

Asylum provisions: criminalisation provisions



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Part 3, NABA 2022 – ‘Immigration Control’

- Section 40:
 - Makes it a criminal offence to ‘arrive in’ (and not just to ‘enter’) the UK without valid entry clearance or an ETA, and to facilitate someone arriving in the UK without prior authorisation.
 - Increases the max penalties for: (i) those returning breaching a deportation order (to 5 years) and (ii) for entry without clearance / overstaying (to 4 years).

- Section 41:
 - Amends the facilitation offences, removing the requirement that assistance is ‘for gain’ from s.25A of the Immigration Act 1971.
 - Increases max penalties for facilitation (to life imprisonment).

Purpose of criminalisation provisions

“It is unacceptable that people seeking to enter our country illegally, including those who have crossed the Channel by small boat, are not appropriately penalised for breaking the law. Tougher penalties would also deter some people from undertaking these dangerous journeys altogether, especially where they originate from manifestly safe European countries with well-functioning asylum systems like France.”

‘New Plan for Immigration: Policy Statement’ (March 2022)

Art 31(1), Refugee Convention

“Article 31 - Refugees unlawfully in the country of refuge

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

Art 31(1) defences

- Limited defences in UK law relating to deception and the use of false documents, principally under s.31, Immigration & Asylum Act 1999.
- *R (Pepushi) v CPS* [2004] EWHC 798 (Admin):

*“There is no room to apply the scope of [Article 31](#) as interpreted and declared by this Court in *Adimi* ; we are bound to apply the narrower provisions of [s 31](#) , even if in so doing it has the consequence that the UK is in breach of international obligations under a human rights treaty.”*

Art 31(1): defences II

“The longer sentence length will ensure that the police, prosecutors and the courts consider the offence as serious enough to take through the Criminal Justice System.”

HL Bill 82 Explanatory Notes to the Bill, §398

NB: Section 37, NABA 2022 concerns immunity from penalties under Art 31(1).

Section 40: criminalising ‘arrival’

- s.24(1)(1), Immigration Act 1971: offence of knowingly entering the UK.
- s.11(1), 1971 Act: “entry” = “*disembarking and subsequently leaving the immigration control area.*”
- A person has not entered the UK if they claim asylum before attempting to pass immigration control or are rescued at sea: *Kakaei v R* [2021] EWCA Crim 503 at [51]; *Kapoor v R* [2012] 1 WLR 3569 at [23]; *Bani v R* [2021] EWCA Crim 1958 at [94].

Section 40

“Entering the UK without leave is no longer considered entirely apt given the changes in the way people have sought to come to the UK through irregular routes.”

Explanatory Notes to the Bill, §392

Section 40: 2x new offences

s.40 creates two new offences:

1. ss.40(1) and (2) insert new subsections into s.24 of the 1971 Act to criminalise those who arrive in the UK without valid ec or an ETA.
2. s.40(4) amends s.25 of the 1971 Act to add 'arrive' to the definition of 'immigration law'.

Section 40 – some points of interest

1. No visa route to seek asylum in the UK. So most applicants will be criminalised or deterred.
2. Is penalising those seeking asylum consistent with Art 31(1)?
3. Proportionality of increased penalties.

Section 41: facilitation offences

- Amends the facilitation offences in ss.25 and 25A of the 1971 Act.
- Facilitation: may “*include behaviour linked to recruiting, transporting, transferring, harbouring, receiving or exchanging control over another person*”: Explanatory Notes to the Bill, §407.
- s.41(3) omits the requirement that assistance is ‘for gain’ from s.25A of the 1971 Act.

Section 41: international obligations / perspectives

Supreme Court of Canada in *B010 v Canada*:

Penalising a refugee under anti-smuggling laws for helping another refugee to arrive by boat was incompatible with international obligations under Art 31(1) of the Refugee Convention and inconsistent with the *Protocol against the Smuggling of Migrants by Land, Sea and Air*. It was also ‘inadmissible’ and “*absurd*” under Canadian law.

Section 41: defences / Section 42: stowaways

- s.41 introduces new exceptions and defences to protect rescuers and with respect to stowaways.
- s.42 introduces a new penalty for failure to secure a goods vehicle.

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