

SENTENCING UPDATE

- **Children and Young People**
- **Racially Aggravated Offences**

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New Guidelines:

Children and Young People



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Sentencing Council New Guidelines

- 1st June 2017
- Overarching Principles
- Sexual Offences and Robbery specific guidelines
- More “individualistic” approach?
- Personal, social background and other factors
- Role of social media
- Peer pressure – a key theme - an aggravating and mitigating factor
- Guilty plea considerations

Overarching Principles

- Approach should be individualistic rather than purely offence focused
- Main focus is rehabilitation
- Underlying factors
- Aim: avoid “criminalising unnecessarily”

Factors diminishing culpability

- Peer pressure, negative influences, experimentation
- “Emotional and developmental age” vs “chronological” age

Welfare

Factors for the Court to be alert to:

- mental health problems
- learning difficulties
- brain injury or traumatic life experience (including exposure to drug and alcohol abuse) and developmental impact
- speech and language difficulties
- vulnerability to self harm
- experiences of loss and neglect and/or abuse.

Social issues:

- Over-representation of BME and “Looked after” children and young people
- Potential additional complexities
- E.g. those leaving the care system

- Some low level offences may not even have come before the courts if in family setting
- Awareness – but the sentence should reflect the seriousness of the offence

Aggravating factors:

Peer pressure

- Involvement of others through peer pressure, bullying, coercion or manipulation.

Social media

- Deliberate humiliation – filming of the offence, deliberately committing the offence before a group of peers with the intention of causing additional distress, circulating details/photos/videos of the offence on social media or within peer groups.

Mitigating factors

“Unstable Upbringing”

Factors (not limited to):

- time “looked after”
- lack of familial presence or support
- disrupted accommodation or education
- exposure to drug/alcohol abuse, or exposure to neglect or abuse of others
- experiences of trauma or loss

Additional mitigating factors

- Participated in offence due to bullying, peer pressure, coercion or manipulation
- In education, work or training
- Particularly young or immature (where it affects their responsibility)
- Developmental and emotional age of at least equal importance as their *chronological age*

Guilty Pleas : How reasonable?

Distinction:

- additional advice and explanation required to know if guilty in fact and law

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- waiting to assess the weight of the evidence.
- Highlight: particular circumstances which significantly reduced their ability to understand what was alleged? Why was it unreasonable to expect them to indicate a plea sooner than was done?

Sentencing for Racially Aggravated Offences



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Sections 29 – 32 of the CDA 1998

- Sections 29 – 32 of the Crime and Disorder Act 1998 (as amended by the Anti-Terrorism, Crime and Disorder Act 2001) introduced specific racially aggravated forms of existing offences.
- These offences include assaults, criminal damage, public order, and harassment.
- Significantly, this legislation increased the maximum sentences for offences which are racially aggravated. This means that racially aggravated forms of summary only offences can be tried on indictment.

Other Offences

- All offences can be racially aggravated, even when they are not contained within sections 29 – 32.
- Section 145 of the Criminal Justice Act 2003 applies to all offences, other than those in sections 29 – 32, which are racially aggravated. This can apply to any offence (e.g. a fraud where members of a particular racial group were deliberately targeted).
- Section 145 stipulates that where any offence is racially or religiously aggravated, the court must treat this as an aggravating feature, and must state in open court that the offence was so aggravated.



Sentencing Guidelines

- There are no specific Sentencing Council guidelines for racially or religiously aggravated offences.
- The only guidance is that racial or religious aggravation is an aggravating feature...
- There are no guidelines as to what specific features of the racial aggravation increase sentence, nor what the increase should be.
- However, there are some cases which provide guidance on the approach to sentencing...

Guideline Cases

- *R v Saunders* [2000]: a period of up to 2 years should be added to the term of imprisonment for the basic offence. The sentence should be considered in two stages. Relevant factors will include: the nature of the hostile demonstration, its length, whether isolated, repeated, or persistent, its location, whether public or private, and the number both of those demonstrating and those demonstrated against.
- *R v Morrison* [2001]: maximum uplift not limited to 2 years.

Guideline Cases

- *R v Kelly & Donnelly* [2001]
 - i) The court should first decide on the appropriate sentence without the racial aggravation.
 - ii) The sentence should then be enhanced to take account of the racial aggravation (sentence uplift).
 - iii) If the offence itself merits custody, that sentence should be enhanced by an appropriate amount to reflect the degree of racial aggravation.
 - iv) The judge should state in court what the appropriate sentence would have been without the racial aggravation.

Nature of the Uplift

- *R v O'Brien* [2003]: pleaded to racially aggravated criminal damage. He was sentenced to 2 months for the basic offence, but an uplift of 12 months, making a total custodial sentence of 14 months. The Court of Appeal did not interfere with this, but suggested that an uplift in the range of 40% - 70% would usually be appropriate.
- *R v Slater* [2005]: where the assault does not merit custody but the racial element does, make the assault sentence notional and then decide the uplift.

Applicability of the Two-Stage Test

- *R v Fitzgerald* [2004]: the *R v Kelly and Donnelly* approach is not applicable in all cases. In some cases, the racial aggravation is so inherent and integral to the offence it is not possible to assess the overall criminality in such a discrete way. In such cases, the court must assess the seriousness of the conduct and its criminality as a whole.

Continued...

- *R v Meechan* [2016]: in this case the racial element (shouting a succession of racial epithets at a health worker) was the essence of the offence. It was deemed artificial to identify a notional sentence for the basic offence, such as a fine or a low level community order, only then to consider the racial aggravation which would lead inevitably to a custodial sentence.