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Neutral Citation No. [2024] EWCA Crim 589



IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202400804/A5

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday, 16 May 2024

Before:

LORD JUSTICE DINGEMANS  
MR JUSTICE WALL  
HER HONOUR JUDGE DE BERTODANO  
(Sitting as a Judge of the CACD)

REX  
V  
AKBAT ARBATI

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MR M CLEJ appeared on behalf of the Appellant

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

LORD JUSTICE DINGEMANS:

### **Introduction**

1. This is the hearing of an appeal against sentence for an offence of knowingly attempting to arrive in the United Kingdom without valid entry clearance, contrary to section 1(1) of the Criminal Attempts Act 1981 and section 24(D1) and (F1) of the Immigration Act 1971. The offence was committed on 10 September 2023 and the appeal raises the issue of whether the sentence is manifestly excessive in the light of the guidance given in *R v Ginar* [2023] EWCA Crim 1121, [2024] 1 WLR 1264.
2. The appellant, who is an Iranian national, is a 31-year-old man. On 12 September 2023 he pleaded guilty at the Magistrates' Court and was committed for sentence. It was common ground that the appellant was entitled to 33 per cent credit for plea. On 6 December 2023 he was sentenced in the Crown Court at Canterbury to two years' imprisonment. The maximum sentence for the offence for which he was convicted was four years.
3. The appellant had a relevant previous immigration history. In 2016 the appellant was a stowaway on a ferry from France to Portsmouth. He claimed asylum on arrival and before a decision was made on that claim the appellant was convicted in the Crown Court at Blackfriars of attempted rape in 2017 and sentenced to 50 months' imprisonment.
4. Following his conviction the appellant was issued with a deportation order but this was revoked upon his making another claim for asylum. That claim for asylum was refused, as was an appeal, and the appellant was issued with a deportation order. Before that order was enforced, the appellant travelled to Turkey on 17 February 2023 of his own volition, before he returned to the United Kingdom on 10 September 2023.

5. It might be noted that the separate offence of knowingly entering the United Kingdom in breach of a deportation order, contrary to section 24(A1) of the Immigration Act 1971, which has a higher maximum sentence, was not charged. Perhaps that was because the deportation order had been revoked. In any event, the appellant can only be sentenced for an offence for which he has been convicted.

### **Circumstances of this offence**

6. Turning then to the circumstances of this offence. On 10 September 2023 the appellant travelled with 72 other people on an overcrowded rigid hull inflatable boat across the English Channel from the French coast. The boat was intercepted by United Kingdom Border Force and all 73 passengers were safely transferred to Dover and processed by the Home Office. The appellant's fingerprints were taken and it was then established that he had the previous immigration history to which we have already referred.
7. As already indicated the appellant had pleaded guilty at the earliest opportunity. The judge's sentence of two years was therefore three years before discount for plea. The judge identified aggravating factors before coming to his final sentence.
8. The submission on behalf of the appellant, and we are very grateful to Mr Clej for his helpful written and oral submissions, is simply that this sentence was manifestly excessive, having regard to the guideline starting point of 12 months as set out in *Ginar*. It is said the judge: erred in increasing culpability because the appellant knew he was entering the United Kingdom in an unlawful manner, although there was some modification of that submission in the oral submissions to us today; the judge erred in relying on inherent harm already identified in this category of offending; the judge was wrong to treat the culpability of the offence increased by the fact that the appellant did not seek to enter in order to claim asylum; the judge aggravated the sentence excessively

on the basis of the previous conviction; and erred in treating the failure to notify police as an aggravating factor.

9. In *R v Ginar* the Court of Appeal set out factors relevant to culpability and harm in this type of offending in the absence of a sentencing guideline produced by the Sentencing Council. The court stated that the appropriate starting point before considering aggravating and mitigating features and credit for plea should be 12 months. Further, factors that might aggravate that offending included a high level of planning beyond that which is inherent or a history of unsuccessful applications.
10. So far as this appeal is concerned, we note that the Crown Court sentenced the appellant without a report and we agree that none was required and we can confirm that a report is not now necessary.
11. In our judgment, the judge was right to increase the sentence in this case from the starting point of 12 months in *Ginar*. This was because the appellant entered without leave before, he was convicted of attempted rape and issued a deportation order, his claim for asylum was dismissed and he then left voluntarily before returning within seven months of his departure.
12. That said, the increase from 12 months to three years (before giving credit for plea) was in our judgment simply too long. A proportionate sentence reflecting all the aggravating and limited mitigating features available in this case would have been a sentence of two years. Giving a discount then of one-third for plea takes the sentence to 16 months.
13. The appeal therefore succeeds to the extent that the sentence of two years' imprisonment is reduced to one of 16 months' imprisonment.

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

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