Judiciary of
England and Wales

A Review of the Year In the Court of Appeal, Criminal Division

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Introduction

by the Vice-President of the Court of Appeal, Criminal Division

It is with great pride that I take up my post as Vice-President of the Criminal Division of the Court of Appeal. From the Court of Criminal Appeal Act 1907 through to the current Criminal Appeal Act 1968, Court of Appeal judges have been carrying out the important task of reviewing convictions and sentences, setting aside those convictions which are unsafe and correcting those sentences which are wrong in principle, manifestly excessive or unduly lenient. The court has a vital role in maintaining the integrity of the criminal justice system.

From its historical roots and traditions, the court has now moved into a new digital age. This is largely due to my predecessor, Sir Adrian Fulford, whose solid leadership guided the Court of Appeal, Criminal Division during a nationwide pandemic, whilst simultaneously implementing new digital working practices in the court. Such resilience and focus will be a difficult act to follow.

I would like to take this opportunity to pay tribute to all the judiciary, the Registrar and the CAO staff for their unwavering support and hard work in ensuring that the work of the court continues to be carried out as smoothly as possible and in ensuring that a high quality service is provided to the public.

In addition, I would also like to take the opportunity to thank all of the advocates who appear before the Court of Appeal, Criminal Division, and those who instruct them. Their individual and collective ability, and the real assistance they give to the court, are much appreciated. The range and contrasting styles of advocacy that I hear are a continual source of delight and pride. Notwithstanding the obvious importance of written grounds of appeal and submissions, there remains power in oral advocacy, which can and on occasions does alter the court's provisional view of a case.

There will no doubt be more challenges ahead, but I look forward to continuing to uphold the integrity and the work of the Court of Appeal, Criminal Division and ensuring that the court continues to deal with its workload justly and efficiently.

Lord Justice Holroyde
Vice-President of the Court of Appeal, Criminal Division

Overview of the Year

Master Beldam, Registrar of Criminal Appeals

It has been a busy year for the Court of Appeal, Criminal Division with an increase in the number of cases received. That number is expected to continue to increase as the Crown Courts continue to deal with their backlogs of cases. In response to the rising number of applications and the variety of the work, the court and the Criminal Appeal Office continue to show resilience and embrace new ways of working.

In October 2022, Sir Adrian Fulford, who was at the forefront of many of the initial changes resulting from digitalisation, stepped down from his role as Vice-President of the Court of Appeal, Criminal Division. Having taken up the post in October 2019, he played a huge role in the life of the court and made an enormous contribution to the administration of justice in England and Wales. I am grateful to him for his sound leadership and support over the last few years, particularly during the pandemic. I wish him all the very best for his well-earned retirement. He is succeeded by Lord Justice Holroyde who I warmly congratulate on his appointment.

The amendments to Criminal Procedure Rule 39 have codified the requirements associated with digital working practices, many of which were implemented in response to the pandemic. This has resulted in the uniform presentation of easily navigable electronic appeal bundles in all cases, which in turn, has greatly assisted the court with the throughput of work.

I extend my thanks to all the judges who sit in the Court of Appeal, Criminal Division for their continued hard work and dedication this year. They too have embraced the new ways of working to ensure that the Court of Appeal, Criminal Division continues to improve its efficiency and accessibility, particularly by facilitating remote participation in and observation of the court's proceedings.

The proportion of applications received from litigants in person continues to increase and the challenges and barriers to justice that they face have been recognised through continued improvement to the Easy Read forms, which are designed to improve access to justice by removing complicated legal jargon. Assistance is also provided in our updated Help for Applicants booklet, which explains our processes in simple and clear terms.

An increase in sentence cases, particularly references by the Attorney General, prompted staff in the Criminal Appeal Office to consider ways in which sentence cases can be prepared for the court more efficiently. Utilising the advances in digitalisation, a shorter form of summary was devised, which has improved the speed with which these summaries can be prepared and thus assisted in reducing waiting times. I would like to thank the staff involved in this innovative piece of work and indeed, all the lawyers and administrative staff in the Criminal Appeal Office for their continued hard work and commitment throughout the year.

We were sorry to lose Jenny Lund, one of our very experienced Senior Legal Managers, but I congratulate her on her well-deserved appointment as a Judge of the First Tier Tribunal and wish her well in her new role.

With the constraints of the pandemic finally behind us, I look forward to once again welcoming visits from judges and legal scholars from around the globe. In addition to being extremely enjoyable, these visits provide an invaluable insight into the work of the courts in other jurisdictions, a forum for discussion and an opportunity to share ideas and best practice.

As the new normality of post-pandemic life returns, I believe the Court of Appeal, Criminal Division is now in a stronger position to face any challenges that may lie ahead and to ensure that the interests of justice will continue to be served.

Master Beldam KC
Registrar of Criminal Appeals

The Work of the Criminal Appeal Office

The Criminal Appeal Office ("CAO") supports the Court and is located at the Royal Courts of Justice, in close proximity to the judges that it serves. The CAO includes both legal and administrative staff.

Lawyers at the CAO work closely with the Registrar of Criminal Appeals to ensure that cases are guided through the appeal process efficiently and justly. They provide case summaries pursuant to the Practice Direction, which are invaluable to the court and practitioners. The summaries are entirely objective and do not provide advice on the merits of a case, but they highlight and crystallise the salient issues in order to assist the court. In addition, the lawyers give advice on procedural matters to practitioners, and also to litigants in person, to help them navigate the relevant Criminal Procedure Rules and statutory framework within which the court operates. The lawyers also provide invaluable advice on legal and procedural issues referred to them by their administrative colleagues.

Three Senior Legal Managers head the legal team. Their work includes the management of staff and work, but also encompasses specialist internal and external training. In addition to being responsible for the promotion of best practice within the CAO, the Senior Legal Managers have an important role in assisting the Registrar in carrying out her statutory functions and making decisions on matters of jurisdiction and public funding.

Acting on behalf of the Registrar, and within the framework of the Criminal Procedure Rules, CAO staff play a proactive role in preparing cases for the Single Judge and the Full Court and assisting in identifying issues for the court.

One clear example of this is in respect of unlawful sentences. In some instances, deficiencies in information given to the sentencing court coupled with misunderstandings of disparate and complex sentencing provisions have led to a number of unlawful sentences not being identified until grounds of appeal (sometimes against conviction only) have been lodged with the court. In such instances the staff of the CAO are often the first to identify that a sentence appears to be unlawful and draw that to the attention of the parties and the court.

Dedicated teams of administrative staff obtain advice from CAO lawyers as necessary and exercise case management functions. In addition to core functions such as the listing of cases, there is a team of specialist administrative staff dedicated to writing case summaries on all but the most complex sentence cases. Administrative staff also provide essential back office support and deal with some specialist matters such as the assessment of costs. Court clerks sit as the Registrar in court and now have additional duties which include co-ordinating participants and court users attending hearings remotely, which present new challenges for staff.

The day-to-day running of the court is overseen by a Senior Operations Manager, who works closely with the Registrar, the three Senior Legal Managers and also the Head of Legal Operations, who together make up the CAO Management Board. The Board meets regularly and ensures that the CAO is operating effectively and efficiently in supporting the court.

Current Digital Working Practices in the Court of Appeal, Criminal Division

This year has seen the Court of Appeal, Criminal Division continue to implement and adapt our digital working practices in order to ensure that applications and appeals progress as effectively and efficiently as possible. As of this year, paper files will no longer be created in the office.

Hyperlinked grounds of appeal and grounds of opposition/electronic bundles of authorities

Practitioners will be familiar with the digital indexes which are now routinely used in the Court of Appeal, Criminal Division utilising the Digital Case System (DCS) or eJudiciary and the Document Upload Centre (for the small number of non-DCS cases).

Amendments to Criminal Procedure Rule (Crim PR) 39.3(1) (effective from April 2021) now require advocates to:

- Create hyperlinks to DCS in their grounds of appeal and skeleton arguments, rather than producing and lodging annexes comprised of existing material; and
- Provide an electronic copy of any authority identified by the grounds of appeal, or if two more such authorities are identified, electronic copies of each together in a single electronic bundle.

The above requirements also apply to Respondent's Notices (Crim PR 39.6(6)).

Practitioners have adjusted well to these changes and although CAO staff are available to provide support, the following guidance may also assist:

- The most appropriate format for the bundle will be a PDF file. The filename should contain the CAO Reference number, the appellant's surname and a short title for the bundle, i.e. "Bundle of Authorities" or "Appeal Bundle".
- All documents should appear in portrait mode. If an original document is in landscape, then it should be inserted so that it can be read with a 90 degree rotation clockwise. No document should appear upside down.
- The default view for all pages should be 100%.

- All significant documents and all sections in bundles should be bookmarked for ease of navigation, with an appropriate description as to the bookmark. The bookmark should contain the page number of the document.
- All pages in the bundle should be numbered, and if possible by computer generated numbering and not numbered by hand. If computer generated or typed, the number becomes machine readable and can be searched for. Again if possible, the number should be preceded by a letter, whether the letter of the bundle or not as this aids with searching through the bundle.
- Pagination should not mask relevant detail on the original document.
- If amendments need to be made to the bundle, practitioners should liaise with the Criminal Appeal Office and confirm whether a replacement bundle should be served or whether any additions can be lodged as a supplemental bundle.

Evidence Presentation System (EPS)

The EPS has now replaced the Clickshare system which was previously used by practitioners to share digital evidence during court proceedings. This system no longer requires the use of dongles; instead practitioners may connect their devices via a wired connection at the prosecution end of the bench or wireless adapters which can be used elsewhere in the court.

CVP and remote attendance requests (participants and observers)

Common Video Platform (CVP) provided an invaluable lifeline for the work of the Court of Appeal, Criminal Division during the pandemic. Although the current default position is that advocates will attend hearings in person, it is acknowledged that this will not always be possible or reasonable in the circumstances of the case.

In accordance with section 51 of the Courts Act 2003, the Registrar and the Vice-President of the Court of Appeal, Criminal Division have the power to grant permission for remote participation subject to the other represented parties having an opportunity to make representations. It is therefore advised that participants who wish to appear via CVP try to seek the agreement of the other represented party/ parties before making their application.

In accordance with section 85A of the Courts Act 2003, only the Full Court has the power to grant permission for remote observation. Practitioners and others are asked to send any requests for remote observation to courtclerks@criminalappealoffice.justice.gov.uk. The Registrar, List Office and Court Clerks work together in order to finalise the constitutions and ensure that requests are dealt with as quickly as possible. If necessary, CVP links can be arranged by the court staff on a provisional basis subject to the Full Court making the direction at the start of the hearing.

The CAO and the Vice-President of the Court of Appeal, Criminal Division are committed to maintaining the progress that has been made with digital working, continuing to review our processes and making any improvements that are required. CAO staff continue to work closely with HMCTS in order to improve DCS, CVP and eJudiciary. We are also looking ahead and taking steps to prepare for the expansion of the Common Platform and assess its impact on the work of Court of Appeal, Criminal Division.

Supporting Litigants in Person

The number of Litigants in Person in the criminal courts has been growing substantially and this is also reflected in the Court of Appeal, Criminal Division. Over the past year, Litigants in Person accounted for a third of all conviction applications lodged.

Litigants in Person use more judicial and administrative resources because they are unfamiliar with both the law and the procedure of the court. Invariably they often engage in voluminous written/telephone correspondence with staff and they use more lawyer resources within the Criminal Appeal Office (all conviction cases where there is a Litigant in Person are currently allocated to a lawyer as the case progression officer). Historically, the court itself and individual single judges have also felt the strain of what can often be voluminous and un-particularised grounds of appeal, sometimes running into hundreds of pages.

However, it is important that the Litigants in Person are not seen as a burden on the court and that they can access justice and effectively participate in the appeal process. Most Litigants in Person in this jurisdiction are in custody and they have additional hurdles as a consequence. It is important that digital advances in processes do not leave them at any further disadvantage.

To ensure effective participation in the appeal process, Litigants in Person are now given targeted information and advice about what grounds of appeal should look like and can access information on the court process, in hard copy, in a leaflet "Help for Applicants", which has been specifically written by the Criminal Appeal Office for Litigants in Person. This is made available to them in prison, through the collaboration of the Criminal Cases Review Commission and also directly by the Criminal Appeal Office on request and whenever a Litigant in Person lodges/ enquires about an application.

The leaflet is supported by the use of the Easy Read Form NG for both Conviction and Sentence, which were developed through the Criminal Procedure Rules Committee in collaboration with the Criminal Cases Review Commission and other organisations, and specifically aims to remove potential barriers to justice which often exist through complicated court forms. They also help applicants acting without a lawyer to better communicate their case, by providing structure to their grounds of appeal and in enabling them to identify an effective ground of appeal. This helps effective participation in the appeal process as Litigants in Person using the Form can present their application to judges in writing (the first stage of the appeal process) more effectively.

Applications by the Attorney General

Overview

If it appears to the Attorney General ("AG") that a sentence imposed in the Crown Court may be unduly lenient he/she may apply for leave to refer the case to the court for review and the court may increase the sentence. This procedure was introduced by section 36 of the Criminal Justice Act 1988. They may also refer to the court a point of law arising from a case but this does not affect the outcome of the case (see s.36 of the Criminal Justice Act 1972). The AG and Solicitor General ("SG") are referred to as the "Law Officers" and both are government ministers, responsible for providing legal advice to government and overseeing public legal bodies e.g. CPS, SFO and Treasury Solicitors. They are supported by the Attorney General's Office ("AGO"), which is a ministerial department. Both the Attorney and Solicitor General may personally attend the Court of Appeal, Criminal Division to argue a reference.

Only certain more serious offences can be reviewed and any person, who does not need to have been involved in the case, can ask the AGO to consider making a referral. The time limit for making a complaint about a possible unduly lenient sentence ("ULS") is 28 days and the application to the Court of Appeal, Criminal Division must be made no later than 28 days from sentence. There is no provision for extending this time limit and therefore a prompt receipt of the application needs to be provided to the AGO. There are, however, occasions when the AGO may make a "provisional" referral to protect their position (if the deadline is imminent); this may subsequently be withdrawn by the AGO once the case has been considered by the Law Officer. AGO ULS referrals are processed by the Sentence Casework Section within the CAO and are prioritised due it being in the interests of the offender, victim and public for the review of sentence to be completed as quickly as possible (between 6 and 8 weeks, depending on the offender's earliest date of release or if they are no longer in custody).

The number of ULS applications submitted by the AGO has more than tripled in 3 years (from 62 in October 2019 to 222 in September 2022). There is an agreed protocol in place between the CAO and AGO, which includes standing directions from the Registrar on the case information that must be provided to the court. The Registrar and the AGO continue to review the protocol periodically to ensure that both Departments are maintaining their responsibilities for processing ULS applications within the set timeframes, particularly given the challenges brought about in the event of a significant increase in sentence.

Attorney General's Reference on Question of Law (No. 1 of 2022) [2022] EWCA Crim 1259, [2023] Cr App R 1

Historically, the Attorney General has not referred many questions of law to the court, but during the legal year, the Attorney General referred the following questions for the opinion of the court, pursuant to section 36 of the Criminal Justice Act 1972:

Question 1:

Does the offence of criminal damage fall within the category of offences, identified in *James v DPP* [2016] 1 WLR 2118 and *DPP v Cuciurean* [2022] EWHC 736 (Admin), where a conviction for the offence is – intrinsically and without the need for a separate consideration of proportionality in individual cases – a justified and proportionate interference with any rights engaged under Articles 9, 10 and 11 of the European Convention on Human Rights ('the Convention')?

Question 2:

If not, and it is necessary to consider human rights issues in individual cases of criminal damage, what principles should judges in the Crown Court apply when determining whether the qualified rights found in Articles 9, 10 and 11 of the Convention are engaged by the potential conviction of defendants purporting to be carrying out an act of protest?

Question 3:

If those rights are engaged, under what circumstances should any question of proportionality be withdrawn from a jury?

The Court of Appeal said, in summary, that prosecution and conviction for causing 'significant' damage (damage which is not 'minor' or 'trivial'), to property during protest or for acts which are violent and not peaceful would fall outside the protection of the Convention; and that given the nature of cases that are heard in the Crown Court, questions of proportionality should not be left to a jury.

DPP v Ziegler; DPP v Cuciurean; James v DPP

In *DPP v Ziegle*r [2021] UKSC 23 the Supreme Court reinstated a decision by a district judge that a conviction for obstruction of the highway would have been a disproportionate interference with the defendant's human rights.

Ziegler was initially interpreted in a number of cases at first instance as establishing that in any criminal case where there is prima facie interference with Convention rights, the court must consider whether the interference with those rights arising from a conviction is a proportionate one.

It has since been established, by the decision of the High Court in *DPP v Cuciurean* [2022] EWHC 736, that this was a misunderstanding of the decision in *Ziegler*. The court in that case held that there exists a category of offences conviction of which – intrinsically and without the need for a separate consideration of proportionality in individual cases – constitute a justified and proportionate interference with the rights protected by Articles 10 and 11. In reaching this conclusion, the court reiterated a distinction identified in *James v Director of Public Prosecutions* [2016] 1 WLR 2118 between offences in relation to which it is necessary for the prosecution to prove that any restriction on Convention rights is proportionate ('the first category') and offences where, once the specific ingredients of the offence have been proved, the defendant's conduct has by definition: *"gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights. 'The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado'"* [para. 58] ('the second category').

Attorney General's Reference: Judgment of the Court of Appeal, Criminal Division

The judgment, handed down on 28 September 2022, arises from a reference in which the Attorney General sought the opinion of the court on three questions of law. The questions arose from the trial, and subsequent acquittal, of four protestors (dubbed the 'Colston four') in Bristol Crown Court for allegations of criminal damage to the statue of Edward Colston during the 2020 Black Lives Matter protests.

The fundamental issue in the reference concerned the way English law, as a matter of substantive law and procedure, ensured a criminal conviction was compatible with a defendant's rights under Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) of the Convention.

The trial judge proceeded on the basis that a conviction would engage the defendants' rights under Art. 9 and 10 of the Convention and directed the jury that in order for the prosecution to prove that the defendants had acted "without lawful excuse", it was necessary for the jury to be sure, on the facts of the defendants' cases, that a conviction would have been a proportionate interference with the defendants' rights under those articles (following the Supreme Court's decision in *Zeigler* [2021] UKSC 23). It should be noted that the judge did not have the benefit of the Divisional Court's consideration in *Cuciurean* and issued his jury directions in circumstances where the implications of *Ziegler* were yet to be considered by the High Court.

The principal issue referred to the court by the Attorney General was whether the judge's approach was correct, or whether the judge's direction was unnecessary, as the offence of criminal damage, through proof of its statutory ingredients, intrinsically constituted a proportionate interference with rights under Arts. 9 and 10 (and the right to lawful assembly under Article 11). The secondary issue concerned how the trial court should approach the issue of proportionality if it did fall to be determined on the facts of individual cases.

The court concluded that prosecution and conviction for causing significant damage to property during protest would fall outside the protection of the Convention either because the conduct in question was violent or not peaceful, alternatively (even if theoretically peaceful) prosecution and conviction would clearly be proportionate [para. 115].

Were a prosecution for criminal damage which is minor or temporary to be initiated arising out of a protest, the Strasbourg case law suggests that there would need to be a case-specific assessment of the proportionality of conviction at least in connection with damage to public property. The court expects that such prosecutions would not be launched because they too would be a disproportionate reaction to the conduct in question [para. 116].

It follows that the answer to the principal question is that the offence of criminal damage does not automatically fall within the category of offences identified in *James v DPP* [2016] 1 WLR 2118 and *DPP v Cuciurean* [2022] EWHC 736 (Admin) whereby proof of the relevant ingredients of the offence is sufficient to justify any conviction as a proportionate interference with any rights engaged under Arts. 9, 10 and 11, without the need for a fact-specific proportionality assessment in individual cases. That said, the circumstances in which such an assessment would be needed are very limited [para. 116].

Looking at the secondary issue, Arts. 9, 10 and 11 are not engaged in circumstances where criminal damage is caused during a protest which is violent or not peaceful, or when the damage is inflicted violently or not peacefully, therefore no question of proportionality arises. Moreover, prosecution and conviction for causing significant damage to property, even if inflicted in a way which is "peaceful" could not, in the court's view, be disproportionate in Convention terms [para. 120].

In cases involving minor or trivial damage to property, the Strasbourg case law suggests that conviction may not be a proportionate response in the context of protest, however, the court could not conceive that the Convention could be used to protect from prosecution and conviction those who damage private property to any degree than is other than trivial [para. 121].

The circumstances in which the statue was damaged did not involve peaceful protest, the toppling of the statue was violent and the damage caused was significant. On both these bases the conduct fell outside the protection of the Convention [para. 123].

It is worth noting that the points arising from the decision in *Zeigler* were argued in the Supreme Court in *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* on 19 and 20 July 2022. Judgment was reserved and was given by the Supreme Court after the end of the period covered by this Review.

Consideration of Whole Life Orders

R v Stewart & Ors [2022] EWCA Crim 1063 (Lord Burnett of Maldon LCJ, Dame Victoria Sharp PKBD, Holroyde LJ VP, Sweeney J and Johnson J)

On 29 July 2022, a five-Judge constitution of the Court, presided over by the Lord Chief Justice, considered four conjoined applications for leave to appeal against sentence and three Attorney General References arguing that the sentences passed were unduly lenient. The applications involved consideration of the most high profile murder cases and the most serious sentence available in law, the whole life order.

Whole life orders had been imposed in the Crown Court on two of the Defendants, Ian Stewart and Wayne Couzens. The Attorney General sought to argue that they should have been imposed for another convicted murderer, Jordan Monaghan, and that the minimum sentence imposed on Emma Tustin for the murder of a young child in her care was unduly lenient and the seriousness of the murder was particularly high.

In its carefully considered judgment, the court first set out the statutory framework in the Sentencing Act 2020 and Schedule 21 to that Act, which determined the circumstances where the starting point would be a whole life order. The court then carefully analysed the application of that statutory framework and affirmed/reproduced the key principles which had been established from the authorities [19]:

i) For offences committed before 28 June 2022, a whole life order may only be considered where a sentence of life imprisonment is imposed on an offender who is over the age of 21 (section 321(3)(a)). Section 126 of the Police, Crime and Sentencing Act 2022 extends the availability of a whole life order to offenders aged 18, 19 and 20 from that date.

ii) A whole life order may only be imposed if the court considers that the seriousness of the offence(s) is such that it should not make a minimum term order (section 321(3)(b)).

iii) "A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life. Often, perhaps usually, where such an order is called for the case will not be on the borderline. The facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life. Indeed, if the judge is in doubt this may well be an indication that a finite minimum term which leaves open the possibility that the offender may be released for the

final years of his or her life is the appropriate disposal. To be imprisoned for a finite period of thirty years or more is a very severe penalty. If the case includes one or more of the factors set out in [the schedule] it is likely to be a case that calls for a whole life order, but the judge must consider all the material facts before concluding that a very lengthy finite term will not be a sufficiently severe penalty." *Jones* at [10].

iv) It is "a sentence of last resort for cases of the most extreme gravity" which is "reserved for the few exceptionally serious cases" where "the judge is satisfied that the element of just punishment requires the imposition of a whole life order" – *Wilson* at [14], *Reynolds* at [5(iv)]. In a borderline case, if the judge is in any doubt as to whether this standard is reached, a minimum term order is likely to be the appropriate disposal – *Jones* at [10], *Reynolds* at [5(ii)].

v) The statutory scheme "does not shut the door" on the possibility of a whole life order where a discretionary sentence of life imprisonment is imposed for a crime other than murder, but such a case would be "wholly exceptional" – *McCann* at [89]. All bar one of those currently serving whole life orders were convicted of murder and, in most cases, more than one offence of murder.

vi) In assessing whether the seriousness of the offence(s) warrants a whole life order, the court must have regard to the general principles set out in Schedule 21 (section 322(3)). Each case will depend critically on its particular facts. The sentencing judge must undertake a careful analysis of all the relevant facts as "justice cannot be done by rote" – *Peters* at [5], *Reynolds* at [5(i)], *Jones* at [6]. Schedule 21 must be applied in a flexible, not rigid, way to achieve a just result – *Height* at [29]. Because each case depends on its own facts, comparison with other cases is unlikely to be helpful. It is the application of the principles to a careful assessment of the relevant facts of the case that is important.

vii) The court must first identify the appropriate starting point. Where the seriousness of the offence(s) is exceptionally high, then the starting point is a whole life order. Where the seriousness of the offence(s) is "particularly high" the starting point is a minimum term of 30 years. Otherwise, the starting point will be 15 or 25 years depending on the circumstances.

viii) Cases of murder involve taking human life where the offender intended to kill or cause really serious harm. All murders are necessarily extremely serious crimes. For that reason, they attract the mandatory life sentence. The requirement for the seriousness to be "exceptionally high" before a whole life order is made arises in that context. The case must be exceptionally serious, even in the context of murder. The period that an offender is required to serve, in the case of a minimum term before the parole board can consider release, encompasses every type of murder from true mercy killings at one end of the spectrum to the most evil at the other.

ix) The period that a murderer must serve does not reflect the value of the life taken away and does not attempt to do so.

x) Paragraphs 2(2) and 3(2) of Schedule 21 list the types of case where the seriousness is "normally" to be regarded as "exceptionally high" or "particularly high". These are not exhaustive lists. The legislation does not exclude the possibility that other cases might reach the indicated level of seriousness, though such cases are "probably rare" – *Height* at [28] The same applies in reverse: a case that nominally comes within the ambit of paragraphs 2(2) or 3(2) may not reach that level of seriousness because of the particular facts – *Height* ibid. The conclusion in *Height* was that it will be rare for a case that does not come directly within the scope of paragraph 2(2) to be regarded as being exceptionally serious.

xi) Having determined the appropriate starting point, the court must consider the aggravating and mitigating factors. These may result in a departure from the starting point. If the starting point is a whole life order, then the balance of mitigating factors and aggravating factors might result in the imposition of a minimum term order. That balance is not struck by listing aggravating and mitigating factors and then considering which list is the longer. Both aggravating and mitigating factors may vary in potency. The statutory factors which indicate that a whole life order should be considered would themselves normally be aggravating factors. Care must be taken not to double count. Conversely, if the starting point is a minimum term order, then the balance of aggravating factors and mitigating factors might result in the imposition of a whole life order.

xii) A plea of guilty is relevant when determining whether the seriousness of a case is exceptionally high and requires a whole life order – *Jones* at [15], *Reynolds* at [5(iii)].

xiii) If the test in section 321(3) is satisfied, then a whole life order must be imposed. Otherwise, a sentence of life imprisonment must be subject to a minimum term order (section 321(2)).

xiv) A whole life order means that the statutory early release provisions do not apply. It does not preclude the possibility of release by the Home Secretary on compassionate grounds. A decision whether to release on compassionate grounds may be challenged in judicial review proceedings. The Grand Chamber of the European Court of Human Rights has confirmed (in agreement with this court's decision in *McLoughlin*) that "the whole life sentence... [is] in keeping with Article 3 of the Convention" – *Hutchinson* at [72].

xv) The assessment of seriousness is for the sentencing judge. On an appeal, or a reference by the Law Officers, this court will not substitute its own assessment for that of the sentencing judge. On an appeal against the imposition of a whole life order or a reference by the Attorney or Solicitor General this court will interfere only if the sentence was manifestly excessive or unduly lenient, as the case may be: *Peters* at [9].

The court applied those key principles to each of the cases before it and quashed the whole life order for the appellant, Ian Stewart, substituting a minimum term.

However, the court affirmed the sentence of a whole life order for Wayne Couzens (the only Defendant who ultimately received a whole life order in the cases before the court). In that case the court found that the particular facts merited a starting point of a whole life order, but it rejected the argument that any new category of case had, or could be, created. That was a matter for Parliament.

With respect to the Attorney General References, the court increased the minimum term imposed on Jordan Monaghan, but found that the sentence imposed on Emma Tustin was not unduly lenient. Thomas Hughes' determinate sentence for manslaughter was subsequently increased on the basis the court found it was unduly lenient.

The cases confirmed that the imposition of a whole life order was rare and reserved for cases which were exceptionally serious, even in the context of murder.

Other 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 three or five judges. It is not possible to report on every case heard, but the following are a selection of cases of note.

Procedure

R v Field **[2022] EWCA Crim 316 (Dame Victoria Sharp PKBD, Sir Nigel Davis and Sir Stephen Irwin) – re-opening of a final decision (Crim PR 36.15)**

In interpreting Crim PR 36.15, the court held that an application to re-open a final decision was an exceptional step, and the procedure could not be invoked simply as a means of "having a second go" [48]. The finality of judicial decisions in the Court of Appeal, Criminal Division was fundamental when interpreting the scope of Rule 36.15. "The wider public interest in the good administration of justice and the interests of the victim and their family also had to be considered" [38] per Dame Victoria Sharp President. The subjective perception of a "real injustice" felt by an appellant or advocate was irrelevant [49]. It was inappropriate and wrong to make such an application with the aim of another constitution of the court reconsidering the merits of an appeal, by means of claims of procedural unfairness or bias which had no sustainable basis. To do so would be an abuse of process. The court would be vigilant to ensure that such applications were confined to those narrow and exceptional circumstances where the Rule was properly to be invoked.

R v Llewelyn **[2022] EWCA Crim 154 (Fulford LJ VP, Cutts J and Cockerill J) – Retrials pursuant to sections 7 and 8 of the Criminal Appeal Act 1968**

A retrial was ordered under section 7(1) Criminal Appeal Act 1968 with an order (section 8(1)) that the Defendant be arraigned within two months. He was, in fact, arraigned after four and half months. Before the retrial started the Defence applied to quash the indictment. The Judge refused on the basis that there had been a presumed waiver to the late arraignment. The Prosecution argued that there had been no objection on arraignment, Court of Appeal, Criminal Division could grant leave to arraign out of time and lack of a defective arraignment did not render the proceedings invalid. The court held that the statute set down a restricted timetable for arraignment and the bespoke procedure for the Court of Appeal, Criminal Division alone to grant leave to arraign outside the two-month time limit. Parliament had put these protections in place and they were not to be avoided, intentionally or otherwise. The court had already made clear in *R v Al-Jaryan (Muner) [2020] EWCA Crim 1801* that the pandemic did not allow these statutory deadlines to be

overlooked. The summary of the principles can be found at [25] and in *R v Pritchard [2012] EWCA Crim 1285*.

Evidence

R v Dunster **[2021] EWCA Crim 1555 (Edis LJ, Turner J and HHJ Karu) – Material provided to the jury after the summing-up**

The Judge, with the agreement of Counsel, provided the jury with further information from the DNA scientists' statements beyond that contained in the Agreed Facts. The Judge referred to his understanding that there was no longer an absolute rule prohibiting additional material being placed before the jury after it had retired to consider a verdict.

The court held that the Judge was in error, but dismissed the appeal given the overwhelming nature of the evidence. The court reviewed all the authorities and concluded "it used to be understood that there was a very firm rule that evidence cannot be admitted after the retirement of the jury, but more recent authorities confirm that there is no absolute rule to that effect. The question is what justice requires."

Guidance was provided at [32] on the correct principles to be applied and that "it is likely that new information will only be found to be in the interests of justice at that very late stage in the case on very rare occasions and where in particular: 1. It answers a question asked by the jury; 2. It is neutral or at least incontrovertible; and 3. It is clear that a Defendant is not in any way disadvantaged by the stage at which it is admitted." D's consent was highly relevant to the decision [31].

Developments in the Criminal Law

Guilty Pleas

R v AB and Ors **[2021] EWCA Crim 2003 (Edis LJ, Hilliard J and HHJ Dean KC) – Unsolicited indication of sentence, *Goodyear* and pressure to plead guilty**

The court considered both an appeal against conviction and an Attorney General's Reference, heard on the same day, in a case where a judge had given an unsolicited indication that should the Defendant plead guilty, a non-custodial sentence would result. The sentences were subsequently held by the court to be unduly lenient. However, the appeals against conviction were allowed (and a retrial ordered).

The case is a salutary lesson and reminder for all counsel and judges to follow the important procedure in *Goodyear* notwithstanding the pressure that the backlog of cases was causing in the Crown Courts.

In summary, the issues were: (i) the Judge had given an unsolicited indication as to sentence; (ii) the indication arose in the course of a meeting in chambers between counsel and the Judge, where no record was made of what was said; (iii) Prosecuting Counsel acquiesced in, or lent support to, the indication; (iv) Defence Counsel did not advise their clients that there was a possibility that any sentence passed might be referred by the Attorney General to the Court of Appeal as potentially unduly lenient; and (v) Prosecuting Counsel did not remind the Judge or Defence Counsel of that possibility. The failures to follow procedure were significant.

Edis LJ: [20] "The real problem, though, was that the indication that there would be no immediate custodial sentence in the event of guilty pleas on that day was so far below the proper level of sentencing that however it was given it would impose real pressure on the Defendant." He also noted "We do not say that this will be the case whenever a judge indicates that there will be no immediate custodial sentence, and thereby indicates an unduly lenient sentence. It is a matter of degree."

R v Tredget **[2022] EWCA Crim 108 (Fulford LJ VP, Hilliard J and Lord Hughes) – Appeals against conviction where the Defendant pleaded guilty – key principles**

The court confirmed that there are three categories of case in which the Court of Appeal, Criminal Division has jurisdiction to entertain appeals against convictions grounded on pleas of guilty:

1. **Where the guilty plea was vitiated**

   Examples included: where an equivocal or an unintended plea was entered; where a guilty plea was compelled as a matter of law by an adverse and wrong ruling by the trial Judge which left no arguable defence to be put before the jury (e.g. *Kakaei [2021] EWCA Crim 503)* as opposed to simply making the Defendant's case more difficult; where the Judge had brought improper pressure to bear on the Defendant *(Nightingale [2013] EWCA Crim 405)*; where erroneous legal advice had been given which was central to the plea *(Saik [2004] EWCA Crim 2936)*, or which deprived D of a defence which would probably have succeeded: *(Boal [1992] Q.B. 591; R v K [2017] EWCA Crim 486)*. [154] – [159].

2. **Cases of abuse of process where it would be unfair to try the Defendant**

   Examples would include: entrapment (see *Togher* [2001] 3 All ER 463); or when there was a fundamental breach of the accused's right to a fair and public hearing under art.6 of the ECHR (e.g. *Hanif [2014] EWCA Crim 1678*) [160] – [161].

3. **The small category of case where it was established that the Defendant had not committed the offence**

   This category would apply only where it was established that the Defendant had not committed the offence, not that they might not have committed it. The test was not one of 'legitimate doubt; it had to be demonstrated that the appellant was not culpable' (see *Jones (Noel) [2019] EWCA Crim 1059*). The present court disapproved of the approach that had been adopted in the Court of Appeal, Criminal Division in the earlier appeal in this case (and in *Brady (Tania Marie) [2004] EWCA Crim 2230*). Where the Defendant had entered pleas of guilty publicly in open court, the Defendant did not lack capacity and knew what he had done and had received appropriate legal advice, the approach to appeals was different to that historically applied to convictions by a jury following a not guilty plea. [169].

R v Johnson **[2022] EWCA Crim 790 (Fulford LJ VP, Jay J and Foxton J) – Equivocal pleas**

The court applied Tredget, the Defendant falling into the first category. The court said that the unrepresented Defendant had pleaded guilty but, in the opinion of the court, had expressed his clear doubt, shortly before he pleaded guilty, as to whether he knew at the time of the alleged offences that what he was doing was wrong. That was inconsistent with his guilty pleas. The court emphasised the distinction between cases where an equivocal plea is entered and cases where an unequivocal plea has been entered but the defendant seeks to change the plea.

In this case the defendant had entered equivocal pleas. He had added a clear qualification immediately before the indictment had been put to him (questioning whether he had mens rea) which may have meant that he was not guilty of the offences. At para [35] the court stressed "...that in the case of an undefended defendant who pleads guilty, care should always be taken to see that he or she understands the elements of the offence, especially if there are indications before the judge that the accused may have a defence".

In this present case although the judge had taken care he had failed to resolve that important question of whether he knew what he was doing at the relevant time was wrong.

Directions to the Jury

R v BQC **[2021] EWCA Crim 1944 (Popplewell LJ, Cutts J & HHJ Blair KC) – Importance of written directions to the jury**

The court quashed the defendant's convictions as the oral directions given to the jury in the summing-up were "very unsatisfactory" and "seriously flawed". The court highlighted the four important purposes for written directions:

1. Assists in clarity of thought and exposition
2. Direction can be given once in a clear and concise format
3. Counsel can be given a draft on which to assist the Judge prior to summing up and
4. The jury will be able to take them in better and use as an aide-memoire [71].

The consequences of not using this important procedural tool are emphasised in [72]. The court also commented on the use of section 120(2) Criminal Justice Act 2003.

R v Cooper **[2022] EWCA Crim 166 (Andrews LJ, Cutts J and HHJ Thomas KC) – Circumstantial evidence direction**

The court dismissed a renewed application for leave to appeal against conviction where it was argued that the Judge had failed to give an adequate direction on circumstantial evidence in response to a jury question on the basis he should have referred to the exact language of the suggested direction in the Crown Court Compendium, which uses the phrase: 'all other possibilities consistent with innocence can be excluded'. The court rejected that argument, pointing out that it is clear from *Kelly [2015] EWCA Crim 817* [39] that no particular form of language needs to be used, provided that the overall direction is fair and balanced. The court further noted that the direction was discussed with counsel beforehand and complied with the guidance in the Crown Court Compendium, being described by the single Judge as 'impeccable'.

Section 34 inferences from failure to mention facts

R v Noor **[2021] EWCA Crim 1767 (Macur, LJ, Carr LJ and Murray J)**

The court found that a direction under section 34 will rarely, if ever, be appropriate in relation to the failure to mention an admittedly true fact, since the adverse inference under section 34 is that a matter not mentioned at interview is unlikely to be true *(Webber [2004] UKHL 1)*.

What is vital is to scrutinise closely whether the "fact" that is not mentioned is in any way different from that relied on in the prosecution case, and if on that basis a section 34 direction is merited, to make clear to the jury precisely which facts that were not mentioned are capable of giving rise to the adverse inference.

R v Harewood and Rehman **[2021] EWCA Crim 1936 (Popplewell LJ, Knowles J and HHJ Blair KC)**

The court considered whether an adverse inference could be drawn in circumstances where there was an absence of information before the jury as to what questions were asked of the defendant in interview. Referring to the conditions set out in *R v Argent [1997] 2 Cr App R 27* as to the operation of section 34, the court observed that there was no requirement that an unmentioned fact must be one about which the accused has specifically been asked a question. The court stated that the statutory criterion was simply whether a defendant was being interviewed under caution and was expressly, or 'by necessary implication', invited to give his account of the matter. (*R v Green [2019] EWCA Crim 411* being referred to as illustrative of this point).

Substantive Law

R v Bani & Others **[2021] EWCA Crim 1958 (Edis LJ, May J and Sir Nicholas Blake) – Section 25 Immigration Act 1971; small boat cases**

The court considered a number of conjoined cases. It found that for the offence of facilitating a breach of immigration law to be made out, it will usually be appropriate for the offence to be predicated on a breach of sections 1 and 3 of the Immigration Act 1971. It will therefore be necessary to show that the act facilitated an entry into the UK or an attempted entry into the UK.

The court held that entry means entry without leave. Therefore the entry would have to be somewhere without a designated area for processing people who arrive in the UK without leave but who have not at that stage entered because they have not passed through immigration controls. [104] and [105] deal with "conditional intent" where in setting off from France the migrants have a number of contemplated outcomes to their journey: landing at a port with a designated immigration area (arrival, not entry), being intercepted (being in detention and therefore not entering) or landing on a beach or at a port without a designated area (entry).

In hoping that this situation would be unique, the court said at [109] the *Boal* test for overturning a conviction following a guilty plea does not apply where: "… [a] guilty plea was not entered simply because counsel gave wrong advice. It was entered because a heresy about the law had been adopted by those who were investigating these cases, and passed on to those who prosecuted them, and then further passed on to those who were defending them and finally affected the way the judges at the Canterbury Crown Court approached these prosecutions". The court also questioned the value of (fresh) expert evidence of cultural context [96] – [98].

AAD and Others **[2022] EWCA Crim 106 (Fulford LJ VP, Knowles J and Sir Nigel Davis) – Section 45 of the Modern Slavery Act (Victims of Trafficking)**

The court considered a number of cases and answered nine questions posed by the Registrar, as follows:

1. **Is an SCA conclusive grounds decision admissible on appeal?**

   The court emphasised that the test of admissibility for fresh evidence on appeal is different to admissibility for the purposes of trial. A decision of the Single Competent Authority ("SCA") is potentially admissible on appeal, as has already been stated in numerous judgments. The court reiterated the reasoning in *Brecani* that an SCA decision is, however, unlikely to be admissible at trial because SCA decision makers are not "experts" within the definition of the criminal law. The jury are capable of deciding whether the account given by the alleged victim of trafficking ("VOT") is true without assistance [79-89].

2. **Is the decision in *Brecani* consistent with previous authorities of the Court of Appeal, Criminal Division?**

   The court found that it was consistent and distinguished the decisions in *JXP* (consistent and credible applicant) and *Rogers v Hoyle* (true expert evidence) [90-100].

3. **Is the decision in *Brecani* consistent with the UK's international obligations and European case law with regard to the protection of VOTs?**

   The key issue in the European case of VCL was *"that the CPS had disagreed with the conclusion of the Competent Authority but for no substantial reason"* [102].

   The court repeated that *Brecani* was dealing with the admissibility of an SCA decision at trial and not the material to which the Prosecution should have regard when deciding whether to bring a criminal charge. It was therefore entirely consistent with the UK's international obligations [103-104].

4. **Is the court able to give further guidance vis-à-vis the observation in Brecani (at [58]) that expert evidence on the question of trafficking and exploitation may be admissible at trial, *"particularly to provide context of a cultural nature [...]" or "of societal and contextual factors outside the ordinary experience of the jury"?***

   The court stated that it does not matter that the jury have not had personal experience of trafficking. Jurors will usually lack *"first-hand experience of the circumstances of offences"*. The court rejected submissions that a trafficking expert can express an opinion as to the plausibility and consistency of the defendant's account, comment on the vulnerability of the defendant or express

a view as to whether a given set of facts meets the legal definition of trafficking. They held, however, that there may be,

"discrete issues that properly require explanation by way of expert evidence, for instance as to the defendant's psychiatric or psychological state or the detailed mores of people trafficking gangs operating in countries that are outside the court's own knowledge and experience"

but the court stressed that:

"in the latter instance, this does not require any comment by the expert as to the consistency of the account given by the defendant." [86-87].

5. **When on an appeal might it be appropriate or necessary for witnesses (appellant, expert, trial representative etc.) to be required to attend to give evidence relating to whether the appellant was trafficked in VOT cases?**

   The court observed that:

   "if the question of the individual's status as a victim of trafficking was a live issue in the Crown Court, this contention will, in all likelihood, have been properly explored in evidence during the trial. In contrast, on an appeal to the Court of Appeal, Criminal Division if this defence was not investigated properly or at all in the court below, the Court of Appeal, Criminal Division will need to determine how best to resolve the merits of any application or appeal in this regard. The court may require oral evidence to be given, including from the applicant/appellant in order to substantiate, for instance, the history relied on, and it may order the production of any relevant documents, including reports and the conclusive grounds decision, if in existence. This will be a highly fact-specific judgment and it would be unhelpful to attempt to lay down any guidance as to the circumstances in which the court will resolve an application or appeal solely on the basis of written reports, decisions by bodies such as the SCA and other relevant materials and, conversely, when it will (additionally) require oral evidence" [82]

   but also held that:

   "there may be cases when the court will consider that the account given by the applicant/appellant requires testing by way of appropriate questioning. This is necessary to deal, for instance, with reports or decisions that are based on "controversial accounts" (see Brecani at [45] and R v Turner [1975] QB 834, 840 E to F)" [84]

And:

"We stress that R v AAJ demonstrates that there will be appeals when it will be wholly unnecessary for oral evidence to be adduced. However, if the suggested trafficking is based, for instance, on unsatisfactory and untested hearsay evidence from the appellant, the court may express the view that it would be preferable for the appellant to give evidence for the proper resolution of the issues on the appeal, thereby enabling his or her account to be appropriately tested" [108].

6. **When the parties disagree, to what extent and at what stage might the court properly be involved in the question of whether live evidence is to be called?**

   Whether live evidence is called is always, ultimately, a matter for the court:

   "Whether it will do so, or when, will depend on the all the circumstances of the case. Where the parties are agreed that no oral evidence is needed, they should in good time inform the Criminal Appeal Office accordingly. This will then be notified to the Vice-President or presiding Lord Justice, who can then confirm or reject their position" [109].

7. **Is it still possible to argue on appeal that prosecution of a Victim of Trafficking was an abuse of process?**

   In other words, *"Does it remain possible, therefore, following the introduction into law of the defence under section 45 (see [64] above), for a defendant to argue (whether at trial before the judge in the absence of the jury or on appeal) that the prosecution was an abuse of process by reason of a failure on the part of the prosecution to apply its own policy guidance"* [110].

   Having considered a number of relevant authorities in detail, the court concluded that abuse of process does remain available in an exceptional case, and significantly, the court departed from the decisions in the cases of DS and A in this respect [see 142 for a summary of their conclusions, and more generally 111-143].

8. **Is the definition of "compulsion" as set out in VSJ [2017] EWCA Crim 36 at [21] and section 45 Modern Slavery Act 2015 too narrow?**

   The statutory language and intention of Parliament is clear:

   "compulsion and causation self-evidently have entirely different meanings and the legislature decided to adopt the approach of the former" [145].

9. **Can a Victim of trafficking seek to argue that a conviction following a guilty plea is unsafe?**

   The court referred to the recent decision of *Tredget* [2022] EWCA Crim 108, and the three categories of case (albeit not a closed list) where a conviction may be overturned following a guilty plea – a) equivocal or unintended plea, plea compelled as a matter of law following an adverse and wrong ruling or plea as a result of improper pressure or incorrect advice, b) abuse of process or c) where the appellant did not commit the offence, i.e. his plea was false (see *Tredget* at [154-162]) [155-157].

R v Magson **[2022] EWCA Crim 1064 (Lord Burnett LCJ McGowan J and Henshaw J) – householder defence/self-defence**

The sole ground of appeal against conviction was that the judge erred in not summing up the issue of self-defence based on sections 76(5A) and (8A) of the Criminal Justice and Immigration Act 2008 ("the 2008 Act"). Counsel argued that the appellant was a householder and that if the jury concluded that the victim had entered as a trespasser or had become a trespasser after the appellant had refused to let him into the property, then she was entitled to rely on the householder defence.

The court considered the statutory householder defence and set out the relevant statutory provisions. It cited *R (Collins v Secretary of State for Justice) [2016] EWHC 33 (Admin) [2016] 2 WLR 1303* where Sir Brian Leveson, noted that if the degree of force used by a householder was disproportionate, he or she may or may not be regarded as having acted reasonably in the circumstances: the statutory provisions simply mean that force is not by law automatically unreasonable in householder cases simply because it is disproportionate, provided it is not grossly disproportionate: see paras [33] and [34].

The court said that approach was approved in *Ray [2017] EWCA Crim 1391*, describing the common law position as having been "slightly refined" by the statute in householder cases to the extent that even if the degree of force used was disproportionate, it might nevertheless be reasonable, depending on the circumstances of the case as the defendant believed them to be: para [26].

In *Cheeseman [2019] EWCA Crim 149*, the court said that the question arose whether the householder defence applied where the deceased had entered the appellant's room in an army barracks with the appellant's consent, but then became violent and refused to leave when asked, thereby potentially becoming a trespasser. This court emphasised that – as appears from the wording of section 76(8A)(d) itself – the question is not whether the victim was or became a trespasser as a matter of law, but whether the defendant believed him to be a trespasser".

Sentencing

R v Jex & ors **[2021] EWCA Crim 1708 (Edis LJ, Turner J and HHJ Karu) – committals for sentence**

The court considered conjoined appeals/applications for leave to appeal against sentence and addressed a number of technical issues arising from committals for sentence. The court stated that the purpose of the Sentencing Code was to clarify the statutory basis of sentencing and not to change it. The accuracy or otherwise of Police National Computer records was of serious concern to the court *(this latter issue has arisen more than once in the last 12 months; in another case a suspended sentence order had been unlawfully activated twice)*.

R v Uddin **[2022] EWCA Crim 751 (Holroyde LJ, McGowan J and Choudhury J) Whether lawful to suspend a minimum sentence for a repeat offence involving a weapon or bladed article**.

On an application by the Attorney General to refer a sentence as unduly lenient, the court considered whether there was power to suspend a sentence where a minimum sentence applied pursuant to section 35 of the Sentencing Code for a repeat offence involving a weapon or bladed article.

The court found that although lawful, suspending such a sentence would only rarely be appropriate, because in most cases the suspending of the sentence would undermine the punitive and deterrent effect which Parliament plainly intended the minimum sentencing provisions to have. It concluded that there will be few circumstances in which a court concludes that the imposition of an appropriate custodial sentence would not be unjust but, notwithstanding the clear intention of Parliament, that the sentence can nonetheless be suspended.

R v Brown **[2022] EWCA Crim 6 (Lord Burnett LCJ, Singh LJ and Goss J) – sentencing 'protest' cases**

This case provides a useful comparator to the leading 'protest' decision in *Roberts [2018] EWCA Crim 2739*. It shows that immediate custodial sentences can be justified in some cases to reflect the degree of disruption occasioned to the public, despite the particular circumstances of the offender. These are difficult cases to sentence, as the court recognised here. The Imposition of Community and Custodial Sentences guideline says that a 'realistic prospect of rehabilitation' is a factor indicating that it may be appropriate to suspend a prison sentence. In 'protest' cases, however, even where the Defendant is of positive good character, the Defendant's avowed determination to continue with disruptive protest in the future must surely mean that there is no such realistic prospect.

R v Ahmed **[2021] EWCA Crim 1786 (Edis LJ, Knowles J and HHJ Marson KC) – discretionary life sentences**

The court considered the continuing existence of the common law discretionary life sentence for offenders aged 21 and over and the correctness of the test in *Ali [2019] EWCA Crim 856* was confirmed. When deciding whether to impose a life sentence, the offender must have been convicted of a serious offence and there must be grounds for believing that they may remain a serious danger to the public for a period that cannot be reliably estimated at the date of sentence. That risk could only be managed by the imposition of a discretionary life sentence.

R v Limon **[2022] EWCA Crim 39 (Holroyde LJ, Lavender J and Sir Nigel Davis) – Historical sexual offending – relevance of sentencing regime applicable at time of offending**

The defendant was convicted of offences under s.14 Sexual Offences Act 1956 committed when he was aged between 14 and 17 but charged several years later. The maximum sentence for each offence for an adult would have been 10 years, but for a young offender at that time it was 12 months detention. The court considered the correct approach to sentencing when the maximum sentence available to the court, if the offender had been convicted at the time of the offences, would by reason of his age have been subject to a restriction which does not apply to an adult. An Article 7 argument was rejected, but the court went on to say that the fact that the Defendant had crossed a significant age threshold between the time of the offending and the date he was convicted, and the passage of time did not make him any more culpable now than he was at the time of the offending. Even though the Defendant was now aged 41, the principles in the Sentencing Children and Young Persons guideline of 2017 (section 59(1) Sentencing Code; every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, unless it is satisfied that it would be contrary to the interests of justice to do so) were relevant, and the disposal had to be tempered by reference to the maximum sentence which could have been imposed on him at the time of the offending – namely 12 months detention. Holroyde LJ added that often the application of these principles will arise in a case where the Defendant is a young adult when convicted of offences committed as a child a comparatively short time earlier. But there is no reason not to apply them also to a case in which many years have passed between the offending and the conviction.

Confiscation

R v Nadia Saroya **[2022] EWCA Crim 602 (Edis LJ. May J. DBE and HHJ Potter) – Criminal Lifestyle offences and continuing offences under section 75(2)(c) Proceeds of Crime Act 2002**

The applicant was convicted of an offence under section 111A(1)(b) of the Social Security Administration Act 1992. She had claimed and was paid housing benefit amounting to £47,640.23 from 27 December 2011 to at least until 5 February 2017. The charge which was brought against her alleged a single act in April 2012, namely the furnishing of a fraudulent rental agreement.

In confiscation proceedings she was ordered to pay a sum of £404,179.82 and on appeal she argued that the offence was not a continuing offence, and did not come within s.75(2)(c) of the Proceeds of Crime Act 2002.

The court stated that where an offence is capable of being a continuing offence then the court will look at how it was presented by the prosecution, and how the defence and the court treated it to determine whether it was an offence which was committed over a period of at least 6 months. The court affirmed the approach in *Barnet LBC v. Kamyab* at [42] and there was nothing in the 1992 Act which requires a different approach. The reason why "making a false statement" may be a continuing offence was that the statute contemplates a claim being made "with a view to obtaining any benefit or other payment" where that obtaining may be achieved by a series of payments over a period of time. In a case where the statement was made to advance a claim for a single payment, then the offence would not be a continuing one. Where it was made "with the view" to securing a series of payments then the "making" continues throughout the period when payments are made in reliance on the "statement".

The court found that the section 111A(1)(b) offence was a continuing offence and there was no dispute that that was how it had been presented in the lower court.

Summary and Statistics

1 October 2021 to 30 September 2022

The Annexes attached to this Review provide details of the number of applications considered by the court, the average waiting times and the general success rates.

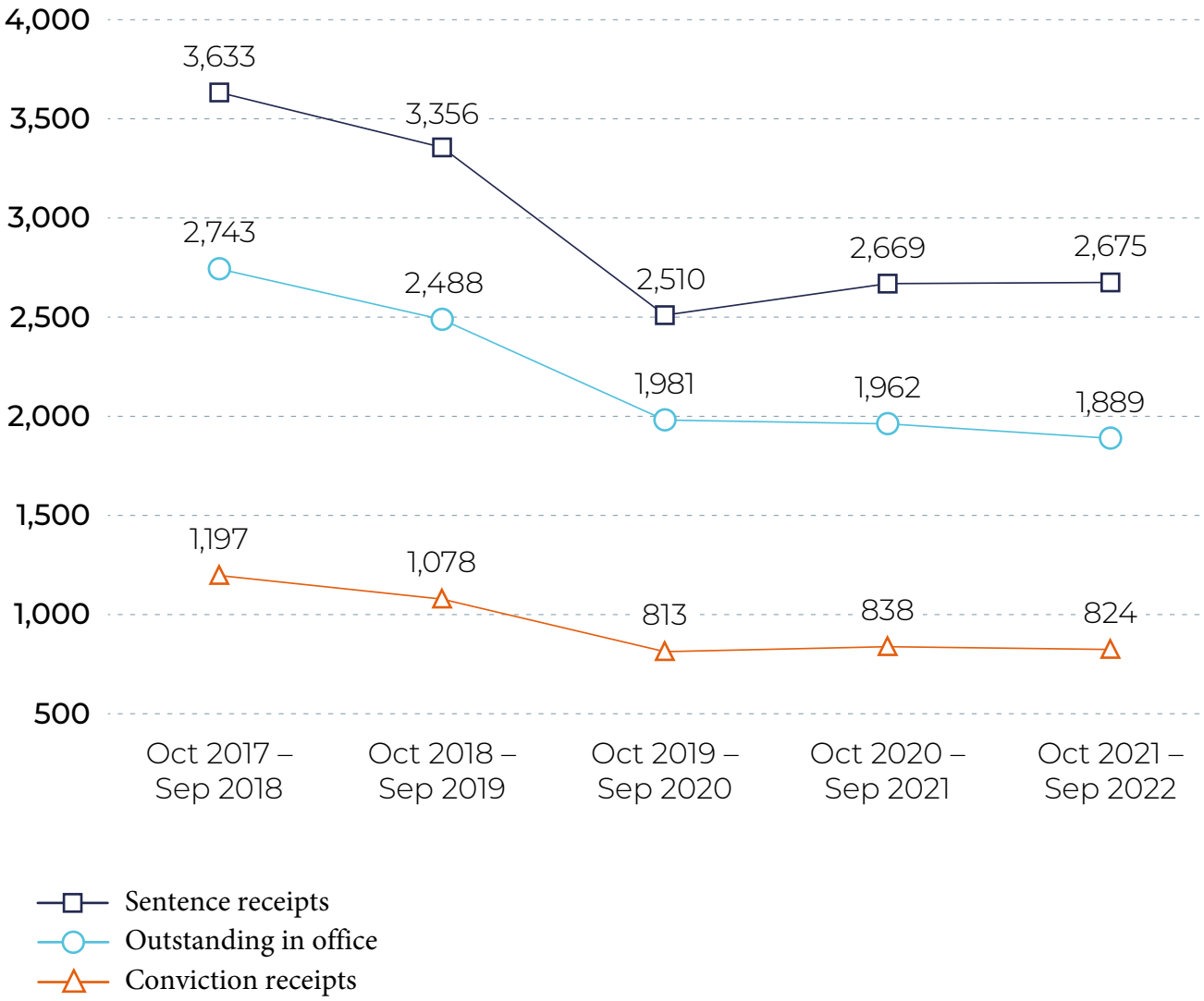
Annex A sets out the number of conviction and sentence applications received. These form the bulk of the court's work. The statistics show a stark drop in receipts in the period from October 2019 to September 2020. This is a reflection of the coronavirus pandemic period when many Crown Courts were not able to continue with jury trials. Since then receipts have risen only slightly, but they have not yet returned to pre-pandemic levels. The rising backlog of outstanding cases in the Crown Court and the Criminal Bar Association action during the legal year, has contributed to the number of applications failing to increase as would normally be expected following a return to capacity in the Crown Courts.

Annex H shows that the Criminal Appeal Office and the Court have been successful in reducing old sentence cases (over 5 months old). At the start of the year there were 142 old cases. These were reduced to 82 at the end of the year and is reflective of new digital efficiencies introduced over the year. The number of conviction old cases has remained broadly consistent throughout the year, with an increase over the vacation period when fewer constitutions of the court were sitting.

The statistics at Annex C show the success rate at the Section 31 leave stage, when the application is considered by a single High Court Judge. Approximately 20% of conviction applications were deemed arguable by the Judge (leave granted or referred) and 27% of sentence applications.

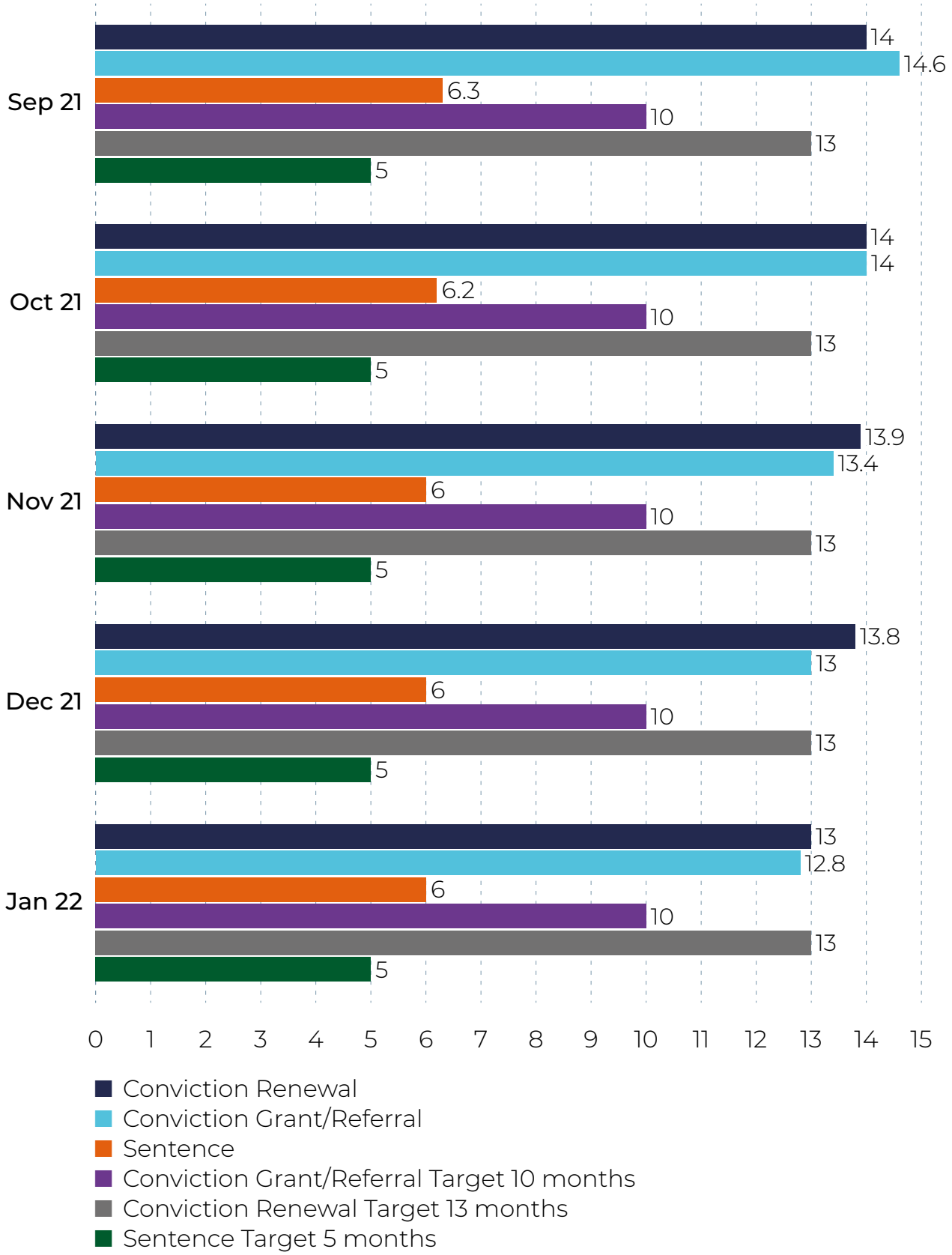
Once a case reaches the court for a full appeal hearing, Annex D shows that just over half of conviction appeals (52%) were allowed by the court (79 out of 152 appeals). In terms of sentence appeals (60%) were allowed by the court (473 out of 779 appeals). This demonstrates the effectiveness of the Section 31 stage in acting as an important filter for the court.

Annex A – Applications received and outstanding in office

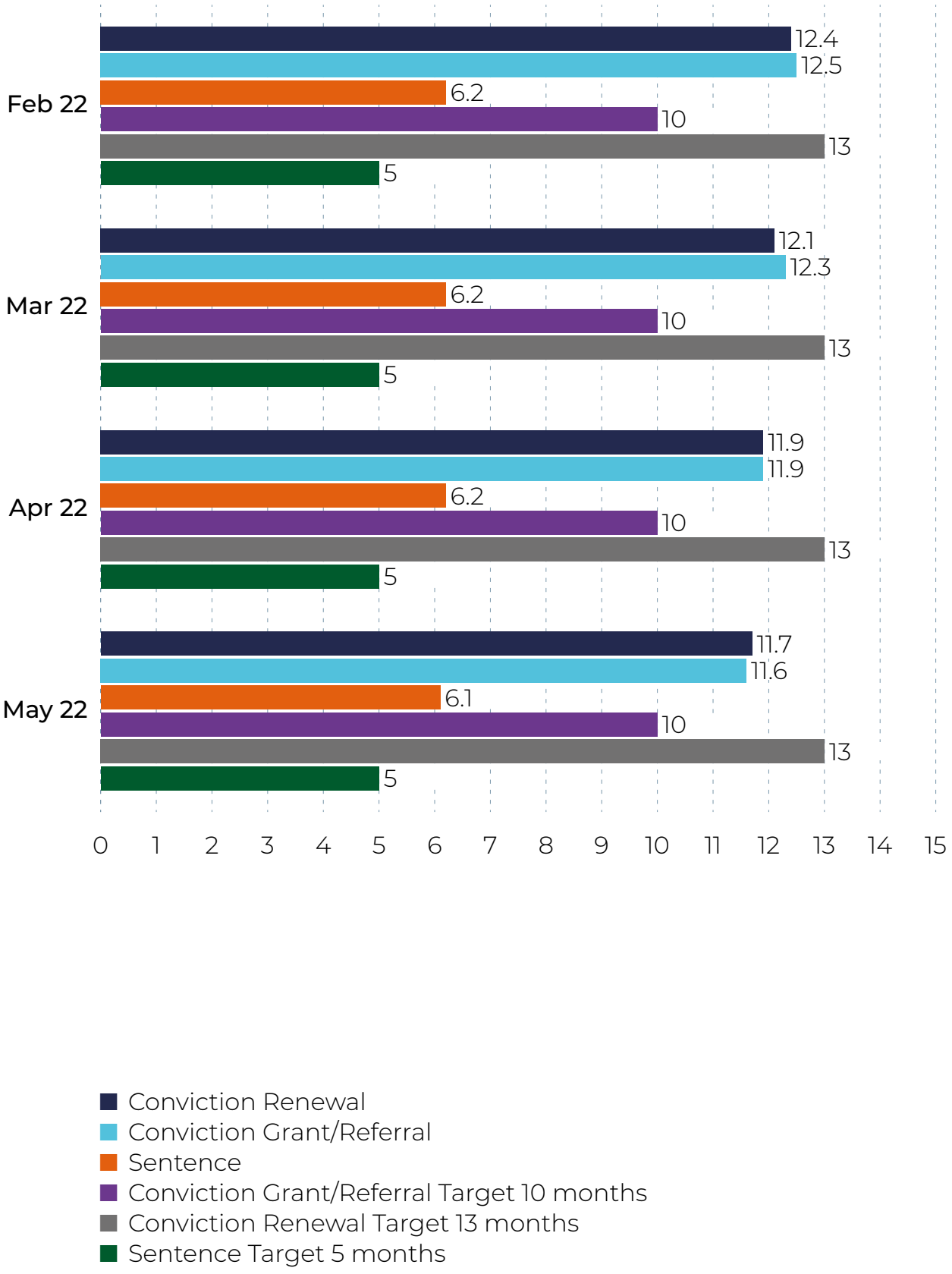


Annex B – Average waiting time (months)

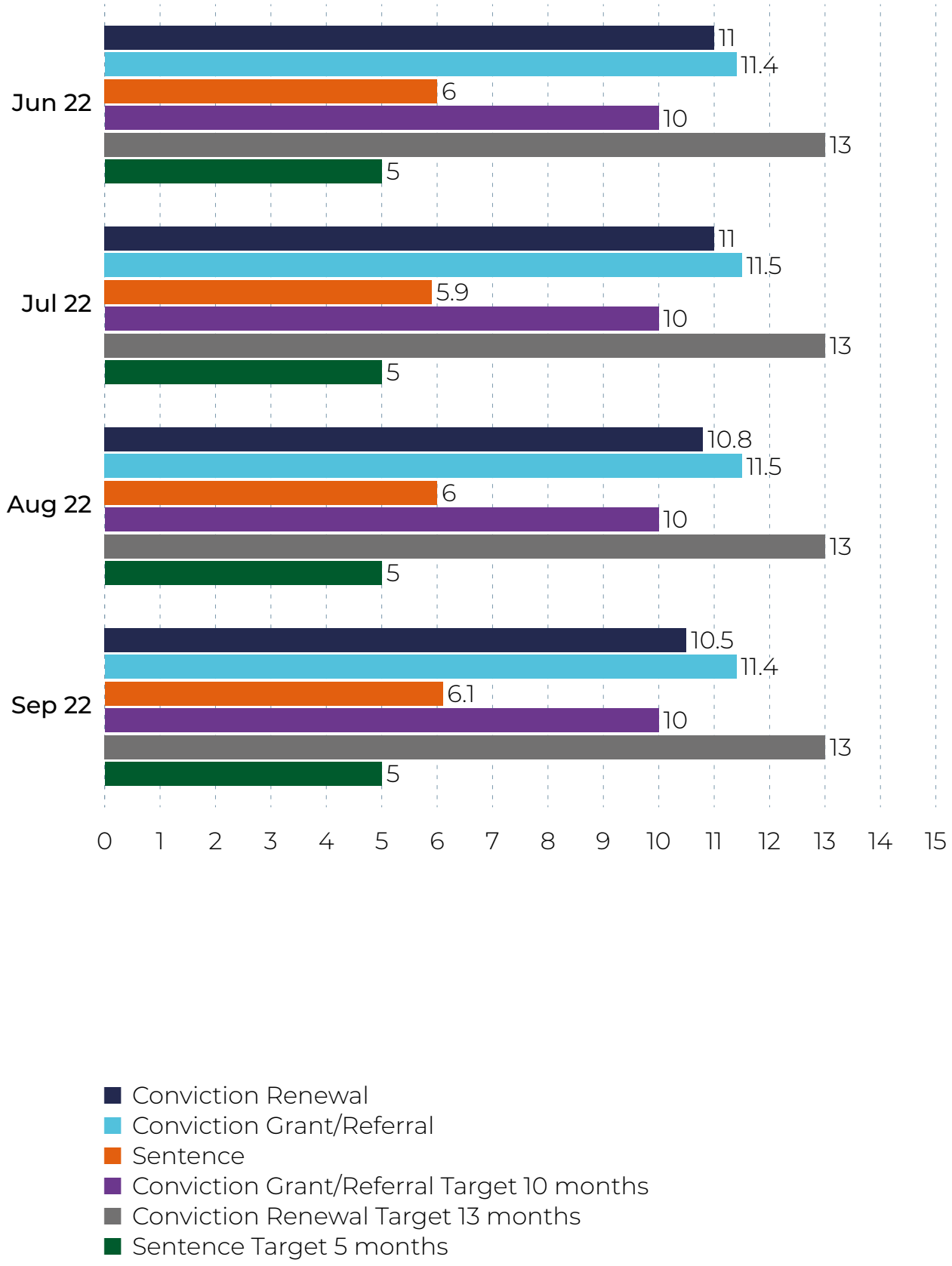
Rolling average of cases disposed by full Court over previous 12 months (part 1)



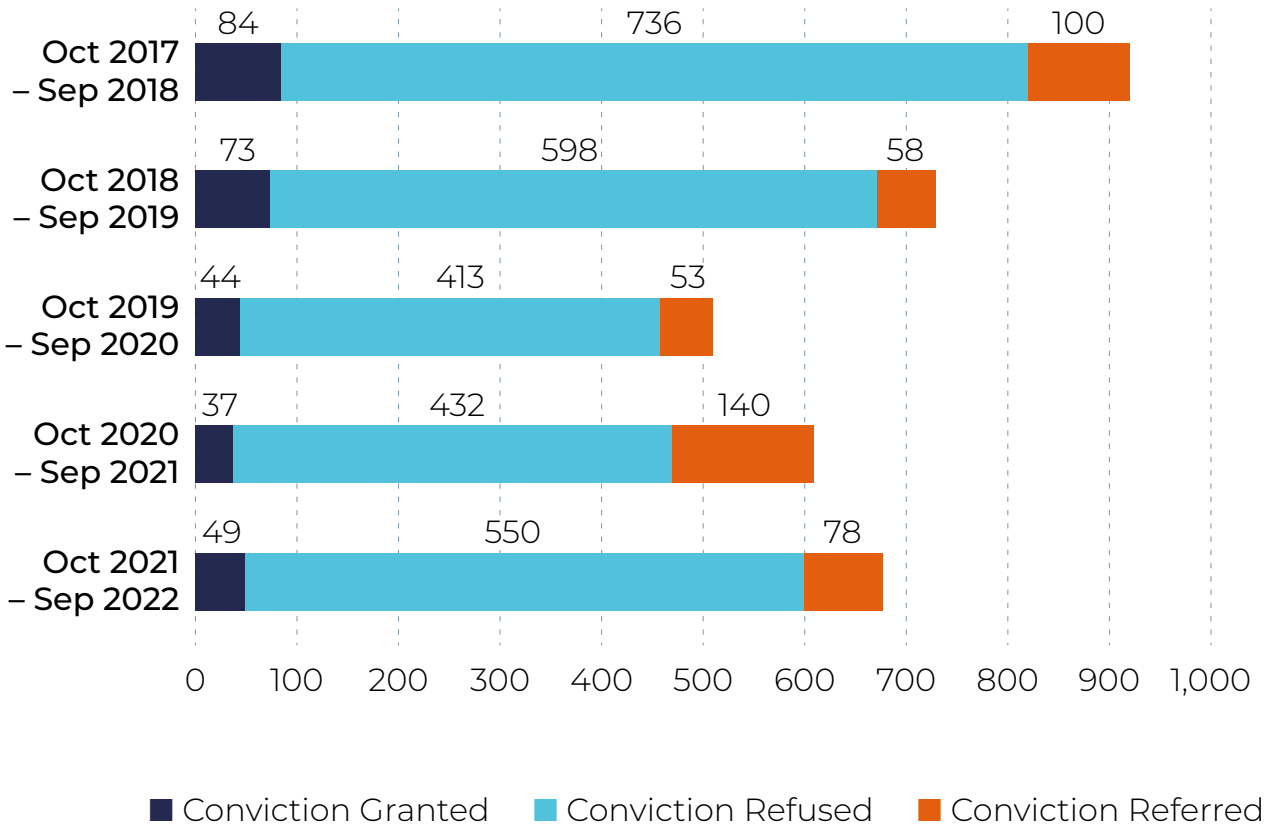
Rolling average of cases disposed by full Court over previous 12 months (part 2)

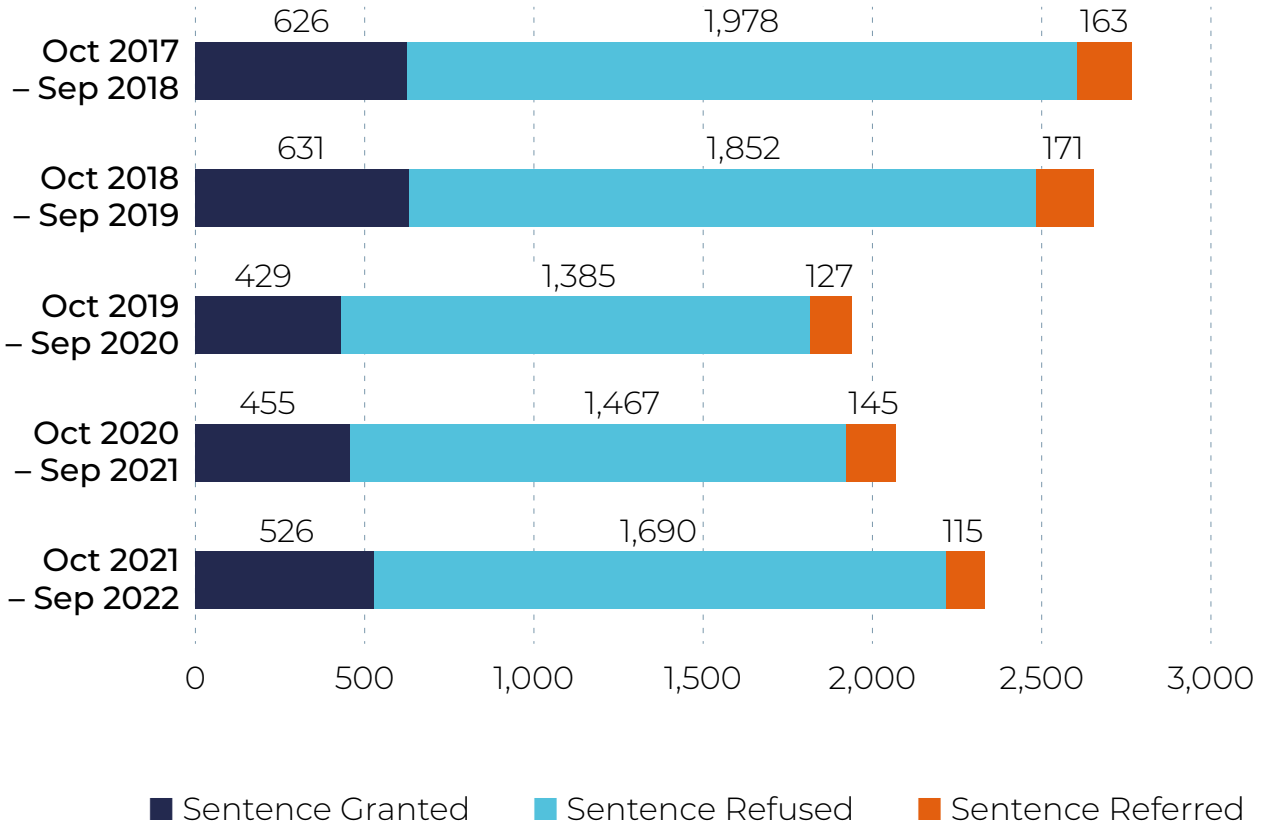


Rolling average of cases disposed by full Court over previous 12 months (part 3)



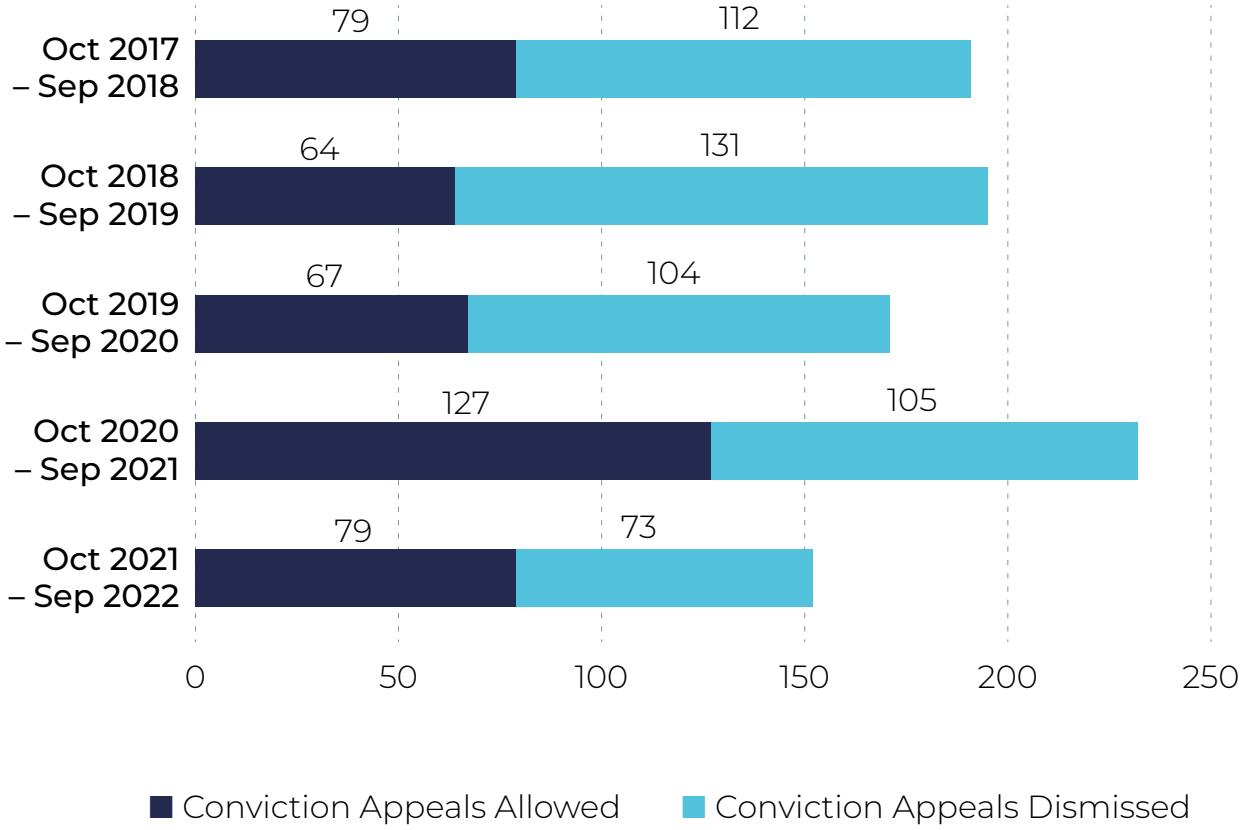
Annex C – Section 31 Applications



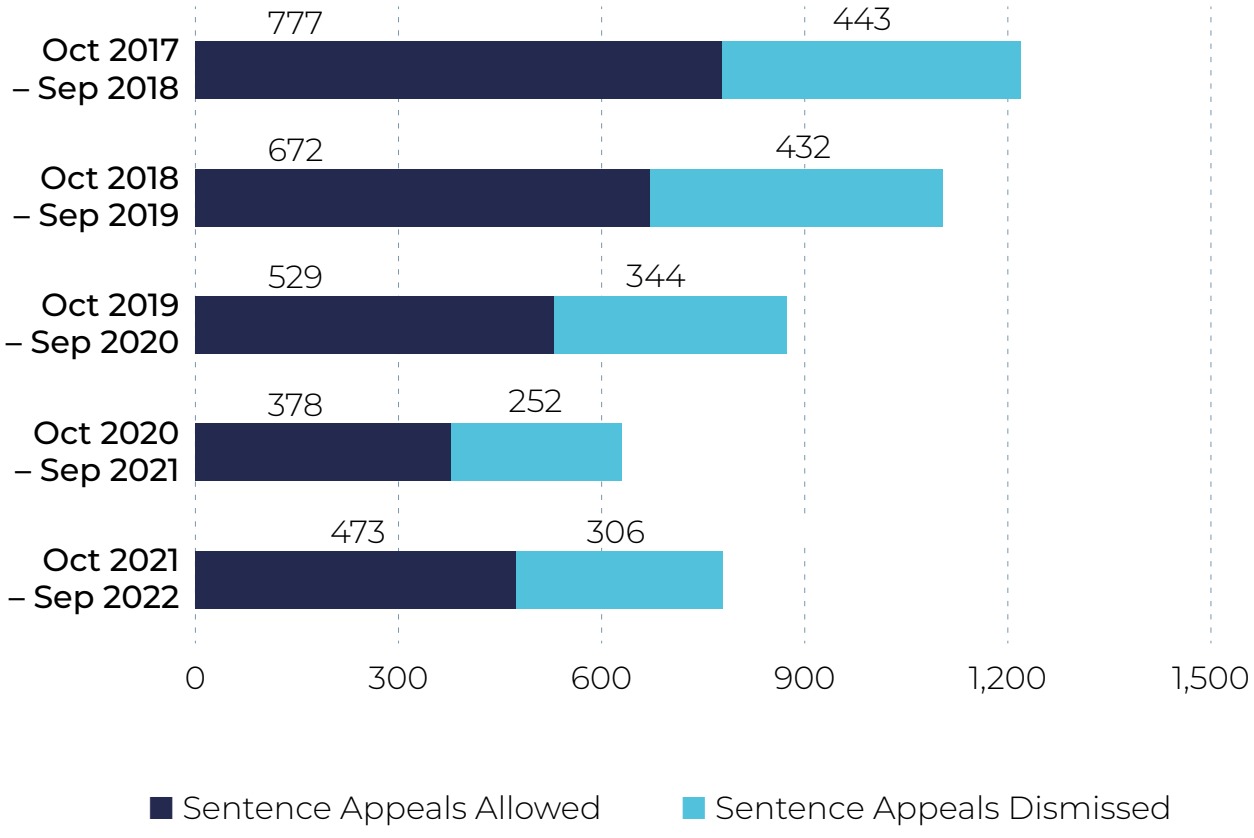


Annex D – Appeals Heard

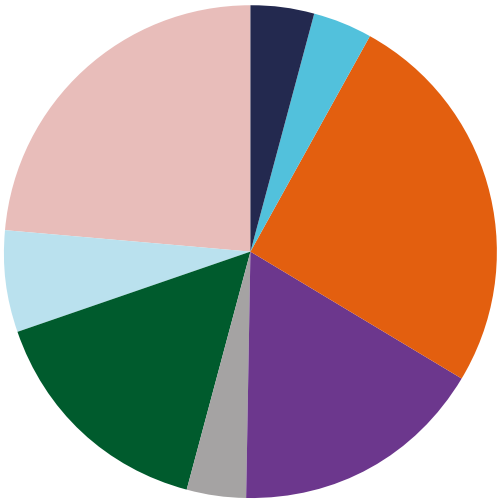
Conviction



Sentence

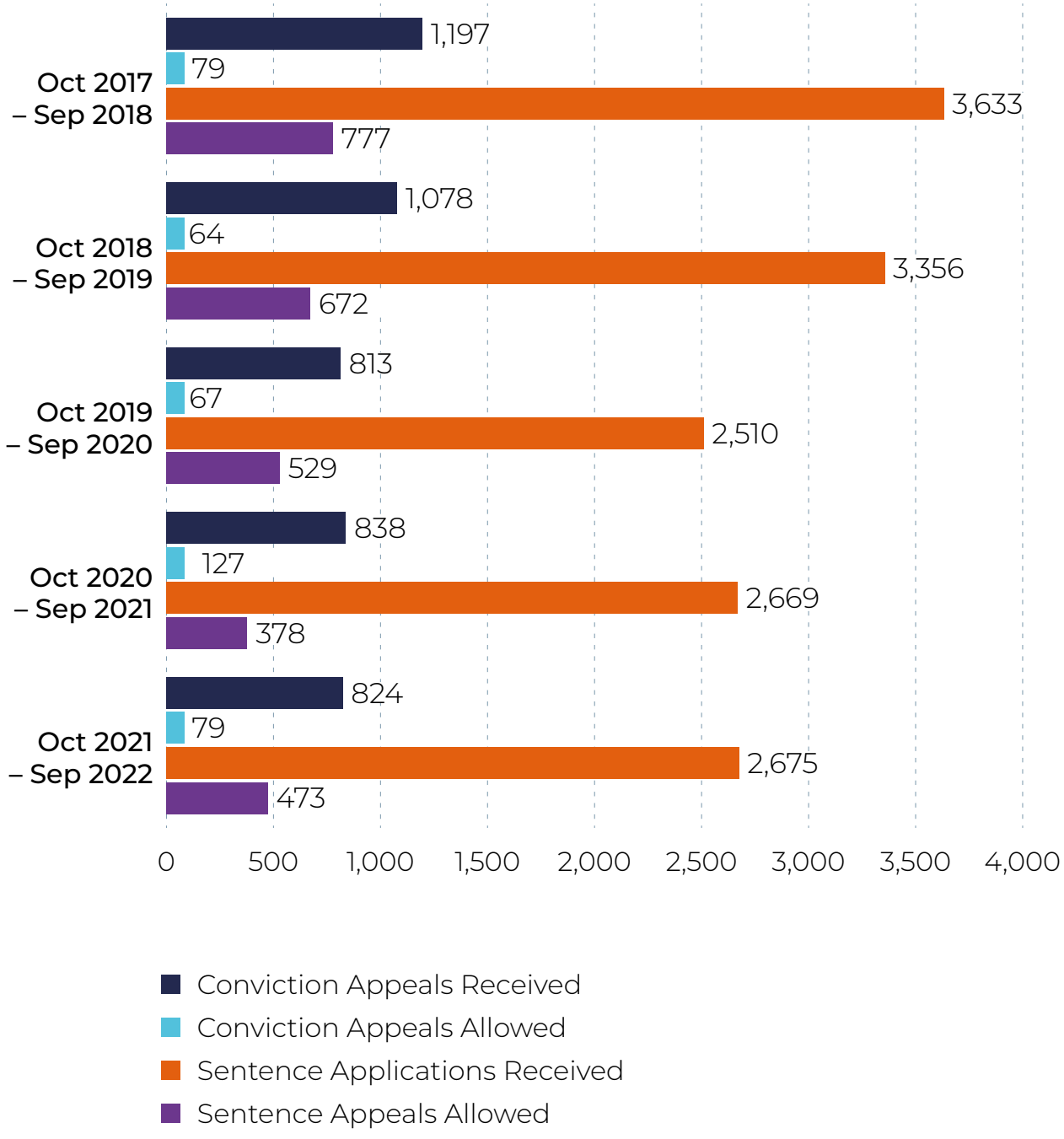


Annex E – Court time Appeals

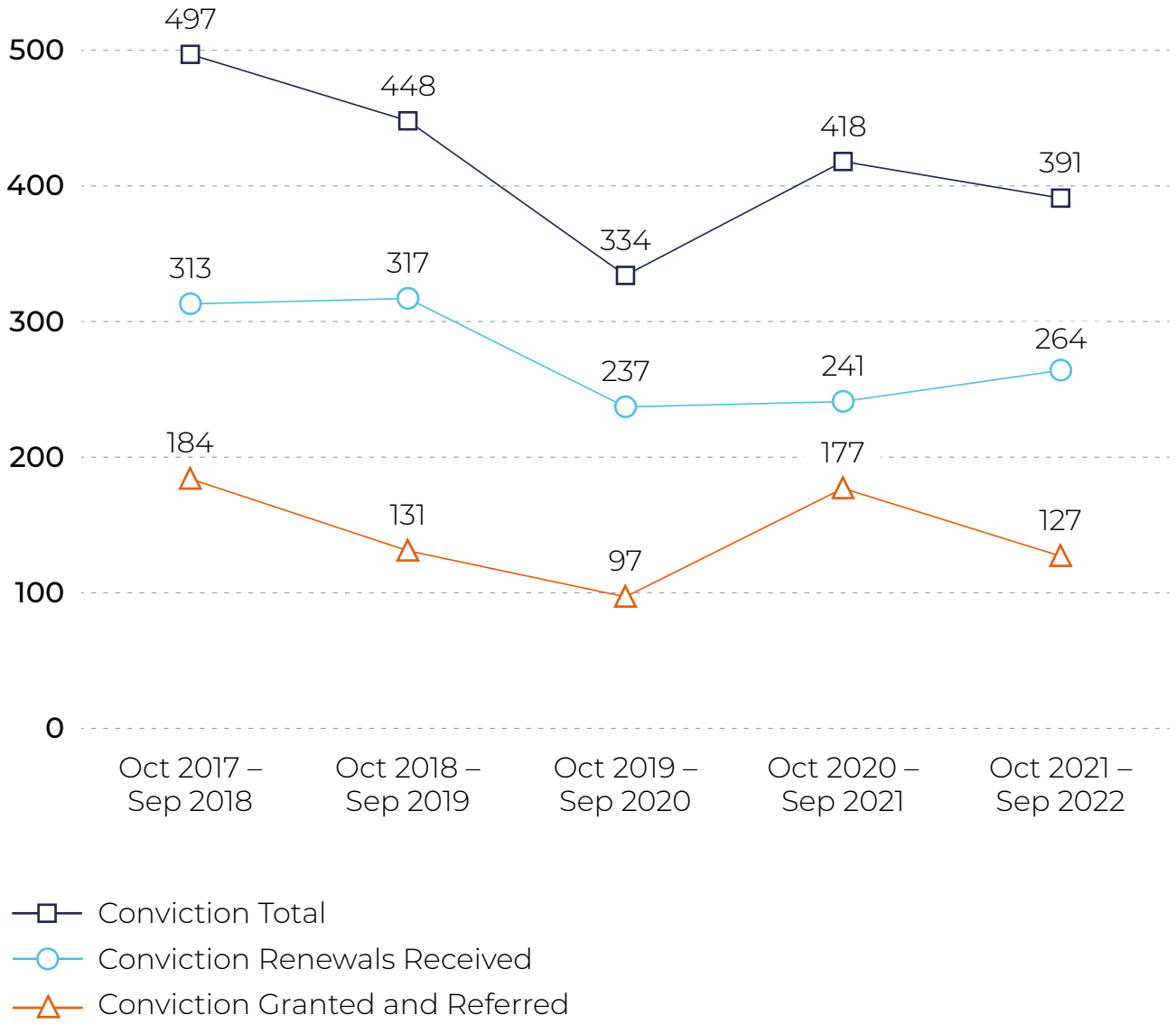


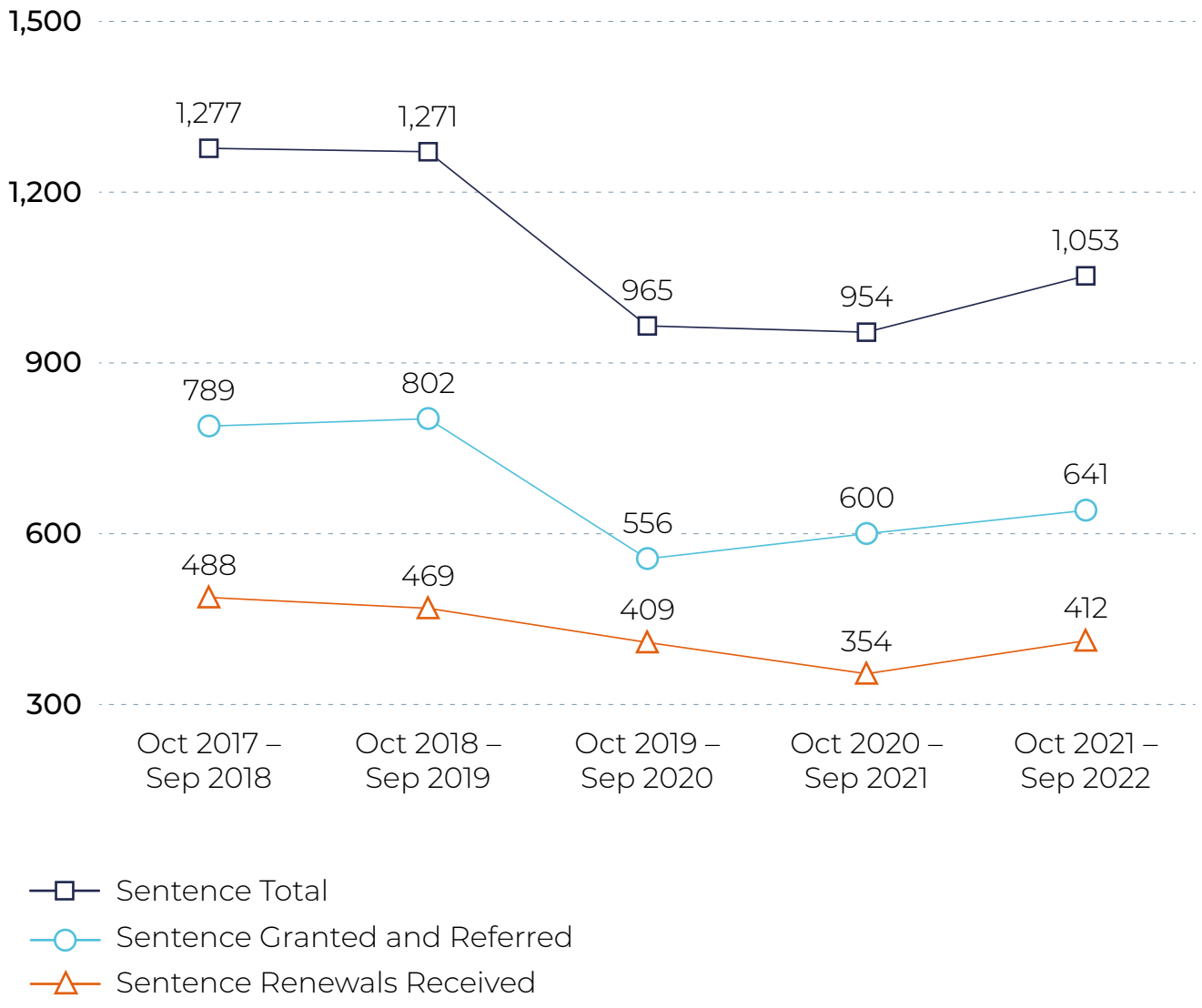
- Conviction Appeals Allowed (79)
- Conviction Appeals Dismissed (73)
- Sentence Appeals Allowed (473)
- Sentence Appeals Dismissed (306)
- Conviction Renewals Granted (72)
- Conviction Renewals Refused (284)
- Sentence Renewals Granted (124)
- Sentence Renewals Refused (434)

Annex F – Applications received and appeals allowed



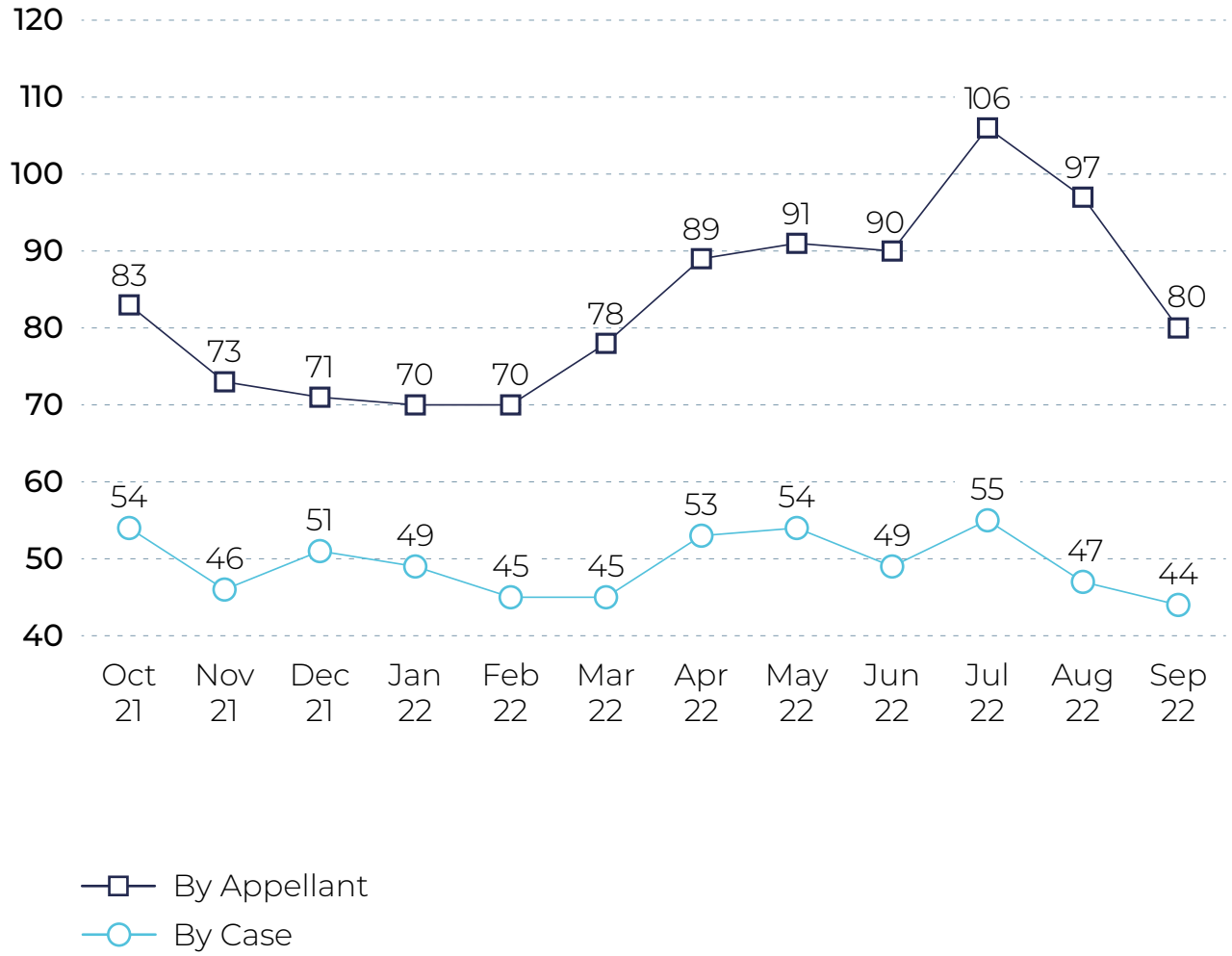
Annex G – Applications Granted, Referred or Renewed



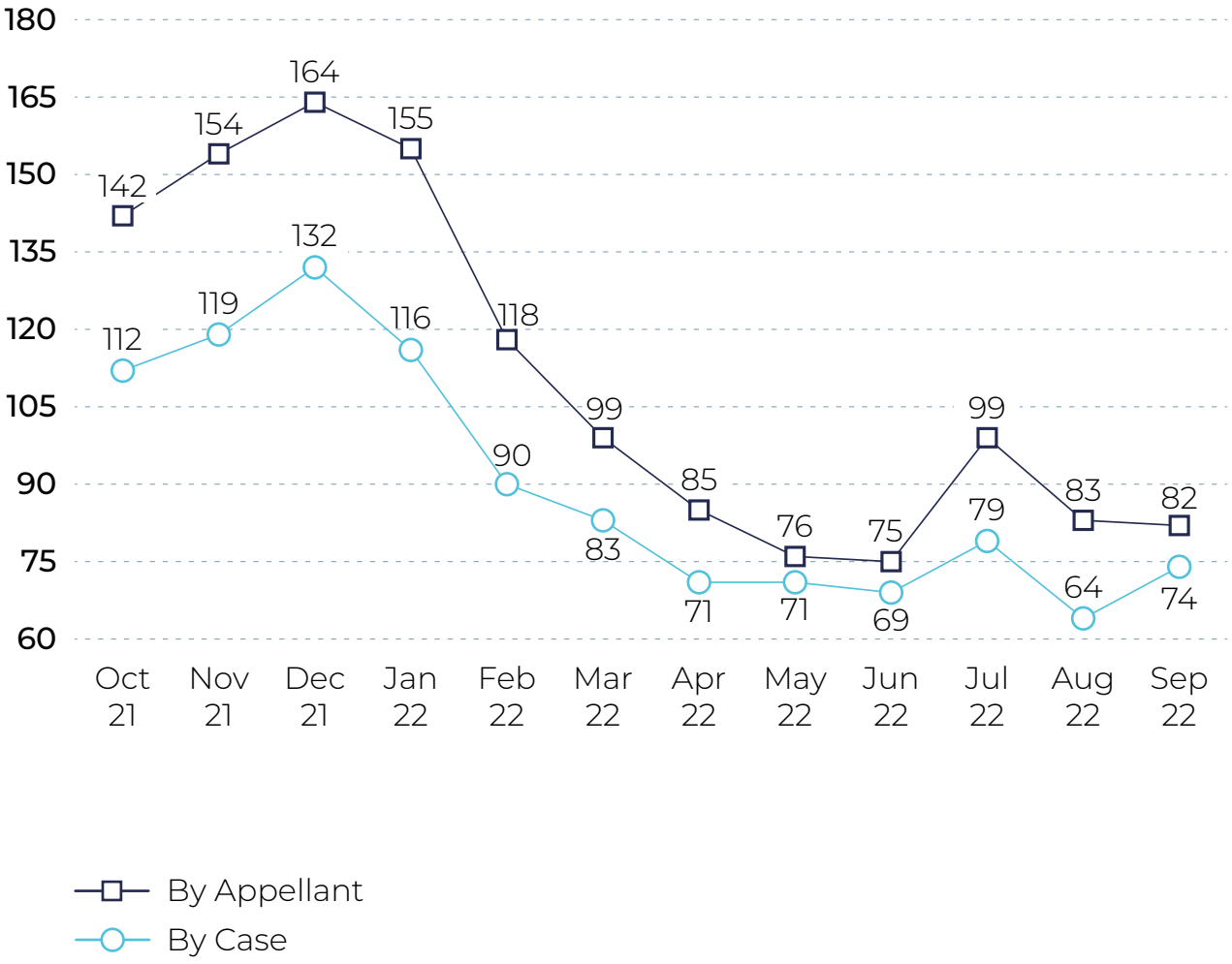

1,500
1,200
900
600
300
1,277
1,271
965
954
1,053
789
802
556
600
641
488
469
409
354
412
Oct 2017 – Sep 2018
Oct 2018 – Sep 2019
Oct 2019 – Sep 2020
Oct 2020 – Sep 2021
Oct 2021 – Sep 2022
Sentence Total
Sentence Granted and Referred
Sentence Renewals Received

Annex H – Old Cases

Conviction old cases – outstanding over 10/13 months



Sentence old cases – outstanding over 5 months



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