The Prosecution of Asylum Seekers

SMALL BOATS CASES & INSIGHTS FROM KAKAEI

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Speakers

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RED LION CHAMBERS

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Historic Context

- Summer 2018 - small boat crossings of the Channel begin to become more frequent
- December 2018 - Home Secretary declared a "major incident"
- January 2019 - Home Secretary and French counterpart agree Joint Action Plan
- Spring 2019 – Routine prosecution of pilots of small boats for facilitating breaches of immigration law begin, attracting sentences of 2-5 years'.

Independent Chief Inspector of Borders and Immigration December 2019 Report on Irregular Arrivals

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Immigration Act 1971
25 Assisting unlawful immigration to member State
(1) A person commits an offence if he—
(a) does an act which facilitates the commission of a breach or attempted breach of immigration law by an individual who is not a citizen of the European Union,
(b) knows or has reasonable cause for believing that the act facilitates the commission of a breach or attempted breach of immigration law by the individual, and
(c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union.
…
(4) Subsection (1) applies to things done whether inside or outside the United Kingdom

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No Defence that the Faciliatory is Themselves a Refugee

Article 31 of 1951 Refugee Convention so called "Non-Penalisation Clause"

Partially enacted into UK Law by section 31 of the Immigration and Asylum Act 1999

Does **not** apply to section 24, 25 or 25A of Immigration Act 1971

No Defence that Migrant Assisted is a Refugee

Sternaj v DPP [2011] EWHC 1094 (Admin)

R v Bina [2014] EWCA Crim 1444

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"Section 11 Defence" – No Intention to Breach an Immigration Law

Section 25 (2) In subsection (1) "immigration law" means a law which has effect in a member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to—
(a) enter the State,
(b) transit across the State, or
(c) be in the State.

Section 11 (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.

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R v Kapoor [2012] EWCA Crim 435

There is no breach of an immigration law where an asylum seeker:

(i) disembarks at a port with a designated immigration area;

(ii) claims asylum before seeking to leave the designated area claims asylum; and,

(iii) is therefore granted temporary leave to enter the UK for his asylum claim to be processed.

R v Kakaei [2021] EWCA Crim 503

[70] CoA sceptical that small boats could sail into the approved area of a port.

[71] CoA acknowledged whether intention to be rescued at sea would amount to a defence matter for trial court.

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Rescues at Sea

Policy as of 2019 was small boats intercepted in Channel would be escorted to, or disembarked and taken to, the Kent Intake Unit ("KIU") within the Port of Dover.

Required by international maritime law.

Therefore, small boats intercepted would be delivered to an approved immigration area within a port.

Reality as of 2019, small boats would regularly call British authorities asking to be resceued while at sea and British Coastal Patrol crews were complaining that migrants regarding them as a "taxi service" (Chief Inspector Report [8.102]).

Therefore, if migrants' intention was to be rescued at sea and claim asylum on delivery to Port of Dover then there is no breach of an immigration law facilitated BUT if primary intention was to sail to anywhere else on the British coast, disembark and claim asylum at some point thereafter then guilty of a breach of immigration law even if intending to claim asylum immediately.

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Proving Intention to be Rescued at Sea

- Small boats easily detected & make no efforts to avoid interdiction.
- Set off at such a time as to ensure they reach British territorial waters in daylight.
- No reason for asylum seekers to risk their lives to trade living illegally in France for living illegally in the UK; but migrants who claim asylum will be able to reside in the UK with a degree of legal status/security and have good chances of being granted asylum or otherwise being able to remain in the UK.
- If seeking to claim asylum safest, most efficient and effective way is to be rescued at sea.
- If said this was their intention in interview, they likely would not have appreciated the legal significance at the time.
- Expert evidence from Migrant NGO Caseworkers (*R v Hodges* [2003] EWCA Crim 290, [2003] 2 Cr. App. R. 15 and *R v Ibrahima* [2005] EWC Crim 1436) that migrants are routinely instructed by smugglers to sail towards lights of Dover, on how to identify when they cross maritime border & once within British waters to call the British authorities to be rescued if not already interdicted.

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Next Steps

1. Pending Prosecutions

CPS discontinued 12 prosecutions on Friday 18 June 2021.

May start prosecuting for section 25A offence of assisting an asylum seeker to arrive in the UK for gain.

Query "for gain" in 1971 Act.

2. Appeals against Convictions Following Pleas Where Section 11 Defence Not Previously Appreciated

R v Boal [1992] Q.B. 591 appeal may succeed where appellant pleaded guilty because not advised of potential defence and that "*defence would quite probably have succeeded and … therefore that a clear injustice has been done*."

N.B. no requirement to establish fault on behalf of original counsel, so original defence team can advise on, and lodge, appeal out of time.