

October 2014 copy for November 2014

Robert Banks, a barrister, writes *Banks on Sentence*. It is the second-largest selling criminal practitioner's 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 was published earlier this year. The book is available for tablets and computers and costs £80 + VAT. The print copy costs £102 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: @BanksonSentence](#) and you can receive his weekly sentencing Alerter.

Q I am told we have a right to association. What with Grayling's cuts there are not enough staff to supervise the activities, so we're banged up in the cells. The prison says this is an emergency problem so it's OK. Can our rights be removed like this?

A Jason writes: As ever, rights are never given clearly and rarely without qualifications. Prison Rules 1999 Rule 30 provides for daily time in the open air only 'if the weather permits and subject to the need to maintain good order and discipline'. Obviously, this places a wide discretion in the hands of prison staff. PSI 10/2011 para 1.4 says, 'Prisoners are encouraged to engage with available regimes by meeting their daily needs whilst being kept in safe, humane, decent and secure conditions' and 'Prisoners must be afforded time out of their living accommodation, time in the open air and the opportunity for family contact (through phone calls)' This policy expired on 31 March 2014 and has not been replaced. On the other hand, amongst the privileges envisaged by the new Incentives and Earned Privileges scheme is 'Time out of cell for association', PSI 30/2013 para 9.5. Para 9.17 says, 'The amount of time prisoners are allowed to spend outside their cells to engage in activities (other than work, education, treatment interventions, recovery focused services or religious services), or to associate together, will vary from one establishment to another, depending on the availability of constructive activities and supervisory staff. But, where there is scope to increase the allowance, Entry and Standard level prisoners may earn extra time out of cell in addition to the establishment's basic minimum, and then further time if they are on Enhanced level.'

In *Malcolm v SSJ* 2011 EWCA Civ 1538, the Court of Appeal refused an application by a prisoner who said whilst he was in segregation, he had been provided with less time in the open air than the policy then in force dictated. The appellant argued that his rights under European Convention of Human Rights art 8(1) were violated. That argument was rejected on the facts of the case but the Court accepted "in general terms that enjoyment of exercise in the open air is capable in principle of constituting an interest protected by article 8 and that it may have a particular significance in the context of prison life and all the more so in the context of solitary confinement in a segregation unit."

It follows that a) changes to relevant policy during Grayling's tenure as Secretary of State for Justice have reduced your right to association and fresh air, and b) the Court of Appeal has left the door open to further challenge to this policy, but c) such challenge is hindered by the withdrawal of adequate public funding for such a challenge to go before the Courts. So you can see that where once our rights were being chipped away, they are now being taken away in large chunks.

Q I pleaded guilty to sexual assault because my previous meant I would never receive a fair trial. There was a deal with the Judge where he promised me a sentence of no more than 12 months if I pleaded. He said this in court. The prosecution dropped a breach of a SOPO. The Judge saw my pre-sentence report from 2011 and said he needed a more up-to-date report. Probation said they would do an amendment. Two weeks later, my barrister said the Judge was not happy with the amendment and he said he was going to depart from the indication. The report said, "In another previous assessment, [the offence] appears to have been

premeditated and particularly brutal”. The quote was from a witness. The Judge in that case, in 2011, did not consider I satisfied the ‘dangerousness’ provisions. [These are the provisions that enable an extended sentence to be passed.] The Judge in the current case gave me 10 months extended with a 5-year extended licence. I have now discovered where the damning assessment by the probation officer came from. It was in a probation OASys report following my recall and it related to an offence which was quashed by the Court of Appeal in 1990. It was for violence. The recent report did say an offence was quashed. I think the damning assessment was misleading as it didn’t say which offence on my record it related to or that it was quashed. I do have a conviction for violence for which I received 7 years in 1997. Can I appeal?

A There are a number of issues, so I will divide them up.

Was the sentence lawful? I assume you were sentenced after 2 December 2012. If the 7-year sentence related to Offences Against the Person Act 1861 s 18, you have a Schedule 15B offence on your record. If so, the custodial term of the extended sentence can be less than 4 years so the sentence, if the conditions are met, can be that short.

Should the Judge’s indication have been kept? Criminal Practice Directions 2013 para VII instruct judges that where a defendant might satisfy the ‘dangerousness’ provisions an indication can still be given but the limitation of the indication should be stated clearly. Here, at the time of the indication, no issue about ‘dangerousness’ arose. I take an indication that you will receive not more than 12 months followed by an extended sentence as the indication not being kept. The reason is, first, with an extended sentence you have to serve at least two-thirds of your sentence whereas with a simple 10-month sentence you have to serve only one half. Second, with an extended sentence, during the 5-year extended licence period you are subject to recall if someone does not like where you live, what you say or who you mix with. That is a significant extra term to the sentence. In all the cases except one, the indication which does not refer to a ‘dangerousness’ type sentence has to be kept even if the imposed sentence is not manifestly excessive. I consider that you may have a ground of appeal.

What is the effect of the PSR being misleading? The Court of Appeal in *R v LE* 2014 EWCA Crim 1939 (which was published while I was checking this reply) is helpful. LE was given an extended sentence. The PSR said LE posed a risk to children and vulnerable adults. It was based, at least partially, on the victim’s reports of abuse by the complainant when she was much younger, which was said to be not an issue before the Court. The earlier abuse was not accepted. The report also relied on reports of abuse from former partners of LE which were again denied. The Court of Appeal held that it would not be right to take account of an assessment which was based, in part at least, on such disputed factors that had not been either admitted or been the subject of convictions. The Court ‘put aside’ the pre-appeal report. However, without that material it concluded that the ‘dangerousness’ test was made out.

Reports can refer to acquittals as long as they make it clear that the defendant was acquitted. This was made clear in *R(S) v Leicestershire & Rutland Probation Trust* 2014 EWHC 3154 (Admin), another very recent case. The former defendant had asked for references to acquittals to be removed. The Court did say that if the Parole Board drew an incorrect inference from the acquittals then judicial review proceedings could be pursued at least in theory. The former defendant who had persuaded the probation team to rewrite the report was told he could raise his concerns again.

Do you have an appeal? You appear to have an appeal concerning the indication. You may also have an appeal over whether you satisfy the dangerousness provisions particularly if the key factor was the ‘brutal’ offence which conviction was quashed. The major problem is that you are out of time and have served your custodial term. However, you are still subject to the licence.

I will ask David to write to you.

Asking Robert and Jason questions

All letters should be sent to Inside Time, marked for Robert Banks or Jason Elliott. Letters are then sent by Inside Time to David Wells of Wells Burcombe, who forwards them to Robert and Jason.

Please make sure your question concerns sentence, prison law or release and not conviction. Prison law and release are dealt with by Jason Elliott. Unless you say you don't want your question and answer published in Inside Time, it will be assumed you have no 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 directly to Robert, cannot be answered. If your solicitor wants to see previous questions and answers, they are at www.banksr.com.