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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 current edition is also available for tablets and computers. The print copy costs £96 on the web and there are regular updates on www.banksr.com If you have access to a computer, you can follow Robert on [twitter](https://twitter.com/BanksonSentence): [@BanksonSentence](https://twitter.com/BanksonSentence)

Q I was sentenced for cocaine supply. The Judge found the weight to be 3.5 kilos. The purity was 73-80%. The prosecution said it was a Cat 2 case. The Judge said that if it is more than 1 kilo it is Cat 1. My barrister did not challenge this. He had told me it was a Cat 2 case. The Judge placed me at the top end of Cat 1 having a significant role. He started at 11 years and with my plea gave me 9 years 4 months. I think Cat 2 is 1 to 5 kilos. After Court my solicitor saw me and he said I should be in the 6½ to 10-year range. He said my barrister's comments are needed for an appeal. What should I do?

A If your account is right, your barrister seems to go to court for his benefit, not yours.

If the weight of drugs for sentencing is 3.5 kilos it falls between Cat 1 (5 kilos) and Cat 2 (1 kilo). The courts have taken five approaches to this:

- 1 Take the category nearest to the amount. In your case Cat 1.
- 2 As above and then adjust the starting point up or down.
- 3 Take the category below. In your case Cat 2.
- 4 Take a starting point between the two categories. (This is similar to No 2.)
- 5 Look at the ranges for both categories and choose a starting point from those figures. (This is similar to No 2.)

I am unaware of any definitive guidance. However, I would expect the Court of Appeal to adopt No 4 or a variation of it. This is consistent with the accepted approach to role, which is often described in terms such as 'at the top of significant' or 'between leading and significant'. (This is No 5.) It is also consistent with the flexible approach that the Court of Appeal has always stressed should be applied to guidelines.

A similar issue arose with the interpretation of the benefit fraud guidelines, *R v Stone* 2013 EWCA Crim 723. There the defendant misappropriated £21,000 worth of benefit which was just in the £20,000 to £100,000 guideline bracket in the table. His sentence had a starting point for that bracket. The court said the guideline table should be applied proportionately (i.e. not in steps for each bracket but as a sliding scale). Had it not been for the aggravating factors the court would have reduced the sentence.

If the Judge said, "If it is more than 1 kilo it is Cat 1," that would appear wrong. Similarly 11 years seems wrong unless you had significant previous, which you say you didn't. It would not be wrong if the offence was aggravated by a particular factor such as selling to children. The purity would not appear to be an aggravating factor as that is the purity one would expect with 3.5 kilos. That factor is significant only for smaller amounts.

You ask what you should do. On the facts given you should appeal. You should write to your solicitor and say you want to appeal and send him this letter. If he wants me to draft the grounds, I will do so for free.

I, along with thousands of others in the criminal justice system, would like to know the official answer to your question.

Q I was sentenced for a series of rapes and the Judge gave me a 17-year extended sentence (12 years and 5 years' extended licence). I had a previous conviction in a false name and as

the sentence was over 10 years my release will be determined by the Parole Board. I am going to be deported as I was here illegally. As I can't take part in any of the release programmes do I have a ground of appeal over the extended part of the sentence?

A Two years ago a defendant was in a similar position and the Judge didn't give him an IPP sentence and the prosecution appealed the sentence, *Att-Gen's Ref No 9 and 10 of 2011 EWCA Crim 1953*. He was convicted of rapes, 'depravity, and callous exploitation and brutality' against young girls who he had tricked to come to the UK and forced into prostitution. The Court found that most of the preparation for release (progressive release into the community, progressive posting to less secure prisons eventually leading to residence at an open prison, home release and conditions of release) could not be available to foreign nationals awaiting deportation. They decided that these factors were proper matters for the sentencing judge to consider when considering whether IPP was suitable. However, the danger that the defendant in that case presented was such that it would have been wrong not to impose IPP, which they then substituted for his determinate term of 21 years.

The same principles would apply to extended sentences, where for long sentences release can be determined by the Parole Board. The Court of Appeal is always loth to interfere with IPP and extended sentences when the criteria have been found to be satisfied. Although I have not seen your papers, I would be surprised if you had a ground of appeal.

For those facing deportation, PSI 41/2012, 2.3, states: '...it is important that they have a realistic understanding of their position from the outset. A foreign national offender who is likely to be removed from the United Kingdom by the United Kingdom Border Agency should be encouraged to consider actions aimed at preparing for their release in the home country as a consequence of their removal from the UK. They should be made aware of the availability of early removal under the Early Removal Scheme, the availability of assistance under the Facilitated Returns Scheme, and the possibility for transfer to their country of origin to serve their sentence under prisoner transfer arrangements.'

Q I am in for coke supply and have not been able to hide the fact I'm gay. I feel intimidated sometimes and worried most of the time. I would feel safer if I shared with another gay guy. I spoke to a prison officer informally and he said, "HM Prison Service is a not a dating agency for poofs". I read the answer about cell sharing last month and wonder if you can help.

A Homosexual relationships are a reality in prison. The response of HM Prison Service often involves allocating the participants to different accommodation or even different prisons. Those prisoners who are actively engaging in homosexual pursuits whilst in prison should be provided with condoms and lubricant as a means of safeguarding them against blood-borne viruses. The Secretary of State informally settled such a legal action last year once the High Court had granted permission for the prisoner to argue the case, CO/3179/2012.

HM Prison Service is committed to supporting equality and outlawing discrimination. PSI 32/2011, 2.1 says: "NOMS is committed to fairness for all. We treat our staff properly and ensure equality of opportunity. We deliver our services fairly and respond to individual needs. We insist on respectful and decent behaviour from staff, offenders and others with whom we work. We recognise that discrimination, harassment and bullying can nevertheless occur and we take prompt and appropriate action whenever we discover them."

It was inappropriate for the member of staff to give you the answer that he did. PSI 32/2011, 2.1 says: "...all members of staff must work and behave in a way that is consistent with the equality policy statement and our legal responsibilities...to eliminate discrimination and to promote equality and good relations." HM Prison Service wants incidents of discrimination or harassment to be reported.

The Prison Service also owes you a common law duty of care. If your physical safety is being put at risk as a result of your sexuality then it is obliged to consider what should be done in order to safeguard you. The decision is difficult. If you are moved to another prison, it may be worse in some respects than where you are now. Sitting miles away as I do, asking for a

change of cell seems to me to be your best course of action. I suspect you may be surprised how sympathetic the senior staff are to your predicament. If they are not, write to us again and a solicitor's letter might solve your problem.

Asking Robert and Jason questions

Please make sure your question concerns sentence, prison law or release and not conviction. Prison law and release are dealt with by Jason Elliott, PO Box 847, North Shields, NE29 1FJ. Please start your letter with the question you want answered and send the letter to Inside Time, marked for Robert Banks or Jason Elliott. Unless you say you don't want your question and answer published, it will be assumed you don't have an objection to publication. 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.

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 readers to Inside Time are sent on to a solicitor, who forwards them to Robert and Jason. If your solicitor wants to see previous questions and answers, they are posted on the website, www.banksr.com.