

Sentencing Council meeting:
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**SC(19)JUL03 – Immigration and Modern
Slavery**

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1 ISSUE

1.1 This is the first full discussion on draft guidelines for Immigration offences and Modern Slavery Act 2015 (MSA) offences and covers the offences of slavery, servitude and forced labour (MSA s1) and human trafficking (MSA s2). This paper covers the main aspects of the guideline for these offences, including approach to assessment of culpability and harm and aggravating/mitigating factors. Sentence levels will be covered at the meeting in September.

2 RECOMMENDATION

2.1 That the Council:

- agree the use of one guideline covering the s1 and s2 offences;
- agree the approach to assessing culpability and harm and the proposed factors;
- agree the proposed aggravating and mitigating factors; and
- agree to the additional text on cases where victims are unwilling or unable to give evidence.

3 CONSIDERATION

Background and approach

3.1 The MSA s1 and s2 offences each cover a wide range of offending behaviour. The s1 offences (s1(a) covering slavery/servitude and s1(b) covering forced labour) are in large part the same as the repealed offences which they replace – offences under the Coroners and Justice Act 2009 s71, the Asylum and Immigration (Treatment of Claimants) Act 2004 s4 and the Sexual Offences Act 2003 s59A. The most significant change is that the new offences have a statutory maximum penalty of life imprisonment (as opposed to 14 years), but in addition the Act includes additional provision on exploitation and makes explicit in statute (in s1(5)) the principle which had grown up in case law that the offence could be committed even in cases where the victim consents.

3.2 Numbers of offenders sentenced are low. In 2017 and 2018 combined, 10 offenders were sentenced for a s1 offence as a primary offence, and 19 for s2. In many of these cases, however, the offender was sentenced for multiple counts of the same offence, relating to multiple victims, or sentenced for a conspiracy offence, again covering multiple victims. It is interesting to note that all these offenders were sentenced to immediate custody, with the estimated average (mean) custodial sentence length (prior to any reduction for guilty plea) being 6.9 years for a s1 offence and 6.2 years for s2. There were also several cases in which the s2 offence was a secondary offence (the primary offence being a s1 offence, a drug trafficking offence, or a serious sexual offence such as rape).

3.3 In developing the guideline for these offences, I have used three main sources of information: guideline judgements in MSA cases and in cases under the previous legislation, particularly *R v Khan*, *R v Connors*, *R v Rooney*, and *R v Zielinski*¹, transcripts of cases sentenced in 2017 and 2018, and discussions with others involved in prosecuting these offences or supporting victims, including the Home Office, the CPS, Barnardo's and the Salvation Army. We have also carried out some initial research with Crown Court judges to find out their views on key areas of the immigration and modern slavery offences. Finally, I have considered the factors used in the existing sentencing guideline for trafficking for sexual exploitation under s59A of the Sexual Offences Act 2003, one of the offences which has been repealed and replaced by the MSA s2 offence. Several judges in cases relating to other forms of exploitation under the MSA have used these factors, and others I have spoken to agree that they have broader relevance.

3.4 The offences under s1 and s2 are clearly different, but 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. The factors set out in *R v Khan*, a trafficking case under the Asylum and Immigration (Treatment of Claimants) Act 2004 s4, have been used in several forced labour cases since, under previous and current legislation. In *Khan*, the factors are based not just on the act of trafficking itself but on the offender's culpability for the subsequent forced labour, and the harm caused by it, since the offence encompasses the offender's intention that the victim be exploited. In addition, the offences are fairly often sentenced together, and in these cases judges seem to use the same factors for both offences.

3.5 Given these considerations, I propose to have one guideline covering both the s1 and s2 offences, with the same culpability and harm factors, and the same aggravating and mitigating factors at step 2. It may be that some factors are likely to be more relevant to

¹ [2010] EWCA Crim 2880, [2013] EWCA Crim 324, [2019] EWCA Crim 681, and [2017] EWCA Crim 758

trafficking cases, and some more relevant to s1 offences, but if so, sentencers could use their judgement as to the extent to which any factor applied in the case before them, as of course they must do for all guidelines.

3.6 In developing the approaches to culpability and harm, and the aggravating/mitigating factors, I have worked on the basis that all types of these offences (whether it is domestic servitude, forced labour, trafficking for sexual exploitation, or some other type of case) should be capable of being assessed as high or low culpability, and high or low harm, depending on the facts of the case. It may be that some types of case (such as those involving large-scale trafficking for forced labour or prostitution) are more likely to be put into the top categories, but I have developed the guideline with the intention that in principle any type of case could feature in any category.

Question 1: Does the Council agree that all types of s1 and s2 offences should be capable of being assessed within any category of culpability or harm?

Approach to culpability and culpability factors

3.7 The guideline judgments and transcripts show that different types of culpability are taken into account. Some judges use the language of the Drug Offences guideline and consider role as of primary importance, others take into account a broader range of factors. Many factors could fall under either culpability or harm. In deciding where to put the factors, I have aimed at consistency with other guidelines as well as trying to ensure a focus on the victim in the harm factors. As the offences cover a very wide range of criminal behaviour, I have tried to keep the factors broad and of general applicability. The range of behaviour also means that there is a wide range of culpability and harm, from those who are directing a large organisation, using violence and threats on large numbers of victims over a long period of time, to those who are themselves coerced into the offending, who are only involved over a very short time (in one case involving a driver, a matter of minutes, though most cases are measured in weeks or months), and who perhaps inflict no physical harm and little psychological harm on their victim. Given the range of culpability and harm, I propose to give three levels for each. The proposed culpability factors are as follows:

A	<ul style="list-style-type: none"> • Directing or organising the offending • Expectation of substantial financial gain • High degree of planning/premeditation • Abuse of a significant degree of trust/responsibility • Use of violence • Victim’s movement physically restricted
B	<ul style="list-style-type: none"> • Operational or management role in the offending • Involves others in the offending whether by coercion, intimidation, exploitation, or reward • Expectation of significant financial gain

	<ul style="list-style-type: none"> • Some planning/premeditation • Threats of violence towards victim(s) or their families • Other cases falling between A and C because: <ul style="list-style-type: none"> ○ Factors in both high and lesser categories are present which balance each other out and/or ○ The offender’s culpability falls between the factors as described in A and C
C	<ul style="list-style-type: none"> • Engaged by pressure, coercion or intimidation • Performs limited function under direction • Limited understanding/knowledge of the offending • Expectation of limited financial gain • Little or no planning/premeditation • Absence of violence/threats of violence

3.8 You will see that for several different aspects of culpability there are factors present in categories A, B and C. The first aspect is role, which covers several factors. These include some of the factors used in the drug offences guideline – “directing or organising the offending”, “expectation of substantial/significant/limited financial gain”, “operational or management role in the offending”, “involves others in the operation whether by coercion, intimidation, exploitation or reward”, “involved through coercion/intimidation”, “limited understanding/knowledge of the offending”, and “performs a limited function under direction”. These factors were given in the majority of cases analysed, and are also covered in *Khan*. Some factors are drafted slightly differently from those in other guidelines so as not to exclude those who are operating on their own. The majority of offenders sentenced for these offences to date have been offending in groups, whether or not they were sentenced together, but some offenders, particularly in domestic servitude cases operated alone, and some of these cases could be very serious.

3.9 The next significant factor relates to planning and premeditation, which was cited in a large number of cases analysed. Distinctions were made between differing levels of planning, or (in the case of a conspiracy) involvement in only parts of the planning of the offence, so I have included this at several culpability levels, as we do in some other guidelines (such as Harassment and Stalking). Planning/premeditation in these offences covered a wide range of behaviour, both planning the practical aspects of the offending, and premeditation in terms of how to “groom” or entice a victim. This is a slightly separate feature from role, since an offender could be directing the offending but it may not involve much premeditation, and guideline cases cite this factor separately.

3.10 A third important aspect of culpability is the method used to exert control over the victim, which is such a crucial part of the offence. In *Khan*, “level and methods of control” was cited as a separate factor from “degree of harm” suffered by the victim. In general,

sentencers used a hierarchy of methods of control, with actual, physical violence at the top, threats of violence (made towards the victim or victim's family) in the middle, and other forms of control (such as giving misleading information about the consequences of reporting an offence to the police to make it more difficult for the victim to escape), at the bottom. Although this could be said to overlap with harm, the actual harm caused to the victim could be very great even with what might appear to be a lower level of control. For example, use of control through misleading information over a long period could cause long-term psychological harm to a victim (which was taken into account in the assessment of harm), but was generally viewed by sentencers as less culpable than physically or sexually assaulting a victim.

3.11 Related to this is the feature in category A only, "Victim's movement physically restricted". This aims to capture cases of actual slavery and servitude or forced labour cases in which a victim is locked into a building and is physically unable to escape. The other forms of restriction on movement are types of control included in the lower categories, and placing physical restriction of movement in the highest category fits with this approach of escalating seriousness in types and levels of control.

3.12 The final aspect of culpability which seems worthy of inclusion at step 1 is abuse of trust. This was a factor in cases involving child sexual exploitation (where the offender was the so-called "boyfriend" of the victim) as well as cases of forced labour and sexual exploitation in which the offender was known to the victim and trusted by them, perhaps as a family member or friend. The words "**significant degree** of trust" have been added to ensure that cases of lower culpability are not included in Category 1.

3.13 Several factors suggested themselves for inclusion at step 1, and which are included in other guidelines at this step, but which I have for various reasons included instead at step 2 as aggravating or mitigating factors; see paragraphs 3.21 to 3.28 below.

Question 2: Is the Council content with the structure of the "Culpability" table and the factors therein? Are there any additional factors you would wish to see or factors which should be removed?

3.14 The different types of exploitation covered by the s1 and s2 offences result in a wide range of types and levels of harm, from someone who is kept in servitude over many years, being physically and sexually assaulted, to someone who is a victim of forced labour under which his wages are taken and who feels some compulsion to stay in that position, but who is not otherwise harmed. All the types of exploitation can cover similar types of harm, broadly categorised as physical, psychological or financial. As these three types of harm can occur

in many different combinations and each can occur to varying degrees, I am proposing to include separate factors relating to each in the harm table, as follows:

Category 1	<ul style="list-style-type: none"> • Serious physical harm which has a substantial and/or long-term effect • Serious psychological harm which has a substantial and/or long-term effect
Category 2	<ul style="list-style-type: none"> • Some physical harm • Some psychological harm • Significant financial loss to the victim(s) • Exposure of victim(s) to additional risk of serious physical or psychological harm • Other cases falling between categories 1 and 3 because: <ul style="list-style-type: none"> ○ Factors in both high and lesser categories are present which balance each other out and/or ○ The level of harm falls between the factors as described in categories 1 and 3
Category 3	<ul style="list-style-type: none"> • Limited physical harm • Limited psychological harm • Limited financial loss to the victim(s)

3.15 For physical harm, I propose three levels, similar to those used in some violent offences, including child cruelty. Physical harm encompasses harm caused directly (for example, by assault) and indirectly (for example, through forcing the victim to live in dirty, unheated accommodation). As with violence against the person offences, it is difficult to describe the level of harm both broadly and accurately, but including substantial and long-term effect as an indicator of seriousness, as in other guidelines, was welcomed by those who support victims of modern slavery with whom I have discussed types and levels of harm.

3.16 For psychological harm, which is arguably the most important type of harm for this offence, similar wording is proposed in the three categories. In addition, and following discussion with organisations which support victims and with the CPS, the draft guideline contains the following text (similar to that used in the rape and child cruelty guidelines) above the harm table:

A finding that the psychological harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim (from, for example, a support worker) that serious psychological harm exists. It is important to be clear that the absence of such a finding **does not** imply that the psychological harm suffered by the victim is minor or trivial.

3.17 The third type of harm, financial, encompasses not just lost earnings (in forced labour cases where the offender takes all or most of a victim’s wages, often to pay back supposed “debts”) but also harm caused by the offender’s taking out credit cards and loans in the

victim's name and running up debts on his behalf. Financial loss is only included in the lower two categories of harm, on the basis that, even when the level of financial loss is high, it is not as serious as physical or psychological harm. This appears to be the approach taken in most of the cases analysed. If the level of financial harm, and gain to the offender is high overall, because of a large number of victims or long duration, that will be captured by other factors in culpability or aggravating factors at step 2.

3.18 The final harm feature relates to risk of harm. This can be very wide ranging. Examples from cases include risk of harm in a forced labour case by forcing victims to work on a building site without any protective equipment, risk of contracting sexually transmitted diseases in cases of forced prostitution, and risk of very serious harm/death in a trafficking case in which victims were trafficked over the dangerous Sahara route, to camps in Libya where one was raped and others at risk of rape or other assault, then moved across the Mediterranean in small boats, at risk of very serious harm or death. This was an important feature in several cases, so I have included it in Category 2.

3.19 Duration and number of victims were commonly cited in guideline and Crown Court cases as features of seriousness, and could be considered aspects of both culpability and harm. I had considered including them in harm, but have decided instead to cover them in other ways at step 2 as aggravating features. This is because, firstly, they could be considered as both culpability and harm and, secondly, including them at step one would give undue prominence to a feature which is more common in some types of offending, so would risk certain kinds of cases being considered incapable of inclusion in particular categories. For example, if "Large number of victims" were in Category 1 harm, and "Small number of victims" in category 3, it would risk domestic servitude cases always being considered less serious than large trafficking cases, regardless of other features of a particular case. At step 2, there will be more discretion to place appropriate weight on the factors as necessary.

3.20 In dividing the three main types of harm into serious, some and limited levels, it is probable that there are very few cases which would, with these features alone, be placed in category 3; the level of harm seen in almost all cases is higher than "limited". However, this is a very wide- ranging offence, and a new one for which not many offenders have yet been sentenced, and as there have been some cases with very limited harm, it seems appropriate to include them here for completeness.

Question 3: Is the Council content with the structure of the "Harm" table and the factors therein? Should any factors be added or removed?

Aggravating factors

3.21 When considering aggravating factors, one difficulty is that many factors cited by judges are, at some level, inherent in the offences. These include some sort of deception of the victim (promising them a good job with decent wages, but in fact forcing them to work for very little money), and lack of respect for the victim or his/her welfare. Some of these factors I have chosen to include as aggravating, since there are situations where they apply more than others. But other factors, such as lack of respect for the victim, I have excluded as it is inherent in the offence and would apply in all cases. If there was some way in which such a factor applied particularly forcefully to a case, the judge could of course consider it as the list of aggravating factors is not exhaustive.

3.22 Aside from the statutory aggravating factors of previous convictions and offence committed on bail, the aggravating factors proposed are:

- A1 – Offending took place over a long period of time (in the context of these offences, this is likely to mean months or years)
- A2 – Deliberate isolation of the victim, including steps taken to prevent the victim reporting the offence or obtaining assistance (above that which is inherent in the offence)
- A3 – Deliberate targeting of vulnerable victims
- A4 – Victim’s passport or identity documents removed
- A5 – Gratuitous degradation of victim
- A6 – Large-scale, sophisticated and/or commercial operation (where not taken into account at Step 1)

3.23 This is a relatively short list of factors, shorter, for example, than that given in the current trafficking for sexual exploitation guideline. However, that guideline covers a narrower range of offending so can give more specific factors. Factor A1, relating to duration, is frequently cited by judges as an aggravating feature. It may relate to an element of culpability or harm, as discussed above at 3.18, and the relevance may differ between types of exploitation so I have included it here at step 2. The explanatory text on length time is aimed to remind sentencers of what will normally apply in the context of these offences, but a shorter time is not necessarily a mitigating feature, which is why I have not included the mirrored factor under mitigating factors below.

3.24 Factor A2 could be said to be present in all offences, however, in some offences the offender has taken additional steps to isolate the victim, including physical isolation and moving the victim around so he/she does not develop local friendships or (in some cases) even know where he or she is. Where this feature is present in the offending to a higher than usual degree (short of actual physical restriction of movement, which is at step 1), it is appropriate to include as an aggravating feature. This could also include cases where the victim had been threatened or bribed with the aim of preventing their giving evidence.

3.25 Factor A3 is common to many guidelines, at step 1 or step 2, and victim vulnerability is an important feature of modern slavery offences. I considered including a “victim particularly vulnerable” factor, but as all victims of modern slavery are vulnerable in some way, this could be applied too broadly. Instead, I have included this “deliberate targeting of vulnerable victims” factor, which I have seen in some cases where the offender has made specific efforts to find and entice vulnerable victims, for example, travelling to a village in Romania where there were likely to be people with no employment prospects who would be more susceptible to promises of work in the UK.

3.26 Factor A4 is again cited in many cases. However, I have included it as it is an important feature of offending not present in all offences, and is one which is not explicitly included at step 1.

3.27 Factor A5 is included because although lack of respect for victims is inherent in the offence, there are some cases involving gratuitous degradation (apparently for the offender’s own pleasure) or gross lack of respect, which judges have highlighted as an aggravating feature. The drafting here is taken from that which we use in the assault guideline.

3.28 The last aggravating factor is included to capture some elements relating to the scale and sophistication of the operation which may be very relevant to an offence (including number of victims in cases where there is a single count of, say, conspiracy, rather than one count per victim) and are often cited in guideline and Crown Court cases as aggravating features. They are related to some aspects of role which I have included in the assessment of culpability, but if placed at step 1 these features would risk being applied to offenders involved in such operations even if the individual’s involvement was small and, conversely, would risk excluding from higher culpability/harm those offences which were not large-scale or sophisticated, but which may in other respects involve very high culpability or harm. Placing this factor here allows it to be taken into account, without these risks.

**Question 4: Does the Council agree with the aggravating factors set out above?
Should any factors be added or removed, or moved to step 1?**

Mitigating factors

3.29 In both guideline cases and the more recent trafficking and forced labour cases, judges in general considered the offences so serious that personal mitigation carried little weight, and very few factors were cited other than, in some cases, some standard factors. I therefore propose the following mitigating factors:

M1 – No recent or relevant convictions
M2 – Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate or conceal the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)
M3 – Remorse
M4 – Sole/primary carer for dependent relatives
M5 - Age/lack of maturity (where linked to the commission of the offence)
M6 – Mental disorder or learning disability

3.30 Factors M1 and M3 to M6 are standard factors, and were cited in a small number of cases. Factor M2, relating to good character, uses the additional wording we have used in other guidelines for serious offences in which judges have been reluctant to take into account good character, and in which it can sometimes be used to facilitate or conceal an offence (an example of this is an offender's being a successful businessman allowing him to present employment in his business as an enticing prospect to potential victims).

Question 5: Does the Council agree to the proposed mitigating factors? Are there any factors which should be removed/added, or moved to Step 1?

Additional text – cases where the victim is unwilling to give evidence

3.31 Several of those I have spoken to, particularly the CPS and the organisations working with victims, have raised concerns about sentencing in cases where the victim (or one of the victims) is unwilling to give evidence, which may be through fear of reprisals against their family members, or because they are not yet able to talk openly about the harm they have suffered. In several cases, the victim was threatened or bribed with the aim of preventing their giving evidence. There are also cases in which different victims have been treated differently by the offenders, and some victims, who have not been treated as harshly, are willing to speak in defence of the offenders. Those I have spoken to have reminded me of the need to treat these cases no less seriously.

3.32 There are similarities here with domestic abuse cases in which a victim is unwilling, for similar reasons, to give evidence against his/her partner. I therefore propose that we include in this guideline some additional text on victim personal statements, similar to that used in the Overarching Principles on Domestic Abuse guideline:

A sentence imposed for a Modern Slavery Act offence should be determined by the seriousness of the offence, not solely by the expressed wishes of the victim. In particular, the absence of a Victim Personal Statement (VPS) should not be taken to indicate the absence of harm. A court should consider, where available, a VPS which will help it assess the immediate and possible long-term effects of the offence on the victim (and any children, where relevant) as well as the harm caused, whether physical or psychological.

3.33 As this relates to the assessment of seriousness at step 1 I propose to place this text near to the “Harm” table.

Question 6: Is the Council content to add the additional text above, and with its position near the “Harm” table?

3.31 At the beginning of the paper I set out reasons for developing just one guideline covering both the s1 and s2 offences, and have set out factors above which are applicable to both offences.

Question 7: Having reviewed the approach and factors above, is the Council content to develop one guideline to cover both the MSA s1 and s2 offences?

4 IMPACT AND RISKS

4.1 As this is the first full consideration of part of these new guidelines, detailed work on impact and risks is some way off, and will be completed for consultation next spring. By basing the guidelines on the existing cases, including those decided under predecessor legislation, we aim to reduce the risks of misinterpretation and unforeseen impacts on resources.

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**Slavery, servitude and forced or compulsory labour
Modern Slavery Act 2015 s1**

**Human trafficking
Modern Slavery Act 2015 s2**

Triable either way
Maximum: Life imprisonment
Offence range: TBC

Culpability

A	<ul style="list-style-type: none"> • Directing or organising offending • Expectation of substantial financial gain • High degree of planning/premeditation • Abuse of a significant degree of trust/responsibility • Use of violence • Victim’s movement physically restricted
B	<ul style="list-style-type: none"> • Operational or management role in the offending • Involves others in the offending whether by coercion, intimidation, exploitation or reward • Expectation of significant financial gain • Some planning/premeditation • Threats of violence towards victim(s) or their families • Other cases falling between A and C because: <ul style="list-style-type: none"> ○ Factors in both high and lesser categories are present which balance each other out and/or ○ The offender’s culpability falls between the factors as described in A and C
C	<ul style="list-style-type: none"> • Engaged by pressure, coercion or intimidation • Performs limited function under direction • Limited understanding/knowledge of the offending • Expectation of limited financial gain • Little or no planning/premeditation • Absence of violence/threats of violence

Harm

A finding that the psychological harm is **serious** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim (from, for example, a support worker) that serious psychological, developmental or emotional harm exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological, developmental or emotional harm suffered by the victim is minor or trivial.

Category 1	<ul style="list-style-type: none"> • Serious physical harm which has a substantial and/or long-term effect • Serious psychological harm which has a substantial and/or long-term effect
Category 2	<ul style="list-style-type: none"> • Some physical harm

	<ul style="list-style-type: none"> • Some psychological harm • Significant financial loss to the victim(s) • Exposure of victim(s) to additional risk of serious physical or psychological harm • Other cases falling between categories 1 and 3 because: <ul style="list-style-type: none"> ○ Factors in both high and lesser categories are present which balance each other out and/or ○ The level of harm falls between the factors as described in categories 1 and 3
Category 3	<ul style="list-style-type: none"> • Limited physical harm • Limited psychological harm • Limited financial loss to the victim(s)

A sentence imposed for a Modern Slavery Act offence should be determined by the seriousness of the offence, not solely by the expressed wishes of the victim. In particular, the absence of a Victim Personal Statement (VPS) should not be taken to indicate the absence of harm. A court should consider, where available, a VPS which will help it assess the immediate and possible long-term effects of the offence on the victim (and any children, where relevant) as well as the harm caused, whether physical or psychological.

Step 2

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

A1 – Offending took place over a long period of time (in the context of these offences, this is likely to mean months or years)

A2 – Deliberate isolation of the victim, including steps taken to prevent the victim reporting the offence or obtaining assistance (above that which is inherent in the offence)

A3 – Deliberate targeting of vulnerable victims

A4 – Victim’s passport or identity documents removed

A5 – Gratuitous degradation of victim

A6 – Large-scale, sophisticated and/or commercial operation (where not taken into account at step 1)

Mitigating factors

M1 – No recent or relevant convictions

M2 – Good character and/or exemplary conduct (where previous good character/exemplary conduct has been used to facilitate or conceal the offence, this should not normally constitute mitigation and such conduct may constitute aggravation)

M3 – Remorse

M4 – Sole/primary carer for dependent relatives

M5 - Age/lack of maturity (where linked to the commission of the offence)

M6 – Mental disorder or learning disability