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 has been another challenging year for criminal justice. The judges and staff of the Crown Court have worked very hard to progress cases and reduce the backlog; but inevitably, many of the cases now coming before the Court of Appeal, Criminal Division have already been subject to long delays. As a result, cases have become more complicated and there has been an increased strain on applicants and victims, and on the resources of the court. We are, moreover, seeing an increase in the number of applications and appeals brought by persons acting without legal representation, and such cases can add to the strain on the court's resources. In this landscape of continuing delays and backlogs, it is difficult to achieve timely and effective resolution of cases, but we must and do continue to strive to work towards that.

The continuing role of the Court of Appeal, Criminal Division in maintaining the integrity of the system has been starkly highlighted in the quashing of the convictions of persons who have suffered miscarriages of justice, such as former sub-postmasters and sub-postmistresses convicted in circumstances where the prosecution depended on evidence provided by the Post Office's Horizon accounting system, and Mr Andrew Malkinson.

I am grateful to all the judges who have sat in the Court of Appeal, Criminal Division. I would particularly mention the Circuit Judges who are authorised to sit with us: we are greatly assisted by their experience and their expertise in the day to day work of the Crown Court. I would also like to take this opportunity to pay tribute to the Registrar and to the Criminal Appeal Office staff for their unwavering commitment 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 users and the public. We are fortunate to have such a dedicated and efficient team. I also thank counsel and solicitors for their continuing dedication in often very difficult circumstances, for their thorough preparation of cases before the court, and for their oral advocacy at the hearing of appeals and applications.

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 another busy year for the Court of Appeal, Criminal Division, with an increase in the number of cases received, which is no doubt a direct response to the Crown Courts working extremely hard to reduce their backlogs. In response to the rising number and increasing complexity of applications, the Court of Appeal and the Criminal Appeal Office continue to work seamlessly together with the common purpose of ensuring cases are dealt with expediently and justly.

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 have fully embraced digital working and work tirelessly in their roles, whether in determining paper applications under section 31 of the Criminal Appeal Act 1968 or when sitting as part of the constitution of the court.

This year, we have seen an important consolidation and slimming down of the Criminal Practice Directions. In relation to appeals to the CACD, the parties are now required to comply with the guidance set down by the Registrar in the Guide to Proceedings in the Court of Appeal Criminal Division, which is available on the judiciary.uk website. The court has also introduced a list of Frequently Cited Authorities, which dispenses with the need to include in the bundle of authorities any authority on that list. Further details about both the guide and the frequently cited authorities are given below.

The court continues to embrace the use of CVP where appropriate, often utilising this technology to ensure victims of crime can have better access to appeal proceedings. An application for either remote observation or remote participation must be made using the appropriate form, also available on the judiciary.uk website. Further details as to these forms are given below.

The proportion of applications received from litigants in person continues to increase and this presents challenges to the judiciary and staff. The barriers to justice that these applicants face have been recognised through the continued use of our Easy Read forms and our updated Help for Applicants booklet, which explains our processes in simple and clear terms.

I would also like to thank all the lawyers and administrative staff in the Criminal Appeal Office for their continued hard work and commitment throughout the year. The Office has suffered from a number of staff shortages but consistently seeks to provide effective support to the court. The excellent relationships between staff and the judiciary were also highlighted in an outreach day where both HMCTS staff and Judges welcomed students under a number of social mobility schemes and explained the importance of the work that we do together.

**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 and the parties. 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, including 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.

# Changes to the Criminal Practice Directions and the Guide to Proceedings

The new consolidated and streamlined Criminal Practice Directions were issued in April 2023 and as the press release noted at the time: "These new practice directions will continue to promote consistency of practice and provide essential guidance in a more succinct, easy to follow style". The revised content is designed to meet the aim that "they contain only the level of information that is necessary, in a style which makes that information easy to find and understand".

Together, the Criminal Procedure Rules ("Crim PR") and the Criminal Practice Directions ("Crim PD") govern the practice and procedure in all criminal courts including the Court of Appeal, Criminal Division ("CACD"). The importance of the rules and the directions cannot be overstated. The Crim PR are secondary legislation (s.69 Courts Act 2003) and the Crim PD supplement the rules and act as a guide for the exercise of judicial discretion. Importantly they are the law (Crim PD 1.1.3), are binding on all criminal courts (Crim PD 1.1.4) and "participants must comply with the Rules and Practice Direction, and directions made by the court" (Crim PD 1.1.5).

Perhaps the most significant addition to the Crim PD is the adoption of the "guide to criminal proceedings in the Court of Appeal, Criminal Division" (formerly known as "the Blue Guide") and the requirement that practitioners must comply with this guidance (Crim PD 10.1.1). The guide should not be viewed as placing additional obligations on practitioners, as it is intended to be part of their (and a judicial) toolkit. It brings together the Crim PR, Crim PD, legislation and case law in a clear narrative and guides the practitioner on a journey from conviction and sentence in the Crown Court, through the application process and procedural stages to the final hearing. To aid practitioners to comply with the expectations of CACD and obligations of the rules and directions, Annex 1 gives practical 'how to' guidance.

The Registrar has a number of statutory powers and obligations; including the duty to further the overriding objective by actively managing cases (Crim PR 3.2 and 36.2 (2)) and the power to make directions. Very often, the directions are for parties to comply with the Crim PR and Crim PD: failure to do so inevitably causes delay. Following the guide ensures the appeal process becomes uniform, efficient and timely for everyone involved in it.

The guide is expertly edited by a lawyer at the CAO, Samantha White. It is a living document and is amended to reflect any changes to the rules and directions, legislative and case law developments. It also allows the Registrar and Vice-President of the CACD to communicate best practice to practitioners. Since its publication in April 2023, there have been two updates, which makes it an invaluable resource that is always current.

Practitioners will note that Crim PD 2023, section 10 made some additions to the content of 2015 version, including the need to provide hyperlinks. The deletions are still reflected in the rules and/or the guide, for example, for unrepresented applicants, it had been the practice that the prosecution should not attend the hearing. However, the guide reminds practitioners that the CACD held in Zuman [2023] EWCA Crim 79 that the position was more nuanced but that there are restrictions on prosecution submissions (guide E.1.2.1).

What is new to the Crim PD 2023?

- 10.1.1 Parties must comply with the guide (NB since publication the guide has had a name change).
- 10.2.7 In fatality sentence cases, where the prosecution are not present and leave is granted, the court must consider adjourning the hearing so that the CPS can instruct an advocate and the victim's family given an opportunity to attend (guide E.1.2.2).
- 10.4.4 Sets out the expectations of fresh representatives and due diligence to be undertaken (guide B.7).
- 10.4.6 Applications must be lodged by email (guide B.2).
- 10.7.4 Bundles lodged are to be in a pdf format and reflects the fact that the Criminal Appeal Office is paperless and will not provide paper copies. D.7 of the guide is an example of updating practitioners on the current practice in the CACD.
- 10.8 Detailed directions are added on the CACD's expectation for the content and format of skeleton arguments if they are required (see 10.8.1, 10.8.2 and guide D.8). Crim PR 39.3(1)(g) (and Crim PR 39.3(2)(f)) makes reference to the provision of authority unless it is "frequently cited". 10.8.9 – 10.8.15 gives detailed guidance on citations and how authorities should be provided. The guide develops the detail of this guidance and very importantly provides a link to the list of 'frequently cited authorities' and the assumptions that practitioners can make about them and what they need cite if relied upon (guide B.3.6).

- 10.9 Sets out what will happen where the court reserves judgment and the treatment of circulated judgments. 10.9.12 reminds practitioners to be alert to reporting restrictions imposed.
- An example of the guide being able to react swiftly to updates on the practice of the CACD is in respect of remote attendance and observation, which are both governed by legislation. Requests can create logistical difficulties for both the court and those wanting to appear or observe remotely. In order to facilitate those requests, applications must be made on a form which can be accessed via the judiciary website which is also hyperlinked from the guide; see D.10 and D.11 for full details. The forms are important as they remind attendees that access via CVP is subject to a number of conditions and advise on the court's expectations.

Practitioners and the judiciary are encouraged to use the guide and to provide feedback. To ensure that the most current edition is in use, it is suggested that Procedure Rules and Practice Directions for the Court of Appeal - Courts and Tribunals Judiciary is bookmarked, at the bottom of that page users will find links to the guide, list of frequently cited authorities and remote observation/participation forms.

# 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 and CVP allows for both remote participation and observation of proceedings.

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.

There are also two new forms of request for a transmission direction in respect of proceedings in the Court of Appeal, Criminal Division. The forms are listed at https://www.judiciary.uk/courts-and-tribunals/court-of-appeal-home/procedure-rules-for-the-court-of-appeal/ and appear at https://www.judiciary.uk/wp-content/uploads/2023/07/Remote-Observation-form-and-rules-1.docx. (Such requests are made under section 85A, Courts Act 2003 (Remote observation and recording of proceedings by direction of a court or tribunal) and the Remote Observation and Recording (Courts and Tribunals) Regulations 2022.)

A form should be completed for each person who wishes to observe/participate in proceedings and there is a need to make the application in good time for the hearing – see in particular the postscript at [46] in Baldwin [2023] EWCA Crim 1475. Requests must be received by 4pm the day before the hearing, as any requests received after that time may not be granted.

# 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 40% of all applications for leave to appeal against conviction lodged. This is a rise from the previous year where applications from litigants in person accounted for about a third of conviction applications. This statistic must also be seen against an increased number of conviction applications overall.

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 with the assistance 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 Forms 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.

# Providing assistance to the authorities:

R v Royle & Ors [2023] EWCA Crim 1311 **(Holroyde LJ VP, Goose J and Sir Robin Spencer)**

Three otherwise unlinked applications for leave to appeal against sentence were listed together as they raised issues relating to the reduction in sentence to be afforded to offenders who had provided information and assistance to law enforcement authorities.

Whilst there is a statutory procedure in s.387-391 Sentencing Act 2020 (previously s74-75 Serious Organised Crime and Police Act 1997), the common law text procedure is still more frequently used.

In text cases, the sentencing judge should identify the starting point then adjust the sentence upwards or downwards to reflect the balance of any aggravating and mitigating factors. The sentencing judge should then reduce the sentence to the extent which appeared appropriate in light of the assistance and information provided. This required a fact-specific assessment of all of the relevant circumstances.

The following checklist of factors which are relevant in determining the appropriate reduction was provided: [1] the quality and quantity of the information provided, including whether it related to trivial or to serious offences, [2] the period of time over which the information was provided, [3] whether it assisted the authorities to bring to justice to persons who would not otherwise have been brought to justice or prevented or disrupted the commission of serious crime or recovered property, [4] the degree of assistance provided, [5] the degree of risk the informer exposed himself and his family to, [6] the nature and extent of the crime in which the informer themselves has been involved and the extent to which he has been prepared to admit the extent of his criminality, [7] whether the informer has relied on the same provision of information and assistance when being sentenced on a previous occasion, or making an application to the Parole Board, [8] whether the informer has been paid for his assistance and, if so, how much.

Rule 28 of the Criminal Procedure Rules, which provides that where the level of reduction includes assistance to the authorities and it is determined that this cannot be aired in open court, the court must arrange for a written explanation to be given to the defendant and prosecutor in writing, only applied to the statutory regime. Counsel made submissions that this procedure should also be used in text cases. The court has asked that the matter be considered by the Criminal Procedure Rules Committee to see whether any amendment to rule 28 is needed.

R v BHR, R v BMV **[2023] EWCA Crim 1622 (Holroyde LJ VP, Bryan J and Freedman J)**

In this case the court considered whether it had jurisdiction to hear an appeal against sentence where two applicants, whose cases were otherwise unconnected, sought a reduction of their sentence on the grounds that while they were serving their sentence they had provided important information and assistance to the law enforcement authorities ('the police'). Both sentencing courts had been unaware that the information and assistance would be provided and neither applicant had entered into a formal agreement to provide such assistance with a specified prosecutor under the statutory scheme set out in either section 74 (in force at the time of sentence) or section 388 of the Sentencing Code (in force after sentence had been passed).

In both cases the court refused the applications for extensions of time and for leave to appeal against sentence.

The court recognised the desirability of encouraging offenders to provide assistance and that there would be cases where the assistance related to matters which had only arisen after they had been sentenced. Where the offender was unwilling or unable to enter into a formal statutory agreement, there were pragmatic arguments in favour of enabling them to evidence their assistance with a confidential text provided by the police ('the text procedure'). The court said that such considerations, however cogent, could not enlarge the jurisdiction of the Court of Appeal which, case law established, operated as a court of review. The court had held in *R v A and B* [1999] 1 Cr. App. R. (S.) 52 that its function was "to review sentences imposed by courts at first instance, not to conduct a sentencing exercise of its own from the beginning" and that to do so it ordinarily relied on material which had been before the sentencing court.

The court concluded, first, that the case law established that there was a firm general rule, recently summarised in *R v Royle, R v AJC, R v BCQ* [2023] EWCA Crim 1311, that a reduction of sentence pursuant to the text procedure was only available to an offender who provided, or at least offered to provide, assistance before they had been sentenced, whether they had pleaded guilty or been convicted after a trial. If they failed to do so, they could not rely on a text as a basis for the court to alter a sentence which was otherwise unimpeachable.

Secondly, the rationale for that rule was the nature of the court's jurisdiction, namely, that on appeal against sentence it reviewed the sentence imposed below on the basis of the information and material which was before the sentencing judge.

Thirdly, the court might take into account assistance provided after sentence where it significantly exceeded, in quality and/or in quantity, material which the sentencer had taken into account in passing sentence; or where before their sentencing the offender had provided or offered assistance to the police which justified the provision of a text but for some reason that had not been made known to the sentencer.

Fourthly, no case considered by the court supported any wider departure from, or exception to the rule. The court recognised it should "never say never" and that "cases may arise – albeit very rarely – which are wholly exceptional when compared with all other cases involving the provision of assistance by informers". It also recognised that the reviewing function of the court might sometimes extend to the consideration of post-sentence developments, for example where reports showed that a young appellant had made good progress while in custody.

The court said that wider exceptions to the general rule faced the obvious difficulty, provided in the authoritative judgment by Lord Thomas CJ in *R v ZTR* (also referred to as *R v Z*) [2015] EWCA Crim 1427, [2016] 1 Cr. App. R. (S.) 15, that there was no good reason to depart from the established principles as to do so would mean that the court was not acting as a court of review but would be rewarding someone for good behaviour during their sentence.

The statutory procedure under s388 Sentencing Code would in most cases be available to an offender who decided, after they had been sentenced, to provide assistance. The existence of that procedure could not be regarded as justifying an expansion of the text procedure so as to require the court to exercise a different function (than as a court of review) which could only be available if the offender had not previously appealed against sentence on other grounds (in contrast to the statutory procedure).

The court said that submissions that the provision of post-sentence assistance was a form of "exceptional progress in custody" were misconceived. Under transitional provisions relating to the introduction of the Criminal Justice Act 2003, such progress could be relevant to the determination of the minimum term of a life sentence to be served by an offender convicted of murder but those very specific provisions did not warrant any wider, general ground of appeal based on exceptional progress.

The court said that it followed that an offender who offered or provided assistance for the first time after they had been sentenced, or was invited to do so, must not be told, or given to understand, that they would be able to rely on that assistance as the ground for an appeal based on the text procedure.

# Protest Cases

## The new offence of intentionally or recklessly causing a Public Nuisance, contrary to section 78(1) and (4) of the Police, Crime, Sentencing and Courts Act 2022

R v Trowland and Decker **[2023] EWCA Crim 919 (Carr LJ (as she then was), Cutts J and Thornton J)**

The applicants were convicted of intentionally or recklessly causing a Public Nuisance, contrary to section 78(1) and (4) of the Police, Crime, Sentencing and Courts Act 2022. This offence had come into force on 28 June 2022; the maximum sentence being 10 years' imprisonment.

The applicants had ascended the QEII Bridge and hoisted a 'Just Stop Oil' banner between two of the central support towers. The applicants then set themselves up in hammocks and the applicant Trowland conducted a series of conferences with national media organisations. Traffic over the bridge was stopped; the accumulated traffic used the two central lanes to continue over the bridge so that the bridge was traffic free. Other than that, the QEII Bridge remained closed from about 4 a.m. on 17 October 2022 until 9:15 p.m. on 18 October 2022, for approximately 40 hours. There was a minimum of 564,942 vehicles delayed and 60,548 hours of vehicle delay. The rough economic impact figure was £916,696.

The applicant Trowland received 3 years' imprisonment after trial; the applicant Decker, 2 years and 7 months' imprisonment. The sentences were upheld. In short, whether or not a sentence of immediate custody for this type of offending was warranted and the length of sentence would be highly fact-specific. Consideration was given to both domestic and ECHR jurisprudence, noting that it could be dangerous to draw comparisons with sentencing outcomes in foreign jurisdictions with different sentencing regimes. It was recognised that the sentences went well beyond previous sentences imposed for this type of offending under the old common law offence, but this reflected Parliament's will, as enacted in section 78. The sentences met the legitimate sentencing aim of deterrence for such offending in current times. They were not manifestly excessive; nor did they amount to a disproportionate interference with the applicants' rights of freedom of expression and assembly under Article 10 and Article 11 so as to be unlawful. This was very serious offending by repeat protest offenders who were trespassers (and on bail) at the time; whilst the protest was non-violent as such, it had extreme consequences for many, many members of the public.

# New Offences

## Intentional strangulation, contrary to section 75A(1)(a) and (5) Serious Crime Act 2015

R v Cook [2023] EWCA Crim 452 **(William Davis LJ, Cockerill J and Johnson J)**

Section 70 of the Domestic Abuse Act 2021 introduced the offence of non-fatal strangulation by adding section 75A to the Serious Crime Act 2015. It came into force for any offence committed on or after 7 June 2022. The maximum sentence is 5 years' imprisonment.

The applicant was 18 and in a relationship with the complainant, who was 17. In the autumn of 2021, the complainant became pregnant. The relationship began to deteriorate and broke down altogether on 6 June 2022, when the applicant strangled and spat at the complainant. He was charged with common assault and bailed with a condition not to visit the complainant's home address. On 6 November 2022, the applicant attended the complainant's home address; their daughter was present. There was a confrontation and the applicant grabbed the complainant's throat and squeezed her neck. He pushed her hard onto the sofa and her head hit the wall. He then got on top of the complainant and began to strangle her using both hands.

The applicant was convicted of common assault (the offence committed on 6 June 2022) by the magistrates after trial on 24 November 2022. On 6 December 2022, at his PTPH for the charge of intentional strangulation committed on 6 November 2022, he pleaded guilty and sentence was adjourned. On 7 February 2023, he was sentenced to a custodial period of 15 months.

The court set out the proper approach to sentencing for this offence in the absence of any offence specific guideline. A custodial sentence would be appropriate, save in exceptional circumstances and the starting point would ordinarily be 18 months immediate custody. The starting point might be increased by the following factors, which were non-exhaustive [1] history of previous violence, [2] presence of children [3] attack carried out in the victim's home, [4] sustained or repeated strangulation, [5] use of a ligature or equivalent, [6] abuse of power, [7] offender under the influence of drink or drugs, [8] offence on licence, [9] vulnerable victim, [10] steps taken to prevent the victim reporting an incident, [11] steps taken to prevent the victim obtaining assistance.

The statutory aggravating factors of [1] previous convictions, [2] offence committed on bail, [3] offence motivated by or demonstrating hostility based on disability, sexual orientation or trans-gender identity would apply. The Sentencing Council overarching principles in relation to domestic abuse were likely to be relevant and the aggravating factors at paragraph 11 would apply in every case of domestic abuse. Mitigating factors would include [1] good character, [2] age and immaturity, [3] remorse, [4] mental disorder, [5] genuine recognition of the need for change and evidence of the offender having sought help and assistance, [6] very short-lived strangulation from which the offender voluntarily desisted. The Sentencing Council's Overarching Principles Guideline would apply. When sentencing for this offence, reference must be made to that guideline to check if a particular factor applied, given the circumstances of the case in question.

Further clarification of the guidance in *Cook*, was given in Borsodi, R. v [2023] EWCA Crim 899 (30 June 2023) (bailii.org). In view of the inherent conduct required to establish the offence, a custodial sentence would be appropriate, save in exceptional circumstances, and such a custodial sentence may be immediate or, in appropriate cases, may be suspended. Ordinarily the sentence will be one of immediate custody, but "ordinarily" in this context was not to be equated with "exceptional circumstances".

# Miscarriages of Justice

## Andrew Malkinson

R v Malkinson **[2023] EWCA Crim 954 (Holroyde LJ VP, Goose J, Sir Robin Spencer)**

On 26 July 2023, a constitution presided over by the Vice-President allowed an appeal against conviction by Andrew Malkinson ("the appellant"), the conviction having been referred for appeal by the Criminal Cases Review Commission ("CCRC").

On 19 July 2003, a young woman (referred to as "C") was attacked and raped as she walked home in the early hours of the morning. The prosecution case against the appellant centred on identification evidence from C and from two witnesses. There was no forensic evidence against him. The appellant's case was that he had been mistakenly identified and that he had been at home at the time. On 10 February 2004 at Manchester Crown Court the appellant was convicted by majority of attempting to choke, suffocate or strangle C with intent to commit an indictable offence, namely rape, and of two offences of rape. He was sentenced to life imprisonment. Although the minimum term was specified as 6 years and 125 days, he served 17 years in prison before being released in December 2020 subject to the conditions of a life licence. Throughout those years, he maintained that he had been wrongly convicted, thereby delaying his release.

An appeal against the conviction was dismissed in July 2006. The appellant, assisted by legal representatives, thereafter made two unsuccessful applications to the CCRC. In 2021, his legal representatives made a third application to the CCRC and their submissions centred on the following issues: (i) reports from a forensic expert based on developments in DNA analysis, (ii) non-disclosure of photographs of C's hands, and (iii) non-disclosure of material relating to the credibility of the two identification witnesses.

The CCRC decided to carry out a further review on the basis of the improvements in DNA analysis. Its review led it to commission a scientific investigation using the samples of C's clothing which had been retained. One of the results of the testing was that the appellant's DNA was not found on the clothing samples, and therefore the findings provided no support for the view that the appellant had been in contact with any of the clothing items examined. Another result of the testing was that a new incomplete DNA profile was identified. A search on the national DNA database resulted in a match between the new profile and an individual previously unconnected with the investigation. The CCRC concluded that the absence of the appellant's DNA on the victim's clothing samples and the presence of another man's unexplained DNA on her vest top gave rise to the possibility that the appellant's conviction may now be overturned, and the referral was made on this basis.

As part of its decision, the CCRC took into account information which it found to be supportive of the ground of referral, namely unused photographs of the victim's hands and the PNC records of the two witnesses.

Following the CCRC's referral to the Court of Appeal, the appellant lodged grounds of appeal concerning the new forensic evidence, the non-disclosure of photographs of the victim's hands and of the PNC records of the identification witnesses, and other information relating to one of those witnesses.

The prosecution conceded that the new forensic evidence was admissible, was not available at the time of trial and was such as to render the conviction unsafe. The prosecution submitted that if the court upheld the ground concerning the new forensic evidence and adjudged the conviction unsafe, the question would arise as to whether the remaining grounds would need to be considered and the prosecution submitted that they would not.

At the appeal hearing on 26 July 2023, the court permitted the appellant to put forward five grounds of appeal. It announced that the appeal was allowed on the ground which had been referred by CCRC and which had not been opposed, namely the fresh scientific evidence, and that it would give its full reasons as well as its decision on the other grounds at a later date in a written judgment.

The court handed down its final judgment on 7 August 2023. The new scientific evidence was undoubtedly admissible as fresh evidence in accordance with section 23 of the Criminal Appeal Act 1968: it was capable of belief; it afforded a ground for allowing the appeal; it would have been admissible at trial; and there was a reasonable explanation for the failure to adduce it at trial, namely the advances in DNA analysis since that time. The evidence clearly showed the convictions to be unsafe. Although the jury had been properly directed about the need for caution when relying on identification evidence, what it could not have known was that more advanced scientific techniques would later result in DNA findings which both seriously undermined the case against the appellant and directly implicated another man. The appeal was allowed on this ground.

Having allowed the appeal on ground 1, the question arose: should grounds 2-5 be considered and if so should the appeal succeed on any or all of those grounds? The court had regard to *Hamilton and others v Post Office Limited* [2021] EWCA Crim 21 which held that if the court concluded that an appeal must be allowed on one ground, it was not obliged to hear argument on any other ground, but may in its discretion do so. The guiding principle in such circumstances was that it must act in the interests of justice, and there was a list of factors which the court would usually wish to consider in deciding whether to exercise its discretion.

Making the fact-specific evaluation in the present case, the court was satisfied that in the interests of justice it should exercise its discretion in favour of determining grounds 2-5. The court took into account in particular the overall importance of the case, the article 6 rights of the appellant in circumstances where he had spent long years in custody, the importance of maintaining public confidence in the criminal justice system, and the fact that consideration of the further grounds did not result in any undue delay to the appeal.

Ground 2 concerned the non-disclosure of photographs of the victim's hands which the court found had prevented the appellant from putting his case forward in its best light, and had strengthened the prosecution case against him in a manner which the photographs now showed to have been mistaken. Had they been disclosed, the jury's verdicts may have been different.

Ground 3 concerned the non-disclosure of the criminal records of the two identification witnesses. Cross-examination on their previous convictions would have been capable of casting doubt on these witnesses' credibility and of affecting the jury's view as to whether they could be sure that the appellant had been correctly identified. The court admitted the fresh evidence underlying grounds 2 and 3, granted leave to appeal and allowed the appeal on these grounds.

On grounds 4 and 5, which both concerned material relating to the credibility of one of the identification witnesses, the court was not persuaded that any of the material would had been admissible or would have assisted the jury in their assessment of the witness's evidence or been capable of casting doubt on the safety of the convictions, even taking them as an adjunct to grounds 2 and 3. Leave to appeal was refused on these grounds.

# Continuing receipt of Post Office cases

2021 saw the first judgment in which the CACD considered appeals against conviction by persons formerly employed as sub-postmasters or sub-postmistresses, or as managers of sub-Post Offices, collectively referred to as SPMs, who had been prosecuted many years ago by Post Office Limited (POL) or its predecessor or the CPS and had pleaded guilty to, or been convicted of, offences of dishonesty: see *R v Josephine Hamilton & others* [2021] EWCA Crim 577. Subsequent cases included *R v Robert Ambrose & others* [2021] EWCA Crim 1443; *R v Roger Allen & others* [2021] EWCA Crim 1874; *R v Margaret White & others* [2022] EWCA Crim 435; *R v* Richard Hawkes & others [2022] EWCA Crim 1197; *R v Sheila Coultas & another* [2023] EWCA Crim 606; and *R v Joanne O'Donnell* [2023] EWCA Crim 979.

The cases raised issues as to abuse of process, and as to the safety of the convictions, having regard to the concerns about the reliability of the computerised accounting system, "Horizon", which was in use in the sub-Post Offices at the relevant times. Fraser J (as he then was), in earlier civil proceedings, had made findings which showed that there had been inadequate investigation of those concerns, and/or a failure to make full and accurate disclosure about the concerns to those who were being prosecuted on the basis that Horizon showed a shortfall in the accounts of the sub-post office.

In *Hamilton* and subsequent cases, the court used the shorthand term "Horizon case" to refer to a case in which the reliability of Horizon data was essential to the prosecution, and in which there was no independent evidence of an actual loss from the account at the branch Post Office concerned, as opposed to a Horizon-generated shortage. The court considered each of the two well-established categories of case in which an accused person may seek to discharge the burden of establishing that a prosecution should be stated as an abuse of process: cases in which it is not possible for the trial process to be fair (category 1 abuse); and cases in which it would be an affront to the public conscience for the accused to be prosecuted (category 2 abuse).

In *Hamilton* the court concluded that, throughout the relevant period, there were significant problems with Horizon, which gave rise to a material risk that an apparent shortfall in branch Post Office accounts did not in fact reflect missing cash or stock, but was caused by one of the bugs, errors or defects which (as Mr Justice Fraser had found) existed in Horizon. The court also concluded that, during the relevant period, POL knew that there were serious issues about the reliability of Horizon, and that POL failed adequately to consider or to make relevant disclosure of problems with or concerns about Horizon, instead asserting that Horizon was robust and reliable. Further, the court was satisfied that POL had consistently failed to be open and honest about the issues affecting Horizon and had effectively steamrolled over any SPM who sought to challenge its accuracy.

At the beginning of 2024, the Criminal Appeal Office implemented a fast track approach to ensure the respondent confirmed within 14 days whether an application would be opposed and, if so, whether on category 1 and/or category 2 abuse of process. Unopposed applications are fast tracked for listing.

In January 2024, four applications for leave to appeal were lodged after the appellants concerned were contacted by POL and informed that their appeals would not be opposed. Their applications were fast tracked:

- *R v Kathleen Crane*, received on 11 January, listed within 14 days of receipt on 25 January 2024.
- *R v Allen Reynolds*, received on 17 January 2024 with grounds of appeal of the applicant's own composition. Funding was granted, the applicant received legal advice and grounds of appeal were settled by counsel. The application was listed within 15 days of receipt on 1 February 2024.
- *R v Ali; R v Bangay*, received on 24 January 2024, both were listed within 8 days of receipt on 1 February 2024.

In all four of those individual cases, the court (Holroyde LJ VP, Picken and Farbey JJ) granted leave to appeal, allowed the appeals and quashed the convictions. It is testament to the commitment of the legal representatives for the appellants and respondent, as well as the Registrar's staff, that the court is able to facilitate listing unopposed applications so quickly.

A further expedited hearing, *R v Jacqueline Falcon*, was listed before the Lady Chief Justice, Holroyde LJ VPCACD and Farbey J on 13 February 2024. The Lady Chief Justice noted that it was the 71st Horizon conviction the CACD had quashed and commented on the efficiency with which such applications for leave to appeal against convictions were dealt with, noting the co-operation of the parties, for which the court was grateful.

We anticipate further applications will be lodged. If so, we will continue to process them as quickly as possible.

# 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.

# Criminal Law and Procedure

## Section 31 Immigration and Asylum Act 1999 defence

R v Elmi [2022] EWCA Crim 1428 **(Whipple LJ, McGowan J and Ellenbogen J)**

The appellant arrived into UK from Somalia in 2010 using a false passport and subsequently pleaded guilty to possession of a false identify document. In 2013 the First-tier Tribunal refused his application for asylum as a refugee, however they did grant him "humanitarian protection" which provided almost equivalent protections as a grant of asylum. The issue before the court was whether this provided a defence under section 31 of the Refugee Convention. The Court concluded that it did not, and s31 only applied to refugees. However, consistent with its statutory purpose, it was considered that the defence may be advanced at trial by those who are at that time presumptive refugees. It would be a matter for the jury to determine whether the defence was made out and whether the defendant was a refugee. In the appellant's case, the court considered that the defence, had it been raised, would quite probably have succeeded, and as a result there had been a clear injustice in his case.

## Confiscation; piercing the corporate veil; appealing against an order made by consent

R v Miller [2022] EWCA Crim 1589 **(Stuart-Smith LJ, Wall J and HHJ Shant KC)**

The appellant was convicted of three counts of being knowingly concerned in the fraudulent evasion of VAT and one count of cheating the Public Revenue whilst being the director of three companies. It was the appellant's case that he had been wrongly advised that the sum of £6,673,082 was the correct amount of his benefit and that this advice should be considered as subverting his agreement to the making of the Order. Further, prior to the making of that order the appellant's son (a solicitor) raised questions about the separate legal personality of the companies. Trial counsel advised that this point was unarguable. In order to answer the question as to whether the advice was correct the court undertook a review of the complex body of authorities to determine the applicable principles on the

calculation of benefit and "piercing the veil" and the effect of a confiscation order made by consent. The court held that counsel's advice that the benefit figure could not be disputed was wrong: it was not a case where the fact of the conviction demonstrated conclusively that the proceeds of the frauds were POCA benefit for the appellant. In allowing his appeal and remitting the case to the Crown Court for assessment as to the benefit figure, the court held that the appellant, facing a very substantial potential confiscation order, was deprived of the ability to advance a point, which was reasonably arguable, by the refusal of his counsel to argue it.

## Modern slavery; Anonymity; principles to be applied

AFU [2023] EWCA Crim 23 **(Carr LJ, McGowan J and Goose J)**

The appellant had pleaded guilty on re-arraignment to conspiracy to produce a controlled class B drug (cannabis). It was argued that he had not been properly advised in relation to the available of a defence under section 45 of the Modern Slavery Act 2015 and alternatively that the prosecution amounted to an abuse of process. The Court concluded that the appellant had been advised as to the s.45 defence but the proceedings had amounted to an abuse of process. The prosecuting authorities had failed to follow CPS guidance on prosecuting suspects who might be victims of trafficking. If they had followed the guidance, they would have discovered that the applicant had been trafficked to the UK and forced to work in two cannabis factories under compulsion. The court also provided a general overview as to the general principles and authorities to be applied in modern slavery.

## CCTV evidence; police officer's analysis

R v Ulas [2023] EWCA Crim 82 **(Lewis LJ, McGowan J, Holgate J)**

The appellant sought to challenge his convictions for wounding with intent, possession of an imitation firearm with intent and violent disorder. As part of their case, the prosecution had relied upon identification evidence from a police officer who had reviewed CCTV images of the incident. Two days later he had seen the appellant and identified as one of the males on the CCTV footage. At trial the defence application to exclude the evidence was refused. In dismissing the appeal, the court held that the key factor was that the officer had studied the photographic material from the incident and so had acquired special knowledge or skills relevant to the identification of the person in the images. Furthermore, it was clear from the summing up, read as a whole, that the judge had properly directed the jury: they had been directed as to the caution necessary in cases of identification and the particular factors to which they should have regard when considering if they could be sure that they were able to identify the appellant as the man in the CCTV photographs.

## Application to re-open a final determination

R v. Zuman [2023] EWCA Crim 79 **(Lord Justice Fulford (sitting in retirement), Sweeney J and Bourne J)**

The applicant sought to set aside a final determination principally on the basis that he was not present to make oral representations whereas the respondent's counsel had been present when his renewed application for leave to appeal conviction was considered by the full court. Prosecution counsel had attended as there were linked conviction applications and those applicants were represented by counsel. The court reviewed the legal framework and authorities and rejected the argument that there had been a breach of principle of equality of arms. The court concluded that the decision had neither been a nullity nor procedurally unfair and refused the application to reopen.

## Issues raised in the authorities ending with *R v. Bani [2021] EWCA Crim 1958* and the amendments made in the Nationality and Borders Act 2022

R v Mohamed and Others [2023] EWCA Crim 211 **(LCJ, Holgate J and Bryan J)**

This special court addressed the question as to whether the legislative amendments had been effective in changing the law to permit the prosecution of persons crossing the English Channel in small boats, often with a view to claiming asylum, where they had been intercepted or rescued at sea and brought to an approved area of a UK port. The amendments also permitted the prosecution of those who facilitated such an arrival or attempted arrival.

## Offers to supply drugs from outside of the UK; jurisdiction

R v Laskowski (Piotr) [2023] EWCA Crim 494 **(Holroyde LJ VP, Holgate J and Foster J)**

The appellant had sent a message from the Netherlands to a person in the UK offering to supply drugs in the UK. The submission was that offence was complete when the message was sent in Netherlands and therefore there was no jurisdiction to try the offence in the UK. The court provided a succinct review of the case law on jurisdiction and found that the offer had been made in the Netherlands and the trial judge had been wrong to conclude that it had been made out when received in the UK. However a 'substantial measure' of the criminal activity took place in the UK and therefore there was jurisdiction for the UK courts to try the case.

## Juror issues

R v Lajevarti (Bijan) [2023] EWCA Crim 615 **(Holroyde LJ VP, Holgate J and Bright J)**

The applicant had been convicted of an offence of indecent assault. Following counsels' closing speeches, one the jurors had disclosed to a jury officer that this trial was bringing back memories of his past and that he had been sexually abused as a child. He stated that he had spoken to another juror (juror 2) about this. The applicant applied for leave to appeal against conviction and for an investigation by the Criminal Cases Review Commission to be directed. The court held that the judge had correctly followed the steps identified in the Criminal Practice Direction (at 26M.7). Whilst it would have been preferable for juror 2 to also have been questioned, there was no support for any suggestion of bias and as a result the court refused the applications.

R v Hernandez [2023] EWCA Crim 814 **(Holroyde LJ VP, Morris J and HHJ Morris)**

The appellant sought to argue that this conviction for an offence of sexual assault was unsafe because there was a real possibility of bias on the part of a juror. In advance of attending court, the juror had written to the Central Jury Summoning Service stating that as a former police officer he would be biased towards the prosecution and would try to persuade other jurors of the defendant's guilt. When selected to serve as a juror during the appellant's trial, the judge, having been provided with this letter, stopped the process and discussed with counsel how he should proceed. With counsel's agreement, the judge questioned the juror in the absence of the other prospective members of the jury. The juror confirmed that he would abide by the affirmation and as a result the judge ruled that he should serve on the jury. The court concluded that the judge had taken the right approach and was best placed to take account of how the juror answered the questions. Further there was no complaint from the other jurors or anything else that suggested that the juror had not complied with his affirmation.

## Procedure in the Magistrates' Court

R v Duignan (Sean) and others [2022] EWCA Crim 1452 **(Edis LJ SPJ, Yip J and HHJ Karu)**

These three, otherwise unrelated, appeals came before the court as the appellants had appeared before the Magistrates' Court for offences which were triable either way, had been erroneously sent for trial and had subsequently been unlawfully sentenced for offences for which they had not been convicted or where no formal plea had been entered. The court highlighted the importance of the lower courts following the correct procedures as set out in the Magistrates' Court Act 1980 and Crime and Disorder Act 1998 in order to avoid such errors in future.

R v Clark [2023] EWCA Crim 309 **(Simler LJ, William Davis LJ and HHJ Dhir KC)**

It was common ground between the parties that the appellant had pleaded guilty to an offence of breaching a restraining order and not guilty to an offence of assault occasioning actual bodily harm. However the sending sheet stated that both offences were sent for trial pursuant to section 51(1) and (2)(b) of the Crime and Disorder Act 1998. Before the full court, both counsel sought to suggest that the court could deal with the matter as an administrative error. The court disagreed stating that the only evidence was the sending sheet. Once the matter was sent the Magistrates' Court was functus officio and any attempt to correct the error afterwards was a nullity. The court went on to sit as a Divisional Court to quash the sending before using the s.66 power to sit as a District Judge in order to commit the breach and allow the appellant to be resentenced.

# Sentencing

## Unrepresented defendant at sentence – CBA days of action – imprisonment

R v Nguyen [2022] EWCA Crim 1444 **(Dame Victoria Sharp PKBD, Hilliard J and Tipples J)**

The court determined that a judge had erred in sentencing an offender to a total of two years' imprisonment for offences of converting and concealing criminal property in circumstances where the offender had the benefit of a legal aid order, but counsel had refused to attend court for the sentencing hearing because they were taking part in the Criminal Bar Association days of action. The court held that the applicant was in no different position to that of someone whose counsel was ill on the day of the hearing or had been delayed by a rail strike. On the facts of her case, it had been unlawful to sentence her unless and until, for proper reason, her representation order was revoked or withdrawn.

## Approach to days on remand; life sentence

R v Cookson and Eaton [2023] EWCA Crim 10 **(Thirlwall LJ, Cheema-Grubb J and Sweeting J)**

The court determined that where a judge imposing a life sentence reduced the minimum term by the number of days that the offender had spent on remand, the calculation of the minimum term was part of the sentence of the court. If an error in the calculation of the number of days subsequently came to light, the number of days could not be adjusted administratively; the matter had to be put before the judge and the amended minimum term pronounced in open court

## Remand time – qualifying curfew

R v Sothilingham [2023] EWCA Crim 485 **(William Davis LJ, Cockerill J and Saini J)**

The court concluded that an offender subject to a qualifying tagged curfew was entitled to the appropriate credit under the Sentencing Act 2020 s.325 even though his electronic monitor was never fitted. There was nothing in sections 325 or 326 of the Sentencing Act 2020 which imported a requirement for the monitoring device to be functioning.

## Children and young persons; approach to sentencing

R -v- ZA [2023] EWCA Crim 596 **(William Davis LJ, May J, HHJ Lockhart KC)**

This appeal raised important points concerning the correct approach to sentencing children and young people. The court observed that the sentencing of children and young people was a difficult and time-consuming endeavour if carried out properly in accordance with the Sentencing Council guidance. The court noted that court lists allowed too little time to prepare for the hearing and the hearing itself. The court noted the importance of the judge being assisted by counsel and highlighted that sentencing notes must be full, accurate and reference the relevant (and correct) guidelines, case law and processes set out in the CPD and the youth-specific Judicial College publication.

In multi-handed cases, care had to be taken to draw the judge's attention to distinctions between older and younger defendants. It was important to note that in the case of under 18s there had to be an individualistic approach. Where there was a youth specific guideline, this must be used and in all cases attention should be drawn to the overarching youth guideline. The court also provided helpful guidance as to listing and logistical arrangements in the courtroom and the use of age-appropriate language.

## Notification requirements: Sexual Offences Act 2003

R v Allon [2023] EWCA Crim 204 **(Holroyde LJ VP, Bryan J and Sir Nigel Davis)**

The appellant had committed an offence of distributing an indecent photograph of a child contrary to section 1(1)(b) of the Protection of Children Act 1978 when he was aged 17. He was sentenced for that offence to a community order when aged 20. An issue arose as to whether he would be subject to the notification requirements under Part 2 of the Sexual Offences Act 2003. The judge decided that he would, as a result of which the s.92 certificate was issued. First, the court resolved a preliminary point as to whether there was jurisdiction to hear the case and secondly, determined that as the complainant had been aged under 16 when the offending film was recorded and the applicant had been under the age of 18, on a proper interpretation of the statutory provisions, the notification requirements did not apply to the appellant.

## Prison conditions: Post pandemic prison overcrowding

R v Ali (Arie) [2023] EWCA Crim 232 **(Edis LJ SPJ, Bryan J and HHJ Dhir KC)**

The court held that a sentence of six months' imprisonment, suspended for 18 months, was appropriate for an offender who, whilst a serving prisoner, had thrown the boiling hot contents of his mug into a prison officer's face causing first-degree burns. Although such an offence would usually lead to an immediate custodial sentence to be served consecutively to any sentence which had caused the offender to be in prison, the delay in the offender's trial, his positive behaviour since the offence and the problem of prison overcrowding meant that there were exceptional circumstances which justified suspending the sentence.

R v Francis Peter Monk [2023] EWCA Crim 518 **(Thirlwall LJ, Stacey J and Bennathan J)**

In this case, the court distinguished the above case of Ali noting that whilst delay and prison conditions were both powerful factors (and in borderline cases, decisive), when weighed against the facts in this case, the seriousness of the offence, the appellant's total lack of insight and remorse, together with the harm done, (both physical and psychological causing the complainants to move from their home of over 11 years), it could not be said that the Recorder's decision not to suspend the sentence was wrong in principle.

## Sentencing an adult for offences committed when they were a child

R v Ahmed [2023] EWCA Crim 281 **(Lord Burnett LCJ, Holroyde LJ VP and William Davis LJ)**

This was a specially constituted court which considered whether there was tension between *R v Forbes and others [2016] EWCA Crim 1388* and *R v Limon [2022] EWCA Crim 39*.

The court reviewed the authorities to date and confirmed the proper approach that whatever the offender's age at the time of conviction and sentence, the guideline on sentencing children and young people was relevant and must be followed unless the court was satisfied that it would be contrary to the interests of justice to do so. The court must have regard to the maximum sentence that would have been available at the time of the offending and, as its starting point, the court should take the sentence which was likely to have been imposed if the child offender had been sentenced shortly after the offence.

However, as with any sentencing exercise, that starting point could increase and decrease. If the defendant could not have been sentenced to any form of detention at the time of the offending, then a custodial sentence could not be imposed by the court. Where a period of detention would have been available, the court was not bound by the maximum sentence that would have been available to the court at the time of the offending. However, the court should only exceed that maximum sentence where there was good reason to do so. The mere fact that the defendant was now an adult was not in itself a good reason.

## Mandatory minimum sentences; previous offences

R v Thomas (Murray) [2023] EWCA Crim 543 **(Carr LJ (as she then was), McGowan J, HHJ Karu)**

In this case, the trial judge had doubled the mandatory minimum term in order to account for the appellant's previous convictions. The court determined that the mandatory minimum term was not the starting point. The correct approach in these circumstances was to have regard to the relevant Sentencing Council Guideline, whilst always ultimately ensuring that the term finally imposed was not less than the mandatory minimum term. Judges should go through the proper sentencing exercise by reference to the Guideline and then cross-check to ensure that the sentence was not less than the minimum term required. In the court's judgment a term of four years' imprisonment by reference to the relevant Sentencing Council Guideline was appropriate. A cross-check with the mandatory minimum term revealed that the sentence did not need any further alteration. The court acknowledged that there may be occasions where an appalling record could take the sentence radically outside the guidelines but in this case the judge had not taken that approach and the appellant had a significant period without offending.

## Conviction for greater offence following guilty plea to lesser offence; incorrect use of no separate penalty

R v Butler [2023] EWCA Crim 676 **(Dingemans LJ, Sweeting J and HHJ Dean)**

The appellant had pleaded guilty to simple possession of cannabis and not guilty to possession of cannabis with intent to supply and to money laundering. He was subsequently convicted of the latter offences at trial and sentenced to a total of two-and-a-half years' imprisonment. He appealed against his sentence which was dismissed by the court. However the court noted that "no separate penalty" had been recorded for the offence of simple possession to which the appellant had pleaded guilty, and that this was incorrect. Applying the old decision of *R v Cole [1965] 2 QB 388*, a guilty plea did not amount to a conviction until a sentence was passed. If a defendant was subsequently acquitted of the more serious offence, he could then be sentenced for the offence to which he had pleaded guilty. If, however, a defendant was convicted of the more serious offence, he would be sentenced for that offence and the earlier admitted offence should be ordered to lie on the file. That avoided a defendant being convicted of two offences for the same criminal conduct.

## Breach of a Sexual Risk Order; correct approach to sentence

R v. Kombi [2023] EWCA Crim 784 **(Stuart-Smith LJ, Jacobs J and HHJ Richardson KC)**

In the absence of a specific Sentencing Council Guideline, the court set out the proper approach to sentencing for offences of breach of a sexual risk order. The court said that judges should have regard to the guidelines for breach of a Sexual Harm Prevention Order ("SHPO"). There were introductory words in the context of harm which referred to the original offence or offences for which the SHPO was imposed and the need to assess harm in that context. Whilst these words did not apply directly to a sexual risk order, the judge should still look at the circumstances which gave rise to the making of the order. Where a person was prosecuted for breach of a SHPO, the judge was not resentencing for the original offence which resulted in the imposition of the SHPO. Rather, the judge was considering the circumstances of the breach against the relevant background. Thus the specific factors identified under both culpability and harm in the SHPO Guideline could readily be applied to breach of a sexual risk order, as could the factors increasing or reducing the seriousness of the offences or reflecting personal mitigation.

# Outreach work

On 23 May 2023, students supported by Anthony Walker bursaries as well as those on a variety of social mobility and other mentoring schemes, all visited the Royal Courts of Justice for an outreach day organised by the CAO and the Court of Appeal, Criminal Division to meet legal colleagues and talk with senior members of the Judiciary.

The Anthony Walker Foundation, in partnership with the CPS, supports students from diverse ethnic minority backgrounds in the north of England, as they aspire for careers in the legal profession. Hosting them and the other delegates at the RCJ, provided valuable experience, learning and connections. In turn, activities such as this help ensure the legal profession of the future reflects the diversity of the society it serves and demonstrates a commitment to open justice.

The students engaged enthusiastically as they heard how HMCTS lawyers at the Criminal Appeal Office joined the legal profession and successfully developed their careers through private practice and roles in the Civil Service, and the Head of Legal Operations at the RCJ shared her very inspiring career journey.

The students also took a tour of the RCJ, stepping through the legal history that infuses the historic buildings and courtrooms. Lord Justice Holroyde, Vice President of the Court of Appeal, Criminal Division, met the students to explain about his role and pass on advice for aspiring legal professionals. Master Beldam KC, Registrar of Criminal Appeals, also met the students and explained the history of the Court of Appeal. Lord Justice Dingemans and HHJ Bate each answered questions on real cases the students had observed in court and gave valuable and practical advice to the aspiring students.

The event was made possible with the kind support of Legal Operations staff, Building Management and others. It was a real success, with those attending expressing thanks and gratitude to all involved.

# Other Visitors

On 30 June 2023, the Registrar welcomed a delegation of Prosecutors from South Korea, who met with the Registrar and a Senior Legal Manager and then went to observe proceedings in court.

# Summary and Statistics

## 1 October 2022 to 30 September 2023

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 that conviction applications have returned to the levels prior to the Covid pandemic, but that sentence applications have remained largely consistent over the last five years. It can be seen that there is a marked increase in the total number of outstanding applications.

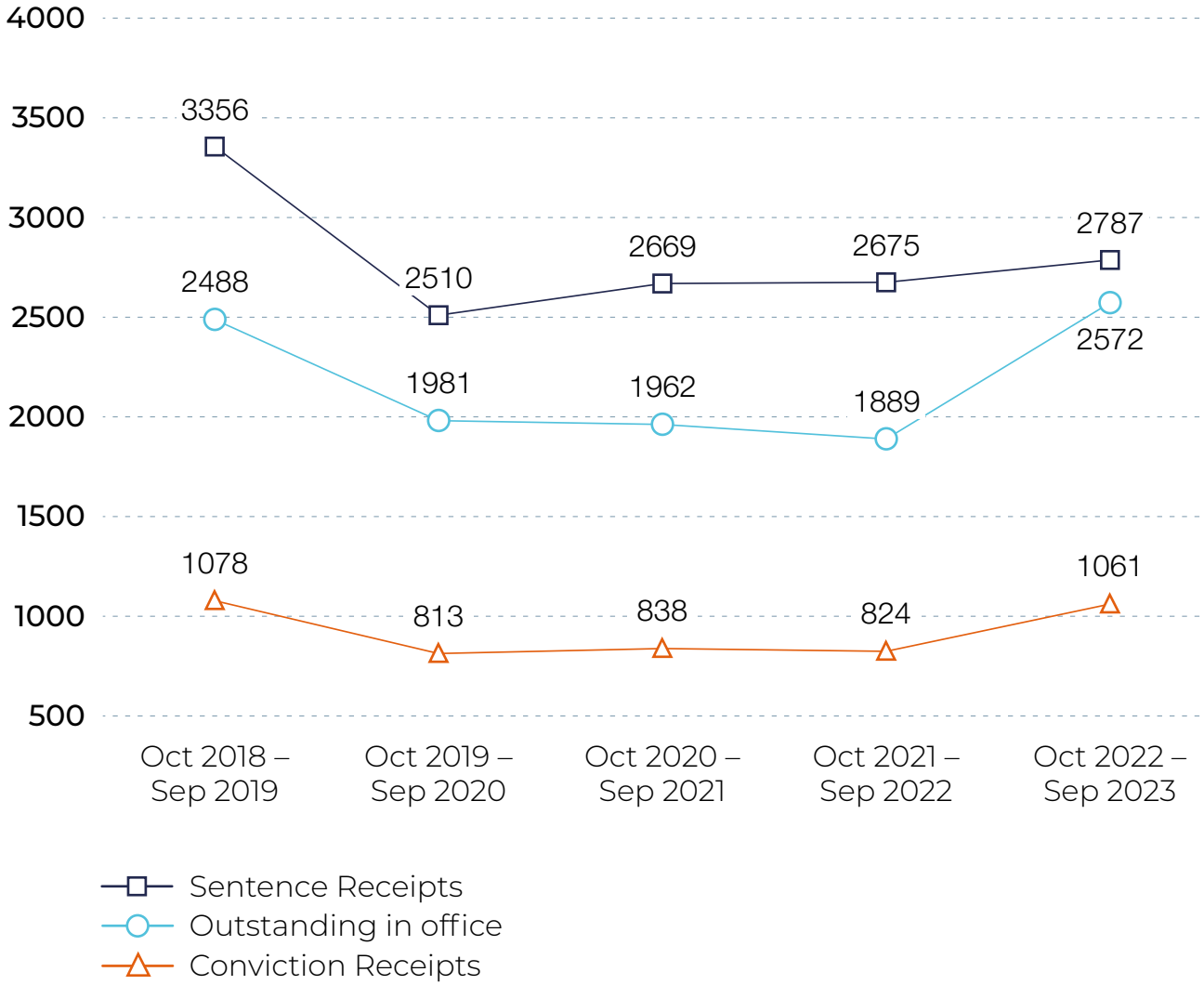
Annex H shows that there is also a marked increase in the number of outstanding old cases and these include a rise in both outstanding conviction and sentence appeal cases.

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 17% of conviction applications were deemed arguable by the Judge (leave granted or referred) and 29% of sentence applications. This demonstrates the effectiveness of the Section 31 stage in acting as an important filter for the court.

Annex F shows that out of 1061 conviction applications received, in the same year only 35 conviction appeals were allowed by the court. That equates to 3%.

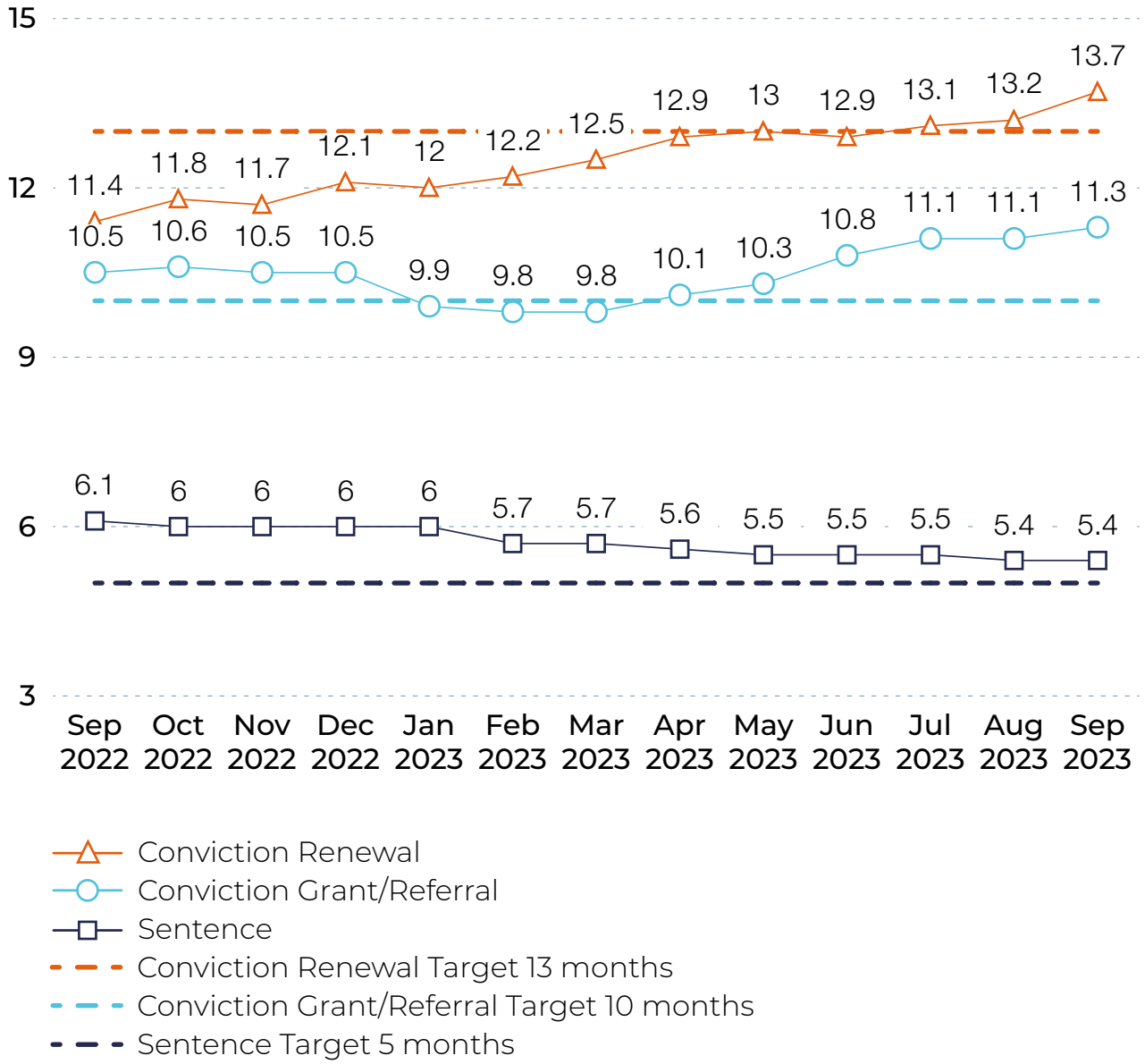
Once a case reaches the court for a full appeal hearing, Annex D shows that just over half of conviction appeals (38%) were allowed by the court (35 out of 92 appeals). In terms of sentence appeals 40% were allowed by the court (278 out of 681 appeals).

# Annex A – Applications received and outstanding in office



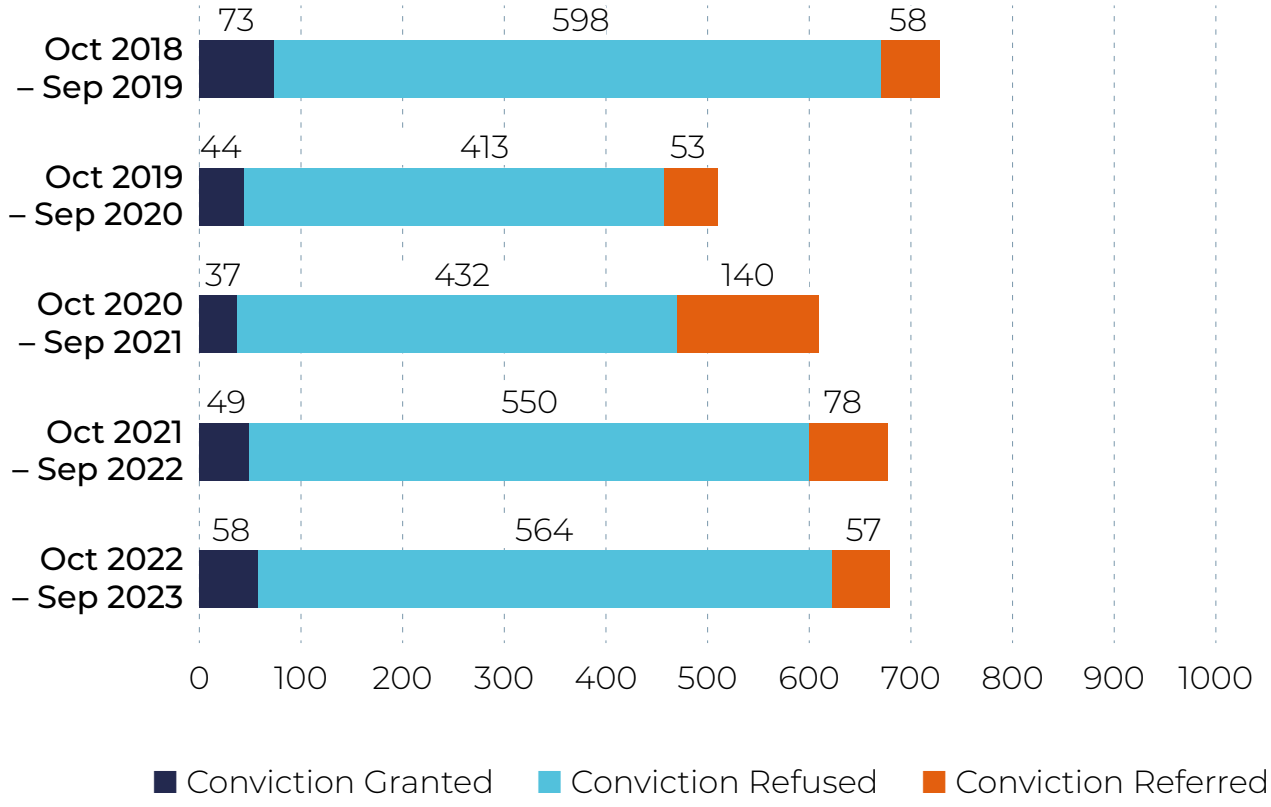
# Annex B – Average waiting time (months)

**Rolling average of cases disposed by full Court over previous 12 months**

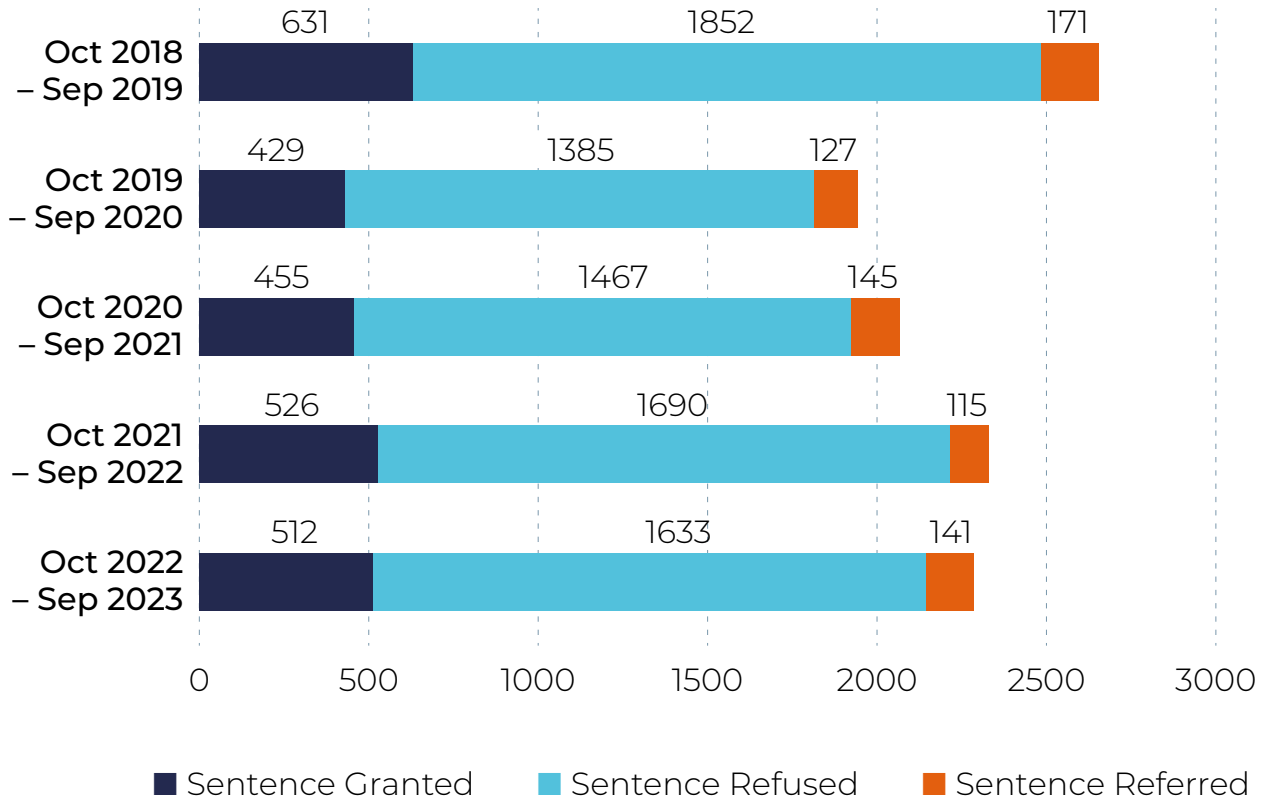


# Annex C – Section 31 Applications

### Conviction applications dealt with

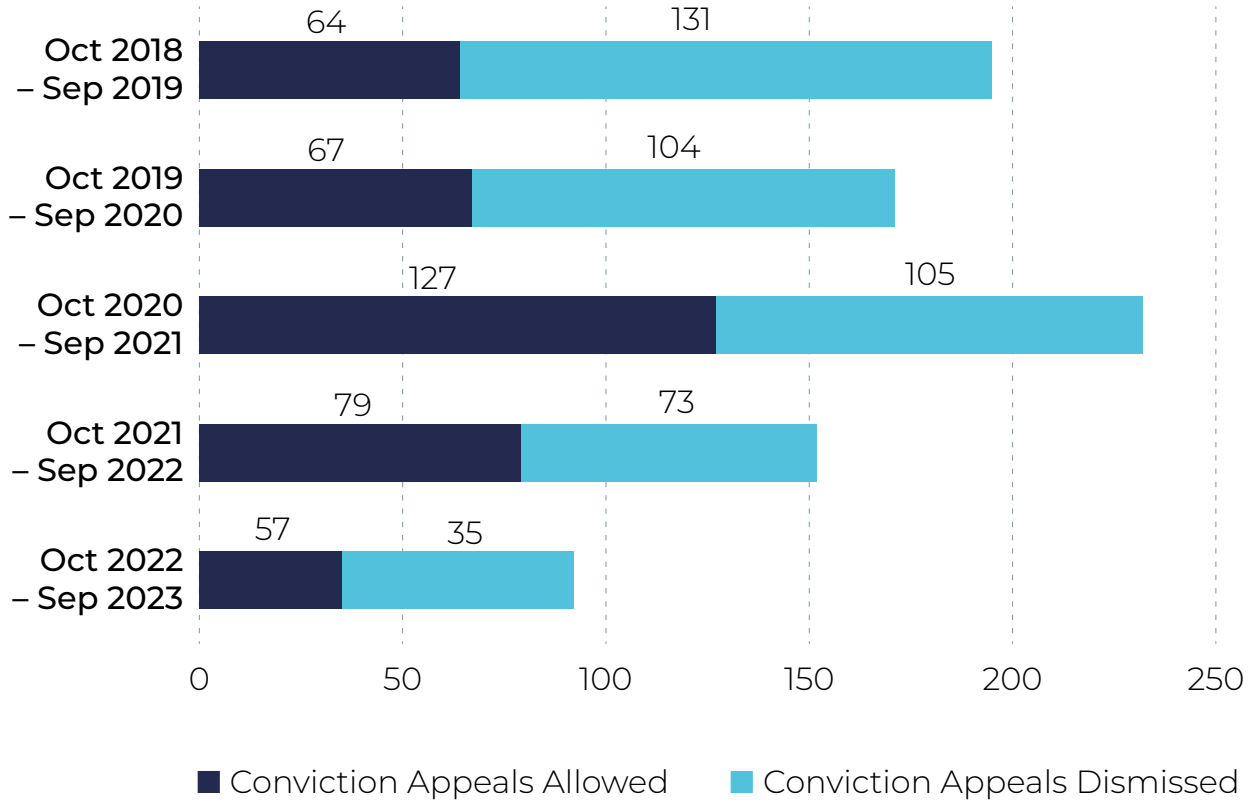



### Sentence applications dealt with

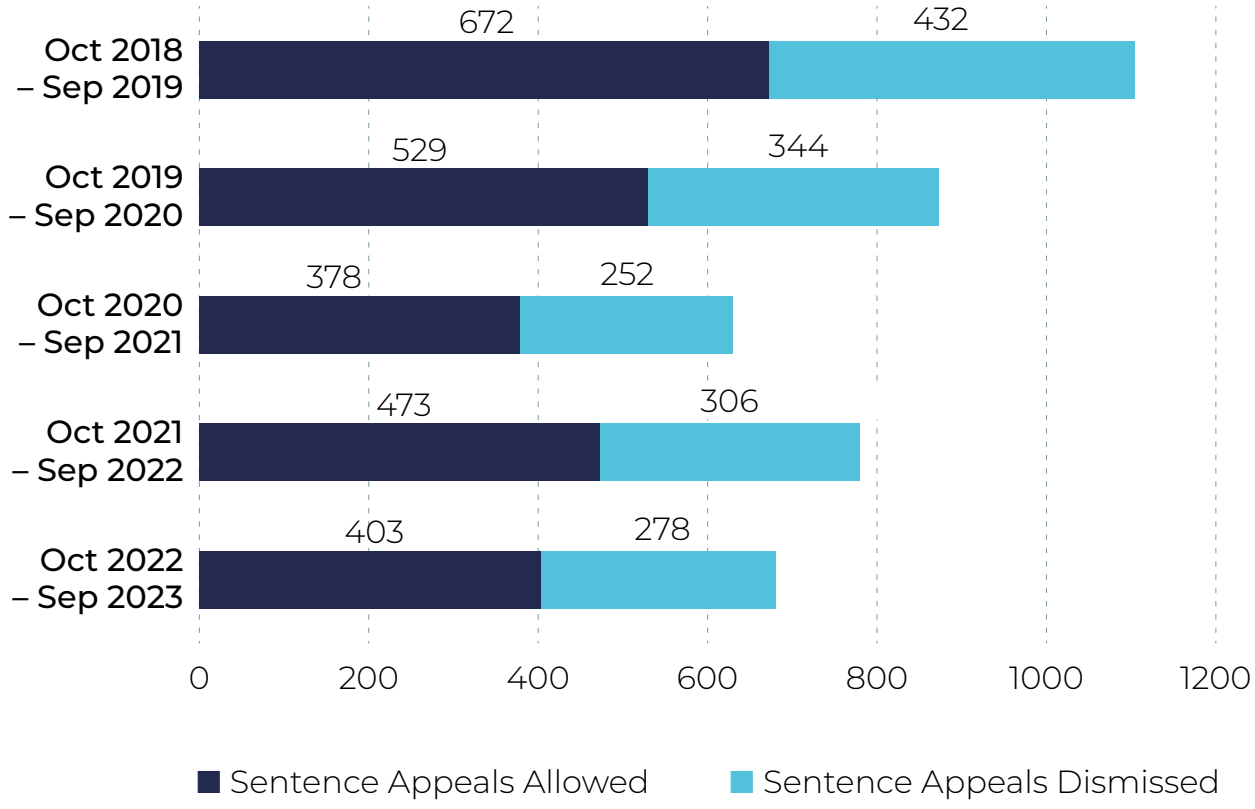


# Annex D – Appeals Heard

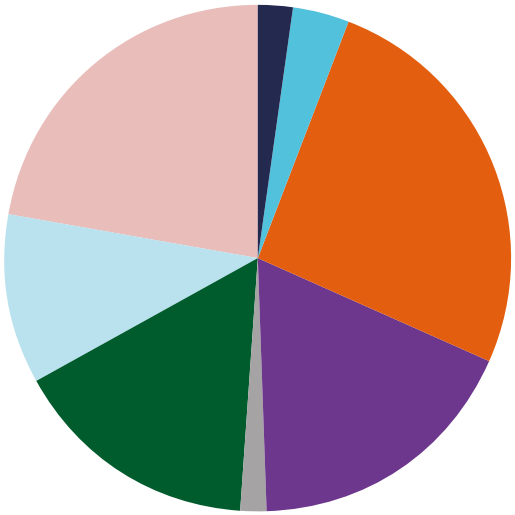
## Conviction




## Sentence

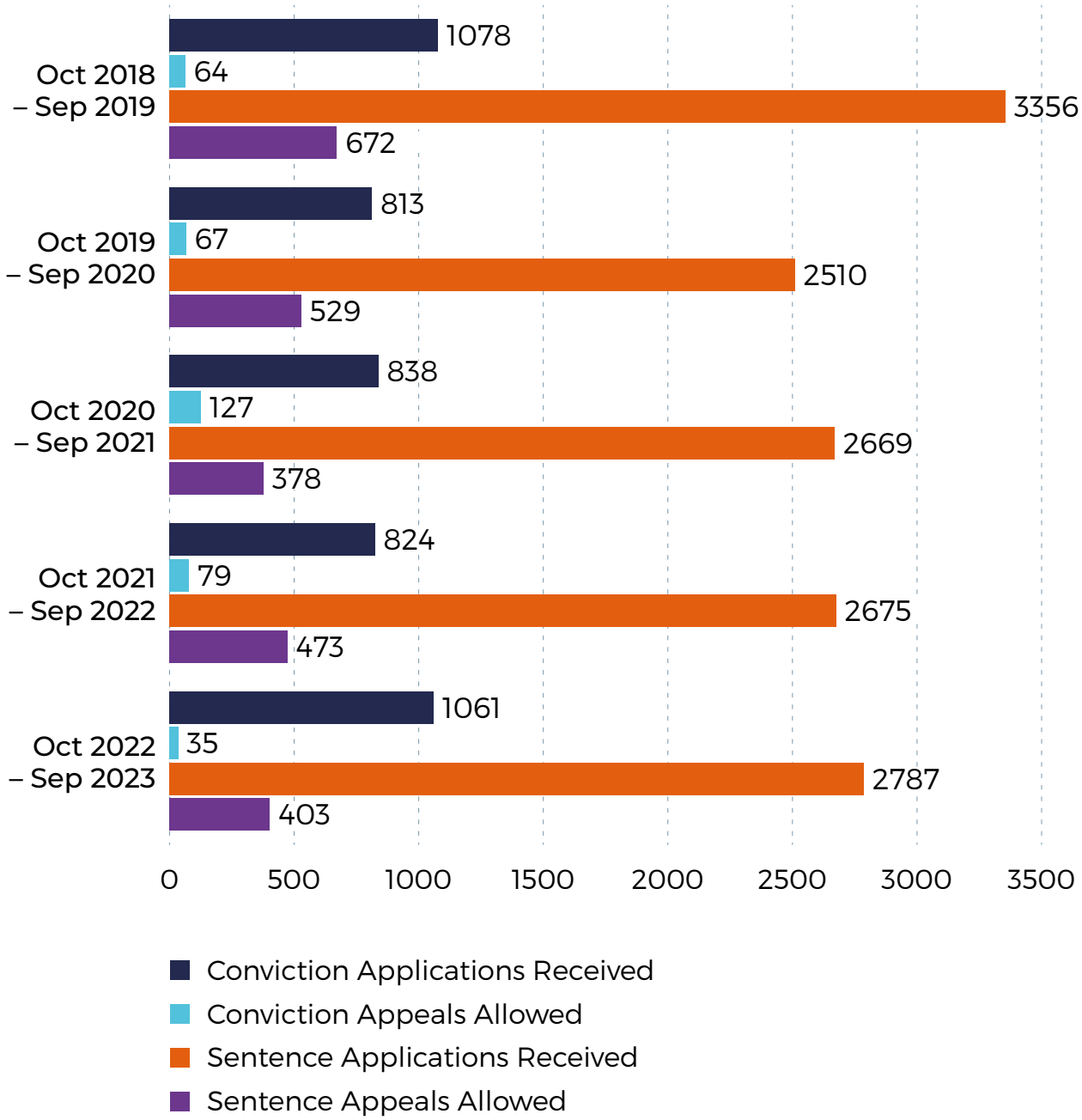


# Annex E – Court time Appeals

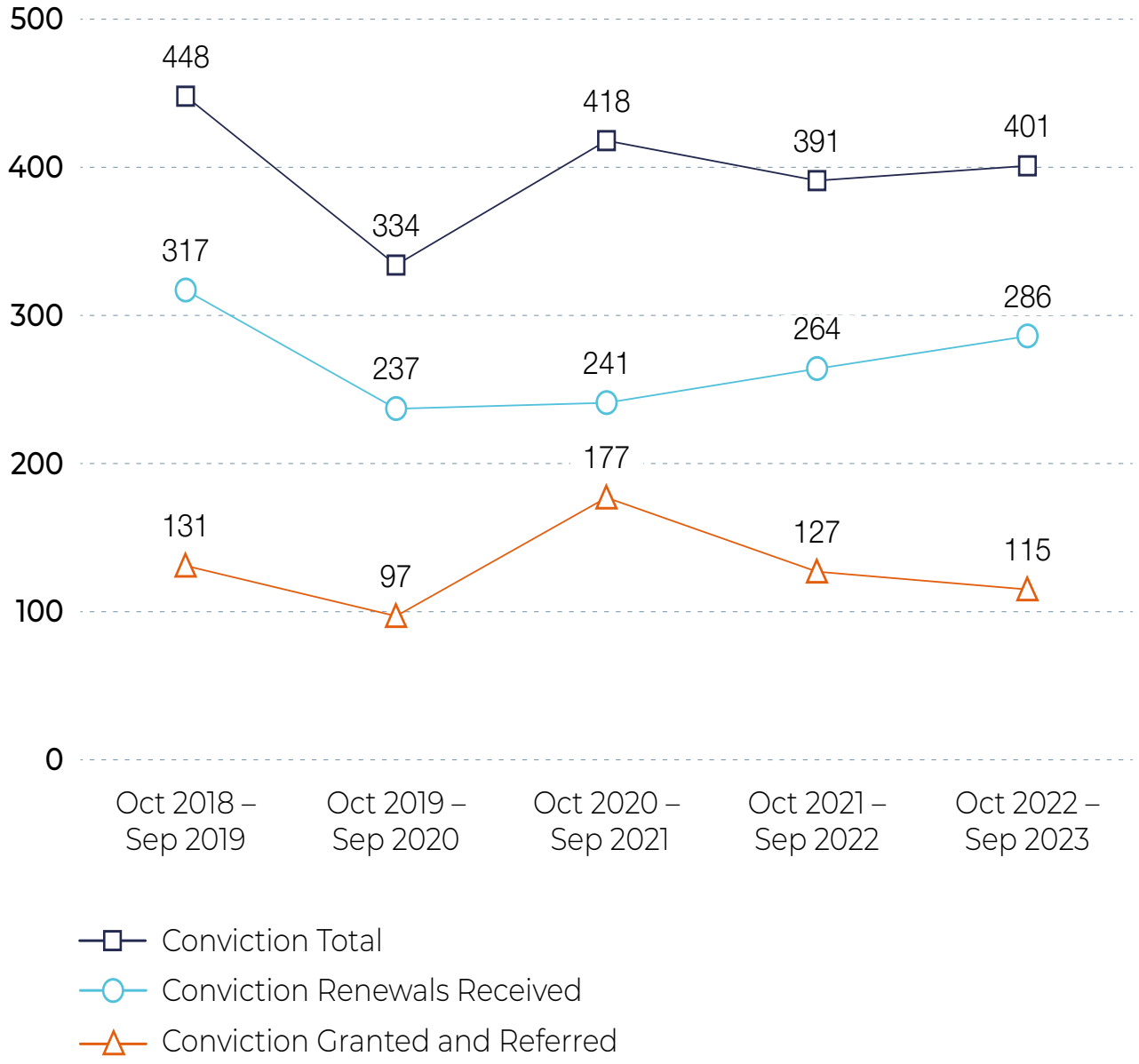


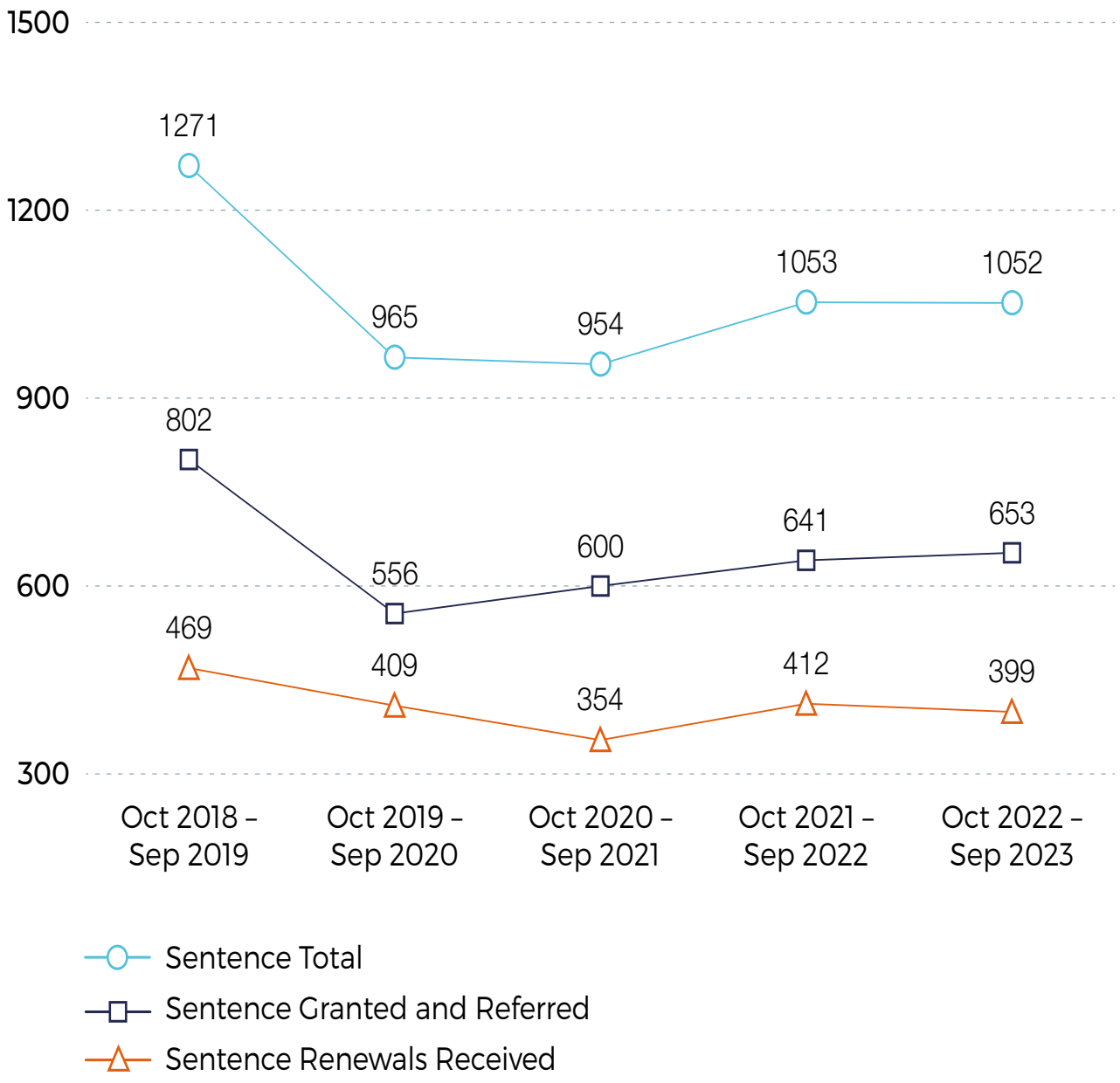
- Conviction Appeals Allowed (35)
- Conviction Appeals Dismissed (57)
- Sentence Appeals Allowed (403)
- Sentence Appeals Dismissed (278)
- Conviction Renewals Granted (25)
- Conviction Renewals Refused (245)
- Sentence Renewals Granted (169)
- Sentence Renewals Refused (346)

# Annex F – Applications received and appeals allowed



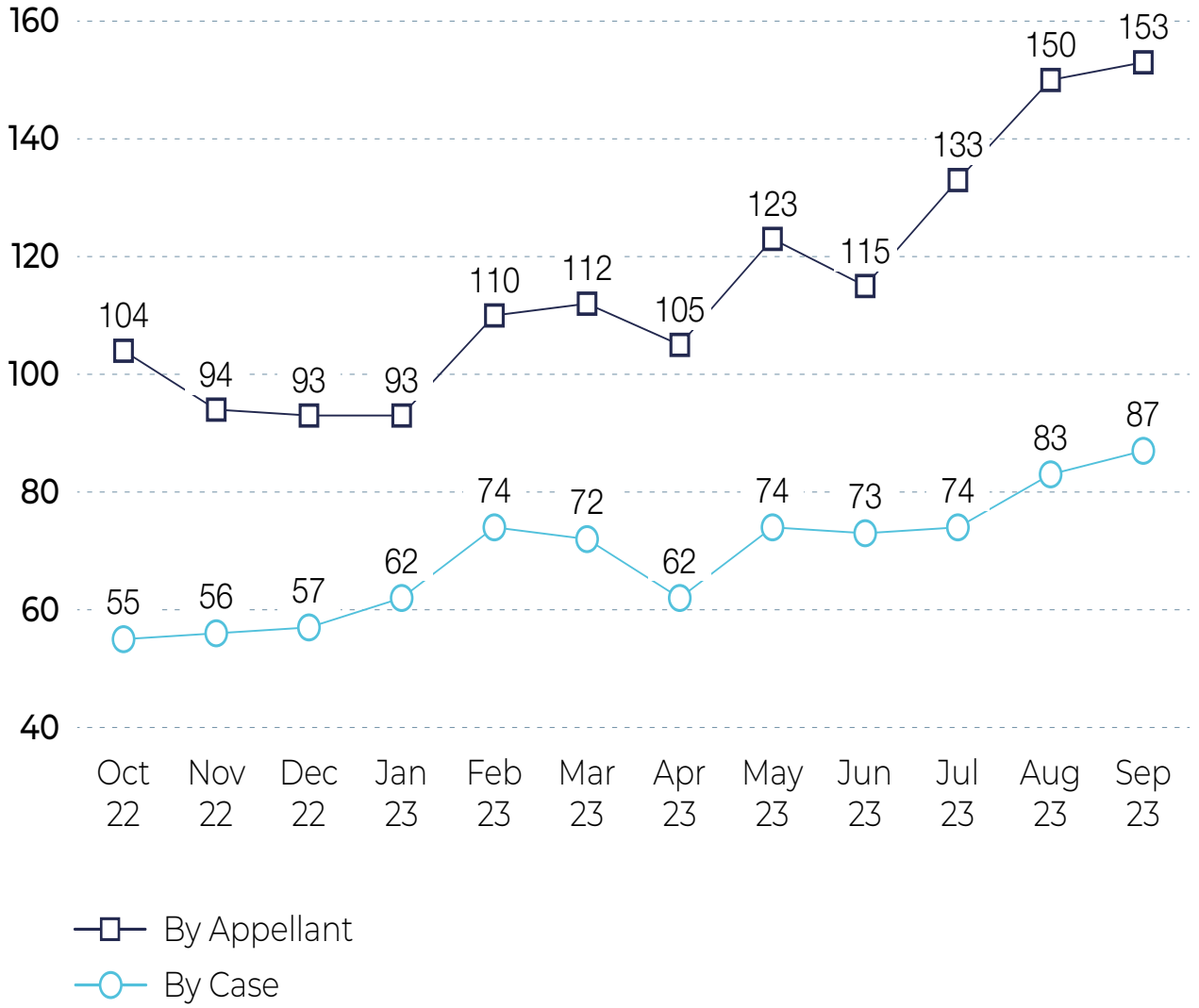
# Annex G – Applications Granted, Referred or Renewed



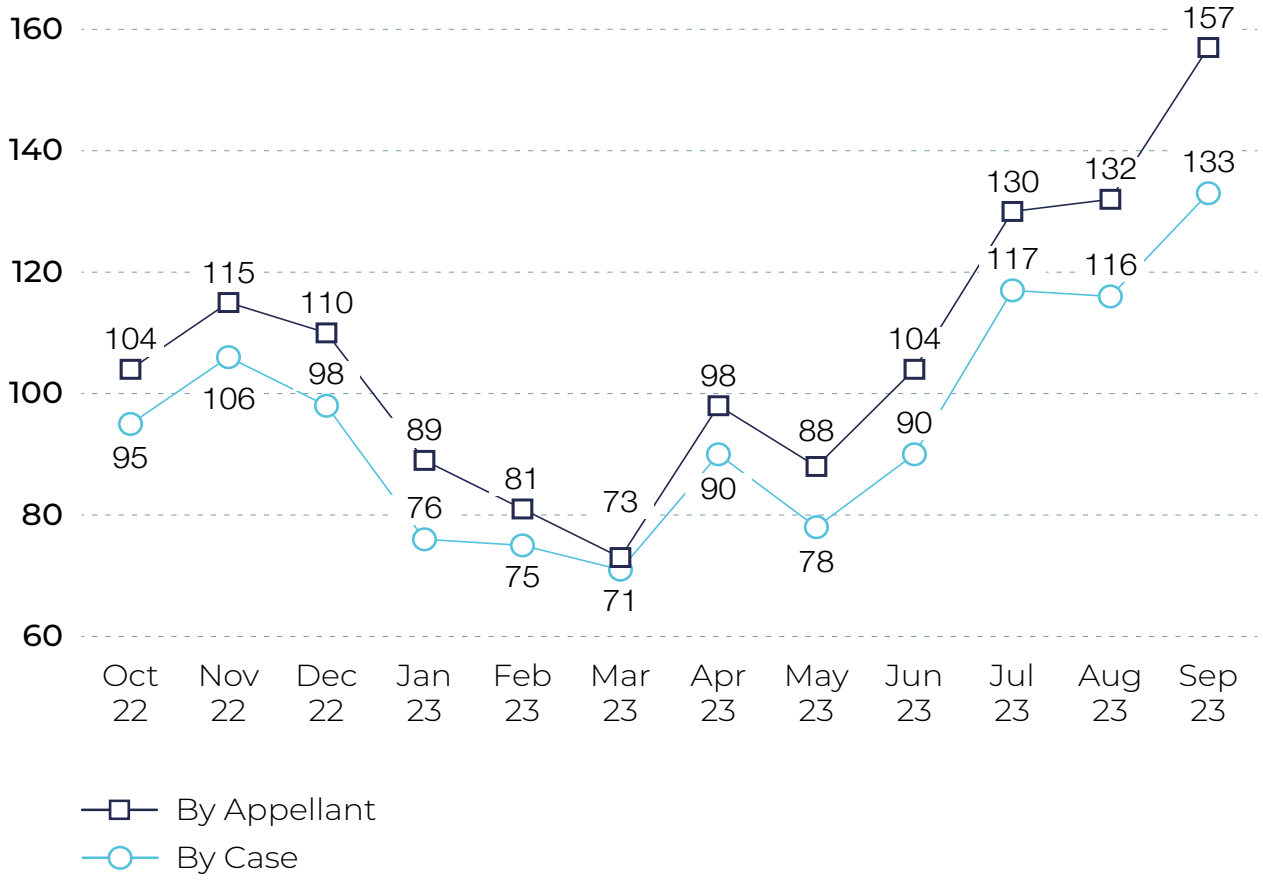

1500
1200
900
600
300
1271
965
954
1053
1052
802
556
600
641
653
469
409
354
412
399
Oct 2018 – Sep 2019
Oct 2019 – Sep 2020
Oct 2020 – Sep 2021
Oct 2021 – Sep 2022
Oct 2022 – Sep 2023
Sentence Total
Sentence Granted and Referred
Sentence Renewals Received

# Annex H – Old Cases

**Conviction old cases – outstanding over 10/13 months**



## Sentence old cases – outstanding over 5 months





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