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Sentencing Update – New Guidelines for Drug Offences

Written by Sarah Day - Libertas Chambers – March 2021

Following various consultations, the Sentencing Council issued new sentencing guidelines for drug offences which will take effect from 1 April 2021. This article takes a look at the changes. Follow this link for the Sentencing Council updates: <https://www.sentencingcouncil.org.uk/news/item/drug-offences-sentencing-guidelines-revised-as-offending-changes/>

The new sentencing guidelines for drug offences coming into force from 1 April 2021, cover importation, supplying or offering to supply a controlled drug (including psychoactive substances), possession of a controlled drug with intent to supply it to another (including psychoactive substances), and cultivation of cannabis/production of a controlled drug. Whilst the starting points and ranges remain the same, there are four key changes that arise and that practitioners should be aware of to see how they develop.

Financial advantage and role

The guidelines attempt to provide clearer guidance as to how an offender's benefit should be treated. This has previously proved difficult when determining whether a low level offender would fall into a significant or lesser role, with any financial advantage seeming to push an offender immediately into a "significant role", even a runner earning very little money at all.

The new guidelines make clear that an individual who expects "limited, if any, financial or other advantage (including meeting the offender's own habit)", should fall into a lesser role. By contrast, to be considered as significant role, an offender would need to expect "significant financial or other advantage (save where this advantage is limited to meeting the offender's own habit)". How the courts will determine whether any advantage is "significant" or not, remains to be seen. It should assist with ensuring that low level offenders are more easily able to be categorised as lesser role.

Exploitation and disparity in sentencing

The new guidelines seek to reflect the changes in the drugs supply chain and in particular the prevalence of the exploitation of vulnerable people. Such exploitation can be due to factors of vulnerability such as age and can also take various forms such as cuckooing (using the home

of a vulnerable person), exploit children or run county lines. The new guidelines address this differently to the 2012 guidelines.

In cuckooing, for example, the leading case on sentencing was *Regina v Ajayi (Richard)* [2017] EWCA 1011 (Crim). The Court of Appeal considered that the approach that should be taken in sentencing the offence should be to reflect the cuckooing either in (i) the assessment of the role of the offender, or (ii) by treating it as an aggravating factor at step two of the applicable drugs sentencing guideline. It further stated that it may also mitigate the position of a vulnerable recruit who has clearly been exploited. The Court considered that where an offender organises an operation from the metropolitan centre, rather than being “hands-on” locally, they would fall within the “leading role” category in the sentencing guidelines. An offender, engaged locally enforcing and managing the drugs supply operation would also fall within the “leading role” category. Those who were involved in taking over the premises would generally fall into the “significant role” in the sentencing guidelines.

The 2021 guidelines take a different approach by introducing new aggravating factors rather than this exploitation being determinative of role. Factors such as “exercising control over the home of another person for drug-related activity” and “targeting of any premises where children or other vulnerable persons are likely to be present” have been introduced as aggravating features to offences. How this will affect the lengths and kinds of sentences imposed is yet to be seen, but it may lead to an increased nuance in sentencing as it seeks to recognise that offenders lower down the chain may also exploit vulnerable individuals.

Aggravating features have also been added to deal specifically with child criminal exploitation offences. These offences have become increasingly prevalent with the rise of county-lines drug trafficking and other such operations. The new aggravating features in question are “exploitation of children and/or vulnerable persons to assist in drug-related activity” and “participates in the exploitation of a child or vulnerable person including one who is also involved in the drugs operation”.

The new guidelines also attempt to tackle racial disparity in sentencing. For example, under “Step 2 – starting point and category range” of the supply of drugs guideline, there is now a clear reminder that “sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black, Asian and Other ethnicity offenders receive an immediate custodial sentence than White offenders and that for Asian offenders custodial sentence lengths have on average been longer than for White offenders.” Addressing such an imbalance is no easy feat, but practitioners can now have this feature of the guideline in their arsenal to protect a defendant’s interests.

Reviewing categorisation of weights and yields

The guidelines attempt to reflect the changing nature of substances and their potency. For example, there has been an increase in purity of ecstasy and expected yield of cannabis since the guidelines were introduced in 2012. In respect of ecstasy, the number of tablets for each starting point has been reduced. In Category 1, for example, the starting point is now 7000 tablets as opposed to previously being 10,000. Similarly, the guideline number of plants and weights in Categories 3 and 4 are reduced for cannabis.

An interesting development is that the Sentencing Council have specifically stated that they will review the harm starting points every three years to ensure that they are properly updated to reflect current positions.

Psychoactive substances

The Psychoactive Substances Act 2016, introduced various supply and possession offences, however, there have been no associated guidelines in place to assist when sentencing for these offences. The new guidelines for these offences could therefore be described as “embryonic”. In respect of culpability, the factors to be considered are the same as those for drugs which are classified.

However, there is a divergence in terms of how harm is to be assessed. The starting point for harm focuses on the circumstances in which a substance is supplied rather than what the psychoactive substance actually is – there is simply no distinction between different substances. Category One is for commercial operations or supply in a custodial setting, Category Two is dealing direct to users (much the same as for Category 3 in Misuse of Drugs Act offences) and finally Category Three deals with “very small quantity”. As sentencing develops in this area, practitioners may be wise to expect further updates to the guidelines.

Conclusion

Sentencing in drugs cases, particularly multi-handed operations, remains highly fact specific and can be complex. These updates to the guidelines are certainly an attempt to reflect the realities of drugs supply as it has developed, so that sentencing courts can take account of the relevant factors. It seems there is scope for those at the lower end of the chain to benefit from the reconfiguration of the guidelines, as it raises the profile of exploitation of the vulnerable as a sentencing consideration. This could therefore mean those who are offenders but are vulnerable themselves due to their own drug use or other factors, could see more lenient sentences. However, there is equally a risk that those who may have fallen into a leading or significant role due to exploitation, may still fall into those categories with exploitation to be added as an aggravating feature, thus seeing higher sentences. As with any change to sentencing, it will take a few cases to see in which direction courts take sentencing in these matters.

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