

April 2015 copy for May 2015

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 2015 edition of the book and app was published on 28 April 2015. The app is for Apple iPads and Windows 8 devices and costs £106 (incl. VAT). Updates will appear in the relevant paragraph. The print copy costs £106 and there will be regular updates on www.banksr.com. There is also a discount available when the print copy and app are purchased together. If you have access to a computer, you can follow Robert on [twitter](#): [@BanksonSentence](https://twitter.com/BanksonSentence) and you can receive his weekly sentencing Alert.

Q I come from Romania and I am finding life here difficult. I am in custody because they say I won't turn up. They also say I am in a team of pickpockets who operate on the Underground. I am aged 17 and they say I am lying as I look much older. I don't have a passport as it was lost. They say it has been deliberately destroyed and they think I may be from Albania. My solicitor is not sure where we go on the age dispute. Can you help?

A I will try. Clearly the issue is important as it will determine where you will be tried. Disputes of this nature are resolved by applying Children and Young Persons Act 1933 s 99(1) and Powers of Criminal Courts (Sentencing) Act 2000 s 164(1). The court is required to make an inquiry and may take evidence to determine the issue. You might think you ask a doctor but the doctor is often in no better position than a member of the public to judge someone's age. This is because people mature at different rates and any doctor's estimate would normally be only an estimate with a margin of error. The Royal College of Paediatrics and Child Health has said in a report that 'age determination is very difficult and no single approach could be relied on'.

To determine the issue the court must apply the *Merton* guidelines, which are from an immigration case, *R(B) v London Borough of Merton* 2003 EWHC 1689 (Admin), where it was again important to determine the age of an immigrant. The court is required to elicit the general background and the defendant's activities in the previous few years. In your case, officials in Romania or at their embassy would be contacted. That might solve the issue quickly. The police may indeed have already done this, and that may be why they say you don't come from Romania. If you are not listed in their records, I would expect the court would want a report made about you and it would be expected that you would be asked questions to test your credibility. Physical appearance could be used but only to a limited extent. In the end it comes down to an evaluation of all the material.

Once the court has made its determination, the defendant is deemed to be of that age even if it turns out to be wrong, unless the determination was not performed properly. This is provided by Criminal Justice Act 1982 s 1(6).

Q I was playing for my local town's football team and we often have trouble when we play [another town's club]. I was having trouble with a particular player from the other side who was marking me some of the time. Our side had little luck and the ref made some dodgy decisions. Tensions were rising. Suddenly this player and I were close and he said, "No results in the net and no results between the legs". I got angrier and angrier. We had played well but we lost. After the game, I saw him outside the changing rooms and I couldn't stand it any more. He was grinning at me, so I clocked him one. He fell over and hit his head on a brick edge to some steps. I just wanted to wipe the smug grin off his face. Unfortunately, he cracked his skull and there was bleeding in the brain and at the moment he can't walk. I didn't want that to happen. I went no comment in my interview. I'm charged with section 20. I breached my bail by going abroad to a football match and I am now in custody. I pleaded early and the court made a fuss of a previous football ABH and started at 3 years and gave me 2 years. My solicitor says there is no appeal, but it was only a smack. It was just bad luck he was badly hurt.

A Your sentence is determined by the *Assault Guideline 2011*. The key parts are:

Category 1	Greater harm (serious injury must normally be present) and higher culpability
Category 2	Greater harm (serious injury must normally be present) and lower culpability or lesser harm and higher culpability
Category 3	Lesser harm and lower culpability

page 8 The court should determine the offender's culpability and the harm caused, or intended, by reference **only** to the factors identified in the table below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category.

Factors indicating greater harm	Factors indicating higher culpability
Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present) Victim is particularly vulnerable because of personal circumstances Sustained or repeated assault on the same victim Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present) Victim is particularly vulnerable because of personal circumstances Sustained or repeated assault on the same victim	Statutory aggravating factors: Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) Offence motivated by, or demonstrating, hostility to the victim based on the victim's disability (or presumed disability)
	Other aggravating factors: A significant degree of premeditation Use of weapon or weapon equivalent (for example, shod foot, head-butting, use of acid, use of animal)
Factors indicating lesser harm Injury which is less serious in the context of the offence	Intention to commit more serious harm than actually resulted from the offence Deliberately causes more harm than is necessary for commission of offence Deliberate targeting of vulnerable victim
Factors indicating lower culpability Subordinate role in group or gang A greater degree of provocation than normally expected Lack of premeditation Mental disorder or learning disability, where linked to commission of the offence Excessive self-defence	Leading role in group or gang Offender motivated by, or demonstrating, hostility based on the victim's age, sex, gender identity (or presumed gender identity)

STEP TWO Starting point and category range

page 8 Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The table is applicable to all offenders.

Offence category	Starting point (applicable to all offenders)	Category range (applicable to all offenders)
Category 1	3 years' custody	2 years 6 months' to 4 years' custody
Category 2	1 year 6 months' custody	1 to 3 years' custody

Category 3	High-level community order	Low-level community order to 51 weeks' custody
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You have a number of factors against you. Obviously the serious injury is to be taken into account. You may not have wanted the injury to happen but you caused the serious injury. The blow was after the incident and appears to have been a punishment rather than a blow in the heat of the moment. The previous ABH means the incident can't be passed off as 'out of character'. That and the breach of bail prevent you from presenting yourself as an otherwise law-abiding person.

Looking at the guideline the judge must have found 'greater harm and lower culpability' when determining the category. This would make your offence Category 2. Category 2 requires 'serious injury'. Clearly there would be uplift because of the very serious injury and the factors above. One very crucial piece of information I don't have is the force of the blow. If it was a tap (which I doubt), meaning your opponent was unlikely to have fallen over, then that would be a significant factor. If it was a full-force blow then that would also be significant. The judge has imposed a sentence before the plea discount at the top of the category range. It would seem he was entitled to do so.

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. Robert and Jason cannot in their answers in effect do the work that should be done by solicitors and barristers who have the relevant case papers.

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.