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NCN: [2022] EWCA Crim 37  
IN THE COURT OF APPEAL  
CRIMINAL DIVISION



CASE NO: 2022 02042 B5

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Friday 13 January 2023

Before:

LADY JUSTICE CARR

MR JUSTICE CAVANAGH

HIS HONOUR JUDGE CONRAD KC

REX

v

KAZEM KHODAMORADI

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MR ANEURIN BREWER appeared on behalf of the Applicant  
MR ANDREW JOHNSON appeared on behalf of the Crown

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**J U D G M E N T**

## MR JUSTICE CAVANAGH:

1. This is an application for an extension of time for leave to appeal against conviction with appeal to follow if granted. The application for permission to appeal was filed 503 days out of time. This application was referred to the Full Court by the Registrar. The prosecution does not oppose the extension of time and does not oppose the appeal, but that is not the end of the matter. As this court observed in **Rakei & Ors**, decided on 8 February 2022, the decision as to whether a conviction is or is not safe is of course a matter entirely for the court and the court is not bound by the stance taken by the prosecution in response to any appeal. For reasons that will become clear, we will deal first the merits of the appeal and then with the question whether we should grant an extension of time.

### The Merits of the Appeal

2. On 30 January 2021, at the Crown Court in Canterbury, the applicant pleaded guilty to one count of facilitating the commission of a breach of immigration law by an individual who is not a citizen of the European Union, knowing of having reasonable cause for believing that the act facilitated the commission of a breach of immigration law by that individual, contrary to section 25 of the Immigration Act 1971. The offence that the applicant pleaded guilty to facilitation of was illegal entry into the United Kingdom contrary to section 24 of the same Act.
3. The facts of case are, briefly, that at around 5 pm on 1 September 2020 a Rigid Hull Inflatable Boat (a "RHIB") was intercepted in the British Channel crossing from France. It was dangerously overcrowded and sitting low in the water. The RHIB contained fourteen to fifteen migrants, including two children aged 6 and 7 years old, all of whom, including the applicant, were from Middle Eastern countries with no prior leave to enter the UK. The applicant was identified by officers aboard the intercepting vessel as one of two males who had been sitting at the rear of the boat with their hands on the engine at times. The RHIB was taken directly to the Kent Intake Unit, the approved area within the Port of Dover. All of the migrants on the boat, including the applicant, claimed asylum.

4. The guilty plea was on a basis of plea which was to the effect that the applicant had only had his hand on the tiller for 1 or 2 minutes. The prosecution accepted that the applicant was an asylum seeker who had assisted in steering the vessel and that he was not a smuggler or organiser.
5. On 25 January 2021 at the same court the applicant was sentenced to 18 months' imprisonment. That sentence has now been served.
6. This court has been provided with trial counsel's comments following a waiver of privilege. Trial counsel said that the applicant was advised that he had no defence in law on the basis of his instructions. It is now clear that this advice was wrong, though it was consistent with the view that was commonly shared by practitioners at the time. The correct position was made clear by this court in the cases of **Kakaei** [2021] EWCA Crim 203, **Bani & Ors** [2021] EWCA Crim 1958 and in **Rakei**. A detailed review of the law was provided by the court in **Kakaei** and **Bani**, to which judgments reference can be made. In short, the offence of unlawful entry to the United Kingdom as set out in the then existing version of section 24 of the Immigration Act 1971 was not committed if a migrant was intercepted or 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 the approved area of the port. This is the effect of section 11(1) of the 1971 Act which defines *enter* for these purposes. Essentially, the approved area of the port is not part of the United Kingdom for these purposes. The migrant will only leave the approved area and enter the United Kingdom if they are given leave to enter, or if she or he is detained for immigration purposes or given immigration bail. In those circumstances, no breach of immigration law occurs when they leave the approved area; therefore there is no unlawful entry; and accordingly the person who steered the boat has not facilitated unlawful entry.
7. There is, however, still a way in which the pilot of a boat that crossed the Channel with migrants might have been guilty of a facilitation offence under section 25. The facilitation offence applies to a breach or to an attempted breach of immigration law. 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, then an offence of facilitating an attempted breach of section 24 would be committed (see **Bani** at [105]).

8. We should add that sections 24 and 25 of the Immigration Act 1971 were amended with effect from 26 June 2022. The effect of the amendment is that a section 24 offence can be committed if a person knowingly arrives in the United Kingdom whether or not she or he also enters the United Kingdom. Section 25(2)(a) now defines immigration law to mean a law which controls entitlement to enter or arrive in the United Kingdom. The intention of this change was to extend the scope of section 24 and 25 offences to cases in which migrants are taken directly to the approved area of a port. We are aware that an appeal is shortly to be heard by the Court of Appeal which raises the question whether these amendments have been effective to change the law so as to give rise to a breach of section 25 if a defendant facilitates arrival at an approved area in a port.
9. In light of the law as clarified in **Kakaie** and **Bani** it is clear that, as the law then stood, the offence of facilitation of a breach of immigration law was not committed simply because the defendant steered a boat containing migrants without leave to enter the United Kingdom, if the boat was intercepted and taken directly to the approved area of the Port of Dover, as the applicant's boat was. On the face of it, therefore, this applicant had a good defence, but was not advised that this was the position and for that reason pleaded guilty. He stated to the judge at the time that he pleaded guilty that he had not been aware that he was breaking the law. It is worth noting that the indictment in the applicant's case contained one count of facilitating a breach of immigration law. There was no alternative count of facilitating an attempted breach of immigration law, and so, unless the indictment was amended, there was no scope for finding him guilty of facilitating an attempted breach of immigration law if the evidence showed that he had intended to deliver the migrants to a landfall outside the approved area of Dover Port or recognised that this was a possible outcome.
10. The question of what approach the Court of Appeal should take to cases of this type where the defendant pleaded guilty has already been considered in **Bani** and **Rakei**. The Court of Appeal quashed the convictions in those cases. As in the present case, the prosecution did

not seek a retrial and so the proceedings were concluded. The present appeal is indistinguishable from the appeals by those who pleaded guilty that were considered in **Bani and Rakei**. In those circumstances, subject to the question as to whether an extension of time should be granted, the correct approach in our view would be to allow the appeal without ordering a retrial.

#### Extension of Time

11. The statutory framework for the Court of Appeal, Criminal Division, is contained in Criminal Appeal Act 1968. Section 18(1) of that Act provides that a person who wishes to appeal to the Court of Appeal, Criminal Division, or to obtain leave to appeal against conviction should give notice of appeal or notice of application for leave to Appeal. Notice and grounds of appeal should be lodged within 28 days from the date of conviction, sentence, verdict, finding or decision that is being appealed (see section 18(2) and paragraph 39.21 of the Criminal Procedure Rules). Section 18(3) provides that "the time for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal". Further, an extension of time application should be made at the time of service of the notice and grounds of appeal and give the reasons for the application (see Criminal Procedure Rules 36.4 and 39.3(1)(e)(ii)).
12. The court is asked to exercise its power under section 18(3) to grant an extension of time in many different circumstances and neither the Criminal Appeal Act 1968 nor the Criminal Procedure Rules limit the discretion of the court on the issue whether an extension of time should be granted (see **Thorsby & Ors** [2015] EWCA Crim 1 and **Paterson** [2022] EWCA Crim 456 at [26]). The following guidance has been given by the Court of Appeal in **Thorsby and Patterson**, see in particular **Patterson** at [27]:

(1) The principled approach to extensions of time is that the court will grant an extension if it is in the interests of justice to do so. The judgment is judicial and not merely administrative.

(2) The court will have in mind finality, the interests of the parties, the efficient use of resources and good administration. The public interest also critically embraces the justice of the case and the liberty of the individual.

(3) Where there is no good reason why the time limits were not complied with, the court is unlikely to grant an extension unless injustice would be caused in consequence. The merits of the underlying grounds will be examined. It is not the case, however, that an arguable case on the merits is simply a trump card without more.

(4) The court will be more likely closely to examine the merits of an out-of-time appeal when it is argued that some principle of law or legal requirement has been ignored or overlooked.

(5) Applicants would be expected to demonstrate with particularity when and in what circumstances they became aware of the entitlement for the first time, that no further delay had occurred after then, and if there had been delay by the applicant himself, the court would be likely to refuse the extension of time.

13. We would add one further point. This is that an applicant who seeks an extension of time should give a detailed description of the delay and the reasons for it. In all but an exceptional case, the information should be provided in a witness statement which complies with the requirements of section 9 of the Criminal Justice Act 1967.

14. In the present case the applicant and his legal adviser did not provide a witness statement in support of the application for an extension of time. This is most unsatisfactory. The extension of time that is being sought is a lengthy one, consisting of 503 days. The only explanation that has been provided is in paragraph 5.2 of counsel's advice in support of the grounds of appeal dated 27 April 2022. This states that:

"The deadline for lodging these grounds of appeal was 10 February 2021. Application will also have to be made for the application for leave to appeal to be considered out of time. The basis of such an application should be that those instructing were instructed by the lay client sometime after his conviction and sentencing when he became aware that a potential defence had not been advanced on his behalf by his original legal team and that following instruction funding from the LAA and the access to the case papers had to be secured which created unavoidable delay before a full advice on and grounds of appeal could be considered and drafted."

15. This explanation is wholly inadequate. It provides no particulars. The **Kakaei** judgment was handed down on 8 April 2021, more than a year before counsel's advice was written. There is no explanation as to how or when the clarification of the law and the existence of a defence came to the applicant's attention. There is no reference to the timing or circumstances of his instruction of new solicitors. The court is not given sufficient information to enable the court to assess whether or not the applicant or his new lawyers acted with despatch. Moreover, counsel's advice and grounds were drafted on 27 April 2022 but the appeal was not filed until 28 June, over 2 months later. No explanation is proffered to explain this further delay. However, it is clear that the fault does not lie with the applicant's original counsel and solicitors. The advice and grounds were provided to them on 23 June 2022 and the applicant signed his waiver of privilege on 29 June 2022. The responses from the applicant's original counsel and solicitors were provided on 15 and 18 July 2022 respectively. It is clear, therefore, that the appeal was not delayed by requests for information from the original legal advisers. In these circumstances the applicant's legal advisers have failed satisfactory to describe or explain the delays in filing the grounds of appeal. As we have said, it is not sufficient for an applicant's legal advisers simply to rely upon the strength or ground or grounds of appeal. In all but an exceptional case, where an extension of time is being sought the applicant's legal advisers should file a witness statement which describes the reasons and/or explanations for the delay.
16. We were informed by the applicant's counsel that a practice has developed in cases such as these of no evidence being provided in support of an application for extension of time where the prosecution does not oppose the appeal or the extension of time. In so far as such a

practice exists, it should cease.

17. Notwithstanding the failure to provide a witness statement or adequately to give reasons for the delay however, we take the view that it is in the interests of justice to allow the appeal. The applicant had a defence to the indictment to which he pleaded guilty which had not been drawn to his attention by counsel and which he could not be expected to be aware of himself. His case is indistinguishable from a number of other cases in which appeals have been allowed by this court and it would be unfair to treat him differently. There is no issue as regards finality or inconvenience to other court users because the prosecution does not seek a retrial. The applicant has already served his sentence. As the respondent submits, a time will come when it cannot be said that those convicted of section 25 offences on an incorrect legal footing have proceeded with sufficient expedition in seeking permission to appeal. However, that stage has not been reached. Although there have been substantial delays in this case which have not properly been explained or justified, it would not be in the interests of justice to refuse an extension of time and to dismiss the appeal. Accordingly, we grant the extension of time, grant permission to appeal and allow the appeal. Quite rightly, the prosecution does not seek a retrial and so these proceedings are now at an end.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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