COURT OF APPEAL
CRIMINAL DIVISION

A Review of the Year in the Court of Appeal (Criminal Division)

2020 – 2021

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Strand
London
WC2A 2LL

www.judiciary.uk

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Introduction – The Vice President of the Court of Appeal (Criminal Division)

The really interesting and the undoubtedly key area of exploration over the next year will be the extent to which our response to COVID – which, I hazard the suggestion, was essentially a success – will have a long-term influence on our working practices. CVP provided an invaluable lifeline for the work of the CACD (for all its occasional imperfections) and at a time when the Crown Court is under very considerable pressure, we may need – for the foreseeable future – to continue to be sensitive and realistic in permitting advocates to appear remotely. The drawbacks, it goes without saying, are principally that CVP is not always reliable and it is more difficult to have a "discussion" during remote submissions as opposed to when the judges and the advocates are together in the courtroom. Therefore, whilst the shape of things to come gradually emerge, we will continue to accommodate (to the extent possible) requests to address the Court in this way. Counsel and solicitors will, as at present, ask the list office to be permitted to join the hearing via CVP, if that is their preference. The request will usually be granted administratively unless it is a significant, lengthy or complicated case, when the application will be referred to the presiding Lord or Lady Justice. However, any application to appear via CVP in an Attorney General's Reference will be put before the presiding LJ (this applying to counsel for both sides) as a matter of course. If the judges, having read the papers, consider that the case, in the interests of justice, requires the advocates to be in court, arrangements will be made for this to happen. In due course the Lord Chief Justice may publish overarching guidelines which will cover the CACD, along with the Crown and Magistrates' Courts.

I wish to pay tribute to the judiciary, the CACD Office (including the court clerks and ushers), the advocates, the solicitors sitting behind the advocates, the prison staff, the stenographers and the probation service for their tremendous assistance over the last 12 months, enabling the Court to emerge out of a difficult time unscathed. It was only because of the considerable forbearance, the largely unacknowledged labours and the good humour of all involved that we managed to achieve an impressive standard of efficiency in dealing with appeals and applications. It has been heartening to witness the wholehearted willingness to assist that characterised the response of "one and all". Uncertain times lie ahead, with areas of Europe returning to lockdown as I write this introduction, but I am confident that with the kind of support we have received to date, the Court will be able to surmount a winter return of COVID, should that regrettable eventuality occur.

The introduction from the Vice President this year, therefore, is a strong message of thanks, both retrospective and in anticipation of possible difficult days ahead, for a truly impressive collaborative effort.

Lord Justice Fulford
Vice-President of the Court of Appeal (Criminal Division)

Overview of the Year – Master Beldam, Registrar of Criminal Appeals

When looking back at the legal year 2020-2021, I am impressed at the innovative ways in which the CACD adapted to the new ways of working necessitated by the various constraints imposed due to the pandemic. As I noted in my foreword last year, the implementation of plans for digital reform in the CACD was kick-started by the pandemic. The articles and cases of note in this Review are testament to the adaptability, dedication and capacity for hard work demonstrated by the judges who sit in CACD and all the support staff. It is due to their commitment that alternative ways of working, which two years ago seemed merely aspirational, have now become the norm.

Whilst electronic working was essential to enable the CACD to continue functioning during various lockdowns, the CACD has fully adopted the use of electronic bundles, to the benefit of both the CACD and advocates. In April this year, amendments to the Criminal Procedure Rules came into force, reflecting the use of the Digital Case System to enable the CACD to provide digital bundles to the judiciary. It is now a requirement for the parties to an appeal to include electronic links with their appeal notice or respondent's notice and provide authorities in a single pdf bundle. It is appropriate here to mention that, later this year, we will say goodbye to Chris Williams, one of the Criminal Appeal Office Senior Legal Managers whose skills in all things digital greatly assisted numerous judges in getting to grips with new processes. We congratulate him on his well-deserved appointment as a District Judge (Magistrates' Court) and wish him well in his new role.

The trend in reduced receipts continued last year, but in relation to applications for leave to appeal conviction the resumption of jury trials in the Crown Court has led to a return to almost pre-pandemic levels. Notwithstanding this increase, staff in the Criminal Appeal Office were able to reduce the inevitable backlog that had arisen as a result of the pandemic and during the year were able to resume business as normal. Thus we were in a good position to prepare for the coming into force of the Sentencing Act 2020 and make sure the Court was properly advised about its application where relevant.

Not long after the end of the third lockdown, the CACD dealt with the largest number of conjoined appeals ever listed together. The high profile miscarriage of justice resulting from the wrongful prosecution by the Post Office of numerous sub-postmasters is covered in detail in an article later in this Review. The number of appellants in this first tranche of cases meant that a multi-disciplinary team was set up in the CAO to manage these cases in addition to their other work. Their work, in combination with that of the CCRC, meant that these appeals could be listed together and many convictions finally quashed. Further cases are being managed by the CAO team, who have built up a considerable expertise in dealing with these cases. I was particularly proud that their hard work and dedication was acknowledged when the team was awarded the Permanent Secretary Team Award for an outstanding contribution to the Ministry of Justice, for May 2021.

The end of lockdown also meant that CACD was able to resume its regular sittings in Wales in Trinity Term and legal history was made in Swansea in July 2021 with the first all-female Court of Appeal to sit in Wales. Lady Justice Nicola Davies sat with Mrs Justice Jefford and Mrs Justice Steyn and was quoted as saying that she hoped the first all-female Court of Appeal in Wales would inspire more girls and young women in the country to consider a career in the law, a sentiment I echo.

As anticipated, we are all having to learn to live with Covid-19, albeit with lesser restrictions, and the adoption of hybrid working for support staff and continued flexibility in use of CVP for hearings when appropriate will ensure that the CACD operates as efficiently as possible. I reiterate my thanks to the judiciary and CAO staff for all their support and their willingness to go the extra mile in the interests of justice whatever the challenges faced.

Alix Beldam
Registrar of Criminal Appeals

A Year of Resilience and Progress in the CACD

2021 is unlikely to be remembered too fondly by many people. After a Christmas characterised by separation and restrictions, January saw England and Wales enter into their third lockdown. However, it was also a year of innovation, success and the refinement of the tools created in 2020 to minimise the impact of the pandemic on the delivery of justice.

It is important to recognise the successes of the year. As the Lord Chief Justice noted when he gave evidence to Parliament's Constitution Committee in May 2021, in both the Magistrates' Courts and Crown Court, "volumes of work being disposed of are back to pre-COVID levels. Outstanding caseloads are gently falling". This is a remarkable achievement and due to the hard work and perseverance of all those who work in criminal justice.

Furthermore, the Criminal Appeal Office has been focused on ensuring access to justice in these difficult times. In 2020, it worked closely with the Criminal Case Review Commission and the Criminal Procedure Rules Committee to develop an Easy Read Form NG. The Form was intended to make it easier for people to lodge their applications to appeal, even when unrepresented. By the start of the year, the forms had already led to an increase in applications lodged by litigants in person. Over 2021, the Criminal Appeal Office worked hard to review the forms and identify areas of further development. Amendments have already been introduced, such as a section addressing waiver of legal privilege. This new section will ensure that applicants understand the process and can provide all of the information necessary to progress their cases effectively.

Moreover, the Criminal Appeal Office published the "blue guide" to commencing proceedings online. This is an essential resource for judges and lawyers and contains the relevant legislation, Criminal Procedure Rules and Practice Directions, along with an easy to read narrative. Publishing it online and for free will ensure that professional court users have all the material they need to conduct an appeal, especially in difficult circumstances in which accessing hard copies is especially challenging.

Perhaps the most striking success of 2021 is the level of resilience and flexibility demonstrated by all those involved in the criminal justice system. The legal landscape has been constantly changing and court users have responded quickly and effectively to these changes. For example, various new tools have been introduced to reduce the impact of the pandemic on the delivery of justice, and court users have embraced them, even when the guidance on their use has changed. For example, in 2020, the Criminal Appeal Office brought forward the introduction of digital bundles. In 2021, the Criminal Procedure Rules were amended to require court users to use them and lawyers were quick to (re)learn technical skills and embrace the advantages they offered.

A similar level of flexibility has been seen with the use of Cloud Video Platforms ("CVP"). Whilst it offers a plethora of benefits, we all understand that it is not a panacea, and court users have appreciated the importance of adjusting the use of this tool to reflect the

circumstances. In January 2021, during the third national lockdown, the Lord Chief Justice made the use of CVP the default in all jurisdictions, recognising that no participant in legal proceedings should be required by a judge or magistrate to attend court during lockdown unless it is necessary in the interests of justice. However, as circumstances changed, so too did the guidance. In March 2021, the Lord Chief Justice recognised that as the vaccine rollout continued and restrictions were eased, it was becoming possible and desirable to increase in-person attendance where it was safe and in the interests of justice to do so. Again, court users embraced the change in guidance and recognised the importance of balancing the benefits of CVP against the need for justice to be done and seen to be done.

It is clear that COVID is likely to be an issue in 2022, but it is equally clear that the CACD is prepared to face the challenge and respond robustly.

The Post Office "Horizon" Appeals – R v Hamilton & Ors [2021] EWCA Crim 577

There was a palpable sense of emotion in Court 4 at the Royal Courts of Justice on 23 April 2021, as Lord Justice Holroyde, (sitting with Picken and Farby JJ) read out the names of 39 sub postmasters and postmistresses (SPMs) whose convictions had been quashed by the Court as unsafe.

The background to these appeals has been well documented in the National Press. Between 2003 and 2013, Post Office Limited (POL) prosecuted a large number of its SPMs for offences of dishonesty after apparent shortfalls in cash or stock in the branches for which they were responsible were identified by Horizon, POL's electronic accounting system, which, it maintained, was wholly reliable.

The foundations for the appeals were findings of fact made by Mr Justice Fraser in 2019 in judgments within High Court proceedings brought by claimants representing hundreds of SPMs. These included findings that Horizon was "not remotely robust", that there was a material risk that apparent branch shortfalls had been caused by bugs, errors and defects in Horizon and that POL had failed to disclose the true and accurate position regarding the reliability of Horizon to the SPMs.

The 39 cases were referred to the Court by the Criminal Cases Review Commission under section 9 of the Criminal Appeal Act 1995. The Commission's Statements of Reasons formed the basis of the grounds of the appeals. Its work was commended by the Court, which agreed with the Commission's assessment that *"exceptional circumstances"* within the meaning of section 13(2) of the Criminal Appeal Act 1995 had justified references being made, even though there had been no prior appellate proceedings.

The Respondent conceded that POL had failed in its legal duties to investigate and to disclose problems with Horizon during the investigation and prosecutions of the appellants. In consequence, the appellants' trials had been unfair and an abuse of the Court's process and the convictions were unsafe. Guilty pleas entered in the absence of disclosure, which would have enabled the appellants to challenge the reliability of Horizon, were not a bar to successful appeals.

The Court exercised its discretion to hear submissions on a second ground of appeal which was resisted by the Respondent in all but four appeals: that in light of Fraser J's findings and material subsequently disclosed by POL, (including a 2013 Advice from counsel instructed by POL, which called into question expert evidence as to the reliability of Horizon,) the failures in investigation and disclosure were so egregious as to make the prosecutions an affront to the conscience of the public and the Court. The Court agreed that in these 39 cases, it had been.

At para 132 of its judgment, it described the devastating impact of the prosecutions and convictions upon the lives of the appellants; all of whom were of previous good character

and three of whom had sadly died. Furthermore POL's serious failures had *"directly implicat(ed) the courts"*. Had disclosure taken place, as it should have, *"no judge would have been placed in the unhappy position of learning – as some Judges …will do – that they unwittingly sentenced a person who had been prevented by the prosecutor from having a fair trial"*.

The cases were referred to the Court by the Commission in June 2020. Following a number of preliminary hearings, the appeals were heard over four days in March 2021. There were significant challenges for staff of the Criminal Appeal Office in proactively managing an unprecedented number of related cases, particularly in the context of the logistical difficulties arising from the Covid-19 Pandemic. Detailed planning was required to achieve safe social distancing at the hearings, including setting up and testing the largest ever number of CVP links the Court has been called upon to provide, so as to enable access to the hearing for appellants and their families, Press and interested persons who were unable to be present in the courtroom or overflow court. The timely and efficient management of these appeals to conclusion during the Pandemic is a testament to the commitment of the Registrar's administrative and legal staff and of the legal representatives for the appellants and respondent who worked with them in furtherance of the overriding objective.

Victims of Trafficking in the CACD

Since its inception in 2009, the number of referrals to the Single Competent Authority ('SCA') have been increasing year on year. In 2015, Parliament brought into force the Modern Slavery Act 2015. As a result of the increased understanding and awareness of this area, the number of applications received by the CACD involving alleged victims of trafficking or modern slavery ('VOT') has also increased. This year, the Full Court has handed down three particularly important judgments for VOTs.

R v BTT [2021] EWCA Crim 4 (Flaux LJ, Cheema-Grubb J and Murray J)

BTT had been convicted in 2016 of production of Class B drugs. It was an unusual case because the applicant had been convicted after trial and given evidence in his own defence, but did not give evidence consistent with trafficking and did not rely on the s45 Modern Slavery Act 2015 ('MSA') defence.

In the course of subsequent immigration proceedings, he gave a different account and was referred to the SCA to assess whether he was a VOT. The SCA provided a Conclusive Grounds decision, stating that it was likely he had been trafficked into the UK but had not been the victim of forced criminality. Further to this decision and as a result of an asylum appeal, the Upper Tribunal found that the applicant was a VOT, both coming into and within the UK. BTT relied on both of these decisions as fresh evidence (along with other expert evidence) to support his application for leave to appeal conviction, arguing that he was a VOT and would have had a defence under s45 MSA.

The Court dismissed the application and held that only in the most exceptional cases would it countenance an appeal based on an account that was different from that put forward at trial. Whilst such examples will necessarily be fact specific, the Court will not allow an application unless the account put forward was credible and demonstrated a defence that would quite probably have succeeded. One aspect of whether the new account is credible is whether there is a cogent and convincing explanation for the change in account. In this case, the account bore "some resemblance" to the account provided to the jury. However, it did not demonstrate any element of compulsion sufficient to satisfy the evidential burden under s45. Moreover, the applicant accepted that he could have walked away, and this was fatal to the defence having any prospect of success. The Court further held that it was not assisted by the decision of the Upper Tribunal, which was dependent upon witness statements untested by cross-examination and which put forward an account which could not stand with the applicant's account. Likewise, the expert evidence could not lend credibility to the applicant's account.

R v CS [2021] EWCA Crim 134 (Thirlwall LJ, Holgate J and Johnson J)

These otherwise unrelated cases were heard together because they raised the novel issue of whether the statutory defence under s45 was available in respect of alleged criminality committed before that section came into force. The applicants submitted that (1) a defendant in criminal proceedings should be entitled to rely on any statutory defence in

force at the time that their criminal liability was being determined, subject to any express or implied statutory restriction on the availability of the defence, (2) there was nothing in the 2015 Act to limit the application of s45, and (3) if Parliament had intended to prevent a defendant from relying on the defence, it could and would have said so.

Having considered the presumption against retrospectivity (*Wainwright v Home Office* [2002] QB 1334 *per* Lord Woolf CJ at [27]), the Court concluded that the applicants' arguments, whilst internally valid, ignored the presumption against retrospectivity. There was no evidence to suggest that Parliament intended to give section 45 retrospective effect and rejected their primary ground of appeal.

R v Brecani [2021] EWCA Crim 731 (LCJ, VPCACD and Jeremy Baker J)

In May, the Court delivered the judgment in the third, and perhaps most significant, case of the year in this area. The case involved a young man (aged 17 on conviction) who was convicted of conspiracy to supply Class A drugs. He relied on the s45 defence at trial, but the Judge ruled that the positive Conclusive Grounds decision from the SCA was not admissible, nor was the evidence of a human trafficking expert. The applicant applied for leave to appeal his conviction on the basis that the Judge had been wrong to exclude these two pieces of evidence to support his assertion that he was a VOT.

The Court considered the status of a Conclusive Grounds decision and specifically, whether such a decision could be classed as expert evidence under Crim PR 19. Disagreeing with a recent decision in the Administrative Court, the Court found that the Judge had been right to rule the decision inadmissible at trial. Case workers assigned to the Competent Authority were junior civil servants performing an administrative function. Whilst their decisions may be disclosed in criminal proceedings, there was no suggestion that they might be called to give evidence or that they were acting as experts. They were not experts in human trafficking or modern slavery and for that reason, could not give opinion evidence at trial on whether a person was trafficked. With regard to expert evidence generally, the Court held that there may be circumstances in which a truly qualified expert might be able to give evidence, particularly to provide "context of a cultural nature".

The commentary on the decision in *Brecani* has been substantial. In an effort to provide further guidance to practitioners and the lower Courts in this complicated area of law, the VPCACD will hear three further conjoined applications before the end of the year… that judgment will, however, have to await next year's review.

Justice for the Shrewsbury 24 – R v Warren and ors [2021] EWCA Crim 413 (Fulford LJ VP, Baker J and Goose J)

On 4 February 2021, the Court of Appeal quashed the convictions of 14 men whose cases had been referred for consideration by the Criminal Cases Review Commission. The defendants were collectively known as "The Shrewsbury 24" and included in their number the actor known as Ricky Tomlinson.

The background to the convictions was a trade dispute between an alliance of the principal building workers' unions and the National Federation of Building Trades Employers between June and September 1972. The dispute itself centred on minimum wage, the system of casual cash-paid daily labour that lacked any accompanying employment rights and concerns over the lack of adequate safety procedures within the industry generally. The Industrial Relations Act 1971 had received Royal Assent the previous year. The charges arose from alleged unrest on 6 September 1972, when a group of secondary pickets travelled in six coaches to visit five sites in Shrewsbury and three in Telford. No arrests were made on the day but following apparent communications between the employers' organisation and the police, 24 men were arrested and charged. The prosecution relied upon witnesses who were present. In general the appellants did not deny that there was some unrest at the site but they did deny their own involvement or the extent of the unrest and their involvement.

There were two central points argued at appeal. The first was that the appellants had obtained a note from a pre-trial conference which took place between Lead Counsel for the prosecution, Maurice Drake QC, and officers from West Mercia police. The note recorded that *"not all original hand written statements were still in existence, some having been destroyed after a fresh statement had been obtained. In most cases the first statement was taken before photographs were available for witnesses and before the Officers taking the statements knew what we were trying to prove"*. On analysis it was clear that in several cases, the amendments significantly changed the witness's account. The new statements did not indicate that they were replacement documents. The obvious risk was that the substitute statements would have had a different emphasis once the police knew what the Crown were seeking to prove. This was not revealed to the accused or the Judge. Indeed, the prosecution represented that they had provided not only the statements obliged but that they had gone further to provide others when there had been no obligation to do so in light of the then law and practice. In times where there was no CCTV footage or mobile telephone evidence, and in a case dependent on witness statements, it was argued that it was vital for the defence to be able to explore differences in the eyewitness accounts.

The second ground concerned a broadcast that went out on the same day that the prosecution closed its case in the first trial. A programme entitled *"Red under the Bed"* was broadcast, which included reference to violent picketing and intimidation and a discussion

of the risk of communism taking over the labour movement. It was argued that the broadcast was highly prejudicial.

The Court quashed the convictions. By present standards, what occurred was unfair to the extent that the verdicts were unsafe. The Court reiterated the usual approach to loss of evidence as summarised in *R v PR* [2019] EWCA Crim 1225. If the destruction of the handwritten statements had been revealed to the appellants, the issue could have been comprehensively investigated with the witnesses when they gave evidence, and the Judge could have given the appropriate directions. Instead there was an unknown number of first written accounts destroyed in a case in which the allegations essentially turned on the accuracy and credibility of witnesses.

The Court was not persuaded that the TV programme alone would render the conviction unsafe. There would have been a postponement of the broadcast in similar circumstances today and the jury direction would have been more robust. However, at the time the jury would have been aware of the political climate and would not have been prejudiced.

The Court noted that this case provided the clearest example as to why injustice might result when a routine date is set for the deletion and destruction of papers. There was no way of predicting whether something may later emerge that casts material doubt over the result of the case. Given that most material is now presented in a digital format, the Court suggested that there should be consideration as to whether the present regime for retaining and deleting digital files was appropriate.

The Freshwater Five – R v Beere and Payne [2021] EWCA Crim 432 (Flaux CHC, Baker J and Calver J)

This was a much anticipated appeal that had been the subject of myriad new articles, books and podcasts. The applicants had been convicted with 3 others of conspiracy to import 250 kilograms of cocaine (worth £53 million) into the UK. The case garnered much press interest and they were labelled the "Freshwater 5". The cocaine was allegedly transported from Brazil by a commercial container ship, the MSC Oriane, which had been under observation by the UK Border Agency. It was the prosecution case that the cocaine was jettisoned from MSC Oriane and collected by the applicants, who were the crew of a fishing boat, the Galwad-Y-Mor.

At trial the prosecution produced expert evidence regarding the routes of the vessels and the opportunity for the larger vessel to cross the path of the smaller to make the exchange. The evidence of the possibility of collection at sea by the Galwad came from a master mariner and marine consultant. His evidence was that the Galwad had positioned itself ahead of the Oriane, allowed it to pass, then proceeded to the vicinity of the wake, where the Galward performed a very slow-speed manoeuvre (which they said was the cooperage). None of the defendants disputed the expert mariner's evidence at trial. Beere claimed that he was not on board and Payne claimed to have been asleep. Another co-accused, Green, was at the helm and did not dispute proximity to the Oriane. His evidence was that he had performed a manoeuvre to get out of the path of a larger vessel. Only Green called expert evidence and his witness gave evidence that it may not have been feasible for the Galwad to have retrieved the drugs.

The Appeal centred upon the argument that fresh evidence had become available that undermined the central assertion that the smaller vessel had been close to the larger and that it had been possible for the cooperage to take place. Undisclosed data from the RADAR system of the observation vessel suggested that the Galwad never crossed behind the Oriane. There was also other data that had not been disclosed that suggested another small, high speed vessel had been in the vicinity.

Over a 3 day period, the Court heard evidence from five experts in order to determine whether to receive any additional evidence. The Court concluded that looking back at all the evidence available at trial as well as the evidence now available, whilst the evidence was circumstantial, there had been a "compelling prosecution case of conspiracy to import cocaine". The Grounds of Appeal did not begin individually or collectively to cast doubt on the safety of these applicants' convictions and they were refused, as were the applications for an extension of time and to adduce fresh evidence.

Diversity on the Bench

This year, Helena Normanton, the first woman to practise as a barrister in English courts, was honoured with a blue plaque at her former London home. Whilst it is important to celebrate this trailblazing lawyer, diversity and fair representation remains a critical issue within the legal system. When giving evidence to the Parliament's Constitution Committee, the Lord Chief Justice recognised that *"the progress made in diversity has been slower than any of us would have liked"*.

In November 2020, the Judicial Diversity and Inclusion Strategy was published, which set an overarching aim to increase the personal and professional diversity of the judiciary at all levels in five years by increasing the number of well qualified applicants for judicial appointment from diverse backgrounds and by supporting their inclusion, retention and progress in the judiciary. In July 2021, the Judicial Diversity Forum published its 2021 report, which showed a rise in the proportion of women in the judiciary and highlighted areas that still required focus, such as increasing the proportion of black individuals on the bench. It is the goal of this strategy to address these concerns quickly and effectively.

One of the most important ways of fostering judicial diversity is to encourage people from every walk of life to consider the profession. Despite the pandemic, there has been a concerted effort to reach out and encourage interest. In July 2021, the Lord Chief Justice visited Devon, where he spoke to students at Stoke Damerel Community College in Plymouth. He was accompanied by local Judges, District Judge Penny Taylor and Tribunal Judge Julie O'Hara, and spoke of the importance of the rule of law and gave guidance on legal careers to year 10 and 11 students. He also heard a Criminal Appeal in Exeter, which was the second time that the Court of Appeal had sat there since 2013.

Moreover, the Lord Chief Justice appointed Lady Justice Nicola Davies to oversee the work of the Court of Appeal in Wales, and in August 2021, history was made after three female Judges, Lady Justice Davies, Mrs Justice Jefford and Mrs Justice Steyn, sat as part of the Court of Appeal in Wales. This was the first time the CACD sat in Wales comprising all women. All three Judges have links to Wales, with Lady Justice Nicola Davies a former Presider of the Wales Circuit, Mrs Justice Jefford a current Presiding Judge of the Wales Circuit and Mrs Justice Steyn acting as the Administrative Court Liaison Judge for Wales. Lady Justice Nicola Davies said she was honoured to sit as part of the first all-female constitution of the Court of Appeal in Wales. She added: "Thirty years ago it would have been unusual to see one female Judge sitting as part of the Court of Appeal; to see an all-female constitution is a sign of the progress which has been made in recent years. I hope this will inspire more girls and young women in Wales to consider law as a real and tangible profession and will encourage practitioners to consider applying for judicial appointment".

Cases of Note

Following guidance from the senior judiciary, the Registrar and her staff look out for cases raising novel or important points of law or procedure for inclusion in special or guidance courts. Such cases may be listed individually or conjoined, where appropriate, before a constitution of five Judges. It is not possible to report on every case heard, but the following are a selection of cases of note.

Criminal Law

R v Jones (deceased) [2021] EWCA Crim 929 (Fulford LJ VP, Cutts J and Saini J) – The proper approach to fresh evidence purportedly raising diminished responsibility

The appellant was convicted of murder. The deceased had been attacked as she walked with her dog and died from multiple blunt force trauma injuries. At trial the appellant relied on an alibi. He had unsuccessfully appealed following his conviction.

Having sought a review by the Criminal Cases Review Commission, the appellant died in prison and Fulford LJ VP approved his mother to pursue the appeal in accordance with section 44A CAA. In October 2019, his case was referred back to the Court of Appeal on the basis that the appellant had accepted responsibility for the deceased's death and there was fresh psychiatric evidence that suggested his responsibility had been substantially impaired at the time of the offence. The appellant's psychiatrist concluded that he suffered from schizophrenia at the time of the offence. The prosecution's psychiatrist disagreed and concluded his behaviour and abnormal mental state was just as consistent with his admitted use of controlled drugs.

The Court dismissed the appeal, concluding that whilst in some cases there was clear and undisputed evidence, unknown at trial, which demonstrates diminished responsibility, the psychiatric evidence in this case was disputed. The appellant's expert's opinion was heavily reliant on the appellant's account, which had been provided in the years since his detention and which was inconsistent with the facts known about the offence. Moreover, it is a matter for the jury to decide whether a defendant suffered from diminished responsibility (*Walton v The Queen* [1978] A.C. 788; *Golds* [2016] UKSC 61). The appellant was now dead and it was therefore impossible to investigate his account on oath. In the absence of agreement between the parties and without the opportunity to assess the appellant there was no proper basis to conclude that the conviction was unsafe.

R v Kakaei – [2021] EWCA Crim 503 (Edis LJ, Holgate J and HHJ Tayton QC) – Immigration offences arising from attempts to cross the channel

The appellant was a migrant who with other migrants, crossed the Channel from France in a rigid hull inflatable boat and whose case was that he and the other migrants would surrender to the UK Border authorities and claim asylum. He pleaded guilty to the section 25 offence after the Judge ruled that even if they had intended to apply for asylum the

moment they disembarked the boat, he and the migrants travelling with him would still have committed a section 24 offence of illegal entry. He sought to appeal on the basis that the Judge's ruling was wrong and deprived him of his only viable defence.

Before the Court, the parties were in agreement that the judge had erred in his ruling. Section 11 of the 1971 Act states that a person who arrives at a port or airport with an approved area where people are held pending consideration of their entry into the UK is deemed not to enter the country until they leave that area. Therefore, if an asylum seeker intends to arrive at a port with such an area and claim asylum before leaving the approved area in that port, that arrival would not constitute entry and so no offence could be committed under section 24 of the 1971 Act, and so a person could not be guilty of assisting unlawful immigration, contrary to section 25 of the 1971 Act.

The Court also considered the circumstances in which a guilty plea would not be a bar to an appeal. In *R v Asiedu* [2015] EWCA Crim 714, the Court set out two principal situations (setting aside equivocal and unintended pleas) where a guilty plea would not bar an appeal: (1) where the proceedings were an abuse of process such that they should not have occurred and (2) where the plea of guilty was compelled as a matter of law by an adverse ruling by the Judge that left no arguable defence. The Court added a third category: where a person has pleaded guilty following legal advice that deprived him of a defence that would have probably succeeded.

R v Aidid [2021] EWCA Crim 581 (Fulford LJ VP, Dove J and Butcher J) – When to give the intoxication direction and the relevance of intoxication to crimes involving specific intent

The appellant was convicted of murder. The prosecution case was that the appellant and co-accused murdered the deceased. The appellant's case was that she took no part in the murder and had been intoxicated and asleep at the time. On appeal, she submitted that the Judge failed to direct the jury on the impact of intoxication on a crime of specific intent. The prosecution submitted that lack of intent was not the basis of the appellant's defence and so no direction was required.

The Court dismissed the appeal and stated that the correct position (as described by Waller LJ in *R v Groark* [1999] Crim LR 669) is that if there is evidence of intoxication that might give rise to an issue as to whether specific intention could be formed, a direction should normally be given that drunken intent is still intent. Accordingly the Court rejected the prosecution's contention that a direction on the effect of drunkenness on intention was unnecessary. The Court further confirmed the long established and uncontroversial direction set out by Lane LJ in *R v Sheehan and Moore* (1974) 60 Cr App R 308 and approved the general approach formulated by the authors of the Crown Court Compendium, namely to break down complex legal directions into a series of short questions, to be answered in logical order, albeit that the use of footnotes in written legal directions should be avoided.

R v Gates [2021] EWCA Crim 66 (Green LJ, Garnham J and Fordham J) – Inconsistent verdicts where the appellant's alleged co-conspirators are acquitted in an open conspiracy

The appellant appealed against his conviction for conspiracy to supply drugs of class A (cocaine). The particulars of the offence stated that the appellant conspired with 10 named individuals and "others unknown" to supply class A drugs. However, the prosecution's case against the appellant was that he only directly contacted one named co-conspirator; Mitchell. It was further alleged that he helped two other co-conspirators, Hickson and Horner. However, there was no direct evidence linking them to him. At trial, Mitchell and Hickson were acquitted. The jury was unable to reach a verdict in relation to Horner and the prosecution did not seek a retrial, so no evidence was ultimately offered. The appellant sought to appeal on the basis that given that the only named co-conspirators with whom he allegedly conspired were acquitted, his verdict was illogical and inconsistent and should be set aside.

The Court held that the acquittal of Hickson and Mitchell excluded them from being part of an agreement with the appellant. Furthermore, there was no direct evidence connecting the appellant to any other named conspirators. However, the prosecution case was that the appellant was involved in a conspiracy involving named co-conspirators **and/or** persons unknown. The prosecution had made it plain that others were involved in the conspiracy who had not been identified. Where an open conspiracy is alleged and the prosecution case includes the possibility that a defendant conspired with persons unknown, the jury is entitled to convict the defendant even if his named co-conspirators are acquitted.

R v A, B, C and D [2021] EWCA Crim 128 (LCJ, Edis LJ and Whipple J) – The admissibility of Encrochat evidence

Encrochat was a system of encrypted communication. It operated using specific handsets provided by the system operator and these handsets could only communicate with other Encrochat handsets. Following the discovery of an Encrochat server in France in late 2019, French and Dutch authorities arranged for malware to be implanted in the servers which was unwittingly downloaded by users when they updated their phone operating system. The malware allowed the authorities to retrieve all data that had not been erased and all messages that were created after the malware was downloaded. The material obtained as a result of the infiltration led to a significant number of prosecutions. This case was the first (but not the last) to consider the evidential issues arising from the investigation.

The appellants appealed against a preparatory ruling in which the Judge ruled that the evidence obtained from the Encrochat server was admissible. The issue for the Court was whether, under the Investigatory Powers Act 2016, at the time of the interception of the material, the communications were being transmitted or had already been stored "in or by" the telecommunications system. The appellants submitted that the material was intercepted whilst it was being transmitted and was therefore inadmissible by reason of the exclusionary rule set out in section 56 of the 2016 Act. The prosecution submitted that the material was intercepted when it was "stored in or by the system" and in any event, that the material was not obtained as a result of "interception related conduct" as contained within section 56(2) of the Act.

The Court agreed with the Judge's conclusion that the communications were extracted from the users' handsets, and not while they were travelling through the system. The material was therefore stored by the time it was intercepted. Moreover, whilst there had been an interception, it was rendered lawful by the Pt. 5 Targeted Equipment Interference warrant under Part 5 of the 2016 Act. Accordingly, the product of the interception was admissible in evidence at trial.

Procedure

R v Gould [2021] EWCA Crim 447 (Fulford LJ VP, Holroyde J and Edis J) – The operation of section 66

The Court of Appeal dealt with four unconnected cases which raised issues concerning the relationship between the Magistrates' Court and the Crown Court and, in particular, about the exercise by a Crown Court judge of the powers of a District Judge (Magistrates' Court) ('DJ') pursuant to section 66 Courts Act 2003. In each case the judge had tried to correct basic procedural errors made by the prosecution.

The Court held that when they decide it is appropriate to do so, section 66 permits a Crown Court (and Court of Appeal) judge to sit as a Magistrates' Court exercising the power of a DJ to deal with criminal cases which are properly within the jurisdiction of that court. This includes sitting as a youth court. The Court recognised that this was not consistent with previous authority. Before a Crown Court judge can deal with an offence as a DJ it must be one which is properly within the jurisdiction of the Magistrates' Court. If a valid charge is correctly committed for sentence, it leaves the Magistrates' Court and is transferred to the Crown Court. The Magistrates' Court is *functus officio* and no DJ can make any order in the case. A Crown Court judge cannot quash or amend the charge or the committal or remit it to the Magistrates' Court whether they purport to act as a judge of the Crown Court or as a DJ pursuant to s66. Only the Divisional Court can quash committals.

If, however, a committal is "obviously bad", the charge remains in the Magistrates' Court and the Crown Court has no power "because the origin of its jurisdiction is a committal which is at least valid on its face". In such a case, the judge can choose simply to notify the Magistrates' Court of the position and leave it to take any corrective action. If, however, the judge is confident of the relevant procedures in the Magistrates' Court, they may take such corrective action themselves as a DJ under s66. If they do so, they have all the powers of a Magistrates' Court including that of accepting fresh charges. However, they must make it clear that they are acting as a DJ and must follow the procedure required in a Magistrates' Court. Where they acted without jurisdiction, the proceedings would be liable to be quashed by the Divisional Court.

R v Mohammed [2021] EWCA Crim 1275 (Carr LJ, Spencer J and Butcher J) – Age Assessments and section 99 of the Children and Young Persons Act 1933

The appellant was convicted of sexual offences involving four different victims. Having found the appellant to be an adult, the Judge imposed an extended sentence of seven years. The gravamen of the appeal related to the Judge's finding on age assessment (pursuant to section 99 of the Children and Young Persons Act 1933) that the appellant was an adult in his early twenties. It was argued that there was procedural unfairness and that the Judge's finding on age was perverse.

The Court was not persuaded that there was any material procedural unfairness. *R (on the application of B) v London Borough of Merton* [2003] EWHC 1689 (*"Merton"*) remained the leading case in the area. As *Merton* emphasised, the age assessment could be informal,

although it had to be procedurally fair, and a formal trial procedure was not necessary. The fact that the Judge was very familiar with the appellant, having presided over his trial, was relevant to his decision. The Judge was not bound by any position adopted by or agreed between the parties. As section 99 made clear, the assessment of age was always a matter for the court and the Judge was entitled to conclude that the appellant was an adult.

R v Wainwright [2021] EWCA Crim 122 (Fulford LJ VP, Whipple J and Fordham J) – the relationship between the lies direction and the section 34 direction concerning silence

The victim was tortured and murdered at the premises of a local drug dealer. Video evidence from a co-defendant's phone showed that the applicant had urinated on the victim during the attack. During his first interview, the applicant denied presence at the scene. When shown the video footage he said he had been mistaken for his twin brother. During his second interview he remained silent. At trial, he accepted presence and some limited involvement in the attack. He accepted he had lied in his first interview and stated it was because he did not think the police would believe him. He had remained silent in the second interview on legal advice. When the Judge provided legal directions to the jury, he gave both a section 34 direction and a partial Lucas direction. On appeal it was argued that only a Lucas direction should have been given, and in any event each direction was inadequate.

In refusing the appeal, the Court found that the Judge's decision to give separate legal directions was entirely sustainable and that they were appropriate in their terms. It is a matter for the judge to decide whether to give two separate directions or a single, combined direction. The court confirmed that they were not diluting the guidance in *R v Rana* [2007] EWCA Crim 2261 or *R v Hackett* [2011] EWCA Crim 380, that when it was feasible and convenient it was preferable to combine the two directions.

R v Pitcher [2021] EWCA Crim 1013 (Fulford LJ VP, Eady J and Stacey J) – The lies direction when given in relation to witnesses rather than defendants

The applicant was convicted of murder. On the night of the offence the applicant, the deceased and a witness had been drinking and taking drugs. Both the applicant and the witness denied being in the room when the deceased died and blamed the other. They both lied to the police. At the applicant's trial, the witness gave evidence for the prosecution. A full Lucas direction was given in relation to the lies told by the applicant and a similar direction was given in relation to the lies told by the witness.

The applicant sought to appeal on the basis that the lies direction should not have been given in relation to the witness. The Court refused the application, concluding that the witness was in a different position to the applicant as they were not on trial. There was therefore not the same requirement to make sure that the lies that they told would not be used to bridge a gap in the case. However, where a defendant relied on the fact that a prosecution witness had lied as evidence that the witness was the one who was guilty of the offence, then the Judge may well take the view that it was necessary to direct the jury to consider whether there might be some other explanation for those lies.

R v Umerji [2021] EWCA Crim 598 (Fulford LJ VP, Holgate J and Sir Nicholas Blake) – The meaning of the "presence of defendant" in relation to section 51 sending to the Crown Court

The applicant was convicted in his absence of conspiracy to cheat the public revenue and conspiracy to transfer criminal property. He had never been present for proceedings, albeit he had been represented by counsel. The appeal concerned the lawfulness of his sending to the Crown Court. On 2nd February 2009, he was summonsed to appear at Merseyside Magistrates' Court. He did not attend but was represented by counsel and his case was sent to the Crown court pursuant to section 51 of the Crime and Disorder Act 1998. He sought to appeal on the basis that given his absence, the Magistrates' Court had no power to send him for trial.

The Court held that in contrast to section 17A of the Magistrates' Court Act 1980, section 51 did not contain an express requirement for the defendant's physical presence. Unless there was an express provision requiring the defendant's physical appearance, section 122 of the Magistrates' Court Act 1980 applied, which states that an absent party shall be deemed present if legally represented.

R v KL [2021] EWCA Crim 200 (Sharp PQBD, Cutts J and Saini J) – The appropriate jurisdiction for appealing against "excepting" directions made in relation to anonymity orders made pursuant to section 45 of the Youth Justice and Criminal Evidence Act 1999

The applicant was convicted of murder. He was 15 years old and prior to trial, an order had been made under section 45(3) of the Youth Justice and Criminal Evidence Act 1999 for him to remain anonymous. On the morning of his sentencing hearing, the Judge made an "excepting" direction, thereby permitting the press to name the applicant. The applicant sought to appeal against the excepting direction by way of an appeal to the CACD and by way of a parallel claim for judicial review in the Divisional Court.

The Court held that the applicant could appeal by way of judicial review. By virtue of section 29(3) of the Senior Court Act 1981, judicial review is not available to challenge a decision of a Judge sitting in the Crown Court **if** the decision relates to the trial on indictment. The making of an excepting direction after conviction was not a matter relating to a trial on indictment and was therefore amenable to judicial review. The Court also held that the applicant had a right to appeal to the CACD **in limited circumstances**. The Court enjoyed no appellate jurisdiction beyond that specifically conferred by statute. Section 45 of the Youth Justice and Criminal Evidence Act 1999 did not confer jurisdiction to the Court of Appeal as a standalone right. However, section 45(10)(b) stated that an excepting direction may be varied or revoked by "an appellate court" and section 45(11) stated that an appellate court meant a court, inter alia, dealing with an appeal arising out of the proceedings or any further appeal. This means that the CACD enjoys a limited power to consider an excepting direction as an ancillary matter when dealing with an appeal against conviction and sentence. It does not exist unless and until leave has been granted and can never be invoked as a Ground of Appeal.

R v Oulton [2021] EWCA Crim 1165 (Warby LJ, Cheema-Grubb J and Murray J) – The Process and principles for challenging reporting restrictions

In contrast to R v KL, supra, this case concerned an appeal against a Judge's refusal to make an excepting direction. Oulton was acquitted of child sex offences. A local newspaper was allowed to publish Oulton's name but, on Oulton's application, the Judge made a reporting restriction order pursuant to section 46 of the Youth Justice and Criminal Evidence Act 1999 prohibiting the newspaper from identifying the witnesses. After Oulton's acquittal, the newspaper applied for an order revoking the order or alternatively, for an excepting direction pursuant to s46(9) allowing the paper to report the evidence of the witnesses without naming or identifying them. The Judge refused and the newspaper applied for leave to appeal.

The Court noted that section 159 of the Criminal Justice Act 1988 does not confer a right of appeal against a decision to refuse a reporting direction, a decision to discharge such an order, or a decision on the making of an excepting direction. Moreover, the statutory power to revoke a reporting direction does not confer a freestanding right of appeal against such a direction. It followed that the applicant required an extension of time to apply for leave to appeal against the original reporting direction, and/or permission to seek judicial review of the subsequent refusal to make an excepting direction. The Court concluded that the newspaper was out of time in appealing against the making of the original order and the lateness was not excused by the application to the Judge to discharge or vary the order. The problem with judicial review against the decision to refuse to make an excepting direction was that the application to the Judge to revoke the order was, on a proper analysis, an attempted appeal to the court which made the original order, and the Judge had no jurisdiction to entertain it. Also, if the court was to entertain a claim for judicial review of the Judge's refusal to accept that she was wrong in making the order, the Court would in effect be granting the very extension of time for appealing that it had held to be inappropriate.

R v Baldwin [2021] EWCA Crim 703 (Dingemans LJ, Holgate J and HHJ Dickenson QC) and R v Khan [2021] EWCA Crim 1526 (Dingemans LJ, Nicklin J and Cockerill J) – Guidance on the procedure for restraining orders

In *R v Baldwin*, the appellant was charged for various offences arising from an incident of alleged domestic abuse. However, the complainant did not attend trial and the Judge refused the prosecution's application to adjourn. As a result, the appellant was acquitted. Following the acquittal, the Judge indicated that he was considering making a restraining order, pursuant to section 5A of the Protection from Harassment Act 1997. He granted a short adjournment to allow defence counsel to take instructions, but neither the prosecution nor the defence sought a longer adjournment to obtain further evidence or secure the attendance of witnesses. No evidence was called, although both sides made submissions. The Judge concluded that there was sufficient evidence to permit him to make the order.

The Court allowed the appeal and set aside the restraining order. It emphasized that when a Judge considers imposing a restraining order after an acquittal where no evidence is offered, natural justice and the Criminal Procedure Rules require that the person against

whom the order may be made be given the opportunity to review the proposed order, consider and test the evidence in support of the application and call evidence against the making of the order. The Judge must consider what evidence is relevant and which parts are agreed or disputed. This needs to be identified fairly so the defendant may respond.

In *R v Khan*, the appellant was charged a malicious communication offence. Ultimately, the prosecution offered no evidence but applied for a restraining order pursuant to section 5A Protection from Harassment Act 1997. Shortly before the hearing started, the appellant emailed the court to tell them that his train was delayed. The Judge adjourned but when the case was called on, the appellant had still not arrived. The Judge referred to *R v Jones* [2003] 1 AC 1 and without hearing any further submissions, concluded that the appellant had waived his right to be heard and the matter should proceed in his absence. The prosecution called evidence in support of its application and the Judge imposed a restraining order. Shortly after the hearing, the appellant arrived and the court reconvened. During the hearing, the appellant became frustrated and the Judge refused to reopen the case.

The Court quashed the restraining order on the basis that the hearing was procedural unfair. It warned that the decision to proceed in a defendant's absence must be taken cautiously, especially if the defendant was unrepresented. Careful consideration must be given to the principles set out in *R v Jones*. In this case, the decision to proceed caused the appellant considerable unfairness, which was compounded by the events that occurred when he arrived. He was denied the fair opportunity to be told what had happened and to apply to the Judge to reopen the hearing. The nature of the procedural unfairness meant that the appellant had not had an opportunity to cross-examine the witnesses, advance evidence in his own defence or make submissions. In short, the Applicant did not receive a fair trial.

The Court also set out the powers available to them. As an appeal against sentence, they were precluded from remitting the matter. Instead, section 11 of the Criminal Appeals Act 1968 allowed them to quash the original order or impose a fresh restraining order (providing its terms are not more onerous that the terms of the original order). The Court decided against imposing a fresh order but noted that the prosecution was not precluded from making a fresh application to the Crown Court under s.5A.

Sentencing

R v AB [2021] EWCA Crim 692 (Fulford LJ VP, Holroyde LJ and Edis LJ) – The meaning of "greater severity" in relation to paragraph 2(1) of Schedule 2 to the Criminal Appeal Act 1968

In 2017, the appellant was convicted of several counts of rape and indecent assault of his sister and his wife. He was sentenced to a total of 14 years' imprisonment comprising 7 years' imprisonment for the counts involving his sister and a further 7 years' imprisonment for those involving his wife, to be served consecutively. In 2019, the Court of Appeal allowed his appeal, quashed all convictions and ordered a retrial. At the retrial before a different Judge, the prosecution did not proceed with the counts involving his wife. The appellant was convicted of all counts of rape and all but one count of indecent assault of his sister and was sentenced to consecutive sentences totalling 7 years 9 months' imprisonment. He appealed on the basis that the sentence was unlawful because it was more severe than the 7 year term originally passed for the counts concerning his sister and therefore contravened paragraph 2(1) of Schedule 2 to the Criminal Appeal Act 1968.

The Court said that paragraph 2(1) was deceptively simple in its terms although it was not a straightforward exercise to establish what constituted "greater severity", particularly when circumstances had changed between the two sentencing exercises. The court provided detailed guidance and concluded that in this case, the critical change was that on the first occasion the sentence which otherwise would have been imposed for the offences concerning his sister was reduced to ensure that the overall sentence was proportionate, taking into account the consecutive sentence imposed for the offences concerning his wife. In contrast, on the retrial the sentence did not need to be reduced for totality reasons because the counts involving his wife were not pursued. In granting leave to appeal but dismissing the appeal, the Court said that a sentence of 7 years' 9 months' imprisonment "was undoubtedly a *"longer"* sentence, but it was not a sentence of *"greater severity"* than that passed on the original conviction because a sentence of at least that length would undoubtedly have been imposed at the first sentencing hearing had it not been for the reduction to reflect totality.

R v Reed & Ors [2021] EWCA Crim 572 (Fulford LJ VP, McGowan J and Griffiths J) – Sentencing child sex offences where there was no victim

These six otherwise unrelated cases were listed together to provide the Court with the opportunity to clarify the approach to sentencing certain sexual offences against children when no sexual activity takes place. The judgment resolved two apparently contrasting CACD lines of authority that had emerged. In *Attorney General's Reference (No.94 of 2014) (R. v Baker)* [2014] EWCA Crim 2752; [2016] 4 W.L.R. 121, the Court considered the approach to sentencing an offence contrary to section 10 of the Sexual Offences Act 2003 and had held that, because the offending did not proceed beyond incitement, it was *"other sexual activity"* within Category 3 of the Guideline, even when the intended activity fell within Category 1 or 2 if carried out. In *R v Privett* [2020] EWCA Crim 557, the Court decided that when sentencing an offender for an offence contrary to section 14 when there was no real child, the judge should first identify the category of harm on the basis

of the sexual activity that the defendant intended and then adjust the sentence in order to ensure that this was commensurate with the applicable starting point and range if no sexual activity had occurred.

The Court concluded that any difference in approach between Privett and Baker was unsustainable. The appropriate approach when sentencing offences contrary to sections 5 to 15A and 47 to 50 of the Sexual Offences Act 2003 was the approach set out in *R v Privett*, that the harm should always be assessed in by reference to the offender's intention, followed by a downward movement to reflect the fact that the sexual act did not occur, either because there was no real child or for any other reason.

R v Plaku [2021] EWCA Crim 568 (Holroyde LJ, Cheema-Grubb J and Bourne J) – The appropriate approach to credit for plea

The Court considered two appeals against sentence in which it was argued that maximum credit for plea should have been given and an Attorney General's Reference in which it was submitted that the Judge fell into error in awarding maximum credit. The Court set out a helpful overview of how the Sentencing Council Guideline on credit for plea applies and consolidated the relationship between the Guideline, the BCM Form used in the Magistrates' Court and the existing authorities.

For an indication of plea to attract the maximum credit of one third (indicated at the first stage in proceedings), the Court confirmed that it needs to be unequivocal in the Magistrates' Court. This means words like "likely", "probable guilty plea", or "likely guilty plea on a basis" will not suffice. Importance is also attached to recording the indication on the up-to-date BCM Form and uploading it to the Digital Case System. In the absence of this unequivocal and duly recorded plea of guilty, maximum credit should only normally be awarded if one of the exceptions set out in the Guideline apply. The Court further confirmed that assistance to police, and "breaking ranks" in a conspiracy by being the first to plead, were not issues of credit for plea (although they can often become embroiled with it), but mitigation to be considered before credit for plea was applied.

R v McCann and others [2020] EWCA Crim 1676 (LCJ, Sharp P, Fulford LJ VP, Choudhury J and Cutts J) – Whole life tariffs for non-murder cases

This case involved three unrelated cases of serious sexual offending. In two of the cases (McCann and Sinagra), referred by the Attorney General as unduly lenient sentences, the Court considered the availability of a whole life order. Both involved some of the most serious sexual offending and raised the question of the appropriateness of whole life orders in cases which did not involve murder. When sentencing McCann, the trial Judge had identified a notional starting point of 45 years and reduced it by one third rather than half; stating that had he not considered a life sentence appropriate, he would have passed an extended sentence of imprisonment (of which McCann would have served two thirds before being eligible for parole). When sentencing Sinagra, the trial judge identified a notional determinate sentence of 60 years and imposed a life sentence with a minimum term of 30 years.

The Court concluded that as serious as the offences were, neither called for a whole life tariff. However, it also endorsed the line of authority that does not shut the door on the availability of whole life tariffs for cases that do not involve murder. In McCann's case, it was appropriate to base the minimum term on two thirds of the notional determinate sentence, but this was required to ensure the "proper requirements of justice were met for the unique crimes" rather than due to the release provisions. The Court granted leave to refer the sentences, and the minimum terms for both were increased to 40 years.

R v McWilliams [2021] EWCA Crim 745 (Sharp PQBD, Sweeney J and Foxton J) – The relevance of early release provisions to the calculation of tariffs imposed for life sentences

The offender pleaded guilty to 40 offences of sexual assault and rape of 23 child victims. At the sentencing hearing in November 2020, the Judge concluded that the offender met the test for dangerousness and that in light of the risk he posed and the severity of his offending, a life sentence was required. He identified a notional determinate sentence of 18 years' imprisonment and fixed the minimum term at 9 years, which was half the notional determinate sentence.

The Attorney General submitted that the Judge failed to take account of the changes introduced by the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 (SI 2020/158) ("the 2020 Order"), which amended release provisions with the effect that prisoners convicted of certain offences and sentenced to imprisonment of 7 years or more would be released after serving two thirds of their sentence. The offender was convicted of offences that engaged this provision. Therefore, the minimum term should have been two thirds of the notional determinate sentence rather than half. By failing to take account of the 2020 Order, the Judge had imposed a sentence that was unduly lenient.

The Court concluded that when fixing the minimum term of a life sentence, section 82A(3) of the Power of Criminal Courts (Sentencing) Act 2000 (now section 323 of the Sentencing Act 2020), requires the Judge to take into account the early release provisions set out in section 244 of the Criminal Justice Act 2003. The 2020 Order has the effect of amending the release provisions set out in section 244. As a result, a sentencing judge is required to calculate the minimum term with reference to the fact that had a determinate sentence been imposed, the offender would have been released after serving two thirds of the sentence. The sentence was therefore unduly lenient. The Court of Appeal granted leave and substituted the sentence for life imprisonment with a minimum term of 12 years.

As a side note, the Court distinguished this case from cases involving the release provisions set out in the Terrorist Offenders (Restrictions of Early Release) Act 2020 ("the 2020 Act"). That act inserted a new section 247A into the Criminal Justice Act 2003, which provided that offenders convicted of specific terrorist offences would serve two thirds of their determinate sentence. As it is a wholly separate provision that is not referred to in either section 82A or section 323, a Judge fixing a minimum term is not required to have regard to it. It should be noted that the Police, Crime, Sentencing and Courts Bill is expected to amend section 323 of the Sentencing Act 2020 to address this discrepancy.

R v Hamza [2021] EWCA Crim 1560 and R v Bel [2021] EWCA Crim 1461 – Sentencing "lower level" terrorism offences

In *R v Hamza* [2021] EWCA Crim 1560, the applicant was convicted of three offences of encouraging terrorism, contrary to section 1 of the Terrorism Act 2006, arising from posts he had shared on Facebook. In 2015 and 2018, he posted a series of messages in which he encouraged acts of terrorism. He received a special custodial sentence of 4 years for an offender of particular concern, comprising a custodial term of 3 years and an additional 1 year licence period. He submitted that the Judge failed to reduce the sentence to reflect myriad mitigating features, including that there were very few posts and they were unlikely to encourage anyone to commit offences. The Court held that the Judge was fully aware of the principal mitigating features and had summarised them in his sentencing remarks. Given the facts of the case, the Judge was entitled to conclude that a custodial sentence was appropriate. Indeed, the total custodial term of three years indicated that a substantial reduction had been made to reflect the available mitigation.

R v Bel [2021] EWCA Crim 1461 concerned an applicant convicted of possessing a copy of the Anarchist's Cookbook, contrary to section 58 of the Terrorism Act 2000. He was sentenced to a special custodial sentence for an offender of particular concern of 3 years, comprising a custodial term of 2 years and an extended licence period of 1 year. The applicant sought to appeal on the basis that the Judge should have imposed a suspended sentence or a community order, especially in light of his good character and Asperger's syndrome.

The Court dismissed his appeal and concluded that the Judge set out wholly reasonable conclusions that the applicant's autism did not have any significant bearing on his culpability and that he was a manipulative individual who used his diagnosis for his own advantage. There was no clear evidence that imprisonment would present a "striking" hardship and offences of this kind are of great concern to society. The sentence was therefore not manifestly excessive.

R v Leadbeater and Bircea [2021] EWCA Crim 1251 (Holroyde LJ, Thornton J and HHJ Dhir QC) – Disqualification where a vehicle is used for the purpose of a crime in a conspiracy

The Court considered two unrelated appeals involving applicants who were disqualified from driving pursuant to section 147 of the Power of Criminal Courts (Sentencing) Act 2000. Both had been convicted of conspiracy to rob and both were disqualified from driving on the basis that they had been getaway drivers. They sought to appeal on the basis that the sentencing Judges had no basis to disqualify them pursuant to section 147. They relied on *R v Riley* (1983) 5 C App R(S) 335, in which the Court had held that where an offender has been convicted of conspiracy to steal, burgle or rob, the mere fact that he used a vehicle in the course of some overt act would not necessarily be sufficient to give the court the power to disqualify.

The Court reaffirmed *R v Riley*, but held that where a vehicle has been used to remove the offender from the scene to make it less likely they will be apprehended or to remove stolen goods, the use of the car amounts to facilitating the commission of an offence and disqualification was thereby permitted pursuant to section 147 (and its equivalent provision in the Sentencing Act 2020 (section 164)).

Summary and Statistics – 1 October 2020 to 30 September 2021

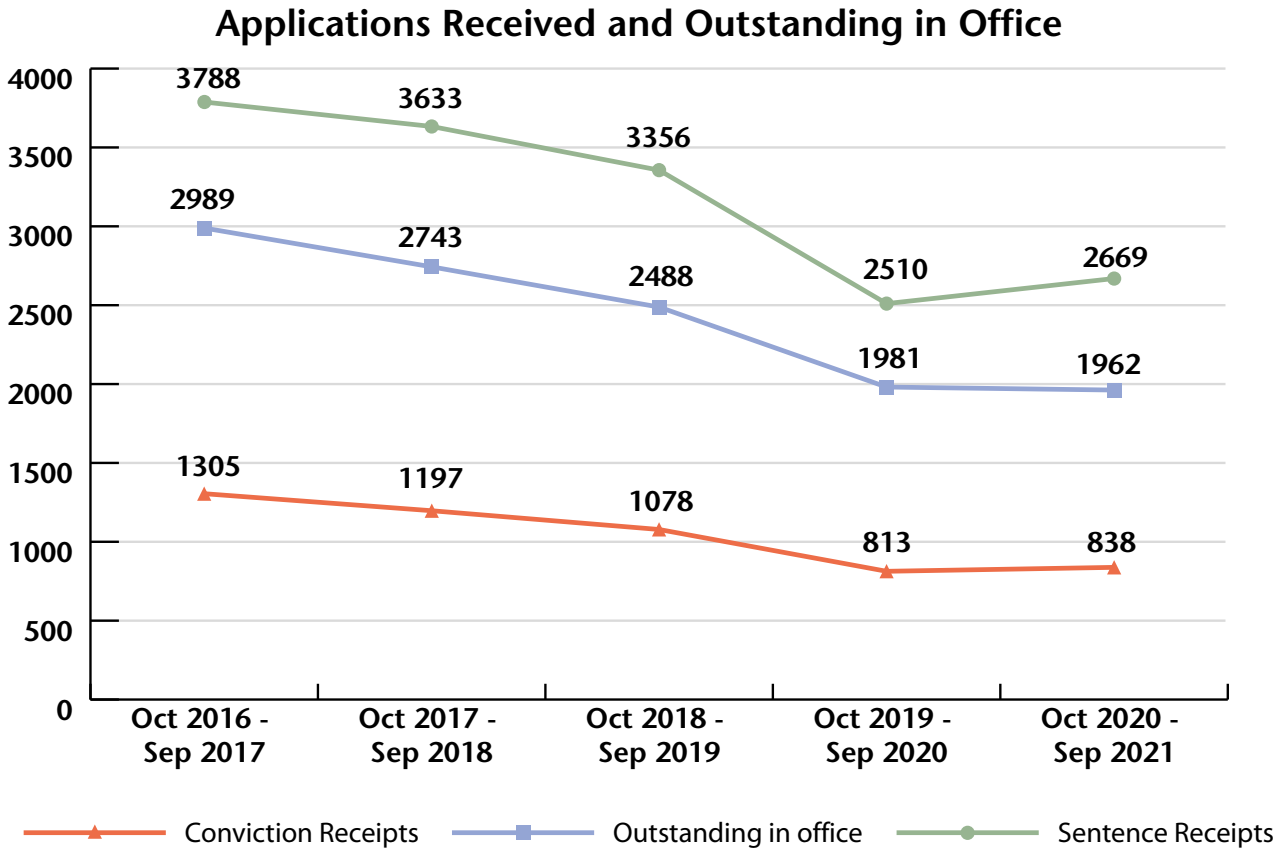
The Annexes attached to this review provide an invaluable insight into the work of the CACD during a difficult year and demonstrate that despite the challenges presented by COVID, the court has progressed cases effectively.

The Court received 184 more applications than last year, with the majority of those additional applications being sentence applications. Despite this increase, the number of outstanding cases is slightly lower than last year. Moreover, the number of outstanding old conviction cases has dropped significantly, albeit the number of outstanding old sentence cases remains at roughly the number it was at the beginning of the year. Cases continue to take slightly longer than anticipated to progress from lodging to a Full Court Hearing, with cases taking, on average, 2 months' longer than the target set within the Criminal Appeal Office. This may in part be due to the increase in applications this year. These statistics are cautiously optimistic and suggest that whilst the coronavirus pandemic continues to impact the Court and the Criminal Appeal Office, the measures that have been introduced to minimise the impact, such as digital bundles and virtual hearings, are allowing cases to progress efficiently.

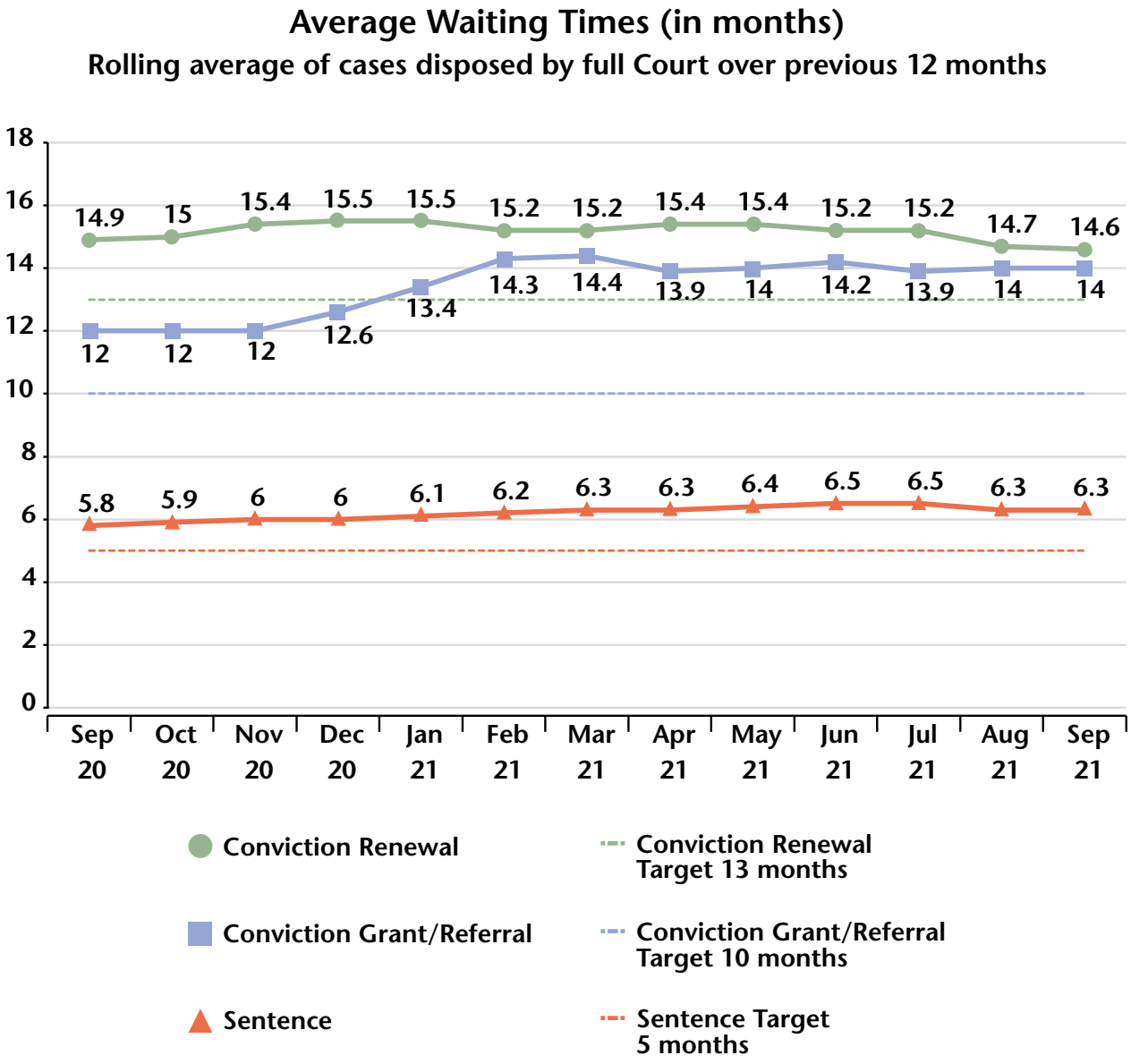
The majority of applications are considered by the Single Judge, although they can be referred to the Full Court by the Registrar. This year, 609 applications to appeal against conviction were dealt with, which was an increase on last year. Approximately 29% of applications were either granted or referred, which is a rather substantial increase on the previous years, which saw closer to 20% of applications being granted or referred. The Full Court heard 232 appeals/applications against conviction, and of those cases, 54% appeals were allowed, which was higher than the previous 4 years, where the average was closer to 35%.

In relation to applications to appeal against sentence, 2067 applications were considered, another increase on last year. Approximately 29% of applications were either granted or referred, which is consistent with previous years. The Full Court heard 630 appeals/applications against sentence, which was fewer than previous years. However, 60% were allowed, which is consistent with previous years.

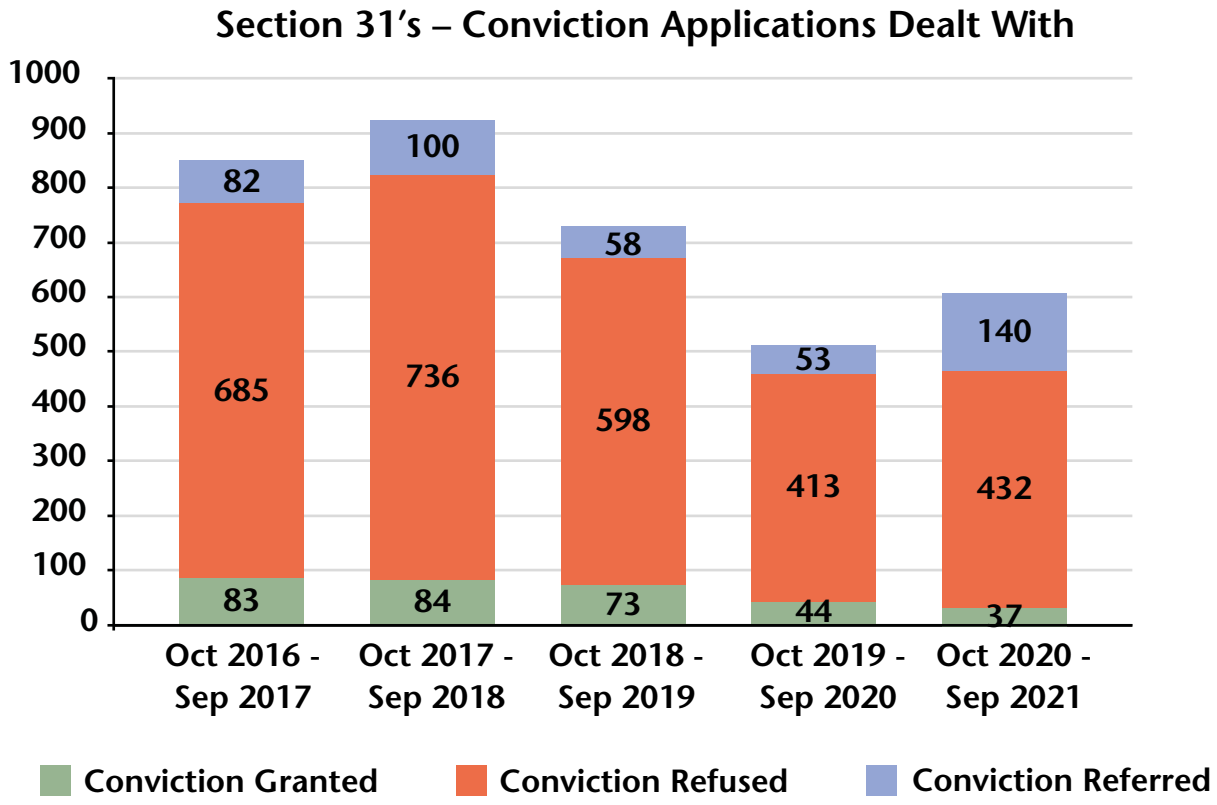
Annex A – Applications received and outstanding in office

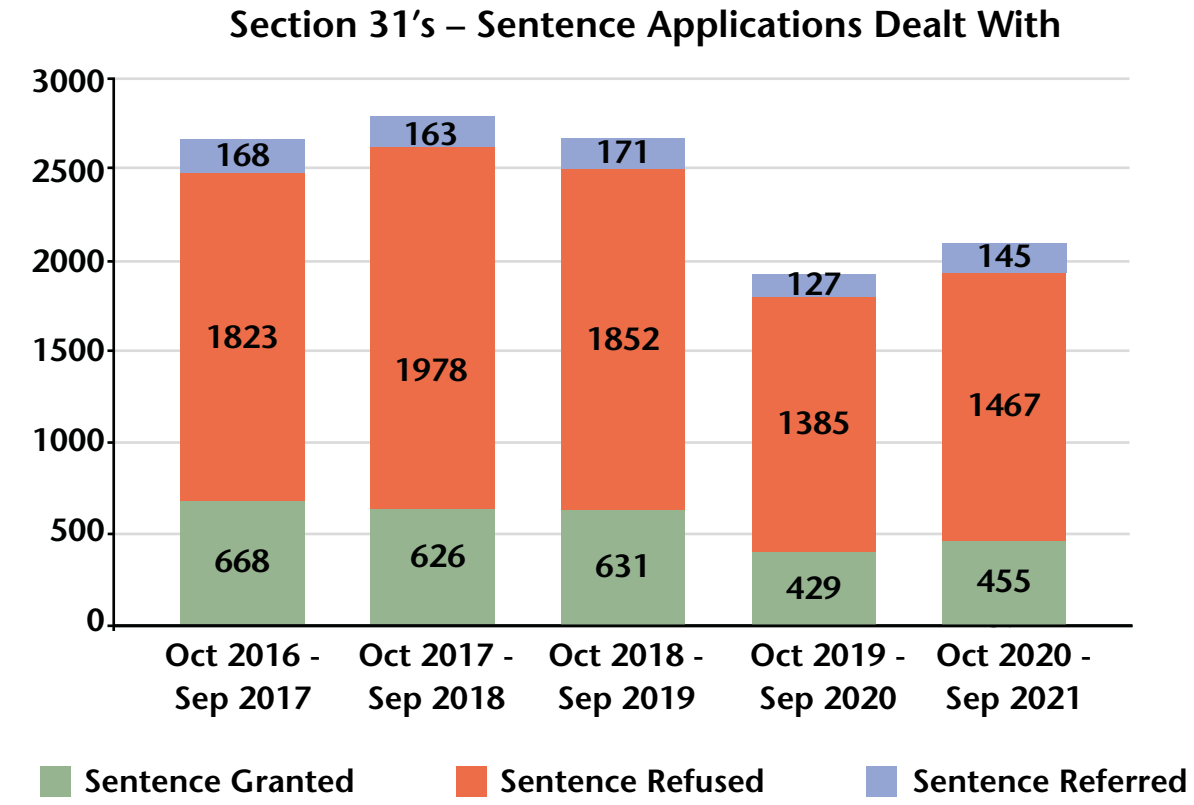


Annex B – Average waiting time (months)

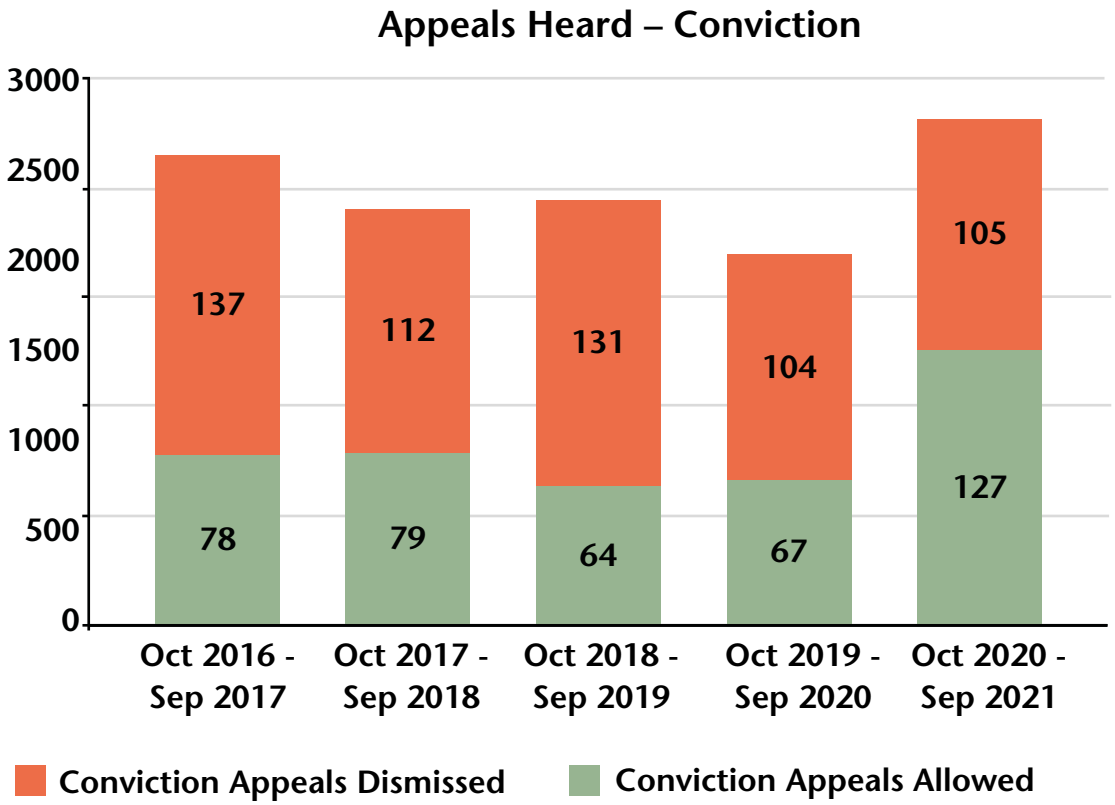


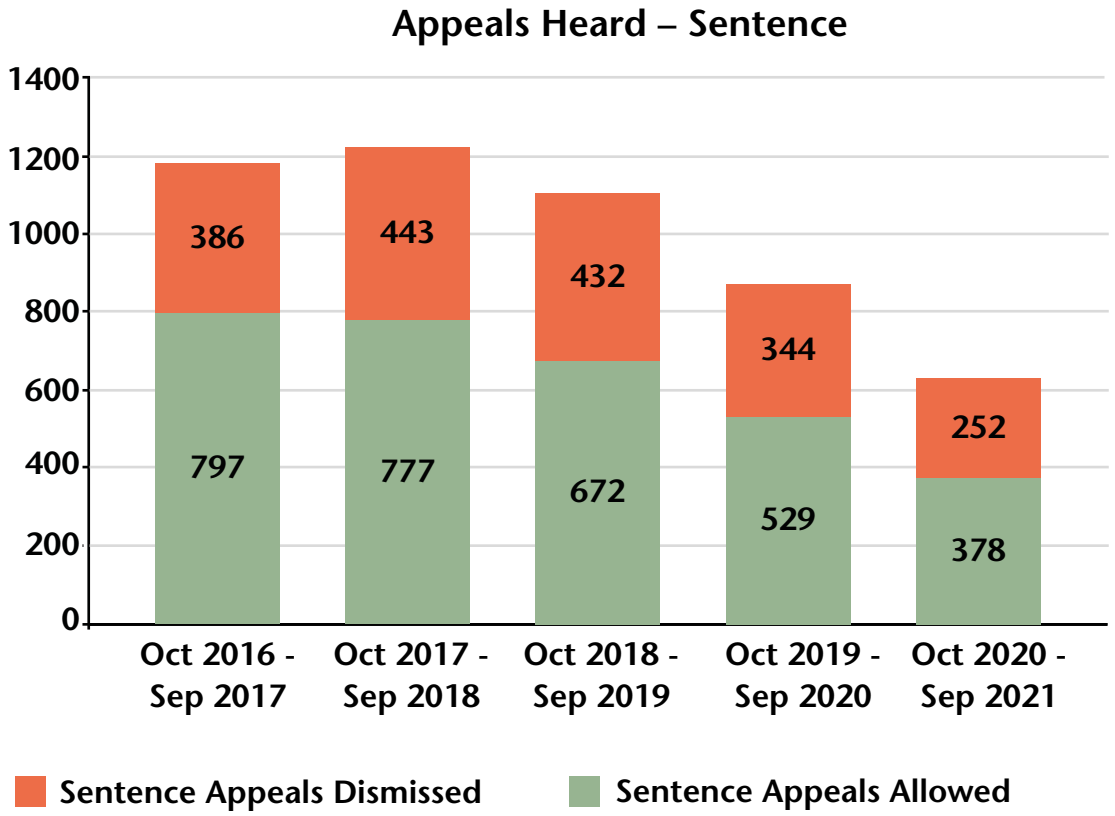
Annex C – Section 31 Applications



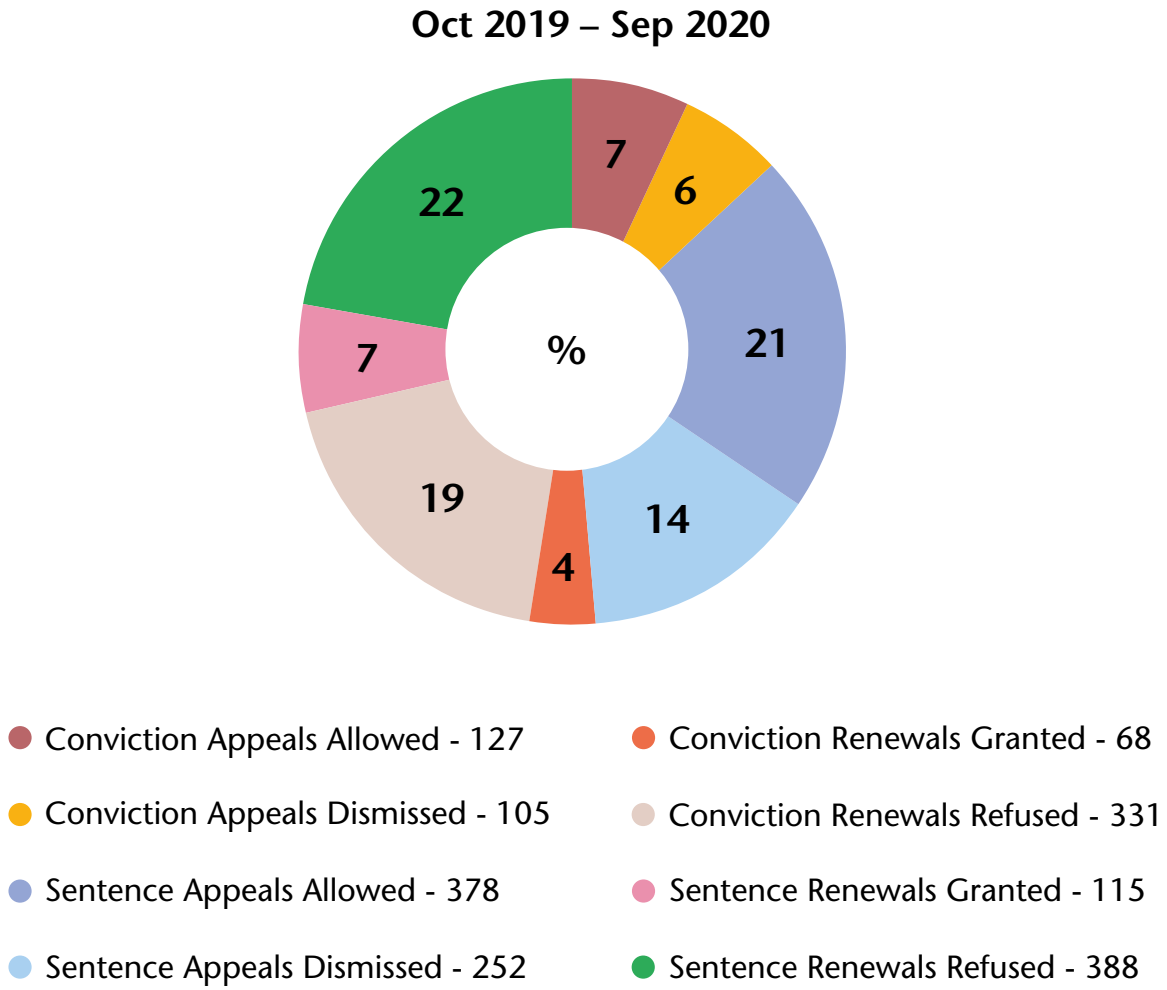


Annex D – Appeals Heard

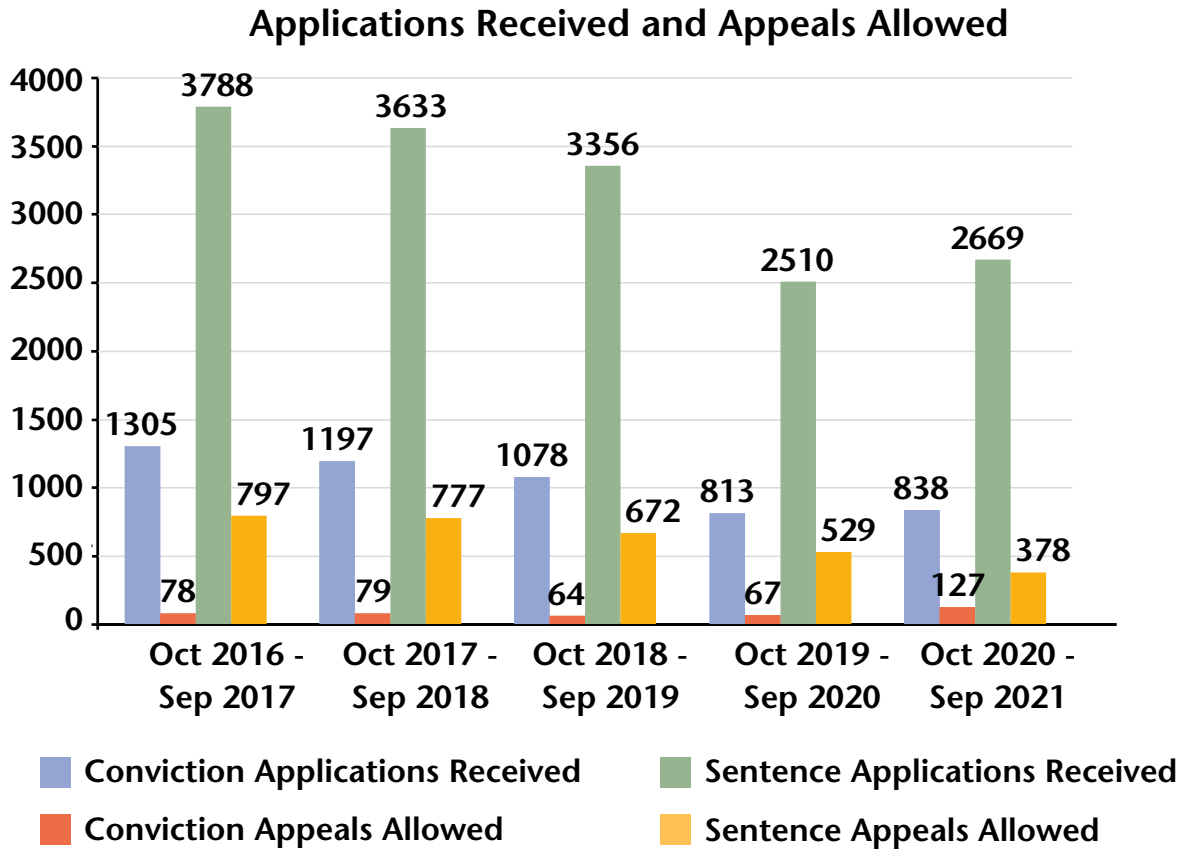




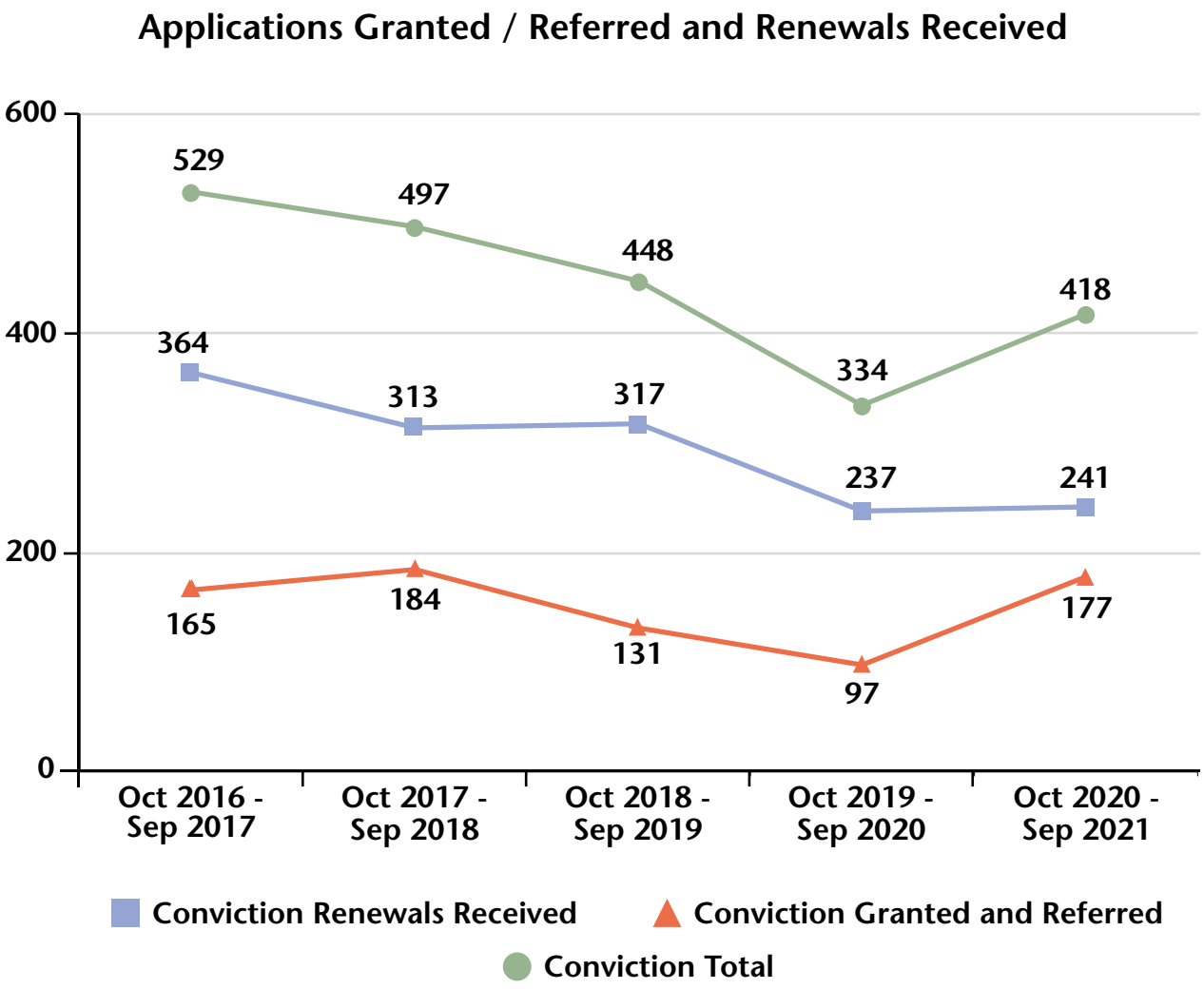
Annex E – Court time Appeals

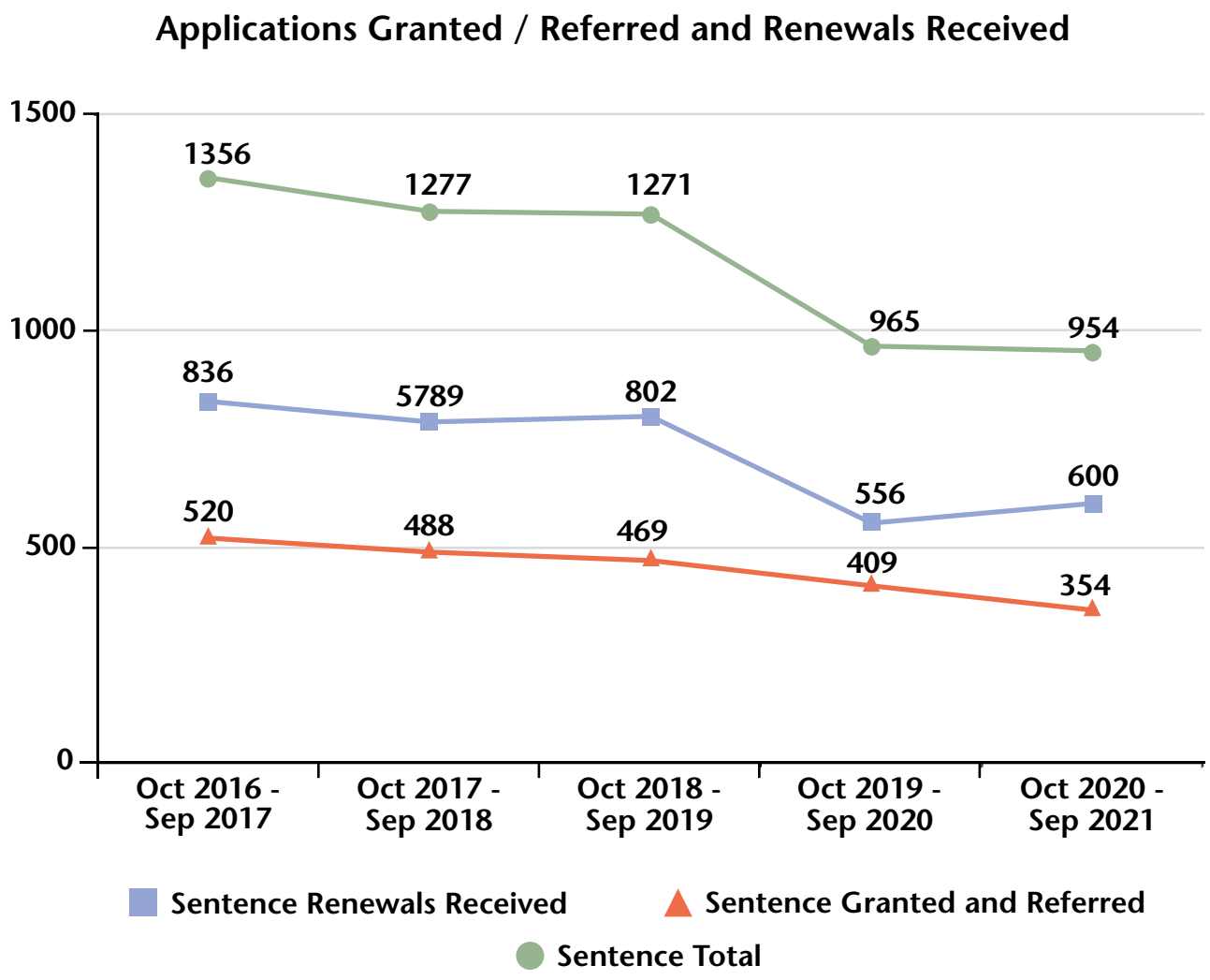


Annex F – Applications received and appeals allowed

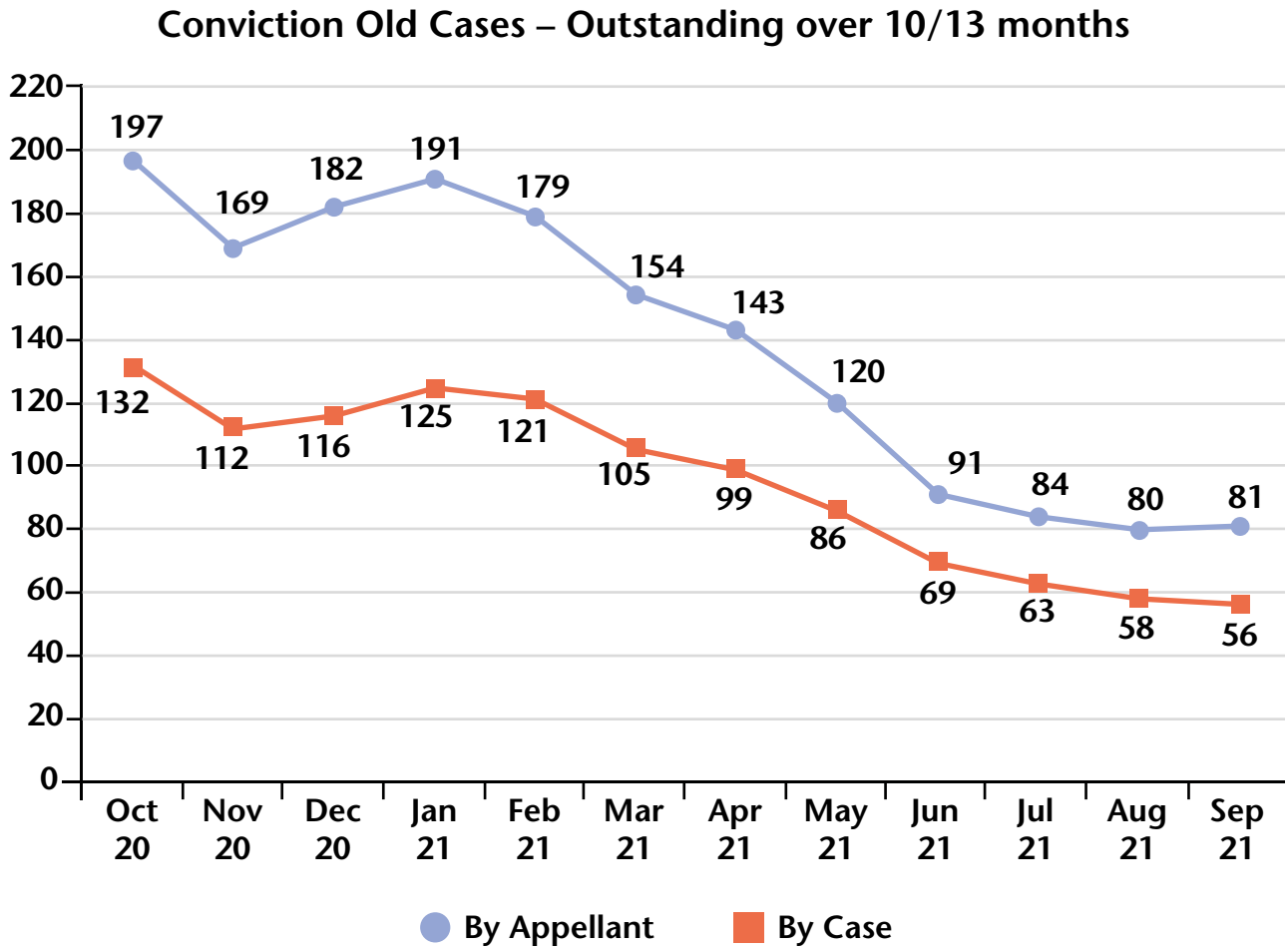


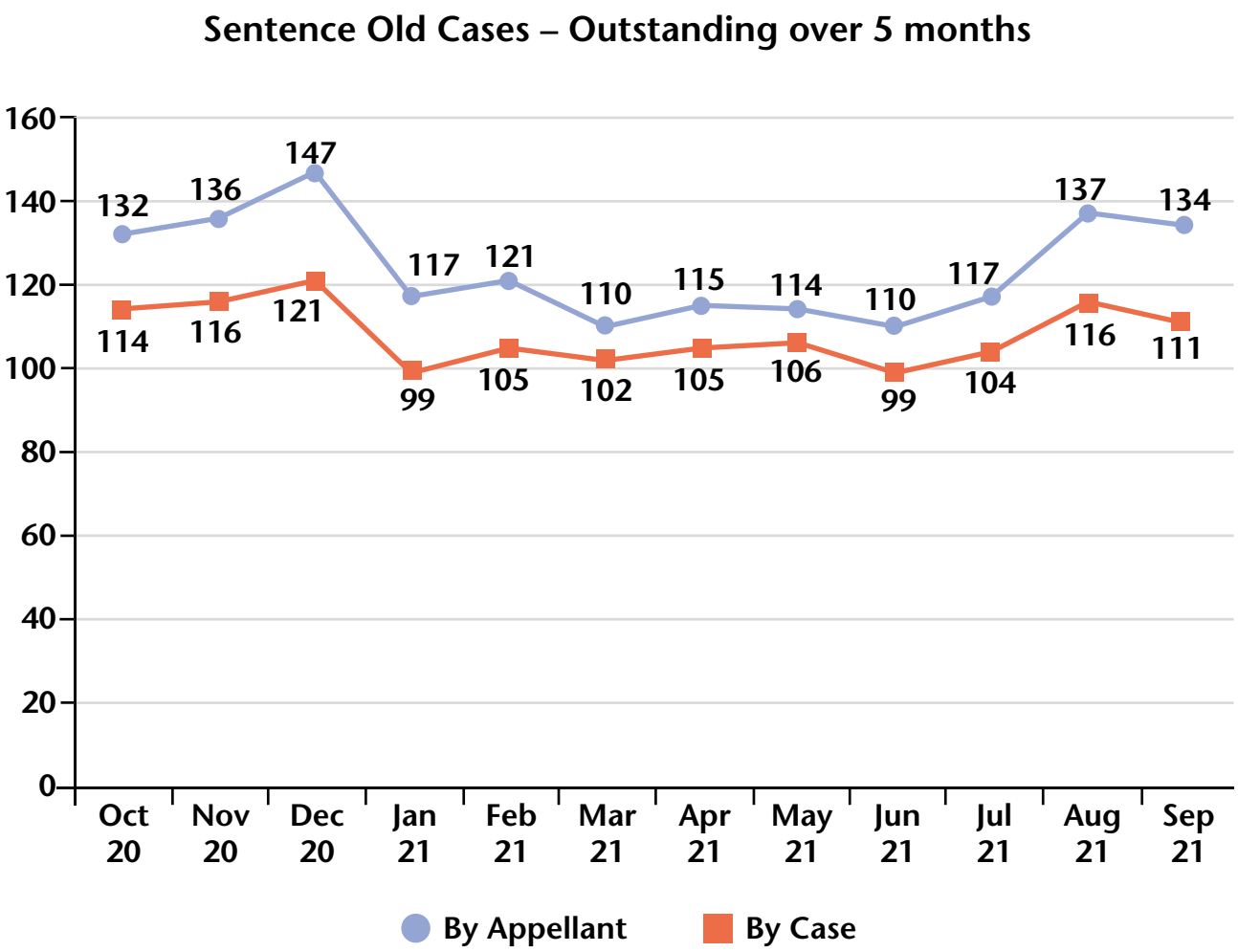
Annex G – Applications Granted, Referred or Renewed




Applications Granted / Referred and Renewals Received
1500
1000
500
0
1356
1277
1271
965
954
836
5789
802
556
600
520
488
469
409
354
Oct 2016 - Sep 2017
Oct 2017 - Sep 2018
Oct 2018 - Sep 2019
Oct 2019 - Sep 2020
Oct 2020 - Sep 2021
Sentence Renewals Received
Sentence Granted and Referred
Sentence Total

Annex H – Old Cases




Sentence Old Cases – Outstanding over 5 months
160
140
120
100
80
60
40
20
0
132
136
147
117
121
110
115
114
110
117
137
134
114
116
121
99
105
102
105
106
99
104
116
111
Oct 20
Nov 20
Dec 20
Jan 21
Feb 21
Mar 21
Apr 21
May 21
Jun 21
Jul 21
Aug 21
Sep 21
By Appellant
By Case