having set out those principles Judge James determined that the range of sentence for those playing a lesser role would be in the range 3 to 6 years' custody with a starting point of 4 years' custody after a trial.
10. In relation to the appellant the judge said that his culpability was at the lower end of the range for an offence contrary to section 25(1) because of the complete lack of criminal sophistication on his part. The appellant had had no involvement in planning the trip. He had not been involved in any coercion of the other passengers. In relation to the appellant's personal position, the judge noted that the appellant had no previous convictions and had not previously attempted to enter the UK. There was no evidence that his purpose in coming to the UK was to engage in crime. Thus, there were no aggravating factors to be taken into account. The judge commented that, if the information available to him about the appellant's position in Sudan were to be confirmed, there could be strong arguments to support his asylum claim.
11. Notwithstanding these matters and despite the appellant's age, the judge found that only an immediate sentence of imprisonment could be justified. He referred to the inherent risks both to the appellant and to others and to the need to deter this type of offending which was placing huge pressures on public resources and helping to fund organised crime. The judge applied a reduction of 25% to the sentence for the plea of guilty at the PTPH. The sentence of 2 years' detention represented a sentence of 2 years 8 months' detention after a trial. The concurrent sentence of 8 months' detention imposed for the offence contrary to section 24(D1) represented a sentence of approximately 11 months' detention after a trial.
12. On behalf of the appellant James Burke (who represented him at the sentence hearing) did not argue that the judge erred in concluding that an immediate custodial sentence was wrong in principle. He accepted, taking into account the guidance in *Ginar*, that the sentence imposed in respect of the offence contrary to section 24(D1) was appropriate. His core submission was that the exceptional personal mitigation available to the appellant was not properly reflected in the sentence of 2 years 8 months' custody after a trial in relation to the offence contrary to section 25. He was recruited to pilot the boat by others who exploited his financial position, his youth and immaturity and his genuine need to enter the UK to seek asylum. Although his actions did facilitate entry of the other passengers in the boat, the appellant had no appreciation of the effect of what he was doing on his level of criminality. Mr Burke submitted that some assistance could be derived from what was said by this court in *Roman* [2017] EWCA Crim 6. That was a case in which the offender had been involved in the commercial facilitation of illegal entry. She and a co-accused had travelled by car from Manchester. They had crossed the Channel to France where they had picked up a person. They had provided this person with false identity documents. They had been stopped by a UK Border Force officer at passport control in France where they had been arrested. The court said that the proper sentence after trial in that case would have been 42 months' custody. Mr Burke argued that the circumstances of this case were significantly less serious than the facts in *Roman*.

13. We had helpful submissions from Daniel Bunting (who did not appear at the Crown Court) and Stacey Holland (who did) in relation to general principles concerning sentencing for offences contrary to section 25 of the 1971 Act. They argued that *Roman* is a case on its own facts. It did not purport to provide guidance. In any event it was decided before the recent increase in the maximum sentence from 14 years' custody to life imprisonment. Subject to minor caveats, they supported the analysis of Judge James of the relevant factors when sentencing offences contrary to section 25 which he set out when sentencing Ashri Mohammed. They suggested that the increase in the maximum sentence should have an effect on all sentences for offences contrary to section 25 even if the uplift would be greater in relation to more serious offences. They referred to what was said by this court in *Soto* [2023] EWCA Crim 55 when considering the effect of the increase in the maximum sentence for the offence of causing death by dangerous driving.
14. As we have said, the Sentencing Council currently is preparing a consultation guideline in relation to immigration offences which will include a guideline in relation to section 25. The guideline will relate to any offence contrary to section 25, not simply cases involving small boats. We are concerned only with instances where a small boat has been used to enter the UK.
15. Culpability will be high where the offence represents commercial activity in which the offender plays a substantial role. Such activity will be sophisticated in nature and will involve significant financial gain to the offender. An offender in this category will be an organiser of the use of small boats to enter the UK. As Judge James noted, such offenders are rarely if ever prosecuted. Nonetheless, the range of sentences for different kinds of involvement in offences contrary to section 25 must recognise the possibility of such offenders being sentenced.
16. Culpability will be low where the offender has a minor role in the enterprise whereby the small boat is being used or where there is no commercial element to the use of the boat. If an offender has been involved due to coercion or pressure, that also will reduce culpability.
17. There will be cases which do not fall easily within either high or low culpability. Sentencers in those cases must take an approach which balances the relevant factors.
18. Judge James in *Ashri Mohammed* suggested that the categorisation of roles in the guideline relating to importation of drugs provided a helpful parallel and could be used to identify where an offender should be placed in the hierarchy of sentencing vis-à-vis culpability. We consider that importation of drugs as a criminal activity is not so closely analogous to the use of small boats to assist unlawful immigration as to permit direct reference to the drugs guideline. The overall notion of division of roles into leading, significant and lesser has some relevance to the offence with which we are concerned. The particular factors set out in the drugs guideline are designed to be specific to the importation of drugs.
19. The highest category of harm will be reserved for cases where the small boat or boats used involved a high risk of serious injury or death and/or where the offender assisted large numbers of individuals to arrive unlawfully in the UK. The former factor will bite where the boat concerned is particularly unsuitable for the purpose to which it is being put. The latter factor will capture those involved in organising small boats

crossing the Channel. Harm also will be high if the offender has exploited or coerced others to assist them. Again this is likely to apply to organisers.

20. Any small boat crossing the Channel will involve some risk of serious injury or death given the potential for bad weather and the number of vessels using the Channel on any given day. Thus, it is unlikely that harm can ever be considered to be minimal. Moreover, inherent in any offence contrary to section 25 will be the harm done to the public interest in maintaining proper border controls.
21. The explanatory notes to the 2022 Act refer to the increase in the maximum sentence for any offence contrary to section 25 as follows:

This section increases the penalty to life imprisonment in order to discourage unlawful facilitation of migrants to the UK.

By way of contrast, in relation to the increase in the maximum sentence for causing death by dangerous driving introduced by the Police, Crime, Sentencing and Courts Act 2022, the relevant explanatory notes stated:

Increasing the maximum penalty to life imprisonment for these offences will provide the courts with enhanced powers to sentence appropriately for the most serious cases.

Although the increase in the maximum sentence for offences contrary to section 25 was not limited to “the most serious cases”, we conclude that any significant increase in sentencing for this offence should be reserved for those organising the use of small boats. For those such as the appellant whose role was to pilot the boat and whose primary interest was in achieving his own entry into the UK, an increase in the custodial term to reflect the increase in the maximum term will not be appropriate.

22. Where a small boat is used to commit the offence contrary to section 25 and the level of culpability is low, we consider that a custodial sentence of 3 years should be the starting point i.e. the sentence without any reduction for plea and before consideration of aggravating and mitigating factors. This is the level of sentence for an offender who simply pilots the boat where the boat is reasonably seaworthy. In the event of an organiser falling to be sentenced, the level of sentence will be much higher. Were a court to be faced with an organiser who had subjected significant numbers of people to a high risk of death when the organiser’s motivation was substantial financial gain, a starting point in double figures would be appropriate. An organiser who also had subjected others to exploitation or coercion might expect a sentence of 14 years or more.
23. The usual statutory aggravating factors will apply to this offence. In addition, previous attempts to enter the UK (where the offender himself is attempting to enter using the small boat) and involvement of others (particularly children) in the offending will aggravate the offence. Mitigating factors will include the offender’s age and/or lack of maturity, co-operation with the authorities once apprehended and the lack of any previous convictions. It is not necessary for us to set out all factors which may arise. In almost all Sentencing Council guidelines, the aggravating and mitigating factors are expressed to be non-exhaustive. Therefore, it would be inappropriate for us to set out an exhaustive list. In an appropriate case it may be relevant to take into account the circumstances which might be relied on as arguable

grounds for claiming asylum i.e. where the offender's principal concern was to gain entry to the UK as an individual with the assistance given to others being a collateral purpose.

24. The overarching guidelines issued by the Sentencing Council will apply to any offence contrary to section 25. Of particular relevance in the context of this offence may be the Children guideline and the guideline for sentencing offenders with mental disorders. We do not consider that *Roman* is of any assistance. The facts in *Roman* were very different. The court in *Roman* did not purport to provide any general guidance.
25. With those general principles in mind, we turn to the appellant's case. The judge was correct for the reasons he gave to conclude that the appellant's culpability was low. He had played no part in the organisation of the trip. He took on the role of pilot because he was asked to do so. His financial gain was simply a reduction in the amount charged to him by the organiser. Harm was more than minimal but there was no evidence of harm being at the highest level. By reference to the guidance set out above, the starting point was a custodial term of 3 years. There were no aggravating factors applicable to the appellant's case. On the other hand, the appellant was and is young. He was only just 18 at the time of the offence. Had he been three months younger, the Children guideline would have applied to him. As this court stated in *Clarke* [2018] EWCA Crim 185, reaching the age of 18 "does not present a cliff edge for the purposes of sentencing". The age of the appellant required a significant adjustment to the starting point. Also of mitigating effect was the attitude adopted by the appellant once apprehended. His involvement as someone who assisted or facilitated unlawful immigration in large part emerged from what he told the authorities rather than any independent evidence.
26. We conclude that the appropriate sentence after a trial in the appellant's case would have been 2 years' custody, the reduction from the starting point being predominantly due to his age. The reduction for the plea of guilty was 25%. Therefore, the correct custodial sentence for the offence contrary to section 25 was 18 months rather than 2 years.
27. The sentence imposed by the judge was one which could have been suspended. He determined that the offence was so serious that only immediate custody was appropriate. He did so having considered the Sentencing Council Imposition guideline and taking into account the current pressures on the prison estate as referred to in *Ali* [2023] EWCA Crim 232. We consider that the judge was correct to conclude that, given the nature of the offence, an immediate sentence of custody was the only appropriate course.
28. For all of those reasons we quashed the sentence of 2 years' detention imposed in respect of the offence contrary to section 25 and substituted a sentence of 18 months' detention. The sentence in respect of the offence contrary to section 24(D1) remained unaltered.