

## **Prison and release law**

### **Questions answered by Robert Banks and Jason Elliott**

**Q** I was minding my own business and the screws, wanting to be nosey, burgled my cell. They found a few grams of cannabis. It was my cell mate's. It was between some floorboards so they charged us both with possession. It was under Prison Rule 51(12). I asked for a brief but the Adjudicator has said it is not necessary. My cell mate has been allowed legal representation. How can I appeal? What is the likely sentence?

**A** The ability to be represented by a lawyer at an adjudication is governed by the 'Tarrant Principles'. 'Necessity' is not the test. The Adjudicator must consider: a) the seriousness of the charge, b) the potential penalty, c) whether any points of law are likely to arise, d) the capacity of particular prisoners to present their own case, e) procedural difficulties, f) the need for reasonable speed, and g) the need for fairness. Further details can be found in your library under PSI 47/2011, 2.10. In order to satisfy the need for fairness under the Tarrant Principles, the fact that your cell mate has been allowed legal representation means that you should be as well. This is because it can be argued that Article 6 of the European Convention on Human Rights is engaged, *Ezeh & Connors v UK* ECHR Nos 39665/98 and 40086/98. There is an entitlement to representation when a case is before the Independent Adjudicator because extra days are likely to be awarded. If your decision is clearly contrary to the Tarrant Principles, a judicial review appeal may be possible. Otherwise there is no appeal.

The standard to which the charge against you has to be proved is 'beyond reasonable doubt'. If you are found guilty by the Governor, as opposed to an Adjudicator but believe the adjudication was 'flawed because it was illegal, unfair, or incorrect procedures were followed', PSI 47/2011, 3.2, this should be drawn to the attention of the Governor, who has the ability to set aside the finding or remit the punishment. A more formal review can be obtained by completing a form DIS8 within 6 weeks of the end of the hearing and forwarding it to the Governor for consideration of a review by the Briefing and Casework

Unit. Adjudications conducted by an Independent Adjudicator can be reviewed by the Senior District Judge.

If you are serving a determinate term or extended sentence, punishment can only involve additional days. In those circumstances, the initial hearing will have to be conducted by an Independent Adjudicator. The imposition of extra days has to be proportionate and has to be in accordance with the published local guidelines, which must be available in your prison. To discover what they are, look at the noticeboard on your wing. There will be a list of sentences approved. No more than 42 extra days can be imposed in relation to any offence and the power exists to later remit them in certain circumstances. More information can be obtained from *Inside Information*, a book in your library. Inside Time can also e-mail fact sheets to your library if asked.

**Q** I am a Cat C and I want to be Cat D. The RC1 reviewed my category and refused it because of the length of time that I still have to serve. What can I do about it?

**A** The test for re-categorisation is based on: 'a) the likelihood of escape or absconding, b) the risk of harm to the public in the event of an escape or abscond and c) any control issues that impact on the security and good order of the prison and the safety of those within it'. The details are in PSI 40/2011, 1.1, which should be in the library. There are two important parts of this rule. First, 'Two years is considered to be the maximum time a prisoner should spend in open conditions. However, assessment of a prisoner's individual risks and needs may support earlier categorisation to open conditions,' para 1.1. Second, 'All prisoners must have assigned to them the lowest security category consistent with managing their needs in terms of security and control,' para 3.1.

Applying those principles, whilst the length of time you have to serve is relevant, it should not be decisive. You can appeal by handing in a Form Comp 1. PSI 40/2011, 3.6 says that the appeal should be based on a fresh consideration of the evidence and conducted by a more senior officer. The appeal is a new evaluation and is not about whether the earlier decision was valid.

If your appeal is unsuccessful and you think their approach was wrong, you may wish to consider talking to a solicitor about the prospect of bringing an application for permission to move for judicial review.

**Q** I had a bust-up with my wife and she wanted to help her case about my access to the kids. Suddenly she invented all these allegations and before anything could be checked I was charged with a whole host of matters. As the whole court system is so biased against men I was convicted of some of them. Everyone seemed to assume if an allegation is made by a woman against a man the woman must be telling the truth. The Judge sent me to prison. I am still innocent of the charges. As a result of me saying I was innocent, I am prevented from attending certain courses. However, the courses remain as objectives on my sentence plan. I am kept at standard level on the Incentives and Earned Privileges scheme. The prison says this is because I am not adhering to my sentence plan. So I will serve longer or may stay in prison for ever. What can be done?

**A** Incentives and Earned Privileges ('IEP') are governed by PSI 11/2011. Compliance with sentence planning is considered a legitimate aim of the IEP scheme and this is reflected in national policy. Your prison is obliged to operate a local policy which may differ from national policy in small details. Whilst national policy seeks to encourage prisoners to engage with sentence planning it does not automatically stop those who maintain their innocence from attaining enhanced status. If a prison operates a local policy which automatically prevents those who maintain their innocence from ever attaining enhanced status then that local policy is unlawful, see *R (Shutt & Tetley) v Secretary of State for Justice* 2012 EWHC 851. Of course, that does not mean that you will therefore be entitled to enhanced status under IEP. It merely means that consideration has to be given to the possibility and that a local system which prevents that from happening should be challenged. Whilst we all know the weight which the Prison Service and Parole Board attach to attendance on courses, this should not be the only way in which progress can be demonstrated or release achieved. The Secretary of State has previously claimed to attach weight to what is termed the 'holistic' approach to risk management which involves seven 'gateways', none of

which are dependent on attending courses, *R (Gill) v Secretary of State for Justice* 2010 EWHC 364.

**Q** My gran has died. I am in bits. I asked to go to the funeral and the prison said 'No'. They said that the risk I pose would be too great. What can I do? It would mean so much if my family were all there. I am nearing the end of my sentence so I am no risk.

**A** PSO 6300, 2.7.2 says that temporary release should normally be granted for prisoners to visit close relatives who are terminally ill or to attend funerals of close relatives. Whilst grandparents are not included within the definition of 'close relatives' the guidance also says that 'Governors will want to take account of other close caring relationships that may occur in extended families'. The quickest means of obtaining a fresh decision is likely to be through the Form Comp 1 system.

I am afraid this type of decision is not readily appealable to the courts, because a) the courts avoid interfering in 'executive' decisions of state departments, b) it would be a decision that they would consider the prison was able to take and c) the funeral would have taken place long before the court would have made a decision. I suggest you write your feelings down about your gran and they can be read out. Then everyone will know how you feel. Telling a story about her which is funny or shows her good character makes more of an impact than a list of complements.

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For details about how to have your questions answered see the Banks on Sentence column.