# Sentencing Council Consultation Response, Section 24 and 25: 'small boat' arrivals

Authors and signatories

This consultation response has been compiled by practitioners and lawyers working with those who have been charged and convicted of the relevant immigration offences. In particular, it focuses on those who are charged after arriving in the UK on 'small boats'.

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- **Tara Wolfe**, Barrister, Bail for Immigration Detainees
- **Captain Support UK** - Captain Support UK is a grassroots organisation which supports individuals criminalised for how they arrive in the UK. To date, the organisation has supported over 300 people charged with Section 24 or 25 off 'small boats'
- **Humans for Rights Network -** Humans for Rights Network is a need led Human Rights organisation, established to facilitate safety and dignity for people forced to migrate, to advocate for a rights-based approach to the movement of people throughout Northern Europe, and to represent humans whose rights are violated.

## Knowingly enters the United Kingdom without leave/ Knowingly arrives in the United Kingdom without valid entry clearance: Section 24 of the Immigration Act 1971

1. Research by the University of Oxford, Humans for Rights Network, Captain Support UK, and Refugee Legal Support, has shown that although Section 24 'illegal arrival' (as amended by the Nationality and Border Act 2022 (NABA)) could be applied against anyone arriving irregularly (asylum claim or not), in practice, two groups are commonly charged (although considerable discretion is left to the CPS):
    a. The first are those identified as steering the dinghy. These people are charged with Section 24 Immigration Act 1971 as amended by the NABA, and less frequently also Section 25.
    **b.** The second are those with a 'previous immigration history in the UK'. This latter group includes people who have been previously deported, simply having previously applied for a visa, or having left of their own accord in order to visit sick or dying family members abroad given the length of time they can be kept in limbo in the UK unable to travel while their asylum claims are being assessed.

2. **The vast majority of these individuals we work with, who have been charged and convicted, make asylum claims upon their arrival in the UK.** As the Equal Treatment Bench Book states, 'People seeking asylum and refugees are among the most vulnerable groups within our society, often with complex health and social care needs. The great majority of people seeking asylum have fled countries ravaged by war and human rights abuses. They have often been separated from their family. Many have undergone a perilous

journey to reach the UK.' It also notes that 'As a result of these factors, people seeking asylum and refugees have higher rates of mental health difficulties than are usually found within the general population. Depression and anxiety are common.' Research has found that the use of Section 24/25 against people seeking asylum is causing significant emotional and physical harm to those imprisoned for 'illegal arrival', where this was the only way they could enter the country to seek asylum.

3. **It is the position of the contributors that it is a breach of the UK's international obligations under the Refugee Convention, specifically Article 31, to prosecute refugees and presumptive refugees for their arrival in the UK to make a claim for international protection.** For the purposes of this consultation, our observations intended to ensure that to the largest extent possible any breach of the rights accorded to refugees and presumptive refugees under the Refugee Convention are minimised and that their particular circumstances are properly reflected in the Sentencing Guidelines.

4. **The right to seek asylum should be strongly considered in sentencing exercises where someone has made, or intends to make, an asylum claim.** Article 14 of the 1948 Universal Declaration of Human Rights states that everyone has the right to seek and enjoy in other countries asylum from persecution. This right was implemented in international law by the 1951 Refugee Convention. Article 31 of the Refugee Convention reads that '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 … enter or are present in the territory without authorization'.

5. **It is important to note that there are no 'safe and legal routes' to enter the UK in order to seek asylum.** There is no visa which can be used for the purpose of claiming asylum. There are visas for those accepted for temporary protection (eg Ukrainians, who received 260,362 visas to August 2023), and settlement visas for those already recognised as refugees or on a resettlement scheme (BNOs from Hong Kong, who received 147,649 visas). Home Office statistics say that in the nearly nine years from 2015 to August 2023, a total of 50,169 refugees - fewer than 6,000 a year - from the rest of the world, including Syria, Afghanistan, Eritrea, Sudan etc, have received visas under resettlement schemes. According to the Refugee Council, in the whole of 2023, only 736 people were admitted for settlement under these schemes, including 104 from Afghanistan. Routes to family reunion for those seeking asylum are equally restrictive for most nationalities.

6. **It is a requirement of the international refugee system that you must be physically present inside a country, such as the UK, to claim asylum there.** People make, and support others in making, irregular journeys (e.g. via 'small boat' or lorry) because this is the only way to enter the country to claim asylum. Therefore, people arriving to seek asylum taking journeys which 'involve a high risk of serious injury or death' do so because they do not have a choice. Given the lack of alternative routes, their 'means or route of entry or arrival' will necessarily involve a 'high' or 'some risk of serious injury or death'. This is due to the lack of alternative routes to the UK, which force people into these channels.

7. During the passing of NABA, the UNHCR issued a statement which clarified that the changes to Section 24 of the Immigration Act 1971 contravene the Refugee Convention. It stated: 'where refugees are the object of smuggling, or where they organised or facilitated

their irregular entry into the UK in order to secure their own safety and/or that of family, associates or other persons in a "humanitarian" or mutual assistance context without profit or other material benefit, any penalisation for migrant smuggling would violate Article 31.' **Section 31 of the Immigration and Asylum Act 1999, added following the case of *Adimi* [1999] EWHC Admin 765, does not, the UNHCR argued, sufficiently protect refugees against criminal penalties under the NABA.**

8. **If a person has claimed asylum, or has evidenced intention to claim asylum, that person is a presumptive refugee until the Secretary of State and the immigration courts have decided that they are not.** If someone has indicated intention to claim, they should be treated as a refugee. It is not for the judge of the criminal court to decide their asylum claim on the merits; they are required to treat that person as a presumptive refugee. Worryingly, judges in the criminal courts have undertaken such assessments, on the basis of no or very slender evidence. For example, in one case in Canterbury Crown Court, a Judge in sentencing an Albanian man to 12-months remarked, despite the fact that the man had indeed claimed asylum (quoted here, September 2023):

> *I consider it necessary to draw a distinction between you, an Albanian national who has made a deliberate decision to seek to enter the country illegally to seek a better life after your efforts to do so legally have failed, and individuals who may have a potential valid asylum claim having fled aggression in the country of origin*

9. **For the purposes of sentencing, given the sensitivity of criminalising people seeking asylum for simply 'arriving' to do so, we strongly advocate a starting point of conditional discharge.** This would better allow the UK to comply with its obligations under the Refugee Convention, as well as the Palermo Protocol, and Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings.

10. For the new offence of 'illegal arrival', the Court of Appeal authority is currently *R v Ginar* [2023] EWCA Crim 1121, which set out a starting point for sentencing of 12 months. We are concerned that the current wording of the guidelines - in particular the 'harm' framing - could be interpreted to enforce higher sentences.

11. **We encourage the Council to make a distinction between entry and arrival in approaches to sentencing.** While the NABA has quashed the distinction for the purpose of charge/conviction, we suggest it is relevant for sentencing exercises. Presenting oneself at port to claim asylum without any attempt to circumvent immigration controls and/or claiming asylum at the first possible opportunity (by for example deception or clandestine landing) represents a mitigating circumstance. This situation, we suggest, should attract a non-custodial sentence, with a starting point of conditional discharge.

12. **We question the aggravating factor 'previous failed application for asylum'.** As stated above, it is not the place of criminal courts to make an assessment on someone's asylum claim. A previous failed attempt does not prevent a new successful application. A 'well founded fear of persecution' can shift over time depending on political and personal circumstances. The aggravating factor could mean that someone who previously claimed asylum from Afghanistan decades ago, was rejected, but has subsequently in 2024 fled from the Taliban, would get a higher sentence for doing so.

13. **We strongly question the proportionality of the proposed sentences** as they relate to people acting in a situation of mutual assistance. This is firstly, due to the fact that, for example, many of those convicted arrive in the UK to claim asylum where there is no other way to do so. Secondly, the proportionality of a sentence should take into account the immigration consequences of a conviction and sentence. For example, under section 72 of the Nationality, Immigration and Asylum Act 2002 (as amended by NABA 2022) a sentence of 12 months or over disqualifies a refugee from protection from *refoulement* under Article 33(2) of the 1951 Convention, as the Act deems the offender guilty of a 'particularly serious crime' and a danger to the security of the country'. Even if the person is allowed to remain, the sentence will certainly affect someone's long term immigration status. In July 2023, the 'good character' requirement for British citizenship was strengthened, meaning that anyone with a 12-month custodial sentence will be restricted from accessing British citizenship 'regardless of when or where the crime took place' (Gov.uk). Part 9.4.1 of the Immigration Rules (as amended) states that any request for entry clearance or leave to remain must be refused if the applicant has received a custodial sentence of 12 months or more.

14. **We would like to add an additional comment on the 'deterrence' logic of sentencing.** We concur with the Court of Appeal in *R v Ginar* [2023] that 'deterrence can, in our view, carry only limited weight as a distinct aim in the sentencing of those who have travelled as passengers in a crossing … the circumstances of those who commit offences of that kind, as opposed to those who organise them, will usually be such that they are unlikely to be deterred by the prospect of a custodial sentence if caught. We know of no evidence or research to the contrary'. This is also the consensus from academic research in the UK, as well as in other jurisdictions who criminalise maritime facilitation (including Italy, Spain, and Greece).[1] This has also been agreed by the Government's own analysts (in slide packs obtained by FOI request). We warn against the uncritical adoption of 'deterrence' based logics which are not based in evidence, particularly in a context where there are no other ways for these individuals to reach the UK to seek asylum.

15. **Instead, the Court of Appeal in *R v Ginar* [2023] stated that 'the predominant purpose of sentencing in cases of this nature will generally be the protection of the public'.** We question this also. The vast majority of those prosecuted for crossing the Channel in 'small boats', for example, are first-time offenders, fleeing persecution, with no other way of claiming asylum in the UK. It is unclear in what way the public needs 'protection' from this group, who pose no evidenced threat of violence or disorder. There is no evidence that people crossing the Channel are more likely than others to engage in further criminal activity, particularly if the necessary modern slavery safeguards are properly implemented. If the logic is that those crossing are supporting so-called 'criminal gangs', then this is punishing the service users/'victims', rather than those organising. There is a risk here of uncritically conflating 'immigrants' and 'criminals'. We also question the assumption that the public

[1] See: Missbach (2023) The Criminalisation of people smuggling in Indonesia and Australia: asylum out of reach; Weber (2012) Criminalising People Smuggling: Preventing or Globalizing Harm?, The Routledge Handbook of Transnational Organised Crime, p. 379; Patane et al. (2020) Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy, Refugee Survey Quarterly, 123-152; Borderline Europe (2023) A Legal Vacuum: The systematic criminalisation of migrants for driving a boat or car to Greece, https://extranet.greens-efaservice.eu/public/media/file/1/8433; Hänsel et al. (2020) Incarcerating the Marginalised: The Fight Against Alleged 'Smugglers' on the Greek Hotspot Islands.

agree with the harsh treatment of those crossing the Channel. For example, a 2022 IPSOS poll found that 56 percent of those polled had sympathy for those crossing in small boats, compared with 39 percent who did not.

16. Imprisonment is the most severe sentence available to the courts. Custodial sentences are reserved for the most serious offences and are imposed when the offence committed is 'so serious that neither a fine alone nor a community sentence can be justified for the offence' (section 230(2) of the Sentencing Act 2020). The Sentencing Guideline for Community and Custodial sentences provides that 'the clear intention of the threshold test is to preserve prison as a punishment for the most serious offences. **The criteria to be applied are the harm caused by the offence and the culpability of the offender. It is our position that neither 'deterrence' nor 'protecting the public' are sufficient justifying logics for custodial sentences in these cases in the absence of a sufficient level of harm or culpability on the part of the offender, properly defined.** This is particularly the case in the current prison overcrowding crisis. In October 2023, the MoJ triggered 'Operation Safeguard' for HMP Elmley (where the majority of those arrested from 'small boats' are held on remand). The high numbers of people on remand for 'illegal arrival' in the prison are likely to be a significant contributing factor.

## Facilitation: Section 25 of the Immigration Act 1971

17. **The Nationality and Borders Act (NABA) expanded the scope of Sections 25 and 25A** through the removal of the requirement for gain in Section 25A, and through the changes in Section 24, expanding the meaning of a 'breach of immigration law'. Individuals can now be prosecuted for 'facilitation' for assisting the *arrival* of people (including asylum seekers) to the UK, whether or not they gain from doing so. The NABA also increased the maximum sentence to life imprisonment. Given the interconnected nature of Section 24 and 25, our comments on Section 24 apply also to this offence.

18. **Sections 25 and 25A are used against a diverse group of people in a range of circumstances.** Sentencing guidelines need to adequately reflect this. We suggest that, in their current form, the guidelines do not adequately reflect situations where individuals are charged in circumstances of mutual assistance, e.g. people who themselves are seeking asylum in the UK who are charged after being captured with their hand on the tiller of a dinghy crossing the Channel. As with our Section 24 guidelines, it is our position that further measures should be taken within the guidelines to uphold the UK's responsibilities under the Refugee Convention as far as possible. We point to international precedent on this issue, for example, the Canadian case of *Appulonappa* [2016] in which the Canadian Supreme Court ruled that individuals cannot be punished criminally for providing assistance to other refugees fleeing violence and persecution.

19. **It is important to note that people can end up steering a dinghy for several reasons**. These include having nautical experience, steering in return for paying less or nothing for the journey, arrangements where several people in the dinghy take it in turns. Research by the University of Oxford, Humans for Rights Network, Captain Support UK and Refugee Legal Support (*No Such Thing as Justice Here)*, found that a common reason given in court was

being under duress, including being forced to steer at gunpoint after being subjected to physical violence. This is consistent with investigations by the National Crime Agency and *The Independent*. Of great significance is the finding of the Independent Chief Inspector of Borders (ICIBI) that 'there were no organised crime group members on board the boats'. Every dinghy must have someone, or several people, tasked with steering in a situation of mutual assistance. In our broad experiences of these cases, it is a falsehood that those criminalised for steering boats are 'organised criminals'.

20. This research (*No Such Thing as Justice Here)* was based on observations of over 100 hearings of the application of ss24/25/25A against people arriving to the UK on 'small boats', as well as interviews with legal practitioners, analysis of case law, and freedom of information requests. Only a small number of people who are initially charged with Section 25 from 'small boats' are eventually convicted (7 from July 22 to March 23 out of 172 arrests, FOI data). The vast majority of those charged with S25 have the charges dropped and are instead convicted of S24. Despite this, there remains the possibility of higher numbers being convicted and sentenced for facilitation. Our concerns are around the proportionality of sentencing practices, and their compatibility with the Refugee Convention.

21. **The current Court of Appeal authority for facilitation on 'small boats' is *R v Ahmed* [2023] EWCA Crim 1521, which set out a starting point of 3 years before reduction for plea and aggravating/mitigating factors.** Due to mitigation for his age (18) and early guilty plea, the defendant in this case received a sentence of 18 months for steering a boat across the Channel. We believe this to be disproportionate, for reasons we set out below. The current proposed culpability and harm factors suggest the possibility of higher sentences than this being handed down after these proposed guidelines.

22. **Where someone has an ongoing asylum claim, or has expressed intention to claim asylum, the starting point should be non-custodial in order to uphold the UK's obligations under the Refugee Convention.** The Refugee Convention's prohibition on penalties (Article 31) was designed to protect refugees coming through 'safe' countries to reach their destination country: see Adimi (1999) and UNHCR comments on Section 31 of the Immigration and Asylum Act 1999. Please see our response to Section 24 'illegal arrival/entry' for a full explanation.

23. **In terms of culpability,** in situations of mutual assistance (e.g. someone steering a dinghy), where there is coercion/pressure and/or no commercial gain, they should, as the proposed guidelines state, have a lower culpability. However, this should take into account 'coercion/pressure' in a wider sense than physical coercive violence. For example, agreeing to steer the boat because otherwise you cannot afford the crossing for yourself should be considered as part of coercion/pressure given the majority of asylum seekers crossing in this way have a well-founded fear of persecution. People have no other choice in these situations and are desperate. For cases of mutual assistance in this way, the starting point should be non-custodial.

24. **In terms of harm**, it is important to note that there are no 'safe and legal routes' to enter the UK to seek asylum, as noted above. There is no visa which can be used for the purpose of claiming asylum, and routes for family reunion are restrictive. It is a mandatory condition of the international refugee system that you must be physically present inside a country, such

as the UK, to claim asylum there. People make, and support others in making, irregular journeys (e.g. via 'small boat' or lorry) because this is the only way to enter the country to claim asylum. Therefore, people arriving to seek asylum taking journeys which 'involve a high risk of serious injury or death' do so because they do not have a choice. The lack of legal routes, due to visa regimes and carrier sanctions legislation, ensures that their 'means or route of entry or arrival' will necessarily involve a 'high' or 'some risk of serious injury or death' - a risk that is heightened by the Government's investment in securitisation in Northern France, which result in more dangerous journeys to avoid detection. Many factors which increase 'harm' (such as weather, availability of life jackets, number of individuals on a boat) are not in the control of those steering. This is not currently reflected in either the guidelines, nor current sentencing practices. By designating 'harm' in the current proposed way, those prosecuted for arriving via 'small boat' or lorry will be punished for doing so, when this is the only way for them to enter the UK to claim asylum.

25. **To reiterate our stance on the 'deterrence' logic of sentencing,** as noted above under section 24, we concur with the Court of Appeal in *R v Ginar* [2023] that for those who do not organise crossings, deterrence can carry only limited weight as a distinct aim of sentencing. Additionally as noted above in section 24, we strongly question the logic of 'protecting the public'. The politicisation of irregular migration, we suggest, has come to influence the terms of the debate here in ways which are not supported by evidence.

26. **We strongly question the proportionality of the proposed sentences** as they relate to people acting in a situation of mutual assistance. The reasons given above under section 24 apply equally to this group of people. They are acting to enable themselves and others to seek asylum, a right recognised in the UDHR, and are forced by preventive legislative and operational measures to do so in circumstances of danger. In addition, the consequences of conviction and sentence of 12 months or more, set out above under Section 24, need to be taken into account in sentencing this group.

## Equality and Diversity

## Age

27. **We are aware of at least 20 individuals who raised their age as under 18 upon arrival who have been charged with either Section 24 or 25 after arriving on a 'small boat' across the Channel**. These individuals were all charged as adults and brought before adult courts. At least 14 of them spent time (the longest 7 months) in an adult prison. The youngest is 14 years old. 7 have, to date, been subsequently accepted to be children by Local Authorities.

28. **Many unaccompanied children arriving in the UK without documentation find it difficult to 'prove' their age**. The vast majority of those arriving to Dover are subject to cursory age assessments in the docks, hours after their arrival, which do not meet the standard of a full 'age assessment' (including not having in-person interpreters, legal advice, or support). Research has demonstrated that the Home Office does not know how accurate these assessments in Dover are, nor how many of them are overturned. Data obtained by FOI request from Local Authorities showed that from Jan 2022 - June 2023, over 1,300

children were wrongly ‘assessed’ in these initial assessments to be adults. This is likely to be an underestimate.

29. **All of the children identified in prison charged with Section 24/25 are black Africans from countries such as Sudan, South Sudan and Eritrea**. There is a large body of evidence detailing the vulnerability of children to exploitation on their displacement journeys,[2] including in Northern France. There is also evidence of children being used to drive boats across the Mediterranean into Europe, and being criminalised in other countries for doing so. Children of certain nationalities may have reduced financial means to pay for spaces on dinghies, which leads them open to exploitation.

30. **These children usually appear in Folkestone Magistrates Court after being charged as adults**. Usually, Benches and District Judges recognised their procedural requirement to respond to a defendant claiming to be a child and turned to Section 99 of the Childrens and Young Persons Act 1933: “the court shall make enquiries as to their age, and the age presumed or declared by the court is deemed to be their true age”. Yet such enquiries are difficult when, as is often the case, the accused young person does not have any paperwork to confirm their age. In the majority of cases, Magistrates simply relied on the Home Office’s given age from Western Jet Foil as determinative. There was no reflection on, or evidence of much understanding of, the limited and rushed nature of these initial ‘enquiries’, or the lack of evidence as to their reliability. Throughout these hearings, there was very little recognition of the sensitivity and complicated nature of assessing someone’s age, and particularly assessing the age of someone who has experienced a likely difficult and traumatic journey from a young age and with different racial, economic, social, and cultural backgrounds.

31. **While age is usually taken into account in sentencing exercises when these young people are sentenced for S24/25, it is not sufficiently considered, and neither are putative children given non-custodial sentences.** When young people were finally brought before the court, Judges at the Crown Court consistently showed hostility against what they perceived to be “constant claims of childhood” from “defendants claiming to be much younger that they physically appear”. On some occasions in court, pressure was placed on defendants to abandon their age disputes. Judges spoke of “fantastically expensive” (Judge, Canterbury Crown Court February 2023) age assessments, and it was often commented that a negative age assessment “will almost certainly result in a considerable reduction in credit” (Judge, CCC May 2023) upon sentencing. This hostility was successful in some cases, where children in prison abandoned assertions of their age and agreed to be sentenced as adults in hope of an earlier release.

32. **Judges at the Crown Court in Canterbury demonstrated a lack of understanding around the particular vulnerabilities of unaccompanied children seeking asylum and what they may have been through, including its effect on their appearance and demeanour**. For example, in one case, the Judge refused to “accept that someone that age – 13 – could make this journey” (Judge, CCC April 2023) from West Africa to the UK (despite

[2] See, for example, Furia (2012) Victims or Criminals? The Vulnerability of Separated Children in the Context of Migration in the United Kingdom and Italy; Chak (2018) Europe’s Dystopia: The Exploitation of Unaccompanied and Separated Child Refugees." Policy Perspectives 15.3 (2018): 7-28

widespread evidence that many children of this age do take these journeys for their own safety each year)

33. **Age-disputed children in adult prison are at serious and obvious risk of harm.** The children that have worked with Humans for Rights Network have been made to share cells with adults who are not known to them, where they were locked in for the majority of each day, sometimes more than 23 hours each day, which falls below national minimum standards, and where prolonged, constitutes torture and other cruel and inhuman and degrading treatment or punishment. Prisons do not receive notification from the Home Office or from the court when an individual is age-disputed, so the emphasis remains on the individual to self-identify. Children report a rapid deterioration in their mental health, including experiencing acute depression, low self-worth, and hopelessness. Their physical health is also at risk in the prison.