

## THE SENTENCING COUNCIL DEFINITIVE GUIDELINES 2012

### Summary and discussion: Rudi Fortson QC

#### General

1. On the 24<sup>th</sup> January 2012, the Sentencing Council published definitive guidelines for drug offences.
2. The Guidelines apply to offenders aged 18 and older, who are sentenced on or after the 27<sup>th</sup> February 2012, **regardless of the date of the offence**.
3. For offenders under 18 years of age, see the Sentencing Council's Definitive Guideline: **"Overarching Principles – Sentencing Youths"** [see *Blackstone's Criminal Practice; Supplement 1; part 18*]
4. Separate Guidelines have been issued for cases before:
  - i. the Crown Courts:  
[http://sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Definitive\\_Guideline\\_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Definitive_Guideline_(web).pdf)
  - ii. and the Magistrates' Courts:  
[http://sentencingcouncil.judiciary.gov.uk/docs/MCSG\\_Update\\_6 - January 2012 \(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/MCSG_Update_6_-_January_2012_(web).pdf)
5. Every court must follow sentencing guidelines *"relevant to the offender's case....unless the court is satisfied that it would be contrary to the interests of justice to do so"*: s.125(1), Coroners and Justice Act 2009.

#### Overview (Crown Court Guidelines) and personal observations

6. The Sentencing Council is to be given considerable credit for the painstaking work that it undertook in the preparation of the Definitive Guidelines.
7. A number of useful papers, research and analysis bulletins, appear on the Sentencing Council website:
  - i. *"Research into the effects of the draft drug offences guideline on sentencing practice"*<sup>1</sup>
  - ii. *"Research into the effects of the draft drug offences guideline – Appendices"*<sup>2</sup>
  - iii. *"Analysis and research bulletin - drug offences"*<sup>3</sup>
  - iv. *"Analysis and research bulletin - drug offences data tables"*<sup>4</sup>
  - v. *"Drug offences - draft resource assessment"*<sup>5</sup>
  - vi. *"Drug 'mules': twelve case studies"*<sup>6</sup>
  - vii. *"Public attitudes to the sentencing of drug offences"*<sup>7</sup>
  - viii. *"Drug offences definitive guideline – Resource assessment"*<sup>8</sup>

<sup>1</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Drug\\_offences\\_guideline\\_research\\_bulletin\\_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_offences_guideline_research_bulletin_(web).pdf)

<sup>2</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Drug\\_offences\\_guideline\\_research\\_Appendices\\_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_offences_guideline_research_Appendices_(web).pdf)

<sup>3</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Analysis\\_and\\_Research\\_Bulletins\\_-\\_Drugs\\_Offences.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Analysis_and_Research_Bulletins_-_Drugs_Offences.pdf)

<sup>4</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Analysis\\_and\\_Research\\_Bulletins\\_-\\_Data\\_Tables.xls](http://sentencingcouncil.judiciary.gov.uk/docs/Analysis_and_Research_Bulletins_-_Data_Tables.xls)

<sup>5</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Consultation\\_stage\\_resource\\_assessment\\_drugs.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Consultation_stage_resource_assessment_drugs.pdf)

<sup>6</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Drug\\_mules\\_bulletin.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_mules_bulletin.pdf)

<sup>7</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Drugs\\_research\\_report.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drugs_research_report.pdf)

<sup>8</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Drugs\\_final\\_resource\\_assessment\\_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drugs_final_resource_assessment_(web).pdf)

- ix. *Press Release*<sup>9</sup>
8. The Council consulted widely, receiving both written and oral representations.<sup>10</sup>
9. The Definitive Guidelines differ markedly from the Council's proposals in its 2011 Consultation Paper.
10. The following points are tentatively advanced:
- i. Vulnerable drug couriers, who have been exploited and preyed upon to commit a drug trafficking offence, can expect to receive a significantly lower sentencing starting point than hitherto. [*NOTE that the expression "drug mule" can be derogatory*]  
  
*Example:* vulnerable drug courier imported 5 kgs of cocaine. Starting point = Lesser role = 8 years' imprisonment. Previously, the starting point (assuming 5 kgs at 100% purity; and a contested trial) would have been in the region of 12 years' imprisonment (consider *R v Martin* [2007] 1 Cr.App.R(S) 14).
  - ii. It is important to note that the Guideline does not treat all couriers the same (see: *Boakye and others* [2012] EWCA Crim 838):
    35. The objective of distinguishing between different couriers has been accomplished by Step One of the new guideline. A third-world offender exploited by others will be likely to be assessed by the judge as having a lesser role: see the expressions "performs a limited function under direction", "engaged by pressure, coercion, intimidation" and "involvement through naivety, exploitation".
    36. By contrast, the courier who is worldly-wise, who knows what he (or she) is doing, and does it as a matter of free choice for the money, is likely to be assessed as having a significant role: see the expressions "motivated by financial or other advantage, whether or not operating alone" and sometimes "some awareness and understanding of the scale of operation".
    37. These two classes of offender may both attract the generic label "courier", but that is not the test. There will be different ranges of sentencing for the two groups. Indeed, sometimes there are such offenders whose role is properly to be assessed as a leading one, for example, those who are an integral part of the importation business and have a substantial financial stake in the consignment.
  - iii. Personal characteristics of the offender will (arguably) afford greater mitigation than hitherto (by how much is unclear). Mitigation can include "serious medical conditions requiring urgent, intensive or long-term treatment",<sup>11</sup> and "mental disorder or learning disability". The lists of mitigating and aggravating factors are not exhaustive.
  - iv. There appears to be greater emphasis on moral responsibility (note the move away from the purity of the substance as determinative of quantity and harm).

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<sup>9</sup> <http://sentencingcouncil.judiciary.gov.uk/media/674.htm>

<sup>10</sup> "*Drug offences guideline – Response to the consultation*":  
[http://sentencingcouncil.judiciary.gov.uk/docs/Drug\\_Offences\\_Response-\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Drug_Offences_Response-(web).pdf)

<sup>11</sup> Perhaps the word "care" might have been preferable to "treatment" (not all conditions are susceptible to treatment).

- v. Persons in *simple possession* of a controlled drug can expect to receive a non-custodial sentence – save in cases, for example, where there has been persistent flouting of the law.
- vi. The Starting Points for simple possession are marginally lower than those stated in the Consultation Paper. BUT this is probably intended to do no more than to emphasise the importance of **health** and **education** initiatives in relation to drug use – rather than imposing terms of imprisonment.
  - a) This approach is NOT “depenalisation” – still less “decriminalisation” – as tends to be reported in the media.
  - b) The guidelines apply only where a person has been convicted of an MDA offence.
- vii. The Starting Points and Category Ranges that are specified in the Consultation Paper, have been substantially reworked:
  - a) The quantities stated in the Definitive Guidelines represent benchmarks for sentencing. The Consultation Paper proposals involved *quantity ranges* (e.g. 2.5kg to 10 kgs). The Definitive Guidelines state specific quantities that are directly referable to the sentencing Starting Points (e.g. 5 kgs of heroin; “leading role”; starting point = “14 years”).
  - b) The Definitive Guidelines are more coherent than the CP proposals in that they group offences of similar seriousness together (e.g. importation – production --- the ‘supply’ offences – permitting premises – simple possession)
- viii. It is tentatively submitted that, *in most cases, definitive guidelines are likely to achieve outcomes that are broadly comparable to those imposed under the judicial guidelines.*
- ix. HOWEVER, there is one category of case, where significantly higher outcomes are likely to result. This concerns those cases where the purity of the drug is very low. This is because the sentencing thresholds are not based on purity.
 

Example: D imports 500 grams of cocaine at 100% purity -- D will be sentenced somewhere between **Category 2** (1 kg) and **Category 3** (150 grams).  
*But,* if D imports 5 kgs of powder containing 1% cocaine, D falls to be sentenced as a **category 1** offender (5 kgs)
- x. Starting points for heroin, cocaine, and LSD, seem (at first sight) to have been based on leading judicial guideline cases (5 kgs (heroin/cocaine – 14 years’ – *R v Aranguren* (1994) 16 Cr.App.R(S) 211; LSD - 250,000 units – 14 years’ – *R v Hurley* [1998] 1 Cr.App.R.(S) 299). However, the guidelines cases were based on the purity of the drug.
- xi. There appears to be a ratcheting up of the tariff for “Ecstasy”. The 14-year starting point in *R v Warren and Beeley* [1996] 1 Cr.App.R.(S) 233, was based on 50,000 or more tablets (assuming 100mg of ecstasy per tablet). By contrast, the same starting point -

under the guidelines – applies to a person playing a “leading role”, where the quantity is in the order of 10,000 tablets.<sup>12</sup>

- xii. There appears to be a scaling down of the tariff with regards to *substantial* quantities of amphetamine and cannabis (no distinction is made in the guidelines between herbal cannabis and cannabis resin).
- a) In the case of amphetamine (Class B), 20 kgs carries a starting point of 8 years’ imprisonment if D played a “leading role” (6 years’ if the role was “significant”). By contrast – applying *R v Wijs* [1998] 2 Cr.App.R.436 – 15 kgs+ carried a sentence between 10 to 14 years’ imprisonment.
  - b) Where the quantity of cannabis (Class B) is in the region of 200 kgs, the starting point is 8 years’ imprisonment for a person playing a “leading role” (6 years’ for a “significant” role). By contrast, the *Ronchetti* guidelines<sup>13</sup> are 100 kgs: 7 to 8 years’ imprisonment, and 10 years’ for 500 kgs or more.
- xiii. The Definitive Guidelines do NOT:
- a) Cater for massive amounts of a controlled drug.
  - b) Not all drugs are included – e.g. Opium; “magic mushrooms”;
  - c) Makes no provision for Temporary Class Drugs
- xiv. Although not expressly stated in the Definitive Guideline for Drug Offences, it is submitted that (save in exceptional cases) the Guideline does apply to the commission of inchoate offences. The Guideline clearly applies where a substantive offence (e.g. production) has been committed *jointly* by two or more persons. Accordingly, one starts from the premise that the Guideline applies to such conduct, albeit charged as a statutory ‘conspiracy’ (noting s.3, CLA 1977). It is important to note that for the purposes of the three offences created under Part 2 of the Serious Crime Act 2007, s.49(1) provides that “[a] person may commit an offence under this Part *whether or not any offence capable of being encouraged or assisted by his act is committed*” [emphasis added]. By s.58 of the 2007 Act, in cases other than murder, the offender “is liable to any penalty for which he would be liable on conviction of the anticipated or reference offence”. It is therefore submitted that there will usually be sufficient flexibility in the structure of the Definitive Guideline to adjust the sentence having regard to the particular features of the case in question (e.g. that the contemplated offence was not carried out).<sup>14</sup> As for flexibility within the Guideline, see *R v Healey* [2012] EWCA Crim 1005 (para.5).

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<sup>12</sup> Consider *R v Davidson* [2002] EWCA Crim 879.

<sup>13</sup> [1998] 2 Cr.App.R.(S) 100. In *Ronchetti*, the Court of Appeal gave guidance to sentencers “by way of addendum” to *Aramah*. Thus: • 100 kilograms: 7 to 8 years’ imprisonment; • 500 kilograms or more: 10 years’ imprisonment; • “larger importations”: will attract a higher starting point. The guidelines were expressed on the basis that the defendant had contested the case and that s/he played more than a subordinate role.

<sup>14</sup> “There is deliberately built in to the guidelines issued by the Sentencing Council a good deal of flexibility, as we shall in a moment demonstrate. The flexibility available to Crown Court judges is appreciable. It does not, however, extend to deliberately disregarding the guidelines, not on the grounds that the case has particular

- xv. The pre-existing Judicial Guidelines may continue to be relevant in the cases mentioned in ix above.

### Steps to be followed by sentencers

11. The steps are as follows:

*i. Determine the “offence category”.*

The relevant factors depend on the offence for which D falls to be sentenced:

- Importation / exportation, possession with intent to supply, supply (etc.), production and cultivation.

Two principal factors are relevant:

- a) The offender’s *culpability* based on **role**: Leading; Significant; Lesser.
- b) *Harm* -- based on the **quantity**. There are four categories (in effect, four categories of harm). Quantity is typically determined by the weight of the substance. Purity is disregarded at this stage. Note:
  - The quantity of Ecstasy is expressed in terms of the number of tablets (but not all ‘ecstasy’ appears in pill form, and many drugs come within the generic label ‘ecstasy’).
  - The quantity of LSD is determined by the number of dosage units (“squares”), but LSD can appear in other forms too.
  - In cases of cannabis cultivation/production, quantity is variously expressed by reference to its weight, or the number of plants, or “operation capable of producing [‘industrial’ (category 1) or ‘significant’ (category 2)] quantities for commercial use”

- “Permitting premises” (s.8, MDA),

- a) *Culpability* is based on **“extent of the activity”**. Factors include whether the property is used primarily as a drug ‘den’ (or not); or for substantial gain (or not).
- b) *Harm* is assessed by reference to the **“quantity of drugs”**. Factors of harm seem to overlap with culpability (e.g. frequent or infrequent drug-related activity).

There are three sentencing categories:

- i. Higher culpability **and** greater harm
- ii. Lower culpability **and** greater harm; **or** higher culpability and lesser harm;
- iii. Lower culpability **and** lesser harm

- Simple possession (s.5, MDA).

*Culpability* is based on the Class of drug (i.e. Class A, B, or C).

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facts which warrant distinguishing it from the general level, but because the judge happens to take a different view about where the general level ought to be.” (Per Hughes LJ: *R v Healey* [2012] EWCA Crim 1005).

There are three sentencing categories (Class A, B, and C)

NOTE:

- Purity is not taken into account at this stage.
- The Class of drug is directly relevant to Step 2.

**ii. Determine the Starting Point and the Category Range:**

- a) Different tables apply to each Class of controlled drug (i.e. Classes A, B, and C).

*[Although not spelt out in the Guidelines, a Temporary Class Drug will be punished under the MDA 1971 as if it were a drug of Class B.]<sup>15</sup>*

- b) Different **roles** attract different **Starting Points**. Leave out of account guilty pleas and, any previous convictions.

- c) The **Category Range** (i.e. penalties above or below the starting point).

- Take into account aggravating and mitigating factors (which may include personal mitigation, and good character or previous convictions).
- High or low purity of a drug may be taken into account at this stage. *[The sentencing guidelines appear to be based on moral culpability]*
- Leave out of account a guilty plea [this is relevant to step 4].

**iii. Consider factors which indicate a reduction for assistance given:** e.g. ss.73 and 74 Serious Organised Crime and Police Act 2005.

**iv. Reduction for guilty pleas:** in accordance with s.144 of the CJA 2003 and the Guilty Plea guideline.

**v. Totality principle**

**vi. Confiscation and ancillary orders (if applicable)**

**vii. Give reasons** (s.174, CJA 2003)

**viii. Time on remand (if any).**

**Further (personal) observations: determining “harm” by weight rather than purity of the substance**

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<sup>15</sup> “The punishments which may be imposed on a person convicted of the offence summarily or (as the case may be) on indictment in relation to the temporary class drug are the same as those which could be imposed had the person been convicted of the offence in that way in relation to a Class B drug (see the fifth column of Schedule 4)” (see s.25(2B) of the MDA 1971, inserted by s.151 and, para.17(2) of schedule 17, to the Police Reform and Social Responsibility Act 2011 (in force from the 15<sup>th</sup> November 2011: see The Police Reform and Social Responsibility Act 2011 (Commencement No. 1) Order 2011; 2011 No. 2515).

12. It is submitted that the shift away from the purity thresholds is an error (and opposed by the Working Party of the Criminal Bar Association for England and Wales).<sup>16</sup> The CBA Response is available from the Criminal Bar Association, or it can be downloaded from the author's website.<sup>17</sup>
13. Purity is now a mitigating or aggravating factor – but this goes only to the “Category Range” and has no bearing on the “Offence Category”. The correctness of the positioning of various substances within Schedule 2 to the MDA (i.e. Classes A, B and C) is itself a highly contentious issue.
14. It is not possible to tinker with the benchmark quantities specified in the Definitive Guidelines because this would be to re-determine the “Offence Category” (step 1). The Guidelines state that “purity is not taken into account at Step 1”.
15. Given that purity is left out of the reckoning at Step 1, it might be said that references in the Guidelines to the “quantity of drug” is misleading because, in the majority of cases, what will be weighed are substances that *contain* the offending drug (e.g. cocaine). The point has some force:
- i.* Section 2(1) of the MDA 1971 defines a “controlled drug” as “any substance or product for the time being specified in Parts Part I, II or III of Schedule 2” (i.e. Class A, B, or C) or a Temporary Class Drug.
  - ii.* The “substance[s] and product[s]” are those listed in para.1 to each Part of Schedule 2 (e.g. cocaine, heroin, cannabis). Those substances or products may appear in various *forms* (e.g. as a “salt”, “ester” or “ether”).
  - iii.* The MDA also controls “Any preparation or other product containing a substance or product” (e.g. a preparation or other product that contains cocaine).
  - iv.* However, (iii) above, merely brings us back to the list of ‘substances and products’ specified in para.1 to Parts 1 to 3.
16. Determining quantity by weight will not always be meaningful or practical:<sup>18</sup>
- i.* Not all substances appear as dry powders, or in tablet form.
  - ii.* In cases where a drug (e.g. cocaine) is suspended in liquid,<sup>19</sup> is it proposed that the court should have regard to the gross weight of the liquid?
  - iii.* In cases where a drug appears as a paste, is the weight of the substance determinative of the quantity of drug?
  - iv.* In a case that involves a large quantity of ‘Magic mushrooms’ (in which *psilocin* subsists: Class A), how should a court determine drug quantity? Is it by the number of mushrooms (if whole), or by their weight, or (as the case may be) the weight of the dried material?
  - v.* Not all amphetamine (typically amphetamine sulphate) is dry.
  - vi.* Do cases that involve cannabis oil, fall outside the guidelines?

<sup>16</sup> It is pointed out that this commentator chaired the Working Party. Other members of that Party were Kate Lumsdon, and Monica Stevenson.

<sup>17</sup> [www.rudifortson4law.co.uk/legaltexts/CBA Response to the Sentencing Council Consultation Paper.pdf](http://www.rudifortson4law.co.uk/legaltexts/CBA%20Response%20to%20the%20Sentencing%20Council%20Consultation%20Paper.pdf)

<sup>18</sup> The author expresses his thanks to a number of criminal law practitioners, and medical practitioners, for their comments on this issue.

<sup>19</sup> For example, *R v Campbell* [2011] EWCA Crim 1017, *R v George* [2003] EWCA Crim 1238;

17. Only time will tell whether the shift away from purity results in greater quantities of high purity drug substances and products being trafficked.
18. The UK does *not* have an offence, under the MDA, of adulterating a controlled substance with a noxious non-controlled substance. Such conduct would nonetheless be an aggravating factor. But, in cases where there is no such evidence of noxious/toxic adulteration of a controlled drug, purity is (it is submitted) a powerful indicator of potential harm.
19. It is not evident whether purity analysis will now be routinely carried out, or whether analysts will confine themselves to statements such as “low”, “medium”, “high purity”; or whether any determination of purity will routinely be carried out. In the absence of analysis carried out by the prosecution, will the burden now fall on the defence to carry out such tests?

**Rudi Fortson QC**

**26<sup>th</sup> June 2012**