



**CBA Response to The Sentencing Council Consultation entitled,
'Immigration Offences'
June 2024**

Introduction - Q 1 to Q4

The Criminal Bar Association

1. The Criminal Bar Association (the 'CBA') represents the views and interests of practising members of the Criminal Bar in England and Wales. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and promote and represent the professional interests of its members.
2. The CBA is the largest specialist Bar association and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery

of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

3. The email contact details for the CBA are:

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These written submissions are provided on behalf of the Criminal Bar Association and we are happy for the names of the organisation and contributors to be included in any consultation response document.

4. The CBA welcomes the introduction of dedicated sentencing guidelines for Immigration offences under the Immigration Act 1971 and the Identity Documents Act 2010.

Section One: Facilitation

5. **Question 5: Do you have any comments on the proposed culpability factors?**

- i. In the Consultation paper at page 7, it outlines:

'There is a statutory defence in section 45 of the Modern Slavery Act 2015 for those who have committed a criminal act because of modern slavery or human trafficking. Once a person has been convicted of an offence and is to be sentenced, the modern slavery defence is no longer relevant either because it was not raised or because the circumstances fell short of the defence.'

There is no specific reference within the draft Guideline itself to the above passage. The statutory defence under s.45 Modern Slavery Act 2015 is not applicable for section 25 Immigration Act 1971 (Schedule 4 MSA 2015). In addition, an accused cannot rely on the protection of

Article 31 of the Refugee Convention in terms of facilitating the entry into the UK of another (see *Sternaj v DPP [2011] EWHC 1094* (Admin).)

- ii. It is suggested that the Lower Culpability C bracket be expanded to include 'involved due to coercion, pressure or relevant exploitation or trafficking.' This would then ensure that in the circumstances where s.45 Modern Slavery Act 2015 cannot apply as a statutory defence to a charge under s.25 Immigration Act 1971 - that if relevant, it can still be taken into account in terms of reflecting a lower level of culpability. Sentencers could be assisted by utilising a Single Competent Authority's Reasonable Grounds or Conclusive Grounds decision in the instance where an offender had been referred into the National Referral Mechanism (this would not be inconsistent with the authority of *Brecani [2021] EWCA Crim 731* which relates to the decision of the Single Competent authority being inadmissible at trial.

6. Question 6: Do you have any comments on the proposed harm factors?

- i. It is noted that the Guidelines per se relate to one offence alone and that currently 'offending conducted over a sustained period of time' is within the section of 'other aggravating factors.' However the real seriousness and methodology of offending in facilitation offences often involves more than 1 incident and conduct over a period of time. Reflecting and applying *Le and Stark [1999] 1 Cr App R (S) 422*, it is suggested that 'repeated offending,' and 'commission over a period of time' should form part of the specific factors to be addressed in terms of categorisation of harm.
- ii. Additional factors under category 1 harm could explicitly include whether illegal entry was being facilitated for individuals who are then required to work as sex workers. Currently category 1 harm includes

factors of 'exploited and/or put pressure on others.' Applying the background of AG Ref (No. 6 of 2004) (Plakici) [2004] EWCA Crim 125 where the overall sentence was a total of 23 years, with other offences including living off the earnings of prostitution, kidnapping and incitement for rape (10 years being the amount for facilitating illegal entry.)

7. Question 7: Do you have any comments on the proposed sentence levels?

- i. Assisting unlawful immigration of a family member for non-commercial purposes would under the draft guideline result in categorisation of lower culpability and category 3 harm – with a range between 1-2 years custody. This is slightly higher than sentences applied in older cases of Nenartoniene [2009] EWCA Crim 2659, Darays [2009] EWCA Crim 2654 and Walid [2016] EWCA Crim 1120 where sentences of between 9-10 months custody were imposed. Although the maximum sentence has been increased to life, the very lowest end of offending is such a distinctly different type of offending such that it may be that the starting range for category 3C should be slightly below 12 months. This would then provide a range for example between 9 months to 2 years custody for category 3C.
- ii. The resource assessment details that the impact of the draft guideline is likely to result in a possible increase of around 1 year 3 months to sentences (resulting in a requirement for around 50 additional prison places for the offence of assisting unlawful immigration to the UK).

8. Question 8: Do you have any comments on the proposed aggravating and mitigating factors?

- i. No statutory defence under s.45 Modern Slavery Act 2015 is available in relation to s.25 Immigration Act 1971. If not taken into account in the lower Culpability bracket, it would assist to include in factors reducing seriousness those of 'involvement due to relevant exploitation or trafficking.'
- ii. Applying the list of factors reducing seriousness or reflecting personal mitigation within the Drug Sentencing Guidelines, additional factors that could be included are:
 - Involvement due to pressure, intimidation or coercion falling short of duress
 - Pregnancy, childbirth and post-natal care
 - Offender's vulnerability was exploited
 - Difficult and/or deprived background or personal circumstances- in light of considerations of different groups within the criminal justice system facing multiple disadvantages that could well have a bearing on their offending.

Section Two: Knowingly enters the United Kingdom without leave/ Knowingly arrives in the United Kingdom without valid entry clearance

9. Question 9: Do you have any comments on the proposed culpability factors?

- i. The draft guideline relates to s24(B1) and s24(D1) offences that encompass arrival, as well as entry into the UK – thus allowing the prosecution of individuals who are intercepted in UK territorial seas. The maximum sentence has been increased to 4 years, and includes

small boats cases, offenders arriving into the UK in the back or lorries or by aeroplane. The consultation paper highlights that 120 offenders were sentenced for s.24(D1) offence of knowingly arriving in the UK without entry clearance in a 6 month period in 2022 and for s24(B1) offence of knowingly entering the UK without leave fewer than 5 offenders were sentenced.

- ii. We would agree that high culpability should include where an accused has made previous attempts to unlawfully enter or arrive in the UK including by the use of a false document. This accords with the recent guidance by the Court of Appeal in Arbati [2024] EWCA Crim 589¹ where the offender had entered without leave before, had been convicted of rape and issued with a deportation order. They left voluntarily yet returned within 7 months. The Court of Appeal viewed that an increase of 12 months to 2 years was appropriate as a starting point (at para [12].)
- iii. In terms of culpability, reflecting on the principles within Ginar [2023] EWCA Crim 1121, a consideration to include in the lower culpability bracket would be ‘culpability will be reduced if the offender genuinely intends to apply for asylum on grounds which are arguable’ (at para [24]).

10. Question 10: Do you have any comments on the proposed harm factors?

- i. In relation to harm considerations, category 1 of the draft guideline includes those ‘seeking to enter or arrive in order to engage in criminal activity.’ The concern is that this may well increase the seriousness of offending for individuals who go on to be victims of modern slavery and relevant exploitation, or have the unintended consequence of

¹ Decision by CACD at 16th May 2024.

capturing individuals who are coerced into offending as a result of debts to human smugglers.

- ii. We would ask that category 2 harm be expanded upon.

11. Question 11: Do you have any comments on the proposed sentence levels?

- i. The Court in *Ginar* (at paragraph 18) noted that as the maximum sentence of 4 years was much less than those of 10 year maximum which applied to the Identity Documents Act that the offending was inherently less serious, namely than those attracting 12-18 months range. It is noted that the draft Guidelines would result in higher sentences that perhaps follow on from the principles in *Ginar*.
- ii. In practice many offenders would be subject to Immigration detention. It is unclear in which circumstances an accused could be provided with a community order when they are without existing immigration status for example. It would assist sentencers to know of which circumstances a community order would be available to offenders without immigration status.
- iii. In a number of these types of cases, consideration is given to alternatives to prosecution and to the use of Foreign Offender Conditional Cautions. It may useful to practitioners to remind of the availability of such disposals (<https://www.cps.gov.uk/legal-guidance/immigration>)².

² The above guidance includes that:

‘The purpose of the Foreign National Offender Conditional Caution (FNOCC) is to bring about the offender’s departure from the UK and to ensure that return does not occur for a specified period of time. These conditions must be imposed in every case.

The offender may also be required to:

12. Question 12: Do you have any comments on the proposed aggravating and mitigating factors?

- i. If not addressed within Culpability, the following could be included within mitigating factors:

‘Committed offence in connection with having been a victim of modern slavery or relevant exploitation.’

- ii. Akin to the Drug sentencing guidelines, the following additional mitigating factors would assist:

- Pregnancy, childbirth and post-natal care.
- Offender’s vulnerability was exploited
- Difficult and/or deprived background or personal circumstances.

Section Three: Breach of Deportation Order

13. Question 13: Do you have any comments on the proposed culpability factors?

- i. There may be individuals who have committed the offence of breaching a deportation order, who have carried out the offence partly

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- Report regularly to an immigration office, reporting centre, police station or other similar place, pending removal.
 - Obtain or assist authorities in obtaining a valid national travel document.
 - Comply with removal directions within a set time period (usually 16 weeks) and any lawful directions given to effect departure.
 - Not to return to the UK within a specified period of time, normally 5 years as set out in the Immigration Rules, although in exceptional circumstances a period of 10 years may be specified.

If the FNO does not comply with the conditions set, they can be prosecuted for the original offence.

A FNOCC may only be offered to a foreign offender having no leave to enter or remain in the UK, and in respect of whom there is power to enforce departure.

FNOCCs may be used in cases that would ordinarily result in the imposition of imprisonment following conviction, where the sentence likely to be imposed for the offence under consideration would be less than two years imprisonment. They should only be used where it will be practicable to remove the person within a reasonable period of time.’

due to being re-trafficked. There may be circumstances where an absolute defence under s.45 MSA 2015 is not available, but forms part of the backdrop to the offending.

- ii. As a result, it is suggested that factors within the lower culpability bracket be expanded to include individuals who have been exploited, or subjected to trafficking or re-trafficking.

14. Question 14: Do you have any comments on the proposed harm factors?

- i. If an individual has committed a 'new serious offence,' then this would lead normally to a separate count being charged and sentence applicable for that new offence. It may result in double counting to include within the Harm bracket the 'commission of a new serious offence.'
- ii. It would assist for category 2 harm to be expanded. There may be many reasons why an individual has remained in the UK in breach of a deportation order for a lengthy period –for example if they have been subjected to relevant exploitation.

15. Question 15: Do you have any comments on the proposed sentence levels?

- i. It is unclear why the starting point for Category 2 harm and culpability C is that of 6 months custody, given that the maximum sentence is one of 5 years imprisonment. It is suggested that the category starting range should be lower than 6 months.
- ii. It is noted as per the consultation paper that only 20 individuals were sentenced for the above offence between the period of June to December 2022.
- iii. References to the published policy by the CPS on Immigration offences may be a useful reminder to practitioners – for example particularly in

terms of diversions from prosecution pertinent to Immigration offences such as Foreign National Offender Conditional Caution.

16. Question 16: Do you have any comments on the proposed aggravating and mitigating factors?

- i. If not included within culpability bracket, we would seek inclusion of the following within mitigating factors:

Committed offence in connection with having been a victim of modern slavery or relevant exploitation.

- iii. Akin to the Drug sentencing guidelines, we would ask for inclusion of the following additional mitigating factors:

- Pregnancy, childbirth and post-natal care.
- Offender's vulnerability was exploited
- Difficult and/or deprived background or personal circumstances.

Section Four: Deception

17. Question 17: Do you have any comments on the proposed culpability factors?

- i. The 'deception' offence relates to section 24A of the Immigration Act 1971, namely obtaining leave by deception. The maximum sentence available is one of 2 years imprisonment.
- ii. Within the lower culpability bracket, we would seek inclusion of those who have offended partly in connection with having been a victim of modern slavery or relevant exploitation. There may be circumstances where an offence is carried out that is linked to relevant exploitation – but not to the point where culpability is extinguished completely or

one of the constituent elements of the statutory defence under s.45 Modern Slavery Act 2015 is not satisfied.

18. Question 18: Do you have any comments on the proposed harm factors?

No matters arise in relation to harm factors proposed.

19. Question 19: Do you have any comments on the proposed sentence levels?

- i. It is unclear how and when non-custodial sentences would apply for the deception offences, particularly if an individual were subject to immigration detention or enforcement proceedings. Section 24A Immigration Act 1971 offences only apply to individuals who are not British citizens.
- ii. It is difficult for sentencers and practitioners alike to know when non-custodial sentences can be applied for offenders without any immigration status for example and would be useful to clarify within a draft Guideline.

20. Question 20: Do you have any comments on the proposed aggravating and mitigating factors?

- i. If not included within culpability bracket, it would be appropriate to include the following within mitigating factors:
 - Committed offence in connection with having been a victim of modern slavery or relevant exploitation.
- ii. Akin to the Drug sentencing guidelines, we would ask for inclusion of the following additional mitigating factors:
 - Pregnancy, childbirth and post-natal care.

- Offender's vulnerability was exploited
- Difficult and/or deprived background or personal circumstances.

Section Five: Possession of False Identity Documents etc with Improper Intention

21. Question 21: Do you have any comments on the proposed culpability factors?

- i. In terms of possession of false identity documents with improper intention (s.4 Identity Documents Act 2010), inclusion within lower culpability bracket, individuals who are involved due to having been a victim of relevant exploitation or trafficking.
- ii. A concern is that where an individual has used a false document in order to obtain employment, then the culpability bracket may place them at level B. This potentially results in a slightly higher sentence being applicable than cases such as *Acheampong* [2015] EWCA Crim 1894 and *Aderemi* [2018] EWCA Crim 1502.

22. Question 22: Do you have any comments on the proposed harm factors?

- i. It is appropriate in our view to place the categorisation of a document being used or intended for use to obtain rights, services or benefits in a lower category than the assistance of criminal activity (aside from category 1 or 3) and falsely demonstrating a lawful right to drive in the UK.
- ii. It also in our view reflects the sentencing authority of *Ovieriakhi* [2009] EWCA Crim 452. It might assist to expand slightly so that it is clear category 3 includes the opening of a bank account or to obtain employment.

23. Question 23: Do you have any comments on the proposed sentence levels?

- i.** In terms of sentencing levels, a number of authorities concerning offenders who have used a false document to secure work have resulted in sentences of 6 months duration – for example in *Aderemi* [2018] EWCA Crim 1502.
- ii.** The concern is that as the gain of employment will necessarily result in financial gain, the draft Sentencing Guideline will lead to the unintended consequence of an increase in the level of sentences imposed for this type of offender.
- iii.** Other examples include *Mehmeti* [2019] EWCA Crim 751 where the Court reduced a sentence to 6 months custody where the false identity document was not used for immigration purposes. In *Acheampong* [2015] EWCA Crim 1894, the Court of Appeal substituted a sentence of 8 months duration where a passport had been used for employment in order to support a child where an offender had not been entitled to be in the UK.
- iv.** Looking at the factual matrix within *R v Rexha Dauti* [2023] EWCA Crim 1766 it may be that the draft guideline could include a differentiation between offenders who arrive in the UK to be with family or to work (as opposed to the other end of the spectrum of those seeking to undertaking criminal activity.) In *Dauti* the appropriate starting point was considered to be 4 years (prior to plea) by the Court of Appeal for an offender who had been deported post a criminal conviction for possession with intent to supply and re-entered the UK using a counterfeit Czech passport. The Court endorsed the Judge’s view that the offender came into the country with the intention of committing criminal activity.

24. Question 24: Do you have any comments on the proposed aggravating and mitigating factors?

- i. If not included within culpability bracket, it would be appropriate to include the following within mitigating factors:

Committed offence in connection with having been a victim of modern slavery or relevant exploitation.

- iii. Akin to the Drug sentencing guidelines, inclusion of the following additional mitigating factors:

- Pregnancy, childbirth and post-natal care.
- Offender's vulnerability was exploited
- Difficult and/or deprived background or personal circumstances.

Section Six: Possession of False Identity Documents etc Without Reasonable Excuse

25. Question 25: Do you have any comments on the proposed culpability factors?

- i. The maximum sentence for section 6 Identity Documents Act 2010 is 2 years imprisonment. We are in agreement with the gradation as between possession of multiple documents (category A) and possession of a single document (category B).
- iii. We would ask for consideration within lower culpability bracket of inclusion of those involved due to having been a victim of relevant exploitation or trafficking.

26. Question 26: Do you have any comments on the proposed harm factors?

We are in agreement with the differentiation in category 1 and category 2 harm – as between driving licences and passports

27. Question 27: Do you have any comments on the proposed sentence levels?

- i. The sentencing range in the draft guideline potentially indicates that only the lowest categorisation, namely Category 2B cases would immediately fall to be sentenced in the Magistrates Court. This would encompass a narrow category of individuals with a driving licence/apparatus capable of making a driving licence and possession of a single document or apparatus to make a single document. It may be as a result that the draft Sentencing Guideline will have the unintended consequence of a greater proportion of s.6 Identity Documents Act 2010 offences being sent to the Crown Court for sentencing. This is in contrast with the current figures cited in the Consultation of 62 % of offenders being sentenced in the Magistrates Court (for 2022, in total 70 offenders overall sentenced for the offence).
- ii. The category range that applies for Category 2B cases is in our view correct and does accord with sentencing decisions of Hoxha [2012] EWCA Crim 1765 and Mehmeti [2019] EWCA Crim 751.
- iii. It is noted that the Sentencing authorities from the Court of Appeal can be somewhat similar as between section 4 and section 6 offences under the Identity Documents Act 2010. For example, in R v Bashkim Hoxha [2012] EWCA Crim 1765 where an Albanian national was stopped driving a vehicle and had produced an Albanian driving licence which was a forgery. He was convicted after trial of an offence under s4 Identity Documents Act 2010 (maximum of 10 years sentence). The sentence imposed of 8 months was substituted by one of 4 months

duration instead. Using the current draft Guideline (if prosecuted and sentenced under s.6 Identity Documents Act 2010), the sentencing range provided for category 2 B in the draft Guideline would accord with the type of sentence imposed by the Court of Appeal in Hoxha.

- iv. However, the draft Guideline may have the potential consequence of increasing sentencing levels for those who have used identity documents purely to obtain employment, rather than for example entering the UK. An example is that in Aderemi [2018] EWCA Crim 1502 where an individual used a counterfeit Dutch identity card to obtain employment. He pleaded guilty an offence under section 4 of the Identity Documents Act 2010. A sentence of 6 months was substituted by the Court of Appeal (on G plea.) Under the draft Guideline, a case replicating the circumstances of Aderemi (if prosecuted under s6 Identity Documents Act 2010) would be placed as category 1B and would fall within a sentencing range of between 6 months to 1 year custody.
- v. The case authorities on the whole accord with sentences of 6 months duration where a false passport is being used to obtain work or open a bank account (see Aderemi [2018] EWCA Crim 1502 – see also Blackstone’s Criminal Practice at B22.75).

28. Question 28: Do you have any comments on the proposed aggravating and mitigating factors?

- ii. If not included within culpability bracket, it would be appropriate to include the following within mitigating factors:

Committed offence in connection with having been a victim of modern slavery or relevant exploitation.

iv. Akin to the Drug sentencing guidelines, inclusion of the following additional mitigating factors:

- Pregnancy, childbirth and post-natal care
- Offender's vulnerability was exploited
- Difficult and/or deprived background or personal circumstances.

Section Seven: Ancillary Orders

29. Question 29: Do you have any comments on the proposed wording at step 6?

i. The current wording at step 6 of the draft Guideline outlines:

'In all cases, the court must consider whether to make a compensation order and/or other ancillary orders.

Recommendation for deportation

Where a custodial sentence of less than 12 months has been imposed and notice has been given under section 6(2) of the Immigration Act 1971, the court must consider whether to make a recommendation for deportation under section 6(1) of that Act.

Where a custodial sentence of 12 months or more has been imposed for a single offence, the provisions for automatic deportation in section 32 of the UK Borders Act 2007 apply and no separate recommendation for deportation should be made by the court under the 1971 Act.'

ii. The Respondents are not Immigration law specialists. However, the current wording within s6(1) of the Immigration Act 1971 does not appear to make it mandatory for a Court to consider making a recommendation for deportation. The wording that a court 'must' consider whether to make

a recommendation for deportation for a custodial sentence of less than 12 months has been imposed is queried.

- iii. It is agreed that automatic liability to deportation applies for sentences imposed of over 12 months duration (see Crown Court Compendium part II June 2023 at S7.3). There are no concerns in relation to the wording expressed in the draft Guideline of:

‘Where a custodial sentence of 12 months or more has been imposed for a single offence, the provisions for automatic deportation in section 32 of the UK Borders Act 2007 apply and no separate recommendation for deportation should be made by the court under the 1971 Act.’

Section Eight: Equality and Diversity

- 30. Question 30: Are there any aspects of the draft guidelines that you feel may cause or increase disparity in sentencing?**

The only potential unintended consequence relates to the practicalities and ability for sentencers of imposing non-custodial sentences for individuals without immigration status. Without the knowledge of when and how non immediate custodial sentences can be applied for those without Immigration status may have an impact on Equality and Diversity issues.

- 31. Question 31: Are there any existing disparities in sentencing of the offences covered in this guideline that you are aware of, which the draft guideline could and should address?**

No additional points to raise.

32. Question 32: Are there any other matters relating to equality and diversity that you consider we ought to be aware of and/or that we could and should address in the guideline?

No additional points to raise.

33. Question 33: Do you have any other comments on the proposed guidelines that have not been covered elsewhere?

No additional points to raise.

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6th June 2024.