Neutral Citation Number: [2021] EWCA Crim 439

Case Nos: 202000110 B5
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
HHJ Patricia Lees

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2021

Before :

LORD JUSTICE SINGH
MRS JUSTICE WHIPPLE DBE
and
HER HONOUR JUDGE DEBORAH TAYLOR, THE RECORDER OF WESTMINSTER

- -

Between :

(1) HENRY DUNN **(2) CHRISTIAN JAMES KING**	**Appellants**
- and -	
REGINA	**Respondent**

(Transcript of the Handed Down Judgment.
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Mr John FitzGerald (instructed by **Reeves & Co Solicitors**) for the **1st Appellant**
Mr James Scobie QC (instructed by **Metro Law Solicitors Ltd**) for the **2nd Applicant**
Ms Claire Harden-Frost and Mr Thom Dyke (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 4 March 2021

Judgment
As Approved by the Court

Lord Justice Singh :

Introduction

1. There are three matters before the Court. The first is an appeal against conviction by Henry Dunn, brought with the leave of the single judge, although the application for an extension of time (of 77 days) has been referred to the Full Court. The second is a renewed application for leave to appeal against sentence by Dunn, together with an application for an extension of time (of 4 days): these applications will of course only arise if the appeal against conviction is dismissed. The third is a renewed application for leave to appeal against sentence by Christian King.

2. At the hearing before us we heard submissions from Mr John FitzGerald on behalf of Dunn; Mr James Scobie QC on behalf of King; and Ms Claire Harden-Frost on behalf of the Respondent. We are grateful to them all for their written and oral submissions.

3. On 25 March 2019, in the Crown Court at Snaresbrook, Dunn (then aged 39) was convicted of participating in the criminal activities of an organised crime group. This was the subject of Count 2 on the indictment at what we will call the first trial.

4. On 23 September 2019 he was convicted, after a retrial, of conspiracy to facilitate the commission of a breach of the United Kingdom's immigration laws: this was the subject of Count 1 at the first trial, on which the jury were then unable to agree and was the only relevant count at the second trial.

5. On 5 December 2019 Dunn was sentenced by HHJ Lees to nine years' imprisonment on Count 1. No separate penalty was imposed on Count 2.

6. At the first trial, on 25 March 2019, King (then aged 38) was convicted of conspiracy to facilitate the commission of a breach of the UK's immigration laws: Count 1. On Count 2, which was treated as an alternative count, the jury were discharged from giving a verdict.

7. On 5 December 2019 King too was sentenced by the Judge to nine years' imprisonment on Count 1.

8. Counts 3 and 4 were ordered to lie on the file against both Dunn and King in the usual terms.

9. Another co-defendant, Christopher Griffin, was acquitted on both counts at the first trial.

10. Earlier, on 1 March 2019, James Davis had pleaded guilty. He was sentenced on 5 December 2019 to four years and six months imprisonment.

11. For completeness we should mention that another man, Thomas Saddington, had been dealt with for related offences in France.

Factual background

12. Between 31 October 2017 and 7 November 2017 there was a conspiracy, involving the above five named individuals and others unknown, to bring four Vietnamese nationals to the UK who had no lawful entitlement to be here.

13. On 6 November 2017, a rigid hull inflatable boat ("RHIB"), without navigational and safety equipment, was piloted by Davis, who had no formal qualifications, across the English Channel from Dymchurch beach, Kent to France. It was an agreed fact at the trial that there was fuel which would have enabled a voyage of at least 230 nautical miles. During the launch King's vehicle got stuck in the sand. Dunn travelled to Kent and gave King a lift to Dymchurch before returning to Essex.

14. The four young Vietnamese men, wearing unsuitable clothing and without lifejackets, were bought back, in the RHIB, to the Kent coast, arriving very early on the morning of 7 November 2017. The young men were collected by Griffin but the vehicle was intercepted by the police on the M20.

15. The prosecution case was that the accused were guilty of both counts on the indictment. It was alleged that telephone and surveillance evidence demonstrated that King engaged in significant planning and reconnaissance. This included determining the best site to land and that he had made a practice run on 4 November 2017. King was responsible for providing the RHIB, recruited Davis and provided the technical boating expertise. Dunn recruited Griffin, to collect the young men from the beach on landing.

16. The accused were interviewed under caution. King exercised his right to silence in the first interview and in the second he gave a prepared statement: that he had sold the RHIB to Davis and had assisted with its launch on 6 November for a fishing trip. Davis had provided him with a phone. Dunn exercised his right to silence in both interviews.

17. The defence case for Dunn was that he was unaware of a plan. Initially he denied going to Dymchurch but in evidence he said that his brother, Matthew, had agreed to go to the coast as a favour to Dunn's driver (it was an agreed fact that Dunn was disqualified from driving), who had broken down on route to pick up a friend. He had introduced his driver to Griffin.

The first trial

18. At the first trial there were, so far as material, two counts on the indictment against King, Griffin and Dunn. Count 1 alleged conspiracy to facilitate the commission of a breach of the UK's immigration's laws, contrary to section 1(1) of the Criminal Law Act 1977. Count 2 alleged participation in the criminal activities of an organised crime group, contrary to section 45(1) and (9) of the Serious Crime Act 2015 (the "2015 Act").

19. Section 45(1) of the 2015 Act makes it an offence for a person to participate in the criminal activities of an organised crime group.

20. Subsection (3) provides that "criminal activities" are activities within subsections (4) or (5) that are carried on with a view to obtaining (directly or indirectly) any gain or benefit. Subsection (6) defines "organised crime group".

21. Subsection (2) provides that, for this purpose, a person participates in the criminal activities of an organised crime group if the person takes part in any activities that the person knows or reasonably suspects (a) are criminal activities of an organised crime group, or (b) will help an organised crime group to carry on criminal activities.

22. Under subsection (9) the maximum penalty for this offence is a term of imprisonment of five years. In contrast, the maximum penalty for an offence of conspiracy to commit an offence under the immigration laws is 14 years.

23. In the first trial (and the retrial) the issues for the jury on Count 1 were whether: (1) there was an agreement to bring the four illegal immigrants into the UK (admitted by the accused), (2) the defendant joined the agreement, (3) the defendant knew what he was agreeing to and (4) when he joined the agreement, the defendant intended that he or some other party to it should carry the agreement out. If the jury returned a not guilty verdict they would be asked to consider Count 2.

24. On Count 2, the issues for the jury were: (1) whether the defendant took part in any activities, (2) which he knew or reasonably suspected were either (a) the criminal activities of an organised crime group (other than the criminal activities of less than three people) or (b) would help an organised crime group to carry on criminal activities.

25. At the first trial counsel for King submitted that the jury should only be invited to return a verdict on Count 1 alone. He submitted that the prosecution case against King was that he was at the heart of the activity and, if that was proven, this amounted to a conspiracy. There was therefore no need for Count 2. The essence of the criminality was covered by Count 1 and there was no rational basis on which a jury could convict on Count 1 and not Count 2. It was submitted that the purpose of section 45 of the 2015 Act was to criminalise activity that could not easily be prosecuted under existing law and, in particular, the offence of conspiracy. It was argued that the offence is not designed to be a replica of the liability that is covered by the offence of conspiracy, but rather, it was introduced to cover activity that is alternative to, and distinct from, such liability.

26. Counsel for the prosecution responded that it was possible for the jury to return different verdicts on each count and the inclusion of Count 2 was potentially important for the purposes of sentencing. It was accepted that there was "considerable overlap" between the criminality alleged by Counts 1 and 2 but it was submitted that it was appropriate that both counts should be left to the jury.

27. The Judge decided that both counts should remain on the indictment. There was an important distinction: there was a lesser *mens rea* on Count 2. There was also the element of whether there was an organised crime group, which the jury would have to decide on Count 2. Nevertheless, the judge said that: "The reality is in my judgement … that the factual scenario of bringing in the immigrants is the same for each, and Count 2 should be an alternative in those circumstances to Count 1".

28. The Judge directed the jury in those terms in her summing up at the first trial: see in particular page 7E. She told the jury:

> "… You will be asked for a verdict on count two in respect of any defendant you found not guilty of count one."

29. After the jury had been in retirement they passed a note to the Judge which made it clear that they were having difficulty in reaching agreement on Count 1 in respect of Dunn. After discussing the matter with counsel, the Judge discharged the jury from reaching a verdict on Count 1 and invited them to retire to consider Count 2: see page 94B-C. The jury then returned to court five minutes later and a verdict was taken: it was a unanimous verdict of guilty.

The second trial

30. At the retrial of Dunn there was now only one relevant count, which had been Count 1 at the first trial. The Judge was invited to stay the prosecution on the ground that it was an abuse of process. She refused that application. Her reasons for doing so were set out in a written ruling dated 16 October 2019, which recorded the arguments advanced on behalf of Dunn as follows:

> "(i) Counts 1 and 2 were so similar that they should not both have been on the same Indictment either as separate or alternative Counts.
>
> (ii) The jury should not have been invited to consider Count 2 in the circumstances which arose, namely their inability to reach a verdict of at least 10 in respect of Count 1 and/or
>
> (iii) The prosecution should not be permitted to retry Mr Dunn on Count 1 because he has been convicted of Count 2, on the basis relied on in (i) above – namely, it is founded on the same facts and because to permit a retrial of the more serious charge would offend not just the public perception of justice but should offend the court's sense of justice and propriety amounting to an abuse of the process by reason of convicting him twice of a single crime."

31. In dismissing each of those arguments, she stated:

> "In respect of (i):- in my judgment there is an important difference between Counts 1 and 2; the mental element and so the degree of criminal responsibility. The facts upon which each Count is based are largely the same but there is an important difference between the mental element required for each. That must also be why there is a significant difference as between the two offences as regards sentencing maxima. In any event, as the Crown rightly point out, this matter has already

been ruled upon by this Court following an application made on behalf of Christian King. This Court has ruled that the Indictment containing two Counts is valid for the reasons provided at that time but that the Counts would be left to the jury as alternatives, with Count 2 only to be considered after finality had been reached in respect of Count 1.

It is accepted by Mr FitzGerald that these are not statutory alternatives and must therefore fall into the category of 'forensic alternatives' as referred to in *R v Nelson* [2016] EWCA Crim 1517.

In respect of (ii):- It was my stated view that the approach to be adopted was the approach ultimately taken. Counsel were given the opportunity to research that view overnight and submissions were invited. The prosecution research revealed that approach was a course approved in *R v McEvilly* [2008] EWCA Crim 1162, especially at paragraphs Q100-105. As Miss Harden-Frost and Mr Dyke set out, in Mr Dunn's case, finality was reached on Count 1 by discharging the jury from reaching a verdict as there was no realistic prospect of their agreeing. Having discharged the jury on Count 1, the Court was entitled to allow the jury to go on to consider Count 2. No submission to the contrary was received.

In respect of (iii):- it is as much in the interests of justice to ensure that the guilty are convicted as the innocent walk free. It is in my judgment also in the interests of justice for a court to know on what basis a person guilty of criminal activity should be sentenced. In this case complaint is made that Mr Dunn would, if convicted of Count 1, have two convictions. That is true, as it is for Mr Davis in respect of whom the prosecution required guilty pleas to both Counts. As I said when that was aired during legal submissions at the first trial, it is open to me when sentencing to reflect that fact and ensure fairness by for example passing concurrent sentences."

Submissions for the Appellant

32. On behalf of Dunn it is submitted by Mr FitzGerald that the Judge should have allowed the application to stay Count 1 as an abuse of process, since the Appellant had been convicted of the "lesser alternative" and there was a "single wrong".

33. Mr FitzGerald submits that, at the first trial, the prosecution case was that all the accused were guilty of both counts; Count 2 was not a lesser alternative. After submissions that Count 2 should be removed from the indictment because the only material difference was the mental element and this was minimal, the Judge ruled that Count 2 would be left to the jury as a lesser alternative in the event that they found the accused not guilty of Count 1. Mr FitzGerald submits that there are two possibilities:

(a) If Counts 1 and 2 are significantly different, then it is an abuse of process to prosecute the more serious offence, the jury having convicted the Appellant of the less serious offence. Whilst they are not statutory alternatives, they are genuine alternatives.

(b) If Counts 1 and 2 are so similar that any difference is *de minimis*, the two counts ought not to have been on the indictment together.

Submissions for the Respondent

34. On behalf of the Respondent Ms Harden-Frost observes that, in the first trial, it was accepted that there was an overlap between the two counts but submits that the Crown has a wide discretion when drafting an indictment; no application had been made that the indictment was bad for duplicity, nor was there an application to stay on the grounds of abuse of process; and it had been conceded by the defence that the *actus reus* and *mens rea* were different. Count 2 was an important aggravating factor for the purposes of sentencing and there was no prejudice to any of the defendants. She also observes that the jury in the second trial were not told about the earlier conviction on Count 2.

35. She further submits that:

(a) At the first trial the counts were left to the jury as forensic alternatives only, not as legal alternatives.

(b) Counts 1 and 2 "cover similar ground but are different offences with significantly different mental elements to them"; the difference in the statutory maximum penalties illustrates the distinction.

The appeal against conviction

36. There can be no question in the present case of there being any plea in bar (such as *autrefois convict*) which would have prevented the second trial against Dunn. The two offences with which he was charged are clearly not the same as a matter of law. The fact that he had been convicted on Count 2 did not mean that he could not be tried later on Count 1.

37. Secondly, the principle in *R v Elrington* (1861) 1 B & S 688 did not apply in this case either. That principle was explained by Hughes LJ in *R v Bayode* [2013] EWCA Crim 356, at paras. 22-23:

> "22. *R v Elrington* (1861) 1 B & S 688 has given its name to a principle which was only partly in issue in the case but which was articulated by Cockburn CJ. The defendant was indicted on three alternative counts of (1) assault causing grievous bodily harm, (2) assault causing actual bodily harm and (3) common assault. But he had previously been tried before the justices for the same assault and acquitted. There was a statutory bar on the subsequent prosecution provided by

section 28 of the Offences against the Person Act 1828 (Lord Lansdowne's Act) but additionally the Chief Justice invoked a wider common law rule:

> '…we must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form.'

As Lord Morris pointed out in *Connelly* (at 1315), this is clearly a reference to charges preferred after a previous one has been disposed of rather than to a series of charges in the same indictment, which latter course is perfectly proper. In the same case, *Connelly*, Lord Hodson aptly described the *Elrington* principle as a rule against 'an ascending scale' of charges. A good modern illustration is afforded by *R v Beedie* (supra). There a landlord failed to maintain a tenant's gas fire, resulting in the death of a tenant. He was prosecuted and convicted of offences under the Health and Safety at Work Act 1974, the death being proved as an aggravating feature of the offence. Later he was indicted for gross negligence manslaughter in respect of the same omission to maintain. This court held that the indictment ought to have been stayed on the *Elrington* principle. The Crown must ordinarily decide once and for all what charges are appropriate to alleged criminal misconduct and must prefer them. It is not normally open to it to proceed first for a minor offence and then later to charge a more serious one arising from the same facts.

23. In *Connelly* this principle was endorsed by Lords Morris, Hodson, Devlin and Pearce and there is no doubt that it represents good law. Lords Morris and Hodson regarded it as a modest extension of the pleas in bar of autrefois convict and acquit, but at that time (1963) the law relating to the limited power of a criminal court to stay a prosecution for abuse of process was in an early stage of development; this was long before the analysis in *R v Horseferry Road Magistrates Court ex p Bennett* [1994] 1 AC 42 and Attorney-General's Reference (No 1 of 1990) [1992] QB 278 – and see now *Warren v Attorney General for Jersey* [2011] UKPC 10; [2012] 1 AC 22. Lord Devlin's speech in Connelly itself contains an early and powerful enunciation of the existence of the power to control vexatious (or abusive) prosecutions, and he treated the *Elrington* principle as an aspect of it. As he observed, this is the better way to analyse the principle, because unlike the pleas in bar it does not provide an absolute bar to proceeding, but rather depends on the justice of the case. That is demonstrated by the long-standing exception to the principle where there has been a

> trial for an offence of violence, but the victim subsequently dies; in such a case a subsequent prosecution for murder has always been regarded as proper. For the same reasons, this court in *Beedie* treated the *Elrington* principle as an aspect of the (limited) abuse jurisdiction, and we agree that this is the best way to regard it in the modern context."

38. As in the case of *Bayode,* so here, the *Elrington* principle does not assist the Appellant because this was not a case of the Crown first preferring a minor charge and then later a major charge. The major charge had been preferred from the outset.

39. Having cleared those principles out of the way, we can turn to the main basis on which Mr FitzGerald contends that it was an abuse of process for the Appellant to be tried on Count 1 when he had already been convicted on Count 2: this is that they were alternative charges. This was the basis for this Court's decision in *Bayode* itself.

40. In that case the defendant was tried for murder but the jury could not agree on that charge. An alternative count of manslaughter was then added to the indictment. The jury were discharged from having to give a verdict on the murder charge and returned a verdict of guilty on the charge of manslaughter. Initially the trial judge was of the view that there was nothing to prevent the prosecution from then bringing a charge of murder but later, having had the opportunity to consider the matter in more detail, the judge ruled that it would be an abuse of process to do so. The Crown then appealed against that termination ruling but that appeal was dismissed by this Court. As Hughes LJ explained, at para. 33:

> "… whether there is one count or two, there cannot be convictions for both of two offences which are properly mutually exclusive alternatives. If there were two counts, and no plea of guilty, the jury would try the defendant on both, but would not be permitted to return verdicts of guilty on more than one. In our view, the course now proposed by the Crown in this case would offend against this fundamental concept of alternative charges."

41. It is clear from that passage that, when Hughes LJ spoke of alternative charges, he was referring to "properly mutually exclusive alternatives." The reason why the offence of manslaughter is properly to be regarded as a true alternative to murder is that, as a matter of law, the elements of the two offences (dealing here only with unlawful act manslaughter and leaving aside gross negligence manslaughter) are identical save for the different mental element which is required. The *actus reus* in a case of unlawful act manslaughter is identical to the *actus reus* for murder.

42. The concept of true alternatives of that type was distinguished by this Court from "forensic alternatives" in *R v Akhtar* [2015] EWCA Crim 176; [2015] 1 WLR 3046. In that case the defendant was charged with having an article, namely a petrol bomb, with intent to destroy or damage property, contrary to section 3 of the Criminal

Damage Act 1971. He was also charged with possession of an offensive weapon, namely a petrol bomb, contrary to section 1(1) of the Prevention of Crime Act 1953. The jury convicted him on the second count but could not agree on the first count. The defendant was convicted at his retrial on the first count. He appealed on grounds which included that the second trial should not have been permitted because he had already been convicted at the first trial of one of two counts which were alternatives. This Court rejected that argument in a judgment given by Sir Brian Leveson P. The Court distinguished the case of *Bayode* in the following terms at paras. 34-35:

> "34. But were these offences (possessing an article with intent to cause damage and possession of an offensive weapon) truly alternatives? As a matter of strict law, Mr Bennathan conceded that they were not, but argued that the effect of the way in which the case had been opened and left to the jury (with the prosecution asserting in opening and the judge directing that they were alternatives) meant that they had to be treated as such. At best, they were 'forensic' alternatives: if the jury convicted on count 1, the prosecution did not require consideration to be given to count 2. As Mr Heywood submitted, they were certainly not 'mutually exclusive alternatives' because they were not precisely the same in factual or legal description or in the mischief to which they were directed.
>
> 35. Possession of an offensive weapon can be and is a complete offence prior to any formation of the intention to cause damage and the two offences can be considered as separate in time: the offensive weapon offence was complete when the petrol and wicks were put into the bottles whereas the intention to cause damage need only have been formed later. Similarly, the two counts are totally different from classic mutually exclusive alternatives (such as theft and handling stolen goods) and different from murder and manslaughter (which was the subject of *R v Saunders* [1988] AC148 and *R v Bayode* [2013] EWCA Crim 356) because both depend on the same act, namely the killing, without any potential for a subsequent intent. Finally, they were not related to each other as a lesser included offence (whether at common law or by operation of section 6(2) or 6(3) of the Criminal Law Act 1967)."

43. The Court concluded on this issue, at para. 42, that:

> "In our judgment, a different approach is entirely justifiable between those cases which are true alternatives (such as *R v Bayode* [2013] EWCA Crim 356) and those cases, described as forensic alternatives, which are not even though they are presented by the prosecution (and by the judge reflecting that approach) to the jury as such. In the circumstances, we

> conclude that although Judge Carr could have discouraged the prosecution from pursuing a retrial on count 1 (requiring further consideration of the public interest in the light of any comment he might have chosen to make), there was no impediment in law to the course which he took. In those circumstances, the appeal against conviction in relation to count 1 is also dismissed."

44. In the present case, it is clear that the two counts were not true alternatives. As a matter of law they have distinct elements. First, the mental element (or *mens rea*) is different. In the case of an offence under section 45 of the 2015 Act, what is required is only a "reasonable suspicion". Mr FitzGerald sought to persuade us that the distinction between this and a belief was so slight as to be *de minimis*. We do not accept that submission. It is well established in law that there is a crucial distinction between a belief and a mere suspicion. For example, in a civil case concerning an action for wrongful arrest by the police, *Buckley v Chief Constable of Thames Valley* [2009] EWCA Civ 365, Hughes LJ said, at para. 6:

> "Suspicion is a state of mind well short of belief and even further short of a belief in guilt or that guilt can be proved."

In that context Hughes LJ referred to the requirement in section 24(6) of the Police and Criminal Evidence Act 1984 that a police officer should have reasonable grounds for suspecting that a person has committed an arrestable offence in order to have the power to arrest that person. The distinction between suspicion and belief is also to be found in other statutory contexts.

45. Secondly, the other elements of the two offences charged in this case are different as a matter of law. Under Count 1 there had to be a conspiracy, in other words an agreement, and the jury had to be sure that the particular defendant whose case they were considering was a party to that conspiracy. In a conspiracy the offence consists of the agreement itself and nothing more need have been done to implement the agreement. In contrast, the charge in Count 2 did not require proof that the Appellant was a party to any agreement. It required only that he took some part in the activities of an organised criminal group.

46. Furthermore, it is clear that the jury at the first trial were sure that the Defendant had done something to make him guilty of Count 2 but could not agree on Count 1. Before this Court Mr FitzGerald suggested that the only explanation for that must be that the jury were acting perversely by being unable to agree on Count 1. We do not accept that submission. The Appellant faces a high hurdle in making that submission. It could only be accepted if there was no reasonable basis on which the jury's verdict could be explained. As Ms Harden-Frost explained to this Court, having been trial counsel for the prosecution, it is not necessary to conclude that there was no reasonable basis for the jury's inability to agree on Count 1. At the trial it was common ground that whoever controlled two "dirty phones" was a party to the conspiracy. Dunn's defence was that he did not have possession of those phones. Given the evidence before the jury at the first trial, it is possible that the jury were not agreed that Dunn had possession of the two "dirty phones", whilst being satisfied, on

the basis of other evidence, that he had participated in the activities of an organised crime group for the purposes of Count 2. This would explain the verdict at the first trial.

47. Finally in this context, the Judge was not only entitled, but was correct, to say that the difference between the two counts was a significant one because Parliament has decided that the maximum sentence for each offence shall be different. The maximum sentence on Count 2 is five years' custody, whereas the maximum sentence on Count 1 is 14 years.

48. For those reasons, we have reached the conclusion that this was not a case of true alternatives but rather was a case of forensic alternatives. As in *Akhtar*, the legal position is that the prosecution were not prevented from pursuing Count 1 at a retrial on the ground that it was an abuse of process. As the Judge recognised, any potential injustice caused by the two convictions could be avoided by sentencing accordingly. We note that, in the event, she imposed no separate penalty on Count 2.

49. For the reasons we have given the appeal against conviction by Dunn is dismissed.

Sentence

50. Dunn was born on 8 August 1981 and was aged 37 at the date of his conviction. He had 15 convictions for 46 offences, spanning the period from 2002 to 2019. King was born on 8 January 1981 and was aged 38 at the date of his conviction. He had 16 convictions for 30 offences, spanning the period from 1997 to 2014.

51. In passing sentence the Judge said that this was a carefully planned, sophisticated conspiracy involving reconnaissance work and a practice run. It was not simply a trip across the Channel and back. The telephone evidence made clear that Dunn and King had devised the plan and organised its execution and were in contact with the other conspirators. The culpability was greater for King, who recruited Davis as the RHIB driver, and Dunn, who recruited Griffin to transport the young men once they were in the UK.

52. They had ruthlessly placed the lives of the four young men in jeopardy; the RHIB was in poor condition, without any safety equipment either for navigation or in the event of an emergency, and Davis was unqualified. The passengers had no lifejackets and wore unsuitable clothing. Davis wore a lifejacket that would have given him 23 hours survival time. They showed no regard for these strangers and they were motivated by financial gain. The uncontested evidence of DI McSheffrey was of a recognised prevalence of this type of offence on the Kent coast and it was significantly higher than in other areas of the country, such that it could be described as exceptional. The offences therefore warranted deterrent sentences.

53. In mitigation, the Judge recognised that the duration of the conspiracy was short and did not involve the trafficking of these four young men. Each defendant had personal mitigation and had no similar previous convictions.

54. Finally, the Judge was satisfied, having heard evidence through the trial, that Serious Crime Prevention Orders were necessary to protect the public.

The decision of the Single Judge in the case of Dunn

55. When refusing leave to appeal against sentence Freedman J's reasons included the following:

> "…
>
> The relevant law and principles are set out at paragraphs 9-15 of the [Respondent's] Note. The applicable aggravating features are set out at paragraph 14 of the Note to which the Judge had regard. She set out the matter particularly clearly in her sentencing remarks at pages 2H – 4F. She had regard to the mitigation at pages 4G-5D.
>
> Contrary to the submissions in the Advice and Grounds of Appeal, the Judge was entitled to regard you at the top of the conspiracy, involved with Mr King in the devising of the plan and organising its execution. That evaluation followed among other things from the detailed analysis of the information on your phones and the whereabouts of the use of your phones connected with your home, your movements and your frequent and significant contact with Mr King and Mr Davis. It also followed from your recruitment of Mr Griffin as the driver. The Judge had the benefit of being able to assess the matter, having heard your two trials in which the precise details of your telephone conversations were the subject of painstaking analysis. The Judge had the benefit of hearing you give evidence twice. The Judge took into account the short duration of the conspiracy.
>
> The Judge also referred to the need for deterrent sentences and took into account the evidence provided by Detective Inspector McSheffrey about the recognised prevalence of similar offending in the Kent area: see sentencing remarks at page 4E-F. DI McSheffrey referred to the level of harm there being significantly higher than elsewhere due to the short Channel crossing, and the increase in illegal crossings being exceptional. This amounted to exceptional local circumstances which might influence sentencing levels: see *R v Bondzie* [2016] 1 WLR 3004 at paragraph 11.
>
> The grounds of failing to give adequate weight to the mitigation are not well made out. The Judge considered your family circumstances, but balanced this against the knowledge that commission of serious crime puts family life at risk. The Judge took into account the absence of similar previous convictions. The seriousness of the offence was such despite this, it is not arguable that the sentence of 9 years was manifestly excessive

> or wrong in principle, nor does an appeal merit the consideration of the full Court."

Renewed application for leave to appeal against sentence by Dunn

56. The maximum sentence for an offence under section 25 of the Immigration Act 1971 was 7 years custody until 13 February 2000, when it was increased to 10 years. It was increased again from 9 February 2003 to the current maximum of 14 years. The fact that Parliament has thought fit to double the maximum sentence must be borne in mind when considering earlier decisions of this Court, in particular *R v Le and Sark* [1999] 1 Cr App R (S) 422, which was decided at a time when the maximum sentence was 7 years. Nevertheless, it is common ground that the guiding principles which were set out in that case by Lord Bingham of Cornhill CJ, at page 425, remain relevant. It is also common ground that no guidelines for offences of this type have been issued by the Sentencing Council. Finally, we should mention that Mr FitzGerald placed particular reliance on *R v Oliveira* [2012] EWCA Crim 2279; [2013] 2 Cr App R (S) 4, which was considered by this Court in *Attorney General's References (Nos 49 and 50 of 2015) (Bakht)* [2015] EWCA Crim 1402; [2016] 1 Cr App R (S) 4.

57. By reference to the various factors which have been mentioned in the authorities as potentially aggravating offences of this kind, Mr FitzGerald emphasised the following points. First, this was an isolated offence, which was not refuted. Secondly, its duration was relatively short, lasting 6 days. Thirdly, there was no exploitation or pressure placed on others. Fourthly, Dunn does not have previous convictions for similar offences. While Mr FitzGerald accepts that this was a commercial enterprise, not a humanitarian one, and accepts that the immigrants concerned were strangers to the Applicant rather than family members, he submits that it was not a large scale or particularly sophisticated enterprise. For example, no passports were issued to the four Vietnamese migrants concerned. Finally, Mr FitzGerald emphasises the personal mitigation which is available to the Applicant, in particular that his daughter has ADHD; and that his son has autism and has found it particularly difficult to be separated from his father.

58. Although it is possible to envisage offences of this kind which would be more serious than the present one, we bear in mind that the sentence passed by the Judge after trial was nine years' imprisonment, which is well below the statutory maximum of 14 years. We are not persuaded that the sentence was either wrong in principle or manifestly excessive or even arguably so. We agree with the Single Judge that leave to appeal should be refused for the reasons which he gave.

The decision of the Single Judge in the case of King

59. When refusing King leave to appeal against sentence Freedman J gave reasons which included the following:

> "…

The relevant law and principles are set out at paragraphs 9-15 of the Note. The applicable aggravating features are set out at paragraph 14 of the Note to which the Judge had regard. This included the clear danger to lives of the Vietnamese youths and the disregard for their safety, the fact that their entry had been facilitated by strangers as opposed to members of their family, the significant amount of planning and the potential for significant financial gain in the enterprise. She set out the matter in her sentencing remarks at pages 2H – 4F. She had regard to the mitigation at pages 4G-5D.

The matters set out at paragraph 1 of the Draft Grounds of Appeal against Sentence do not provide a different perspective. The Judge was entitled to regard you (and Mr Dunn) at the top of the conspiracy and particularly in view of your supply of the boat and recruitment of Mr Davis. That was not the limit of your involvement. At the trial, there was detailed consideration of the telephone evidence particularly between you and Mr Dunn, showing your frequent and significant contact with Mr Dunn and Mr Davis. This took place with the use of what were described in the prosecution note on sentence as "'dirty' phones to maintain a sterile corridor between co-conspirators". The Judge had the benefit of being able to assess the matter following your trial and to reach the conclusion which she did. The Judge took into account the short duration of the conspiracy.

The Judge also referred to the need for deterrent sentences and took into account the evidence provided by Detective Inspector McSheffrey about the recognised prevalence of similar offending in this part of Kent: see sentencing remarks at page 4E-F. DI McSheffrey referred to the level of harm there being significantly higher than elsewhere due to the short Channel crossing, and the increase in illegal crossings being exceptional.

The ground of failing to give adequate weight to the mitigation is not well made out. The Judge considered your family circumstances but balanced this against the knowledge that commission of serious crime puts family life at risk. The Judge took into account the absence of similar previous convictions and certificates demonstrating achievements in custody and your working to reduce violence by others in custody. The seriousness of the offence was such that despite these points of mitigation, it is not arguable that the sentence of 9 years was manifestly excessive or wrong in principle nor does it merit the consideration of the full Court."

Renewed application for leave to appeal against sentence by King

60. On behalf of King, Mr Scobie made similar submissions to those of Mr FitzGerald, which he adopted. We have taken into account everything that can be said on behalf of King, including information which has been provided to this Court since the refusal of leave by the Single Judge, as to how well he has done in prison. Nevertheless, we are not persuaded that the sentence of nine years imposed on him was either wrong in principle or manifestly excessive or even arguably so.

61. Mr Scobie also complains about the terms of the Serious Crime Prevention Order ("SCPO").

62. An SCPO may be imposed under section 19 of the Serious Crime Act 2007 where the court has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales. It may contain such terms as the court considers appropriate for that purpose.

63. Mr Scobie complains about the impact of the SCPO on King after his release from prison because the reference to "any water going vessel" is too wide. He submits that it should be restricted to "sea water going vessel" in view of the circumstances of this case. He submits that the work which King does on internal waters is 24 hours a day; and can be last minute, so that advance registration of vessels may well not be practicable.

64. We are not persuaded by that submission. As Ms Harden-Frost has submitted, the index offence involved King providing a boat for use in a criminal conspiracy. The circumstances of this case illustrate how a boat that is wholly unsuitable for a Channel crossing may nevertheless come to be used to smuggle illegal immigrants into this country. There is plainly a risk that the Applicant might be tempted to offer the use of a boat that is designed for internal waters for such an operation in the future. In any event, the Judge was entitled to conclude that it was appropriate to include any water going vessel to be registered with the police in order to protect the public from his involvement in serious crime. It is not arguable that the scope of the Order was disproportionate.

65. For those reasons, as well as those given by the Single Judge, we refuse the application for leave to appeal against sentence.

Applications for extension of time

66. Given the conclusions we have reached, no practical purpose would be served by granting the extensions of time which are required. We therefore also refuse those applications.