

Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

27 January 2023
SC(23)JAN03 – Immigration
Stephen Leake
Vicky Hunt
vicky.hunt@sentencingcouncil.gov.uk

1 ISSUE

1.1 The Council is invited to consider commencing work on an Immigration guideline and, if in agreement, to consider the offences that should be in scope.

2 RECOMMENDATION

2.1 That the Council agree to commence work on an immigration guideline and the proposed scope.

3 CONSIDERATION

3.1 In May 2019 the Council commenced work on a package of guidelines which included modern slavery and immigration. In 2020 it was decided that the guidelines should be separated to prioritise the work on modern slavery and leave immigration until the end of the Brexit implementation period to see what changes might result for immigration offences. In addition, the Council was aware that new legislation was being proposed in this area under the, then named, Nationality and Borders Bill. However, the Council also indicated that it would not wish to delay unduly producing guidelines in this area.

3.2 As the Brexit implementation period has passed, the new legislation is largely in force and there is space within the work schedule, we consider that now is a good time to return to the immigration guidelines.

Question 1: Does the Council agree to start work on immigration guidelines?

3.3 Should the Council agree to commence work on immigration guidelines, the first issue to consider will be the scope of the package.

3.4 The scope was originally discussed and agreed back in May 2019 and confirmed in 2020. The table below shows the offences that were previously agreed, along with the volumes that were known at the time.

LEGISLATION	Offence Legislation	2018	2019	2020
Immigration Act 1971 s25(1) and (6)	Do an act to facilitate the commission of a breach of UK immigration law by a non-UK national.	226	184	107
Immigration Act 1971 s24A(1)(a), s24A(1)(b) and (3)	Seek / obtain leave to enter / remain in UK by deceptive means - immigration. Secure avoidance of enforcement action by deceptive means	12	6	6
Immigration and Asylum Act 1999 s91(1)	Provide an immigration service in contravention of a prohibition. Provide an immigration service in contravention of a restraining order.	7	4	3
Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s2(1)	Entering the UK without a passport	1	0	0
Identity Documents Act 2010 s4	Possessing or controlling identity documents with intent	409	361	235
Identity Documents Act 2010 s6	Possessing or controlling a false or improperly obtained or another person's identity document	110	87	68

3.5 Two of the offences that were previously included in scope (as seen above) have very low volumes. The first is the offence of providing an immigration service in contravention of a prohibition, (s91(1) Immigration and Asylum Act 1999). This offence was included following a request from the Office of the Immigration Services Commissioner (OISC). However, it is understood that the OISC is content that our general guideline could be used to deal with these cases. The latest data (**Annex A**), shows that these offences continue to be very low in volume.

The second is the offence of entering the UK without a passport, (s2(1) Asylum and Immigration (Treatment of Claimants, etc.) Act 2004). This offence continues to be very low volume with zero cases sentenced since 2019. The CPS have said that this offence is not aimed at those entering the UK without a passport or identity document, but at those who fail to provide them at a leave or asylum interview. It is used to discourage people from destroying identity documents to increase their chances of an asylum claim or frustrate their removal. The CPS have indicated that there are challenges in prosecuting such cases which explains why volumes are so low.

3.6 It is, therefore, proposed that both of these two low volume offences are removed from the scope of this project.

Question 2: Does the Council agree to remove these two offences from the scope of the immigration project?

3.7 It is proposed that the remaining offences remain within scope as they are either key offences or have sufficient volume to justify a guideline.

Question 3: Does the Council agree to keep the remaining offences within scope?

Changes to Legislation

3.8 Since 2020, a number of changes have been made to the Immigration Act 1971 by the Nationality and Borders Act 2022 (NABA).

3.9 NABA increased the statutory maximum penalty for the section 25 (facilitating the commission of a breach of immigration law), and section 25A (facilitating entry by asylum seekers) Immigration Act 1971 offences raising them from 14 years to life imprisonment.

3.10 The Act also amended the offence of knowingly entering the UK in breach of a deportation order (section 24(1)(a) of the Immigration Act 1971), which was summary only, by splitting it into a number of new offences with statutory maximum penalties of 4-5 years.

- knowingly entering the UK in breach of a deportation order (maximum: 5 years' imprisonment); (section 24(A1))
- knowingly entering the UK without permission to do so (maximum 4 years' imprisonment); (section 24(B1))
- has only limited leave to enter or remain and knowingly remains beyond the time limited- Overstayers (maximum: 4 years' imprisonment); (section 24(C1))
- knowingly arriving in the UK without valid entry clearance (maximum 4 years' imprisonment); (section 24(D1))
- is required not to travel to the UK without an Electronic Travel Authorisation (ETA) and knowingly arrives without such an ETA (maximum 4 years' imprisonment); (section 24(E1)).

3.11 The Council had previously agreed not to include any offences that were summary only and so the pre-NABA offence had never been included within scope. However, as the

new offences set out above have a statutory maximum of 4-5 years the Council may wish to include some, or all of them.

3.12 Some of the s24 offences may be considered controversial as they focus on those seeking to enter the country rather than traffickers, and the s25A offence of assisting asylum seekers to enter the UK has been amended to remove the requirement that assistance be for gain.

3.13 The s24(E1) Immigration Act 1971 offence has not yet come into force (it is expected to do so later this year). The other s24 offences only came into effect in June 2022 and so data is very limited. The CPS have, however been able to share some data which shows the number of convictions from April 2022 to March 2023 for some of the offences.

Offence	Convictions
Knowingly enters the UK without leave (s24(B1) Immigration act 1971) Combined with Arrives in the UK without valid entry clearance (s24(D1) Immigration act 1971)	Total 86 (includes 23 small boat cases)
Knowingly entering the UK in breach of a deportation order (s24(A1) Immigration act 1971)	43
Overstayers (s24(C1) Immigration act 1971)	0

3.14 The CPS' have informed us that the number of convictions since NABA came into effect have risen significantly, mostly attributed to a greater response to the small boats' crisis. For this reason, the CPS say that they would welcome guidelines on all NABA offences.

3.15 The CPS also indicate that it would be useful to have guidelines for the two facilitation offences under section 25 (section 25 facilitating the commission of a breach of immigration law, and section 25A facilitating entry by asylum seekers) as they now both carry life imprisonment. The Council had previously agreed that s25 should be included in scope but not s25A (possibly due to low volume).

3.16 Including all of these offences (an additional 6) would significantly increase the size of the project. The Council could, however, choose to only include those offences with

sufficient volume: (s24(A1) Immigration act 1971, s24(B1) Immigration act 1971 and s24(D1) Immigration act 1971).

Question 3: Does the Council want to include all offences created/ amended by NABA namely, s24(A1) Immigration act 1971; s24(B1) Immigration act 1971; s24(C1) Immigration act 1971; s24(D1) Immigration act 1971; s24(E1) Immigration act 1971; and s25A immigration Act 1971?

Other Offences

3.17 In considering scope this time around we have obtained up to date statistics on a far wider set of immigration and associated offences. The table produced by the Analysis and Research team can be seen at **Annex A**. The offences that were previously agreed to be in scope have been highlighted.

3.18 As can be seen from the table, the offences of *Obstructing engines or carriages on railways* (s36, Malicious Damage Act 1861) and to a lesser extent, *Doing or omitting anything to endanger passengers by railway* (s34, Offences Against the Person Act 1861) have reasonably high volumes. Whilst both of these offences have in the past been treated as immigration offences, as they were used at a time when migrants were entering through the channel tunnel and disrupting Eurostar rail services, it seems that such offending is not as common anymore and so these volumes are likely to relate to non-immigration type offending. For this reason, it is not proposed that they be included in the scope of this project.

4 EQUALITIES

We will consider equalities issues in the usual way as part of guideline development and publish breakdowns of the demographics of offenders. We will consider the demographic data as part of the project.

5 IMPACT AND RISKS

5.1 We will consider the impact of the guidelines in the usual way, although existing trends in sentencing volumes may not be indicative of the future because of a change in enforcement strategy because of the new legislation.

5.2 In addition, as outlined above, some of these offences may be viewed as controversial and so the production of guidelines in this area will require careful handling.

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Number of adult offenders sentenced by legislation/ offence, 2017 to 2021

Source: Court Proceedings Database, Ministry of Justice

Legislation	Offence	2017	2018	2019	2020	2021
a. Immigration Act 1971 s24A(1)	Seek / obtain leave to enter / remain in UK by deceptive means - Deception	22	12	6	6	5
b. Immigration Act 1971, s25A	Facilitating entry by asylum-seekers to the UK	9	6	3	2	2
c. Immigration Act 1971 s25(1) and (6), Criminal Law Act 1977 s1(1)	Do an act or conspire to do an act to facilitate the commission of a breach of UK immigration law by a non EU person/ non UK national	237	226	184	107	142
d. Immigration Act 1971, s26A ss(3)(a), (b), (d), (e), (f) and (g)	Making etc. a false registration card	0	0	0	0	0
e. Immigration Act 1971, s26A ss (c) and (h)	Has false article etc in possession	0	0	0	0	0
f. Immigration Act 1971, s26B	Possession of immigration stamp	0	0	0	0	0
g. Immigration, Asylum and Nationality Act 2006, s21	Knowingly employing adults subject to immigration control	2	0	0	0	0
h. Identity Documents Act 2010 s4	Possessing or controlling identity documents with intent	625	409	360	235	247
i. Identity Documents Act 2010, s5	Apparatus designed or adapted for the making of false identity documents	4	4	1	0	4
j. Identity Documents Act 2010 s6	Possession of false identity documents	131	110	87	67	77
k. Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s35(3) and (4)	Failure to cooperate with arrangements for removal	9	3	4	2	1
l. Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s2(1) and (9)	Entering the UK without a passport	1	1	0	0	0

m. Immigration and Asylum Act 1999, s84 and s91(1)	Provide an immigration service in contravention of a prohibition/ restraining order	3	7	4	3	5
n. Malicious Damage Act 1861, s36	Obstructing engines or carriages on railways	75	93	92	73	67
o. Malicious Damage Act 1861, s35	Placing wood etc. on railway, with intent to obstruct or overthrow any engine etc.	0	1	4	0	1
p. Offences Against the Person Act 1861, s32	Placing wood etc. on a railway, with intent to endanger passengers	0	0	0	1	0
q. Offences Against the Person Act 1861, s34	Doing or omitting anything to endanger passengers by railway	7	17	10	12	8