Rt Hon Harriet Harman KC MP
Member of Parliament for Camberwell and Peckham
Mother of the House of Commons

Draft Sentencing Guidelines

Administering drugs or using instruments to procure abortion

Offences against the Person Act 1861, s.58[1]

"Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life."

and

Punishment for child destruction

Infant Life (Preservation) Act 1929, s.1[2]

(1)Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life:

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

(2)For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be primâ facie proof that she was at that time pregnant of a child capable of being born alive.

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[1] https://www.legislation.gov.uk/ukpga/Vict/24-25/100/section/58#:~:text=%5BF1Every%20woman%2C%20being%20with,miscarriage%20of%20any%20woman%2C%20whether

[2] https://www.legislation.gov.uk/ukpga/Geo5/19-20/34/section/1

Triable only on indictment
Maximum: Life imprisonment
Offence range: Discharge - Community order

Step 1 – Determining the offence category

The court should determine the offence category with reference only to the factors listed in the tables below. In order to determine the category the court should assess culpability and harm.

Culpability

The level of culpability is determined by weighing all the factors of the case. Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics giving appropriate weight to relevant factors to reach a fair assessment of the offender's culpability.

A – High culpability
- Significant degree of planning or premeditation

B – Medium culpability
- Cases falling between category high and low culpability because:
    - 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 high and lesser culpability

C – Lesser culpability
- The action was taken by the pregnant woman and was necessary to prevent injury to the physical or mental health of the pregnant woman, or any existing children of her family, or risk of life to the pregnant woman, or that there was a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.[3]
- Offender was the pregnant woman and she acted in response to prolonged or extreme violence or abuse by partner, relative, or other known person
- Mental disorder or learning disability of the offender

Harm

All cases will involve 'really serious harm', which can be physical or psychological, or wounding. The court should assess the level of harm caused with reference to the impact on the foetus.

Category 1
- Death, or particularly grave or life-threatening injury caused

Category 2
- Offence results in a permanent, irreversible injury or condition not falling within category 1

Category 3
- All other cases of harm

[3] Abortion Act 1967

Step 2 – Starting point and category range

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all pregnant women offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Harm	**Culpability**		
	A	**B**	**C**
Category 1	**Starting point** High level community order	**Starting point** Medium level community order	**Starting point** Low level community order
	Category range Medium level community order – high level community order	**Category range** Low level community order – high level community order	**Category range** Band C fine[4] – Medium level community order
Category 2	**Starting point** Medium level community order	**Starting point** Low level community order	**Starting point** Band C fine
	Category range Low level community order – high level community order	**Category range** Band C fine – Medium level community order	**Category range** Band B fine – low level community order
Category 3	**Starting point** Low level community order	**Starting point** Band C Fine	**Starting point** Discharge
	Category range Band C fine – Medium level community order	**Category range** Band B fine – low level community order	**Category range** Absolute discharge – Band A fine

The court should then consider further adjustment for any aggravating or mitigating factors. The following is a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the sentence arrived at so far.

Factors increasing seriousness

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

[4]

	Starting point	**Range**
Fine Band A	50% of relevant weekly income	25 – 75% of relevant weekly income
Fine Band B	100% of relevant weekly income	75 – 125% of relevant weekly income
Fine Band C	150% of relevant weekly income	125 – 175% of relevant weekly income

Other aggravating factors:

- Offence committed whilst on licence or subject to post sentence supervision
- Failure to comply with current court orders

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Self-reporting
- Cooperation with the investigation/ early admissions
- Little or no planning
- The offender was in a lesser or subordinate role if acting with others / performed limited role under direction
- Involved through coercion, intimidation or exploitation
- Limited awareness or understanding of the offence
- Delay since apprehension
- Age and/or lack of maturity
- Sole or primary carer for dependent relatives
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment
- Mental disorder or learning disability

Step 3 – Consider any other factors which indicate a reduction, such as assistance to the prosecution

The court should take into account section 74 of the Sentencing Code (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Step 4 – Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 73 of the Sentencing Code and the Reduction in Sentence for a Guilty Plea guideline.

Step 5 – Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour. See Totality guideline.

Step 6 – Reasons

Section 52 of the Sentencing Code imposes a duty to give reasons for, and explain the effect of, the sentence.

Annex

IN THE CROWN COURT AT STOKE ON TRENT

THE KING V. CARLA FOSTER

12 JUNE 2023

SENTENCING REMARKS OF THE HON. MR JUSTICE PEPPERALL

1. This case concerns one woman's tragic and unlawful decision to obtain a very late abortion. The balance struck by the law between a woman's reproductive rights and the rights of her unborn foetus is an emotive and often controversial issue. That is, however, a matter for Parliament and not for the courts. While an abortion is available in limited other circumstances, the principal rule under the Abortion Act 1967 is that a pregnancy can be lawfully terminated up to the twenty-fourth week of pregnancy. Early medical abortions, being abortions performed in the first ten weeks of pregnancy, usually involve the prescription of two drugs. First, mifepristone is taken in order to block the effects of progesterone. Secondly, some 24-48 hours later, misoprostol is taken in order to induce labour and cause the woman to miscarry.

2. The 1967 Act requires that such treatment be provided at a clinic or other premises approved by the Secretary of State. Between 2018 and the COVID-19 pandemic, women seeking an early medical abortion were required to attend a clinic for the first part of their treatment but were able to take the second drug, misoprostol, at home. That model of providing abortion services was not sustainable at the height of the pandemic and accordingly, on 30 March 2020, the then Secretary of State for Health & Social Care approved a woman's home as a suitable place for abortion treatment. The effect of that approval was that abortion services could be provided without the need for an in-person appointment at a clinic. In 2020, the courts dismissed a judicial review claim brought by Christian Concern seeking to challenge the lawfulness of the provision of abortion services by so-called telemedicine.

3. Some weeks after that change in the law, you, Carla Foster, obtained abortion drugs by a telephone consultation designed only for abortions in the first ten weeks. You were in fact 32-34 weeks pregnant and well beyond the point at which you could lawfully obtain an abortion. Messages found on your phone indicate that you had known of your pregnancy for about three months on 1 February 2020. By midFebruary, you were conducting internet searches on ways to induce a miscarriage. By the end of February, you were searching for abortion services. Your search on 25 February indicated that you then believed that you were 23 weeks pregnant. Your internet searches continued sporadically through March and April 2020. On 24 April, you searched "I need to have an abortion but I'm past 24 weeks."

4. On 6 May, you consulted the telemedical service provided by the British Pregnancy Advisory Service. You gave false answers that would have indicated that your pregnancy was 7 weeks and 4 days in length. Abortifacient drugs were then posted out to you.

5. On 9 May, you took mifepristone. That same day you conducted internet searches suggesting that you were 28 weeks pregnant. You then took the misoprostol at around 1pm on 11 May. Two emergency calls were made for medical attention that afternoon and evening. Paramedics attended

at 4.25pm in response to a report that you might be having a miscarriage. You gave the paramedics false information and, not realising that you were pregnant, they left. The second call was made at 6.39pm shortly before your daughter, Lily, was stillborn. Paramedics attended at 7pm but all attempts at resuscitation failed and Lily was pronounced dead at 7.45pm. Further internet searches that evening suggested that you believed that you were 30 weeks pregnant.

6. You originally maintained to medical staff that you were unaware that you were pregnant. You later told a midwife that you had obtained drugs from an abortion clinic and that you believed that you were in the early stages of pregnancy. You said that you realised that you needed to speak to the police. When you did so, you admitted taking abortifacient drugs and that Lily could have been conceived in either October or December 2019, but you maintained that you did not know how far into the pregnancy you had been.

7. Post-mortem examination confirmed that the pregnancy was between 32-34 weeks' gestation at the time of this offence. There was no sign of natural disease or trauma that could explain her death. In police interview, you falsely maintained that the pregnancy was less advanced than you plainly knew it was.

8. Unusually the court has received a letter dated 6 April 2023 from the President of the Royal College of Obstetricians and Gynaecologists, the Chief Executive of the Royal College of Midwives, the President of the Faculty of Sexual & Reproductive Healthcare, the President of the Faculty of Public Health, the Chair of the Royal College of Obstetricians and Gynaecologists' Abortion Taskforce, the Clinical Lead and a Clinical Representative for the Abortion Care Guideline developed by the National Institute for Health Care Excellence, and the Co-Chair of the British Society of Adoption and Care Providers. These eminent professionals argue that the successful introduction of the telemedicine option was one of the single greatest advances since abortion care was legalised by the 1967 Act. They explain that telemedicine has transformed the care for some of the most vulnerable women and girls who find it difficult to access in-person medical services. Such patients include women and girls at serious risk of harm whether from a coercive partner or other family member and those who are isolated in rural communities. The letter urges a non-custodial sentence and indicates that its authors are concerned that your imprisonment might deter other women from accessing telemedical abortion services and other late-gestation women from seeking medical care or from being open and honest with medical professionals. The letter also regrets a recent increase in investigations following late-gestation deliveries, and even suggests that one of the letter's authors might appear before the court to present their plea in person.

9. It would plainly not have been appropriate to have allowed any of the authors to address the court. Indeed, I consider that it would have been better if the letter had not been written at all. While it provides me with some useful information about the delivery of telemedicine services, the letter also has the capacity to be seen as special pleading by those who favour wider access to abortions and is, in my judgment, just as inappropriate as it would be for a judge to receive a letter from one of the groups campaigning for more restrictive laws and which might seek to argue that it is important that the law is upheld by passing a deterrent sentence.

10. My duty as a judge is to apply the law as provided by Parliament and clarified by the Court of Appeal. If the medical profession considers that judges are wrong to imprison women who procure a late abortion outside the 24-week limit then it should lobby Parliament to change that law and not judges who are charged with the duty of applying the law.

11. In my judgment, the vast majority of women and girls seeking an abortion only do so after the most anxious consideration. It is often a very difficult decision and it is always intensely personal and painful. Equally, the vast majority of women and girls recognise that they must make a decision about whether to seek an abortion at an early stage of their pregnancy and well before the 24-week limit imposed by law. I do not accept that imprisonment in this case is likely to deter women and girls from lawfully seeking abortion care within the 24-week limit. Rather, it might be said that it would reinforce the limit of that law. Your case requires, however, very anxious and careful consideration on its own facts.

12. There are no sentencing guidelines for this offence. I therefore consider the General Guideline issued by the Sentencing Council. In such circumstances, the guideline requires judges to arrive at a provisional sentence taking into account the statutory maximum sentence; sentencing judgments of the Court of Appeal (Criminal Division); and guidelines issued for analogous offences. Here, the statutory maximum is life imprisonment. There are no analogous guidelines on which the court can draw but useful guidance was given by the Court of Appeal in the case of R v. Catt [2013] EWCA Crim 1187.

13. Ms Catt was 36 and had two young children. She had aborted a previous pregnancy just before 24 weeks and given up a further baby for adoption. She obtained abortifacient drugs from an online retailer and took the drugs at full term. The body was never recovered. Allowing Ms Catt's appeal against sentence, the Court of Appeal concluded that the appropriate sentence after trial was 5 years' imprisonment which was reduced to 3½ years to reflect credit for her guilty plea.

14. Rafferty LJ, giving the judgment of the court, identified the following aggravating features: the termination was at full term, the body had never been recovered, there was careful planning and acquisition of abortifacient drugs, and the offence was committed despite considerable experience of pregnancy and its range of consequences. Against that, the appeal court took into account the following mitigating features: the plea of guilty, Ms Catt's remorse, her emotional attachment to the child in utero, and the fact that Ms Catt was a good mother with two young children whose development would be adversely affected by her imprisonment.

15. Faced with a dearth of other guidance as to the appropriate sentence for this very rare offence, both counsel focused on the points of similarity and difference between your case and Catt.

16. My task, however, is to assess both culpability and harm in your case in order to reach a provisional sentence. Catt provides great assistance but does not itself identify the appropriate provisional sentence before consideration of the aggravating and mitigating features of the case. In my judgment, your culpability is high in that your pregnancy was between 32-34 weeks' gestation; you knew full well that your pregnancy was well beyond the legal limit of 24 weeks; you deliberately lied in order to bring yourself within the telemedical service for early medical abortions; you had considerable previous obstetric experience; and there was some planning. The planning was, however, somewhat chaotic and showed how you struggled for some weeks to make a final decision before obtaining abortifacient drugs. Against that, and solely in order to calibrate this case against earlier authority, it would appear that culpability in Ms Catt's case might have been very high in that the pregnancy was at full term and the baby's body was never recovered. Harm in both cases was very high in that the drugs were effective in causing you to miscarry.

17. In my judgment, the appropriate provisional sentence in this case would be 5 years' imprisonment. I anticipate that had the Court of Appeal applied the approach in the current General Guidelines, it would have reached a higher provisional sentence before considering the mitigation available to Ms Catt.

18. There are no additional aggravating features in this case.

19. You are now aged 44 and have no previous convictions. This offence was committed against the backdrop of the first and most intense phase of lockdown at the start of the COVID-19 pandemic. Forced to stay at home, you moved back in with your longterm but estranged partner while carrying another man's child. You were, I accept, in emotional turmoil as you sought to hide the pregnancy.

20.I have carefully considered psychiatric reports from Drs Gupta and Kennedy, the Pre-Sentence Report; and letters from your former partner, the baby's father and a teacher at your son's school. You were not suffering from any serious mental illness at the time of this offence. I accept, however, that there is evidence of emotionally unstable personality traits. More significantly, I accept that you feel very deep and genuine remorse for your actions. You are wracked by guilt and have suffered depression. I also accept that you had a very deep emotional attachment to your unborn child and that you are plagued by nightmares and flashbacks to seeing your dead child's face.

21. I also take into account the fact that you are a good mother to three children who would suffer from your imprisonment. One of your children himself has special needs which means that he is particularly reliant upon your love and support.

22.Taking into account the aggravating and mitigating features of your case, I consider that the appropriate sentence after trial would have been three years' imprisonment.

23.You were originally charged with an offence of child destruction. At the plea and trial preparation hearing on 18 August 2022, you pleaded not guilty to that charge. In a note for that hearing, your counsel asked whether the prosecution had given consideration to an alternative charge under s.58 of the 1861 Act. Directions were given and the case was listed for trial on 26 April 2023. On 1 February 2023, your counsel formally indicated for the first time that you would plead guilty to the s.58 offence. That plea was then taken on 6 March 2023. In my judgment, you are entitled to 20% credit for your plea. I will, however, round down the sentence in your favour and the appropriate sentence is therefore 28 months' imprisonment.

24.For the offence of administering poison with intent to procure a miscarriage, I sentence you to 28 months' imprisonment. Among the many tragedies in this case is that you did not indicate your guilty plea at the earliest opportunity in the magistrates' court. Had that been done, the sentence of imprisonment that I am now obliged to pass would in law have been capable of being suspended.

25.You will serve up to 14 months, being half of your sentence, in custody. Upon your release, you will serve the remainder of your sentence on licence. You must then keep to the terms of your licence and commit no further offence or you will be liable to be recalled and you may then serve the rest of your sentence in prison.

26.Further, I order that you should pay the appropriate statutory surcharge. You may go down.