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Sentencing Guidelines for firearms - 1st January 21

By James Walker - Libertas Chambers – March 2021

Eight new guidelines for sentencing offenders convicted of firearms offences ranging from the unlawful possession of weapons to manufacturing illegal guns have been published by the Sentencing Council following consultation. The new guidelines came into force on 1st January 2021. They apply to all defendants sentenced after this date.

For the first time, judges and magistrates in England and Wales will have dedicated guidelines for sentencing these complex offences which, while low in volume, can be extremely serious with several offences carrying maximum sentences of 10 years or life and some requiring a minimum sentence of five years. This introduction tacitly acknowledges the numbers involved. GunPolicy.org estimates there about one million illegal or unlicensed firearms in the UK. Homicide figures average at about 750 per year, dropping to 600 and rising above 1100 in 2003. However, the numbers of homicides involving firearms remains relatively stable and relatively low in comparison. The figure averages at approximately 30 – 40 per year and is often outstripped by suicide involving a firearm.

These particular guidelines were ground breaking as they were the first to acknowledge racial disparity in respect of sentencing outcomes. This was considered one of the key factors in a decision to eventually attempt to codify firearms sentencing. It has taken some time. The sentencing council reached its ten year anniversary in April 2020.

Sentencing in respect of firearms had previously been governed by the authority of *Avis [1998] 1 Cr App R 420*. Lord Bingham CJ set out four questions which it would be appropriate for the sentencing court to ask itself when carrying out the sentencing exercise for firearms offences:

1. *What sort of weapon is involved?*
2. *What (if any) use has been made of the firearm?*
3. *With what intention (if any) did the defendant possess or use the firearm?*
4. *What is the defendant's record?*

Subsequent Court of Appeal decisions have sought to build upon its foundations and provide further guidance and clarification. In *R v. Sheen [2011] EWCA Crim 2461* the Court of Appeal suggested two further questions:

5. *Where was the firearm (or were the firearms) discharged, and who and how many were exposed to danger by its or their use?*
6. *Was any injury or damage caused by the discharge of the firearm or firearms, and if so how serious was it?*

In Wilkinson [2009] EWCA Crim 1925 the Court of Appeal expanded upon the guidance in Aviz to address the wholesale importation and distribution of firearms, making clear that such offences should attract a lengthy custodial sentence and in some cases an indeterminate sentence.

Given that certain questions would inevitably be reflected in a different or separate count, this formula was something of a blunt tool.

Sentencing in firearms cases was complicated by the introduction of mandatory minimum sentences. The scope of the mandatory minimum sentence for firearms offences has been extended several times since its introduction in the Criminal Justice Act 2003 and is now consolidated in section 311 of, and schedule 20 to, the Sentencing Act 2020.

Section 311(2) of the Sentencing Act 2020 makes clear that the court must impose an appropriate custodial sentence for a term of at least the required minimum term unless the court is of the opinion that there are “exceptional circumstances” which “relate to the offence or to the offence” and which “justify not doing so”.

The Offences covered

It is important to note the sentencing guidelines do not cover every offence within the Firearms Act. The offences covered are as follows:

1. Possession, purchase or acquisition of a prohibited weapon or ammunition - sections 5(1), 5(1A)
2. Possession, purchase or acquisition of a firearm/ammunition/shotgun without a certificate - sections 1(1), 2(1)
3. Possession of a firearm or ammunition by person with previous convictions prohibited from possessing a firearm or ammunition - section 21(4) and 21(5)
4. Carrying a firearm in a public place - section 19
5. Possession of firearm with intent to endanger life - section 16
6. Possession of firearm or imitation firearm with intent to cause fear of violence - section 16A
7. Use of firearm/imitation firearm to resist arrest/possession of firearm or imitation firearm while committing a schedule 1 offence/carrying firearm or imitation firearm with criminal intent - sections 17(1), 17(2) and 18
8. Manufacture/sell or transfer/possess for sale or transfer/purchase or acquire for sale or transfer prohibited weapon or ammunition - 5(2A)

Culpability and Harm

There is an initial culpability test before the more generic culpability assessment. Practitioners must first consider what “type of weapon” was used before then making an assessment of “other culpability factors”. These are identical for the first four guidelines and include whether the firearm was going to be used for a “criminal purpose” and whether the Defendant intended the firearm to be used or was reckless as to whether it would be.

The two-stage test encapsulates the first three questions set out by Lord Bingham CJ in *Avis* and suggests that for the less serious offences similar considerations will apply under the guidelines as before. It is of note however that when moving to the more serious offences in sections 16, 17, 18 and section 5(2A) in the culpability assessment no consideration is given to the type of weapon involved. This is specifically distinguished when analysing starting point and category range.

An assessment of culpability differs for each offence, but for those under sections 16, 17 and 18, there are common factors. These include whether the firearm was discharged and whether the Defendant had a leading role where offending is part of a group activity. The offence of importation and distribution under section 5(2A) has its own specific culpability factors, including whether the defendant abused a position of trust and responsibility as a registered firearms dealer.

An assessment of harm essentially considers the same factors for all offences, with consideration required of the degree of alarm and/or distress, psychological and/or physical harm, disorder caused. For section 5(2A) offences the focus is understandably on the scale of the criminal operation, with reference made to the number of weapons involved, the duration of the operation and its geographical range.

One of the harm factors is stated as ‘close connection to OCGs’, it will be interesting to follow the development of this criterion as prosecutors may easily assert but find difficult to evidence. Conversely, once raised defence practitioners may find difficulty in contradicting. As with most sentencing guidelines category 2 allows for a balancing exercise when factors are present within 1 and 3. This will be of use for example when a single firearm has been transferred between a large geographical area. Effectively cancelling each other out.

The starting point and range assessment for offences contrary to sections 5(1) and 5(1A) contain two relevant separate tables, depending on whether the particular offence charged falls within the scope of the mandatory minimum sentencing provisions. This reflects the fact that sections 5(1) and 5(1A) criminalise possession of a diverse range of weapons.

Aggravating and Mitigating Factors

In order to move within the sentencing range, it is necessary to consider aggravating and mitigating factors. A number of these factors are very specific to firearms offences.

The fact that the relevant firearm was disguised is an aggravating feature common to all of the guidelines, as are whether the firearm was modified to make it more dangerous and whether the firearm and/or ammunition was held with multiple weapons. The absence of knowledge or suspicion that the item was a firearm is a mitigating factor for all offences bar sections 16, 17 and 18, whilst the fact that the firearm was incomplete or incapable of being discharged is a mitigating factor in every case.

Although the type of weapon is not relevant to culpability for the more serious offences, specific reference is made within the aggravating factors for section 16, 17, 18 and 5(2A) offences to whether the firearm is prohibited under section 5(1)(a) as an automatic weapon.

For those offences to which the mandatory minimum applies, the guidelines helpfully set out a summary of the relevant provision and principles. To a large extent this simply restates the law as is now set out in section 311 of the Sentencing Act 2020. In Paragraph seven, the Sentencing Council make clear that where factual circumstances are disputed, the procedure should follow that of a Newton hearing, reflecting the established practice in *R v. Rogers* [2016] EWCA Crim 80.

In respect of exceptional circumstances the principles set out are almost identical to those established in *Rehman* and restated in *Nancarrow*, with the Sentencing Council acknowledging that a “single striking factor may amount to exceptional circumstances”.

The sort of factors or circumstances that may suffice are not set out, however the Sentencing Council does make clear that the “mere presence” of one or more lower culpability factors, mitigating factors or a plea of guilty should not “in itself” be regarded as exceptional.

Disparity

Analysis conducted by the Council in preparation for the guidelines suggests there are disparities in sentence outcomes for some firearms offences based on ethnicity. The Council has taken measures in the guidelines to address this, including drawing sentencers’ attention to evidence of sentencing disparities in specific offences as an integral part the sentencing process. The Council has stated it is committed to continuing to investigate apparent disparity in sentencing outcomes across all offences and will take further action as and when there is evidence of effective measures that can be applied to guidelines.

In an attempt to address this disparity, the Sentencing Council have included the following reminder within some, but not all, of the firearms guidelines:

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 and Asian offenders receive an immediate custodial sentence than White offenders and that for Black offenders custodial sentence lengths have on average been longer than for White offenders.

The guideline specifically refers to the Equal Treatment Bench Book which covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system, to ensure that there is fairness for all involved in court proceedings.

It is likely that such notices will appear in other offence guidelines, with the Sentencing Council making clear that they will continue “to investigate apparent disparity in sentencing outcomes across all offences”.

Conclusion

The new sentencing guidelines are a welcome attempt to codify an increasingly complex sentencing area.

The detailed culpability provisions, allied to an extensive list of aggravating and mitigating factors for each offence, should give the court the flexibility to deal with individual cases whilst at the same time making it easier for practitioners to properly advise Defendants.

Practitioners will be cautiously optimistic in respect of the guidelines as to the impact upon the sentencing of firearms. The acknowledgement and attempt to address racial disparity in respect of sentencing outcome can only be a step in the right direction.