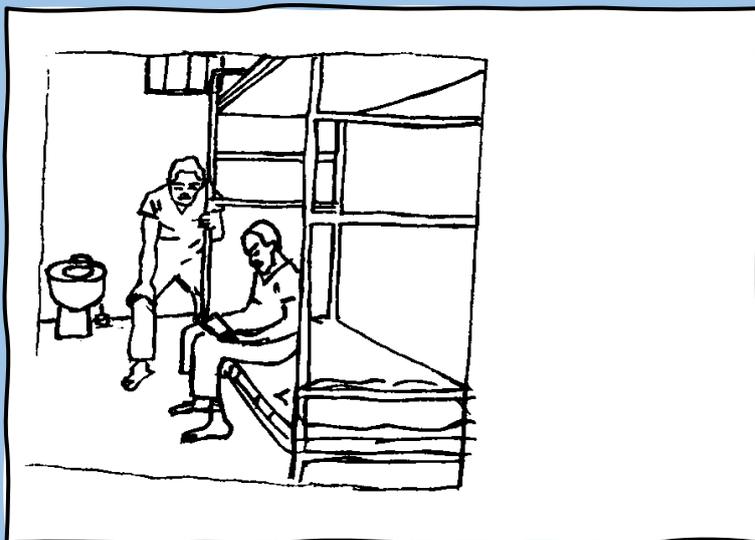
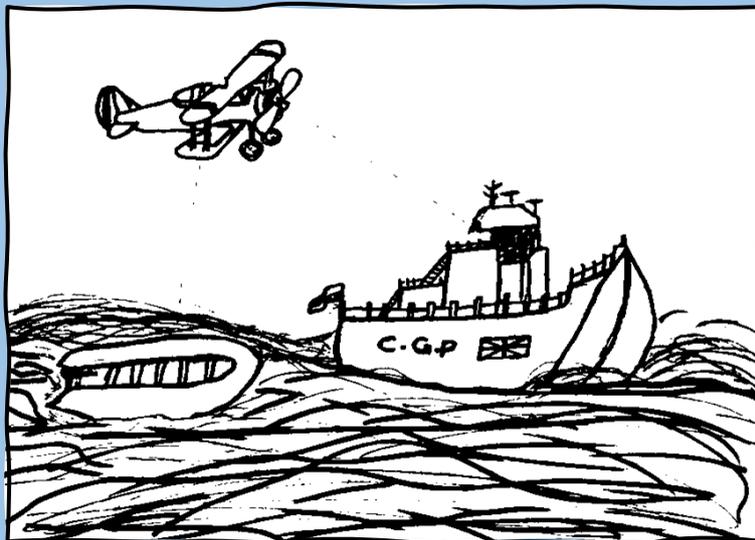


# “NO SUCH THING AS JUSTICE HERE”

THE CRIMINALISATION OF PEOPLE ARRIVING TO THE UK ON ‘SMALL BOATS’





# Authors and Acknowledgements

Cover illustrations and title quote by Ibrahim from Sudan.

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This report is informed by the collective work of several organisations. These key contributors are:



## **Captain Support UK**

*Captain Support UK is a grassroots organisation which works in solidarity with all people criminalised for crossing borders or facilitating freedom of movement. The collective provides practical solidarity to people in prison and post-release as well as campaigning for systemic change against criminalisation of migration in the UK, alongside Captain Support International.*



## **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. We are led and informed by the Migrants we work with and collaborate to address mistreatment and challenge systemic and structural racism and discrimination, and the harmful impact of these.*



## **Refugee Legal Support**

*Refugee Legal Support works in solidarity with people who migrate. We advocate for the promotion and protection of people's rights throughout the migration process. We provide legal support, casework, strategic litigation, outreach, training and partnerships. Our approach is inclusive, sustainable and participatory. Our work is directly informed by those with lived migration experience.*

We would like to express our gratitude and solidarity with the people who contributed to this report. In particular, special thanks goes to Ibrahim, Zain, Ahmad and Samir<sup>1</sup> who shared their experiences of being arrested and imprisoned.

This report has been published by Border Criminologies and the Centre for Criminology at the University of Oxford. Border Criminologies is an international network of researchers, practitioners, and those who have experienced border control. Any enquiries relating to this report can be directed to: [victoria.taylor@crim.ox.ac.uk](mailto:victoria.taylor@crim.ox.ac.uk).

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<sup>1</sup> To protect the identities of these individuals, their names have been changed.

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# Research Summary

This report details how people seeking asylum in the UK are being arrested and imprisoned for their arrival on 'small boats'. Research methods included observations of over 100 court hearings; interviews with people directly affected by the law; interviews with lawyers; analysis of data collected through Freedom of Information (FOI) requests; and analysis of case law. This research builds on collective work, including detailed casework, by organisations operating in the UK, from October 2022 to January 2024.

## Background: 'Stop the boats'

In late 2018, the number of people using dinghies to reach the UK from mainland Europe began to increase. Despite Government claims, alternative 'safe and legal routes' for accessing protection in the UK remain inaccessible to many people. There is no visa for 'seeking asylum', and humanitarian routes to the UK are restricted.

For many, irregular journeys by sea have become the only way to enter the UK to seek asylum.

## Nationality and Borders Act (2022)

In June 2022, the Nationality and Borders Act (2022) expanded the scope of immigration crimes in the UK in response to people arriving into Dover on 'small boats'. The Act made two key changes to the Immigration Act 1971:

- introduced the offence of '**illegal arrival**' (Section 24) and increased the maximum penalty to **4 years imprisonment**,
- expanded the scope of the more serious offence of '**facilitating arrival**' (Section 25) and increased the maximum penalty to **life imprisonment**.

During Parliamentary debates, both MPs and Lords argued that these offences criminalise the act of seeking asylum in the UK. The Joint Committee on Human Rights, the Select Committee on the Constitution, and the UN Refugee Agency all agreed that these offences risked violating Article 31 of the 1951 Refugee Convention, which is intended to protect refugees from being penalised for the way they enter a country to seek protection.

While the Government defended this change as necessary to deter the arrival of 'small boats', there is no evidence to support this claim. Indeed, the Court of Appeal has acknowledged that those now prosecuted under these offences "are unlikely to be deterred by the prospect of a custodial sentence". Instead, given the lack of alternative routes, these new offences have made seeking asylum in the UK a criminal act.

## Who is arrested?

**In the first year (June 2022 – 2023), 240 people arriving on 'small boats' were charged with 'illegal arrival'**. The vast majority of those arrested are young men travelling to seek asylum and safety in the UK.

While anyone arriving irregularly could be arrested for 'illegal arrival', those arrested in practice usually fit into one or both of two groups:

1. having an '**immigration history**' in the UK, including having been identified as being in the country, or having attempted to arrive previously (for example, through making a visa application); or,
2. having been identified as **steering** a dinghy as it crossed the Channel.

49 people were charged also with Section 25 for 'facilitating' the arrival of others in the first year of the Act for their role in steering dinghies.

**In 2022, 1 person in every 10 dinghies was arrested for their alleged role in steering. In 2023, this was 1 in every 7 dinghies.**

People end up being spotted with their 'hand on the tiller' for many reasons, including having boating experience, steering in return for discounted passage, taking it in turns, or being under duress.

## At Court

Those who were charged faced short hearings in the magistrate courts, usually within 48 hours of their arrival. Proceedings were often complicated or significantly delayed by poor interpretation and faulty video link technology. There were frequent problems with the court accessing an appropriate interpreter in their first language. People before both the magistrates and Crown Court reported being confused and unable to follow proceedings.

Bail was routinely denied without proper consideration of each individual's circumstances.

Those accused were usually advised to plead guilty to benefit from sentence reductions. These early guilty pleas restricted the possibility of legal challenges.

### **Sentencing**

While there are currently no formal sentencing guidelines, individuals arrested for 'illegal arrival' (Section 24) due to being identified as steering the dinghy were usually sentenced to around **9 months imprisonment**.

Those convicted of 'illegal arrival' (Section 24) with a 'previous immigration history' usually received sentences of **12 months or over**, meeting the automatic deportation threshold.

Those convicted of 'facilitating arrival' (Section 25) were sentenced to several years imprisonment (**a starting point of 3 years after trial**).

### **Experiences in prison**

People imprisoned for these offences routinely waited months on remand without knowing how long they will remain there, and without contact from their lawyers. Sometimes, their period on remand was longer than the eventual custodial sentence.

Imprisonment caused significant psychological and physical harm, which people said was particularly acute given their experiences of displacement. They frequently reported not being able to access crucial services, including medical care, interpretation services including for key documents relating to their cases, contact with their solicitors, immigration advice, as well as work and English lessons.

People shared their experiences of poor living conditions, inadequate food, and routine and frequent racist remarks and abuse from prison staff as 'foreign nationals'

### **Ongoing impacts of imprisonment**

The majority of those imprisoned were released into asylum accommodation to await the outcome of their claim, which was delayed during their imprisonment. Regular failures in communication between prison staff, probation, and the Home Office meant that many were released onto the street, enduring homeless and destitution.

People who received sentences of over 12 months were subject to automatic deportation procedures and were often detained under immigration powers after their sentence. This included victims of trafficking and torture, and nationalities where it was subsequently found there was no realistic prospect of removal.

There are ongoing questions about the implications of these convictions on the long-term immigration status of those affected. It is likely that many will subsequently be denied British citizenship due to their criminal conviction.

People also reported considerable long-term impacts of their imprisonment in the UK on their mental and physical health. Many described significant difficulties in negotiating life in a new country with a criminal record.

### **Age disputed children in adult prisons**

Research by refugee support organisations has highlighted significant flaws in the Home Office's age assessment processes in Dover, resulting in children being aged and treated as adults. One consequence is that children with ongoing age disputes have been charged as adults with the offences of 'illegal arrival' and 'facilitation' for their role in steering a 'small boat'.

**Humans for Rights Network has identified 15 age-disputed children who were wrongly treated as adults and charged with these new offences, with 14 spending time in adult prison.** This is very likely to be an undercount.

These young people have all claimed asylum, and several claim (or have been found to be) survivors of torture and/or trafficking. The majority are Sudanese or South Sudanese. Throughout the entirety of the criminal process, responsibility lay with the child at every stage to dispute their 'given' age and reassert that they are under 18. Despite this, the Courts generally relied on the Home Office's 'given age', without recognition of evidence highlighting clear flaws in these initial age enquiries.

Children who maintained that they were under-18 in official legal proceedings faced substantial delays to their cases due to the time taken by the relevant local authority to carry out an age assessment, and delays to the criminal process. Due to this inaction, several children agreed to being convicted and sentenced as adults to ensure they do not spend additional time in prison.

These young people have experienced serious psychological and physical harm in adult courts and prisons, raising serious questions around the practices of the Home Office, Border Force, Ministry of Justice, magistrates and Judges, the CPS, defence lawyers, and prison staff.

This research shows how the Nationality and Borders Act (2022) criminalised asylum seeking in the UK, and explains its many consequences. These offences achieve nothing but human misery. Instead of discouraging people from moving, border policies such as these force people into more dangerous and precarious situations, increasing the likelihood of death at the border. As Ibrahim, from Sudan, explained:

*I laugh when people say about justice in UK, about human rights. There are none here. There is no such thing as justice here.*

# Introduction: ‘Stop the boats’

In late 2018, the number of people using dinghies to reach the UK across the English Channel from mainland Europe began to increase. Decades of British investment in policing and border control technologies in Northern France have made more established irregular routes via lorry, train, and car more difficult, dangerous, and expensive. Yet, the reasons why people rely on these means of travel to reach the UK have persisted.

Contrary to the government’s claims, access to alternative, so-called ‘safe and legal routes’ to reach the UK is extremely limited for those without a passport that allows them to enter.<sup>2</sup> To receive ‘entry clearance’, people must be granted a visa under a category set out in the immigration rules. It is a feature of the international refugee system that you must be physically present inside a country, such as the UK, to claim asylum there. Yet, there is no ‘asylum seeking’ visa,<sup>3</sup> and routes for family reunion are restrictive. According to the Home Office, the majority of those crossing the Channel do so to make an asylum claim in the country.<sup>4</sup> With no other means of reaching the UK, for many, irregular journeys by sea have become the only way to enter the country to reach safety.

In the shadow of Brexit and promises to ‘take back control’, the British Conservative Government has announced a series of increasingly draconian measures, fuelling a media response in which ‘small boats’ have been framed as a major political and social crisis. Since 2018, those crossing the Channel in this way have been vilified as, among other things, disease carriers, sexual predators, and criminals.<sup>5</sup> This dehumanisation has been accompanied by a dominant policy logic of ‘deterrence’, which together have justified a series of increasingly hostile actions to ‘stop the boats’.

While many of these announcements have not materialised - including reports of wave machines, pushbacks, and offshoring - a number of policy and operational changes have been implemented following this rubric, not least under the legislative changes of the Nationality and Borders Act (2022) and Illegal Migration Act (2023).<sup>6</sup> Actions justified under ‘stop the boats’ since 2018 include: increased investments in security infrastructure and policing on the French coast; expanded use of accommodation explicitly designed to ‘deter’ arrivals, including prison-like isolated former military

barracks and ships; tightening the domestic legal definition of a ‘refugee’ to restrict numbers able to benefit from its protection; and greatly expanded the number of people whose asylum claims could be deemed as ‘inadmissible’ in the British system.

**This report focuses on one element of this ‘stop the boats’ campaign: the people being arrested and imprisoned for the way in which they arrive to the UK.**

As this report will detail, since 2019, people have been arrested and imprisoned for their role in steering dinghies across the Channel. In June 2022, however, the Nationality and Borders Act expanded the scope of criminal offences applied against people arriving to the country irregularly.<sup>7</sup> Since then, a sizable minority of people arriving in dinghies have been arrested, either for their own ‘illegal arrival’, or for ‘facilitating’ others due to their role steering the dinghy they crossed on. Given the lack of alternative routes available, these changes have effectively criminalised the very act of seeking asylum in the UK.

The use of criminal law against border crossers is widespread across Europe, including in Italy, Greece, and Spain. In these places, researchers and activists continue to document the violence and futility of policies seeking to curtail freedom of movement.<sup>8</sup> This report contributes to these collective efforts. Across these different geographies, the imprisonment of border crossers fails to deter them from seeking safety and a better life. Instead of discouraging people from moving, border policies such as these force people into more dangerous and precarious situations, increasing the likelihood of death at the border.

Drawing on 10 months of court observation in Kent courts, interviews with legal practitioners and four people subjected to these criminal prosecutions, and case work by Humans for Rights Network, Captain Support UK and Refuge Legal Support, this report aims to shed light on these new policies. It provides an overview of the criminalisation process: who is arrested and how; their experiences in the magistrates and Crown Courts; imprisonment; and the consequences of convictions on their lives after prison.

<sup>2</sup> <https://www.amnesty.org.uk/resources/truth-about-safe-and-legal-routes>

<sup>3</sup> It is also an offence to obtain or seek leave to enter or remain through deception, so obtaining a visa for other purposes when the intention to seek asylum is also an offence.

<sup>4</sup> <https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-june-2023/irregular-migration-to-the-uk-year-ending-june-2023>

<sup>5</sup> Parker et al. 2022, ‘It’s time we invested in stronger borders’: media representations of refugees crossing the English Channel by boat, *Critical Discourse Studies* 19(4), 348-368.

<sup>6</sup> However, it is also worth noting that unsubstantiated announcements can cause widespread distress and damage among communities they target.

<sup>7</sup> Nationality and Borders Act Explanatory Notes, 386.

<sup>8</sup> See, for example, Captain Support International; ‘From Sea to Prison project’ from ARCI Porco Rosso and borderline-europe, <https://fromseatoiprison.info/introduction/>.

# Methodology

**This report is informed by collective work by a network of organisations operating in the UK, from October 2022 to January 2024.**<sup>9</sup> It is the result of a mixed-method approach to researching the application of new 'immigration crimes' against people arriving on dinghies across the Channel. This report combines data from court-watching, interviews, and analysis of official statistics and quantitative data obtained through Freedom of Information (FOI) requests.

The primary source of data is ten months of observational research in courts across Kent, from January and October 2023. This method of 'court-watching' involved being physically present in magistrates and Crown Courts, identifying relevant cases, observing, note-taking, and careful data recording. This report draws on observations of over 100 court hearings across two main court sites: Folkestone Magistrates Court and Canterbury Crown Court.<sup>10</sup> Direct quotations from court-watching are included in *purple*.

Observational findings from court are supplemented and corroborated through interviews with defence lawyers; prosecution lawyers; and interpreters who have worked on these cases.<sup>11</sup>

Data collected through FOI requests to the Home Office and Ministry of Justice, and secondary analysis of case law before the period of observation, is also included.

Finally, and most importantly, this report includes testimonies of four people with experience of being criminalised for their arrival in the UK. Their identities have been anonymised and pseudonyms used (Ahmad, Ibrahim, Zain and Samir). Their words are included in *blue*.

This group includes people arrested for both driving dinghies across the Channel, as well for having a previous immigration history with the UK. Their sentences ranged from 7 to 15 months, and all had been released at the time of being interviewed. We have not included direct testimonies from any of the age-disputed children imprisoned as the risk of re-traumatisation was too high at the time of research for this particularly vulnerable group, many of whom have only been released in recent months.

While people arriving into the UK via other means - including on airplanes, lorries, and in cars - are also being charged with these criminal offences, the scope of this research focused on the nature and impact of the criminalisation of those arriving on 'small boats'.

Any questions relating to the methodology of this research can be directed to the author, Victoria Taylor, on [victoria.taylor@crim.ox.ac.uk](mailto:victoria.taylor@crim.ox.ac.uk).

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<sup>99</sup> These organisations include: Captain Support UK, Humans for Rights Network, Refugee Legal Support, Kent Refugee Support, and Madaniya.

<sup>10</sup> Observations also took place at Winchester Crown Court, and the Court of Appeal in London.

<sup>11</sup> N=6

# 1. Legal Framework

The UK has a long history of using criminal law against people crossing its borders, a practice which has intensified since the 1970s.<sup>12</sup> There are now many ways that border crossers (in either direction) can be subject to criminal prosecution, including: for using or possessing false documents; illegal entry/arrival; facilitating the arrival of others; overstaying visas, failing to cooperate with removal from the UK; trespassing in the Channel Tunnel; or being in a restricted area of a port.<sup>13</sup>

This chapter introduces the legal framework behind the contemporary criminal prosecution of people arriving with valid entry clearance, including those arriving on 'small boats'.

## Immigration Act 1971

**The 1971 Immigration Act first criminalised unauthorised arrival by enacting three new offences:** knowingly entering the UK without leave (**Section 24**); facilitating illegal entry into the UK (**Section 25**); and facilitating the arrival of an asylum seeker *for gain* (**Section 25A**). This Act effectively attached criminal sanctions to formerly administrative breaches of immigration rules, increasing reliance – at least on paper – on criminal law for immigration enforcement.

Despite the existence of these offences, since the 1970s breaches of immigration law have usually been dealt with through administrative removal from the country where possible, avoiding the 'expense' of pursuing criminal prosecution.<sup>14</sup> However, their continued existence and use – albeit against a minority of people caught committing immigration offences - has been justified by successive governments as targeting either 'people traffickers' or other vilified groups, including 'failed asylum seekers'.<sup>15</sup>

Despite this, evidence has consistently shown that it is overwhelmingly those committing offences surrounding their own arrival, or facilitating the entry of friends or family, who are among this imprisoned minority. The number of so-called 'organised criminals' facing the law in this way has, historically, been extremely limited.<sup>16</sup>

**In 1999, the High Court commented that too many people seeking asylum were being prosecuted occurring without due care or regard to the UK's obligations under the Refugee Convention.**<sup>17</sup> Article 31 requires that signatory states do not impose penalties on refugees on account of their illegal entry or presence, recognising that irregular entry is often the only way to make an asylum claim.<sup>18</sup> Responding to this criticism, Section 31 of the Immigration and Asylum Act 1999 was introduced into domestic law, and provided a statutory defence for refugees committing particular offences, provided they satisfy stated conditions.<sup>19</sup>

Guidance issued by the Crown Prosecution Service (CPS) still states that where someone with an ongoing asylum claim has been charged with a Section 31 listed offence, it would normally be appropriate to await the outcome of the asylum proceedings before continuing with the decision to charge.<sup>20</sup> However, Section 31 remains more restrictive than the intended meaning of Article 31 of the 1951 Refugee Convention, in part due to its application only to a narrow range of offences.<sup>21</sup> Neither Section 24 'illegal entry' nor Section 25 'facilitation' were included in the list, and hence people with ongoing asylum claims have continued to be prosecuted since 1999.<sup>22</sup>

## From 2019: Criminalisation of 'small boat arrivals'

When people started crossing the Channel in dinghies in greater numbers in 2018, the Government began to test a new prosecution strategy against those allegedly involved in the 'facilitation' of such journeys. Just as in other European countries,<sup>23</sup> it began to prosecute those identified as steering the dinghy at some point during the journey.

<sup>12</sup> See Ana Aliverti (2013) *Crimes of Mobility* for full historical analysis.

<sup>13</sup> For an overview, see <https://www.cps.gov.uk/legal-guidance/immigration>

<sup>14</sup> Aliverti (2013) *Crimes of Mobility*; Bunting (2023) *Immigration Offences: A Practitioners Guide*, p. 101.

<sup>15</sup> Aliverti (2013) *Crimes of Mobility*.

<sup>16</sup> *Ibid.*

<sup>17</sup> *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi* [1999]

<sup>18</sup> With some important clarifications, for the full text see <https://www.refworld.org/pdfid/470a33b10.pdf>

<sup>19</sup> <https://www.cps.gov.uk/legal-guidance/immigration>

<sup>20</sup> *Ibid.*

<sup>21</sup> See Goodwin-Gill (2001:9): "If Article 31 is to be effectively implemented, clear legislative or administrative action is required to ensure that such proceedings are not begun and that no penalties are in fact imposed."

<sup>22</sup> For a summary of cases sent for review see: Sato, M., Hoyle, C. and Speechley, N.-E. (2017) Wrongful convictions of refugees and asylum seekers: responses by the Criminal Cases Review Commission. *Criminal Law Review*, 2017 (2). pp. 106-122.

<sup>23</sup> Captain Support Greece (2023) <https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/06/imprisonment-boat-drivers-greece-examples-lesvos>

## 2019

In 2019, beginning in June, seven people were arrested for the ‘facilitation’ of people arriving on ‘small boats’.<sup>24</sup> In total, 1,843 people arrived via this method on 163 dinghies.<sup>25</sup>

## 2020

**Prosecutions became more frequent from January 2020, suggesting a change in strategy.** That year, there were 66 arrests of people arriving on dinghies for their own ‘illegal entry’ (Section 24), 57 of whom were charged, and 49 convicted. For the offence of ‘facilitation’ (Section 25), 57 were arrested, 11 charged, and 8 convicted. In total, 8,466 people arrived on ‘small boats’ in 2020 on 641 dinghies.

## 2021

**The prosecutorial strategy changed again in January 2021.** Arrests for Section 24 of people arriving on dinghies stopped, with only 2 arrests made, both in November. Arrests, charges, and convictions for Section 25 continued, however. From January 2021 to the end of May 2022, 82 people were charged with Section 25 for the facilitation of people crossing the Channel in dinghies: 16 were charged, and 14 convicted. This was out of a total of 28,526 ‘small boat’ arrivals in 2021, on 1034 dinghies.

## 2022

The first half of 2022 mirrored prosecutorial activity in 2021. From January to the end of May, 21 arrests were made only for Section 25, but none of these were charged. Two people were convicted from charges in 2021. **In June, relevant provisions in the Nationality and Borders Act came into force, changing the legal landscape (see below).**

## Fouad Kakaei and the Court of Appeal: A legal “heresy”

One of the seven men prosecuted for facilitating the illegal entry of people on ‘small boats’ in 2019 was an Iranian man, Fouad Kakaei. Following the refusal of his asylum claim in Denmark in April 2019, he made several attempts to enter the UK from Belgium and France. On his final crossing on 29th December 2019, Fouad claimed asylum along with the other 10 people who had travelled with him. Despite his ongoing asylum claim, he was arrested soon after arrival.<sup>26</sup>

On the basis of photographic evidence passed from Border Force to the CPS, Fouad was charged under Section 25 of the Immigration Act 1971 for ‘facilitating’ the arrival of others due to his role as ‘pilot’, as well as under Section 24 for his own ‘illegal entry’. He was sentenced to 4 months imprisonment for the Section 24 offence shortly after his arrival, and in January 2021, to 26 months for Section 25. At trial, he admitted to steering the dinghy in several of his crossing attempts, but he argued that this responsibility was shared out amongst passengers, and denied any financial motive for his decision to do so.

Fouad was insistent that he was not a ‘smuggler’ and instructed his lawyers to appeal the conviction. 17 months after his arrival and imprisonment, in May 2021, his case was heard in the Court of Appeal. Fouad’s defence rested on the difference in meaning between illegal ‘entry’ and ‘arrival’. His lawyers argued that a person who is intercepted or rescued at sea and taken to an approved area at a port does not *enter*, he only *arrives*. His ‘entry’ would then be made lawful through his asylum claim. **Whereas unauthorised ‘entry’ was a criminal offence under the 1971 Act, unauthorised ‘arrival’, they argued, was not.**<sup>27</sup>

This argument was successful. Using notably strong language for this Court, in a subsequent case (*R v Bani* [2021]), Lord Justice Edis argued that the law had previously been “misunderstood” by the Home Office and CPS, amounting to a “**heresy about the law**” that made asylum seekers believe they had no defence to charges of assisting unlawful immigration.<sup>28</sup> Edis argued that the prosecution strategy had been adopted “without any careful analysis of the law and appropriate guidance to those conducting interviews, taking charging decisions, and presenting cases to the courts.”<sup>29</sup>

<sup>24</sup> Prosecution data obtained via Freedom of Information Requests.

<sup>25</sup> All arrivals data taken from: <https://migrationobservatory.ox.ac.uk/resources/briefings/people-crossing-the-english-channel-in-small-boats/>

<sup>26</sup> All facts here are taken from *Kakaei* [2023] EWCA Crim 503.

<sup>27</sup> In reference to Section 11(1) of 1971 Immigration Act.

<sup>28</sup> *R v Bani* [2021] <https://www.bailii.org/ew/cases/EWCA/Crim/2021/1958.html>

<sup>29</sup> <https://www.bailii.org/ew/cases/EWCA/Crim/2021/1958.html> 86.

In July 2021, the CPS, the Home Office, and the National Crime Agency came to a joint agreement that they would not prosecute people with ongoing asylum claims with 'illegal entry', unless they were entering in breach of a deportation order.<sup>30</sup> **12 convicted asylum seekers have successfully appealed their convictions applying the logic tested in this case.**<sup>31</sup> In June 2022, Fouad Kakei finally received his refugee status.

## Small boat prosecutions and the Nationality and Borders Act 2022 (NABA)

In response to these successful appeals, the Government sought to close the defence argument made in *Kakaei* through changes in legislation. "People seeking to enter the country illegally, including those who have crossed the Channel on dinghies, are not appropriately penalised for breaking the law", they argued.<sup>32</sup> This, of course, ignores the fact that, as *Kakaei* found, they were not breaking the law.

### Section 24 D1: Illegal arrival

On 28<sup>th</sup> June 2022, Section 40 of the Nationality and Borders Act (2022) (NABA) made several legislative changes to the scope of immigration crimes in the UK. First, it created the new offence (Section 24 D1) of 'illegal arrival'.

**The maximum penalty for Section 24 'illegal arrival' was increased, from 6 months to 4 years, or 5 years if that arrival is in breach of a deportation order.** It is now also an offence to 'attempt' to arrive. The relationship between criminal prosecution and deportation in the UK is important here. The UK Borders Act 2007 brought in the requirement of automatic deportation for all non-EEA nationals sentenced to over 12 months for a criminal offence (24 months for EEA nationals).<sup>33</sup> The expansion in sentences for 'illegal arrival' means that this threshold could, and is, triggered for this new offence.

### Section 25 and Section 25 A: Facilitation of illegal arrival

The offence of 'facilitation' was expanded to take account of this new definition of 'illegal arrival'.<sup>34</sup> In addition, previously, Section 25A stated that a person could only be prosecuted for assisting the entry of asylum seekers if it could be proven that they acted 'for gain'. The

Nationality and Borders Act (2022) removed this 'for gain' requirement. This was explicitly intended to enable the prosecution of people identified as steering dinghies where financial gain was difficult to prove.<sup>35</sup> These changes remove any real difference between Section 25 and Section 25A (where the person being facilitated seeks asylum),<sup>36</sup> so they are discussed in this report together as 'Section 25'.

### The maximum sentence for Section 25 was increased from 14 years to life imprisonment.

In response to concerns that civil search and rescue organisations, such as the Royal National Lifeboat Institution (RNLI), could be prosecuted under this expanded offence, the Home Office clarified, via Twitter, that "organisations such as the RNLI or HM Coastguard helping those in distress at sea" would not be targeted.<sup>37</sup> A subsequent amendment exempted actors instructed by the Coastguard, but stated that those on the same dinghy could not benefit from this protection.<sup>38</sup>

Section 24	
Pre NABA	Post NABA
It was an offence to 'enter' without entry clearance, leaving the possibility open of 'arriving' at port to claim asylum.	It is an offence to 'arrive' without entry clearance.
The maximum sentence was: 6 months for arrival without entry clearance, including for a breach of deportation order	The maximum sentence is: 4 years for arrival without entry clearance 5 years for arrival without entry clearance in breach of a deportation order

Section 25	
Pre NABA	Post NABA
It was an offence to facilitate an asylum seeker's <i>entry</i> , if you <i>gained</i> from doing so.	It is an offence to facilitate an asylum seeker's <i>arrival</i> , whether or not for gain .
The maximum sentence was: 14 years	The maximum sentence is: Life imprisonment

<sup>30</sup> <https://www.telegraph.co.uk/news/2021/07/08/illegal-migrants-escape-prosecution-cps-targets-smugglers/>

<sup>31</sup> FOI Request 321107022, accessible:

<https://www.whatdotheyknow.com/request/1044685/response/2488771/attach/html/3/Victoria%20Taylor%2020231107022%20FOI%20response.pdf.html>

<sup>32</sup> <https://researchbriefings.files.parliament.uk/documents/CBP-9275/CBP-9275.pdf> p44

<sup>33</sup> Noting that this is not always possible due to factors including protection claims and lack of returns agreements.

<sup>34</sup> Facilitation' in this context is not defined in the Immigration Act, but is generally understood broadly to 'include behaviour linked to recruiting, transporting, transferring, harbouring, receiving or exchanging control over another person', <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/en/210141en.pdf> 400, see also Bunting 2023 p107 on the meaning of facilitation in 'small boat' cases.

<sup>35</sup> <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/en/210141en.pdf> 397.

<sup>36</sup> Bunting 2023, 121.

<sup>37</sup> <https://twitter.com/ukhomeoffice/status/1412755144740114437>

<sup>38</sup> Section 25BA Immigration Act, see also Bunting (2023) p.116-117

## Debate and justification in the Houses of Parliament

During debates in both Houses as the Nationality and Borders Act (2022) passed through Parliament, the proposed introduction of these new offences attracted significant critique. Opposition MPs, Lords, and Parliamentary Committees, including the Joint Committee on Human Rights<sup>39</sup> and the Select Committee on the Constitution,<sup>40</sup> argued that these measures would effectively criminalise the act of seeking asylum in the UK, and could reasonably lead to the imprisonment of thousands of people, including refugees, victims of trafficking and modern slavery, and beneficiaries of other forms of protection.<sup>41</sup>

Then Immigration Minister, Tom Pursglove, responded: *“we are not seeking to criminalise those who come to the UK genuinely to seek asylum, and who use safe and legal routes to do so. We will be targeting for prosecution those migrants in cases where there are aggravating factors—where they caused danger to themselves or others, including rescuers; where they caused severe disruption to services such as shipping routes, or the closure of the channel tunnel; or where they are criminals who have previously been deported from the UK or persons who have been repeatedly removed as failed asylum seekers.”*<sup>42</sup>

However, these ‘aggravating factors’ are not included in the legislation and those defined in the statement above are so broad as to provide very little clarity. Pursglove admitted that “[t]he factors for prosecution when someone comes to the UK may change depending on the circumstances”<sup>43</sup>, leaving MPs and Lords questioning the fairness and legitimacy of relying on the CPS’s discretion for something so fundamental as the protection of refugee rights.

Pursglove also fundamentally misrepresented the reality of border crossing and asylum seeking in today’s world. People cross borders for many different and overlapping reasons. As outlined in this report’s *Introduction*, those arriving on ‘small boats’ do so as there is no alternative available to them. There is no visa for ‘asylum seeking’, and other ‘safe and legal routes’ are extremely restrictive, usually on the basis of nationality.<sup>44</sup>

Despite Pursglove’s assurances, these offences can, and have, criminalised “those who come to the UK genuinely to seek asylum”.<sup>45</sup>

Members of both Houses questioned the compatibility of Pursglove’s statements, and the offences themselves, with Article 31 of the Refugee Convention, referring to the UNHCR’s criticism that “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(1)” as well as arguably the Palermo Protocol, and Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings.<sup>46</sup> While the UNHCR is therefore clear in its position that “penalties imposed upon persons arriving illegal or for facilitating the irregular entry of others must not inadvertently target or penalise asylum-seekers and refugees acting in the course of seeking safety for themselves and/or each other”, this is explicitly what these offences are intended to achieve.

The Government’s response was that these offences are necessary to ‘stop the boats’. However, there is no available evidence supporting the claim that criminal offences for smuggling or entry are a successful ‘deterrent’. This has since been explicitly recognised in the Court of Appeal in *R v Ginar* [2023], finding that “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 of research which indicates the contrary”.<sup>47</sup> The same conclusion has been reached by researchers examining the impact of smuggling offences globally, including in Indonesia and Australia,<sup>48</sup> Italy,<sup>49</sup> and Greece.<sup>50</sup>

This wealth of evidence is persuasive in showing that prosecuting people for their arrival, or role in facilitating themselves and others for humanitarian reasons, do not and cannot ‘stop the boats’.

<sup>39</sup> <https://committees.parliament.uk/publications/8021/documents/83303/default/>

<sup>40</sup> <https://committees.parliament.uk/publications/8606/documents/86994/default/>

<sup>41</sup> [https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill\(EleventhSitting\)](https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill(EleventhSitting))

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> [https://binghamcentre.biicl.org/documents/137\\_nationality\\_and\\_borders\\_bill\\_report\\_part\\_2.pdf](https://binghamcentre.biicl.org/documents/137_nationality_and_borders_bill_report_part_2.pdf)

<sup>45</sup> [https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill\(EleventhSitting\)](https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill(EleventhSitting))

<sup>46</sup> <https://www.unhcr.org/uk/media/unhcr-observations-new-plan-immigration-uk>

<sup>47</sup> *R v Ginar* [2023] EWCA Crim 1121

<sup>48</sup> Missbach (2023) *The Criminalisation of people smuggling in Indonesia and Australia: asylum out of reach*; Weber (2012) *Criminalizing People Smuggling: Preventing or Globalizing Harm?*, *The Routledge Handbook of Transnational Organised Crime*, p. 379.

<sup>49</sup> Patane et al. (2020) *Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy*, *Refugee Survey Quarterly*, 123-152

<sup>50</sup> *Borderline Europe* (2023) *A Legal Vacuum: The systematic criminalisation of migrants for driving a boat or car to Greece*, <https://extranet.greens-efa-service.eu/public/media/file/1/8433>; Hänsel et al. (2020) *Incarcerating the Marginalised: The Fight Against Alleged ‘Smugglers’ on the Greek Hotspot Islands*.

## 2. Arrested and charged

From 28<sup>th</sup> June 2022, anyone arriving to the UK irregularly could be arrested, charged, and imprisoned. This chapter covers how arrests and charges in Kent have been determined and made after the implementation of the Nationality and Borders Act.<sup>51</sup>

### From immigration control to criminal arrest

After being intercepted in the English Channel, almost all new arrivals are brought into Dover by the RNLI or Border Force. At Western Jet Foil, they receive a basic health check, a change of clothes, and some food,<sup>52</sup> before providing basic details to immigration officers and being detained under immigration powers.<sup>53</sup> This process is carried out without interpreters, with Border Force staff instead relying on images and reference sheets. This inevitably results in confusion.<sup>54</sup>

Families and adults are transferred by bus to the 'short-term holding facility' located in a former RAF base in Manston, Kent (hereafter, Manston).<sup>55</sup> The process for those under 18 is addressed in *Chapter 7* of this report.

After arriving at Manston, adults and families have their fingerprints and basic details taken by immigration officers.<sup>56</sup> Their detention is then managed by private companies while they wait to have an asylum screening interview, and for accommodation elsewhere to be arranged.<sup>57</sup>



Western Jet Foil, January 2022. Source: ICIBI Report 21-22

### Who is arrested?

**While most of those who arrive in 'small boats' are transferred onwards to asylum accommodation around the country, others are separated, handcuffed, and arrested.**

*When I arrived, I spent one night, I think I was in Dover but I'm not sure. Then early the next morning, I was taken to somewhere that was maybe the police station. I didn't know where I was going or anything. I didn't know about this situation. I never expected this. I was shocked. (Ahmad, Iranian)*

While the Nationality and Borders Act (2022) legislated that anyone arriving into the UK irregularly could be arrested under criminal powers, in practice, the CPS has conceded that "It would not be practicable to charge and then to proceed with criminal proceedings against all of the migrants who across the Channel in small boats".<sup>58</sup> In reality, then, a smaller - but by no means insignificant - number of people are arrested. See Annex A for a breakdown of numbers arrested, charged, and convicted.

**In 2022**, 1,110 dinghies arrived in the UK carrying 44,725 people. 189 people were arrested off these dinghies. 109 of these were arrested for their role in steering the dinghy.<sup>59</sup> **This means approximately 1 person off every 10 dinghies was arrested for steering in 2022.**

**In 2023**, 602 dinghies arrived carrying 29,437 people. 86 of these were arrested for their role in piloting the dinghy.<sup>60</sup> The total number arrested in this year is not yet confirmed. **This means approximately 1 person off every 7 dinghies was arrested for steering in this time period.**

<sup>51</sup> These new offences are being applied to people arriving in the UK via other routes (for example, airports). The focus here is their application to people arriving on small boats.

<sup>52</sup> ICIBI (2023) [A re-inspection of the initial processing of migrants arriving via small boats, including at Western Jet Foil and Manston](#) p11.

<sup>53</sup> Ibid. 6.5, footnote 19.

<sup>54</sup> Ibid. 6.6.

<sup>55</sup> Ibid. 2.7, Manston opened in early 2022.

<sup>56</sup> ICIBI (2023) [A re-inspection of the initial processing of migrants arriving via small boats, including at Western Jet Foil and Manston](#) 10.3.

<sup>57</sup> These companies include Mitie Care & Custody, MTC, and Interforce. <https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2023/06/WJF-Manston-and-KIU-web-2023.pdf> 2.8

<sup>58</sup> <https://www.judiciary.uk/wp-content/uploads/2022/12/Preparatory-hearing-Small-Boats-cases-rulings-21Dec22-final-v.pdf>

<sup>59</sup> <https://www.gov.uk/government/statistics/statistics-relating-to-the-illegal-migration-bill/additional-statistics-relating-to-illegal-migration-to-end-october-2023>

<sup>60</sup> <https://homeofficemedia.blog.gov.uk/2024/01/02/uk-government-action-in-2023-to-stop-the-boats/>

**In the first year of these new crimes, from 28<sup>th</sup> June 2022 – June 28<sup>th</sup> 2023 (See Annex A):**

- 240 people were charged for their own ‘illegal arrival’ (Section 24) on ‘small boats’, and 165 of those were convicted.
- 49 were charged for the facilitation of ‘small boat’ arrivals (Section 25), and 7 convicted.

## Section 24 arrests

The new Section 24(d) offence of ‘illegal arrival’ could be applied against anyone arriving on a dinghy to the UK, but as the data in Annex A shows, this does not occur in practice. The Crown Prosecution Service is required to make a judgement as to whether the prosecution is in the ‘public interest’,<sup>61</sup> and has published a list of ‘aggravating factors’ that it argues might be relevant in meeting this test.<sup>62</sup> However, these are broad and could realistically be applied to most people arriving on ‘small boat’.<sup>63</sup>

**Evidence from court observations and interviews with lawyers has found that those prosecuted under Section 24 usually fit into one (or both) of two groups:**

1. **The person identified as steering the dinghy**, who are charged with their own illegal arrival (Section 24), and sometimes also for facilitating the arrival of the others on the dinghy (Section 25); or,
2. Those with an **existing immigration history** in the UK, who are charged with their own illegal arrival (Section 24). This included people who have been identified as being in the UK previously, or having attempted to arrive (for example, through making a visa application).

## Nationalities

The nationalities of those charged broadly reflect the overall makeup of people arriving in ‘small boats’. In the first year of these offences (June 2022 – June 2023), the highest number of charges were those with Albanian (30%), Sudanese (13%), Afghan (12%), Egyptian (10%), Iranian (7%) and Iraqi (7%) nationality.<sup>64</sup>

However, people from Albania, Sudan and Egypt are overrepresented (meaning they make up a highest

percentage of those charged, compared to overall arrival figures). Albanians made up 24% of people arriving on ‘small boats’ July 2022 – June 2023, but 30% of arrests. Sudanese people made up only 4% of arrivals, but 13% of arrests, and Egyptians 3% of total arrivals but 10% of arrests. The most common reasons for driving the dinghy were being under duress from smugglers in Northern France; needing a discount on the crossing; or having previous experience driving boats, either from previous employment or irregular journeys.

*“It’s sheer tokenism. They’re going for the lowest hanging fruit, and it’s all about being able to show that they’ve done something.” (interview, defence lawyer, December 2023)*

## Section 25 arrests

Usually, those arrested for their role in steering dinghies are prosecuted only under Section 24. However, sometimes they are prosecuted under Section 25 for ‘facilitation’ as well. CPS guidance gives some indication of how this decision to charge an individual with the ‘more serious’ offence is made, but again, this is broad.<sup>65</sup>

**People can end up steering the dinghy for several reasons**, including having nautical experience, steering in return for paying less for the journey, arrangements where people in the dinghy take it in turns. A common reason given in court was being under duress, including being forced to drive at gunpoint, a finding consistent with investigations by the National Crime Agency and *The Independent*.<sup>66</sup> The Independent Chief Inspector of Borders (ICIBI) previously found that “there were no organised crime group members onboard the boats”.<sup>67</sup> Every dinghy must have someone, or several people, tasked with steering. As was once raised in court, each of these people *“played his part in keeping them alive, yet he is the one [arrested]”*.<sup>68</sup>

**Despite the Government’s rhetoric, both Section 24 and 25 target people with no role in organised criminal gangs.** It targets people that have been exploited in their search for safety, and people who take on the role with humanitarian intentions of ensuring the safe passage of both themselves and those they are travelling with. As the Court of Appeal has recognised, those responsible for orchestrating the use of ‘small

<sup>61</sup> [https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill\(EleventhSitting\)](https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill(EleventhSitting))

<sup>62</sup> <https://www.cps.gov.uk/legal-guidance/immigration> ‘Public Interest considerations’

<sup>63</sup> <https://www.cps.gov.uk/legal-guidance/immigration> see for the full list

<sup>64</sup> [https://www.whatdotheyknow.com/request/section\\_24\\_and\\_25\\_charges\\_by\\_mea](https://www.whatdotheyknow.com/request/section_24_and_25_charges_by_mea)

<sup>65</sup> <https://www.cps.gov.uk/legal-guidance/immigration>

<sup>66</sup> <https://www.independent.co.uk/news/uk/home-news/channel-crossings-smugglers-migrants-asylum-seekers-forced-labour-b714733.html>

<sup>67</sup> ICIBI (2020) *An inspection of the Home Office’s response to in-country clandestine arrivals (‘lorry drops’) and to irregular migrants arriving via ‘small boats’ (May 2019 – December 2019)*

<sup>68</sup> Courtwatching notes, Canterbury Crown Court, June 2023

boats' as a way of entering the UK are rarely, if ever, prosecuted.<sup>69</sup>

*He was recruited to pilot the boat by others who exploited his financial position, his youth and immaturity and his genuine need to enter the UK to seek asylum. (Ahmed v R [2023])*

On paper, Section 25 prosecutions should usually require evidence of greater involvement and a more significant role in planning or organising the journey than others on the dinghy, such as having gained (financially or otherwise), arranging it, or sourcing the dinghy.<sup>70</sup> Given this requirement and the possibility of an easier alternative conviction under Section 24, quite often these charges are dropped when evidence cannot be produced by prosecution. However, this was not always the case, particularly if those convicted were advised to plead guilty to this offence before such evidence can be obtained, for example, off a mobile phone.

While Section 25 was almost always applied only to those caught with their 'hand on the tiller', we also observed two cases of men accused of facilitating the arrival of their children into the UK on the dinghy with him. In each case the father was separated from his children, who were taken into Local Authority care, while he was taken to prison. With both offences, there appears to be a huge amount of discretion on the part of immigration officers stationed at Manston as to who is arrested by police and referred to the CPS for a charging decision.

*They told me that I was arrested for illegal entry and facilitation. I said no, I am not guilty. If I am guilty, then so is everyone, all 30 or more people on the boat. So I can't be guilty. It is not fair. (Ibrahim, Sudanese)*

## Nationalities

Data obtained by Freedom of Information request shows that in the first year, those charged with Section 25 included people from Sudan, Egypt, Albania, Libya and South Sudan, Afghanistan, Eritrea, Iran, and Iraq.<sup>71</sup>

## Does an ongoing asylum claim affect CPS decision making?

The vast majority of those identified by Captain Support, Humans for Rights Network, and Refugee Legal Support had ongoing asylum claims, made just prior to their arrest, including from nationalities with refugee grant rates close to 100% (such as people from Sudan, Syria, and Afghanistan).

As described in Chapter 1, domestic legislation<sup>72</sup> relies on a restrictive interpretation of the meaning of Article 31 of the Refugee Convention, which prohibits penalising refugees for their unlawful entry or presence if they come directly from a country where their life or freedom was threatened, present themselves to the authorities without delay, and show good cause for their unlawful entry or presence.

While the UNHCR and leading legal scholars have argued that Article 31 should be interpreted "broadly and purposively, such that refugees who have crossed through, stopped over or stayed in other countries en route to the country of intended sanctuary may still be exempt from penalties"<sup>73</sup> British legislation requires that coming through a 'safe third country' should (a) preclude someone from accessing asylum, and (b) enable their criminal prosecution.<sup>74</sup>

The question of whether the CPS should take into account someone's asylum claim was addressed in both the Crown Court<sup>75</sup> and Court of Appeal<sup>76</sup> in *R v Mohamed and Others* [2023]. The defence's argument that these prosecutions may be incompatible with Article 31 of the Refugee Convention, as well as Articles 8 and 14 of the European Convention on Human Rights, was not given leave to appeal. However, Judges in both courts discussed whether asylum seekers should be exempted, considering the meaning of domestic legislation.

While the defence argued that refugees should not require entry clearance because no such clearance is available for the purpose of claiming asylum, it was ruled that the legislation, as it was intended, does not exempt refugees or people with ongoing asylum claims. In the Preparatory Hearing in the Crown Court, it was stated that while the CPS should take someone's ongoing asylum claim into account in determining whether the prosecution is in the 'public interest', it might not prevent a prosecution. People with asylum claims, as well victims of

<sup>69</sup> *R v Ginar* [2023] EWCA Crim 1121; *Ahmed v R* [2023] EWCA Crim 1521

<sup>70</sup> <https://www.cps.gov.uk/legal-guidance/immigration>.

<sup>71</sup> See FOI data [here](#). Note that this is from 'live data' and hence there is discrepancy on the numbers charged. See Annex A for further information.

<sup>72</sup> Section 31 Immigration and Asylum Act 1999

<sup>73</sup> UNHCR 2022 accessed here: <https://www.unhcr.org/uk/media/unhcr-updated-observations-nationality-and-borders-bill-amended>; and UNHCR (2023) [Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-seekers](#).; see also [https://binghamcentre.biicl.org/documents/137\\_nationality\\_and\\_borders\\_bill\\_report\\_part\\_2.pdf](https://binghamcentre.biicl.org/documents/137_nationality_and_borders_bill_report_part_2.pdf)

<sup>74</sup> <https://www.legislation.gov.uk/ukpga/1999/33/section/31>

<sup>75</sup> *R v Mohamed and Others*, Rulings by Mr Justice Cavanagh at a Preparatory Hearing on 14, 15 and 21 December 2022, Canterbury Crown Court, available at: <https://www.judiciary.uk/wp-content/uploads/2022/12/Preparatory-hearing-Small-Boats-cases-rulings-21Dec22-final-v.pdf>

<sup>76</sup> *R v Mohamed and Others* [2023] EWCA Crim 211

trafficking and torture, are therefore regularly convicted for 'illegal arrival'.

## How arrests take place

### Identifying the driver

For those arrested for steering dinghies, the moment of identification usually happens at sea. Drones, or Border Force officers with cameras on their boats, capture photographic imagery of whoever has their 'hand on the tiller' at the time of interception: "*This is a case where [the defendant] has piloted a boat crossing the Channel. The images show him piloting the boat for around 10 minutes.*"<sup>77</sup> The moment of search and rescue is, therefore, also a moment of border policing.

**Not every person that steers the dinghy is prosecuted.** In court, people accused frequently say that they shared the role, and are confused as to why they were the only one arrested. It is also common for no one to be arrested from a dinghy. **In 2022, for example, someone was arrested for steering from one in ten dinghies. In 2023, this was one in seven** (see above).<sup>78</sup> Capacity to arrest and charge appears to be dependent on factors which affect enforcement capacity, including staffing, weather, and the availability of technology.

### "He's got an immigration history"

**The second group of people arrested off 'small boat' are those identified as having an 'immigration history' in the UK.** This definition can mean a range of things. One common scenario observed in court was someone who left and re-entered while waiting for an ongoing asylum claim. The length of time people can spend waiting for refugee status in the UK has increased significantly in recent years, leaving people in limbo for years, unable to see family and friends who may be abroad.<sup>79</sup> Among those observed in court were people who left the UK while waiting for their asylum claim to visit sick or dying relatives, as well as to be reunited with, or locate, missing family members after long periods apart. In other cases, people arrested re-entered after being unknowingly trafficked out of the country by people promising work, or after having been subjected to coercion and violence.

In some cases, re-entrants had returned to their home country, either voluntarily or having been deported, but had sought to come back to Britain when their situation subsequently changed. For example, in 2023, 'Zain', a Syrian man in his twenties, arrived in the UK on a small boat. His father had been imprisoned by the Syrian government, and he feared for his safety. He hoped to

settle with extended family in the UK. After months in the country, he heard that his younger brother had also fled to Europe but had gone missing. After pressure from family members, Zain left the UK irregularly to find his brother and ensure his safety. While out of the UK, Zain heard that his brother was detained by militia in Libya. Unable to afford the money being requested for his release, he returned to the UK to continue his asylum claim and be with family members. He was arrested in Kent for 'illegal arrival' and given a 12-month sentence. He was detained in an Immigration Removal Centre after his criminal release.

Several people have been imprisoned where the only aggravating factor was having previously applied for a business, student, or standard visit visas, attempts that were either rejected or ongoing. Their use of a dinghy to arrive in the UK after the failure of these attempts to enter regularly is seen as evidence of their 'higher culpability'.

## At the police station

The majority of people arrested for these offences are taken from Manston to nearby police stations for questioning.<sup>80</sup> If the person arrested had arrived with family, they are separated. We observed several instances of the separation of pregnant women from their husbands, and in at least two observed cases, of children from their father and sole carer in the UK.

At the police station, people arrested are entitled to free legal advice, regardless of means. Generally, they are allocated a duty solicitor. However, mistrust and misunderstanding of what are often perceived to be government allocated lawyers means that sometimes people decide to go to court unrepresented. At the police station, those arrested are interviewed, and after the interview they will be charged and held, usually overnight, before their appearance in the Magistrates Court. For many, this is deeply distressing:

*At the police station, my lawyer said you're going to be in the court tomorrow. He said they might give me a sentence. I asked what does this mean, "sentence" and "court". He told me, you are going to be in jail. The interpreter, sometimes she is talking to me, but I don't understand her, her Arabic is bad, so I leave her and start talking to the lawyer in English.*

*When he told me I am going to be in jail, I was thinking like before, somewhere like Brook House [Immigration Removal Centre]. I thought it was going to be like that, maybe 1 week and then they release me to a hotel. So when he started speaking about jail and prison, I told him, "jail?, I'm not going to be with my family? They're outside!" He said no. I told him, "for how long am I going to be in*

<sup>77</sup> Courtwatching notes, Folkestone Magistrates, June 2023

<sup>78</sup> <https://www.gov.uk/government/statistics/statistics-relating-to-the-illegal-migration-bill/additional-statistics-relating-to-illegal-migration-to-end-october-2023>

<sup>79</sup> <https://migrationobservatory.ox.ac.uk/resources/briefings/the-uks-asylum-backlog/>

<sup>80</sup> We are, however, aware of people being arrested after their dispersal to asylum accommodation around the country, and being dealt with in courts outside Kent.

*jail? One day, two days, two weeks?" He told me, "maybe a month, maybe two, maybe three, maybe five, maybe a year." I still remember his words. I started to cry.*

*After that, they left and I they took me back to the cell. I start to feel the walls falling in on my body and I was scared. [...] After that, I started to breathe hard. Straight away, the officer, she opened the door and called others. They took me out to the yard. It was a small space. I felt more bad. Panic. They took me to the nurse and they called the ambulance. The nurse, she kicked them out and she spoke to me. I told her that I can't breathe in the cell. After that, they put me in an ambulance. They took me to the hospital with two officers, and another one in the hospital. I was in a chair in the hospital for 6 or 7 hours. I was very scared. (Zain, Syrian)*

### 3. Before the Magistrates

*“Magistrates Courts are the wild, wild west!”<sup>81</sup>*

Within 48 hours of arriving in the UK, those arrested and charged with ‘illegal arrival’ or ‘facilitation’ usually appeared before the Magistrates Court<sup>82</sup> after a night or two in a police cell in Kent.<sup>83</sup> This section deals with procedural and legal issues observed in Folkestone Magistrates’ Court.

#### Legal representation

Before appearing in the courtroom, anyone accused of an offence can access free legal representation from a duty solicitor. They are usually offered a consultation before the hearing, where the lawyer should explain their situation and advise them how to plead. However, due to the capacity pressures faced by these lawyers, or issues with accessing interpreters, on several observed occasions in cases involving people arrested off ‘small boats’, this either did not happen entirely, or consultations occurred only via phone: *“I don’t know if that’s [my client being video linked into court], I’ve only spoken to him on the phone, I haven’t seen him.”<sup>84</sup>* People arrested often described feeling confused by their lawyers, including how to contact them, which often led to distrust.

*As for the criminal solicitor, they are not on our side. It’s like the police go out of the room and change uniform and come back in. And every time it’s a different solicitor, a different lawyer. It’s like, how am I going to feel comfortable with you? (Ibrahim, Sudanese)*

From our observations and as described by these lawyers themselves, there were widespread misconceptions and lack of knowledge among criminal lawyers about how to deal with the specific vulnerabilities of those who have recently arrived to seek protection, including the relevance of asylum claims, disputed ages, as well as claims of trafficking, modern slavery or torture. This includes being able to answer clients questions about the immigration consequences of their convictions.<sup>85</sup>

People in prison described having no, or more damagingly, wrong information given to them about the impact of conviction and sentence on their prospects of staying in the UK. In one case, for example, a criminal solicitor told a teenage client that he would surely be deported to Sudan after his sentence, causing him considerable distress. In fact, however, this was untrue. It was said at a time where the grant rate for Sudanese asylum applications was close to 100%, and no deportations were happening to Sudan.

Magistrates, similarly, often demonstrated limited understanding of the asylum system in the UK, including whether people in the asylum system were allowed to work, and the conditions of Home Office accommodation.

#### In Court: what do you plead?

*On [a date] this year, within the jurisdiction of the central criminal court, you did an act, namely steering a small boat across the English Channel from France to English territorial waters, which facilitated a breach of immigration law. In that you assisted the unlawful arrival into the UK of [around 60] people who are not nationals of the UK. Do you plead guilty or not guilty?<sup>87</sup>*

After initial legal consultations, defendants are brought before a District Judge or Magistrates’ bench, either in person or through a video link. Hearings follow the standard pattern of all offences in this court: first the charge(s) are read, before the defendant indicates their plea (guilty, not guilty or no indication). Then, the prosecution reads out the case against the defendant, before the defence lawyer has the opportunity to respond. The Magistrates bench can then decide, for these ‘either way offences’, whether they wish to retain jurisdiction of the case, or send it to the Crown Court for trial or sentence. Finally, the issue of bail is discussed in brief. **Hearings are usually concluded within 10 minutes.**

**In the vast majority of cases observed, solicitors advised their clients to plead guilty** to the Section 24 ‘illegal arrival’ offence. This was for two reasons. First, it was generally understood that there was no defence to

<sup>81</sup> Interview, prosecutor, July 2023

<sup>82</sup> In the UK, these are local courts in which almost all criminal cases start. In these proceedings, initial pleas are taken (guilty, not guilty, or withheld) and, in some cases, punishments can be issued. These decisions are made either by District Judges, or by Magistrates. These are non-legal professionals who volunteer in these roles, and preside over hearings in groups of two or three, with the support of a legal advisor. Magistrates are limited in their sentencing powers.

<sup>83</sup> Although, we are aware of an increasing number of people arrested around the country from asylum hotels and dealt with in local courts.

<sup>84</sup> Courtwatching notes, Folkestone Magistrates, May 2023.

<sup>85</sup> This reflects the lack of training in immigration law available to criminal lawyers, and is not new. See *R v Mateta & Ors* (2013) EWCA Crim 1372, and commentary: <https://freemovement.org.uk/channel-tunnel-man-refugees-should-not-be-prosecuted-for-irregular-entry/>; <https://freemovement.org.uk/miscarriage-of-justice-wrongly-convicted-asylum-seekers-and-trafficked-persons/>

<sup>86</sup> Courtwatching notes, Folkestone Magistrates, August 2023.

this new offence of 'illegal arrival'. As one defence lawyer interviewed put it, *"It's virtually an absolute offence and it was designed so to prevent what they had before June of last year."*<sup>87</sup> The only defences on paper are Section 45 of the Modern Slavery Act, which provides a defence for victims of slavery or trafficking. However, despite some people imprisoned subsequently being recognised as victims of trafficking, this defence is not routinely raised in either magistrates or Crown Courts.

Second, early guilty pleas are 'rewarded' with sentence reductions: *"You want your maximum credit. So you enter the guilty plea"*.<sup>88</sup> Pleading guilty in the Magistrates Court results in 33% off the overall sentence, which reduces to 25% at the Crown Court. There is, therefore, a strong incentive to plead guilty as early as possible, and defence lawyers are often unwilling to take the risk of exposing their clients to a potential 12-month sentence (given that a 12-month sentence renders the individual liable to deportation) by delaying their guilty plea. **The extraction of early guilty pleas therefore continues to reduce space for legal challenge, just as it had before Fouad Kakaie's successful appeal in 2021.**

Pleas for the offence of 'facilitation' are more varied, with not guilty or withheld pleas made in hope that the CPS will withdraw the charge.

*When you go to the court, they don't ask you why you did it, why you drove the boat. Just "guilty or not guilty". If you say more, that is bad, you are not allowed to speak. If you don't say you are guilty, it is also worse. They put you in prison and you don't know for how long. (Ahmad, Iranian)*

## Issues with interpretation in court

**Issues with access to, and quality of, interpreters were a consistent problem.** In the court system, interpreters were usually supplied by the private company, the Big Word. Interpreters are paid by the hour for their services. While there are a few regular and experienced interpreters that do a large portion of these cases in the Crown Court, often the interpreters allocated by the Big Word had no previous experiences in arrival cases. As one interpreter explained, *"these cases are difficult and they need interpreters who have done it for a while, who have a lot of experience in criminal procedures. This is not always the case and it results in a lot of confusion [for the defendant]"*.<sup>89</sup>

**Frequently, lack of, or delays in organising, interpreters delayed proceedings. When interpreters were present, they were often unable to properly communicate with their client.** Arabic interpreters, in particular, were often booked without care as to which dialect the defendant might best understand, resulting either in prolonged delays to proceedings, or in hearings continuing with the defendant only partly understanding. On several observed occasions, interpreters had to be told to make sure they were interpreting fully everything that was being discussed in court: *The interpreter wasn't good. He didn't say literally everything that I said, maybe 40%. (Samir, Sudanese)*. Frequently, those supported by Captain Support UK, Humans for Rights Network, and Refugee Legal Support left court not understanding what had happened, where they were going, or for how long.

As cases moved to video link, interpreters would often appear physically in court, or via video link, a hybrid situation which resulted in high levels of confusion, discomfort and distress, and inadequate communication between the court, the defendant, and the interpreter. Having been arrested very soon after arriving, in a foreign country, and in a different language, inadequate interpretation compounds confusion and distress, with the potential for affecting their hearings adversely: *Myself as well as the representative yesterday at the police station have both come to the conclusion [the defendant] is very confused. He doesn't quite know what is happening. His instructions are not most forthcoming, all he keeps saying is that all he wanted to do is to claim asylum because his country of origin, Sudan, is at war.*<sup>90</sup>

## Video link technology

Increasingly, the justice system in England and Wales is relying on video technology. In May 2023, changes to processes in Kent magistrates' courts meant that most people arrested from Manston were taken physically to Margate magistrates court, while their case was heard virtually before magistrates in Folkestone. This meant that people appeared in court from a cell in Margate over video link.

Video links were often badly affected by practical audio-visual problems: *"We can't hear you well. It sounds like you're in a wind tunnel below the sea!"*<sup>91</sup>. Poor quality audio meant that defendants were often misunderstood, and it was not clear whether they could always hear interpreters clearly. On several occasions, we observed the misuse of digital technology to silence distressed defendants who were trying to make themselves heard to the court by muting them.

<sup>87</sup> Interview, defence lawyer, November 2023.

<sup>88</sup> Interview, defence lawyer, November 2023.

<sup>89</sup> Interview, interpreter, October 2023.

<sup>90</sup> Courtwatching notes, Folkestone magistrates, April 2023.

<sup>91</sup> Courtwatching notes, Folkestone magistrates, August 2023.

## “It’s a sausage factory, not proper justice”: Magistrates’ decision making<sup>92</sup>

For the majority of cases of ‘illegal arrival’, defendants pleaded guilty in the Magistrates Court. Magistrates then considered whether it was within their power to sentence the defendant.

**From May 2022 until the end of March 2023, Magistrates courts had the power to impose sentences of up to 12 months.** During this period, most people convicted of ‘illegal arrival’ were therefore sentenced at the Magistrates, as they could retain jurisdiction. Those who pleaded ‘not guilty’ or who were charged with ‘facilitation’ were sent to Canterbury Crown Court for trial or sentencing.

In September 2022, a resident judge in Canterbury gave sentencing remarks relating to the first post-NABA ‘hands on tiller’ case he handled in the Crown Court. He argued *“that the length of the sentence for offences without obvious and identifiable aggravating features would usually be somewhere in the region of 12 months imprisonment for those convicted after trial”*. After the expected guilty plea, most people who were convicted for their part in driving dinghies across the Channel were being given 8-9 month sentences (due to a reduction in sentence for pleading guilty), which could be handed down by Magistrates.

While, for the most part, these sentencing remarks given by a single Crown Court judge were uncritically adopted by Magistrates and District Judges in Folkestone, we observed occasions in which Magistrates deviated significantly from these guidelines. For example, two Indian nationals who arrived on the same dinghy were seen on consecutive days by different magistrates’ benches. The facts of the two cases were identical: each had re-entered by dinghy, having been tricked into getting into the back of a lorry to go to Scotland, but instead were taken back in Calais. One received a custodial sentence of 8 months in prison, whereas the other, in front of different bench the next day, received a suspended sentence.

**On 31<sup>st</sup> March 2023, however, across the country magistrates’ sentencing powers were again reduced to 6 months, reversing national changes made to ease backlogs caused by Covid-19.** The by now entrenched dominance of these sentencing remarks, and the reluctance of Magistrates and District Judges to deviate from them, therefore meant that benches consistently declined jurisdiction and sent these cases to the Crown Court. This is despite, as earlier sentences

demonstrated, the possibility of suspended and lower sentences for the offence of ‘illegal arrival’. As one prosecutor reflected: *“suspended sentences are rarely raised by defence, and never seriously considered”*.<sup>93</sup>

## Denying bail

*His ability to evade border controls means he is unlikely to follow conditions put on him (Courtwatching notes, Canterbury Crown Court)*

Bail was routinely denied in these cases at the Magistrates’ court. In most cases, no application was made, and the decision was made routinely and quickly. Magistrates rely on two reasons: the risk that they would **‘fail to surrender’** if bailed, and the **‘risk of reoffending’**. Given that the offence is one of mobility, these two reasons overlap. Denying bail was usually justified further through routine reference to:

- 1) The nature and seriousness of the offence and the likely sentence;
- 2) The defendant’s lack of community ties;
- 3) The defendant’s lack of a fixed abode in the UK;
- 4) An assumption that they are a ‘flight risk’, due to the nature of the offence;
- 5) That they would be detained under immigration powers regardless, so they ‘may as well’ start serving their sentence.

Taking each in turn: **first, the ‘nature and seriousness of the offence and likely sentence’, refers to the likelihood of a custodial sentence.** As most of those convicted get a standard 8/9 months. This is not a sufficient basis alone to deny bail.

**Second, ‘lack of community ties’ was nearly always included as a reason to deny bail, even where considerable ‘ties’ were evident.** For example, in one case, a Kurdish man was denied bail even though his parents (with indefinite leave to remain) had provided a bail address in the UK, offered a surety of £25,000 in support of bail, and assurance that he would be supported financially. In another case where ‘lack of community ties’ was listed as a reason to deny bail, the man’s brother sat crying at the back of the courtroom.

**Third, having ‘no fixed abode’ was frequently referred to as a reason to deny bail.** However, the majority of those arrested had ongoing asylum claims, made only hours before. People seeking asylum are eligible for accommodation provided by the Home Office. In the few cases where defendants attempted to offer a bail address

<sup>92</sup> Interview, defence lawyer, November 2023.

<sup>93</sup> Interview, prosecutor, September 2023.

<sup>94</sup> Courtwatching notes, Folkestone Magistrates, August 2023.

of a family member or friend with status in the UK, it was always rejected as 'unverified' without any further enquiry.

**Fourth, the defendant being a 'flight risk' was often used to justify denial of bail:** *"On the basis of the nature of the offence alone,"* it was argued in one case, *"there must be substantial grounds to believe that if released the defendant would fail to return to custody, and furthermore that there are substantial grounds to believe that he would commit further offences, specifically with a view of leaving the jurisdiction"*. This is despite the fact that, as some defence lawyers pointed out, by this point, they had invested significant time, money, and risk to enter the UK specifically.

**Finally, defence lawyers were often reluctant to fight for bail for their clients on remand due to the assumption that** *"they will be detained anyway under immigration powers, so they might as well be in prison serving their sentence"*.<sup>95</sup> These assumptions are made without full, transparent investigation as to the likelihood, legality, or proportionality of immigration detention for each individual. This logic is also often explicitly included by District Judges and Magistrates as part of their justifications for denying bail: *"The only thing I say about that is that your client will remain in immigration detention whatever I say, and will not be in a position to take up that position of bail whatever I say"*.<sup>96</sup>

**Time on remand in prison ranged from one month to 6 months.** While people on remand should have access to different 'privileges' (as they have not yet been sentenced for a crime), in practice, they are barred from education, work, and other rehabilitative programmes in increasingly overcrowded prisons. While this period will ultimately be deducted from the eventual sentence, not knowing how long the eventual sentence will be during this period causes considerable distress.

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<sup>95</sup> Interview, defence lawyer, July 2023.

<sup>96</sup> Courtwatching notes, Folkestone Magistrates Court, August 2023.

## 4. At the Crown Court

From March 2023, the vast majority of ‘small boat cases’ of Section 24 and Section 25 were referred to Canterbury Crown Court for sentencing or trial, after a period in prison on remand. This involved being loaded into a celled police van and driven for over an hour to court, where they were again unloaded into the cells beneath the court rooms to wait for their hearing. This chapter addresses how these cases were dealt with and sentenced in the Crown Court.



Canterbury Crown Court, photo by Captain Support

### All Rise!: Confusion in court

**More often than not, those in prison will not have had a chance to speak to their solicitor while on remand.** During the period of research, legal visits were difficult to obtain in prison, and particularly in HMP Elmley where the majority of those charged were held before they are sentenced: *“It’s so hard to get a legal visit before the sentencing hearing, and even then it’s often only 15 minutes”*.<sup>97</sup>

The lack of contact with their lawyer caused serious distress and confusion among people who, understandably, did not have good knowledge of the British legal system, their rights, or the process. Many spent months not knowing how long they would be in custody. Lack of contact with their lawyer also resulted in the only communication sometimes being a rushed consultation before their appearance in the Crown Court.

*They don’t even give you the number of your solicitor, or tell you who is going to represent you in the court. The reception officer won’t let you talk to your solicitor. They know nothing. (Samir, Sudanese)*

On one occasion before the Crown Court, a barrister asked for an adjournment, saying they needed more time to take instructions from their client. They hadn’t been able to visit him in HMP Elmley as they had been told by prison staff that no one with that name was in custody. By the time this could be corrected, and he was located in Elmley, they did not have time to meet with him. The request for adjournment was denied.

**Problems with accessing and understanding interpreters continued in the Crown Court.** For example, in one hearing observed, the wrong dialect Arabic interpreter was booked for a young man from South Sudan, and lawyer and client could not communicate effectively. The interpreter was sent away. While a full hearing was adjourned, the Judge and lawyers continued to discuss his case for half an hour in English. The young man sat alone at the back of the courtroom in the dock without any interpretation, with no understanding of what was going on, or what might happen to him. In another case, an Afghan man, who had already served two weeks longer than expected on remand, had his hearing adjourned by another two weeks because of an administrative error: the magistrates court had noted his language as Arabic rather than Pashto, meaning that the correct interpreter had not been arranged. This type of error was common. Given the backlog within the court system, the frequency of these kinds of administrative error result in hearings being delayed, often extending the period of uncertainty for those in prison.

### Illegal arrival at the Crown Court

**The majority of those before the Crown Court for these crimes of mobility pled guilty to Section 24 ‘illegal arrival’ at the magistrates court, and were produced before the Crown Court for sentencing.**

If the person has pleaded not guilty or withheld their plea, hearings might involve preparations for trial and discussions of any relevant delaying factors (such as age). Bail hearings are also heard in the Crown Court. Just as in the Magistrates Court, these cases became dealt with in a routine manner over time. As one defence lawyer explained, *“Crown Court are faced with the burden of having to process this number of cases, and they deal with it in a pragmatic expeditious way that is not necessarily the most just way, but it’s about processing them and getting them through. One the whole, it’s a routine operation.”*<sup>98</sup>

<sup>97</sup> Interview, defence lawyer, July 2023.

<sup>98</sup> Interview, defence lawyer, November 2023.

*I didn't want to say guilty but my lawyer, he made me scared. He said: "if you say guilty you will be released soon. This judge is sympathetic to you. If you say not guilty, then you might be in front of a less good judge next time and you might get a longer sentence". So they scare you into saying you are guilty. But guilty of what? I am not guilty, I am no criminal. (Ibrahim, Sudanese).*

## Sentencing illegal arrival

The NABA increased the maximum sentence for illegal 'arrival' into the UK. At the time of publication, the Sentencing Council has issued no formal sentencing guidelines for either offence – 'illegal arrival' or 'facilitation'.

**The first sentencing of the new offence of 'illegal arrival' was on 28th September 2022.**<sup>99</sup> The factor that led to the man's arrest was his alleged role in steering the dinghy he arrived on. Judge James provided sentencing remarks, without the intention that these should dictate future sentencing, but which have since been relied upon heavily by other Judges and Recorders sentencing similar cases. James noted the need to balance personal mitigation in cases *"which almost all seem to involve young men, without a known history of offending, who originate from areas of the world challenged by conflict, deprivation and the persecution of minorities. Often defendants are motivated by what they have been led to believe will be a better life"*.

Yet he concluded that *"the understandable public concerns regarding the increased prevalence of the offence, the need to deter others from placing their own and others' lives at risk and the need to attempt to starve organised criminal gangs of profiting from exploitation, demands a conclusion that the custody threshold will almost always be passed when this offence is being considered."*<sup>100</sup>

**Judge James concluded that a 12-month starting point after trial would be appropriate for this case. This would reduce to 8 or 9 if a guilty plea had been given.** This general approach used has now been upheld by the Court of Appeal.<sup>101102</sup> These sentences are very rarely, if ever, suspended, despite sentences falling within

the eligible parameters set out by the Sentencing Council's Guidelines,<sup>103</sup> and indeed, despite suspended sentences being handed down in the early days of the implementation of this offence. A full breakdown of the sentences handed down to people labelled as 'small boat pilot' by the Home Office, obtained through a Freedom of Information request, is included in Annex B. The typical sentencing remarks heard in court were that:

*Border controls provide an integral part of the nation's security. Any attempt to circumvent the immigration rules has the capacity to undermine the system as a whole. Crossing the English Channel, one of the busiest sea routes in the world is highly dangerous. It is prevalent offence which is causing genuine public concern, such as the pressure it is placing on already stressed resources. In such circumstances, it is an offence which requires the imposition of a deterrent sentence. In my judgement, only an immediate sentence of imprisonment can be justified.*<sup>104</sup>

While Judges often recognised the lack of criminal intent, ongoing asylum claims, and the vulnerability of those being sentenced, sentencing remarks emphasised that those driving dinghies *"placed both you and others in considerable danger"*. It was also often claimed that people arriving on dinghies have not only a *"clear capacity to undermine the nation's security"*, but *"undermine public confidence in the asylum system"* noting that *"this method of circumventing immigration controls is costing the state enormous sums to police"*. These kinds of assertions place the blame of displacement on those who are themselves affected, without acknowledging their reasons for doing so, or the structural reasons which necessitate their travel by irregular means. Assessments of defendants' journeys through 'safe countries' were often used to challenge mitigation and emphasise culpability.<sup>105</sup>

**For cases of Section 24 where the charging feature was having previous immigration history, sentences have been more varied.** This is because the facts of each case were often complicated by a series of aggravating factors, including the number of previous entry attempts, entry in breach of deportation orders or entry bans, or having previous convictions in the UK.

For example, a Kurdish man with Turkish nationality was arrested after arriving on a 'small boat' from France. He had previously lived in the UK with his parents and claimed asylum in 2001, arguing that he feared persecution due to his active support of Kurdish political

<sup>99</sup> *R v. Abdulminan Mohammed*, 28<sup>th</sup> September 2022

<sup>100</sup> *Ibid.*

<sup>101</sup> *R v. Ginar* [2023] EWCA Crim 1121 (26 September 2023)

<sup>102</sup> In the UK, for most offences, half the imposed sentence will be served in prison, before the person is released. For the second half, the person will remain under certain 'post-sentence supervision' conditions. In practice, therefore, this means spending around 4 months in prison.

<sup>103</sup> <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>

<sup>104</sup> Courtwatching notes, sentencing remarks, Canterbury Crown Court, June 2023.

<sup>105</sup> In International law, there is no obligation for a person to claim asylum in the 'first safe country' (Hathaway 2021, *The Rights of Refugees Under International Law*)

struggles. Both his first, and a second application were refused. He left the country, but his parents, aunts, uncles and cousins remained in the UK. He applied for a family visit visa in in early 2010s, which was rejected, and for a visit visa in 2023 which was also rejected. Finally, wanting to rejoin his family and escape persecution in Turkey, he made the journey by dinghy. He pleaded guilty to illegal arrival and was sentenced to 18 months in prison.

In another case, an Albanian man claimed asylum upon arrival on the basis that he feared violence in his home country due to his political activism. He was arrested from Manston and taken to Folkestone Magistrates court. This was on the basis that he had previously applied for a visa to enter the country as the partner of an EU national, but that this, and his appeal rights on the matter, had been dismissed. He had never previously been in the UK. A month later, he was given a 12-month custodial sentence at Canterbury. In sentencing him, the Judge remarked:

*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 having fled aggression in the country of origin.*<sup>106</sup>

As above, particularly in cases of Albanian men, there is often explicit scepticism about someone's ongoing asylum claim included in sentencing remarks, even when the reason for the claim is explained in court. Assumptions of this nature, based solely on their nationality, should not play a role in criminal proceedings while asylum claims are ongoing.<sup>107</sup> As one defence lawyer remarked, *"what seems to emerge is a hierarchy of what I'd call deserving and less deserving cases. That is a product of the origin of the defendants. So someone from Syria, from Eritrea, Afghanistan, are treated more kindly, I think then, for example, the Albanians"*.<sup>108</sup>

## Facilitation at the Crown Court

**While the majority of people arrested from Manston are charged only with the offence of 'illegal arrival', some are also charged with the more serious offence of 'facilitation' under Section 25 of the Immigration Act 1971.** Usually, this was applied only to those caught with their 'hand on the tiller' of the dinghy, however, we also observed two cases of men convicted of facilitating the arrival of their children into the UK on the dinghy with them.

**Section 25 charges were most often dropped before reaching the Crown Court** as, to quote a judge dealing

with one such case, *"a plea to Section 24 is often pragmatically and sensibly seen as an alternative"*.<sup>109</sup>

This often occurred when the additional evidence needed for a strong case under Section 25 could not be found, for example, on the defendant's confiscated phone. The argument that having a 'hand on the tiller' amounts to 'facilitation' most often does not reach court.

However, in a minority of cases, either defendants pleaded guilty to Section 25 in the magistrates, or the CPS decided to continue the prosecution on the basis of the evidence before them.

The four cases considered together within *R v Mohamed* were among the first to be charged for their alleged role in steering dinghies across the Channel after the implementation of the Nationality and Borders Act (2022). Each of the four defendants in this case were Sudanese nationals, without valid entry clearance, who claimed asylum on arrival. All four were charged with Section 24 'illegal arrival', and two were additionally charged with the more serious Section 25 'facilitation' offence. This case was discussed in a consolidated preparatory hearing before Mr Justice Cavanagh in December 2022, as well as in the Court of Appeal.<sup>110</sup> It was ultimately concluded that these offences did indeed achieve what they set out to do: to prosecute people seeking asylum for their irregular arrival to the country.

### On trial for steering a 'small boat'

**Since June 2022, there have been several trials for people charged with both Section 24 and Section 25 for their role in steering a 'small boat' across the Channel.** In one case before Salisbury Crown Court, the defence successfully argued first, that the defendant was acting under duress of circumstance, preventing the others on the dinghy from drowning. Second, the defence questioned the meaning of 'facilitation', arguing that everyone on the dinghy had helped in some way, for example in lifting the dinghy into the water, or helping inflate it. Steering the dinghy was just one of these roles, but not everyone had been arrested for 'facilitation'. The defendant was acquitted. However, this is not always the case.

One case, in particular, has attracted media attention. **In December 2022, Ibrahima Bah was arrested after the dinghy he was steering across the Channel broke apart next to a fishing vessel.** Four people are known to have drowned, and up to five are still missing.<sup>111</sup> In February 2024, a jury found him guilty of 'facilitation' and four counts of manslaughter. He was sentenced to 4 years for 'facilitation' and 9 years for each count of

<sup>106</sup> Courtwatching notes, Canterbury Crown Court, September 2023.

<sup>107</sup> In *Kishientine* [2004] EWCA Crim 3352, it was held that the criminal courts should not involve themselves in an assessment of the genuineness of an asylum claim.

<sup>108</sup> Interview, defence lawyer, November 2023.

<sup>109</sup> Courtwatching notes, Canterbury Crown Court, April 2023.

<sup>110</sup> Rulings by Mr Justice Cavanagh at a Preparatory Hearing on 14, 15 and 21 December 2022;; *R v Mohamed* [2023] EWCA Crim 211

<sup>111</sup> Alarm Phone and LIMINAL (2023) [What happened in the Channel on 14 December 2022?](#); Captain Support (2024) [Statement](#)

manslaughter, to be served concurrently, resulting in an overall sentence of 9.5 years. This is despite his consistent narrative that drove the boat after being “assaulted and threatened with death”<sup>112</sup> and consistent testimonies of survivors that he had tried to keep everyone on the dinghy calm. In court, survivors described Ibrahim as “an angel” and said “it was not his fault”.<sup>113</sup> A report by Alarm Phone and LIMINAL raises unanswered questions about the French and British responses, as well as the actions of the fishing boat next to which the dinghy broke apart.<sup>114</sup> Their analysis highlights the Government’s attempt to scapegoat this one individual, Ibrahim, for deaths at sea. Deaths which are entirely avoidable by providing people on the move with safe means to enter the country.

### Sentencing ‘small boat’ facilitation offences

**People accused of steering a ‘small boat’, who pleaded guilty to Section 25, or who were found to be guilty, were then sentenced.** In the sentencing remarks for the first of these Section 25 sentencings heard at Canterbury Crown Court (June 2023), Judge James suggested that **between 3 and 6 years would be appropriate, with a starting point after trial of 4 years.**<sup>115</sup> In this case, a young Sudanese man, who had admitted to steering the dinghy he arrived on in exchange for free passage, and had pleaded guilty to ‘facilitation’, was given a sentence of 3 years imprisonment.

However, in a subsequent case before the Court of Appeal (*Ahmed v R* [2023]), the Judges ruled that where the level of culpability is low, as they commented it is for the vast majority of these ‘boat pilot’ cases, that a **custodial sentence of 3 years should be the starting point.**<sup>116</sup> This was the case even though it was recognised that the man in question likely had “strong arguments to support his asylum claim”.

Deviating from *Ginar* [2023], this judgment did not comment on the coherence of the Government’s logic of ‘deterrence sentences’. However, they did make it clear that those with ‘high culpability’, who are involved in ‘commercial activity in which the offender plays a substantial role’ are rarely ever prosecuted: “for those such as the appellant whose role was to pilot the boat and whose primary interest was in achieving his own entry into the UK, an increase in the custodial term to reflect the increase in the maximum term will not be appropriate” (*Ahmed v R* [2023]).

## Media Coverage of court hearings

There has been some, albeit limited, reporting on what has been happening in criminal courts across Kent. Those who have covered courtroom developments are often briefed by Home Office or National Crime Agency media teams. Often, this reporting includes personal details (names, age, location) of those before the court, including people with outstanding asylum claims. They are not linked here, so as not to increase the risk of harm of those whose names have been published.

While the usual principle in courtrooms is one of ‘open justice’, immigration and asylum cases heard in the Court of Appeal are quite routinely anonymised to safeguard both the appellant and their family.<sup>117</sup> Identification through media reporting both publicly announces the location of an individual who has fled persecution, as well as potentially disclosing further information which could put them at risk, either from those they fled from, or from those who facilitated their passage. While, in principle, this type of protection against media reporting should be available to people who have sought asylum in the magistrates and Crown Courts,<sup>118</sup> in practice, defence lawyers do not apply for this type of protection, and where it is applied for, is rejected.<sup>119</sup>

**The result is reporting which increases risk of harm both to individuals appearing in court, as well as their families.**

<sup>112</sup> <https://www.independent.co.uk/news/uk/crime/english-channel-senegal-canterbury-crown-court-libya-channel-b2371404.html>

<sup>113</sup> Courtwatching notes, Canterbury Crown Court, February 2024.

<sup>114</sup> Alarm Phone and LIMINAL (2023) [What happened in the Channel on 14 December 2022?](#)

<sup>115</sup> Courtwatching notes, Canterbury Crown Court, 28<sup>th</sup> June 2023

<sup>116</sup> *Ahmed v R* [2023] EWCA Crim 1521

<sup>117</sup> See <https://www.judiciary.uk/guidance-and-resources/practice-guidance-anonymisation-of-parties-to-asylum-immigration-cases-in-the-court-of-appeal/> (5)

<sup>118</sup> Bunting 2023, p.324; see also precedent in [2017] EWCA Crim 2129 where Lady Justice Hallet ruled that, in this case “it would, in principle, be desirable for the Court of Appeal Criminal Division to follow the practice adopted by the Civil Division and the Tribunals of anonymising the applicant in cases raising asylum and international protection issues”, although she declined to give general guidance on the matter.

<sup>119</sup> Courtwatching, Canterbury Crown Court, December 2022.

## 5. Conditions and experiences in prison

*It's a limited life in the prison. Today is like tomorrow and yesterday. The same problems everyday. There is no life inside the prison.*  
(Samir, Sudanese)

The prison system in England and Wales is widely recognised to be at a crisis point. Overcrowding, poor-quality buildings and infrastructure, self-harm, violence, and drug use are widespread.<sup>120</sup> This chapter argues that not only is imprisonment experienced as violent by those incarcerated, but that they experience certain compounded violences due to their migration background: often being imprisoned far away from support networks, facing language barriers which prevent access to basic needs, and experiencing both racism and racist abuse within the prison system.

### HMP Elmley



HMP Elmley, photo: Captain Support Network

The majority of those arrested for these offences are sent, on remand, to HMP Elmley on the Isle of Sheppey straight from the Magistrates Court. Elmley is a Category B prison, housing around 1,100 men, half of whom are on remand awaiting sentencing, while others have been sentenced. In its most recent inspection, conducted in February 2023, the prison scored 'not sufficiently good' across all areas, including 'safety', 'respect', and 'rehabilitation and release planning'.<sup>121</sup>

In October 2023, the Ministry of Justice triggered 'Operation Safeguard' for HMP Elmley as it 'reached capacity'.<sup>122</sup> The high numbers of people on remand for 'illegal arrival' in the prison are likely to be a significant contributing factor to this overcrowding.

*They took me to court from the police station. I didn't know what was happening. I didn't know what's guilty or not guilty means. But my lawyer said I could say 'not guilty', so I did. Then they said you have to go to prison. And they didn't tell me anything about for how long. At 7 or 8 in the evening I arrived at the prison. I didn't know what was happening. I didn't even imagine what was happening to me. (Ahmad, Iranian)*

'Foreign national offenders' are, for the most part, held together in Elmley: *When I was there, they moved all the foreigners to Block 6. There's 6a and b. One was for rapists, one was for foreigners. (Ahmad, Iranian)*

Those in the prison frequently reported not being able to access information about their case or their situation from within the prison, resulting in significant distress:

*When we arrived, they put cuffs on me and they didn't give me any information or guidelines. I didn't understand anything. They just gave me a prison ID. They didn't tell me how long I would be there, or when my next court date was. We're not allowed to speak with the officers unless it's about things inside the prison, like the food. If you talk to the officers about your case and you argue, they're going to lock you in an isolated room alone. (Samir, Sudanese)*

**People held in Elmley reported not having access to sufficient food or medical care for both physical and mental health conditions.** These problems were exacerbated by limited access to interpretation, where people reported not being able to advocate for their own needs because of a language barrier with prison staff. The latest inspection report noted that "staffing shortages in primary health care had led to weaknesses in governance, a reduction in services available and long

<sup>120</sup> <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2023/>

<sup>121</sup> <https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2023/03/Elmley-IRP-web-2023.pdf>

<sup>122</sup> <https://www.kentonline.co.uk/sheerness/news/emergency-declared-as-kent-prison-reaches-capacity-294824/>

waiting times”.<sup>123</sup> This was particularly acute for people arrested for crossing the Channel, who may not have been able to access medical support along their journeys, may have sustained injuries during their crossing, and who may be suffering from the impact of their displacement on their mental health while also in prison.

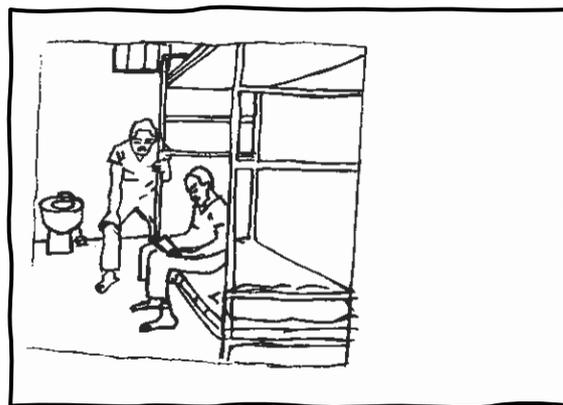
*There is not enough food in prison. Not enough. Happened to me a lot of times when I was in the queue and they said there's no more food. There's only like rice, left, but lots of people, they can't eat that. You can't complain because the guards they will make things worse. Happened many times when I did not have enough to eat in the prison. (Ibrahim, Sudanese)*

**Frequently, people within the prison reported being treated differently because of being a 'foreign national'.** The latest HMIP inspection of Elmley found that “the absence of a needs analysis and clearly defined equality strategy left leaders without a sense of direction or the ability to monitor progress of and assess outcomes for prisoners with protected characteristics”, including being a foreign national. It is not clear whether inspectors themselves had access to interpreters, and hence whether they could speak to foreign nationals detained within the prison as part of their report:

*The officers, they insult people, especially foreigners. [One guard] many times he insulted many people, including myself. Lots of times he would say – I'm sorry for my language – but he would say “fucking foreigners” to us a lot. “Fucking foreigners. Fucking foreigners.” (Ahmad, Iranian)*

*Literally every day we faced racism and discrimination inside that prison [Elmley]. With the officers, with them it's different with other people there. We are discriminated against because we are not nationals. If you give the officers your general application for study or work, you will be sure that it will be in the bin, unless you give it to a white prisoner to give to the guard. (Samir, Sudanese)*

People in prison clearly identified unmet needs specific to being 'foreign nationals', including better access to English classes (“I waited 7 months before I got into English classes because there's a long queue” (Ibrahim, Sudanese)), and clothes. Being away from family and friends weighed heavily on those we spoke to, and contributed to rapidly declining mental health and extreme feelings of isolation:



*When I didn't get visits, the people in prison they'd ask why I had no one, why no one was visiting me. Then they started joking about it and laughing. It is easy to start fights this way because it is difficult [...] And with clothes, if no one sends you any then you wear the prison clothes and everyone knows that you have no one. (Ibrahim, Sudanese)*

The inspection also raised substantial concerns around the use of force within HMP Elmley, reporting that “use of force documentation was not always fully completed”, and that “too many staff failed to activate [body-worn video cameras] during an incident”. Those we spoke to each had a story about abuse they witnessed or experienced while in HMP Elmley, whether that was threat of abuse done in spaces where officers knew they were not captured on CCTV, or in some cases, reports of explicit physical abuse by officers:

*When I just arrived and I didn't speak any English, they hit me with sticks and they got me on the floor. Five guys, they bent my arm back to my shoulder and then they handcuffed me. Then they asked me to get up. But how could I get up from that position, my chest, my face in the floor, and my hands tied behind my back. I couldn't. I just lay there. Then a woman, she helped me up. I went to my cell and a gov asked what I did to be in handcuffs. I said check the CCTV, I did nothing, they hit me. The next day they came and said we saw you did nothing. But then nothing happens. Where is justice here? (Ibrahim, Sudanese)*

<sup>123</sup> See 119.

## HMP Maidstone

Those who received a sentence of 12 months or above were usually transferred to HMP Maidstone for the remainder of their sentence.

*I didn't want to move from Elmley to Maidstone. They came first thing in the morning and they said "pack your stuff" and I said "No. I'm not going to be transferred". These people, they don't want me to be happy. Even when I was 'prison happy' and had a good cell mate, they don't want me to be happy. The officer came and said, "look, get your stuff, or we are going to carry you without your stuff and drop you in the van". I was like, ok I'll take my stuff. They transferred me. That van, from [the private company] Serco, it's nightmare. If you're going to stand up, you'll smack your head. You have to stay sitting. You don't know where you're going to go, you don't know the time you are going to spend in this van. You are stressed and you are panicked. It is very easy to get a panic attack from this. (Zain, Syrian)*

Maidstone is one of three 'Foreign National only' prisons in the country, and imprisons around 580 men.

The most recent inspection<sup>124</sup> flagged major concerns, including that: there was "widespread anxiety and distress"; less than a third of prisoners said they had enough to eat; oversight and scrutiny of use of force was weak; access to activities was limited; professional interpretation services were not used enough, resulting in safeguarding and vulnerabilities concerns not being identified and addressed, as well as exacerbating feelings of loneliness and isolation; people were asked to sign documents they didn't understand; legal representation slots were booked weeks in advance, limiting access to representation and advice.

Captain Support UK, Humans for Rights Network and Refugee Legal Support know of at least two individuals held in prisons other than HMP Elmley and HMP Maidstone. **We are concerned that more people are being held in other prisons around the country for these offences, particularly if they were arrested after being transferred to asylum accommodation and do not have access to support.**

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<sup>124</sup> <https://www.justiceinspectorates.gov.uk/hmprisons/wp-content/uploads/sites/4/2023/01/Maidstone-web-2022.pdf>

# 6. Ongoing impacts of imprisonment

**Imprisonment can cast long shadows into people's lives, whatever their circumstances.** This chapter addresses the ongoing impacts of imprisonment on the people supported by Captain Support. The vast majority of those arriving into the UK on 'small boats' claim asylum on arrival,<sup>125</sup> and this is true also of those arrested for 'illegal arrival' or facilitation off these same dinghies. These ongoing claims are important as they restrict the Home Office's ability to remove people from the country. However, this does not prevent the Home Office from issuing paperwork to people signalling their intent to deport them, nor does it prevent them from being detained.

## Immigration detention and deportation

Deportation, or even threat of deportation, is not legally a criminal sanction nor is it considered a form of double punishment, but in practice it is frequently experienced as such.<sup>126</sup> While the majority of those convicted of illegal arrival are released from prison, many remain in custody, detained under immigration powers following being issued a deportation notice.

The Home Office should only detain people where there is a realistic prospect of removal within a reasonable timeframe.<sup>127</sup> While most people are released straight from prison, many are not. They are moved to an Immigration Removal Centre after they have served their custodial sentence. There is no time limit on detention, so people are detained without knowing when or if they will be released.

**Two groups are most likely to be issued with a deportation notice while in prison for 'illegal arrival' or 'facilitation'.** First, those who received a sentence of over 12 months. Part 13 of the Immigration Rules state: "A foreign national, who is not an Irish citizen, is liable for deportation where: (a) they have been convicted of a criminal offence for which they have received a custodial sentence of at least 12 months".

Of the people we have been in contact with, all those sentenced to 12 months custody received an automatic deportation notice, even if there was no prospect of removal because the individual has an ongoing asylum claim and is a national of a country such as Syria or Sudan.

Second, people can be detained if the sentence they received is below the 12 months threshold, but their

removal is considered in the 'public good'. In practice, this often means people from nationalities where returns agreements increase the possibility (at least on paper) of their removal, particularly Albania and India. We have observed cases where people from these nationalities are detained by the Home Office after the end of their criminal sentence, even when this sentence was under 12 months.

We have observed cases where people from high asylum grant rate nationalities (including Syria and Sudan), where there is no realistic prospect of removal, were detained after the completion of their custodial sentence.

So far, none of the people Captain Support, Humans for Rights Network or Refugee Legal Support have been in touch with have been deported because of their mode of arrival into the UK. This is because they all either have an ongoing asylum claim, or substantial family ties to the UK which would explain their previous immigration history. Judges seeing their bail applications recognise there is no imminent prospect of deportation, and release them. However, there is a possibility that this could happen.

## Upon release: Homelessness or Hotels

Those sentenced to less than 12 months imprisonment were generally released after serving half their sentence. Generally, they were given a small amount of money and a train ticket to their probation appointment. They must find their own way there, often without a phone, in a foreign country, and often with limited English.

As the majority had previously claimed asylum when they arrived in the UK, and met destitution criteria, they were eligible for Home Office provided accommodation when they leave prison. On many occasions, however, people with ongoing asylum claims were released from prison without any accommodation, leaving them both homeless and destitute. This happened particularly when people were released on a Friday and could not reach their probation appointment until after 5pm.

Where coordination between the Home Office, probation, and prison officers was successful, those released from prison were taken to asylum accommodation. People had no choice as to where they are sent in the country. As with most accommodation during this period, this was most likely a hotel. As previous research by others have shown,

<sup>125</sup> In the year ending June 2023, [90% claimed asylum](#).

<sup>126</sup> Bosworth (2011) Deportation, detention and foreign-national prisoners in England and Wales, *Citizenship Studies*, 15(5), 583-595

<sup>127</sup> Home Office (2024) [Adults at risk in immigration detention](#)

this accommodation is often isolated and inadequate, particularly for housing potentially vulnerable people.<sup>128</sup>

Ahmad, from Iran, talked about his experiences in hotel accommodation as a continuation of what he had experienced in prison:

*I have nothing to do, I have no permission [to work]. It's actually an open prison. No permission to work, can't stay out more than 24 hours, can't cook, can't put what you want in your room. The other people in the hotel can be difficult because they have nothing to do. Lots of people stay in bed 24 hours. There are lots of problems. And then after a year they are expected to be part of society. It is not right.*

## Bail conditions

After being released from prison, people are subject to two sets of conditions:

1) **Criminal post-sentence licence conditions** which should be monitored by a probation officer. These remain in place for the second half of someone's sentence which they didn't spend in prison.

2) **Immigration bail conditions.** These can include regular (up to weekly) attendance to an immigration reporting centre, often in a different city.

**These conditions are not always clear, and information is not always provided in the appropriate language meaning they can be easily misunderstood.** In one case, a Kurdish person missed their probation appointment due to not being aware of the appointment. They were then arrested from their hotel accommodation and recalled to prison for breaching their bail conditions. Due to then being away from their Home Office asylum accommodation while being imprisoned, this accommodation was removed, but no alternative was arranged when they were released a week later. They became street homeless.

In another case, faults with a Sudanese young person's electronic monitoring ankle tag indicated he was not in his approved accommodation one night, despite evidence from staff that he was. The young person was arrested for breaching his bail, where he was taken to court. He pleaded guilty because he was not provided with interpretation and did not understand what he was being accused of, or what was going on. He could not explain

the situation. While this was later corrected so that it would not affect his ongoing bail conditions, it caused significant distress, and demonstrated clear failings in procedural justice.

**Electronic monitoring as a condition of immigration bail was introduced into legislation in 2004.** In recent years has been used more frequently for the tracking of people while they await their asylum claim.<sup>129</sup> It is widely acknowledged, however, including by the Public Accounts Committee and the National Audit Office, that "the Ministry and HMPPS still do not know what works and for who, and whether tagging reduces reoffending."<sup>130</sup> In other words, there is no evidence to support the government's argument for their use. In contrast, there is significant evidence detailing the impact of tagging on people's mental health, including exacerbating psychological illness and recovery.<sup>131</sup> Having been imprisoned for crossing the border, being forced to carry around this reminder has significant impacts on people's mental and physical health:

*This ankle tag is difficult. It stops me sleeping because it beeps in the night when it needs to be charged and I have to wake up and plug it in. And sometimes when I'm walking down the street it beeps and I have to go back to the hotel to charge it. It is difficult, it stops me being free. (Ibrahim, Sudanese)*

Most asylum seekers do not have the right to work in the UK. Being prevented from working has a profound impact on people's mental and physical health as they are kept in limbo in the UK's asylum system.<sup>132</sup> We have also seen people without the right to study. As Ibrahim, from Sudan, put it:

*My bail conditions, I cannot work, I cannot study. I wanted to go to class in [nearby town], but I am worried because I cannot study. I cannot get my English better. It is so stupid. It is so much for everyone, because I have to use an interpreter for doctors and stuff. Wouldn't it be better for me to learn, better and easier for everyone.*

## Physical and mental health

**Prison has a significant impact on the health of those imprisoned for seeking asylum.** This often exacerbates the impact of trauma experienced in home countries, in displacement journeys, and the effects of being in the limbo of the UK's asylum system. Poor medical care

<sup>128</sup> See Refugee Council (2022) [Lives on Hold](https://www.refugee-action.org.uk/heartbreak-hotels/); <https://www.refugee-action.org.uk/heartbreak-hotels/>; Human Rights Watch (2023) ["I felt so stuck"](https://www.hrw.org/report/2023/01/11/i-felt-so-stuck/)

<sup>129</sup> See BID, Medical Justice and Public Law Project (2022) [Every Move You Make: The Human Cost of GPS Tagging in the Immigration System](https://www.bid.org.uk/every-move-you-make-the-human-cost-of-gps-tagging-in-the-immigration-system/)

<sup>130</sup> <https://committees.parliament.uk/publications/30446/documents/175605/default/>

<sup>131</sup> See BID, Medical Justice and Public Law Project (2022) [Every Move You Make: The Human Cost of GPS Tagging in the Immigration System](https://www.bid.org.uk/every-move-you-make-the-human-cost-of-gps-tagging-in-the-immigration-system/)

<sup>132</sup> See <https://www.refugee-action.org.uk/wp-content/uploads/2018/10/Lift-the-Ban-report.pdf>

within the prison means that people often experience further delays to accessing the healthcare they need, making conditions worse:

*It has had a massive massive massive effect on my mental health and my physical health. I lost a lot of weight. It was my first time to be in a jail, to be in a locked place. Without knowing you are why you are inside the prison. You didn't do anything, you are not guilty. (Samir, Sudanese)*

**The impact of having a criminal record can also cast a long shadow.** Many employers require criminal records to be disclosed, which means that they may struggle to find work. People affected talked about constantly finding new hurdles to overcome due to their criminal conviction:

*My probation or anytime I apply for work, they're going to tell me, you've got a criminal record. It destroyed my life. I had big plans for my life. I came to the UK. I survived from my country, 15 years of war. I came to start a new life, to save the rest of my family. Now they destroy my life. have criminal record. Even going to some countries, if I want to visit my cousin it is impossible now. It was 'illegal entry' yeah, but criminal. (Zain, Syrian)*

## Impacts on asylum and citizenship

**Being imprisoned delays the process of being granted refugee status.** This is because asylum claims are usually paused while someone is in prison. Questions remain about the impact of these convictions on people's ongoing asylum claims. However, given the length of the Home Office's asylum backlog, we do not yet have sufficient evidence to comment on the likely impact.

People with criminal convictions can, in some circumstances, be denied refugee status if the crime is deemed to be "particularly serious".<sup>133</sup> The Nationality and Borders Act (2022) reduced the UK's definition of "particularly serious" from any conviction leading to a sentence of imprisonment of two years down to only 12 months. It is possible that any 12-month sentence, or conviction under Section 25, could be used to invoke Article 33 (2) and waive protection from non-refoulement for someone who is already recognised as a refugee.<sup>134</sup>

In one ongoing case, in the immigration bail hearing of Syrian man sentenced to 12 months for 'illegal arrival', the Home Office Presenting Officer orally stated they were in the process of revoking his refugee status due to his criminal conviction. However, at the time of publication some months after this was stated, he has not received the follow up paperwork confirming this intention.

**It is, however, certain that those with a sentence of 12 months or above will face particular difficulties with their ongoing immigration status, after being granted asylum.** 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".<sup>135</sup> Part 9.4.1 of the Immigration Rules (as amended) states 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.<sup>136</sup>

**Criminal judges are not allowed to consider the immigration impact their decision making when deciding the length of the criminal sentence.** This is where the issue of credit becomes even more crucial. A 12-month sentence (the risk if someone pleads 'not guilty') compared with an 8-month sentence (with full credit for a guilty plea at the first opportunity) represents not only an additional 2 months in custody but effectively condemns the personal to a lifetime of insecure immigration status in the UK. They will never be able to obtain indefinite leave to remain or naturalise as a British citizen.

<sup>133</sup> Yeo (2024) [Briefing: Can criminals be denied refugee status?](#)

<sup>134</sup> <https://www.gov.uk/government/publications/asylum-instruction-exclusion-article-1f-of-the-refugee-convention/exclusion-article-1f-and-article-332-of-the-refugee-convention-accessible-version#article-33-2-immigration-rule-334>

<sup>135</sup> <https://www.gov.uk/government/news/home-secretary-cracks-down-on-criminals-receiving-citizenship>

<sup>136</sup> <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal>

# 7. Age disputed children in adult prison

*This section has been written jointly by Vicky Taylor and Humans for Rights Network.<sup>137</sup>*

Many unaccompanied children arriving in the UK without documentation find it difficult to 'prove' their age. They may be unable to produce documents because they were destroyed, lost or taken, never issued, or in some cases because the child travelled on false documentation.<sup>138</sup> Many are subsequently treated as adults after brief 'age enquiries' conducted in Dover by immigration officials. The Home Office and Local Authorities are subject to a legal duty to safeguard children who are in the UK and to promote their welfare. This chapter addresses the urgent issue of vulnerable age-disputed children being charged, prosecuted and imprisoned in adult prisons for their 'illegal arrival' in the UK to seek asylum.

## Issues with age determination processes in Dover

The process of "age assessing" individuals who state they are children begins just after they are disembarked at Dover. When young people arrive, they are given an opportunity to state their age or date of birth at Western Jet Foil. If they say they are under 18, there are three options available to Border Force staff and the in-house team of independent social workers:

- (a) to believe the child,
- (b) to dispute that the individual is a child but acknowledge there is some doubt, or,
- (c) to determine that the child's appearance strongly suggests they are significantly over 18 and therefore treat them as an adult without further enquiry.<sup>139</sup>

Those who are deemed to be (a) children or (b) 'age-disputed children' are usually transferred to the short-term holding facility, Kent Intake Unit ('KIU'), before being released into the care of a local authority. Those deemed to be (c) are taken into a porter cabin for an 'enquiry' into their age completed by immigration officers and, sometimes, an independent social worker.<sup>140</sup> During this 'enquiry', young people are questioned about their age and journey to the UK, and an assessment is made about their physical appearance as well as their demeanour.

**These initial assessments, done within hours of traumatic journeys across the Channel, have been widely criticised as unreliable and subjective.**<sup>141</sup> Yet, the outcome may decisively shape a child's journey through the British asylum system. Previous research has included the testimony of children describing the hostility of those carrying out these brief assessments, where the presumption, they felt, was that they were lying. Children have reported not being provided with the correct interpreter, impacting their ability to both explain and understand their situation. Children have frequently reported being unclear as to the purpose of and what was being tested in these interviews. Humans for Rights Network also regularly speaks with children who arrived with proof of their age, but who were not allowed to present it at these short interviews. After being assessed as adults, these young people reported not understanding the reason for the age given to them and receiving no information or support on how to dispute this decision.

**These 'enquiries' are not full or formal age assessments and should not be seen as a comprehensive or reliable determination of age.** They are brief, lasting between 10 and 40 minutes according to those who have experienced them. It is clear from the testimonies of many young people that these 'enquiries' are not trauma-informed and are carried out in settings which would not be considered suitable or lawful for a Merton-compliant age assessment to be conducted (in a porter cabin, without an in-person interpreter, quickly, soon after a traumatic journey, and without access to advice or support). These enquiries can end in the age-disputed child being 'given' an adult date of birth by those who undertook the assessment.<sup>142</sup>

**Previous research by refugee support organisations in the UK has demonstrated that the Home Office does not know how accurate these assessments are, nor how many of them are overturned.**<sup>143</sup> Strong evidence shows that the government consistently misrepresents the accuracy and reliability of these initial assessments.<sup>144</sup> Data obtained by Freedom of Information (FOI) requests shows that from January 2022 – June 2023 over 1300 children were wrongly 'assessed'

<sup>137</sup> See also <https://www.theguardian.com/uk-news/2023/aug/27/children-reaching-uk-in-small-boats-sent-to-jail-for-adult-sex-offenders>

<sup>138</sup> Helen Bamber Foundation and Humans for Rights Network (2023), [Disbelieved and denied: Children seeking asylum wrongly treated as adults by the Home Office](#)

<sup>139</sup> Home Office (2023), [Assessing Age for asylum applicants: caseworker guidance, March 2023](#).

<sup>140</sup> HMIP (2023) [Report on an unannounced inspection of short-term holding facilities at Western Jet Foil, Manston and Kent Intake Unit, Jan – Feb 2023](#) 2.35

<sup>141</sup> Helen Bamber Foundation, Humans for Rights Network and Refugee Council (2024) [Forced Adulthood: The Home Office's incorrect determination of age and how this leaves child refugees at risk](#), Refugee Council (2022) [Identity Crisis: how the age dispute process puts refugee children at risk](#); Helen Bamber Foundation and Humans for Rights Network (2023); <https://post.parliament.uk/research-briefings/post-pn-0666/>; Independent Chief Inspector of Borders and Immigration (2022) [An inspection of the initial processing of migrants arriving via small boats at Tug Haven and Western Jet Foil](#)

<sup>142</sup> Helen Bamber Foundation and Humans for Rights Network (2023) [Disbelieved and denied](#)

<sup>143</sup> Ibid.

<sup>144</sup> See Ibid.; Enver Solomon 2023, [Lets be clear on children seeking asylum](#); Refugee Council 2022 [Identity Crisis](#)

by the Home Office in these initial assessments to be adults, having subsequently been recognised to be children by Local Authorities.<sup>145</sup> This is likely to be an underestimate of the total picture, as not all children are referred to children's services, and not all local authorities responded to the FOI requests.

## Children charged as adults for seeking asylum

**One result of these flawed age assessments in Dover is that criminal charges for 'illegal arrival' and 'facilitation' are brought against children with ongoing age disputes.** The Home Office does not collect accurate data on the number of age-disputed children charged as adults, or the outcomes of their age disputes. For example, at the same time the Home Office admitted that one age-disputed individual had been charged, Humans for Rights Network was working with three.<sup>146</sup> There are clear issues not only of transparency, but of how an individual's age dispute is recorded. If someone is given an adult date of birth through the process outlined above, there is no marker that follows them to say that they remain 'age-disputed', or that outlines how they were given the date of birth. The burden is on the child to consistently advocate for the fact he is age-disputed, as other agencies are not otherwise informed.

**Humans for Rights Network, Captain Support UK and Refugee Legal Support have identified 15<sup>147</sup> children with ongoing age disputes who were arrested, charged, and convicted for their 'illegal arrival' or for 'facilitating' the arrival of others.** 14 of these spent time in adult prison for these offences. Each of these young people sought asylum in the UK, and several claim (or have been found to be) survivors of torture and/or trafficking. The most common nationalities are Sudanese or South Sudanese.

These children were identified at varying points in their journeys through the British criminal justice system. Some were identified through court observation in Kent Courts, some through other people in prison, and others via their criminal solicitor. Several were identified after they had served their criminal sentence in an adult prison. During incarceration, children struggled to access child protection mechanisms, including access to specialist support services, and a fair assessment of their age. This left them incarcerated in adult facilities and delayed the provision of support in many cases.

**15 is very likely to be an undercount of age-disputed children who have been charged with these offences.**

The identification processes available to Humans for Rights Network and Captain Support UK focus mainly on Kent; however, we recently identified an age-disputed child who was arrested from their asylum hotel after arrival and brought before Luton Magistrates Court. The outcome was the same: he was sent to an adult prison. This raises significant concerns about the unknown number of age-disputed children being seen before adult courts across the country, and the subsequent outcomes.

**These age disputed children are generally arrested because of being identified with their 'hand on the tiller' of dinghies crossing the Channel.** There is a large body of evidence detailing the vulnerability of children to exploitation on their displacement journeys,<sup>148</sup> including in Northern France.<sup>149</sup> 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.<sup>150</sup> Children of certain nationalities may have reduced financial means to pay for spaces on dinghies, which leads them open to exploitation. One age disputed child criminalised in the UK explained to Humans for Rights Network how he did not want to drive the dinghy but was threatened with a gun to his head on the beach in Northern France. In another case, the evidence used against a child was a photo of him trying to help fix a motor in the middle of the Channel because the dinghy was in distress.

**Each of the 15 young people identified by Humans for Rights Network has experienced a different journey through the criminal justice system after being prosecuted for 'illegal entry' or 'facilitation'.** This has depended on factors including the proactiveness of their lawyers, and whether they decided to continue to claim they were under-18 or accept sentencing as an adult to secure earlier release from prison.

**At the time of writing, at least five of these young people have been subsequently confirmed to be a child after they were accommodated by the relevant Local Authority.** Two had their ages accepted without a detailed 'Merton' age assessment, indicating that professionals within Local Authorities were satisfied by their immediate interactions with them that they were children. Two were confirmed to be children after 'Merton' age assessments were completed. We expect this number to increase over time. It is usual for age disputed children to wait long periods of months or years before a

<sup>145</sup> Helen Bamber Foundation, Humans for Rights Network and Refugee Council (2024) [Forced Adulthood: The Home Office's incorrect determination of age and how this leaves child refugees at risk](#)

<sup>146</sup> FOI data, December 2023.

<sup>147</sup> All of these age disputed children were convicted after the implementation of the Nationality and Borders Act, except for one young person who was convicted prior. All arrived through Dover and were subject to initial 'enquiries', except for one who arrived through an airport and was not subject to an initial enquiry at his port of entry due to the situation around his arrival.

<sup>148</sup> 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

<sup>149</sup> UNICEF (2016) [Neither safe nor sound](#)

<sup>150</sup> <https://lostineurope.eu/investigations/boat-drivers-investigation/italy-migrant-children-tried-as-adult-smugglers-in-court>

final decision is reached on their age. This means that these children could wait years to have their convictions overturned.

**The emphasis here is not on these numbers, but instead to highlight that the criminalisation of vulnerable asylum-seeking children is an inevitable consequence of the overlap between current Home Office age assessment processes in Dover, and the Crown Prosecution Service's prosecution strategy.** The procedural and legal injustices occurring in courts and prisons in Kent implicate the Home Office, the CPS, the Ministry of Justice, prison staff and governments, and relevant Local Authorities.

## Children in the Magistrates

Children charged as adults appear in Magistrates courts in Kent alongside adults. The court is given the age assigned to them by the Home Office in Western Jet Foil, without any indicator that this is an assigned age based on a preliminary 'enquiry', not the age stated by the child. **The responsibility, at every stage, is placed on the child to continually dispute this given age and state that they are a child.**

**When age-disputed children first started appearing before Folkestone Magistrates' court, they were met with either confusion or denial.** Neither lawyers nor magistrates had experience in what happens when the defendant disputes their age. Someone's age has real implications, including whether the CPS continues the charge, which court they are dealt with in, whether they are granted bail, and if not, which custodial facility they are sent to. In one early case before Folkestone Magistrates in February 2023, for example, despite the accused saying that he was 16 – not 25 as the Home Office had assessed him – his lawyer made no representations on his behalf, including regarding his age. Clearly confused, the magistrates simply rejected the young person's stated date of birth without any further consideration or discussion about the Home Office's 'given' age and its basis. The young person was simply sent to an adult prison.

**However, after a series of these cases from February 2023 onwards, a more standardised procedure developed.** 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 Children 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. Magistrates sometimes attempted to get the young person to give evidence about

their age, without consideration as to the distress this may cause them, their vulnerability, or their inability to access specialist legal advice.

**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. Ultimately, rather than believing the child and giving them the benefit of the doubt, often magistrates selected lines from the Home Office's written defence of their given age to support a Section 99 assessment in favour of them being an adult. When children themselves raised problems with the assessment, they were ignored:

*I've read the Senior Immigration Officer's assessment which was agreed by the independent social worker about his demeanour and his body build. [The defendant's] response was because of his upbringing which wasn't easy, he might come across as more confident, and that because of the hard life he's had, he might appear more mature.<sup>151</sup>*

In a few cases, Magistrates' and District Judges expressed discomfort with the position they were being put in by the Home Office and the CPS, recognising the real risk of placing a child in an adult prison. *"All I've seen is a scribble on a piece of paper [regarding the young person's age]",* stated a District Judge in one case, *"The difficulty we have today is that he is on the link, the sound quality is poor, and my learned friend [the prosecution] has not had the opportunity to see him".<sup>152</sup>* In this case, the Judge decided that, in the absence of full details from the enquiry undertaken from the Home Office, with the defence solicitor saying they had real concerns about him being dealt with in an adult court due to his apparent youth, and his appearance via a poor-quality video link, the court could not continue on the basis that the young person was an adult.

There has only been one case where an adequately informed solicitor and concerned District Judge ensured that the young person was released on bail to the care of the relevant local authority as an age disputed child, although he still spent a week in an adult prison on remand before this occurred. In all other cases these children were disbelieved and remanded into adult custody, except one who was bailed to an adult asylum hotel in which he felt unsafe.

<sup>151</sup> Courtwatching notes, Folkestone magistrates, April 2023.

<sup>152</sup> Courtwatching notes, Folkestone magistrates, July 2023.

## Children in the Crown Court

In the majority of these cases, age disputed children were remanded to an adult prison in HMP Elmley while they awaited further hearings in the Crown Court, or the outcome of an age assessment (if referred for one in prison). They could be in an adult prison for months waiting for an outcome. In at least two cases, this delay has stretched longer than the person would otherwise have been in prison because of their conviction, resulting in the young person accepting being sentenced as an adult so that their release would not be delayed any further. Children explained to Humans for Rights Network that their primary concern was leaving adult prison as soon as possible. While pleading to the offence as an adult resulted in a quicker release in some cases, it means that the young person has a conviction and adult sentence on their record.

**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 than they physically appear”.**<sup>153</sup> From the experiences of attending court hearings, these young people’s physical appearance did seem consistent with the age they stated, given their life experiences. But regardless, it is widely recognised that physical appearance should not be considered the sole, or even primary, factor in determining someone’s age. The Home Office’s own guidance states that both ‘physical appearance’ and ‘demeanour’ are ‘notoriously unreliable’ and there is a recognised high margin of error.<sup>154</sup> The explicit articulation of these views in court, particularly in hearings where the child could not respond or defend themselves, was distressing for these young people.

**On some occasions in court, pressure was placed on defendants to abandon their age disputes.** Judges spoke of “*fantastically expensive*”<sup>155</sup> age assessments, and it was often commented that a negative age assessment “*will almost certainly result in a considerable reduction in credit*” upon sentencing.<sup>156</sup> 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:

*If he wants to be seen as an 18-year-old, which makes him young in any case, he will receive a 1/3rd off for pleading guilty at the first opportunity. If he continues to*

*assert that he is under 18, I cannot sentence him... I don’t know how long that would take.*<sup>157</sup>

Judges at the Crown Court 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*”<sup>158</sup> from West Africa to the UK (despite widespread evidence that many children of this age do take these journeys for their own safety each year)<sup>159</sup>. Even where judges noted they should be “*acutely conscious of the different heritage*”<sup>160</sup> of the young person, they always again resorted to physical commentary, noting features such as “*voice broken, moustache*”, “*strong jaw*” or “*broad shoulders and evidence of shaving*” as justification for treating the young person as an adult. In some cases, the fact that child services were not engaged in other European countries was used as evidence of the young person not being a child, rather than a symptom of them being let down by authorities in multiple jurisdictions.

**Similarly, Judges often failed to acknowledge the unreliable nature of initial age assessments conducted in Western Jet Foil.** They often relied on the fact that these assessments were done by Immigration Officers and involving an independent social worker as a marker of their dependability, despite evidence to the contrary, as well as the Home Office’s own guidance on age assessments which stresses the importance of setting and timing.<sup>161</sup> Details provided by young people in these initial ‘enquiries’, often completed soon after traumatic journeys and without full explanation of what was happening, were used against them in court to show inconsistencies. This is worrying given the quality of interpretation reported in these enquiries, as well as their timing in the hours after a traumatic journey with no advice, support, or assistance.

## Harms and risks to children in adult prison

**Age-disputed children in adult prison are at serious and obvious risk of harm.** The children we have worked with have been routinely made to share cells with adults who are not known to them, where they were locked in for the majority of each day. Prisons do not receive notification from the Home Office or from the court when an individual is age-disputed, and so the emphasis remains on the child to self-identify. Despite safeguarding

<sup>153</sup> Courtwatching notes, Canterbury Crown Court, February 2023.

<sup>154</sup> <https://post.parliament.uk/research-briefings/post-pn-0666/>; [National Age Assessment Board Guidance](#)

<sup>155</sup> Courtwatching notes, Canterbury Crown Court, February 2023.

<sup>156</sup> Courtwatching notes, Canterbury Crown Court, May 2023.

<sup>157</sup> Courtwatching notes, Canterbury Crown Court, April 2023.

<sup>158</sup> Courtwatching notes, Canterbury Crown Court, April 2023.

<sup>159</sup> For example, figures for 2022: <https://www.refugeecouncil.org.uk/wp-content/uploads/2022/03/Children-in-the-Asylum-System-Feb-2022.pdf>

<sup>160</sup> Courtwatching notes, Canterbury Crown Court, February 2023.

<sup>161</sup> [Home Office \(2023\) Age assessment joint working guidance](#)

requests being made to the prison for each young person, it was often unclear what steps the prison took in response to it, including whether they referred the young person to the relevant Local Authority for an age assessment.

**Children we spoke to in HMP Elmley experienced a rapid deterioration in their mental health.** While in prison, they told Humans for Rights Network that they were distressed, traumatised, and afraid. They often talk about their inability to sleep, their nightmares, flashbacks, the panic and distress they felt, as well as experiencing depression, low self-worth and hopelessness. They linked these feelings to being imprisoned, as well as the uncertainty both of how long they will be there for (when on remand), and what will happen after release.

*The teenagers, when they came to the prison, straight away they stop eating their meals, they stop communicating. They moved [a young person] to the fourth floor with the high-risk prisoners. He was scared and he was scared about his future because he didn't plead guilty. He stopped eating. He started to vape in prison. Before, he was in good health. After one month, he started to become very skinny, nothing. He started to get mental health issues. He thought the guards were out to kill him, sent by people in [his country]. (Zain, Syrian)*

**Children expressed feeling isolated in prison.** As with all people in prison, children there do not have access to their own mobile phone, meaning that if they could not remember the contact number for relatives, they were unable to make contact, including to inform their family that they survived the journey across the Channel. When these young people were released, they struggled to talk about their time in prison, and face ongoing issues with mental health which they link to their time incarcerated in the UK.

**Children's physical health is also at risk within adult prisons.** Children reported struggling with accessing medical services while in prison, a common concern also among adults. At least one young person reported having been assaulted by an adult prisoner while in HMP Elmley. Young people talk about being exposed to violence and drug use within the prison. Zain, from Syria, reflected that *"The fourth floor was for the teenagers and the high-risk criminals as well. It was very very bad mix. Why would you mix the teenagers and the most dangerous people?"*

**Young people we spoke to in prison frequently had little or no information or understanding of their**

**conviction or why they were in prison.** As with adults, they frequently struggled to access support and legal advice, including from their criminal solicitor, but also from specialist legal support providers regarding their ongoing age disputes, immigration advice and services which might identify them as potential survivors of trafficking, and specialist mental health support services. Difficulties in booking legal and social visits, experienced by all prisoners in HMP Elmley, meant that it was often difficult for specialist community care solicitors to take instructions from their clients, adding significant barriers to their ability to challenge their situation. Even making phone contact was difficult. As detailed above, people in prison must add numbers to an 'approved call list' and can only call at restricted times. If the call is missed, people on the outside cannot call the person in prison back. Interpreters also cannot be added to calls from prison, making outside support very difficult. These barriers mean that often, even when Humans for Rights Network identified someone from their first court hearing, it could take weeks to make contact. This means that it could take weeks or months for further referrals and attempts made to request age assessments to a Local Authority.

**When the first young person with an ongoing age dispute was identified by Humans for Rights Network in October 2022, the organisation's safeguarding referrals and concerns were met with no response or communication from HMP Elmley.** Concerned, Humans for Rights Network engaged with the office of the Children's Commissioner, who were able to gain access to the prison and visit some of the young people in September 2023, four months after being contacted by Humans for Rights Network.<sup>162</sup> The Commissioner agreed with Humans for Rights Network that the young people there at that time "certainly" did not meet the Home Office's threshold of having "physical appearance and demeanour very strongly suggesting that they are significantly over 18", and instead "appeared to be young, scared and confused".<sup>163</sup>

**In response, HMP Elmley claims it has implemented measures to safeguard those it recognises may be children.** This is an admission of the potential for the presence of highly vulnerable children within its estate. However, these measures do not sufficiently safeguard these individuals who remain, ultimately, within an adult prison which does not have the capacity to provide the necessary specialist children's services. Children report that these 'safeguarding' measures result in them having restricted access to activities, and increased hours isolated from others as they are locked in their cells more hours a day. While there is no published guidance for how children can be safeguarded in adult prisons, guidance for how children can be safeguarded in Immigration Removal Centres notes that "staff should look to maintain as much association and activity as possible whilst

<sup>162</sup> <https://www.childrenscommissioner.gov.uk/blog/update-on-the-illegal-migration-act/>

<sup>163</sup> *ibid.*

ensuring that the person is safeguarded” before they are released to a Local Authority as soon as possible.<sup>164</sup> Children in prison have reported feeling punished for saying that they are a child. This has contributed to children asking to be treated and sentenced as adults, despite being under 18.

**Questions also remain about the prison’s adherence to these safeguarding measures.** For example, in recent months, an age disputed child reported being given a third date of birth by the prison, who disagreed with the Home Office’s given age of 24, and instead assessed him as 18 when he arrived. Despite his repeated insistence that he was under 18, and the prison’s evident scepticism over the accuracy of the Home Office’s assessment, they continued to leave him sharing a cell with an adult man.

**There has been some limited success in asking for children to be released and bailed to Local Authority care; however, this strategy was frustrated by Kent Local Authority in other cases.** In one case, Kent County Council unlawfully refused to provide a bail address on the basis that they “didn’t have any space”. This raises significant concerns about Kent’s approach to such significant safeguarding concerns as children being held in adult prisons in their area. While a legal challenge could have been brought, the young person decided not to pursue it, and to be sentenced as an adult, to avoid spending longer in prison.

Humans for Rights Network has acted as accompanying adult for an age assessment for one individual which took place in HMP Elmley, in the knowledge of the prison, the court, and the Home Office: *“While there are issues of access and location is not perfect, I have been assured by the governor of Elmley that appropriate arrangements can be put in place for his age assessment there.”*<sup>165</sup> We have significant concerns that conducting age assessments in prison is harmful and sets a dangerous precedent. While there is guidance as to how an age-disputed child should be treated if detained in an Immigration Removal Centre,<sup>166</sup> there is no public guidance as to what should happen with children placed in adult prisons. The Home Office’s own guidance on how age assessments should lawfully take place notes that “Age assessments should be conducted at suitable facilities by qualified social workers...on this basis facilities such as police stations are not considered appropriate venues”.<sup>167</sup> Similarly, guidance clearly states that “an individual who is [age disputed] **must not** remain in detention pending a Merton compliant age assessment. He/she will be released into the care of a local authority” (emphasis in original). Completing an age assessment in prison would therefore strongly appear to

contradict the Home Office’s own guidelines and may not meet the requirements of a ‘Merton compliant’ assessment. Particularly in the context of the distress of imprisonment, and the isolation enforced on children who identify themselves within the prison, age assessments should not be done in prison. Instead, children should be immediately released to Local Authority care and safeguarded appropriately.

## After imprisonment

**The distress of being imprisoned stays with children once they are released.** Many of these young people struggle to talk about the time they spent in prison. While many are distressed by experiences prior to being in the UK, they clearly articulate their treatment and incarceration in the UK as a cause of mental health decline and re-traumatisation.

Humans for Rights Network continues to provide support to these children, as do a number of criminal, community care, and immigration solicitors. Imprisonment has undoubtedly has a profound effect on their mental and physical health, as does the heavy weight of a criminal conviction. These children often struggle to understand why they were convicted and incarcerated. Release is rarely the end of the journey, as they likely face further complex and distressing legal hurdles after prison, for example, to challenge their assessed age and attempt to overturn their criminal conviction.

**While there has been some early success of convictions being quashed when a child’s age is accepted, this is a complex, lengthy and uncertain process with no guarantee as to the outcome.** At the time of publication one age accepted child had their conviction quashed, and two had their prosecutions discontinued. The potential consequence, therefore, is that children will live their lives in the UK with a criminal conviction, which they obtained for seeking safety. As with others imprisoned, this will affect many areas of their lives, including fundamentals of employment and their ongoing immigration status.

<sup>164</sup> [Home Office \(2019\) Care and management of post detention age claims](#)

<sup>165</sup> Courtwatching notes, Canterbury, April 2023.

<sup>166</sup> [Home Office \(2019\) Care and management of post detention age claims](#)

<sup>167</sup> [Home Office \(2023\) Age assessment joint working guidance](#)

## 8. Conclusion

This report has detailed the ongoing impacts of new offences brought in by the Nationality and Borders Act (2022), which criminalise people arriving to the UK without valid entry clearance. Analysis has focused on its application against people arriving across the Channel in 'small boats'. While these offences of 'illegal arrival' and 'facilitation' attracted significant critique during their passing in Parliament, there has since been little commentary or attention paid to this change in policy. It is now the case that anyone arriving in the country irregularly could be imprisoned for doing so.

**There is no evidence that these prosecutions will have the 'deterrent' effect used to justify them.** The Government defends this policy by arguing that criminal offences are necessary both to deter 'criminal gangs' and to stop people making the dangerous journey across the Channel. Yet, not only are most people arriving unaware of this policy, but those who are remain undeterred, mirroring available evidence from other contexts. People enter the country irregularly because they have no other way of doing so. This has been since recognised by the Court of Appeal, who held that no available evidence supported the argument that people seeking to cross to the UK for safety would be deterred by the prospect of a custodial sentence.

**Rather than minimising harm to people crossing the Channel, this report has highlighted the significant human impact of the current prosecution strategy.** The British government invests large sums of money into the surveillance and policing of people on the move which, rather than preventing them from crossing the border, forces them into taking greater risks to reach the UK. Rather than prioritising investments in good quality housing and processing asylum claims, significant sums of money are being spent instead on their imprisonment.<sup>168</sup> Among those imprisoned are people with ongoing asylum claims, victims of trafficking, victims of torture, and children with ongoing age disputes. Their imprisonment achieves nothing except human misery, with those imprisoned reporting significant distress which impacts in their mental health. The shadow of these convictions follow people after their time in prison, affecting their ability to find work, and ultimately, their ability to naturalise as British citizens.

**This report has demonstrated evidence of the imprisonment of children in adult prisons for the crime of 'illegal arrival'.** Widely reported and systemic issues with Home Office decision making in Dover results in children under the age of 18 routinely being placed, not only in adult asylum accommodation, but also, adult prison. The Home Office, Border Force, Social Services in Kent and elsewhere, and prison staff are all complicit in this imprisonment of children in adult jails.

**Significant procedural and legal injustices are occurring in courts in Kent.** Both Magistrates and Crown Courts are overwhelmed, and these cases put additional and significant pressure on resources. Routinely cases are delayed, resulting in some people spending longer than half their prison sentence on remand. Court hearings are often characterised by confusion, often due to wrongly allocated interpreters, the impact of video links, and misunderstandings of immigration law and process by criminal lawyers and judges. When this confusion is overcome, there is a strong reliance on what one defence lawyer termed "sausage factory justice". Bail is routinely denied, and 'cookie-cutter' sentences applied.

**We call for an immediate end to the practice of criminalising people for arriving at the border in search of safety or a better life.** This is a practice which commentators argue contravenes international law, including Article 31 of the Refugee Convention, the Palermo Protocol, and Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings.<sup>169</sup> It causes human misery, both at the time of imprisonment, and long after. To end with the words of Ibrahim, from Sudan:

*I laugh when people say about justice in UK, about human rights. There are none here. There is no such thing as justice here.*

<sup>168</sup> In 2020-2021, the cost per prisoner was £48,409 a year, see: [https://assets.publishing.service.gov.uk/media/61f121e7e90e0703787c571d/costs-per-place-costs-per-prisoner-2020\\_-2021.pdf](https://assets.publishing.service.gov.uk/media/61f121e7e90e0703787c571d/costs-per-place-costs-per-prisoner-2020_-2021.pdf)

<sup>169</sup> <https://www.unhcr.org/uk/media/unhcr-observations-new-plan-immigration-uk>



## Annex A: Numbers of people affected by Section 24 and 25 of the Immigration Act 1971

*This data has been obtained by several FOI requests by Victoria Taylor. It comes with the caveat that “this data is taken from live system and is subject to change.” This explains why the total sum in the table before differs slightly from the statistics provided in the report. This is particularly true for Section 25 data, indicating the frequency at which charges are dropped due to lack of evidence, or after a guilty plea to Section 24. In a separate FOI request on the number of people arrested, charged and convicted from 28 June 2022 to 28 June 2023, Immigration Enforcement disclosed:*

### Section 24 Immigration Act 1971

- 504 arrests were made under Section 24 of the Immigration Act 1971; of these 235 were relating to small boats.
- 425 charges were brought under Section 24 of the Immigration Act 1971; of these 240 were relating to small boats.
- 307 convictions under Section 24 of the Immigration Act 1971; of these 165 were relating to small boats.

### Section 25 Immigration Act 1971

- 311 arrests were made under Section 25 of the Immigration Act 1971; of these 129 were relating to small boats.
- 328 charges were brought under Section 25 of the Immigration Act 1971; of these 49 were relating to small boats.
- 80 convictions under Section 25 of the Immigration Act 1971; of these seven were relating to small boats.

Month 22/23	Section 24 relating to small boat arrivals			Section 25 relating to small boat arrivals		
	Arrests	Charges	Convictions	Arrests	Charges	Convictions
June	6	6	0	12	3	0
July	13	24	4	24	17	0
Aug	29	33	16	22	9	1
Sept	32	33	21	18	3	0
Oct	35	33	37	12	2	0
Nov	25	22	27	6	2	1
Dec	11	11	23	6	0	0
Jan	4	4	8	3	1	1
Feb	10	10	8	5	7	1
March	7	6	7	2	2	0
April	13	13	7	5	1	1
May	19	15	6	5	0	1
June	31	34	11	14	1	0
July	34	38	9	12	1	0
August	38	40	16	12	5	0
September	39	41	25	11	2	1
October	21	15	28	3	2	0

*Numbers of people arrested, charged, and convicted under Section 24 and 25 of the Immigration Act 1971 relating to small boat arrivals. Source: Freedom of Information Requests, Home Office*

## Annex B: Small boat ‘pilot’ sentences

The following data was obtained through a Freedom of Information Request to the Home Office (FOI2023/05235), dated 6<sup>th</sup> December 2023., in which the following was requested and provided: A breakdown of the sentences given to individuals identified as small boat pilots, convicted under Section 24 and Section 25 of the Immigration Act 1971 (aa) between 1 July 2022 and 31 October 2023.

### Section 24:

For the time requested; between 1 July 2022 to 31 October 2023

<b>Sentence received</b>	<b>Number of individuals convicted under Section 24 IA 71 (aa)</b>
Suspended sentence	14
Custodial sentence of: 6 months or less	75
Custodial sentence of: 7 months	8
Custodial sentence of: 8 months	83
Custodial sentence of: 9 months	28
Custodial sentence of: 10 months	15
Custodial sentence of: 11 months	4
Custodial sentence of: 12 months	19
Custodial sentence of: 13 – 18 months	9
Custodial sentence of: 19 – 24 months	3
Custodial sentence of: 25 – 36 months	1
Custodial sentence of: over 37 months	0

### Section 25:

For the time requested; between 1 July 2022 to 31 October 2023

<b>Sentence received</b>	<b>Number of individuals convicted under Section 25 IA 71 (aa)</b>
Suspended sentence	0
Custodial sentence of: 6 months or less	1
Custodial sentence of: 7 months	0
Custodial sentence of: 8 months	4
Custodial sentence of: 9 months	0
Custodial sentence of: 10 months	0
Custodial sentence of: 11 months	0
Custodial sentence of: 12 months	0
Custodial sentence of: 13 – 18 months	1
Custodial sentence of: 19 – 24 months	0
Custodial sentence of: 25 – 36 months	1
Custodial sentence of: over 37 months	0





