

# Immigration Offences

Consultation

March 2024



# **Immigration Offences**

## **Consultation**

# About this consultation

- To:** This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.
- Duration:** From 20 March 2024 to 12 June 2024
- Enquiries (including requests for the paper in an alternative format) to:** Office of the Sentencing Council  
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- How to respond:** Please send your response by 12 June 2024:  
by email to Vicky Hunt:  
[consultation@sentencingcouncil.gov.uk](mailto:consultation@sentencingcouncil.gov.uk)  
or by using the online consultation at:  
<https://consult.justice.gov.uk/>
- Response paper:** Following the conclusion of this consultation exercise, a response will be published at: [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)
- Freedom of information:** We will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.  
In addition, responses may be shared with the Justice Committee of the House of Commons.  
Our [privacy notice](#) sets out the standards that you can expect from the Sentencing Council when we request or hold personal information (personal data) about you; how you can get access to a copy of your personal data; and what you can do if you think the standards are not being met.

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# Introduction

## What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines for the courts to use when passing a sentence. The Council consults on its proposed guidelines before they come into force and makes changes to the guidelines as a result of consultations.

## Why Immigration offences?

This consultation seeks views on a draft of the first dedicated sentencing guidelines for immigration offences under the Immigration Act 1971 and the Identity Documents Act 2010.

There are currently no definitive guidelines for these offences.

The draft guidelines cover the 1971 Act offences of Facilitation (assisting unlawful immigration to the UK and helping asylum - seekers to enter the UK) (section 25 and 25A); Deception (section 24A); Breach of Deportation Order (section 24(A1)); Knowingly entering the UK without leave (section 24(B1)), and Knowingly arriving in the UK without valid entry clearance (section 24(D1)).

The draft guidelines also cover the 2010 offences of possession of false identity documents with improper intention (section 4) and possession of false identity documents without reasonable excuse (section 6).

There are many more immigration offences that could have been included however the Council has chosen to focus on the higher volume, more serious offences.

A number of changes have been made to the Immigration Act 1971 by the Nationality and Borders Act 2022 (NABA).

NABA increased the statutory maximum penalty for the Facilitation offences (section 25 and 25A) raising it from 14 years to life imprisonment.

The Act also amended the offences of breach of a deportation order (section 24(A1)) and knowingly enters the UK without leave (section 24(B1)), increasing the statutory maximum sentences from 6 months to 5 years and 4 years respectively.

In addition, a number of new offences were created including knowingly arriving in the UK without valid entry clearance (section 24(D1)) which was given a maximum sentence of 4 years.

## **What is the Council consulting about?**

The Council has produced this consultation paper in order to seek views from as many people as possible interested in the sentencing of immigration offences.

However, it is important to clarify that the Council is consulting on sentencing guidelines for these offences and not the legislation upon which such offences are based. The relevant legislation is a matter for Parliament and is, therefore, outside the scope of this exercise.

## **Responding to the consultation**

Through this consultation process, the Council is seeking views on:

- the principal factors that make any of the offences included within the draft guidelines more or less serious;
- the additional factors that should influence the sentence;
- the types and lengths of sentence that should be passed; and
- anything else you think should be considered.

In the following sections the proposed changes are outlined in detail and you will be asked to give your views. You can give your views by answering some or all of the questions below either by email to [consultation@sentencingcouncil.gov.uk](mailto:consultation@sentencingcouncil.gov.uk) or by using the online consultation at <https://consult.justice.gov.uk/>.

A summary of the consultation questions can be found at **Annex A**.

## **What else is happening as part of the consultation process?**

This is a 12 week public consultation. The Council has not planned any consultation meetings but would be happy to arrange a meeting to discuss any of the issues raised if this would be helpful. Once the results of the consultation have been considered, the updated guidelines will be published and used by all courts.

**Question 1: What is your name?**

**Question 2: What is your email address?**

**Question 3: Are you answering as an individual? If so, are you happy for your name to be included in the consultation response document?**

**Question 4: If you are answering on behalf of an organisation, group or bench, please provide the name of the organisation, group or bench.**



# Overarching issues

## **Approach to the guidelines**

In preparing the guidelines, the Council has had regard to the purposes of sentencing and to its statutory duties. The Council's aim is to ensure that all sentences are proportionate to the offence committed and in relation to other offences.

## **Applicability of guidelines**

When issued as definitive guidelines following consultation the guidelines will apply only to offenders aged 18 and older. General principles to be considered in the sentencing of children and young people are set out in the Sentencing Council's definitive guideline, [Overarching Principles – Sentencing Children and Young People](#).

# Section One: Facilitation

The draft guideline for section 25 (Assisting unlawful immigration to the UK) and section 25A (Helping asylum seekers to enter the UK) can be found [here](#).

The main ways in which the facilitation offences are committed are:

- Assisting illegal entry or arrival, for example by smuggling someone in a small boat or other vehicle or by providing false documents for presentation at a port. (s25)
- Harbours an illegal entrant, a person who stays longer than allowed by their leave, or a person who fails to observe a condition of their leave. (s25)
- Assisting someone to remain by deception, for example by entering into a sham marriage or by procuring false documents such as education certificates to obtain a visa. (s25)
- Bringing asylum seekers to the UK to enable them to claim asylum. (s25A)

The offences under section 25 and section 25A share the same maximum penalty (life imprisonment) and the approach to sentencing them in both the Crown Court and Court of Appeal has been very similar.

Given these considerations, the Sentencing Council proposes to have one guideline covering both the section 25 and section 25A offences, with the same culpability and harm factors, and the same aggravating and mitigating factors. Some factors will be more relevant to offences under section 25, and some more relevant to section 25A offences. Others will be common to both offences. As with all guidelines, sentencers will apply the factors which are relevant to the case before them.

## Step One

The first step of the guidelines requires the sentencer to assess the culpability level of the offender and the harm caused by the offence.

## Culpability factors

Considering factors that are commonly present in relevant case law, three levels of culpability are proposed, reflecting the role that an offender played in the offending, the levels of sophistication or planning, the level of financial advantage expected or obtained and the presence of any coercion or pressure.

### Culpability demonstrated by one or more of the following

In assessing culpability, the court should weigh up all the factors of the case, including the offender's role, to determine the appropriate level. Where there are characteristics present which fall under different categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

#### A - High culpability

- Leading role in group offending carried out for commercial purposes
- Sophisticated planning by the offender beyond that which is inherent in the offence
- Significant financial gain and/or expectation of significant financial gain

#### B – Medium culpability

- Other cases that fall between categories A and C because:
  - Factors are present in A and C which balance each other out and or
  - The offender's culpability falls between the factors as described in A and C

#### C – Lower culpability

- Non – commercial activity
- Minor role in group activity
- Involved due to coercion or pressure

Note that one factor indicating lower culpability is where the offender is engaged by coercion or pressure. 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. In some circumstances, however, this factor may be relevant to reflect the fact that an offender had a lower level of responsibility.

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

#### Harm factors

Once the court has determined the level of culpability, the next step is to consider the harm caused or intended to be caused by the offence.

Three levels of harm are proposed, with the highest category (category 1) intending to capture cases where there is a high risk to life due to the method of entry or arrival into the UK. In addition, as is seen in the case law, facilitating entry into the UK, as opposed to facilitating the unlawful extension of a person's stay in the UK, is considered more serious. Therefore facilitating the entry of large numbers of individuals has been placed into the highest category of harm. This factor is included in harm, rather than culpability, as many cases refer to the harm to the public of such offending, or to the fact that such offending is of 'grave public concern'.

Finally, exploiting or putting pressure on others has also been added to the highest harm category.

<b>Harm</b>	
Use the factors given in the table below to identify the Harm category.	
<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Means or route of entry or arrival involved a high risk of serious injury or death</li> <li>• Facilitating large numbers of individuals to illegally enter or arrive in the UK</li> <li>• Exploited and/or put pressure on others</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Means or route of entry or arrival involved some risk of serious injury or death</li> <li>• Facilitating small numbers of individuals to illegally enter or arrive in the UK</li> <li>• Facilitating large numbers of individuals to remain unlawfully</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• All other cases</li> </ul>

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

**Step Two**

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

**Sentence levels**

As set out above, the statutory maximum sentence for these offences was increased to life imprisonment in relation to offences committed from June 2022. Prior to this, the statutory maximum sentence was 14 years’ custody. The data available is for offenders sentenced up to December 2022 and is therefore unlikely to reflect the increase in the statutory maximum sentence.

For the section 25 offence, the majority of offenders are sentenced to immediate custody. In 2022, around 84 per cent of offenders received immediate custody. A further 15 per cent received a suspended sentence. For those sentenced to immediate custody in 2022, the (mean) average custodial sentence length (ACSL) after any reduction for guilty plea was 3 years 1 month. All offenders received a sentence of 8 years or less in 2022, after any reduction for guilty plea.

The section 25A offence is very low volume. In 2022, fewer than 5 offenders were sentenced. In the last four years, all offenders received an immediate custodial sentence. Due to the small number of offenders sentenced for this offence each year, the ACSL has been provided for the last five years combined. Between 2018 and 2022, the ACSL was 3 years 11 months. In the last 11 years, all offenders sentenced to immediate custody received a sentence of 8 years or less, after any reduction for guilty plea.

An average sentence in the region of 3-4 years may seem relatively low, for an offence which has a statutory maximum penalty of either 14 years (as it would have been for the

majority of cases) or life imprisonment. It is important to remember that these figures represent the final sentence imposed and would include a reduction of up to a third in cases where the offender pleaded guilty. The figures in the Sentencing Council guidelines reflect the sentence before any guilty plea reduction is applied by the court. In addition, having considered a number of transcripts it is clear that there is a broad range of seriousness amongst the cases.

In deciding upon the sentence levels the Council considered transcripts and the statistical data, and also considered other offences of similar gravity such as modern slavery.

The Council also considered Parliament's intention in raising the statutory maximum penalty for these offences to life imprisonment. The rationale of the government for introducing the increased sentencing powers, as set out in the 'New Plan for Immigration policy statement', dated March 2021, was that 'Each attempt at illegal entry risks life and the penalties for those who facilitate illegal entry should reflect that. We will therefore increase the maximum sentence from 14 years to life imprisonment.'

It seems that the main concern was illegal entry, especially in cases where life is at risk. The sentencing table therefore provides higher sentences for the most serious offending behaviour whilst maintaining current sentencing practice for less serious offending:

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

<b>Culpability</b>			
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<p><b>Starting Point</b> 14 years' custody</p> <p><b>Category Range</b> 10 - 16 years' custody</p>	<p><b>Starting Point</b> 12 years' custody</p> <p><b>Category Range</b> 9 - 14 years' custody</p>	<p><b>Starting Point</b> 8 years' custody</p> <p><b>Category Range</b> 6 - 10 years' custody</p>
<b>Category 2</b>	<p><b>Starting Point</b> 8 years' custody</p> <p><b>Category Range</b> 6 - 10 years' custody</p>	<p><b>Starting Point</b> 5 years' custody</p> <p><b>Category Range</b> 4 - 7 years' custody</p>	<p><b>Starting Point</b> 3 years' custody</p> <p><b>Category Range</b> 2 - 5 years' custody</p>
<b>Category 3</b>	<p><b>Starting Point</b> 5 years' custody</p> <p><b>Category Range</b> 4 - 7 years' custody</p>	<p><b>Starting Point</b> 3 years' custody</p> <p><b>Category Range</b> 2 - 5 years' custody</p>	<p><b>Starting Point</b> 1 year 6 months' custody</p> <p><b>Category Range</b> 1 - 2 years' custody</p>

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

### Aggravating and mitigating factors

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence. The following are proposed:

#### Factors increasing seriousness

##### Statutory aggravating factors:

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

##### Other aggravating factors:

- Offending conducted over a sustained period of time
- Abuse of position of trust
- Recruited others to take part in offending (unless already taking into account at step 1)
- Significant risk of injury or death to those seeking to rescue individuals

#### Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Sole or primary carer for dependent relatives
- Age/lack of maturity
- Mental disorder or learning disability
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment
- Offender co-operated with investigation, made early admissions and and/or voluntarily reported offending
- Limited understanding of scale of activity

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

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

The draft guideline for the section 24(B1) and section 24 (D1) offences can be found [here](#).

Prior to the amendments made by the Nationality and Borders Act 2022 (NABA) the offence of knowingly entering the UK without leave was set out in section 24(1)(a) of the Immigration Act 1971.

"Leave" refers to permission to enter or remain in the UK – such leave may be limited in terms of duration, or indefinite. "Entry" is defined in section 11(1) of the 1971 Act as meaning disembarking and subsequently leaving the immigration control area. Where a person is detained and taken from the area, or granted immigration bail, they are not deemed to have entered the UK.

The offence of entering the UK without leave was no longer considered sufficient given the changes in the ways in which people have sought to come to the UK through irregular routes. NABA therefore created two new offences so that it encompasses arrival, as well as entry into the UK. This allows prosecutions of individuals who are intercepted in UK territorial seas.

Prior to the changes, the penalty for entering the UK without leave was an unlimited fine and/or a maximum of 6 months' imprisonment. The Government's assessment was that this maximum term of imprisonment did not provide a sufficient deterrent to those seeking to enter the UK without leave and did not reflect the seriousness of the offence, in particular where there are factors such as where conduct endangers life. The two new offences were therefore given higher maximum sentences of four years' imprisonment.

Due to the similarities between the offences of entry and arrival the proposed guideline combines the two. In drafting this guideline, and looking at the recent case law and transcripts available it is clear that small boat cases are currently the most common method of committing the offence. However, this offence can also be committed in other ways such as offenders coming into the UK in the back of lorries, or by aeroplane. The draft guideline seeks to cover all scenarios.

## Step One

The first step of the guidelines is to consider the culpability level of the offender and the harm caused by the offence by the assessment of a series of factors.

### Culpability factors

Picking up on factors commonly present in case law and sentencing remarks, the Council proposes three levels of culpability, reflecting the role that an offender played in the offending; the level of sophistication or planning; any previous unlawful attempts to enter the UK; whether the offender was fleeing persecution or danger; and whether they had been pressured or coerced.

Previous convictions are usually considered at step 2 of the guideline but in this guideline the Council has included the high culpability factor 'Has made previous attempts to unlawfully enter or arrive in the UK including by use of a false document' to step 1. The Council considers that repeated attempts to evade the border is a key consideration that is relevant to the initial assessment of seriousness.

The Council has included a low culpability factor 'Offender fled persecution or serious danger' as this has been a consideration in recent Court of Appeal guidance, and is likely to be relevant in other cases. Where the court is satisfied that the offender was fleeing persecution or serious danger it is appropriate that this should be reflected in the assessment of seriousness.

### Culpability demonstrated by one or more of the following

In assessing culpability, the court should weigh up all the factors of the case, including the offender's role, to determine the appropriate level. Where there are characteristics present which fall under different categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

#### A - High culpability

- Significant role played (more than simply a passenger)
- Sophisticated planning by the offender beyond that which is inherent in the offence
- Has made previous attempts to unlawfully enter or arrive in the UK including by use of a false document

#### B – Medium culpability

Other cases that fall between categories A and C because:

- Factors are present in A and C which balance each other out and/or
- The offender's culpability falls between the factors as described in A and C

#### C – Lower culpability

- Offender fled persecution or serious danger
- Involved due to coercion or pressure



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

### Harm factors

Once the court has determined the level of culpability, the next step is to consider the harm caused or intended to be caused by the offence.

Two levels of harm are proposed, with the highest category (category 1) for those who enter the country with the specific purpose of engaging in criminal activity and for those who exploit or put pressure on others. All other cases will fall into the lower category.

Harm	
Use the factors given in the table below to identify the Harm category.	
Category 1	<ul style="list-style-type: none"> <li>• Seeking to enter or arrive in order to engage in criminal activity</li> <li>• Exploited put pressure on others</li> </ul>
Category 2	<ul style="list-style-type: none"> <li>• All other cases</li> </ul>

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

### Step Two

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

### Sentence levels

As set out above NABA created these new offences with a statutory maximum sentence of four years. The new offences came into effect in June 2022.

For the s24(B1) offence of knowingly entering the UK without leave, between June and December 2022 fewer than 5 offenders were sentenced, all of whom received a custodial sentence (either immediate or suspended). All offenders who received immediate custody were given a sentence greater than 6 months and up to and including 12 months, after any reduction for guilty plea.

For the s24(D1) offence of knowingly arriving in the UK without valid entry clearance, around 120 offenders were sentenced between June and December 2022. All offenders received a custodial sentence. The ACSL during the period June to December 2022 was 8 months. Almost all offenders received a sentence of 12 months or less (97 per cent), after any reduction for guilty plea.

Considering this data and reading transcripts and case law the Council proposes the following sentence levels:

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

<b>Culpability</b>			
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<p><b>Starting Point</b> 2 years' custody</p> <p><b>Category Range</b> 1 year 6 months' - 3 years' custody</p>	<p><b>Starting Point</b> 1 year 6 months' custody</p> <p><b>Category Range</b> 9 months' – 2 years' custody</p>	<p><b>Starting Point</b> 1 years' custody</p> <p><b>Category Range</b> 6 months' – 1 year 6 months' custody</p>
<b>Category 2</b>	<p><b>Starting Point</b> 1 years 6 months' custody</p> <p><b>Category Range</b> 9 months' - 2 years' custody</p>	<p><b>Starting Point</b> 1 years' custody</p> <p><b>Category Range</b> 6 months' – 1 year 6 months' custody</p>	<p><b>Starting Point</b> 6 months' custody</p> <p><b>Category Range</b> High level community order – 8 months' custody</p>

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

### **Aggravating and mitigating factors**

The court should next consider any additional factors, not identified at step one, which may aggravate or mitigate the offence. The following are proposed:

#### **Factors increasing seriousness**

##### **Statutory aggravating factors:**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

##### **Other aggravating factors:**

- Previously deported, removed or extradited from the UK or deprived of UK citizenship
- Previous history of failed applications for leave to enter or remain in the UK or for asylum (if not already taken into account at step 1)

### Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Sole or primary carer for dependent relatives
- Age and/or lack of maturity
- Mental disorder or learning disability
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment
- Offender co-operated with investigation, made early admissions and/or voluntarily reported offending

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

# Section Three: Breach of Deportation Order

A deportation order requires the subject to leave the UK and prohibits them from entering the UK. It invalidates any leave to enter or remain in the UK that was granted before the order was made or while it is in force.

Prior to the amendments made by NABA the maximum sentence for breach of a deportation order was 6 months imprisonment. NABA increased the maximum to five years imprisonment.

## Step One

The first step of the guidelines requires the sentencer to assess the culpability level of the offender and the harm caused by the offence.

## Culpability factors

Considering factors that are commonly present in relevant case law, three levels of culpability are proposed, reflecting the offender's level of compliance with the order, any previous breaches, how sophisticated the breach was and whether there was any coercion or pressure to breach the order.

### Culpability demonstrated by one or more of the following

In assessing culpability, the court should weigh up all the factors of the case, including the offender's role, to determine the appropriate level. Where there are characteristics present which fall under different categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

#### A - High culpability

- Breached order shortly after its imposition
- Has previously breached a deportation order
- Sophisticated method of breach

#### B – Medium culpability

- Other cases that fall between categories A and C because:
  - Factors are present in A and C which balance each other out and/or
  - The offender's culpability falls between the factors as described in A and C

**C – Lower culpability**

- Complied with order for lengthy period of time
- Involved due to coercion or pressure
- Unsophisticated nature of conduct

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

Once the court has determined the level of culpability, the next step is to consider the harm caused or intended to be caused by the offence.

Two levels of harm are proposed, with the highest category (category 1) intending to capture cases where the offender has committed a new serious offence, has returned to the UK with the intention of offending, or has been in breach of the order for a lengthy period. All other cases will fall into lower harm.

**Harm**

Use the factors given in the table below to identify the Harm category.

**Category 1**

- Committed new serious offence(s)
- Returned with the intention of committing further serious offence(s)
- Been in the UK in breach of a deportation order for a lengthy period

**Category 2**

All other cases

**Question 14: Do you have any comments on the proposed harm factors?****Step Two**

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

**Sentence levels**

As set out above, prior to the creation of this new offence by NABA, the maximum sentence for breaching a deportation order was 6 months' imprisonment. NABA increased the maximum sentence from six months to five years' imprisonment. This new form of the offence came into effect in June 2022.

Only around 20 offenders have been sentenced for this offence between June and December 2022. Nearly all offenders received an immediate custodial sentence (91 per cent), while around 4 per cent received a suspended sentence. Between June and December 2022, the ACSL was 7 months. All offenders who received immediate custody were sentenced to 2 years or less, after any reduction for guilty plea.

Considering this data and reading transcripts and case law the Council proposes the following sentence levels:

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

<b>Culpability</b>			
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<p><b>Starting Point</b> 2 years 6 months' custody</p> <p><b>Category Range</b> 2 - 3 years 6 months' custody</p>	<p><b>Starting Point</b> 2 years' custody</p> <p><b>Category Range</b> 1 – 3 years' custody</p>	<p><b>Starting Point</b> 1 year 6 months' custody</p> <p><b>Category Range</b> 6 months' – 2 years' custody</p>
<b>Category 2</b>	<p><b>Starting Point</b> 2 years' custody</p> <p><b>Category Range</b> 1 – 3 years' custody</p>	<p><b>Starting Point</b> 1 year 6 months' custody</p> <p><b>Category Range</b> 6 months – 2 years' custody</p>	<p><b>Starting Point</b> 1 year's custody</p> <p><b>Category Range</b> 6 months – 1 year 6 months' custody</p>

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

### **Aggravating and mitigating factors**

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence. The following are proposed:

#### **Factors increasing seriousness**

##### **Statutory aggravating factors:**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

**Other aggravating factors:**

- Use of false documents (where not charged separately or taken in account at step 1)

**Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Sole or primary carer for dependent relatives
- Age and/or lack of maturity
- Mental disorder or learning disability
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment
- Offender co-operated with investigation, made early admissions and or voluntarily reported offending

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

# Section Four: Deception

The ‘deception’ offence includes use of deception to enter; remain; obtain an Electronic Travel Authorisation, and to seek to avoid, postpone or revoke enforcement action. The offence has a statutory maximum sentence of 2 years.

## Step One

The first step of the guidelines requires the sentencer to assess the culpability level of the offender and the harm caused by the offence.

## Culpability factors

Considering factors that are commonly present in relevant case law, three levels of culpability are proposed, reflecting the level of sophistication or planning, whether there had been multiple or repeated deceptions, and any reduction in responsibility due to mental disorder, learning disability or coercion or pressure.

**Culpability demonstrated by one or more of the following**

In assessing culpability, the court should weigh up all the factors of the case, including the offender’s role, to determine the appropriate level. Where there are characteristics present which fall under different categories the court should balance these characteristics to reach a fair assessment of the offender’s culpability.

**A - High culpability**

- Sophisticated nature of the offence or significant planning
- Multiple or repeated deceptions

**B – Medium culpability**

- Other cases that fall between categories A and C because:
  - Factors are present in A and C which balance each other out and/or
  - The offender’s culpability falls between the factors as described in A and C

**C – Lower culpability**

- Unplanned or limited in scope
- Unsophisticated nature of conduct
- Offender’s responsibility substantially reduced by mental disorder or learning disability
- Involved due to coercion or pressure



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

### Harm factors

Once the court has determined the level of culpability, the next step is to consider the harm caused or intended to be caused by the offence.

Just two levels of harm are proposed which ensure that those who have benefitted from a lengthy stay in the UK as a result of their deception are more severely penalised.

Harm	
Use the factors given in the table below to identify the Harm category.	
Category 1	<ul style="list-style-type: none"> <li>Deception results in lengthy period of stay</li> </ul>
Category 2	<ul style="list-style-type: none"> <li>All other cases</li> </ul>

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

### Step Two

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

### Sentence levels

Immediate custody was consistently the most common sentence outcome during the last 11 years. In 2022, around 89 per cent of offenders were sentenced to immediate custody and the remaining 11 per cent received a suspended sentence.

The statutory maximum sentence for this offence is 2 years' custody. Due to the small number of offenders sentenced each year, the ACSL has been calculated for the last five years combined. During the period 2018 to 2022, the ACSL was 11 months and all offenders received a sentence of 18 months or less, after any reduction for guilty plea.

Considering this data and reading transcripts and case law the Council proposes the following sentence levels:

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

<b>Culpability</b>			
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<p><b>Starting Point</b> 1 year 3 months' custody</p> <p><b>Category Range</b> 10 months – 1 years 8 months' custody</p>	<p><b>Starting Point</b> 1 year's custody</p> <p><b>Category Range</b> 9 months' – 1 year 6 months' custody</p>	<p><b>Starting Point</b> 6 months' custody</p> <p><b>Category Range</b> High level community order - 9 months' custody</p>
<b>Category 2</b>	<p><b>Starting Point</b> 1 year's custody</p> <p><b>Category Range</b> 9 months – 1 year 6 months' custody</p>	<p><b>Starting Point</b> 9 months' custody</p> <p><b>Category Range</b> 6 months – 1 year's custody</p>	<p><b>Starting Point</b> High level community order</p> <p><b>Category Range</b> Band C fine – 6 months' custody</p>

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

**Aggravating and mitigating factors**

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence. The following are proposed:

**Factors increasing seriousness**

**Statutory aggravating factors:**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

**Other aggravating factors:**

- Involvement of others through pressure, influence
- Use of false documents (where not charged separately or taken in account at step 1)

### Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Sole or primary carer for dependent relatives
- Age and/or lack of maturity
- Mental disorder or learning disability (where not taken into account at step 1)
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment
- Offender co-operated with investigation, made early admissions and/or voluntarily reported offending

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

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

The offence of possession of a false identity document is not solely related to immigration. Offenders can commit the offence for other purposes and this draft guideline seeks to cover all forms of the offence. It has, however, been included in this project because the use of false documents for immigration purposes is a key immigration offence.

## Step One

The first step of the guideline requires the sentencer to assess the culpability level of the offender and the harm caused by the offence.

## Culpability factors

Considering factors that are commonly present in relevant case law, three levels of culpability are proposed, reflecting whether the offender was in possession of documents for their own use, or for the use of others, potentially on a commercial scale; any evidence of financial gain and to what extent; whether it was a group offence; whether there was an element of planning or sophistication and finally whether the offender was pressured or coerced into committing the offence.

### Culpability demonstrated by one or more of the following

In assessing culpability, the court should weigh up all the factors of the case, including the offender's role, to determine the appropriate level. Where there are characteristics present which fall under different categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

#### A - High culpability

- Possession of a large number of documents used for commercial scale criminal activity
- Substantial financial gain or expectation of substantial financial gain
- A leading role where offending is part of a group activity
- Sophisticated nature of offence or significant planning

**B – Medium culpability**

- Possession of multiple documents intended for the use of others
- Financial gain or expectation of financial gain
- A lesser role where offending is part of a group activity

**C – Lower culpability**

- Possession of one or two false documents for own use
- Involved due to coercion or pressure

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

Once the court has determined the level of culpability, the next step is to consider the harm caused or intended to be caused by the offence.

Four levels of harm are proposed, with the highest category (category 1) reserved for immigration cases. The second category is for offences where the offender has used documents to assist in criminal activity or to evade responsibility for criminal activity. In addition, the second category covers offenders driving using false documents. The third category is for offenders who use documents in order to gain benefits or rights such as employment, accommodation, or bank accounts.

<b>Harm</b>	
Use the factors given in the table below to identify the Harm category.	
<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Document(s) used or intended for use to evade immigration controls</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Document used or intended for use to assist criminal activity (other than that described in category 1 or 3)</li> <li>• Document used or intended for use to evade responsibility for criminal activity (other than that described in category 1 or 3)</li> <li>• Document used or intended for use to falsely demonstrate a lawful right to drive in the UK</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• Document used or intended for use to obtain rights, services or benefits</li> </ul>
<b>Category 4</b>	<ul style="list-style-type: none"> <li>• All other cases</li> </ul>

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

### **Step Two**

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

### **Sentence levels**

The volume of offenders sentenced for possessing false identity documents etc with improper intention has decreased since 2013. In 2022, around 190 offenders were sentenced, compared to around 860 in 2013.

Immediate custody has consistently been the most common sentence outcome across the period 2012 to 2022. In 2022, around 72 per cent of offenders were sentenced to immediate custody. A further 20 per cent received a suspended sentence and around 6 per cent received a community order.

The statutory maximum sentence for this offence is 10 years' custody. In 2022, the ACSL was 9 months after any reduction for guilty plea and this is similar to previous years. The majority of offenders receive a sentence of 1 year or less (84 per cent of immediate custodial sentences in 2022).

Considering this data and reading transcripts and case law the Council proposes the following sentence levels:

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

<b>Culpability</b>			
<b>Harm</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Category 1</b>	<p><b>Starting Point</b> 7 years' custody</p> <p><b>Category Range</b> 5 – 8 years' custody</p>	<p><b>Starting Point</b> 3 years' custody</p> <p><b>Category Range</b> 2 – 4 years' custody</p>	<p><b>Starting Point</b> 2 years' custody</p> <p><b>Category Range</b> 1 year 6 months' months – 2 years 6 months' custody</p>
<b>Category 2</b>	<p><b>Starting Point</b> 3 years' custody</p> <p><b>Category Range</b> 2 – 4 years' custody</p>	<p><b>Starting Point</b> 1 year 6 months' custody</p> <p><b>Category Range</b> 1 – 2 years' custody</p>	<p><b>Starting Point</b> 1 year's custody</p> <p><b>Category Range</b> 6 months – 1 year 6 months' custody</p>
<b>Category 3</b>	<p><b>Starting Point</b> 1 year 6 months' custody</p> <p><b>Category Range</b> 1 – 2 years' custody</p>	<p><b>Starting Point</b> 1 year's custody</p> <p><b>Category Range</b> 6 months – 1 year 6 months' custody</p>	<p><b>Starting Point</b> 9 months' custody</p> <p><b>Category Range</b> 6 months – 1 year's custody</p>
<b>Category 4</b>	<p><b>Starting Point</b> 1 year's custody</p> <p><b>Category Range</b> 6 months – 1 year 6 months' custody</p>	<p><b>Starting Point</b> 9 months' custody</p> <p><b>Category Range</b> 6 months – 1 year's custody</p>	<p><b>Starting Point</b> 6 months' custody</p> <p><b>Category Range</b> High level community order - 9 months' custody</p>

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

## Aggravating and mitigating factors

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence. The following are proposed:

### Factors increasing seriousness

#### Statutory aggravating factors:

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

#### Other aggravating factors:

- Offending conducted over a sustained period
- Involvement of others through pressure, influence
- Offender not lawfully present in the UK (unless taken into account at step 1)
- Abuse of position of trust

### Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Sole or primary carer for dependent relatives
- Age and/or lack of maturity
- Mental disorder or learning disability
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment
- Offender co-operated with investigation, made early admissions and/or voluntarily reported offending
- Limited understanding of scale of activity

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



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

As with the section 4 offence, this offence is not solely related to immigration. Offenders can commit the offence for other purposes and this draft guideline seeks to cover all forms of the offence. It has, however, been included in this project because the use of false documents for immigration purposes is a key immigration offence.

This offence includes both possession of a false document and possession of any apparatus etc that could be used to make a false document.

## Step One

The first step of the guidelines requires the sentencer to assess the culpability level of the offender and the harm caused by the offence.

## Culpability factors

The section 6 offence involves simple possession and has a much lower statutory maximum sentence than the section 4 offence, of two years. Due to the nature of the offence, there are limited ways in which seriousness can be gradated, and so this proposed guideline has just two culpability and harm categories. The guideline seeks to mirror the section 4 guideline whilst reflecting the less serious nature of the offence.

### Culpability demonstrated by one or more of the following

In assessing culpability, the court should weigh up all the factors of the case, including the offender's role, to determine the appropriate level. Where there are characteristics present which fall under different categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

#### A -

- Possession of multiple documents
- Possession of any apparatus, article or material that could be used to make multiple documents

#### B -

- Possession of a single document
- Possession of any apparatus, article or material that could be used to make a single document

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

**Harm factors**

Once the court has determined the level of culpability, the next step is to consider the harm caused or intended to be caused by the offence.

As with the previous guideline, this guideline treats immigration offending more seriously than other offending.

Harm	
Use the factors given in the table below to identify what the offence involves:	
Category 1	<ul style="list-style-type: none"> <li>• Passport, other immigration document, or a document that can be used instead of a passport</li> <li>• Apparatus, article or material is capable of making a passport or other immigration document</li> </ul>
Category 2	<ul style="list-style-type: none"> <li>• Driving licence</li> <li>• Apparatus, article or material is capable of making a driving licence</li> </ul>

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

**Step Two**

Once the court has determined the culpability and harm categories at step one, the next step is to identify the starting point of the sentence.

**Sentence levels**

The volume of offenders sentenced for possessing false identity documents etc without reasonable excuse has declined since 2012, with the last 4 years being relatively stable. In 2022, around 70 offenders were sentenced compared to 240 in 2012. Nearly two-thirds of offenders (62 per cent) were sentenced in the magistrates’ courts in 2022.

The most common sentence outcomes in 2022 were immediate custody (26 per cent of offenders) and fines (25 per cent). Around 20 per cent each received a community order and suspended sentence.

The statutory maximum sentence for this offence is 2 years’ custody. Of those who received immediate custody, the ACSL in 2022 was 4 months and all offenders received a sentence of 12 months or less, after any reduction for guilty plea.

Considering this data and reading transcripts and case law the Council proposes the following sentence levels:

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Culpability		
Harm	A	B
<b>Category 1</b>	<p><b>Starting Point</b> 1 year's custody</p> <p><b>Category Range</b> 9 months – 1 year 6 months' custody</p>	<p><b>Starting Point</b> 9 months' custody</p> <p><b>Category Range</b> 6 months – 1 year's custody</p>
<b>Category 2</b>	<p><b>Starting Point</b> 6 months' custody</p> <p><b>Category Range</b> High level community order – 9 months' custody</p>	<p><b>Starting Point</b> High level community order</p> <p><b>Category Range</b> Band C fine – 6 months' custody</p>

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

### Aggravating and mitigating factors

The court should then consider any additional factors, not identified at step one, which may aggravate or mitigate the offence. The following are proposed:

#### Factors increasing seriousness

##### Statutory aggravating factors:

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

##### Other aggravating factors:

- Offending conducted over a sustained period
- Offences taken into consideration

### Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Sole or primary carer for dependent relatives
- Age and/or lack of maturity
- Mental disorder or learning disability
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment
- Offender co-operated with investigation, made early admissions and/or voluntarily reported offending

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

# Section Seven: Ancillary Orders

At step six of these guidelines the Court is required to consider any appropriate ancillary orders. The Council proposes that this step includes the following guidance on recommendations for deportation:

## STEP SIX

### Ancillary Order

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.

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

# Section Eight: Equality and diversity

The Sentencing Council considers matters relating to equality and diversity to be important in its work. The Council is always concerned if it appears that the guidelines have different outcomes for different groups. The Council published the report '[Equality and diversity in the work of the Sentencing Council](#)' in January 2023, designed to identify and analyse any potential for the Council's work to cause disparity in sentencing outcomes across demographic groups.

In addition, the available demographic data, (sex, age group and ethnicity of offenders) is examined as part of the work on each guideline, to see if there are any concerns around potential disparities within sentencing. For some offences it may not be possible to draw any conclusions on whether there are any issues of disparity of sentence outcomes between different groups caused by the guidelines, for example because of a lack of available data or because volumes of data are too low. However, the Council takes care to ensure that the guidelines operate fairly and includes reference to the Equal Treatment Bench Book in all guidelines:

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

The Council has had regard to its duty under the Equality Act 2010 in drafting these proposals, specifically with respect to any potential effect of the proposals on victims and offenders with protected characteristics.

For offences where a small number of offenders are sentenced each year, the demographic data on sex, age and ethnicity have been presented for the period 2018 to 2022, rather than for a single year. The statistics discussed below can be found within the data tables published on the [Council's website](#).

## Sex

Across the offences in scope for this consultation, more males were sentenced compared to females. For both males and females, immediate custody was generally the most common sentence outcome. Out of those sentenced to immediate custody, male offenders generally had a slightly higher average custodial sentence length (ACSL) than females.

## Age group

While more than half of the offenders sentenced were under the age of 40 (between 18 and 39 years) for the offences in scope, for some offences, the age profile was noticeably younger. For example, around 57 per cent of offenders sentenced for assisting unlawful

immigration to the UK were aged under 40. By comparison, around 81 per cent of offenders sentenced for possessing false identity documents etc without reasonable excuse were aged under 40. Immediate custody was typically the most common sentence outcome across the age groups. There was some variation in the ACSL between age groups, however these groups include a low number of offenders and therefore the ACSLs derived are more sensitive to small shifts in volume.

## **Ethnicity**

The ethnicity is not recorded or not known for a considerable proportion of records across these offences. For example, for around 54 per cent of offenders sentenced for assisting unlawful immigration to the UK, the ethnicity is not recorded or not known. This means that for most offences, the volume of offenders within each (known) ethnicity group is very small. As a result, the proportions and ACSLs derived for these groups are more sensitive to small changes in volume and these data should be interpreted with caution.

In general, across these offences, most offenders were white (where ethnicity was known). Immediate custody was generally the most common sentence outcome for each ethnicity group. There was some variation in the ACSL across ethnicity groups, however, there was no evidence of a substantial difference indicating a disparity between ethnicity groups.

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

**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?**

**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?**

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

# Annex A

## Consultation Questions

### Introduction:

**Question 1: What is your name?**

**Question 2: What is your email address?**

**Question 3: Are you answering as an individual? If so, are you happy for your name to be included in the consultation response document?**

**Question 4: If you are answering on behalf of an organisation, group or bench, please provide the name of the organisation, group or bench.**

### Section One: Facilitation

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

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

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

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

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

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

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

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

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

### Section Three: Breach of Deportation Order

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

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



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

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

#### **Section Four: Deception**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Section Seven: Ancillary Orders**

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

#### **Section Eight: Equality and Diversity**

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

**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?**

**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?**

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

