Neutral Citation Number: [2023] EWCA Crim 211

Case Nos: 202300002 B5, 202300004 B5, 202300003 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CANTERBURY
Mr Justice Cavanagh

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 March 2023

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE HOLGATE
and
MR JUSTICE BRYAN

- -

Between:

REX	**Respondent**
- and -	
(1) ASHARI MOHAMED	
(2) KHDEIR IDRIS MOHAMED	
(3) MUSTAFA MOHAMMED ALDAW	**Appellants**

- -
- -

Richard Thomas KC and Charlotte Oliver (instructed by **Graham & Co**) for the **First Appellant**
Richard Thomas KC and John Barker (instructed by **Tuckers**) for the **Second Appellant**
Sonali Naik KC and Ronnie Manek (with **Jennifer Twite, Ali Bandegani and Raza Halim acting pro bono**) (instructed by **GT Stewart**) for the **Third Appellant**
John McGuinness KC and Daniel Bunting (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 1 February 2023

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Approved Judgment

Lord Burnett of Maldon CJ:

Introduction

1. These are appeals against rulings made by Cavanagh J sitting in the Crown Court at Canterbury in prosecutions of four men (three of whom are appellants) who are alleged to have steered small boats, or rigid hull inflatable boats ("RHIBs") from France, full of irregular migrants, to or towards the United Kingdom. The preparatory hearing dealt with five points of law which commonly arise where persons who cross the English Channel in small boats, often with a view to claiming asylum, are charged with offences under sections 24(D1) or 25(1) of the Immigration Act 1971 ("the 1971 Act").

2. The judge decided each of the points in favour of the prosecution. He granted the defendants leave to appeal under section 35 of the Criminal Procedure and Investigations Act 1996 ("the 1996 Act").

The Background

3. Ashari Mohamed is due to stand trial on 30 May 2023 on one count of assisting unlawful immigration to the UK contrary to section 25(1) of the 1971 Act. It is said that on 10 July 2022 he steered a RHIB containing 37 other persons who were not UK citizens to facilitate a breach of immigration law, namely sections 1, 3 and 24(D1) of the 1971 Act, knowing or having reasonable cause to believe that his act facilitated the commission of a breach of immigration law by those persons and that they were not UK citizens.

4. Khdeir Mohamed is due to stand trial on 19 June 2023 on one count of assisting unlawful immigration to the UK contrary to section 25(1) of the 1971 Act. He is alleged to have steered a RHIB containing 35 other non-UK citizens to facilitate a breach of sections 1, 3 and 24(D1) of the 1971 Act with the requisite intention.

5. Mustafa Aldaw is charged with attempting to arrive in the UK without a valid entry clearance contrary to section 1(1) of the Criminal Attempts Act 1981 and section 24(D1) of the 1971 Act. The prosecution says that Mr Aldaw was travelling in a RHIB across the Channel with 38 other non-UK citizens. The boat was intercepted in UK territorial waters. Mr Aldaw along with the other passengers was transported by the authorities to the "approved area" in the port of Dover. The alleged offence under section 24(D1) has been charged as an attempt because Mr Aldaw did not make landfall before the RHIB was intercepted.

6. Prior to amendment by the Nationality and Borders Act 2022 ("the 2022 Act"), section 24(1)(a) of the 1971 Act provided for an offence of knowingly entering the UK without leave. The effect of section 11(1) of the 1971 Act is that a person arriving in the UK by ship or aircraft does not enter this country unless and until he disembarks, and on disembarkation he still does not enter the UK so long as he remains in an "approved area", that is an area approved for immigration control, or if he leaves that area under immigration detention or bail. Consequently, a migrant who is intercepted or rescued at sea and taken to an approved area at a port does not enter the UK. He does enter if he arrives at a port without an approved area or lands on a beach (*R v. Javaherifard* [2006] Imm. App. R 185 at [14]-[16]; *R v. Kakaei* [2021] EWCA Crim 503, [2021] 4 WLUK 491; *R v. Bani* [2021] EWCA Crim 1958, [2021] 12 WLUK 457).

7. Likewise, a person steering a RHIB across the Channel does not facilitate entry without leave by migrants into the UK, contrary to section 25(1) of the 1971 Act, if he intends to steer the RHIB to a port with an approved area or towards an area where he expects the authorities to intercept the boat and take the migrants to an approved area within a port. The prosecution would have to show that the person steering the RHIB intended to deliver the migrants to a landfall other than a port with an approved area or had reasonable cause to believe that that was a possible outcome (*Bani* at [105]).

8. Section 40 of the 2022 Act sought to address these issues in two ways. First, section 24 of the 1971 Act was amended to add a new offence of *arriving* in the UK without entry clearance (section 24(D1)). Secondly, the definition of "immigration law" in section 25(2) was amended to refer to controls on "arriving" as well as "entering" the UK. The stated intention of Government in introducing the amendment was that the offence of facilitating a breach of immigration law would apply to assisting in the arrival or attempted arrival of persons without entry clearance (see para. 406 of the Explanatory Notes to the 2022 Act).

9. The central issue in the preparatory hearing was whether those amendments to sections 24 and 25 of the 1971 Act have been effective to change the law, to permit the prosecution of migrants who are intercepted or rescued at sea and are then brought to the approved area of a port, and those who facilitate such an arrival or attempted arrival.

The issues of law in these appeals

10. The five issues of law determined by the judge were:

> (1) Whether, in a prosecution of a "facilitation" offence contrary to section 25(1) of the 1971 Act, the amendments made by the 2022 Act have meant that "the commission of a breach of immigration law" can include the offence of arrival without leave in section 24(D1) of the 1971 Act;
>
> (2) If the answer to (1) is "yes", whether it must be proved that the defendant to a section 25(1) facilitation charge or a section 24(D1) unlawful arrival charge 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. it is 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 1971 Act; the mental element requirement for a section 24(D1) offence; and the meaning of "attempting to arrive";
>
> (4) Whether sections 30(3) and 37 of the 2022 Act provide a defence to a person charged with an offence contrary to section 24(D1) of the 1971 Act.

> (5) Whether section 24(D1) has any application to a person who is seeking asylum on arrival to the UK?"

11. In relation to issue (3) the judge ruled:

> "(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 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 [1971 Act], if they took place in international waters."

12. No application for leave to appeal was made in relation to the rulings on issue (3).

13. Ashari Mohamed and Khdeir Mohamed have been granted leave to appeal in relation to the judge's rulings on issues (1) and (2).

14. In relation to issue (1) the judge ruled:

> "….. 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 [the 2022 Act] have achieved the objective for which they were designed, and that is set out at paragraph 406 of the Explanatory Notes …: 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."

15. In relation to issue (2), the judge ruled:

> "….. it is not necessary, in order for there to be an offence under section 25(1) of the [1971 Act] 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)."

16. Mustafa Aldaw has been granted leave to appeal on points (4) and (5).

17. In relation to issue (4) the judge ruled:

> "….. sections 30(3) and 37 of [the 2022 Act] do not provide a defence to a person charged with an offence contrary to section 24(D1) of the [1971 Act]. 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 Asylum Act 1999."

18. In relation to issue (5) the judge ruled as follows:

> "….. 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."

19. The points of law raise issues of statutory interpretation. Several of the issues arise irrespective of whether a migrant intends to claim asylum.

20. However, issue (5) directly raises the question whether section 24(D1) can apply to a person who seeks asylum on arrival in the UK. The judge was referred to the CPS Policy Guidance on public interest considerations in deciding whether to prosecute under sections 24 and 25 of the 1971 Act. That Guidance considers the refugee status of an offender and the factors relating to Article 31 of the Refugee Convention (the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol). The judge considered matters relating to prosecutorial discretion and the Guidance to be irrelevant to the construction of the legislation. We agree.

21. In ground 3 of her perfected grounds of appeal Ms Sonali Naik KC on behalf of Mr Aldaw sought to argue that if, as a matter of construction, there is no defence to section 24(D1) of the 1971 Act where the conditions of Article 31 of the Refugee Convention are satisfied, the legislation is incompatible with articles 8 and 14 of the ECHR. The Crown Court has no jurisdiction to make a declaration of incompatibility under section

4 of the Human Rights Act 1998. The judge declined to express a view on the submissions made on those matters and he did not grant leave to appeal on that subject. Under section 35(1) of the 1996 Act an appeal only lies to this court against a ruling made by the judge in the preparatory hearing. Accordingly, as Mr. John McGuinness KC submitted for the prosecution, this court has no jurisdiction to entertain ground 3. In a note dated 25 January 2023 Ms Naik accepted this point but reserved the issue for another day should it properly arise.

22. We will consider the four issues of law which are before the court in the following order: (5), (4), (1) and then (2).

The factual basis for the preparatory rulings

23. The parties agreed that the preparatory hearing should proceed on the basis of seven assumed facts and one allegation by the prosecution:

> "(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 (sic) 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."

Statutory framework

24. The statutory provisions which touch on the issue with which this appeal is concerned are many and complex. They begin with Section 1 of the 1971 Act:

> "**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 entry into, stay in and departure from the United Kingdom as is imposed by this Act; …..
>
> (3) …..
>
> (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."

25. Section 2 defines those persons who have a right of abode, mainly British citizens.

26. Section 1(1) and (2) establishes the fundamental distinction between persons who have a right of abode and are not subject to immigration control, and those who do not have that right and are subject to immigration control. Persons in the latter category may only live, work and settle in the UK "by permission" and subject to such regulation and control of their entry into and stay in the UK as is imposed by the 1971 Act. Section 1(4) authorises the making of rules by the Secretary of State on the practice to be followed for regulating the entry into and stay in the UK of persons without the right of abode, which shall include making provision for "admitting" persons, subject to restrictions or conditions for certain purposes such as employment or study.

27. Section 3 provides:

> "**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 …."

28. Section 3(1) lays down a fundamental principle of "regulation and control", that a non-British citizen is not entitled to enter the UK without "leave to enter", save where the 1971 Act otherwise provides. So, for example, a member of a crew of an aircraft or ship arriving in the UK may enter the UK without leave under the terms of section 8(1). Diplomats are generally exempt from immigration control (section 8(3)). However, the 1971 Act does not contain any exemption from the prohibition in section 3(1) on a non-British citizen entering the UK without leave to enter for a person who intends to claim asylum on arrival in this country. The appellants' counsel did not suggest otherwise.

29. Section 3A of the 1971 Act, inserted by section 2 of the Immigration and Asylum Act 1999, came into force on 14 February 2000. It enables the Secretary of State to make an order with further provision for the grant of leave to enter. An order may provide for leave to be given or refused before a person "arrives" in the UK (section 3A(2)). An order may provide that an "entry visa" or "other form of entry clearance" is to have effect as "leave to enter" the UK (section 3A(3)). Section 33(1) of the 1971 Act defines "entry clearance" as "a visa, entry certificate, or other document which, in accordance with the immigration rules, is to be taken as evidence or the requisite evidence of a person's eligibility, though not a British citizen, for entry into the United Kingdom …."

30. The Immigration (Leave to Enter and Remain) Order 2000 (SI 2000 No. 1161) implements those provisions in section 3A. The object of this regime is to enable immigration control to be exercised outside the UK before a person arrives in this country or at a port of entry. Entry clearance enables the holder not simply to arrive in the UK but also to enter the country.

31. A person who requires leave to enter and does not have such leave (or entry clearance) is liable to be removed from the UK under section 10(1) of the Immigration and Asylum Act 1999 ("the 1999 Act").

32. Section 11(1) defines "entry" for the purposes of the 1971 Act:

> "(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 2022 or on immigration bail within the meaning of Schedule 10 of the Immigration Act 2016."

33. Section 40(1) of the 2022 Act inserted additional provisions into section 24 of the 1971 Act, in particular:

> "(B1) A person who —
>
> (a) requires leave to enter the United Kingdom under this Act, and
>
> (b) knowingly enters the United Kingdom without such leave,
>
> commits an offence.
>
> …..
>
> (D1) A person who —
>
> (a) requires entry clearance under the immigration rules, and
>
> (b) 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—
>
> (i) for an offence under subsection (A1), to imprisonment for a term not exceeding five years or a fine (or both);
>
> (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)."

34. Section 25 of the 1971 Act (as amended by the 2022 Act) reads:

> "(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—
>
> (a) enter or arrive in the State or the United Kingdom,
>
> (b) transit across the State or the United Kingdom, or
>
> (c) be in the State or the United Kingdom."

Section 25(2A) defines a "national of the UK" to mean primarily a British citizen or a person who is a British citizen by virtue of Part 4 of the British Nationality Act 1981 and who has a right of abode in the UK. This is similar to the exemption from immigration control in section 1(1) of the 1971 Act. By section 25(4), section 25(1) applies to things done whether inside or outside the UK.

35. Section 25(6) provides that a person convicted under section 25 on indictment is liable to imprisonment for life or to a fine, or both, and on summary conviction, to imprisonment for up to 6 months or a fine not exceeding the statutory maximum, or both.

36. Section 25A of the 1971 Act was introduced by the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). As amended, it provides:

> "(1) A person commits an offence if—
>
> (a) he knowingly … facilitates the arrival or attempted arrival in, or the entry or attempted entry into, the United Kingdom of an individual, and
>
> (b) he knows or has reasonable cause to believe that the individual is an asylum-seeker.
>
> (2) In this section "asylum-seeker" means a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under—
>
> (a) the Refugee Convention (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999 (c. 33) (interpretation)), or

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

As originally enacted this offence was only concerned with facilitating the "*arrival*" of an asylum-seeker. In 2008 section 25A(1) was amended to add "entry" into the UK. The requirement in the 1971 Act that the offence be committed "for gain" was removed by section 41(3) of the 2022 Act.

The Refugee Convention

37. Under article 1(A)(2) of the 1951 Refugee Convention, as amended by the 1967 Protocol, a "refugee" includes any person who "owing to a 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."

38. 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."

39. The Refugee Convention has not been incorporated into domestic law, but section 31 of the 1999 Act creates defences to specified offences based on article 31(1) of the Convention. Section 31 provides:

> "(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 Forgery 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)."

40. By section 167(1) a "claim for asylum" means a claim that it would be contrary to the UK's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the UK. By section 31(6) "refugee" has the same meaning as under the Refugee Convention. By section 31(10) the Secretary of State may by order amend section 31(3) to add offences to those listed. Section 31 of the 1999 Act has not been extended to apply to offences contrary to sections 24, 25 or 25A of the 1971 Act.

41. Sections 30 to 38 of the 2022 Act concern "Interpretation of the Refugee Convention".

42. Section 30(1) of the 2022 Act provides that sections 31 to 35 "apply for the purposes of the determination by any person, court or tribunal whether a person (referred to in those sections as an "asylum seeker") is a refugee within the meaning of Article 1A(2) of the Refugee Convention". Sections 31 to 35 contain provisions for the interpretation of respectively "persecution", "well-founded fear", "reasons for persecution", "protection from persecution" and "internal relocation" in a part of a person's country of nationality or former habitual residence.

43. Section 36 of the 2022 Act contains interpretation provisions for the purposes of Article 1(F) of the Refugee Convention, which disapplies the protection afforded to refugees where there are serious reasons to consider that a person has committed certain crimes (see section 30(2)).

44. By section 30(3), section 37 of the 2022 Act "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."

45. Section 37 provides:

> "(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;

(b) in the case of a person who became a refugee while they were in the United Kingdom—

(i) if their presence in the United Kingdom was lawful at that time, they made a claim for asylum before the time when their presence in the United Kingdom became unlawful;

(ii) if their presence in the United Kingdom was unlawful at that time, they made a claim for asylum as soon as reasonably practicable after they became aware of their need for protection under the Refugee Convention.

(3) For the purposes of subsection (2)(b), a person's presence in the United Kingdom is unlawful if they require leave to enter or remain and do not have it.

(4) A penalty is not to be taken as having been imposed on account of a refugee's illegal entry or presence in the United Kingdom where the penalty relates to anything done by the refugee in the course of an attempt to leave the United Kingdom.

(5) In section 31 of the Immigration and Asylum Act 1999 (defences based on Art.31(1) of the Refugee Convention)—

(a) in subsection (2), for "have expected to be given" substitute "be expected to have sought";

(b) after subsection (4) insert—

"(4A) But this section does not apply to an offence committed by a refugee in the course of an attempt to leave the United Kingdom."

(6) In this section—

"claim for asylum" means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom;

"country" includes any territory;

"refugee" has the same meaning as in the Refugee Convention."

Issue (5): Does section 24(D1) apply to a person seeking asylum in the UK?

46. Ms Naik submitted that an offence under section 24(D1) of the 1971 Act can only be committed by a person who requires entry clearance under the Immigration Rules (HC 395) and knowingly arrives in the UK without that clearance. Mr Aldaw was not someone who required entry clearance because no such clearance is available to a refugee or asylum-seeker for the purposes of claiming asylum. Indeed, it is not possible to make a claim for asylum to the UK authorities outside the UK (section 14 of the 2022 Act), whereas an application for entry clearance must be made outside the UK (Rule 28 of HC 395).

47. Ms Naik relied upon paragraph VN 1.1 in Appendix Visitor: Visa National List in the Immigration Rules. Mr Aldaw is a citizen of Sudan and therefore a "visa national" on that list. That paragraph suggests that such a person requires entry clearance to travel to the UK as a visitor or for any other purpose for less than 6 months. Mr Aldaw was not seeking entry to the UK as a visitor or for any purpose lasting less than 6 months. He was seeking to arrive in and then enter the UK as a refugee. Accordingly, she submitted that Mr Aldaw did not require entry clearance. Therefore, section 24(D1) could not apply to him as an asylum seeker.

48. Ms Naik also referred to section 2 of the Asylum and Immigration Appeals Act 1993, which provides that nothing in the Immigration Rules "shall lay down any practice which would be contrary to the [Refugee] Convention". We understood her submission to be that if the Rules require an asylum-seeker to obtain entry clearance, that would be inconsistent with Article 31(1) of the Refugee Convention. She also suggested that the absence of anything in the Rules giving effect to that provision, when read in conjunction with section 24(D1), offended section 2 of that Act.

Discussion

49. The argument advanced by Ms Naik assumes that a person who intends to claim asylum in the UK does not otherwise require entry clearance and, more particularly, that paragraph VN.1 is exhaustive of the circumstances in which a "visa national", such as a citizen of Sudan, is required to obtain entry clearance. But it is necessary to consider the relevant parts of the statutory scheme as a whole.

50. The general principle is that a person without a right of abode requires permission to live in the UK *and* is subject to the regulation and control of entry into the UK imposed by the 1971 Act (section 1(2)). Mr Aldaw did not have a right of abode in the UK. As a non-British citizen, he was also subject to the general prohibition on entry into the UK without the grant of leave in accordance with section 3(1) of the 1971 Act. The legislation does not provide an exemption from those controls because a person intends to claim asylum on arrival.

51. Section 3A of the 1971 Act enables the Immigration Rules to impose requirements for entry clearance to be obtained before arrival in the UK. Such entry clearance has the effect of a grant of leave to enter. This scheme for requiring entry clearance to be obtained before arrival in the UK is to be read together with sections 1(2) and 3(1) of the 1971 Act. Asylum-seekers are not excluded from the scope of the powers to require entry clearance to be obtained before arrival.

52. The definition of "asylum-seeker" in immigration legislation is consistent with this analysis, namely a person who intends to claim that to remove him from, or require him to leave, the UK would be contrary to this country's obligations under the Refugee Convention (see e.g. section 25A(2) of the 1971 Act, section 167(1) of the 1999 Act, section 37(6) of the 2022 Act and HC 395 rule 327). A person who does not have any necessary leave to enter, or for that matter entry clearance, is liable to be removed from the UK under section 10(1) of the 1999 Act. The definition of asylum-seeker recognises that that person might otherwise be removed from or required to leave the UK. Although there is no requirement for entry clearance to be obtained by an asylum seeker *in that capacity*, the statutory scheme does not suggest that a person who intends to claim asylum is exempt from requirements to obtain leave to enter, or entry clearance, which otherwise apply. Similarly, where the defence in section 31 of the 1999 Act is available, a refugee must show that he had "good cause for his illegal entry or presence".

53. The parties provided to the court the core Immigration Rules dealing with entry clearance in their current form (rules 24 to 30C and interpretation provisions in rule 6.2). It was not suggested that these rules differ materially from the version in force at the time of the alleged offences for the purposes of the issues in these appeals. It does not appear to us that there is any material difference.

54. Rule 6.2 of HC 395 defines "visa nationals" and "non-visa nationals":_

> ""**Visa Nationals"** means persons specified in Appendix Visitor: Visa National list as needing an entry clearance (a visa), in advance of travel to the UK for any purpose and **"Non-visa nationals"** are persons who are not specified in that Appendix and are required to obtain entry clearance in advance of travel for any purpose other than as a visitor for less than 6 months."

A "visitor" is a person who is granted permission *inter alia* under Appendix V: Visitor after 9am on 1 December 2020.

55. Rule 24 of HC 395 provides:

> "The following persons are required to obtain entry clearance in advance of travel to the UK:
>
> (i) a visa national;
>
> (ii) a non-visa national (not a British or Irish national) who is seeking entry for any purpose other than as a visitor seeking entry for 6 months or less, or
>
> (iii) a British national without the right of abode who is seeking entry for a purpose for which prior entry clearance is required under these Rules.
>
> Any other person who wishes to ascertain in advance whether they are eligible for admission to the United Kingdom may apply for the issue of an entry clearance."

56. Under rule 24A a person who requires entry clearance must on *arrival* in the UK produce to the Immigration Officer their passport and either entry clearance endorsed therein or an "eVisa". A person who requires entry clearance and fails to satisfy Rule 24A "must not be granted leave to enter on *arrival*" (Rule 24B). Entry clearance which satisfies article 3 of SI 2000 No. 1161 has effect as leave to enter.

57. An application for entry clearance will be considered in accordance with the provisions in HC 395 governing the grant or refusal of leave to enter (rule 26).

58. The clear combined effect of rule 24 read with rule 6.2 is that visa nationals, such as a citizen of Sudan, require entry clearance before arrival in the UK for any purpose. That is so irrespective of whether they have an intention to claim asylum on arrival. That is hardly surprising. Ultimately it may be decided that a migrant does not fall within the definition of a refugee for one or more reasons and their claim for asylum rejected quite properly. For example, it may be decided that a claimant could reasonably have been expected to have sought protection under the Refugee Convention in another country in which he stopped before arriving in the UK. Alternatively, the claim for asylum may not be based upon a genuine ground falling within the Convention or may be fabricated.

59. Appendix V to HC 395 expressly deals with persons who want to visit the UK for a temporary period, normally up to 6 months. A visa national (a person from a country in the Visa National list) must obtain entry clearance "as a visitor" before arrival in the UK (see also para. V1.1). A non-visa national may normally seek entry as a visitor on arrival in the UK. Accordingly, Appendix V has no bearing on the situation where persons wish to travel to the UK to enter for the purposes of permanent residence, whether a visa national or a non-visa national. A visa national is required to obtain entry clearance before travelling to the UK for *any* purpose. A non-visa national requires entry clearance where he seeks entry to the UK for "any purpose other than as a visitor seeking entry for 6 months or less" (rules 6.2 and 24). The court has not been shown any provision creating an exception to these requirements because the person concerned intends to claim asylum on arrival. Paragraph VN1.1 of the Appendix Visitor: Visa National List does not alter or affect any part of the above analysis.

60. Accordingly, we conclude that section 24(D1) applies to a person who requires entry clearance under the Immigration Rules and who knowingly arrives in the UK without such clearance, even if he or she intends to claim asylum on arrival. That is also the position in relation to an attempt to commit such an offence.

61. The provisions of HC 395 to which we have referred do not offend section 2 of the 1993 Act. They simply lay down a general requirement to obtain entry clearance before arriving in the UK, or leave to enter upon arrival here, but not in the capacity of seeking asylum. Those provisions do not themselves create "penalties" for "illegal entry or presence" (see article 31(1) of the Refugee Convention). Those penalties are to be found in primary legislation, sections 24(D1) and (F1) of the 1971 Act, to which section 2 of the 1993 Act does not apply.

62. For these reasons we reject the submissions on behalf of the appellant Mr Aldaw and uphold the judge's ruling on this issue.

Issue (4): Do sections 30(3) and 37 of the 2022 Act provide a defence to a charge contrary to section 24(D1) of the 2022 Act?

63. Ms. Naik submitted that on a true construction of sections 30 and 37 of the 2022 Act Mr Aldaw is entitled to rely upon section 37 as a defence. Section 24(D1) inserted by section 40 of the same Act must be read compatibility with sections 30 and 37. Accordingly, there was no need for section 31 of the 1999 Act to be amended to refer to section 24(D1) (or section 25). She submitted that section 37 provides a defence to any criminal offence in circumstances where article 31(1) is applicable.

Discussion

64. The judge rejected the appellant's submissions on this issue as being contrary to the clear language of the statute. Ms Naik did not press this ground of appeal but did not abandon it. We agree with the judge's ruling on point (4) and express our reasons shortly.

65. Section 31 of 1999 Act provides a defence to the offences listed in sub-section (3). Although Parliament took the opportunity in section 37(5) of the 2022 Act to amend section 31, none of the provisions in sections 30 to 37 of the 2022 Act are expressed as a defence to a criminal charge. Instead, as the heading of those provisions suggests, and as is clear from their content, they are concerned only with the interpretation of article 1(A)(1), article 1(F), article 31(1) and article 33(2) of the Refugee Convention in the circumstances stated.

66. It should also be noted that section 37 of the 2022 Act does not address all of article 31(1). It interprets certain parts of that provision concerned with whether a person has come directly from a territory or presented themselves without delay to the authorities and circumstances in which a penalty is treated as not having been imposed on a refugee on account of their illegal entry into or presence in the UK. Section 37 lacks a key provision of article 31(1), namely the prohibition on penalising a refugee on account of his illegal entry or presence in the UK. It also lacks the requirement that the refugee "show good cause for their illegal entry or presence."

67. There is no rule or principle of construction which could enable the court to construe sections 30 to 37 as creating a defence to a criminal charge.

68. We therefore reject the ground of appeal on issue (4) and uphold the judge's ruling.

Issue (1): Does "the commission of a breach of immigration law" include the offence of arrival without leave contrary to section 24(D1) of the 1971 Act?

69. Mr Richard Thomas KC submitted on behalf of Ashari Mohamed and Khdeir Mohamed that a person does not commit an offence under section 25(1) of the 1971 Act unless he facilitates a breach of "immigration law" as defined in section 25(2). He argued that the amendment by the 2022 Act of section 25(2) to refer additionally to arrival in the UK has not achieved the apparent intention of the draftsman that facilitating the commission of an offence under section 24(D1) is an offence contrary to section 25(1). He submitted that the key word in the definition of "immigration law" in section 25(2) is "entitlement" (see [34] above). "Immigration law" refers to a law which *inter alia* controls the entitlement of persons who are not UK nationals to enter or arrive in the

UK. Sections 1(2) and 3(1) of the 1971 Act are provisions which control the entitlement of such persons to enter the UK. But they have not been amended to control *arrival* in the UK. Thus, the creation of the criminal offence in section 24(D1) does not form part of "immigration law" for the purposes of section 25(2) because a criminal offence does not control entitlement. A criminal sanction is no different in this respect from a legal provision which regulates the procedure by which issues of entitlement are decided.

Discussion

70. The appellants' argument proceeds on the basis that sections 1 and 3 of the 1971 Act constitute "the immigration law" to which section 25(2) refers. We understood Mr Thomas to accept during his oral submissions that there is no authority to support that proposition. He drew two authorities to our attention as being relevant to this issue: *R v. Kapoor* [2012] EWCA Crim 435, [2012] 1 WLR 3569 and *R v. Dhall* [2013] EWCA Crim 1610, [2013] 9 WLUK 597. Each of these cases was concerned with section 25(2) before its amendment by the 2022 Act.

71. In *Kapoor* the conduct said to have been facilitated by the defendants was disposal by asylum seeking migrants of fake Indian passports with which they had been provided for travel to the UK whilst they were in transit. It was alleged that under section 25(1) of the 1971 Act the defendants had facilitated a breach of immigration law, namely section 2 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 which, in effect, made it an offence for persons to present themselves at a leave to enter or asylum interview after having divested themselves of a passport in their possession during the journey to the UK (see [10], [22] and [32]).

72. This Court held in [36]:

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

Applying that test, the Court decided that section 2 did not qualify as an "immigration law". The offence in section 2 was not concerned with determining whether the migrants had lawfully or unlawfully entered the UK (see also *Kakaei* at [48]).

73. Accordingly, *Kapoor* does not support the proposition that "immigration law" in section 25(2) of the 1971 Act must fall within the ambit of sections 1(2) or 3(1) of that Act.

74. In *Dhall* the Court did not make any decision about the scope of "immigration law" in section 25(2) because the appellant conceded that he had facilitated a breach of sections 1 and 3 of the 1971 Act. That is also common ground in the present appeals. But *Dhall* is not authority for the proposition that "immigration law" in section 25(2) is confined to sections 1 and 3.

75. The appellants' assertion that only immigration law falling within sections 1 and 3 of the 1971 Act qualifies for the purposes of section 25(2) is unfounded. Nothing in the sections themselves support that proposition and they need, in any event, to be read with other provisions such as section 3A. Since 2000 section 3A (together with the definition of "entry clearance" in section 33(1)) has enabled Immigration Rules to be made requiring entry clearance to be obtained before a person arrives in the UK. To adapt the language of *Kapoor* at [36], the regime created by section 3A of the 1971 Act falls within section 25(2) because it determines whether a person lawfully or unlawfully arrives in and then enters the UK.

76. Consistent with this analysis, Parliament framed the new offence in section 24(D1) as being committed where a person who requires entry clearance under the Immigration Rules (i.e., before arriving in the UK) arrives in this country without a valid entry clearance.

77. It also follows that the only amendment which needed to be made to section 25(2), so that the facilitation offence in section 25(1) could apply to a breach of the regime created by section 3A and the new offence in section 24(D1), was the insertion of the words "or arrive in" in sub-paragraph (a).

78. Section 24 (D1) of the 1971 Act operates in conjunction with section 3A (and indeed section 3) just as section 24(B1) operates in conjunction with sections 1(2) and 3. However, even taking section 24(D1) in isolation, we do not accept Mr Thomas's submission that a criminal offence of that nature does not control "entitlement" to arrive in the UK. A person is not entitled to do something which is illegal by virtue of being a criminal offence. The imposition of criminal liability for the act of arriving (or attempting to arrive) in the UK without the necessary entry clearance controls entitlement to arrive in this country and, without more, is part of "immigration law".

79. For these reasons, which differ in part from those given by the judge, we reject the ground of appeal in relation to issue (1) and uphold the judge's ruling.

Issue (2): Must the facilitator be aware or have reasonable cause to believe that the conduct of the passenger was criminal?

80. Mr Thomas submitted below that it is necessary for the prosecution to prove that "the 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" to prove an offence under section 25(2) of the 1971 Act of facilitating the commissioning of an offence under section 24(D1).

Discussion

81. The answer to that contention is that Parliament has set out in section 25(1)(b) and (c) of the 1971 Act the requirements for *mens rea* which the prosecution must prove. There is nothing in the language of the legislation to import into section 25(1) the additional mental elements for which the appellants have contended.

82. Mr. Thomas's submission was based upon an argument that not all conduct by a migrant falling within the scope of section 24(D1) is "criminalised". By that he meant that, applying Crown Prosecution Service Guidance on the public interest test which is

applied before launching a prosecution, not all such conduct is prosecuted. It is true that not all cases of this nature where the evidence supports a conviction will be prosecuted. The CPS might often consider prosecution not to be in the public interest. But that does not bear upon the statutory construction of section 25.

83. The conduct facilitated need not be criminal at all. It need only be a breach of immigration law. For example, the conduct said to have been facilitated in the indictment against Ashari Mohamed and Khdeir Mohamed could have been expressed as breaches of the Immigration Rules under the regime established pursuant to section 3A of the 1971 Act. The appellants' argument is untenable.

84. For these reasons we reject the grounds of appeal in relation to issue (2) and uphold the judge's ruling.

Conclusion

85. In the result, none of the grounds of appeal has any merit. We dismiss the appeals and uphold the judge's rulings.