

September 2014 copy for October 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 in a cheaply built prison and they have doubled up the cells. To make matters worse, some of the prisoners nearby are always shouting and there is one who is making a protest about his sentence. This noise goes on day and night and I can't sleep properly. We all think our governor is weak, which in some ways is a good thing but it isn't as far as this noise is concerned. I would like to move. Are there any rules about this, as the noise is doing my head in?

A Jason writes: There are some minimum standards that a cell must comply with. These relate to 'size, lighting, heating, ventilation and fittings' adequate for health, Prison Act 1952 s 14(2). Cells need a certificate that they conform to these requirements, Prison Rules 1999/728 Rule 26. There is no specific requirement that deals with noise. The closest to any reference to the impact of noise is contained in PSI 17/2012, C1.5. This says that one of 'the principles underlying the Accommodation Standard' is that 'environmental conditions must be adequate for health'.

Requests to move fall under the rules for allocation. There is no longer any clear national policy on allocation of prisoners to individual prisons. It used to be set out in PSO 0900, which also dealt with categorisation. The newer categorisation policy, PSI 40/2011, is silent on the subject of allocation. This may be because an overcrowded prison system leaves governors with less room for manoeuvre. That said, a lack of available spaces in a lower security prison should not be used to prevent progressive re-categorisation, PSI 40/2011, 3.2, although, in reality, it may mean that a change in security category doesn't even result in moving to a different prison.

I suspect any request to transfer to a different establishment based on the level of noise at your current prison would fail. If your application to move was granted, then all your fellow inmates could also ask to be moved. I suggest you think of another reason why it would be sensible for you to be moved. If you invent factors, that will destroy the application.

Q I got IPP for a stabbing in 2007. I had a section 18 stabbing before and my brief didn't put up much of a fight for me. I got a 4-year term. I was transferred to hospital and I have been in here ever since. The doctors are saying that I suffer from a mental disorder which was not in the reports when I was sentenced. I'm told it's easier to be released from a Hospital Order than IPP. Is that right? Also can I ask to change my IPP for a Hospital Order? I talked to a solicitor and he seemed completely out of his depth. Can you help?

A It is possible, even after a long delay, to substitute a Hospital Order for IPP. As you would expect, there are a number of obstacles to overcome. It is not something that you would be able to do on your own as the application is complicated. First you need a solicitor and so I will ask David Wells to write to you. The solicitor would need to collect two up-to-date reports from senior psychiatrists, who have to show two important matters. They must show a) that the original reports were wrong and b) that in 2007 you were suffering from a 'mental disorder which made it appropriate for you to be detained in hospital'. The test is whether the IPP with the new evidence was wrong in principle. Normally the Court of Appeal considers the factors which were before the sentencing Judge. With those new reports you would have

to ask the Court of Appeal for permission to appeal and to use the new medical reports. This is because you need to ask permission to rely on fresh evidence and for a Hospital Order, the Court may require the evidence from a doctor or doctors to be given from the witness box. Your advocate would also have to ask for permission to appeal out of time. Normally, the greater the delay after sentence, the more difficult it is to appeal. The best way to overcome this obstacle is to have clear merit on your side. If not, then your appeal is likely to be refused. Even if you get this far, your advocate would need to persuade the Court to intervene. The Court of Appeal routinely supports the status quo. They also like supporting the trial Judge. It is not enough to show that a Hospital Order makes sense. The fact that you are now in hospital is not a key factor. It is necessary to show that a Hospital Order is the sensible or appropriate order. The Court of Appeal would, if IPP had been considered suitable, impose a Restriction Order, which makes the test for release more stringent. A key factor is often what would be the effect on your treatment and your mental health if the hospital no longer thought you required hospital care and you were returned to prison. If it is clear that a removal would be detrimental to your health, then that is helpful. A recent example of a Hospital Order being substituted for an IPP sentence (which was imposed in 2006) was *R v Colborne* 2014 EWCA Crim 286, which was heard at the beginning of this year.

You ask about the differences in release. The test for the removal of the Restriction Order is that the Secretary of State considers it is no longer required for the protection of the public from serious harm. The test for release from a sentence of IPP is that 'the prisoner's confinement is no longer necessary for the protection of the public'. This is known as the 'life and limb test'. On the face of it there doesn't seem much difference. The difference is in the procedure. IPP prisoners are beset with a lack of courses, delays for a hearing, inadequate reports and a bias against release. Clearly hospital consultants don't want to take risks with discharging patients because the mistake would invariably receive damaging publicity in papers like the Daily Mail. However, the decision is a clinical one. I understand the general view is that it is a fairer procedure with a Hospital Order. As the procedure for release from IPP is grossly unfair that may not be much of a comfort. For you there is a clear reason why a Hospital Order might be preferable. With your IPP you need two release decisions. First you need release from hospital and then you need release from prison.

I wish you luck and I hope you do not suffer the discrimination mental patients frequently receive from a community that neither understands the issues nor wants to understand the issues.

Q In 2011 I was sentenced to 4½ years for conspiracy to rob after going guilty. Nine months later I was released and was arrested for two robberies and a theft. I again went guilty and received 5, 5 and 2 years all concurrent. I did them for my baby. I now really regret doing it and wonder if I can rely on the baby which has just been born as a change of circumstances to get a shorter sentence. This wasn't mentioned at the sentencing hearing. My co-defendants got a year off in 2011 so I'd like that too.

A If you ask round your prison you will find achieving a reduced sentence at the Court of Appeal is difficult. The reason is as follows. The Judge determines the sentence on the material before him or her. For offences of robbery he or she considers the 2006 sentencing guideline. The rules are intended to ensure that the sentences passed are consistent with each other. In fact the structure of the guidelines is so poor the intention is frequently not realised. The Court of Appeal will only intervene with a sentence if it considers the sentence is manifestly excessive or wrong in principle. You provide few details of the latest offence so I am unable to say whether it is manifestly excessive or not. I note you don't suggest it is. It is unhelpful that you have committed a similar offence before and your latest offences were committed when on licence. There have been occasions when someone has had their sentence reduced because they have turned their life around. That doesn't apply to you as you were not turning your life round. The court is likely to have considered that you were returning to your old ways. I regret to say that a new baby could be seen as an aggravating factor as you were

committing crimes risking imprisonment while your partner would clearly need your help. In reality, now that the sentence has been imposed the fact of your change in outlook and the recent birth will not grant you a ground of appeal when none existed before. I am sorry I can't be more help.

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 (PO Box 847, North Shields, NE29 1FJ). 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 direct to Robert, cannot be answered. If your solicitor wants to see previous questions and answers, they are at www.banksr.com.