JUDICIARY OF
ENGLAND AND WALES

R.
v
KHEDEIR IDRIS MOHAMED
ASHARI MOHAMED
ADAM HUSSEIN KHALIL ABDUL KARIM
MUSTAFA MOHAMMED ALDAW

CANTERBURY CROWN COURT

RULINGS
BY MR JUSTICE CAVANAGH
AT A PREPARATORY HEARING ON
14, 15 AND 21 DECEMBER 2022

Introduction

1. These rulings are made at a consolidated preparatory hearing. The purpose of this preparatory hearing has been to deal with a number of points of law which are common to what are known as the "small boats" cases, involving Defendants who have crossed the English Channel in a small boat, usually with a view to claiming asylum in the United Kingdom. The aim is that these rulings will make it easier for courts, prosecution, and defence teams to manage these cases, and similar cases, in the future.

2. Each of the Defendants whose case has been dealt with at this consolidated preparatory hearing has recently arrived in the UK, having travelled across the English Channel from France on a Rigid Hulled Inflatable Boat (RHIB), along with other migrants. In each case, the RHIB was intercepted by the United Kingdom authorities and the Defendant, with the other occupants, was taken to the "approved area" of the port of Dover. Again, in each case, it is the Prosecution case that the Defendant piloted the RHIB for part or all of its journey. None of the Defendants had a visa or entry clearance to enter the United Kingdom when they arrived. Each of the Defendants has claimed asylum in the UK. None of the Defendants has any connection with any of the others.

3. The Defendants have been charged with one or both of two offences. The first offence is attempted arrival in the United Kingdom without valid entry clearance, contrary to

section 1(1) of the Criminal Attempts Act 1981, and sections 24(D1) and 24(F1) of the Immigration Act 1971 (IA 1971). This offence is charged as an attempt because the relevant Defendants did not make landfall in the United Kingdom before they were intercepted and/or rescued. They were picked up at sea. The second offence is assisting unlawful immigration to the United Kingdom, contrary to section 25(1) of the IA 1971. The particulars of the second offence are, broadly, that, on the relevant date in 2022, the Defendant did an act, consisting of steering a RHIB containing a number of other individuals who were not citizens of the United Kingdom, in order to facilitate the commission of a breach of immigration law, namely section 24(D1) of the IA 1971, knowing or having reasonable cause for believing that the act facilitated the commission of a breach of immigration law by those individuals.

4. The charges against these Defendants are typical of charges that have been brought against persons who are alleged to have piloted small boats containing migrants from France to England. Most of these boats are intercepted at sea in British territorial waters, and the occupants are rescued and taken to an approved area in a port, usually at Dover. Normally, many, and sometimes all, of the migrants claim asylum when they land.

5. It would not be practicable to charge and then to proceed with criminal proceedings against all of the migrants who cross the Channel in small boats. The Crown Prosecution Service considers each case and then determines whether it will be in the public interest to charge and to proceed to trial. In practice, criminal proceedings under section 24(D1) and/or section 25 are taken against only a small proportion of the migrants. In cases in which the individual is believed to have been piloting the boat, it is more likely, though not certain, that he (it is almost always a he) will be charged with an offence under section 24(D1) and/or section 25. The section 25 offence is the more serious offence. There are other circumstances in which a migrant might be charged, for example, if it is believed that he is one of the organisers of a trafficking operation, or if it is believed that the migrant is attempting to return to the UK having already been deported after a previous attempt to enter.

6. The background to the issues of law that I have been invited to deal with is that sections 24 and 25 of the IA 1971 were amended, with effect from 28 June 2022, by section 40 of the Nationality and Borders Act 2022 (NABA 2022). This was in response, in particular, to two judgments of the Court of Appeal in 2021, **R v Kakaei (Fouad)** [2021] EWCA Crim 503 and **R v Bani (Samyar Ahmadii)** [2021] EWCA Crim 1958, in which it was confirmed that the offence of unlawful entry to the United Kingdom, as set out in the then-existing version of section 24 of the IA 1971, was not committed if a migrant was intercepted/rescued at sea and taken to an approved area within a port. This is because a person is deemed not to "enter" the United Kingdom if he or she disembarks at a port and remains within its "approved area", or if s/he is detained and taken from that area or given immigration bail. This is the effect of section 11(1) of the IA 1971. The Court of Appeal in **Kakaei** held that it would not be facilitation of a section 24 offence, for the purposes of section 25, if the Defendant intended to deliver the occupants of the boats directly into the approved area of a port, or if he was steering at a point at which it was expected and intended that the UK authorities would intercept the boat and pick up the migrants and take them to an approved area in a port. It would only be if the Defendant intended to deliver the migrants to a landfall outside the approved area of a port, or recognised that this was

a possible outcome, that an offence of facilitating a breach of section 24, as it then was, would be committed (see **Bani** at paragraph 105).

7. The Explanatory Notes to NABA 2022 explain the intended purpose of the relevant amendments to sections 24 and 25 of the IA 1971 as follows:

> "399. Overview: This section [section 40] creates two new criminal offences of arriving in the UK without a valid entry clearance or electronic travel authorisation (ETA) where required, in addition to the existing offence of entering without leave. This section increases the maximum penalty for those returning to the UK in breach of a deportation order from 6 months to 5 years, and for entering without leave or arriving without a valid entry clearance or ETA, or overstaying a grant of leave, from 6 months to 4 years.
> 400. Background: The offence of knowingly entering the UK without leave is currently set out in section 24(1)(a) of the Immigration Act 1971 ("the 1971 Act"). "Leave" refers to permission, under the 1971 Act, to enter or remain in the UK – such leave may be limited in terms of duration, or indefinite.
> 401. The concept of "entering the UK without leave" has caused difficulties about precisely what "entering" means in the context of the current section 24(1)(a) of the 1971 Act.
> 402. "Entry" is defined in section 11(1) of the 1971 Act as meaning disembarking and subsequently leaving the immigration control area. Where a person is detained and taken from the area, or granted immigration bail, they are not deemed to have entered the UK.
> 403. 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.
> 404. This section creates two new offences so that it encompasses arrival, as well as entry into the UK. The intention is that these new offences of people arriving in the UK without a required entry clearance (EC) or ETA apply to everyone who requires an EC or ETA on arrival. These offences will cover all asylum claimants who arrive without the necessary EC or ETA. As a matter of law, refugees will be in scope of the offence but decisions on prosecutions remain a matter for the Crown Prosecution Service (CPS) in England and Wales, the Crown Office and Procurator Fiscal Service (COFPS) in Scotland, and the Public Prosecution Service (PPS) in Northern Ireland, who will take into account the public interest test.
> 405. 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.
> 406. 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.

8. The central issue, at the heart of this preparatory hearing, is whether the amendments to sections 24 and 25 have been effective to bring about a change in the law, so as to permit the prosecution of migrants in small boats who are intercepted or rescued at sea and who are brought to the approved area of a port and then detained or given immigration bail, and to permit the prosecution of those who facilitate this offence (if it is an offence), in the way anticipated by the Explanatory Memorandum.

9. The parties have been represented as follows: the Defendant Khedeir Idris Mohamed is represented by Richard Thomas KC and John Barker; the Defendants Ashari Mohamed, and Adam Hussein Khalil Abdul Karim by Richard Thomas KC and Charlotte Oliver; the Defendant Mustafa Mohammed Aldaw by Sonali Naik KC and Ronnie Manek (assisted by Ali Bandegani, Jennifer Twite and Raza Halim acting pro bono); and the Prosecution by John McGuinness KC and Daniel Bunting. I am grateful to all counsel for their very helpful submissions, both those made orally and those in writing.

The issues that I have to decide

10. The first issue which has arisen for consideration at this hearing is whether it is appropriate to hold a consolidated preparatory hearing in these cases at all. For reasons I will explain in the next section, I have decided that the answer is "yes".

11. The next issue is concerned with identifying the points of law, if any, that are suitable and appropriate to be determined at this preparatory hearing. Mr Thomas KC and Mr McGuinness KC agreed a list of four points of law which they invited me to determine at the preparatory hearing. These are:

    (1) Whether, in a prosecution of 'facilitation' offence contrary to section 25(1) of the IA 1971, the amendments in NABA 2022 have meant that 'the commission of a breach of immigration law' can include the offence of arrival without leave in section 24(D1) Immigration Act 1971;
    (2) If the answer to (1) is 'yes', whether it must be proved that the Defendant to a charge of s25(1) facilitation charge of a section 24(1) unlawful arrival offence must be aware or have reasonable grounds to believe that the conduct of the passenger migrant whose arrival without leave is being facilitated is 'criminal' (i.e. is it an 'egregious' case and/or the passenger migrant is not a genuine or presumptive refugee) for a defendant to be guilty of facilitating that conduct;
    (3) The meaning of 'arrival' for the purposes of section 25 and 24(D1) of the IA 1971; the mental element requirement for a section 24(D1) offence; and the meaning of "attempting to arrive"; and
    (4) Whether sections 30(3) and 37 of NABA 2022 provide a defence to a person charged with an offence contrary to section 24(D1) of the IA 1971.

12. Ms Naik KC agreed that the Court should address and give rulings on points (1) to (4), above. In fact, it was she, rather than Mr Thomas KC, who contended that sections 20(3) and 37 of NABA 2022 provide a defence to proceedings under section 24(D1) (point (4)). In addition, Ms Naik KC invited the Court to deal with a fifth point, namely whether section 24(D1) can have no application to a person who is seeking asylum on arrival to the United Kingdom.

13. In her skeleton argument, Ms Naik KC also invited me to express a view as regards whether section 24(D1) violates certain articles of the European Convention on Human Rights, specifically Article 6 (right to a fair trial), Article 7 (no punishment without law), Article 8 (right to family life) or Article 14 (non-discrimination), taken with Articles 7 and/or 8. She acknowledged that, sitting in the Crown Court, I have no power to make a declaration of incompatibility under section 4 of the Human Rights Act 1998. As I have no such power, I declined to express a view on these matters, Ms Naik KC made clear in her oral submissions that she was not inviting me to make rulings on arguments about alleged breaches of the ECHR. Moreover, I have taken the view that this is not a case in which any significant question arises as regards whether I should read sections 24(D1) or 25 in a particular way so as to render them compatible with the Convention rights, in accordance with section 3(1) of the 1998 Act. I will, however, deal briefly, later in these rulings, with one submission, based on the Convention, that was advanced by Ms Naik KC, namely whether the relevant legislation should be read in a particular way so that it complies with the requirements of certainty and precision which are aspects of Article 7 rights. This submission was made as part of Ms Naik KC's submissions on point (4), above.

14. I will first explain why I consider it appropriate to proceed with a consolidated preparatory hearing in these cases and why I have decided that the points of law are suitable and appropriate to be determined at this preparatory hearing. I will then summarise the relevant legislative framework and CPS guidance, before dealing with each of the five points of law in turn.

15. I summarise my rulings at the end of this document.

The decision to proceed with a preparatory hearing, and to determine the five points of law

17. The current charges against the Defendants are as follows:

18. Khedeir Idris Mohamed is charged with an offence of facilitation under section 25, alleged to have been committed on 11 July 2022. The Prosecution served a Notice of Discontinuance upon Khedeir Mohamed last week, but, very shortly afterwards, withdrew it, as it had been served in error. Mr Thomas KC accepted on behalf of Khedeir Mohamed that the Notice of Discontinuance, having been withdrawn, was invalid and of no effect. Khedeir Mohamed was arraigned at the commencement of the preparatory hearing, and pleaded not guilty.

19. Ashari Mohamed was charged with section 25 facilitation on 10 July 2022, and also with attempted arrival contrary to section 24(D1) on the same day. He was arraigned on the section 25 offence at the commencement of the preparatory hearing and pleaded not guilty. At his request, he was arraigned on the 24(D1) offence on 15 December 2022, at the end of the legal argument in the preparatory hearing, and pleaded guilty to that offence. Accordingly, the only outstanding charge against him is the section 25 offence.

20. Adam Hussein Khalil Abdul Karim was originally charged with section 25 facilitation on 4 July 2022, and also with attempted arrival contrary to section 24(D1),. However, on 31 October 2022, the CPS wrote to the Court to say that the Prosecution was not

proceeding with the section 25 count. Accordingly, Khalil Abdul Karim was arraigned before me on the section 25 count and pleaded not guilty. The prosecution then formally offered no evidence, and I entered a verdict of not guilty on the section 25 count pursuant to section 17 of the Criminal Justice Act 1967. Khalil Abdul Karim was arraigned on the section 24(D1) count at the outset of the preparatory hearing and pleaded not guilty.

21. Mustafa Mohammed Aldaw is charged with attempted arrival contrary to section 24(D1) on 8 August 2022. He was arraigned on this count, and pleaded not guilty on 8 October 2022.

22. Accordingly, the current position is that two Defendants, Khedeir Mohamed and Ashari Mohamed face a charge of section 25 facilitation and the other two Defendants, Khalil Abdul Karim and Mustafa Aldaw face a charge of attempted arrival, under section 24(D1).

23. The parties have agreed that the preparatory hearing should proceed on the basis of the following basic assumed facts (and one allegation, at (8)):

(1) Each of the Defendants is a Sudanese national;
(2) Each of the Defendants was travelling on a small boat, a RHIB, in the English Channel, which had set off from France;
(3) Each boat had other migrant passengers on it;
(4) Each boat was intercepted or rescued in UK territorial waters by the United Kingdom authorities;
(5) Each Defendant was taken off the boat, along with the other migrant passengers, and was escorted to the "approved area" in the port of Dover;
(6) Each Defendant claimed asylum when he landed. (There is a factual issue as regards whether Khedeir Mohamed claimed asylum when he landed or only later, but the Prosecution does not take a point on this).
(7) None of the Defendants had a visa or entry clearance which permitted entry to the United Kingdom, and
(8) The Prosecution alleges that each Defendant was piloting (steering) the small boat for all or part of its journey.

24. Section 29 of the CPIA 1996 makes provision for preparatory hearings in complex cases. Section 29 provides, in relevant part:

> **"29 Power to order preparatory hearing**
>
> (1) Where it appears to a judge of the Crown Court that an indictment reveals a case of such complexity, a case of such seriousness or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing—
> (a)before the time when the jury are sworn, and
> (b)for any of the purposes mentioned in subsection (2),
> he may order that such a hearing (in this Part referred to as a preparatory hearing) shall be held.

….

2. The purposes are those of—
(a) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial,
(b) if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,
(c)determining an application to which section 45 of the Criminal Justice Act 2003 applies,
(d)assisting the judge's management of the trial.
(e)considering questions as to the severance or joinder of charges,

….

(4) An order that a preparatory hearing shall be held may be made—
(a) on the application of the prosecutor,
(b) on the application of the accused or, if there is more than one, any of them, or
(c)of the judge's own motion.

...."

25. Section 31 of the CPIA 1996 provides, again in relevant part:

"31 **The preparatory hearing**

At the preparatory hearing the judge may exercise any of the powers specified in this section.

(2) The judge may adjourn the preparatory hearing from time to time.

(3) He may make a ruling as to -
(a) Any question as to admissibility of evidence;
(b) Any other question of law relating to the case;

…
(11) An order or ruling made under this section shall have effect throughout the trial, unless it appears to the judge on application made to him that the interests of justice require him to vary or discharge it."

26. The circumstances in which it would be appropriate for a judge to hold a preparatory hearing were considered by the House of Lords in **R v H** [2007] UKHL 7; [2007] 2 AC 270, a case which was concerned with the materially identical provisions for preparatory hearings in fraud cases, set out in sections 7 and 9 of the Criminal Justice Act 1987. At paragraph 53, Lord Rodger of Earlsferry said:

> "Since the powers in section 9 [the equivalent of section 31 of the CPIA 1996] are designed to achieve the purposes in section 7(1) [the equivalent of section 29(1)], in practice a judge who is considering whether to hold a preparatory hearing need only ask himself whether exercising any of these powers at such a hearing, rather than at the trial when the jury have been sworn, is likely to result in substantial benefits.... The potential benefits are described by Lord Bingham of Cornhill in **R v Shayler** [2003] 1 AC, 247, 265, para 16:
>
> "Jurors and witnesses, summoned to court for the trial, can be spared hours and days of frustrating inaction while issues of law are argued out in their absence. The risk of sudden adjournments to deal with unforeseen contingencies can be reduced."

27. At paragraph 99 of the judgment in **R v H**, Lord Mance said that a judge has power, under the preparatory hearing jurisdiction, to determine a point of law relating to the case, whether or not it might be aimed at precluding or terminating trial entirely on any particular count.

28. In the present case, no formal application has been made by any of the parties for a preparatory hearing, under sections 29(4)(a) or (b) of the CPIA 1996. This is because the Court had, of its own motion, listed these cases for preparatory hearings, as the court was entitled to do under section 29(4)c. Preparatory hearings were listed for 14 and 15 December 2022. This was done on 8 August 2022 by HHJ Catherine Brown in the cases of Ashari Mohamed and Khalil Abdul Karim, and on 19 August 2022 in the case of Khedeir Mohamed. Mustafa Aldaw was a late substitute for another case, in which the Prosecution decided to offer no evidence, and his case was listed to be heard as a preparatory hearing on these dates by HHJ Rupert Lowe on 8 December 2022. However, at the outset of the preparatory hearing on 14 December 2022, I considered afresh whether it was appropriate to proceed with preparatory hearings in these cases. This was done after I had asked counsel, a few days before the hearing, to provide the court in writing with a list of the points of law that they invited me to determine.

29. Having been provided with a list of the points of law, I was fully satisfied that these are suitable cases in which to hold a consolidated preparatory hearing, and to deal with the five points of law. This is, in my view, a case in which the substantial benefits of determining these points of law at the preparatory hearing stage are clear. Each of the cases gives rise to complex points of law which it would be beneficial to determine before the jury is sworn. If the Defence arguments on the first or fifth points of law, set out above, is right, then the relevant Defendants will have a complete defence to the charges against them. A decision on the other three points of law will serve to identify the issues that the jury will have to decide and to delineate the scope of potential defences. The parties are agreed that these points are suitable and appropriate to be dealt with at a preparatory hearing. I have had the benefit of detailed legal argument by leading counsel on behalf of the Prosecution and Defence. This argument lasted a day and a half. I then reserved my decision and took some days to consider my rulings. It would have been highly inconvenient for the jury in these cases if they had to wait around for a number of days whilst the points of law were determined. Moreover, the nature of the points of law, which are essentially

concerned with matters of statutory construction, mean that they are suitable for determination on assumed facts. The assumed facts are not complicated or speculative. There is no danger that determination of the points of law at the preparatory hearing stage, on the basis of the assumed facts, will prejudice the trials before the jury. Still further, an advantage of the preparatory hearing jurisdiction is that it provides a party, if so minded, with the opportunity to seek permission to appeal from the trial judge or the Court of Appeal at an early stage.

30. The reasons set out in section 29(1) of the CPIA 1996 for holding a preparatory hearing are focused on the benefits for the case in question. However, there are obvious wider benefits in proceeding by way of preparatory hearing to determine points of law that arise in many small boats cases. The Crown Court at Canterbury, where I am sitting, deals with a significant number of section 24(D1) and section 25 cases every week. There are obvious benefits in having a single set of rulings on the points of law that are common to almost every case. This may save a great deal of time, expense and duplicated effort, and may serve to minimise the possibility of inconsistent rulings. Although these rulings will not bind the Crown Court in other cases in which similar issues arise, I hope that my analysis will assist judges who are grappling with the same points in other cases. In any event, and more importantly, there is a strong likelihood that these rulings will be appealed to the Court of Appeal, and rulings at this stage will make it possible for these matters to come before the Court of Appeal as swiftly as possible and in a form which, it is hoped, will assist the Court of Appeal in considering the issues.

Reporting of this preparatory hearing, including the written rulings made at the end of it

31. Section 37 of the Criminal Procedure and Investigations Act 1996 (CPIA 1996) makes provision for restrictions of reporting of preparatory hearings. Section 37(1) provides that, except as provided by that section, no written report of proceedings falling within subsection (2) shall be published in the United Kingdom, and no report of proceedings falling within subsection (2) shall be included in a relevant programme for reception in the United Kingdom. By section 27(2)(a), a preparatory hearing falls within the class of proceedings in subsection (2). However, section 27(3)(a) provides that the judge dealing with a preparatory hearing may order that subsection (1) shall not apply, or shall not apply to a specified extent, to a report of the preparatory hearing.

32. In many cases, it will not be appropriate for the press or media to report a preparatory hearing, because there will be discussion at the hearing about admissibility of evidence. If the proceedings are reported, there is a risk that information or evidence will come into the public domain which the judge then rules is inadmissible. There is a risk, therefore, that members of the jury which is eventually selected to hear the case will have been made aware of inadmissible evidence through press and media reporting.

33. This problem does not arise at this preparatory hearing. The preparatory hearing has not dealt with the admissibility of evidence. Rather, the preparatory hearing has dealt with pure points of law which are concerned, in the main, with issues of statutory construction. The legal argument has taken place by reference to very limited assumed facts (which I have set out at paragraph 23, above). The only potentially

controversial matter that is covered by the assumed facts is whether each Defendant piloted the RHIB on which he was travelling (at least for a while). In the case of several of the Defendants, this is not in dispute, but it is, or may be, disputed by at least one of them (Mustafa Aldaw). I make clear, in this ruling, therefore, that the facts are assumed facts only, and the determination of the facts relating to each Defendant will be a matter for the jury at trial. The jury is not bound in any way by the assumed facts.

34. There is no danger, therefore, that reporting of the proceedings or of the rulings will prejudice the trial, either by publicising inadmissible evidence, or in any other way. In these circumstances, I have taken the view that the principle of open justice means that the press and other media should be entitled to report both the proceedings at the preparatory hearing itself and the rulings which I have made at the end of the preparatory hearing.

35. Defence counsel invited me to order that the press should not report the names of the Defendants, either temporarily or permanently, because they are asylum seekers. Ms Naik KC pointed out that the names of asylum seekers are routinely redacted by court order in civil litigation. However, it is not the practice in Crown Court trials to redact the name of Defendants to criminal proceedings, simply because they have applied for asylum, and I do not see any reason to depart from this practice in the present case. There are no particular features of these cases which mean that any one of the four Defendants will suffer prejudice or will be placed in danger if his name is published in reports of the proceedings.

36. Accordingly, I have made an order pursuant to section 37(3)(a) of the CPIA 1996 to the effect that the prohibition upon reporting of preparatory hearings in section 27(1) of that Act shall not apply. For the avoidance of doubt, this means that the press and other media are free to report the proceedings, and my rulings, and are free to name the Defendants, if they see fit to do so. I have made arrangements for a copy of these written rulings to be uploaded to the Judgments section of the Judiciary.uk website.

The legislative framework

The IA 1971

37. Sections 1 and 3 of the IA 1971 lay down general principles and general provisions for regulation and control of entry into the United Kingdom.

38. Section 1 provides, in relevant part:

> "1**.— General principles**.
> (1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.
> (2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of

their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).
….
(4) The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom."

39. Section 3(1)(a) and (b) and 3(4) provide:

"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;
(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

….

(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances …."

40. Section 11(1) of the IA 1971 defines "entry" for the purposes of the Act. It provides:

"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."

41. The offences with which the court is currently concerned are contained in sections 24(D1) and 25 of the IA 1971.

42. Section 24(D1) was inserted by section 40 of NABA 2022, in order to create an offence of illegal arrival in the United Kingdom, to stand alongside the existing offence of illegal entry into the United Kingdom. Sections 24(B1), (D1) and (F1) provide:

"24.— **Illegal entry and similar offences**.

….
(B1) A person who—
requires leave to enter the United Kingdom under this Act, and
knowingly enters the United Kingdom without such leave,
commits an offence.
….
(D1) A person who—
requires entry clearance under the immigration rules, and
knowingly arrives in the United Kingdom without a valid entry clearance,
commits an offence.

….

(F1) A person who commits an offence under any of subsections (A1) to (E1) is liable—

(a) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or a fine (or both);
….
(d) on conviction on indictment..... (ii) for an offence under any of subsections (B1) to (E1), to imprisonment for a term not exceeding four years or a fine (or both).

43. Section 25 was amended by section 40 of NABA 2022 by the insertion of the words "or arrive in" in section 25(2). Section 25 provides, in relevant part:

"25 **Assisting unlawful immigration to member State or the United Kingdom**

(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 national of the United Kingdom,
(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 national of the United Kingdom.

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

enter **or arrive in** the State or the United Kingdom,
transit across the State or the United Kingdom, or
be in the State or the United Kingdom."
….

(6) A person guilty of an offence under this section shall be liable -

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

(emphasis added)

44. Section 25A(1) provides for a separate offence of knowingly facilitating the arrival or attempted arrival in, or the entry or attempted entry, into the United Kingdom of an individual whom the accused knows or has reasonable cause to believe is an asylum-seeker. An "asylum-seeker" is defined in section 25A(2) to mean, inter alia, 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 the Refugee Convention. The same penalties apply upon conviction of an offence under section 25A as apply to conviction for the section 25 offence. None of the Defendants has been changed with an offence under section 25A.

Criminal Attempts Act 1981, section 1(1)

45. Section 1(1) provides:

"1.**Attempting to commit an offence**.

(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."

Article 31 of the Refugee Convention, section 31 of the Immigration and Asylum Act 1999, and sections 30(1) and (3) and 37 of NABA 2022

46. The "Refugee Convention" is the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention. "Refugee" is defined in Article 1A(2) of the Refugee Convention to include any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

46. Article 31(1) of the Refugee Convention provides:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

47. The Refugee Convention has not been enacted into domestic law, but section 31 of the Immigration and Asylum Act 1999 (the 1999 Act) provides for defences to certain offences which are based on Article 31(1) of the Refugee Convention. Section 31 provides, in relevant part:

> "**31Defences based on Article 31(1) of the Refugee Convention**.
>
> (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—
> (a)presented himself to the authorities in the United Kingdom without delay;
> (b)showed good cause for his illegal entry or presence; and
> (c)made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.
>
> (2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably be expected to have sought protection under the Refugee Convention in that other country.
>
> (3) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under—
> (a)Part I of the M1Forgery and Counterfeiting Act 1981 (forgery and connected offences);
> (aa)section 4 or 6 of the Identity Documents Act 2010;

(b)section 24A of the 1971 Act (deception); or
(c)section 26(1)(d) of the 1971 Act (falsification of documents).

….

(10)The Secretary of State may by order amend—

(a)subsection (3), or
(b)subsection (4),

by adding offences to those for the time being listed there."

48. It will be seen that the offences listed in section 31(3) of the 1999 Act do not include offences under section 24 or 25 of IA 1971.

49. Sections 30 to 38 of NABA 2022 contain provisions which are relevant to the interpretation of Articles of the Refugee Convention.

50. Section 30(3) of NABA 2022 provides:

> "(3) Section 37 applies for the purposes of the determination by any person, court or tribunal whether Article 31(1) of the Refugee Convention (immunity from certain penalties) applies in relation to a person who is a refugee within the meaning of Article 1(A)(2) of the Refugee Convention."

51. Section 37 provides in relevant part:

> "**37 Article 31(1): immunity from penalties**
> (1)A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.
>
> (2)A refugee is not to be taken to have presented themselves without delay to the authorities unless—
> (a)in the case of a person who became a refugee while they were outside the United Kingdom, they made a claim for asylum as soon as reasonably practicable after their arrival in the United Kingdom;
> …."

CPS policy guidance on the prosecution of immigration offences

52. Even though section 31 of the 1999 Act does not apply to offences under sections 24 and 25 of the IA 1999, it is accepted that it would not be appropriate to impose penalties on refugees for committing offences under section 24 or 25, if to do so would breach the United Kingdom's obligations under Article 31(1) of the Refugee

Convention. This is dealt with primarily by the application of a "public interest" test to prosecutorial decisions by the CPS.

53. The approach that must be followed by prosecutors is set out in the CPS policy guidance on the prosecution of immigration offences, which was most recently updated on 6 December 2022 (the CPS Policy Guidance). The CPS Policy Guidance is published on the internet and so is available to defence lawyers.

54. The section of the CPS Policy Guidance which sets out the approach to public interest considerations in cases involving refugees in general, and in cases in concerning allegations of offences under sections 24 and 25, in particular, states as follows:

> "1. **Approach in cases involving refugees**
> The defence under section 31 of the Immigration and Asylum Act 1999 reflects the UK's obligations under Article 31 of the Refugee Convention. This defence only applies to specific offences. Section 37(1) of NABA also sets out Parliament's intention that there should be no immunity from penalty where protection could reasonably have been sought in a different country during the defendant's journey.
>
> In cases where there is no statutory defence, prosecutors should have regard to circumstances which are relevant to Article 31 of the Refugee Convention when considering the public interest stage. Pursuant to paragraph 2.10 of the Code for Crown Prosecutors, prosecutors must have regard to the obligations arising from international conventions.
>
> Specifically, prosecutors should consider the factors listed below in relation to Article 31. This will ensure that the humanitarian aims of the Convention are appropriately taken into account when deciding whether or not to prosecute. For more information on determining the approach to be taken when determining whether a suspect is a refugee, see the section above.
>
> **Factors relating to Article 31 of the Refugee Convention**
>
> The person:
> - Is a refugee within the meaning of the Convention: see Article 1
> - Came directly from a territory where their life or freedom was threatened in the sense of Article 1
> - Presented themselves without delay to the authorities
> - Showed good cause for their illegal entry or presence
> - Committed the offence(s) reasonably or necessarily in the course of flight from persecution or threatened persecution
>
> The burden and standard of proof to be applied in considering these factors should be the same as would apply to a section 31 defence at trial: see the section on Statutory Defences above.

The presence of all of these factors will make it less likely that a prosecution is required. However, unlike statutory defences, they will not provide an automatic bar to prosecution.

In all cases where the suspect is a refugee and the public interest test is applied, prosecutors must outline their approach to Article 31, including the reasons for their decision on the public interest, in their case review.

For a structured approach to assessing the merits of a section 31 defence, see para 9(4) of **R v Dastjerdi** [2011] EWCA Crim 365 (applied in **R v PK** [2017] EWCA Crim 486 and **R v Idahosa** [2019] EWCA Crim 1953).

The Article 31 factors will need to be weighed with any other factors identified in the case, to form an overall assessment of the public interest. The factors listed below under "Administrative removal" will be relevant. Additionally, the following factors should be considered:

- Evidence that the suspect was previously refused entry clearance or a prior application for an Electronic Travel Authorisation (ETA) to the UK.
- The offending compromised the genuine identity of another person, causing them loss, distress, or inconvenience (obtaining leave by deception / entering without leave through fraud).
- Evidence of provable involvement with an organised crime group behind the criminality.

Relevant public interest factors

The following public interest factors would be considered relevant when making the decision to prosecute:

- A likely sentence of less than 12 months' imprisonment
- Where no aggravating factors in favour of prosecution would apply
- Whether, in the absence of other aggravating factors, the offender (or overstayer) might be dealt with more judiciously by removal
- Whether the suspect may be willing to assist in the investigation or prosecution of others (in accordance with the Serious Organised Crime & Police Act 2005), and who would need to remain in the UK for this purpose
- Any other issue arising from the Code for Crown Prosecutors. In particular, under paragraphs 4.14(b) and (d), the personal circumstances or characteristics of the suspect – for example, their age or the state of their physical or mental health, or other vulnerabilities – are factors which may mean it is less likely

that a prosecution is required. This information should be provided by Immigration Enforcement CFI. However, prosecutors can also consider information from other sources including the police, other investigators, the suspect or those acting on their behalf.

Section 24 illegal /arrival entry and arrival offences

Factors tending in favour of prosecution (aggravating factors)

- The level of culpability involved in securing illegal entry (this might include other relevant offences committed alongside immigration offences). When an individual pilots a small boat, but there is insufficient evidence to prove a facilitation offence, culpability is likely to be higher as their actions will have made at least some contribution to the passage of others, in addition to directly contributing to their own illegal arrival or attempt.
- Offenders who are in breach of a Deportation Order and those who are repeat offenders who have previously been removed
- Offenders who are in breach of a decision or order to exclude them from the UK or to ban them from re-entry for a specified period
- Where the suspect has previous convictions or has committed other offences in addition to the immigration offending
- A potentially substantial confiscation order and the likelihood of timely enforcement
- Evidence of violence / harm or risk to life to others
- Evidence of money flows or financial advantage / gain or benefit.
- Evidence of repeated attempts to enter the UK illegally
- Evidence of document destruction (where not charged as a separate offence)
- Evidence that the suspect could have sought asylum in a safe country before beginning the final leg of their journey
- Evidence that the suspect was previously refused entry clearance or a prior application for an Electronic Travel Authorisation (ETA) to the UK.
- The offending compromised the genuine identity of another person, causing them loss, distress, or inconvenience (obtaining leave by deception / entering without leave through fraud)
- Evidence of provable involvement with an organised crime group behind the criminality

In relation to the section 24 illegal arrival/entry and arrival offences, it may be that those refugees, or presumptive refugees, who commit criminal offences as a necessary part of their journey to the UK are

not prosecuted, provided the conditions in section 31(1) (as interpreted in Asfaw) are met.

Where a claim for asylum has been made, factors in support of prosecution may be:

- non-meritorious claims
- additional factual elements providing the context of the offence or particular circumstances of the unlawful arrival in the UK, indicative of higher culpability or higher seriousness of the offending
- factors relating to the suspect, whether relating to the suspect's circumstances in their country of origin or to their journey, indicative of higher culpability

Examples may include asylum seekers with a particular organisational role, such as the facilitation of the buying of the boat in **Bani and others** [2021] EWCA Crim 1958, or the different seriousness in conduct in a case like **Mirahessari and Vahdani** [2016] EWCA Crim 1733.

Section 25 / S25A Facilitation offences

Factors tending in favour of prosecution (aggravating factors)

- Where there is evidence that the suspect has greater involvement and a more significant role in planning or organising the facilitation of migrants and the offence is not an isolated incident
- Where there is evidence of facilitation beyond the defendant having their hand on the tiller, such as piloting the vessel for gain (financial or otherwise), and/or arranging the journey or sourcing the boat
- A higher level of culpability of migrants in boats or lorries, in particular between those who travel on RHIBs with the intention or expectation that they will be intercepted and those whose intention is to avoid immigration controls altogether through concealed entry
- A higher level of culpability involved in securing or assisting the illegal entry of individuals or asylum-seekers to the UK or a member State in breach of immigration laws (this might include other offences committed alongside immigration offences)
- The offending compromised the genuine identity of another person, causing them loss, distress or inconvenience
- Access to public services is obtained, which would not otherwise be available
- The suspect's actions caused harm to others, or placed other persons' life, health or safety at risk (including those who

rescue migrants at sea). Those facilitating migrants crossing the English Channel are likely to create a higher risk of such harm

- Disruption to services, such as those relating to train services in the Channel Tunnel, or disruption to other shipping / vessels in the channel Economic loss, which may, for example, be linked to any disruption of services
- The offending caused a significant investment of police or Immigration resources

Factors tending against prosecution (mitigating factors)

- The absence of any gain (whether financial or otherwise)
- Where the evidence suggests that the suspect was acting to safeguard other passengers, it may be in the public interest to charge the lesser section 24 offence rather than section 25,

Article 31 does not necessarily apply to these offences in the same way as to the section 24 offence, as the Refugee Convention provides protection for refugees themselves, rather than those who assist them (whatever their motives may be).

However, if an asylum claim has been made by someone charged with a facilitation offence, prosecutors should consider their culpability in the facilitation offence.

In those circumstances, their actions may be closer to being "necessarily committed in the course of flight from persecution", and therefore covered by Article 31.

The principles underpinning the Refugee Convention to which the UK is a signatory are relevant to the assessment of the public interest."

55. These are not the only public interest considerations which might affect prosecutorial decisions and prosecutors also take account of evidential considerations.

56. The careful approach to public interest considerations by the CPS in these types of cases is likely to be the reason why only a small proportion of those who attempt to reach the United Kingdom by crossing the English Channel on a small boat are prosecuted. However, though the number of migrants who are prosecuted is only a small proportion of the overall total, the numbers are still significant. Mr Thomas KC said that, since NABA 2022 came into force on 28 June 2022, an estimated 29,400 migrants had arrived on small boats, of whom an estimated 78 had been charged with an offence under section 24(D1). The Prosecution did not dispute that these figures were broadly correct. However, I was not provided with any figures for those who have been charged with the section 25 offence. The number is likely to be smaller than the number of those who have been charged with the section 24(D1) offence.

(1) <u>Does arrival without leave in breach of section 24(D1) amount to a breach of immigration law for the purposes of the facilitation offence in section 25?</u>

57. This is an important point. If the answer to this question is "no", then this means that there can be no prosecution for a facilitation offence under section 25 if the Defendant is accused of facilitating the offence of unlawful arrival by one or more other migrants for the purposes of section 24(D1). This would mean, therefore, that, so far as the section 25 facilitation offence is concerned, the amendments to sections 24 and 25 by section 40 of NABA 2022 do not have the effect intended for it by the Government. The Explanatory Notes show that it is clear that the intended purpose of the relevant amendments in section 40 was to close the perceived loophole that exists in section 25 as a result of the statutory definition of "entry" in section 11 of the IA 1971. The effect of section 11 is that a person does not enter the United Kingdom if he or she is picked up in United Kingdom territorial waters and taken straight to the approved area at Dover port, and is then placed in detention or given immigration bail. This was made clear by the Court of Appeal in **Bani** and **Kakaei**. This means that the migrant passenger does not commit an offence under section 24(B1), unlawful entry, as there has been no entry into the United Kingdom. The effect of section 24(D1) (subject to the other points of law that I will deal with later in these rulings) is that an offence of unlawful arrival (or attempted unlawful arrival) is committed, even if the migrant is intercepted/rescued in territorial waters and taken straight to the approved area at a port such as Dover, or goes straight to the approved area, notwithstanding that the migrant never "enters" the United Kingdom. However, if the Defence are right that the offence of unlawful arrival under section 24(D1), or the attempt, is not a breach or attempted breach of immigration law for the purposes of section 25(1)(a), then no section 25 facilitation offence can be committed in respect of a section 25(D1) offence. This would mean that the prosecutions of any Defendants who are charged with the section 25 office of facilitation of arrival without leave (including Khedeir Mohamed and Ashari Mohamed) must inevitably fail.

58. This is a pure point of statutory construction. The meaning of "immigration law" for the purpose of section 25(1) is set out in section 25(2). It has been amended by section 40 of NABA 2022. For present purposes, the definition of "immigration law" is a law which has effect in the United Kingdom and which controls, in respect of some or all persons who are not nationals of the United Kingdom, entitlement to enter or arrive in the United Kingdom. As I have said, the words "or arrive in" were added by section 40.

59. On behalf of the Prosecution, Mr McGuinness KC submitted that the words "or arrive in" make clear that "immigration law" for these purposes includes the new offence which was created by section 24(D1). Moreover, the Explanatory Notes demonstrate that this was, without doubt, the intention of the Government.

60. Mr Thomas KC, who made the principal submissions on behalf of the Defendants on this issue, submitted that, if this had been Parliament's intention, it has not been put into effect. He submitted that, in this context, "immigration law" is a reference to sections 1 and 3 of the IA 1971. There has been no amendment to those sections. Put another way, it is a reference to substantive immigration law, consisting of the law that regulates immigration into the United Kingdom. "Immigration law" does not

encompass the criminal offences which are provided for by the IA 1971, because those offences do not control entitlements; rather they provide for criminal penalties for various breaches of immigration law. Mr Thomas KC submitted that effect must be given to the clear meaning of the statute, and in that there is no ambiguity. Even if there is an ambiguity, this being a criminal statute, the interpretation should be adopted which is most favourable to the accused. There is no room, he submitted, for a **Pepper v Hart** approach, pursuant to which ambiguities in the legislation are resolved by reference to Parliamentary materials which make clear the intention of Parliament.

61. In my judgment, the Prosecution is right: the section 25 facilitation offence encompasses facilitation of an offence under section 24(D1) of the IA 1971. There are a number of cumulative reasons why I take this view.

62. First, and foremost, this is the clear conclusion to be drawn from the statutory language itself, even without recourse to any aids to construction. Parliament has provided, in section 25(1), a statutory definition for the words "immigration law" in section 24(1). That statutory definition was expanded by section 40 of NABA by the addition of the words "or arrive in". These words can only refer to the offence in section 24(D1). Sections 1 and 3 of the IA 1971 do not regulate "arrival", and the definition of "entry" in section 11 means that the general corpus of immigration law does not regulate mere arrival, if it does not also amount to entry. (The distinction between "entry" and "arrival" for the purposes of immigration law has been made clear by the appellate courts on numerous occasions, for example in **R v Naillie** [1993] AC 674, at 680B-E, per Lord Slynn of Hadley.)

63. There must be a purpose to the addition of the words "or arrive in" in the definition of immigration law in section 25(2). Otherwise, the words "or arrive in" would be otiose. There is a presumption that every word in an enactment is to be given meaning. See, for example, **R v B** [2018] EWCA Crim 1439, [2019] 1 WLR 3177, at paragraph 25. This presumption applies with particular force when the extra wording has been inserted into the legislative provision by amendment. The only possible purpose and effect of the addition of the words "or arrive in" must be to make clear that, for the purpose of section 25(1), "immigration law" includes the offence at section 24(D1).

63. The amendment which expanded the definition of "immigration law" in section 25(2) was inserted at the same time, and by the same statutory provision, as the amendment which made knowingly to arrive without entry clearance a criminal offence for the first time. This cannot be coincidental. The only possible construction of the expanded section 25(2), in my view, is to read it to mean that facilitating an offence under section 24(D1) is now an offence under section 25(1).

64. The expanded definition in section 25(2) covers "a law....which controls....entitlement to... arrive in.... the United Kingdom." The Defence said that this is not apt to cover section 24(D1), because, it was submitted, section 24(D1) does not control an entitlement, but, rather, creates an offence of knowingly arriving in the United Kingdom without a valid entry clearance. It creates a criminal offence, rather than making a change to the corpus of immigration law which controls entitlements. However, the only way to make sense of the definition of "immigration law" in section 25(2) is to read "controls …. entitlement" so as to cover the imposition

of criminal liability for the act of arriving (or attempting to arrive) in the United Kingdom. Section 24(D1), for the first time, extends the scope of the IA 1971 to deal with the arrival in the United Kingdom of a person who requires entry clearance and knows that he or she does not have it. This amounts to controlling the entitlement to arrive in the UK. Previously, mere arrival was not controlled by immigration law, unless it also amounted to entry, as defined in the IA 1971, section 11. Put bluntly, a person who requires entry clearance is not entitled to arrive in the UK, if s/he knows that they do have a valid entry clearance, because to do so will amount to a criminal offence. A person is not "entitled" to do something, if it will amount to a criminal offence.

65. Another way of making the same point is this: prior to the amendments in section 40 of NABA 2022, it was not against the law for a person who required entry clearance and who knew that they did not have it to arrive (or to attempt to arrive) in the United Kingdom in circumstances which did not also amount to entry. Accordingly, their entitlement to arrive, but not enter, was not then controlled by immigration law. Now it is. Now, a person who requires entry clearance and who knows that they do not have it commits a criminal offence if they arrive (or attempt to arrive) in the United Kingdom, even if they do not enter the country. Their entitlement to arrive in the country is thereby controlled.

66. It follows that the addition of the words "or arrive in" to section 25(2) were effective to mean that facilitation of a section 24(D1) "arrival" offence comes within the scope of section 25(1), even though sections 1 and 3 of the IA 1971 do not deal with arrival in the United Kingdom. The addition of these words means that, whatever the position may have been prior to 28 June 2022, "immigration law" for the purposes of sections 25(1) and 25(2) is not limited to the law set out in sections 1 and 3 of the IA 1971. The heading of section 3 of the Act refers to "General provisions for regulation and control" but this does not mean that there may not be specific provisions for control elsewhere in the Act, for example in section 24(D1).

67. I should add that the words "arrive" or "arrival" already appeared in various places in the IA 1971, prior to the addition of section 24(D1). They appear, for example, in section 1(2), in which arrival in the United Kingdom on a local journey from the common travel area, consisting Channel Islands, Isle of Man and Republic of Ireland, is excluded from the scope of section 1, so that leave to enter is not required on arrival from those places unless specific provision is made. They also appear in section 8, which deals with the arrival of the crew of a ship or aircraft and which provides that, upon such arrival, the crew member may without leave enter the United Kingdom at the place of arrival and remain until the departure of the ship or aircraft on which he is required by his engagement to leave. However, these provisions do not control entitlement to arrive. Rather, they specify how, in particular circumstances, the control of the right to enter, after arrival, is to be exercised. These provisions do not, therefore, detract from the conclusion that the reference to the control of entitlement to arrive in section 25(1) can only be a reference to the new criminal offence in section 24(1).

68. Accordingly, in my judgment, even without recourse to canons of construction, the interpretation of the clear words of the statute make clear that facilitation of an offence under section 24(D1) is an offence under section 25. There is no ambiguity.

69. However, this conclusion is further supported, if further support is required, by the Explanatory Notes to section 40 of NABA 2022. Paragraphs 399 to 406 of the Explanatory Notes, set out at paragraph 7 above, and especially paragraph 406, make clear that it was Parliament's intention to make the facilitation of an offence under section 24(D1) an offence under section 25.

70. The significance and value of explanatory notes was explained by Lord Steyn in **R (Westminster City Council v National Asylum Support Service** [2002] UKHL 38:

> "In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible …"

71. Further, in **Flora v Wakom (Heathrow) Ltd** [2006] EWCA Civ 1103; [2007] 1 WLR 482, Brooke LJ said:

> "15. The use that courts may make of explanatory notes as an aid to construction was explained by Lord Steyn in **R v (Westminster City Council) v National Asylum Support Service** [2002] 1 WLR 2956, paras 2-6; see also **R (S) v Chief Constable of the South Yorkshire Police** [2004] 1 WLR 2196, para 4. As Lord Steyn says in the **National Asylum Support Service** case, explanatory notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone; they aim to explain the effect of the text and not to justify it.
>
> 16. The text of an Act does not have to be ambiguous before a court may be permitted to take into account explanatory notes in order to understand the contextual scene in which the Act is set: see the National Asylum Support Service case, para 5. In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of explanatory notes as an aid to construction by saying [2002] 1 WLR 2956 , para 6:
>
> "What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting

> the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in explanatory notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."
>
> 17. The value of para 354 of the explanatory notes as an aid to construction in the present appeal is that it identifies the contextual scene as containing a determination "To ensure that the real value of periodical payments is preserved over the whole period for which they are payable". That is all. If, however, it is impossible to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament, it is in my judgment equally impossible to treat the Government's expectations as reflecting the will of Parliament. We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them."

72. In the present case, therefore, the Explanatory Notes are useful to identify the mischief at which the amendments to section 24 and 25 was aimed. The Explanatory Notes make clear that they were designed to create a new criminal offence of arriving without leave and also to extend the scope of the section 25 facilitation offence, so as to cover facilitating the offence of arriving without leave, contrary to section 24(D1). The interpretation which I have given to section 25(2), as amended, is therefore, consistent with the mischief that the amendments were designed to address.

73. Mr Thomas KC cautioned against placing much, if any, reliance upon the Explanatory Notes. He submitted that, even if the intended purpose of a statutory provision is clear, it is possible that the wording of the statute has simply failed to achieve that purpose, and in such a case it is the obligation of the court to give effect to the words of the statute, rather than to apply an impermissible interpretation in order to give effect to the intention of the Government or Parliament. I accept that this is so. It was, for example, said by Brooke LJ at paragraph 17 of **Flora v Walkom**. See, also, **Thet v DPP** [2006] EWHC 2701 (Admin); [2007] 1 WLR 2022 (DC), at paragraph 25. However, this is not such a case. I have already said that, on a clear and straightforward interpretation, section 25 has been extended to cover the facilitation of a section 24(D1) offence. This means that this is not a case in which the court is ignoring or distorting the statutory language in order to bring it in line with the Government's purpose as shown by the Explanatory Notes.

74. As the meaning of section 25(2) is not ambiguous or obscure, and does not lead to absurdity, it is neither necessary nor appropriate for me to look at the Parliamentary debates for the purposes of ascertaining the meaning of section 25(2), under the rule in **Pepper v Hart** [1993] AC 593. Mr Thomas KC submitted that the rule in **Pepper v Hart** has no application to section 25, because of the presumption that a person should not be penalised except under clear law, relying on an observation by Lord Phillips of Worth Maltravers in **Thet** at paragraph 15. As I am not relying upon **Pepper v Hart**, I do not need to consider this question. However, I note that the Editors of ***Bennion, Bailey and Norbury on Statutory Interpretation***, 8th Ed, 2020, at 24-11, state that there are plenty of examples of cases in which **Pepper v Hart** has been relied upon in the criminal context, and that the presumption against doubtful

penalisation is best viewed as simply one factor (albeit a particularly weighty one) in deciding how much importance to attach to a ministerial statement in light of other interpretative criteria.

75. The Defence relied upon two authorities, decided before sections 24 and 25 were amended in 2022, in support of the proposition that "immigration law" for the purposes of section 25 is limited to the law as set out in sections 1 and 3 of the IA 1971.

76. The first authority is **R v Kapoor** [2012] EWCA Crim 435; [2012] 1 WLR 3569. The Appellant in that case boarded a flight to the United Kingdom using false documentation and then destroyed the documentation during the flight. This case was concerned with the offence of being at a leave or asylum interview without a valid immigration document, contrary to section 2 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. The issue before the court was whether this was an "immigration law" for the purposes of section 25 of the IA 1971. the Court of Appeal said that the answer was no. The Court said, at paragraph 36 of its judgment:

> "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."

77. In my judgment, **Kapoor** does not support the Defence argument. In **Kapoor**, the Court of Appeal said that "immigration law", for the purposes of the pre-amendment version of section 25, meant a law which determines whether a person is lawfully or unlawfully entering the United Kingdom, or in transit or being in the United Kingdom. That followed the wording of section 25(2) as it then was. The reason why an offence under section 2 of the 2004 Act was not "immigration law" for these purposes was because the offence was not concerned with the control of entry, transit, or presence. Rather, it was an offence that was concerned with the destruction of travel documentation. **Kapoor** was decided before the amendments to section 25 that were introduced by section 40 of NABA 2022, and there is nothing in **Kapoor** which supports the conclusion that, after the amendments, an offence of unlawful arrival contrary to section 24(D1) cannot be an immigration law which controls entitlement to arrival into the United Kingdom.

78. The second authority is **R v Dhall (Harpreet Singh)** [2013] EWCA Crim 1610. In that case, the Appellant had assisted others to obtain leave to remain by deception. He was a regulated Immigration Adviser who had assisted in the preparation and submission of fraudulent Tier 1 (General) High skilled worker visa extension applications. The indictment did not specify the immigration law which the Appellant was accused of facilitating. The Appellant appealed on the basis that the offence of obtaining leave to remain by deception, contrary to section 24A(1) of the IA 1971, to which those the Appellant had assisted had pleaded guilty, was not "immigration law" for the purposes of section 25(2). However, by the time the appeal came on for hearing, the Appellant's new counsel accepted that he had facilitated breaches of immigration law consisting of sections 1 and 3 of the IA 1971. In those

circumstances, it was not necessary for the Court of Appeal to go on to consider the meaning of "immigration law" in section 25(2), or whether a breach of section 24A(1) was such a breach of "immigration law". This was made clear at paragraph 22 of the judgment of the court:

> "22. The realistic stance adopted by Mr Seymour as regards at least some of the applicants – which accords with the best traditions of our legal professions – and our conclusions on the main argument on this appeal concerning the suggested change in stance by the Crown are determinative of this appeal. A number of other issues were raised as to the meaning of the expression "immigration law" for the purposes of section 25(2), and particularly the ambit of the corpus of laws that controls the entitlement of individuals who are not nationals to be in the UK, but it is unnecessary for us to give further consideration to them. Determining whether or not the appellant's acts facilitated the commission of breaches of other aspects of the relevant "conspectus" of immigration law (such as provisions within the Immigration and Asylum Act 1999 or the immigration rules) or, as just indicated, whether there was a breach of sections 1 and 3 of the Act or some other provision for those Indian nationals whose applications for an extension of leave to remain were refused, is an unnecessary undertaking, given the appellant's counsel accepts he had facilitated the commission of breaches of sections 1 and 3 of the Act whenever a relevant application for an extension was granted."

79. Accordingly, the Court of Appeal in **Dhall** did not have to decide on the scope of "immigration law" for the purposes of section 25(2). The Court held that "immigration law" includes sections 1 and 3 of the IA 1971, but the case is not authority for the proposition that "immigration law", for these purposes, is limited to sections 1 and 3. In any event, **Dhall** was decided before the amendments to section 25(2) in NABA 2022 and, for the reasons I have already given, in my judgment those amendments made clear that an offence under section 25 can be committed by the facilitation of an offence under section 24(D1).

80. For these reasons, I rule that arrival without leave in breach of section 24(D1) of the Immigration Act 1971 amounts to a breach of immigration law for the purposes of the facilitation offence in section 25. This means that the relevant amendments that were introduced by section 40 of NABA 2022 have achieved the objective for which they were designed, and that is set out at paragraph 406 of the Explanatory Notes to NABA 2022: there can be prosecutions under section 25(1) for facilitation of a section 24(D1) unlawful arrival offence, or for facilitation of attempted unlawful arrival.

(2) <u>Is there an additional mental element requirement, in order for there to be an offence under section 25 of facilitating unlawful arrival contrary to section 24(D1), namely that Defendant knew or had reasonable cause to believe that the migrant whose arrival was facilitated was an egregious case or was not a genuine or presumptive refugee?</u>

81. Once again, Mr Thomas KC made the principal submissions on this this issue, which Ms Naik KC adopted. The Defence submitted that conduct which should not be criminalised cannot be a breach of immigration law. He submitted that if the passenger migrant was arriving in order to claim refugee status, and was entitled to international protections (because s/he was entitled to refugee status or was claiming it in good faith as a presumptive refugee: see **R v Uxbridge Magistrates Court, ex parte Adimi** [2001] QB 667, at para 7), there was no offence contrary to section 24(D1). Mr Thomas KC submitted that it follows from this that the Crown would have to prove that at the time when the Defendant, facing a count under section 25(1), was doing the act of facilitation, he knew or had reasonable cause to believe that the passenger migrant intended to arrive in the United Kingdom without leave and in breach of international protections. If not, there could be no intention to facilitate a breach or intended breach of immigration law contrary to section 25(1).

82. Once again, this is an important point. If the Defence is right on this issue, it will place a formidable obstacle in the way of many prosecutions under section 25(1) for facilitating breaches of section 24(D1). It may well be difficult for the Prosecution to establish, to the criminal standard, that the section 25(1) Defendant was sufficiently familiar with the personal circumstances of those with whom he shared the RHIB to know or have reasonable cause to believe that the migrant intended to arrive in the United Kingdom without qualifying for international protections.

83. In my judgment, there is no such additional requirement for the section 25 offence, as contended for by the Defence.

84. The mental element for the offence of section 24(D1) unlawful arrival is set out in the section itself. It is that the person knowingly arrives in the United Kingdom without a valid entry clearance. Similarly, the mental element for the facilitation offence under section 25(1) is spelt out in the section itself. It is that, at the time when he or she does an act which facilitates the commission of a breach or attempted breach of immigration law, the person knows or has reasonable cause for believing that the act facilitates the commission of a breach or attempted breach of immigration law by another individual (s25(1)(b)) and knows or has reasonable cause to believe that the individual is not a national of the United Kingdom (s25(1)(c)). It follows that the mental element for facilitation of a section 24(D1) offence exists if the Defendant knew or had reasonable cause to believe that the passenger migrant intended to arrive in the United Kingdom without leave. The circumstances of the small boats cases mean that, in many instances, this will be an obvious inference which the jury may draw: if a migrant was intending to enter the United Kingdom with leave, then it is perhaps unlikely that they would do so by means of travel across the English Channel on a RHIB.

85. There is nothing in the statutory language that would justify the addition of either of the further mental element requirements, as argued for by the Defence.

86. The first of those additional mental elements is that the facilitator must know or reasonably believe that there is something egregious about the passenger migrant's case, above and beyond the simple fact of knowingly arriving in the United Kingdom without a valid entry clearance. The Defence did not provide a definition of what might amount to an egregious case, and the lack of any such definition is itself an

argument against the implication of this further mental element requirement. However, I take this to mean something more culpable than usual, such as seeking to re-enter the United Kingdom after having been deported. There is simply no support in the statutory provisions for such a restriction. It may well be the case that the public interest considerations that are taken into account by the CPS when deciding whether to prosecution mean that, in practice, there will be some extra element in a particular case before a decision to proceed with a prosecution under section 24(D1) is taken, but that is a matter for prosecutorial discretion. It does not affect the scope of section 24(D1). Still less does it create, by some form of implication, an additional mental element for the section 25(1) facilitation offence. The various factors which prosecutors will take into account are set out in the extract from the CPS Policy Guidance at paragraph 54 above.

87. The second additional mental element requirement for cases concerning section 25(1) facilitation of 24(D1) unlawful arrival, contended for by the Defence, is that the facilitator must also know or have reasonable cause to believe the migrant intended to arrive in the United Kingdom in breach of international protections. In his skeleton argument, Mr Thomas KC submitted that to seek a facilitation prosecution solely on the fact of a migrant's arrival without leave would be an abuse of process of the court.

88. I do not accept this submission. The fact that a migrant arrived in circumstances in which the migrant has a good claim to refugee status, or is a presumptive refugee, is a relevant consideration when the CPS is deciding whether to prosecute that migrant under section 24(D1). However, the fact remains that if the person knowingly arrives in the United Kingdom without a valid entry clearance, the offence under section 24(D1) is committed, whether or not it is prosecuted. A section 25(1) Defendant will have facilitated that offence, therefore, whether or not the passenger migrant is prosecuted for the offence under section 24(D1). The decision to proceed with a prosecution under section 25(1) would not contravene the United Kingdom's obligations under Article 31 of the Refugee Convention. As the CPS Policy Guidance says, Article 31 of the Refugee Convention confers protection on the person claiming asylum, not on any person assisting them. A section 25(1) facilitation prosecution is directed towards the person assisting a claimant for asylum, not the person claiming asylum themselves.

89. The CPS Policy Guidance makes clear that Prosecutors should take into account Article 31 when deciding whether to prosecution under section 25(1) for facilitating section 24(D1) offences, but should do so by considering whether the section 25(1) Defendant is a refugee himself, rather than by considering whether the Defendant knew or should reasonably have known that the persons whom he was assisting are refugees:

> "Article 31 does not necessarily apply to these offences in the same way as to the section 24 offence, as the Refugee Convention provides protection for refugees themselves, rather than those who assist them (whatever their motives may be).
> However, if an asylum claim has been made by someone charged with a facilitation offence, prosecutors should consider their culpability in the facilitation offence.

> In those circumstances, their actions may be closer to being "necessarily committed in the course of flight from persecution", and therefore covered by Article 31."

90. In my judgment, this is the right approach.

91. Strong support for the proposition that there is no additional mental element, beyond that which is set out in the statutory language itself, is to be found in the judgment of the Court of Appeal in **Bani**, at paragraph 104:

> "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."

92. It is true that there was no suggestion by the Defence in **Bani** that the section 25(1) offence could only be committed if the Defendant knew or had reasonable cause to believe that the passenger migrant intended to arrive in the United Kingdom in breach of international protections, but there is no suggestion in the judgment that such a limitation exists.

93. The premise that underpins this submission on behalf of the Defence is that section 24(D1) should be read in such a way as to provide that, as a matter of statutory interpretation, those who have good asylum claims, or who are presumptive refugees, do not commit an offence under section 24(D1) by arriving when knowing that they do not have valid entry clearance and so cannot be guilty of an offence under section 24(D1). As Mr Thomas KC frankly conceded during legal argument, point (2) was a rather convoluted way of advancing this submission. A kindred submission is made somewhat more directly by Ms Naik KC in point (4) (the Refugee Convention defence) and I will return to this issue when I deal with that point.

94. My ruling on point (2), therefore, is that it is not necessary, in order for there to be an offence under section 25(1) of the IA 1971 of facilitating unlawful arrival contrary to section 24(D1), that the Defendant knew or had reasonable cause to believe that the migrant whose arrival was facilitated was an egregious case (in some way) or was not a genuine or presumptive refugee. In other words, the Prosecution does not have to prove an additional mental element, over and above those set out expressly in sections 25(1)(b) and (c).

(3) The meaning of 'arrival' for the purposes of section 25 and 24(D1) of the IA 1971; the mental element requirement for a section 24(D1) offence; and the meaning of "attempting to arrive"

96. It is common ground between the parties that, for the purposes of section 24(D1), "arrival" means making landfall in the United Kingdom (whether in an approved area, or on the beach or elsewhere). Making landfall at a place which is not an approved area at Dover or another port would also amount to "entry" to the United Kingdom for the purposes of the IA 1971, as defined in section 11(1). The parties agree that a person has not "arrived", for the purposes of section 24(D1) at the point at which they are on a boat which is piloted in, or which drifts into, UK territorial waters. I agree that this is correct. It is for this reason that most offences relating to section 24(D1) are charged as attempts. Ms Naik KC, however, made two submissions about the meaning of "attempting to arrive" for these purposes which, if correct, would potentially have a major limiting effect on the scope for prosecutions for attempting to arrive in breach of section 24(D1).

97. First, Ms Naik KC submitted that being rescued and transported to land by the maritime authorities cannot be construed as "arriving" in the United Kingdom. She submitted that this means that if the migrant RHIB has been provided with sufficient fuel to enable it to enter UK territorial waters, but insufficient fuel to enable it to make landfall, and if the migrants' sole intention is to remain afloat on water with a view to being rescued, this cannot be an attempt to arrive in the United Kingdom.

98. In my judgment, this submission is misconceived. A migrant "arrives" in the UK just as much if he or she is carried the last part of the way in a boat that has rescued or intercepted the RHIB on which they were travelling as he or she does if they make the whole journey on the RHIB.

99. It is a requirement of the offence of attempting to arrive in the United Kingdom, contrary to section 24(1)D, that the Defendant intended to arrive in the UK. It is not a requirement that the migrant intended to travel the whole distance in the RHIB. This intention can be proved either on the basis that the Defendant intended to arrive there by being piloted on a RHIB or other vessel so as to reach to land, including directly to the approved area of a port, or that the Defendant intended to arrive there by travelling in a RHIB with a view to being rescued by the British authorities and thereafter taken to land. Even if the RHIB was not provided with sufficient fuel to make landfall, it is plainly open to the jury to draw the inference that the migrants intended to arrive on land in the United Kingdom, albeit by means of being rescued and conveyed there in a boat belonging to the United Kingdom authorities or another rescuer. The jury is not obliged to conclude that the migrants set off without enough fuel purely because it was their heart's desire to drift for the rest of their lives on the English Channel (or that they set off from Northern France towards England with a view to travelling to a different destination altogether).

100. In other words, even if was the sole intention of the migrants to remain afloat on water with a view to being rescued, this does not mean that they did not intend to arrive in the United Kingdom. This applies even if the migrants did not have enough fuel to

reach the United Kingdom shore. It is open to the jury to conclude that they intended to arrive in the UK by obtaining a lift from the UK maritime authorities or another rescuer.

101. I must confess to considerable relief at reaching this conclusion. Otherwise, there would be a perverse incentive for migrants to set off from France without enough fuel to make landfall in England. It is also worth observing that winds and/or currents might bring a RHIB to landfall in the United Kingdom, even if there was not enough fuel to make the crossing from France under power. Still further, it may well be the case that a migrant is unaware of the amount of fuel in the RHIB. Setting off without enough fuel is not, therefore, necessarily strong evidence that the migrants did not intend to make landfall in the RHIB (or at least if they were not intercepted or rescued first).

102. The second submission made by Ms Naik KC was that, if the "attempted arrival" began in France, the United Kingdom has no jurisdiction. Once again, this submission is misconceived. Under section 1 of the Criminal Attempts Act 1981, a person attempts to commit an offence if, with intent to commit the offence, the person does an act which is more than merely preparatory to the commission of the offence. There is no reason why the offence of attempting unlawfully to arrive in the United Kingdom should come to an end when a migrant departs from France. It is plainly possible for the attempt to continue and so still to be taking place when the migrant arrives in UK territorial waters on his or her way to the United Kingdom. It follows that there is jurisdiction in cases in which the journey was commenced from France.

103. I should add that I have not been asked to rule upon whether the offence of attempted arrival (or the substantive offences under sections 24(D1) and 25) can take place in international waters, as well as in United Kingdom territorial waters, and I express no view on this point.

104. Accordingly, I rule that:

(1) "arrival" for the purposes of sections 24(D1) means arrival on land in the United Kingdom, whether in the approved area of a port or elsewhere;

(2) A Defendant "arrives" in the United Kingdom if he or she is rescued at sea and is transported to land by the maritime authorities or other rescuers;

(3) it is not necessary to withdraw a section 24(D1) case from the jury if the RHIB from which the Defendant was taken did not have sufficient fuel to make landfall, and the Defendant's sole intention was to remain afloat with a view to being rescued: it is still plainly open to the jury to draw the inference that the Defendant was attempting to arrive in the United Kingdom, albeit by means of being rescued in territorial waters by a vessel operated by the United Kingdom maritime authorities, and then by being conveyed by that vessel to landfall in the United Kingdom;

(4) it is not the case that if the attempted arrival began in France, the United Kingdom has no jurisdiction. In such cases, it is plainly open to the jury to conclude that the attempt continued until such time as the Defendant was in United Kingdom territorial waters; and

(5) for the avoidance of doubt, I have not been asked to rule whether there is jurisdiction for the United Kingdom criminal courts to deal with attempts or substantive offences under section 24(D1) or section 25 of the IA 1971, if they took place in international waters.

(4) <u>Do sections 30(3) and 37 of NABA 2022 provide a defence to a person charged with an offence contrary to section 24(D1) of the IA 1971?</u>

105. There is a stark difference between the submissions of Ms Naik KC, for Mustapha Aldew, on the one hand, and Mr McGuinness KC, for the Prosecution, on the other, as regards how the United Kingdom's obligations under Article 31 of the Refugee Convention are met in relation to a person charged with an offence under section 24(D1).

106. Article 31 states that the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life of freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

107. The protections in Article 31 apply to presumptive refugees, that is those who claim asylum in good faith, as they do to those who are in fact refugees: **R v Uxbridge Magistrates Court, ex parte Adimi** [2001] QB 667, at 677G-678A), per Simon Brown LJ. There is a body of case-law about what is meant by "coming directly", "presenting without delay" and "good cause" (see, for example, **Adimi**, **Afsaw**, **R v Asfaw (United Nations High Commissioner for Refugees Intervening)** [2008] UKHL 31; [2008] 1 AC 1061, and **R v Mateta and others** [2013] EWCA Crim 1372; [2014] 1 WLR 1516) which I do not need to summarise or consider for the purposes of these rulings.

108. The judgment in **Adimi** exposed a serious lacuna in our domestic law, which failed to give any immunity against criminal penalties in accordance with Article 31 (see **Afsaw**, at paragraph 23, per Lord Bingham of Cornhill). The Refugee Convention has not itself been formally incorporated or given effect in domestic law (**Afsaw**, at paragraph 29, per Lord Bingham). Section 31 of the Immigration and Asylum Act 1999 was enacted to give effect to this omission. However, section 31 (set out at paragraph 47 above) provides a defence based upon Article 31 only for certain criminal offences which are specified, for England, Wales, and Northern Ireland, in section 31(3). These do not include unlawful arrival contrary to section 24(D1) of the IA 1971. Section 31(10) grants a power to the Secretary of State by order to add offences to the list in section 31(3) but no such power has been exercised in relation to the offence in section 24(D1) of the 1971 Act.

109. In **Afsaw**, Lord Bingham said that the limited number of offences which are within the scope of section 31 was "in some respects perplexing" but that there was no legitimate process of statutory interpretation by which section 31 could be interpreted as applying to offences that are not specifically mentioned in section 31(3) (**Afsaw**, paragraph 28).

110. Pausing there, the position in relation to impact of Article 31 of the Refugee Convention and those charged with an offence under section 24(D1) of the IA 1971 is that Article 31 is not part of domestic law, and the defence based on Article 31 which was incorporated into domestic law by section 31 of the Immigration and Asylum Act 1999 has no application to section 24(D1) offences. Nonetheless, it is common ground between the parties (and I agree) that those who are charged with an offence under section 24(D1) are entitled to the protection of Article 31, if it applies to them. This brings me to the disagreement between Ms Naik KC and Mr McGuinness KC. They disagree as regards the mechanism by which this protection is made available. Ms Naik KC submitted that the position has been changed by the enactment of sections 30(3) and 37 of NABA 2022. She submitted that 30(3) and 37 of NABA 2022 provide a new statutory defence for a person charged with an offence contrary to section 24(D1) of the IA 1971, if that person comes within Article 31 of the Refugee Convention. Mr McGuinness KC submitted that sections 30(3) and 37 do not create a new statutory defence. Rather, the protections afforded to refugees by Article 31 of the Refugee Convention are given effect by the "public interest" discretion exercised by prosecutors in accordance with the CPS Policy Guidance, accompanied by the "backstop" of the abuse of process jurisdiction. He said that if such a defence as Ms Naik KC contends for existed, it would place a huge burden on the prosecution, because the prosecution would have to disprove the defence to the criminal standard.

111. On behalf of his clients, Mr Thomas KC did not adopt Ms Naik KC's submissions on this point of law. He accepted that the United Kingdom's international obligations can be complied with by a combination of the exercise of prosecutorial discretion and the abuse of process jurisdiction, as described below.

112. In my judgment, Mr McGuinness KC is right: sections 30(3) and 37 of NABA do not create a new defence, based on Article 31 of the Refugee Convention, for offences under section 24(D1) of the IA 1971.

113. The reasons why I have come to this conclusion are as follows:

114. The first and principal reason is that it is simply not possible to construe sections 30(3) and 37 in such a way as to regard them as creating a new statutory defence, based on Article 31, for offences that are not expressly within the scope of section 31 of the 1999 Act. Sections 30(3) and 37 do not incorporate the terms of Article 31 into domestic law. It is not possible to read the words of the sections in such a way. Nor do they provide for a new defence along similar lines to the defence provided for certain specified offences in section 31 of the 1999 Act. The purpose and effect of sections 30(3) and 37 is much more limited. They place a statutory gloss on the meaning of certain words and phrases in Article 31 of the Refugee Convention with a

view to determining whether Article 31 applies in relation to a person who is a refugee within the meaning of Article 1(A)(2) of the Convention. That is all that they do.

115. Thus, section 37(1) identifies circumstances in which a refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened. Section 37(2) identifies circumstances in which a refugee is not to be taken to have presented themselves without delay to the authorities. Section 37(4) sets out circumstances in which a penalty is not to be taken as having been imposed as a result of a refugee's illegal entry. Courts are required to apply the meanings given to words or phrases by section 37 when determining whether Article 31 applies to a refugee.

116. If Parliament had intended to create a new statutory defence to apply to the offence under section 24(D1) of the IA 1971, the simple way to have done so would have been for the Secretary of State to exercise her power under section 31(10) of the 1999 Act to add the section 24(D1) offence to the list of offences for which there is a statutory defence based on Article 31. At the very least, if section 37 of NABA was intended to create a new statutory defence based on Article 31, it would have said so. It does not.

117. Ms Naik KC's submissions obtain no support from the Explanatory Notes to NABA 2022. Indeed, the Explanatory Notes make absolutely clear that the purpose of sections 30(3) and 37 was much less ambitious than Ms Naik KC contends. The Explanatory Notes say, at paragraph , when dealing with section 37:

> "The purpose of this section is to create an interpretation of the criteria set out in Article 31(1), in order to clarify when a refugee would and would not benefit from the immunity from penalty provided for by that Article."

118. Ms Naik KC submitted that the heading to section 37, "Article 31(1) Immunity from penalties", is significant. She submitted that it shows that the purpose and effect of section 37 was to provide a defence of immunity from penalties for refugees who are entering the UK along the same lines as the immunity which is set out Article 31 of the Refugee Convention. In my judgment, the heading does no such thing. The purpose and significance of the heading is much more limited. It is to be read as a whole, including the reference to Article 31(1). It is simply making the point that section 37 is concerned with the meaning of words and phrases in Article 31 of the Convention, and the heading summarises the subject-matter of that Article. Article 31 is the Article that is concerned with immunity from penalties. It echoes section 30(3) which refers, in parentheses, to Article 31(1) as being about "(immunity from certain penalties)". This is simply to distinguish Article 31 from the other Articles in the Convention which deal with other matters. Sections 31 to 36, and section 38, of NABA 2022 provide statutory interpretations of words and phrases in other Articles of the Convention. In each case, the heading is a short summary of the subject-matter of the Articles concerned, or of the words or phrases that are being defined. So, for example, the heading to section 31 is "Article 1(A)(2): persecution" and the heading to section 32 is "Article 1(A)(2) well-founded fear."

119. Moreover, it is not necessary, in order to ensure that the United Kingdom complies with its international obligations in the Refugee Convention, to identify a provision in NABA 2022 which creates a new statutory defence, applicable to section 24(D1), which replicates Article 31 of the Convention. This is because there is a different mechanism for giving effect to the United Kingdom's obligations. This is done by means of the guidance given to prosecutors in the CPS Policy Guidance, set out above. This states, in terms, that prosecutors must have regard to circumstances which are relevant to Article 31 when considering the public interest stage of the decision to prosecute, and should, in particular, consider the factors listed in the CPS Policy Guidance in relation to Article 31. The CPS Policy Guidance sets out, in great detail, the public interest considerations that prosecutors should take into account both in general and specifically in relation to section 24(D1) and 25 offences.

120. It is true that the CPS Policy Guidance does not say that the presence of factors which would amount to a section 31 defence, if the offence came within section 31, is an automatic bar to prosecution. Rather, the CPS Policy Guidance says that the presence of these factors will make it less likely that a prosecution is required. There are other public interest considerations which may point the other way. Nonetheless, the CPS Policy Guidance says that:

> "In relation to the section 24 illegal arrival/entry and arrival offences, it may be that those refugees, or presumptive refugees, who commit criminal offences as a necessary part of their journey to the UK are not prosecuted, provided the conditions in section 31(1) (as interpreted in **Asfaw**) are met."

121. It is clear that, in practice, prosecutors do indeed take into account considerations relating to Article 31 when considering whether it is in the public interest to prosecute. This is the reason why only a small proportion of migrant passengers on RHIBs arriving from France are prosecuted under section 24(D1).

122. However, there is a further backstop protection for Defendants, in that the court has jurisdiction to stay proceedings under 24(D1) if the judge takes the view that, in light of Article 31 of the Refugee Convention, it would be an abuse of process for the case to proceed to trial. It is clear that such a jurisdiction exists: see **Adimi** at 684C-F. It was exercised by the House of Lords in **Afsaw** itself: see Lord Bingham at paragraphs 31-34, Lord Hope of Craighead at 70-71, and Lord Carswell at 118. However, this jurisdiction may only be exercised sparingly. In **R v AGM** [2022] EWCA Crim 920, the Divisional Court (Males LJ and McGowan J) said, at paragraph 12:

> "…. If the prosecution authorities have applied their minds to the relevant questions in accordance with the applicable CPS guidance, it will not generally be an abuse of process to prosecute unless the decision to do so is clearly flawed. The Court will be reluctant to intervene in such circumstances as the decision to prosecute is for the CPS and not the court."

123. There may also be the option of seeking judicial review of a decision to prosecute: see **Adimi** at 695E, per Newman J.

124. It is clear that a mechanism consisting of prosecutorial discretion not to prosecute, coupled with the backstop of the abuse of process jurisdiction, is sufficient to comply with the United Kingdom's international obligations under Article 31 of the Refugee Convention: see **Adimi** at 682C-685F. It is relevant in this regard that the fact of prosecution is probably not, in itself, a penalty for the purpose of Article 31 (see **Adimi** at 683G-H), and so no penalty will have been imposed if a case is stayed for abuse of process. Ms Naik KC submitted that this mechanism was inconsistent with Article 7 of the ECHR and the principles of legal certainty and precision, but in my judgment this is not the case. The law, as set out in sections 24(D1) and 25, is clear. The existence of a prosecutorial discretion not to proceed on public interest grounds does not mean that the nature and scope of the offence is uncertain or imprecise.

125. This means that there is no need to strain the wording of sections 30(3) and 37 of NABA 2022 so as to render the United Kingdom compliant with its obligations under Article 31. However, even if the current approach of prosecutorial discretion plus the abuse of process jurisdiction was not compliant with the United Kingdom's obligations under Article 31, that would not be justify the court placing an interpretation on sections 30(3) and 37 which would give rise to a statutory defence, based on Article 31, for offences under section 24(D1). It is simply not possible, applying any of the available canons of construction, to construe sections 30(3) and 37 in such a way as to amount to a statutory defence.

126. In **Asfaw**, Lord Hope made clear that it is not open to the Court simply to fill in a perceived gap of in the coverage of offences in section 31 of the 1999 Act by finding some way of adding further offences of its own choosing to those that have an Article 31 defence in domestic law. He said, at paragraph 69:

> "69….The giving effect in domestic law to international obligations is primarily a matter for the legislature. It is for Parliament to determine the extent to which those obligations are to be incorporated domestically. That determination having been made, it is the duty of the courts to give effect to it. There can be no free-standing defence, nor can there be any legitimate expectation that one will be provided, where Parliament has chosen in its own words to set out the scope of the defence that is to be available. For the courts to add further offences of their own choosing to the list of those to which Parliament has said section 31 applies in England and Wales and Northern Ireland would not be to interpret the subsection but to legislate. Our constitutional arrangements do not permit this."

127. For these reasons, my ruling on point (4) is that sections 30(3) and 37 of NABA 2022 do not provide a defence to a person charged with an offence contrary to section 24(D1) of the IA 1971. In particular, sections 30(3) and 37 do not provide a defence based on Article 31 of the Refugee Convention for offences (such as the offence under section 24(D1)) which are not specifically provided with such a defence by section 31 of the Immigration and Nationality Act 1999.

128. Mr Thomas KC and Mr McGuinness KC jointly invited me to express my approval of a proposed procedure for dealing with Article 31 and other public interest arguments as to why a prosecution should not proceed. The proposed procedure is as follows:

(1) Defendants who seek to submit that it is not in the public interest to prosecute them should first make written submissions to the CPS;
(2) The CPS should consider those representations carefully, given the heavy burden placed on the CPS to exercise its prosecutorial discretion in a way that means only egregious cases are prosecuted and ensure compliance with the United Kingdom's international obligations;
(3) The court does retain a supervisory jurisdiction through the abuse of process jurisdiction. If the CPS decision is to continue with the prosecution, an application to stay the proceedings can be made. Defence representatives will have to consider carefully whether the facts of an individual case merits such an application on the ground that the CPS decision is "clearly flawed";
(4) The Crown has a duty to disclose material that may assist the Defendant make an application for a stay; and
(5) Any application for a stay will have to be considered on the particular facts of that case.

129. I should make clear that I have not been requested to rule that the CPS and Defence lawyers are bound to adopt this procedure in all small boats cases. I have no power to do so. All that I can and should do is express the view that this appears to me to a be a sensible way of proceeding, but that does not mean that there cannot be other courses of action that are equally sensible and will ensure that the United Kingdom complies with its international obligations.

(5) <u>Does section 24(D1) have any application to a person who is seeking asylum on arrival to the United Kingdom?</u>

130. It is made clear by section 24(D1)(a) that the section 24(D1) offence can only be committed by a person who requires entry clearance under the immigration rules. Ms Naik KC submitted that this means that it has no application to a refugee who seeks asylum in the United Kingdom, because s/he does not and cannot possess the necessary valid clearance to enter the United Kingdom in that capacity, and is not required to have entry clearance in order to obtain asylum.

131. In my judgment, this does not follow. A person who intends to seek asylum as a refugee is nonetheless a person who requires entry clearance under the immigration rules. Rule VN.1 of the immigration rules contains a list of persons who need entry clearance (i.e. a visa). These include, at VN.1(a), nationals of certain countries or territorial entities which are therein listed. Sudan is on the list. It is true that if a person from one of these countries claims asylum when they arrive and are granted asylum, then they will obtain leave to enter and remain, without having obtained entry clearance under the immigration rules, but the fact remains that they were, at the time they arrived, a person who required entry clearance under the immigration rules.

132. Accordingly, my ruling on point (5) is that section 24(D1) applies to a person who is seeking asylum on arrival in the United Kingdom. The fact that the person is seeking asylum may have an effect on the prosecutorial decision as to whether it is in the public interest to prosecute, but that is a different matter.

Summary of my rulings

133. For the reasons set out above, at the conclusion of this consolidated preparatory hearing, I rule as follows on the five questions of law that I have been invited to rule upon:

(1) Arrival without leave in breach of section 24(D1) of the Immigration Act 1971 amounts to a breach of immigration law for the purposes of the facilitation offence in section 25. This means that the relevant amendments that were introduced by section 40 of NABA 2022 have achieved the objective for which they were designed, and that is set out at paragraph 406 of the Explanatory Notes to NABA 2022: there can be prosecutions under section 25(1) for facilitation of a section 24(D1) unlawful arrival offence, or for facilitation of attempted unlawful arrival.

(2) It is not necessary, in order for there to be an offence under section 25(1) of the IA 1971 of facilitating unlawful arrival contrary to section 24(D1), that the Defendant knew or had reasonable cause to believe that the migrant whose arrival was facilitated was an egregious case (in some way) or was not a genuine or presumptive refugee. In other words, the Prosecution does not have to prove an additional mental element, over and above those set out expressly in sections 25(1)(b) and (c);

(3) As for "arrival" and "attempted arrival":

(a) "arrival" for the purposes of sections 24(D1) means arrival on land in the United Kingdom, whether in the approved area of a port or elsewhere;

(b) A Defendant "arrives" in the United Kingdom if he or she is rescued at sea and is transported to land by the maritime authorities or other rescuers;

(c) it is not necessary to withdraw a section 24(D1) case from the jury if the RHIB from which the Defendant was taken did not have sufficient fuel to make landfall, and the Defendant's sole intention was to remain afloat with a view to being rescued: it is still plainly open to the jury to draw the inference that the Defendant was attempting to arrive in the United Kingdom, albeit by means of being rescued in territorial waters by a vessel operated by the United Kingdom maritime authorities, and then by being conveyed by that vessel to landfall in the United Kingdom;

(d) it is not the case that if the attempted arrival began in France, the United Kingdom has no jurisdiction. In such cases, it is plainly open to the jury to conclude that the

attempt continued until such time as the Defendant was in United Kingdom territorial waters; and

(e) for the avoidance of doubt, I have not been asked to rule whether there is jurisdiction for the United Kingdom criminal courts to deal with attempts or substantive offences under section 24(D1) or section 25 of the IA 1971, if they took place in international waters;

(4) Sections 30(3) and 37 of NABA 2022 do not provide a defence to a person charged with an offence contrary to section 24(D1) of the IA 1971. In particular, sections 30(3) and 37 do not provide a defence based on Article 31 of the Refugee Convention for offences (such as the offence under section 24(D1)) which are not specifically provided with such a defence by section 31 of the Immigration and Nationality Act 1999; and

(5) Section 24(D1) applies to a person who is seeking asylum on arrival in the United Kingdom. The fact that the person is seeking asylum may have an effect on the prosecutorial decision as to whether it is in the public interest to prosecute, but that is a different matter.

Permission to appeal

134. Section 35(1) of the Criminal Procedure and Investigations Act 1996 provides that an appeal shall lie to the Court of Appeal from any ruling of a judge under section 31(2), but only with leave of the judge or the Court of Appeal.

135. At hearing held by CVP on 21 December 2022, I summarised my rulings to the parties, on the basis that they would be thereafter be supplied with full written reasons. On behalf of the first three Defendants, Mr Thomas KC applied for permission to appeal in relation to points of law (1) and (2). On behalf of the fourth Defendant, Ms Naik KC applied for permission to appeal in relation to points of law (4) and (5), whilst making clear that she wishes to advance arguments in reliance upon Article 7 of the European Convention on Human Rights. The Prosecution was neutral as regards these applications.

136. I have decided to grant leave to appeal on all of the points of law for which leave has been requested. This is not because I harbour serious doubts about the conclusions that I have come to. Rather, the purpose of this consolidated preparatory hearing procedure has been to provide parties and lawyers, and judges, with clear rulings on points of law that are likely to arise, time and again, in prosecutions under sections 24(D1) and 25 of the Immigration Act 1971. If I am wrong in my decisions on several of these points, then the result will be that many prosecutions cannot and should not proceed. It will plainly, in my judgment, be in the interests of all concerned, and in the public interest, for these issues to be heard and considered by the Court of Appeal as soon as possible. This will result in authoritative rulings which, unlike my rulings, will be binding on all Crown Courts.

137. So far as I am aware, I do not have power to order expedition of these appeals. This is a matter for the Court of Appeal, Criminal Division, whether in the form of the

Registrar or a judge of the Court. I hope it is helpful, however, if I express the view that it would be helpful if these appeals were to be expedited, not only in the interests of the individual Defendants but also because the Crown Courts, and, in particular, Canterbury Crown Court are dealing with a large number of prosecutions under sections 24(D1) and 25 and the sooner definitive answers are given to these points of law the better.