

Robert Banks, a barrister, writes *Banks on Sentence*. It is the second largest selling practitioner's criminal text book and is used by judges for sentencing more than any other. The book is classified by the Ministry of Justice as a core judicial text book. The new edition has just been published and is also available for tablets and computers. The print copy costs £96 on the web and there will be regular updates on www.banksr.com If you have access to a computer, you can follow Robert on [twitter: @BanksonSentence](https://twitter.com/BanksonSentence)

Q I bought a Brocock air pistol and a Brocock air rifle in 2000/2001 for my girlfriend at a gun club quite legally. Last year the police found the guns in my gun safe and charged me with possession of prohibited weapons. I discovered that in 2004, without any publicity, the guns were made illegal. How could I know the law had been changed? The Judge gave me 20 months. I have never committed a crime before. Is it fair? What can I do about it?

A I am afraid lack of knowledge about the law is no defence.

There is always a problem when the law is changed but this change will inevitably cause injustice. I certainly don't think it is fair, but I am afraid that is not the issue. The issue is whether the sentence was manifestly excessive. That issue is bound up with the second unfairness, which is that possession of prohibited weapons carries a minimum 5-year sentence unless there are 'exceptional circumstances'. This is interpreted differently by different judges. From what little I know about your case, your lack of knowledge, the protection of being kept in a gun safe, your good character and the fact that the guns were acquired lawfully could amount to exceptional circumstances. However, I suspect that not all judges would reach that conclusion.

I know very little about the facts of this but on the face of it you were fortunate that the Judge did not give you a 5-year minimum sentence. I doubt the Court of Appeal would consider your sentence manifestly excessive as they have stressed repeatedly that they do not seek to undermine the clear intention of Parliament. I suggest you ask for a written advice on sentence but I would not expect that advice to be favourable.

Q I have a drug problem. I went into a flat which turned out to be unoccupied. It was being renovated. I stole some builders' tools. I know you get more for a dwelling burglary. Is this a dwelling?

A Surprisingly, the word dwelling is not defined and has not been subject to much Court of Appeal assistance. Hotel rooms have been considered dwellings. If the occupants go on holiday the house is still a dwelling, even though it is unoccupied. In *R v Sticklen* 2013 EWCA Crim 615, the defendant was charged with a dwelling burglary of a flat that was being renovated. The prosecution dropped the dwelling averment in the count and the Judge said it was akin to a dwelling burglary and sentenced the defendant outside the guidelines. The Court of Appeal said that was wrong. Whether a property which is being renovated is a dwelling will, I think, depend on how extensive the refurbishment is. Clearly if the work being done is scheduled to take a fortnight, the flat is likely to be a dwelling. If the flat is gutted and the work is due to take six months, it is unlikely to be considered a dwelling.

I suggest you discuss with your advocate making an offer to plead to a non-dwelling burglary and see what happens. You will have to bear in mind the impact the early guilty plea scheme may have on your discount, if your case is put into that scheme.

Q I was sentenced to 4 years for possession of 65 plants. I have been in prison for 8 months. I have kept my nose clean. Four weeks ago I got my D cat. I would like to know about 'exceptional circumstances' for HDC. Will any of this help me to be released early?

A Sadly, the relevance of exceptional circumstances to your case has been overtaken by a change in the law. The HDC provisions of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force on 3 December 2012. This means that prisoners serving terms of 4 years or more are statutorily excluded from HDC. This is dealt with in PSI 43/2012 para 1.2. I am sorry to have to provide you with this bad news.

Q I was given 18 months for an attempted sex offence. My barrister says that I am ineligible for HDC. Is this correct?

A This is correct. If you are subject to the notification requirements imposed by Sexual Offences Act 2003 Part 2 then, as of 3 December 2012, you are excluded from early release under the HDC scheme. This is one of the changes made by Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

Q I was sentenced for arson, reckless as to whether life was endangered, breaches of a non-molestation order and dangerous driving. I represented myself. A flat door was damaged but no-one came to any harm. I was given a lenient 3-year sentence because I had been out of trouble for 20 years. I have no previous for arson. I want to know if I can get a tag. Other prisoners have had different experiences and two probation officers gave different answers. The prison has not approached me about a tag. I have been in prison for 10 months and want to support my family as the children are suffering. I am due to be released in January 2014. Can you give a 100% concrete answer?

A At one time arson was excluded from what became known as the 'presumptive' HDC scheme. The law changed. I can say 100% that there is nothing in the information you have provided me with to suggest that you are statutorily excluded from HDC or presumed unsuitable. If you received separate sentences for the offence, that may be a complicating factor and of course I must stress that I do not know anything about your previous offending. On the information you have given me, you would appear eligible for HDC. I suggest you should find out from the prison what the situation is. You should apply under the FORM COMP scheme if you have not already done so. If the application is unsuccessful you should instruct a solicitor, who can argue your eligibility for HDC on your behalf.

Asking Robert and Jason questions

Please make sure your question concerns sentence, prison law or release (dealt with by Jason Elliott, Dere Street Chambers, Newcastle upon Tyne) and not conviction. It is usually not possible to determine whether a particular defendant has grounds of appeal without seeing all the paperwork. Analysing all the paperwork is not possible. The column is designed for simple questions and answers.

Please start your letter with the question you want answered and send the letter to Inside Time, marked for Robert Banks. Unless you say you don't want your question and answer published, it will be assumed you don't have an objection to publication. No-one will have their identity revealed. Letters which a) are without an address, b) cannot be read, or c) are sent direct, cannot be answered. Letters sent by you to Inside Time are sent on to a solicitor, who forwards them to Robert. If your solicitor wants to see previous questions and answers, they are posted on the website, www.banksr.com.