Judiciary of
England and Wales

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

October 2023 – September 2024

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This publication is available at www.judiciary.uk.

Any enquiries regarding this publication should be sent to us at website.enquiries@judiciary.uk.

Published by: Judicial Office
11th Floor Thomas More Building,
Royal Courts of Justice,
Strand,
London WC2A 2LL

www.judiciary.uk

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Introduction

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

The number of cases dealt with by the Court of Appeal, Criminal Division (CACD) continues to increase and the variety, as well as the increasing complexity, of these cases is highlighted by those featured within this year's review. As ever, I remain grateful to the Registrar and the Criminal Appeal Office (CAO) staff for their ongoing efforts in ensuring that the work of the court is carried out as smoothly as possible and that we provide a high quality service to our court users and the public. I am particularly grateful to the CAO staff for their vigilance in spotting unlawful sentences which, regrettably, have previously gone unnoticed.

It is clear that there is immense pressure upon all of those working within the Criminal Justice System. CACD is not immune to those pressures and the rise in receipts, in the number of litigants in person (LIPs) and in outstanding cases waiting to be heard by the court, is a clear reflection of those unrelenting demands which the court must continue to navigate. The increase in the proportion of cases involving LIPs makes particular demands on the CAO staff, as experience shows that such cases are more time-consuming than equivalent cases in which the applicant is represented. I express my heartfelt thanks to the CAO staff, and to my judicial colleagues, for their efforts in rising to meet these challenges and for their dedication and commitment to the administration of justice.

I also wish to thank counsel and solicitors for their diligent case preparation and written submissions as well as the quality of the advocacy that they deliver before the full court. It is incumbent on all of us to share best practice in order to promote the profession. Although the court will always have read the papers in advance of any hearing, the importance of oral submissions cannot be overstated and the court is extremely grateful for the focused manner in which counsel make their submissions and the assistance that they provide to the court.

The year covered by this Review has included the pleasures of welcoming the first HMCTS apprentice to the Criminal Appeal Office and of hosting a second outreach day within CACD. These opportunities ensure that the work of the courts is transparent and that there is appropriate training and development for those looking to enter the progression or for those who are at an early stage of their legal career. Promoting diversity in the profession will also have clear benefit to clients and the profession as a whole and ultimately will lead to a more diverse judiciary.

Finally, I thank all involved in the preparation of this Review. It includes helpful reminders and guidance, which I commend to practitioners.

No doubt the year ahead will continue to bring complex and challenging work to the court but, as always, we shall continue to work in a manner that progresses cases as justly and efficiently as possible.

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

Overview of the Year

Master Beldam, Registrar of Criminal Appeals

Although receipts this year have not quite returned to pre-pandemic levels, the continued increase in the proportion of applications by litigants in person and the level of complexity of many applications lodged by legal representatives, the Court of Appeal, Criminal Division and the Criminal Appeal Office continue to work together with the common purpose of ensuring cases are dealt with expediently and justly. As Registrar, I regularly give directions as to the listing of urgent applications before the full court or the allocation of applications to a single judge, where, for example grounds of appeal argue that the sentence should have been suspended, so that such applications can be prioritised where necessary.

All the judges who sit in the Court of Appeal, Criminal Division, both in the full court and as single judges dealing with applications for leave to appeal, continue to work at full capacity to assist with the throughput of work. However, the increasing complexity of the work, reflected in the length of grounds of appeal and supporting documents, has led to an unwelcome backlog in the number of applications awaiting allocation to a single judge. I am particularly grateful for the contribution made by judges sitting in retirement, whose assistance with heavy and complex applications, which are especially time-consuming, is of enormous value.

The court continues to embrace the use of CVP where appropriate, in particular where counsel is appearing pro bono and remote participation will minimise any interference with Crown Court proceedings. The court is always grateful for the focused written submissions lodged by legal representatives and is always assisted by oral submissions made at the hearing. Whilst all the members of the court will have read all the written material in advance, the importance and value of oral advocacy must not be underestimated: oral submissions may reinforce any preliminary view or may lead the court to a completely different conclusion.

The proportion of applications received from litigants in person continues to increase, which reflects the efforts made to remove the barriers to justice they face. Whilst this is another positive step, the increase presents challenges to the judiciary and staff as well as a burden on trial legal representatives, whose professional responsibilities require them to respond, without remuneration, to grounds of appeal which criticise the performance of their duties. I thank all those legal representatives for the invaluable assistance they continue to give the court, notwithstanding the pressures of their already busy practices.

This year saw the passing of the Post Office (Horizon System) Act 2024, under which convictions which the Secretary Of State considers to be in scope are quashed, obviating any need for a decision of the CACD. Where applications for leave to appeal conviction have already been received from Sub-Post Masters, the CAO has written to the applicants asking to be notified as soon as they are informed that their convictions have been so quashed and some have already responded that they have received such notification.

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 seeks to provide effective support to the court and build effective working relationships with court users to improve efficiency. This includes holding an annual Court User Group meeting, ably co-ordinated by the Secretary to the User Group, Samantha White, who is an experienced CAO lawyer. Following the consolidation and slimming down of the Criminal Practice Directions last year, Samantha White has also regularly updated the guidance set down by the Registrar in the Guide to Proceedings in the Court of Appeal Criminal Division, available on the judiciary.uk website.

I extend my thanks to all the judges who sit in the CACD and to the judges of the King's Bench Division and the Commercial Court who consider applications for leave to appeal. Their patience and good humour contributes to the excellent relationship between staff and the judiciary. This was also highlighted in another successful 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. Such visits are enjoyable for the judiciary and staff and invaluable in promoting diversity in the legal professions and thus the pool of talent from which the judges of the future will be drawn.

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 they then 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.

The Guide to Criminal Proceedings in the Court of Appeal, Criminal Division

General information for practitioners

Pursuant to Criminal Practice Direction 10.1.1, practitioners must comply with this guidance which has been drafted to aid practitioners to meet the expectations of the CACD and comply with their obligations under the Criminal Procedure Rules and Practice Direction.

The guide provides guidance in relation to a number of practices and procedures including:

- Authorities – advocates should provide a PDF bookmarked bundle of authorities that are relevant to the application (see Guide B.3.6 and Annex 1, G3 and G6)

- Urgent listings – the Registrar will consider expediting cases where appropriate, for example where the grounds of appeal are that the sentence should have been suspended or in prosecution appeals where a jury is in waiting (see the Guide at B.2.4 and H.1.2).

- Time estimates – the CAO summary contains time estimates for the hearing (including the delivery of the judgment) and the judges' reading time of the core material. The advocates must review these time estimates and communicate with the CAO as soon as possible if they do not consider that the time estimate as stated in the CAO summary is accurate and / or realistic. If the time estimate is not challenged, then the hearing will be listed with that estimate in mind and oral submissions must fit into the available time (see the Guide at D.9.1)

- Remote participation by advocates – to request a live link direction, an application form must be completed and sent via email to courtclerks@criminalappealoffice.justice.gov.uk as soon as reasonably practicable and, where possible, at least 7 days before the hearing to allow for sufficient time for the request to be considered. The judges in the CACD are conscious of the pressure of work in the Crown Courts and will endeavour to permit remote attendance, where possible, in order to minimise disruption to any Crown Court cases (see Guide, D.10).

The guide is a living document which is expertly edited and updated by CAO lawyer, Samantha White. 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.

Remote observation of hearings

Remote observation of hearings is still in its infancy; they were introduced by the Coronavirus Act 2020 in a response to lockdown and to keep justice moving across all jurisdictions. New powers to observe hearings remotely came in to force on the 28th June 2022 by virtue of s.85A of the Courts Act 2003 (as inserted by s.198 of the Police, Crime, Sentencing and Courts Act 2022. The regime is implemented by the Remote Observation and Recording (Courts and Tribunals) Regulations 2022).

Until s.85A there was flexibility in how permission was granted but the legislation introduced mandatory requirements (and safeguards). It is important to note, as set out in the practice guidance issued in June 2022 by the then Lord Chief Justice, Lord Burnett, t, that open justice is a fundamental principle but access to the courts is not unfettered.

The criteria to be satisfied for the 'transmission' direction are that (a) it would be in the interests of justice to make it; (b) there is capacity and technological capability to enable transmission and giving effect to the direction would not create an unreasonable administrative burden. The court must take into account the need for open justice; the timing of any access request and its impact on the business of the court; the extent to which the resources necessary for effective remote observation are or can be made available; any statutory limitation on those entitled to observe; any issues that might flow from observation by people outside the UK; and any impact which the making or withholding of such a direction, or its terms, might have upon (i) the content and quality of the evidence; (ii) public understanding; (iii) the ability of the media and public to observe and scrutinise; and (iv) the safety and right to privacy of any person involved with the proceedings.

The application form, which **must be used** in the CACD, complies with other legislative requirements that those who want to watch or listen must identify themselves to the court by providing their full name and email address beforehand and reminds the observer that they must conduct themselves appropriately, and in accordance with the court's directions, during the transmission.

There is a judicial and administrative logistical issue for the CACD as only the full court can give a 'transmission' direction so all the judges in the constitution must make a joint decision as to whether to give a direction. It should be noted that this is an entirely separate provision from remote attendance by participants (s.51 Criminal Justice Act 2003) which requires the presiding Lady/Lord Justice only to give a live-link direction. Therefore to facilitate judicial and business administration, anyone seeking a 'transmission' direction, including practitioners who are not formally instructed in the proceedings, must email the application for remote observation to courtclerks@criminalappealoffice.justice.gov.uk as soon as reasonably practical and, where possible, at least 7 days before the hearing to allow sufficient time for the request to be considered. Applications received after 4.00pm on the day before the hearing may not be granted. The Registrar, through the CAO staff, will ensure that the constitution is consulted as soon as possible but, if necessary, the links can be arranged by the court staff on a provisional basis, subject to the full court making a direction at the start of the hearing.

The forms and rules for both remote observation and remote attendance can be found at Procedure Rules and Practice Directions for the Court of Appeal - Courts and Tribunals Judiciary at the bottom of the page. There is also a link to the guide to proceedings in the Court of Appeal, Criminal Division which contains guidance at D.10 and D.11.

The Importance of Access to Justice for Litigants in Person

The number of Litigants in Person in the criminal courts has been growing substantially and this is also reflected in the CACD. This year 44% of conviction applications and 15% of sentence applications were lodged by Litigants in Person. In 2016, that proportion was 22% of all conviction applications lodged and 6% of all sentence applications. The current statistics are striking and represent the greatest proportion of Litigant in Persons that the CACD has had since it started keeping records of these (since 2016).

The proportions reflect the changes in legal aid brought in by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and also a reduction in criminal solicitors and counsel with the capacity and/or willingness to undertake publicly funded appeal work.

Litigants in Person use more judicial and administrative resources because they are unfamiliar with both the law and the procedure of the court. They often engage in voluminous written and / or telephone correspondence with staff and they use more lawyer resources within the CAO (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 when considering what can often be repetitive 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.

Over the last year, there have been a number of appeal cases initiated by Litigants in Person which have been demonstrated to have merit and resulted in their convictions and/or sentences being quashed by the court:

R v Leighton Williams [2024] EWCA Crim 686 **(Popplewell LJ, Thornton and Cavanagh JJ)**

The appellant lodged his own grounds of appeal against an indeterminate sentence of public protection imposed on 26th June 2008. He was aged 19 at the time of the offence and 20 at the date of sentence and required a substantial extension of time in which to apply for leave. His sentence was quashed and substituted for a sentence of 5 years imprisonment, the single Judge having referred his applications to the court and granted public funding for junior Counsel.

R v Moore [2023] EWCA Crim 1685 **(William Davis LJ, Whipple LJ and HHJ Watson)**

The appellant lodged his own grounds against conviction for two counts of breach of a Sexual Harm Prevention Order and one count of failure to comply with notification requirements. The single Judge granted leave to appeal on the basis that undue pressure to plead guilty was placed on him by the Crown Court judge. Public funding was granted and his convictions were subsequently quashed by the court with no re-trial ordered.

R v Reid [2024] EWCA Crim 308 **(Holroyde LJ VPCACD, Morris J and Bryan J)**

The appellant lodged his own grounds of appeal against a conviction for an offence of assault occasioning actual bodily harm which had taken place in prison. His application was referred to the court by the single Judge who gave very detailed and structured reasons setting out the multiple grounds of appeal and who granted public funding for junior Counsel. The court subsequently allowed the appeal and quashed the conviction. No re-trial was ordered.

R v Casserly [2024] EWCA Crim 25 **(Lady Carr LCJ, Warby LJ and Cheema-Grubb J)**

The appellant lodged his own grounds of appeal against his conviction for an offence under Section 1(1)(b) of the Malicious Communications Act 1988. He argued that there had been a breach of his Article 10 rights and obtained the leave of the court on a renewed application for leave, which he had pursued as a Litigant in Person. He was granted funding for Kings Counsel. The court quashed his conviction essentially on one of the grounds of appeal the appellant had settled himself as a Litigant in Person and did not order a re-trial.

These cases highlight the importance of Litigants in Person being able to have effective access to the CACD. If a judge or the court has determined that there is merit in a Ground of Appeal, the instruction of Counsel will normally always follow. That cannot happen, however, if Litigants in Person are unable to access the court in the first place.

To ensure effective participation in the appeal process, Litigants in Person are now given targeted information about what grounds of appeal should look like and can access information on the court process, in hard copy, in a leaflet titled “Help for Applicants”, which has been specifically written by the CAO for Litigants in Person. This is made available to them in prison, through collaboration with the Criminal Cases Review Commission as well as directly by the CAO 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. The forms specifically aim 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 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) in a clear and more focused manner.

The cases highlighted show why effective access to justice is so important. Equally, even if applications are lodged which are not successful, having the right to appeal and being able to exercise that right, even without representation, ensures the integrity of the criminal justice system. Therefore, although meeting the challenges of an increasing number of Litigants in Person is not without substantial difficulty, it is a challenge which the court must continue to meet with its customary dedication and commitment.

Sentencing Pregnant Defendants

From 1st April 2024, the Sentencing Council included a new, dedicated mitigating factor: 'Pregnancy, childbirth and post-natal care', in the majority of offence specific sentencing guidelines, providing guidance for courts on sentencing pregnant offenders and new mothers.

The mitigating factor sets out what, when sentencing a pregnant or post-natal woman (someone who has given birth in the previous 12 months), the sentencing court may take into consideration, for example:

- the medical needs of the offender including her mental health needs;
- any effect of the sentence on the physical and mental health of the offender;
- any effect of the sentence on the child.

The Sentencing Council guidance also states that if considering a custodial or community sentence for a pregnant or post-natal offender, the sentencing judge or magistrates should ask the Probation Service to consider these issues in a pre-sentence report and, if a suitable pre-sentence report is not available, should normally adjourn sentencing until one can be provided.

Over the reporting year, the court has considered sentencing appeals where the defendant was pregnant:

R v Bassaragh [2024] EWCA Crim 20 **(Holroyde LJ VPCACD, Garnham and Andrew Baker JJ)**

The appellant was pregnant at the time of sentencing, but this fact was not known by her and therefore was not brought to the attention of the sentencing Judge when passing a mandatory minimum sentence of 5 years imprisonment for a firearms offence. The court considered fresh evidence of the pregnancy and detailed expert evidence as to the particular impact and risks of it in the circumstances of the appellant. Having noted that all prison pregnancies are categorised as, in general terms, "high risk" and the impact of custody can be harmful for both the woman and the child, the court found exceptional circumstances not to impose the mandatory minimum term as a result of significant personal mitigation in addition to the pregnancy. After discount for plea they were able to impose a suspended custodial term of 2 years imprisonment.

R v Byron [2024] EWCA Crim 818 **(Fraser LJ, May and Bright JJ)**

The appellant was sentenced to 27 months imprisonment for an offence of conspiracy to commit fraud by false representation. She was 12 weeks pregnant at the time of her entering of her plea and the sentencing Judge made certain

disparaging remarks about the defendant's motivation to become pregnant. The court was very clear that it was inappropriate to pass comment on how or why a female defendant had become pregnant and they stated that whether a pregnancy is planned or not can be of no concern to a sentencing judge, whose focus must be on the risks to mother and baby of pregnancy and birth in custody. The court considered fresh expert evidence of the risks involved in the pregnancy in the appellant's case and the Sentencing Council's guidance, which had come into force after the appellant was sentenced. They reduced the sentence to 21 months and in all the circumstances felt able to suspend it for 2 years.

These cases both highlight the importance of obtaining reports to assist the sentencing Judge in such cases and the Sentencing Council's recognition that sentencing Judges would benefit from further guidance on the approach that should be taken in sentencing pregnant defendants and new mothers. However, the court has been very clear that pregnancy is not an automatic bar to imprisonment:

> *"Like any other compelling personal mitigation, the judge might properly reflect an offender's pregnancy by reducing the sentence that would otherwise have been passed, suspending a sentence that would otherwise have been … a sentence of immediate imprisonment, or by both reducing and suspending as for example this court did in Charlton … . Pregnancy will not only provide strong personal mitigation but might also tend to improve the prospect of rehabilitation. Further, immediate imprisonment may often result in a significant harmful impact on the unborn child. Pregnant offenders cannot, however, automatically expect to avoid imprisonment. In particular, some pregnant offenders will present a risk or danger to the public and others will have committed offences so serious that there is no alternative to immediate custody. Such offenders aside, in our judgment proper application of the imposition guideline will often justify the suspension of a short sentence in the case of a pregnant offender."*
>
> **(Para. 29 of R v Stubbs [2022] EWCA Crim 1907,** cited with approval at para. 32 of Bassaragh)

Case overview: R v Letby [2024] EWCA Crim 748

Over 22nd, 23rd and 25th April 2024, the court (**Dame Victoria Sharp PKBD, Holroyde LJ VPCACD and Lambert J**) heard a renewed application for leave to appeal against conviction, an application to vary the notice of appeal and an application for leave to adduce fresh evidence by Lucy Letby. Her application for leave to appeal had been refused on paper by the single judge and renewed. On 24th May 2024, the court pronounced its decision refusing the applications. The judgment was handed down on 2nd July 2024 following the conclusion of a retrial.

Lucy Letby was a qualified nurse working in a neonatal unit of a hospital. She was charged with 22 counts of murder or attempted murder in respect of 17 babies. In August 2023, following a 10-month trial at Manchester Crown Court before Mr Justice Goss and a jury, she was convicted of seven counts of murder and seven counts of attempted murder. She was sentenced to life imprisonment on each count and a whole life order was imposed on each count.

The prosecution case at trial was that between 2015 and 2016, Lucy Letby serially harmed babies in her care with the intention of killing them. She did so by various means: by causing air embolus by introducing air exogenously via intravenous lines; by forcing air into the abdomen via nasogastric tubes; by force feeding milk; by poisoning through exogenous administration of artificial insulin and by physical trauma causing bleeding or internal injury. She was the only person who was present when each baby was harmed. The case was a circumstantial one. To prove it, the prosecution relied upon expert medical witnesses, in addition to evidence from numerous medical professionals who cared for the babies and other strands of evidence, such as Lucy Letby's shift patterns, records of the treatment of the babies she had taken home as 'trophies' and a handwritten note which concluded with the words, "I am evil, I did this."

The defence case was that the deaths or collapses were a consequence of the medical condition of the babies, a consequence of sub-optimal care, or a combination of both. Furthermore, the period of June 2015 to June 2016 was a period when the neonatal unit had experienced an increase in admissions and this included admission of babies of a higher acuity than before. Staffing pressures mounted because there had been no increase in staffing to accommodate the increased demands of the admissions. The applicant maintained that she had never falsified records and her keeping of confidential documents had no sinister purpose, nor did her Facebook searches for the families of the babies involved. Her handwritten notes, alleged to be confessions, were something she did as a habit and were a product of her despair and distressed state.

She sought leave to appeal on the following grounds:

i. The judge was wrong not to direct the jury to disregard the evidence given by lead prosecution medical expert Dr Dewi Evans; and was wrong to admit further evidence from him. The defence contended he had constructed theories designed to support allegations rather than presenting an independent opinion based on the facts. The CACD had been critical of Dr Evans in an unrelated case.

ii. The judge was wrong to reject the submission of no case to answer. It was contended that none of the prosecution experts who had given evidence relating to air embolus as a cause of collapse or death had sufficient clinical expertise to do so and the research evidence cited failed to meet the requirements of scientific evidence capable of supporting the allegations.

iii. The judge was wrong to direct the jury that they did not have to be sure of the precise harmful act or acts on any given count on the indictment.

iv. The judge did not take the correct course in investigating a potential jury irregularity.

She also sought leave to admit fresh evidence in the form of two reports by Dr Shoo Lee, a neonatologist and author of a scientific paper that featured prominently in the trial. His evidence supported a further ground that the weakness in scientific evidence relating to air embolus rendered certain convictions unsafe and proposed a single type of discolouration that was sufficient to diagnose air embolus. Save for that one very specific form of discolouration, it would be wrong to diagnose air embolus on the basis of skin discolouration alone. The court considered Dr Lee's evidence *de bene esse* and Dr Lee gave oral evidence by video link.

There was a degree of overlap between the grounds and the first three grounds were rooted in two related points: the bona fides of the prosecution experts and the quality of their evidence.

The court found the trial judge had carefully assessed Dr Evans' qualifications and competence to give expert evidence and had further concluded his approach to his role in the investigation was reasonable and did not amount to partiality. The criticisms of the CACD in an unrelated case were put to Dr Evans in cross-examination.

In respect of the ground relating to the submission of no case to answer, the court found each expert witness was appropriately qualified in their field to give the expert evidence which they gave. The level of scientific knowledge concerning air embolism was not so limited that no reliable expert evidence could be given; air embolus as a cause of collapse or death in a neonate was not a "bogus" medical theory.

In relation to the directions given by the trial judge, the court found the judge was correct to direct the jury that they must be sure, on the evidence as a whole, that the applicant had deliberately done something to harm a baby, with the requisite intent for murder or attempted murder, and in the case of those babies who died, that her act or acts had caused or contributed to the death. It was not necessary for the prosecution to prove the precise manner in which she had acted. To impose such a burden on the prosecution would be wrong in law.

The proposed fresh evidence did not assist the applicant as no prosecution expert had diagnosed air embolus solely on the basis of skin discolouration and so was inadmissible. There was no reasonable explanation as to why the proposed fresh evidence was not called at trial.

The discrete ground relating to the judge's handling of a potential jury irregularity was also refused. The court concluded that the judge had taken reasonable and necessary steps and had followed the procedure laid down in paragraph 8 of the Criminal Practice Directions 2023.

Protest Cases

R v Smith and Others [2024] EWCA Crim 1040 **(Holroyde LJ VPCACD, Griffiths J and HHJ Dean KC)**

The new statutory offence of causing a public nuisance, contrary to section 78 of the Police, Crime, Sentencing and Courts Act 2022 ("s78" and "the Act"), came into force on 28 June 2022. The appellants, and their co-accused Bethany Mogie, were the first defendants to be convicted of the offence. The appellants and Ms Mogie took part in a pre-arranged protest at the British Grand Prix at Silverstone on 3 July 2022. Silverstone is situated on private land; the appellants and Ms Mogie each bought a ticket. Access to the track and the land next to it, was prohibited to spectators and barriers and fences were in place. After the race had begun, the appellants and Ms Mogie climbed over a fence. The appellant Baldwin was pulled back by a race marshal. The others made their way onto a part of the track known as the Wellington Straight. The race had started but as a result of collision, a red flag was shown, which indicated to the drivers that they were required to slow down.

By the time the appellants had reached the track, 15 of the cars had passed. The appellants sat down in a line which obstructed about half of the track. The remaining two cars passed them. Within a minute, marshals removed them from the track and they were arrested.

At trial, the prosecution case was put on the basis that the serious harm risked by the defendants' conduct was death or personal injury. Submissions of no case to answer were made at the close of the prosecution case. The judge found that there was a case to answer. Although the cars had slowed down because of the red flag, the risk was substantial.

The single judge gave leave to appeal on grounds relating to the submission of no case to answer. All five appellants argued that the judge was wrong and that, no jury properly directed could find that the appellant had created a risk of serious harm to "a section of the public". They further argued that the judge failed to give any sufficient or adequate direction to the jury as to how to consider what amounted to "a section of the public".

The court gave guidance on the correct approach when it is alleged defendants acted in a way which created a risk of serious harm to the public or a section of the public, where the sufficiency of the evidence was called into question: 1) the focus must be on the risk of harm created, not on whether any harm was caused. The risk must be real and not fanciful. In this case, the risk was created when the defendants trespassed onto the prohibited area and not only when they sat on the track; 2) identification of the relevant risk involved identification by the jury of the persons who are placed at risk. In this case those persons were not limited to the drivers

of the last two cars and the one or two marshals who went on to the track, after the last two cars had passed; 3) where more than one person was accused of a s78 offence, it will be necessary to consider whether each of the co-accused can himself or herself be identified as a member of the relevant "section of the public". Such cases will however, be rare as s78 of the Act was designed to protect those who were not participating in the offence; 4) whether the persons whom the jury find to have been put at risk of serious harm can properly be described as "a section of the public" is a question of fact.

The court also stated that whilst some of the statements of principle in the case law predating the Act may sometimes be of some assistance, it was emphasised that those statements related to the common law offence which had been abolished and therefore s78 did not have to be interpreted precisely in accordance with case law relating to the common law offence. The court also rejected the submission to the effect that an offence of public nuisance could not be committed on private land; persons do not cease to be a section of the public when they enter private land. The convictions were upheld.

Attorney General's Reference on a Point of Law (No 1 of 2023) [2024] EWCA Crim 243
(Lady Carr LCJ, William Davis LJ & Garnham J)

This case concerned a reference by His Majesty's Attorney General as to the scope and effect of section 5(2)(a) of the Criminal Damage Act 1971 (section 5(2)(a)) (the 1971 Act). Section 5(2)(a) defines when a person is to be treated as a "having lawful excuse" for the purpose of the offence of criminal damage provided for in section 1 of the 1971 Act. The deployment of section 5(2)(a) in cases of climate change protestors was a recent phenomenon and judges at first instance were reaching inconsistent rulings on its application. As such, a definitive ruling on the matters raised in the reference was highly desirable

The defendants were members of a political group known as "Beyond Politics", which had grown out a group called "Extinction Rebellion" and was now known as "Burning Pink". They had thrown pink paint over premises belonging to charities and political parties and they planned to target the headquarters of various trade unions. The latter plan came to light before that agreement was put into effect. At their trial for conspiracy to commit criminal damage, the defendant, along with multiple other unrepresented defendants, was charged with conspiracy to damage property contrary to section 1(1) of the Criminal Law Act 1977.

The trial judge ruled that the defence of lawful excuse based on a belief in consent under s.5(2)(a) of the 1971 Act was impossible for him to rule on before the evidence had been called and the defence was left to the jury.

The defendant gave evidence that she believed that the occupiers of the premises, which she and others agreed to damage, would have consented to the damage had they been aware that it was carried out to alert those responsible for the premises to the nature and extent of man-made climate change. The defendants were acquitted of the offences.

Following the defendants' acquittals, pursuant to section 36 Criminal Justice Act 1972, the Attorney General referred the following questions to the CACD:

1. "What matters are capable, in law, of being the 'circumstances' of destruction or damage under section 5(2)(a) Criminal Damage Act 1971? In particular,

    a. if the destruction or damage is an act of protest, are 'circumstances' in the phrase 'the destruction or damage and its circumstances' capable as a matter of law of including the merits, urgency or importance of any matter about which the defendant may be protesting by causing the destruction or damage, or the perceived need to draw attention to a cause or situation?

    b. if there is no direct nexus between the destruction or damage and the matters on which the defence rely as 'circumstances', can those matters still be 'circumstances' within the meaning of the phrase 'the destruction or damage and its circumstances'?

2. Was the Judge right to rule:

    a. before the case was opened to the jury; and

    b. at the conclusion of the evidence that the defence should not be withdrawn from the jury?"

In addressing the first question, the belief the defendant relied on to establish the defence must be one held by the defendant at the time of the commission of the office and not one formed later to explain their conduct. Secondly, the belief must be genuine and honestly held; this was a subjective test. Thirdly, the defendants must believe that the owner either had consented or would have consented to the damage if they had known of the damage "and its circumstances". The defendant's honest belief must be that they were sure that the owner would have consented. Fourthly, in any case where a defence was raised under section 5(2)(a) of the Act there must be evidence that the defendant believed that the owner would have consented to the damage had they known of the damage and its circumstances. The circumstances must relate to the destruction of, or damage to, the property and may include matters such as the time, place and the extent of the damage caused, but they do not include the political or philosophical beliefs of the person causing the damage. There needed to be a direct nexus between the circumstances of the damage and the anticipated defence of giving consent. The circumstances must belong to the damage, not to the defendant.

The reason for the damage was an act of protest against climate change. This was a "circumstance of the damage". D's views on climate change and the need to draw attention to it, lacked the necessary proximity to the damage. The issue is whether D honestly believed that the owner would have consented had they known of the damage and its circumstances. On the facts of this case what D had to say about the facts of or effects of climate change could not amount to the circumstances of the damage. Such evidence would be inadmissible in relation to the defence under section 5(2)(a); the section was not intended to afford a defence to protestors based on the merits, urgency, or importance of their cause (nor the perceived need to draw attention to a cause or situation).

The answers to the first question were as follows:

a. The term "circumstances" in s.5(2)(a) "does not include the merits, urgency or importance of the matter about which the defendant is protesting, nor the perceived need to draw attention to the situation".

b. In protest cases, "'damage and its circumstances'… means the fact that the damage was caused as part of a protest (against a particular cause)".

As a result of the answers to the first question, the court declined to answer the second question in the terms in which it was posed. Such an answer might have the effect of calling into question C's acquittal and so contravene the prohibition in section 36(7) of the Criminal Justice Act 1972. The court reiterated the principle found in *Attorney General's Reference (No.1 of 2022)*, that a judge may withdraw a defence from a jury if no reasonable jury properly directed could reach a particular conclusion. It was emphasised that a judge must exercise considerable caution before taking that step. It is not for the judge to substitute his or her decision for that of the jury when deciding to withdraw the defence. The judge is only entitled to withdraw the defence from the jury where no reasonable jury, properly directed, could find the defence to be made out.

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

Anonymity - defendant alleged to have been a victim of trafficking

R v. Ahmet and another [2024] EWCA Crim 102

This case concerned a reference by the Attorney General seeking to increase the sentence imposed for drug offences. During the course of the appeal proceedings reference was made to one of the defendants as having been the subject of trafficking and modern slavery. The question arose as to whether the defendant's name should have been anonymised.

The court (**Dingemans LJ, Andrew Baker J, and HHJ Rafferty KC**) considered the relevant provisions of the Sexual Offences (Amendment) Act 1992 as they applied to the offences under the Modern Slavery Act 2015. They considered that in the circumstances of this case, the offender was not entitled to anonymity under that Act in these criminal proceedings.

Proceeding in the defendant's absence - factors to take into account - whether seriousness of the offence should be considered

R v. Arshad [2024] EWCA Crim 67

The appellant was convicted of rape and two offences of sexual assault. Following his arrest, police interview and the grant of bail, the appellant failed to attend subsequent court hearings including his trial. The judge directed that the trial could proceed in his absence. On appeal, the issue was whether the judge had expressly taken into account the seriousness of the offence contrary to the view of Lord Bingham in *R v Jones [2002] UKHL 50*.

The court (**Dingemans LJ, Griffiths J and HHJ Rafferty**) stated that the judge had correctly decided that the trial could continue. Although she had referred to the seriousness of the offences, this had not been the primary consideration and she had properly considered the relevant factors as outlined in *R v Jones*.

Bad character: limits of Section 98 / ambit of section 101 of the Criminal Justice Act 2003

R v. Grundell [2024] EWCA Crim 364

The appellant was convicted of two counts of rape. At trial the judge adduced bad character evidence concerning an incident that took place the day after the second offence of rape had allegedly occurred. The period of time between the alleged rape and the incident was around 14 hours. Prosecution counsel said that the incident fell within section 98 of the Criminal Justice Act 2003 because it had to do with the facts of the offences charged. Defence counsel had argued that the evidence should not be admitted because it did not fall within section 98 of the Criminal Justice Act 1988 and should not be admitted either under any gateway in section 101.

The judge ruled that the disputed evidence did fall within section 98(a) of the Criminal Justice Act 2003 and was admissible. He observed that the authorities did not disclose a clear set of guidance as to the limits of section 98(a) of the 2003 Act. Alternatively, the evidence fell to be admitted under section 101(1)(c) of the 2003 Act as important explanatory evidence. He noted that there was no clear dividing line where that provision ended and the section 101 gateways, for reprehensible conduct which did not have to do with the facts of the offence charged, began.

The court (**Edis LJ, Farbey J and HHJ Richardson KC**) concluded that the judge erred in finding that the previous incident fell within section 98 of the 2003 Act. The 14 hour gap between the two incidents and the difference in their nature meant that they were, in truth, separate events. The judge correctly considered whether any of the gateways applied but incorrectly adduced the evidence under section 101(1)(c) when the appropriate gateway would have been section 101(1)(d). Nonetheless, the evidence was admissible and the conviction was not unsafe.

Failure to give a recent complaint direction

R v. Jodeiri-Lakpour [2024] EWCA Crim 97

The appellant was convicted of making a threat to kill in the context of a domestic setting. At trial the judge failed to give a recent complaint direction. On appeal the prosecution accepted that such a direction should have been given, but argued that the conviction was nevertheless safe.

The court (**Warby LJ, Bryan J and HHJ Altham**) agreed that the direction should have been given but noted, in line with previous authorities, that a failure to give a direction was not of itself sufficient to found a successful appeal and the court had to consider all of the circumstances of the case. Having reviewed the evidence, the summing up as a whole, as well as the fact that the directions were discussed and provided in draft format to counsel who did not raise the issue of the complainant direction, the court were satisfied that the conviction was not unsafe and dismissed the appeal.

Jury tampering

R v. Mohammad and Others [2024] EWCA Crim 34

The appellants faced trial in relation to fraud offences. On the morning of the fourth day of deliberations, the jury informed the court of two incidents of jury tampering which had taken place about a fortnight before. Following an investigation, it was accepted that jury tampering had taken place. The judge discharged the whole jury and proceeded to hear the case without a jury.

On an interlocutory appeal, the judge's decision to continue the trial without a jury was challenged by a number of the defendants.

The court (**Lady Carr LCJ, Edis LJ and Griffiths J**) determined that the judge was right to conclude that jury tampering had taken place and that the trial could continue fairly without a jury. The court noted that the judge had granted leave, not because he considered that his ruling was wrong in principle or unjustified in any way but because he understood from the authorities that trial judges in similar situations had invariably granted leave. The court confirmed that leave to appeal should only be given on a principled basis, namely where it was considered that there was a real prospect of successes. There was no need for every case to come to the court simply because the event was rare or the consequence serious.

Incompetent counsel - Comments made about procedural failings in the trial proceedings

R v. Brooker [2024] EWCA Crim 103

The appellant was convicted of two counts of theft. The appeal was concerned with the fairness of the trial. It was suggested that there had been a clear challenge to the victim's allegations by the appellant: in his interviews under caution, in his defence statement and in evidence that he ultimately gave in his own defence at the trial. However the appellant's former counsel had taken a decision at an early stage not to challenge the victim's evidence by cross examination, a stance which he maintained at trial in the face of a ruling from the judge that he was professionally obliged to do so. It was argued that counsel's professional misconduct and incompetence in this (and other) respects resulted in significant unfairness to the appellant such that it rendered his conviction unsafe.

The court (**Dame Victoria Sharp PKBD, Cheema-Grubb and Swift JJ**) concluded that there were ample grounds for criticising the conduct of trial counsel and they were satisfied that his performance fell below the standard to be expected of a member of the Bar of England and Wales. The court were not convinced that the behaviour fell to be described as incompetent, which implied a lack of skill. Here counsel has made an erroneous strategic decision and then failed to comply with orders of the court before the trial and during the trial itself - this was a deliberate course of conduct. However, notwithstanding trial counsel's conduct, the court concluded, having considered the case as a whole, that the appellant's conviction was not unsafe and dismissed the appeal.

Causing or allowing serious physical harm to a child: Section 5 of the Domestic Violence, Crime and Victims Act 2004 (as amended)

R v. ATT and BWY [2024] EWCA Crim 460

In February and March 2024 ATT and BWY stood trial on a single count of causing or allowing serious physical harm to a child contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004 (as amended). At the close of the prosecution case both defendants successfully submitted that the prosecution had failed to establish a case for them to answer. The prosecution sought leave to appeal pursuant to section 58 of the Criminal Justice Act 2003.

The court (**William Davis LJ, Morris J and HHJ Johnson**) in refusing the application, stated that having reviewed the relevant statutory provisions, the requisite test in section 67(c) of the 2004 Act (as amended) had not been met. There needed to be evidence in relation to a significant risk of serious physical harm being caused by

an unlawful act. With the evidence as it stood at the conclusion of the prosecution case, a reasonable jury properly directed could not have been satisfied that there was such a risk.

Absence of prosecutor - proceedings stayed by judge - general guidance provided by CACD

R v. Ng and O'Reilly [2024] EWCA Crim 493

In this case, the judge had to deal with non-attendance of prosecuting trial counsel. He decided to stay the proceedings as an abuse of the process of the court. The prosecution sought leave to appeal his decision pursuant to section 58 of the Criminal Justice Act 2003.

The court (**Lady Carr LCJ, Edis LJ and Pepperall J**), in allowing the application, stated that the power to stay criminal proceedings as an abuse of process was an important and exceptional remedy to be exercised with care and restraint. It was a measure of last resort. Although the court could sympathise with the judge's frustration at the non-attendance of prosecution counsel, particularly with the current pressures to reduce the backlog of cases and delays in the crown court, there were a number of flaws of fact and principle in his decision. He had proceeded on the basis of a materially inaccurate procedural history and had failed to have regard to the settled principles of law which applied to applications to stay proceedings as an abuse of process.

Unlawful act manslaughter – common assault – apprehension of immediate unlawful force – recklessness

R v Grey [2024] EWCA Crim 487

The appellant was convicted, after a retrial, of manslaughter. She had gesticulated towards an oncoming cyclist, waving her left arm and shouting that she should "get off the fucking pavement." The appellant had proceeded to walk towards the cyclist who fell off her bicycle and into the path of a car. The driver had no chance to stop or take action and the cyclist died at the scene.

The court (**Dame Victoria Sharp PKBD, Yip and Farbey JJ**) allowed the appeal and quashed the conviction. They stated that unlawful act manslaughter required proof of four elements: that the act was intentional, the act was unlawful, a sober and reasonable person would recognise that the act would subject another to the risk of some harm, albeit not necessarily serious harm and the act caused the victim's death. In this case, common assault was the only unlawful act upon which a conviction could be based but there was insufficient evidence for the jury to be sure

that any physical contact had taken place between the appellant and the deceased. Had the parties appreciated the need to prove the actus reus and mens rea of common assault, it would have become clear that the prosecution case was flawed and insufficient to be left to the jury.

Fitness to plead

R v Ismael [2024] EWCA Crim 301

The appellant had pleaded guilty to a number of offences in April 2020. He was subsequently charged with other offences and found unfit to plead in October 2020. It was argued that the appellant should have been unfit to plead in relation to the earlier offences.

The court (**Thirlwall LJ, Jay J and HHJ Tracey Lloyd-Clarke**) summarised the relevant legal principles. A person was unfit to plead if they were unable to do any one of the following: understand the charges, decide whether or not to plead guilty, exercise their right to challenge jurors, follow the course of proceedings, give evidence in their own defence or instruct their legal representatives. Although the court had to approach after the event challenges to fitness to plea with caution, having considered in detail what had occurred as well as the fresh medical evidence, they concluded that there had been a failure by the appellant's lawyers to identify and act effectively in the light of his difficulties. The appellant had been unfit to plea and as a result his conviction were unsafe. The court agreed with the prosecution that a retrial was not in the public interest and reminded all those involved in criminal cases that they must be alert to the possibility of fitness to plead issues and know what to do when faced with a defendant who appears cognitively vulnerable.

Sentencing

Guidance as to the proper approach to sentencing for the offence of assisting unlawful immigration

R v Ahmed (Abdul) [2023] EWCA Crim 1521

The court (**William Davis LJ, Farbey J and HHJ Moreland**) considered an appeal against sentence for the offence of assisting unlawful immigration contrary to section 25(1) of the Immigration Act 1971. Pending a Sentencing Council guideline for the offence the court gave the following guidance.

Culpability should be assessed as high where the offence represented commercial activity, sophisticated in nature, in which the offender played a substantial role for significant financial gain. An offender in this category would ordinarily be an organiser of the use of small boats to enter the United Kingdom. Culpability would

be lower where the offender played a minor role whereby a small boat was being used or where there is no commercial element to the use of the boat. If an offender had been involved due to coercion or pressure, that factor would also reduce culpability. Sentencers must take an approach which balanced the relevant factors in cases which did not fall easily within either high or low culpability.

The highest category of harm would be reserved for cases where the small boat used involved a high risk of serious injury or death and/or where the offender assisted large numbers of individuals to arrive unlawfully in the United Kingdom. Harm would also be high where the offender had exploited or coerced others to assist them. Any small boat crossing the Channel would involve some risk of serious injury or death given the potential for bad weather and the number of vessels using that route, it was unlikely that harm can ever be considered to be minimal. Inherent in any offence contrary to section 25 would be the harm done to the public interest in maintaining proper border controls.

The Nationality and Borders Act 2022 increased the maximum sentence that could be imposed in respect of an offence contrary to section 25(1) from 14 years' imprisonment to life imprisonment. Although not limited to the most serious cases, the court concluded that any significant increase in sentencing for the section 25(1) offence should be reserved for those organising the use of small boats. For those whose role was to pilot the boat in order to facilitate their own entry into the United Kingdom, an increase in the sentence imposed to reflect the increase in the maximum term would not be appropriate.

Where a small boat was used to commit the offence contrary to section 25(1) and the level of culpability was low, a sentence of three years' imprisonment should be the starting point, before any reduction for plea and or consideration of aggravating and mitigating factors. This was the level of sentence for an offender who simply piloted the boat where the boat was reasonably seaworthy. The level of sentence for an organiser would be much higher. For an organiser who subjected significant numbers of people to a high risk of death when the organiser's motivation was substantial financial gain, a starting point of ten years' imprisonment or more would be appropriate. An organiser who also subjected others to exploitation or coercion might expect a sentence of 14 years' imprisonment or more.

The usual statutory aggravating factors would apply. In addition, previous attempts by the offender to enter the United Kingdom using a small boat and the involvement of others (particularly children) in the offending would aggravate the offence. Mitigating factors would include the offender's age and/or lack of maturity, co-operation with the authorities once apprehended and the lack of any previous convictions. In an appropriate case it may be relevant to take into account the circumstances which might be relied on as arguable grounds for claiming asylum, for example where the offender's principal concern was to gain entry to the United Kingdom as an individual with the assistance given to others being a collateral

purpose. The overarching guidelines issued by the Sentencing Council would apply to any section 25 offence, those that may be particularly relevant are the Children Guideline and the guideline for sentencing offenders with mental disorders.

Taking into account changes in early release provisions when sentencing for historic offending

R v. BPO [2024] EWCA Crim 517

The appellant was charged with having committed sexual offences in the late 1970s and early 1980s. He was sentenced, on the basis that he was under 18 at the time of the offending, to five years' imprisonment. He appealed against sentence on the ground that it was manifestly excessive, contending that the sentence of five years should have been reduced to reflect the fact that the early release provisions operating at the time of the offending would have resulted in a shorter period of time in custody had he been sentenced for the offending then.

The court (**Edis LJ, Morris J and HHJ Johnson**) held that, in the present case, the judge had correctly applied the principles relevant to sentencing an adult for offences committed as a child and had been right to refuse to make any adjustment to take account of release provisions; and that, accordingly, the sentence of five years' imprisonment was not manifestly excessive.

The proper terms of a Sexual Harm Prevention Order ("SHPO")

R v Dewey [2024] EWCA Crim 409

This appeal concerned the proper terms of a Sexual Harm Prevention Order ("SHPO"). The appellant pleaded guilty to four offences of making or possessing indecent images of children and one offence of possessing extreme pornographic images. Crim PR rule 31.3(1)(b) and (5) required service of a draft order not less than two business days in advance of a hearing but in this case the prosecution did not serve their draft SHPO until the morning of the sentencing hearing.

The court (**Green LJ, May and Yip JJ**) considered that the terms of restrictive orders would always require careful consideration, which was why the rules required a draft to be produced in good time. The last-minute rush in this case precluded a sensible discussion between counsel before the hearing, both as to the need for certain terms (in particular the non-contact provision) and as to the proper wording of terms, so as to ensure that necessary restrictions were also manageable and proportionate.

The touchstone when considering the precise terms of a restrictive order such as a SHPO was always necessity and proportionality. The terms which were necessary in an individual case had to be carefully considered and weighed against the facts

of that case. Further, when considering what was necessary, it would be important to bear in mind the protection afforded to the public by the offender being on the Sexual Offences Register and subject also to the Disclosure and Barring Service. Any restriction beyond those necessarily involved in notification and disclosure/barring must be justified, not just as "appropriate" but as necessary.

Correct approach to dealing with administrative amendments to sentences pronounced in open court

R v Leitch and Others [2024] EWCA Crim 563

These six otherwise unconnected cases were listed together to allow the court to consider issues relating to administrative amendment of a sentence pronounced in court.

The court (**William Davis LJ, Jay J and HHJ Moreland**) stated that the fundamental principal was that the sentence imposed on an offender in the Crown Court was the sentence pronounced in open court by the judge. Therefore, if there was a discrepancy between the transcript of the sentencing proceedings and the order recorded by the Crown Court, the former had to take precedence. The Crown Court has a power under section 385 of the Sentencing Act 2020 to vary a sentence it has imposed, within 56 days of the imposition of that sentence, which is governed by Crim PR r 28.4 2, and may be exercised by the court on written application by either party, served on the court and all parties, or by the court acting of its own motion. Although Crim PR r 28.4(2)(a)(ii) permits the Crown Court to exercise that power at a hearing in public, or at a hearing in private, or without a hearing, the variation must be announced at a hearing in public along with the reasons for the decision. The decision must be made by the judge who imposed the original sentence, but it may be pronounced by another judge. Failure to announce a variation of sentence in open court would mean that the variation was of no effect and the sentence remained as originally pronounced.

Crediting periods of remand time for life sentences

R v Sesay and Others [2024] EWCA Crim 483

These cases were listed together to allow the court to give guidance in relation to crediting periods of remand in custody when a life sentence was imposed.

The court (**William Davis LJ, Morris J and HHJ Johnson**) reviewed the current legislative position. Whenever a life sentence is imposed, the effect of section 322(2)(b) (for mandatory life sentences) and section 323(2)(c) (for discretionary life sentences) of the Sentencing Act 2020 is that the following periods must be deducted from the minimum term to be served that would otherwise be set: (i) the number of days for which the offender was remanded in custody in respect of

the offence for which the life sentence is imposed or a related offence; (ii) the credit period for any period which the offender spent on bail subject to a qualifying curfew with an electronic monitoring requirement; and (iii) any period which the offender spent in custody awaiting extradition for the offence in respect of which the life sentence is imposed. The result of that calculation will be the minimum term, which itself is part of the sentence of the court. Therefore, if an error is made in any part of the calculation it cannot be corrected administratively as it forms part of the sentence. It can only be varied by the Crown Court pursuant to section 385 of the 2020 Act, within 56 days of the sentence being imposed, or by the CACD on appeal.

The court stated that when announcing the minimum term to be served, the sentencing judge should give the minimum term arrived at by carrying out the deductions required by section 322(2)(b) or 323(2)(c). The sentencing judge must also announce the number of days which had been deducted to reach the minimum term, so that if an error occurred in relation to the calculation of days it was clear what the court had taken into account on the day of sentence. In any case where a life sentence was anticipated, the parties must come to the sentencing hearing fully armed with the information necessary for the calculation. Furthermore, in any case where the life sentence was fixed by law, the need to obtain the information would be known from an early stage; and where a discretionary life sentence may be a possibility the sentencing judge would be under a duty to give proper notice of that fact.

Whether to impose a custodial sentence on a sectioned defendant

R v Hawkridge [2023] EWCA Crim 1288

The appellant pleaded guilty in relation to harassment and was sentenced to 8 weeks' imprisonment suspended for 12 months. He appealed against sentence on the basis that the judge should have given consideration to a mental health disposal.

The court (**Stuart-Smith LJ, Choudhury J, HHJ Shant KC**) stated that in a case where a defendant was detained as an impatient at a mental health hospital under a responsible clinician pursuant to section 3 of the Mental Health Act 1983, and it was uncertain whether or when they might cease to be detained, the sentencing judge was obliged under section 232 of the Sentencing Act 2020 to consider the likely effect of a custodial sentence on the defendant's condition and any treatment which might be available for it. In the instant case, the imposition of a suspended sentence created a real risk of conflicting regimes. The default position would be that if the defendant were to reoffend, he would, or should, be arrested and the suspended sentence activated, which was considered an unacceptable outcome in circumstances where the defendant was already subject to detention under a different regime, having been sectioned.

A conditional discharge would also have carried a risk of conflicting regimes if the defendant were to reoffend, even if the risk of conflict may be less acute because of the procedure likely to be followed in the event of alleged reoffending. It was not open to the sentencing judge to make a hospital order at the time of sentencing as he did not have evidence from two registered medical practitioners, nor did he have oral evidence from the approved clinician as to the matters required by section 37(4) of the Mental Health Act 1983. However, the judge should have set in train the necessary steps with a view to the possible making of a hospital order on another occasion either by themselves or another judge. The court were satisfied that there were important procedural errors in the course adopted by the judge and set aside his order. A hospital order was imposed in its place.

Whether the Sentencing Council guideline on perverting the course of justice altered previous case law

R v Feve [2024] EWCA Crim 286

This was an application by the Solicitor General under section 36 of the Criminal Justice Act 1988 for leave to refer the sentence to the Court of Appeal on the grounds that it was unduly lenient. The defendant was charged with an offence of doing an act tending and intended to pervert the course of justice. The background was that the defendant, when questioned by the police in connection with a murder investigation, had said that his stepson, a person of interest in the investigation, was at home on the relevant evening, knowing that not to be the case. He was convicted and sentenced to 12 months' imprisonment, suspended for 12 months, with an unpaid work requirement of 200 hours. Counsel for the solicitor general submitted that the sentence was unduly lenient because it was clear from long-established case law that the offence of perverting the course of justice was so serious that it is almost always necessary to impose an immediate custodial sentence, unless there were exceptional circumstances. The defendant's position was that the guideline on Perverting the Course of Justice had superseded the approach set out in earlier case law.

The court (**Holroyde LJ VPCACD, Goose J, HHJ Lickley KC**) held that the guidelines reflected, and did not alter, the established principles as to the inherent seriousness and usual consequences of the commission of this offence. Therefore a proper application of the Perverting the Course of Justice guideline and the Imposition of Community and Custodial Sentences Guideline would have led to the same position. In this particular case the sentence imposed had been lenient however, having regard to the defendant's personal circumstances, in the exercise of the court's discretion the sentence imposed would not be increased.

The effect of s.11(3) of the Criminal Appeal Act 1968 on the appeal court when exercising its powers to substitute a sentence

R v ES [2024] EWCA Crim 753

Following conviction for rape and assault by penetration, the appellant had been sentenced to a special custodial sentence for offenders of particular concern of 11 years comprising 10 years' custody and 1 year licence and a consecutive custodial sentence of 3 years comprising 2 years custody and 1 year licence. He appealed against the sentence on the basis that those offences did not attract special custodial sentences under section 278 of the Sentencing Act 2020. It was agreed that a determinate sentence of 10 years and 2 years consecutive would be appropriate, subject to section 11(3) of the Criminal Appeal Act 1968, which required the court when exercising its powers to substitute a sentence to ensure that 'taking the case as a whole, the appellant was not more severely dealt with on an appeal than he was dealt with by the court below.'

The court (**Lewis LJ, Goss J and HHJ Moreland**) considered the different early release provisions for the special custodial sentence and determinate sentences. It was held that the provisions governing early release from custody were not relevant when deciding upon the length of a determinate sentence. However, the potential impact of sentence and the date on which release becomes unconditional did need to be assessed. In this case the appellant was subject to 12 years custody before being subject to a 2 year licence; with a determinate sentence of 10 years plus 2 years the release would be automatic at 7 years and 8 months with a licence period of 4 years and 4 months. Therefore, the substitution of determinate sentence of 12 years in total did not amount to the appellant being treated more severely.

Proper approach to sentencing where there is no offence specific guideline – Section 3 of the Female Genital Mutilation Act 2003

R v Noor [2024] EWCA Crim 714

The appellant was convicted of assisting a non-UK person to mutilate a girl's genitalia whilst outside the United Kingdom, contrary to section 3 of the Female Genital Mutilation Act 2003. There was a Sentencing Council guideline for a section 3A offence namely, failing to protect a girl under the age of 16 from the risk of genital mutilation but no guideline in relation to the other offences in the 2003 Act.

The court (**William Davis LJ, Cockerill, and Linden JJ**) stated that a section 3 offence constituted very serious offending. The offence involved deliberate assistance given to and/or encouragement of a person who carried out FGM on

a girl. The seriousness of that act was magnified when the victim was an infant, as was the case here. The introduction of the 2003 Act increased the maximum penalty for mutilating female genitalia, whether as a principal or as a secondary party, from 5 years to 14 years. Where an offence was of particular gravity and/or where the offence in respect of which deterrence was an important feature, mitigating factors did not fade into insignificance. However, they would tend to be of less weight in the overall sentencing exercise.

When sentencing for a section 3 offence a judge was required by the Sentencing Council General guideline: overarching principles to take into account guidelines for analogous offences, and to apply those guidelines carefully making adjustments for any differences in the statutory maximum sentence and elements of the offence. The offences of causing grievous bodily harm with intent and allowing a child to suffer serious harm were analogous offences for those purposes. In this case the judge had not fallen into error in having regard to the guidelines for those offences. The appropriate starting point by reference to the guidelines was 9 years' imprisonment, which had to include any aggravating factors, and the judge had been correct to take those into account. To commit an offence of causing or allowing a child to suffer harm, a person had to be a member of the same household as the child which imports a relationship of trust. Any child in that position will be vulnerable due to their position vis-à-vis the offender. The judge took into account all the relevant mitigating factors and considered the principles in *R v Petherick* and reduced the sentence by 2 years. Custody could not be avoided and was bound to be a substantial custodial sentence. It carried with it an element of deterrence given the nature if the offence and given the fact that it was not an offence that occurs on the spur of the moment and requires some deliberation, deterrence was a highly relevant feature. It was envisaged that substantial sentences would be imposed notwithstanding the cultural context. The fact that FGM was considered appropriate in particular cultures could be of no relevance to the seriousness of the offence.

Confiscation – refusal of Crown Court judges to make confiscation order due to a failure to complete proceedings within the permitted time

R v. Haden and Others [2024] EWCA Crim 344

In these four cases the prosecution sought leave to appeal against refusals by judges of the Crown Court to make confiscation orders against the respondents because of a failure to complete the proceedings within the permitted time provided by section 14 of the Proceeds of Crime Act 2002 ("the 2002 Act").

The court (**Edis LJ, Farbey J and HHJ Richardson KC**) stated that the permitted period in section 14 was a procedural device to ensure that proceedings should be started within a certain time. It was not however a limitation provision. Further, the

permitted period may be extended if there were exceptional circumstances so that it is longer than two years. This may happen whether the two year period has expired or not, and whether an application was made before expiry or not. It could happen even if no application has ever been made. They also found that the meaning of "exceptional circumstances" should be construed broadly. Nonetheless courts should always case-manage confiscation proceedings with a view to their timely determination and should strive to ensure they are completed no later than two years after conviction.

With regard to the four cases in question, the court directed that each of the cases should be listed within 28 days of the judgment being handed down so that a timetable and any further directions could be dealt with and hearing dates fixed with any necessary postponements granted.

Judge's failure to explain the sentence or to consider the Totality Guideline

R v Janjua [2024] EWCA Crim 32

This case concerned a sentence appeal. The appellant had been sentenced on two separate indictments for a number of road traffic offences, drug offences and failing to surrender. He was sentenced to a total term of 7 years imprisonment.

The court (**Coulson LJ, Foster and Hilliard JJ**) made the following comments about how the sentencing judge set out his remarks: when a judge imposed any term of imprisonment, particularly one as long as 7 years, it was always necessary for him or her to explain, in simple language, how that term had been calculated. In some important respects, the court considered that that did not happen here.

The court also found that the fact that the judge had made no reference to the Sentencing Council Guideline on Totality was a fundamental problem with the sentencing exercise undertaken. In a case such as this, where there were a variety of different offences, committed at different times, it was important for the judge to have particular regard to the overall length of the sentence that he intended to impose, in order to ensure that it was just and proportionate.

The court therefore reconsidered the entire sentencing exercise, finding that the original exercise was in part incorrectly calculated and, more importantly, failed to take into account the principle of totality. This resulted in the court reducing the sentence of 7 years imprisonment to 5 years and 9 months imprisonment.

The correct approach to sentencing co-defendants for joint enterprise murder, where one was just over 18 years of age and others just under

R v. Kamarra-Jarra [2024] EWCA Crim 198

The appeal raised the question of the correct approach to sentencing co-defendants who had committed a murder jointly, where one was just over 18 years of age and the others just under. At the time of the murder, the appellant was 18 years and 4 months old and his co-defendants were aged 17 years and 10 months and 17 years and 9 months respectively.

The court (**Lady Carr LCJ, Holroyde LJ VPCACD and Stacey J**) stated that the starting points in paragraphs 2 to 6 of Schedule 21 were not to be applied mechanistically, but in a flexible way so as to achieve a just result. The court stated that in a case in which one defendant is over 18 and one under 18 at the time of the murder, the sentencer's focus must be on determining the individual minimum terms which are appropriate in all the circumstances of the individual cases, rather than on striving to maintain a strict arithmetical relationship between the sentences which precisely reflected the differential starting points in paragraph 5A of Schedule 21 to the Sentencing Act 2020.

The court found that the sentencing judge had made no reference either to the impact of the appellant's immaturity and/or his extreme childhood experiences on culpability and thus on the seriousness of the offending. He made no mention of the Sentencing Council Guideline on Sentencing Children and Young People, which would have been directly relevant had the appellant been a few months younger when he committed the offence. The court allowed the appeal, quashing the minimum custodial term imposed by the judge and substituting in its place a minimum term of 28 years.

Outreach work

On 20th June 2024, 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 a second 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 Appeals 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 historical buildings and courtrooms. Lord Justice Holroyde, Vice-President of the Court of Appeal, Criminal Division, met the students to explain 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 and Lady Justice Macur answered questions on the cases that 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 5th March 2024, the Registrar welcomed a delegation of students and professors from Temple University in Philadelphia. They met with the Registrar and a Senior Legal Manager and then went to observe proceedings in court.

Summary and Statistics

1 October 2023 to 30 September 2024

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 risen from 1061 to 1163 compared to the previous year, but that sentence applications have remained largely consistent over the last five years. It can be seen that there is a very marked increase in the total number of total outstanding applications from 2572 to 3257. That is a dramatic increase and of concern. However the court heard many more conviction appeals over the reporting year (from 92 last year to 135 over this reporting year).

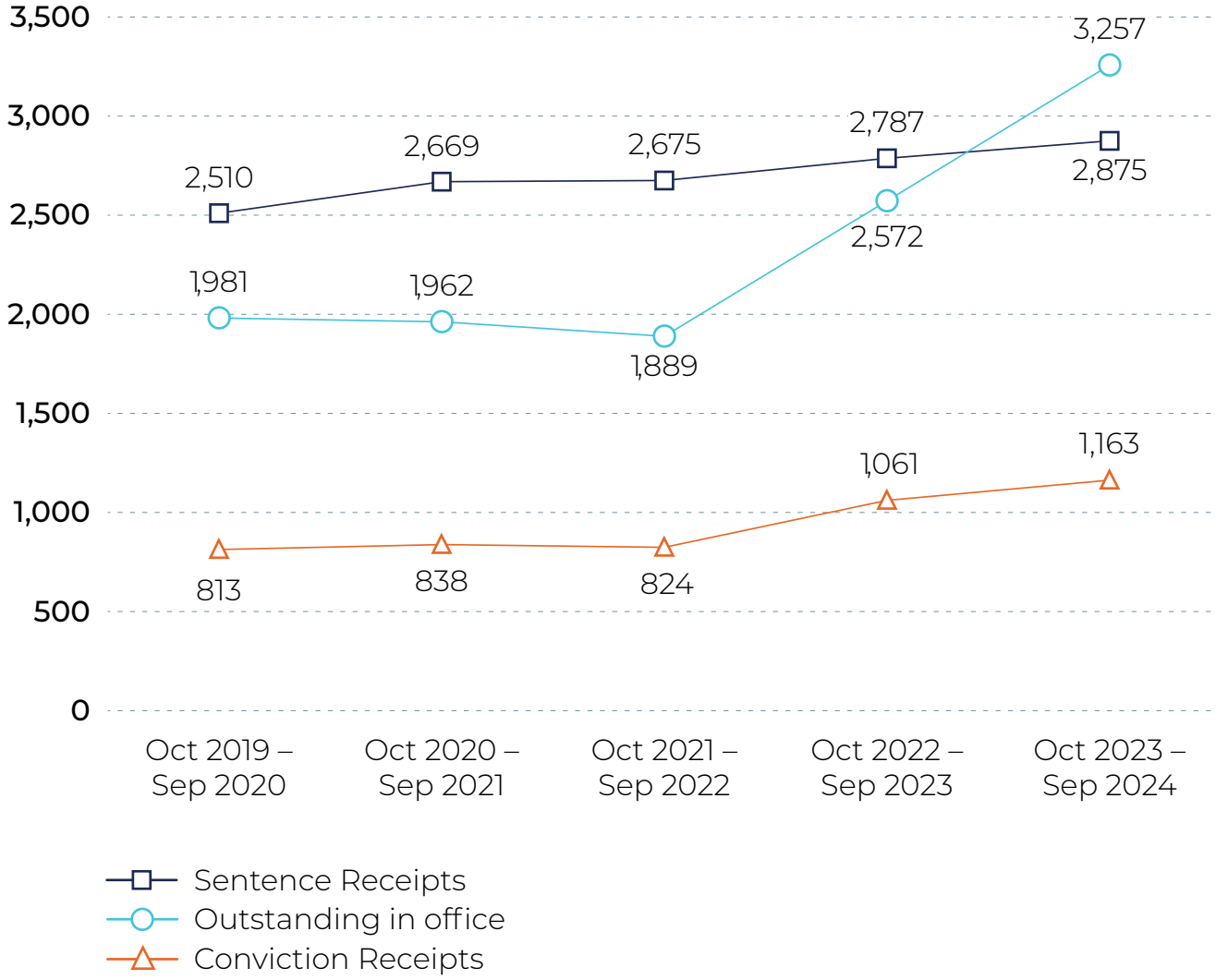
Annex H shows that there is also a marked increase in the number of outstanding old cases and these include a rise in both outstanding old conviction and old sentence appeal cases. The number of outstanding old cases is just over double the figure for the previous year for both conviction and sentence cases and reflects the increased number of total outstanding 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 18% 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. These percentages are very similar to the statistics for the last reporting year.

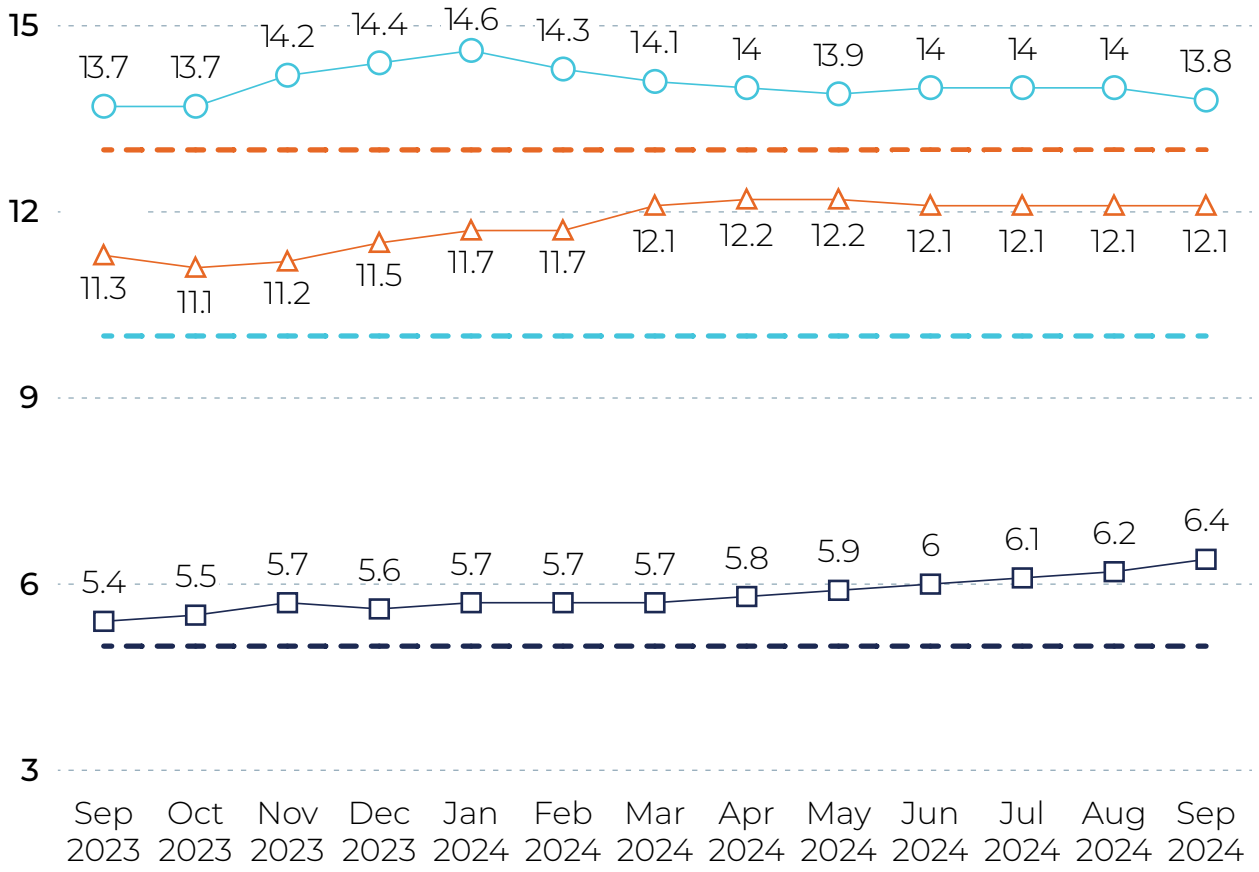
Annex F shows that out of 1163 conviction applications received, in the same year only 61 conviction appeals were allowed by the court. That equates to 5%.

Once a case reaches the court for a full appeal hearing, Annex D shows that just over half of conviction appeals (45%) were allowed by the court (61 out of 135 appeals). In terms of sentence appeals, 60% were allowed by the court (409 out of 684 appeals).

Annex A – Applications received and outstanding in office

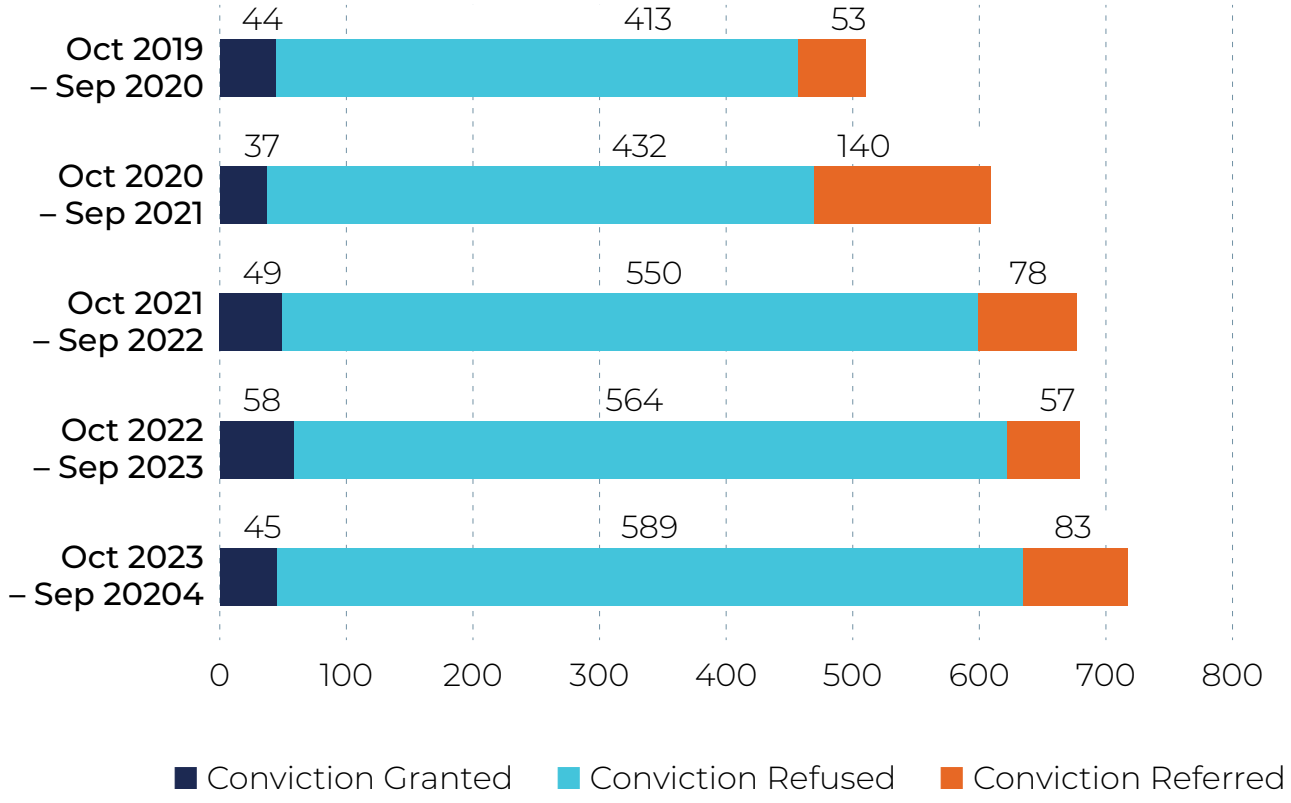


Annex B – Average waiting time (months)

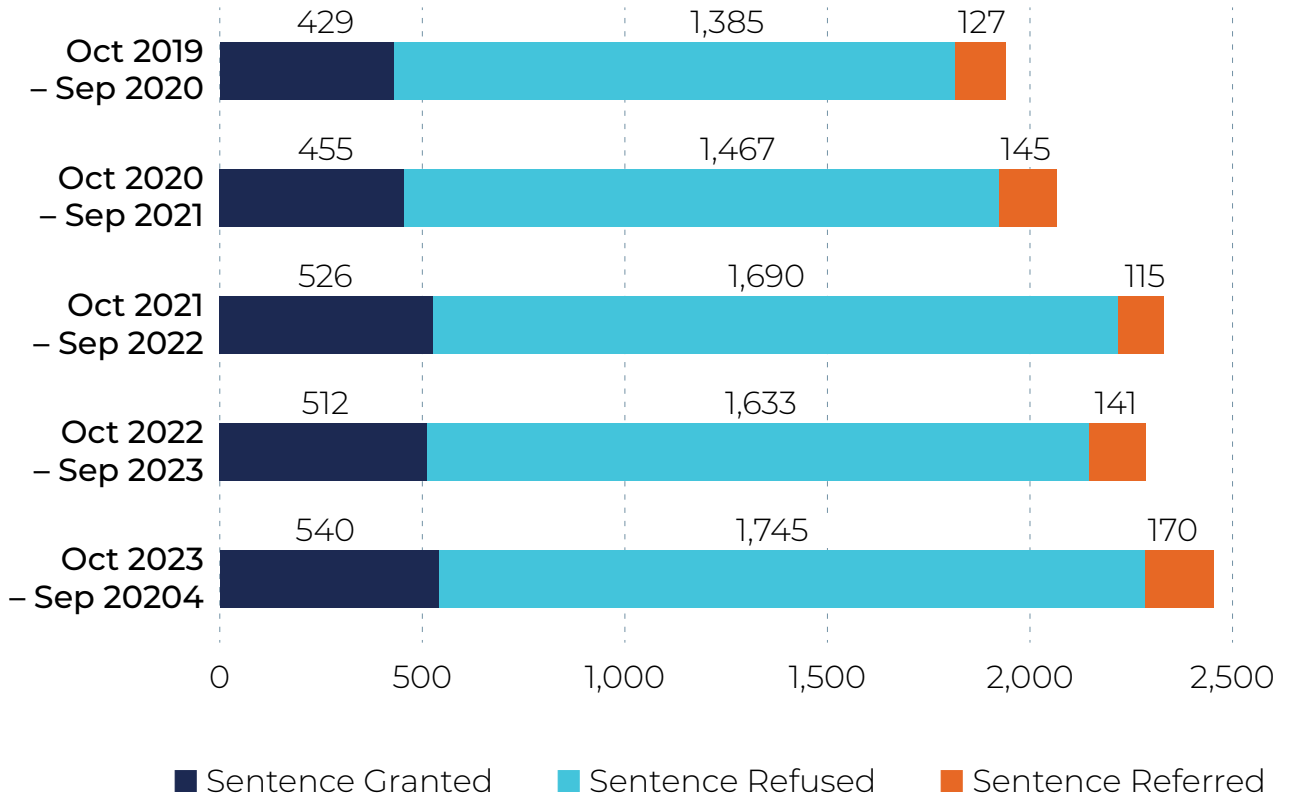


Annex C – Section 31 Applications

Conviction applications dealt with

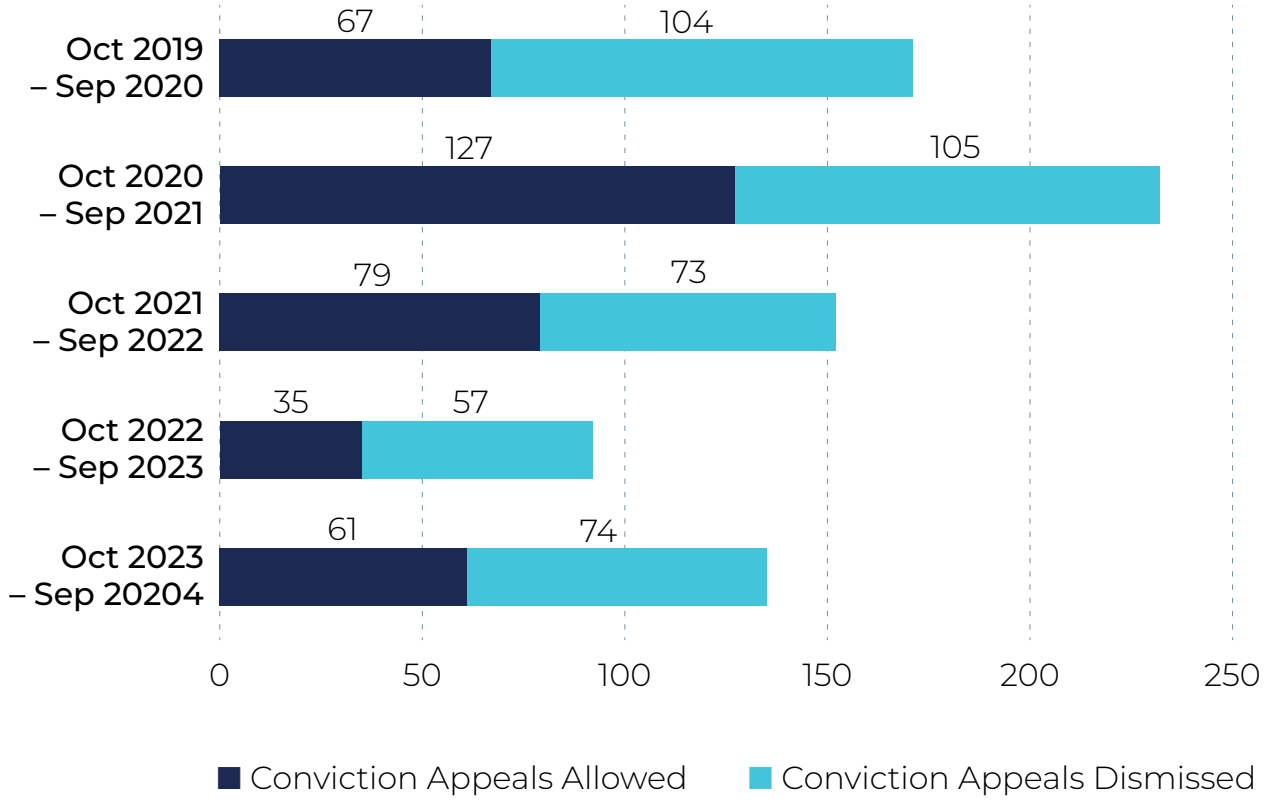


Sentence applications dealt with

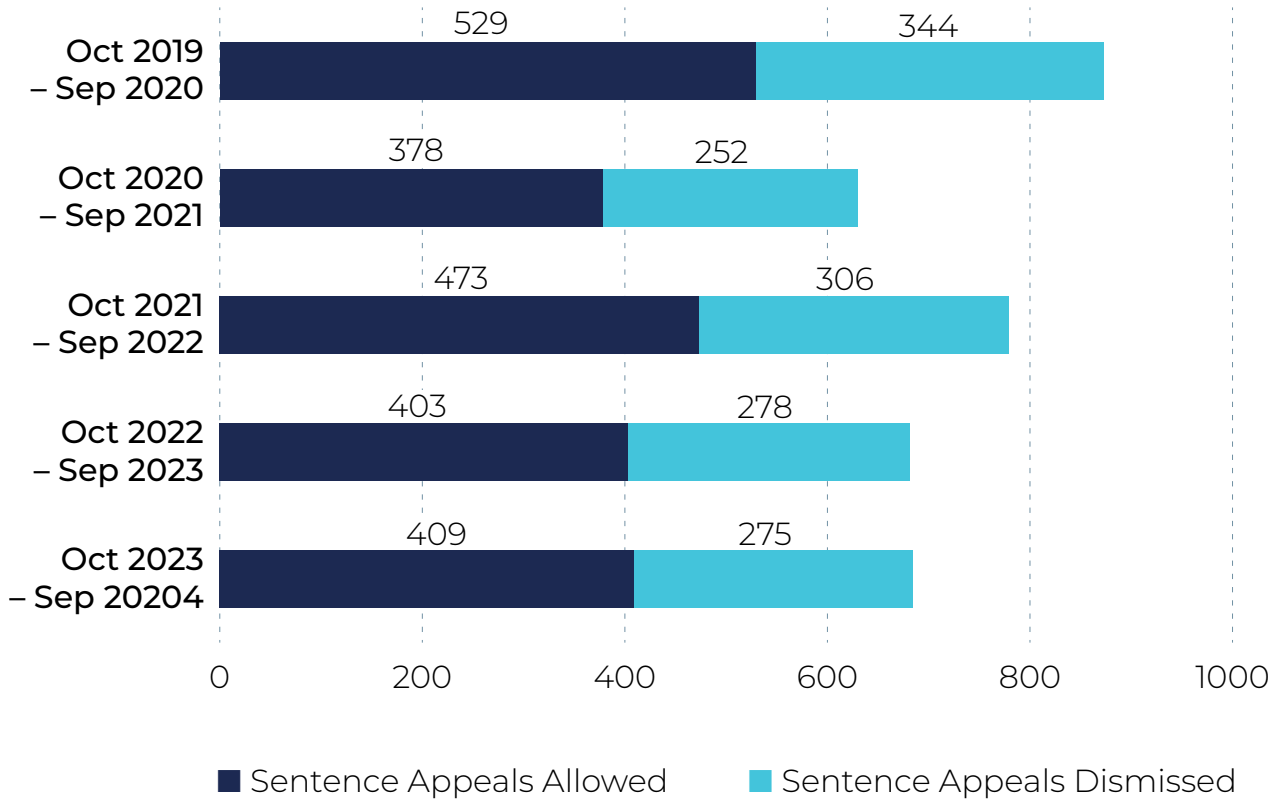


Annex D – Appeals Heard

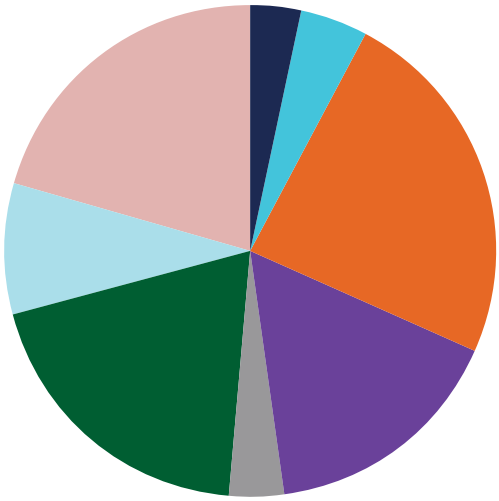
Conviction



Sentence

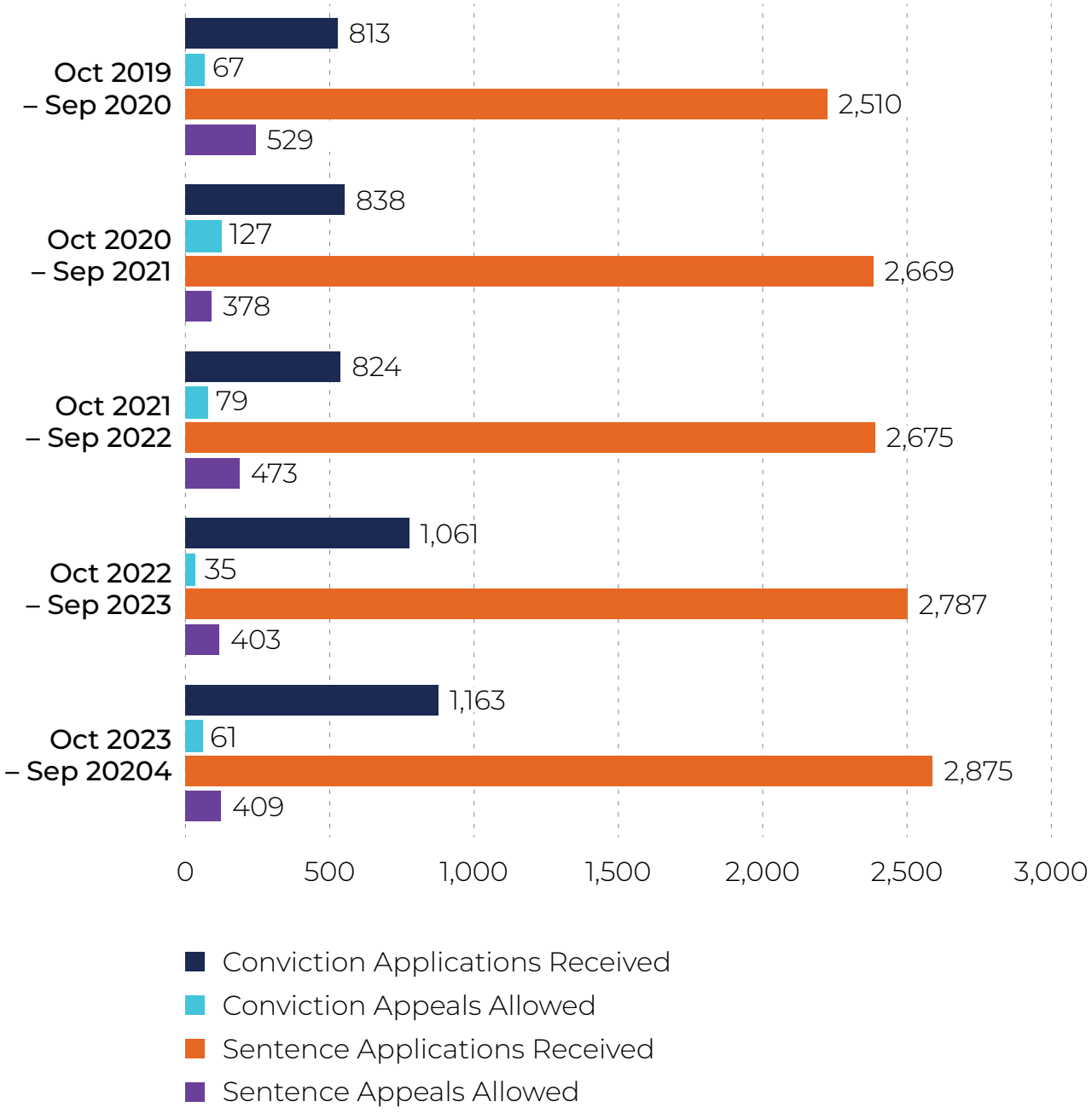


Annex E – Court time Appeals

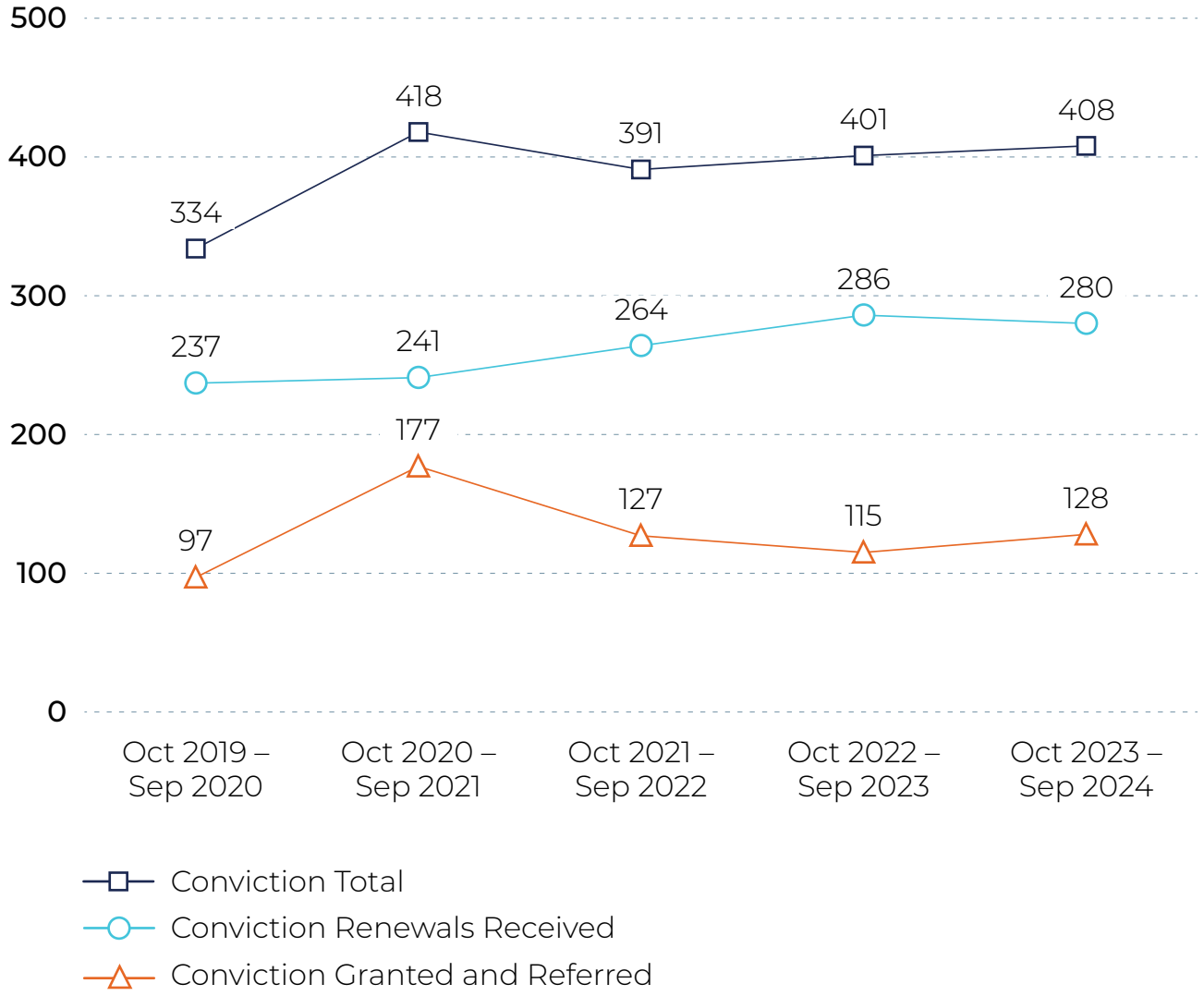


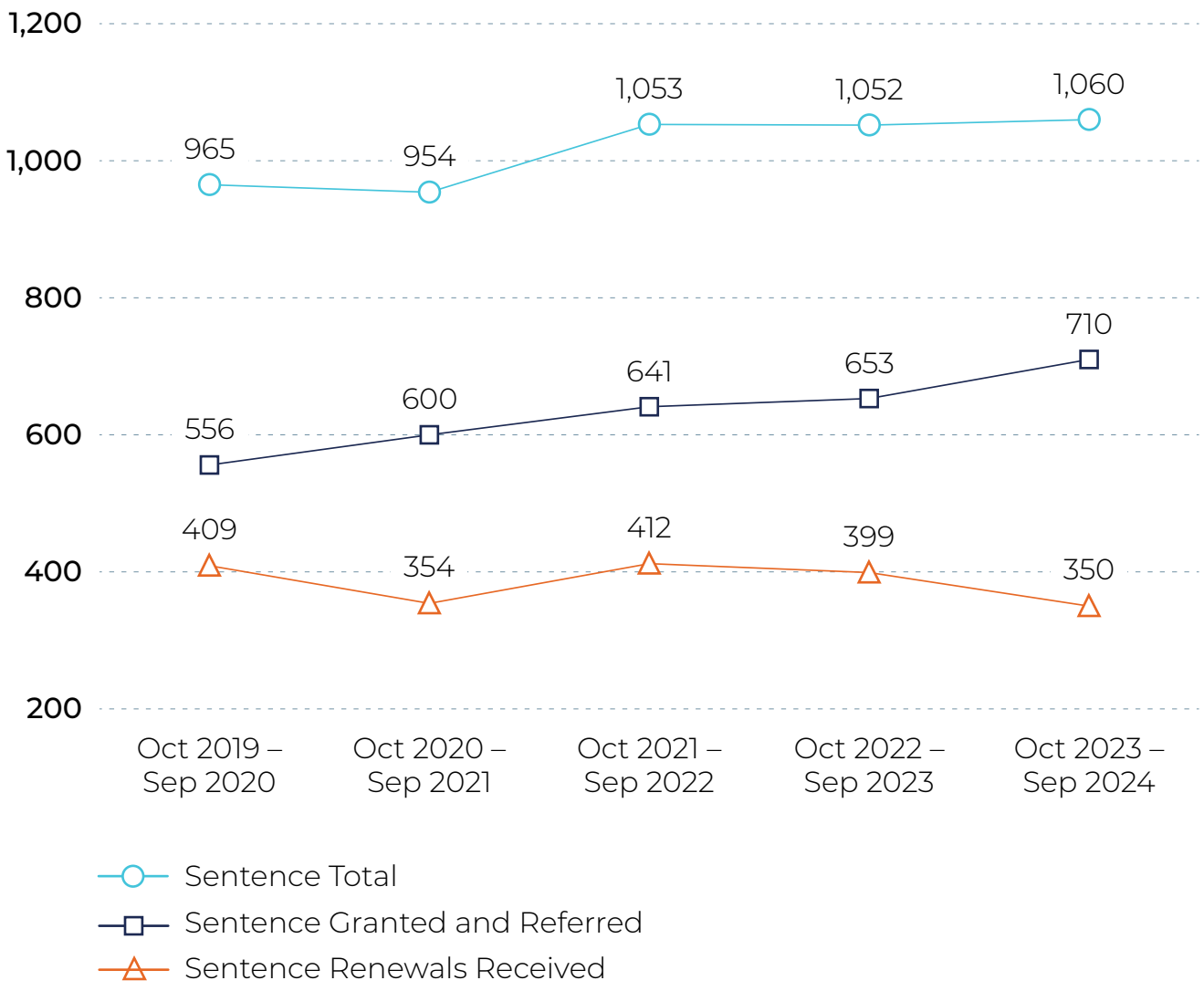
- Conviction Appeals Allowed (61)
- Conviction Appeals Dismissed (74)
- Sentence Appeals Allowed (409)
- Sentence Appeals Dismissed (275)
- Conviction Renewals Granted (65)
- Conviction Renewals Refused (333)
- Sentence Renewals Granted (145)
- Sentence Renewals Refused (351)

Annex F – Applications received and appeals allowed



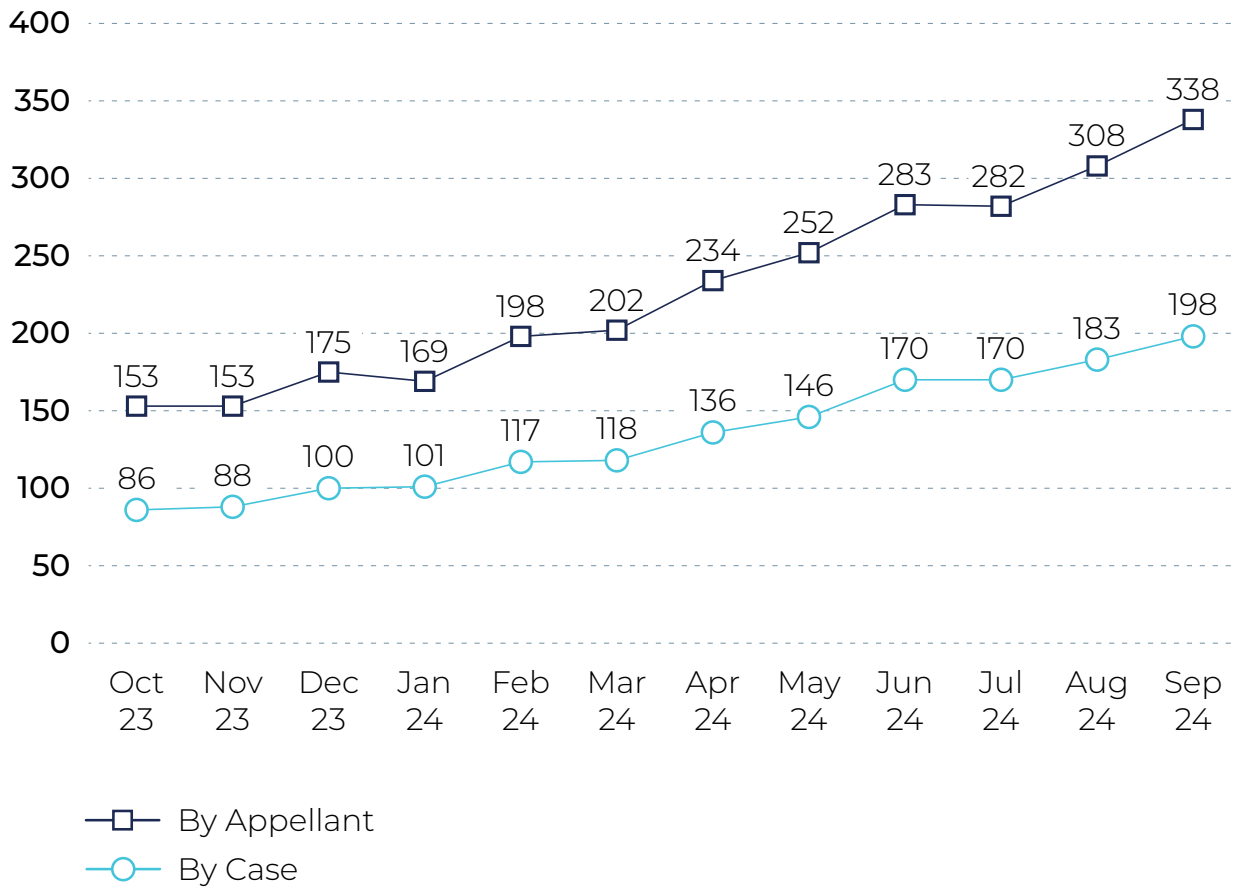
Annex G – Applications Granted, Referred or Renewed



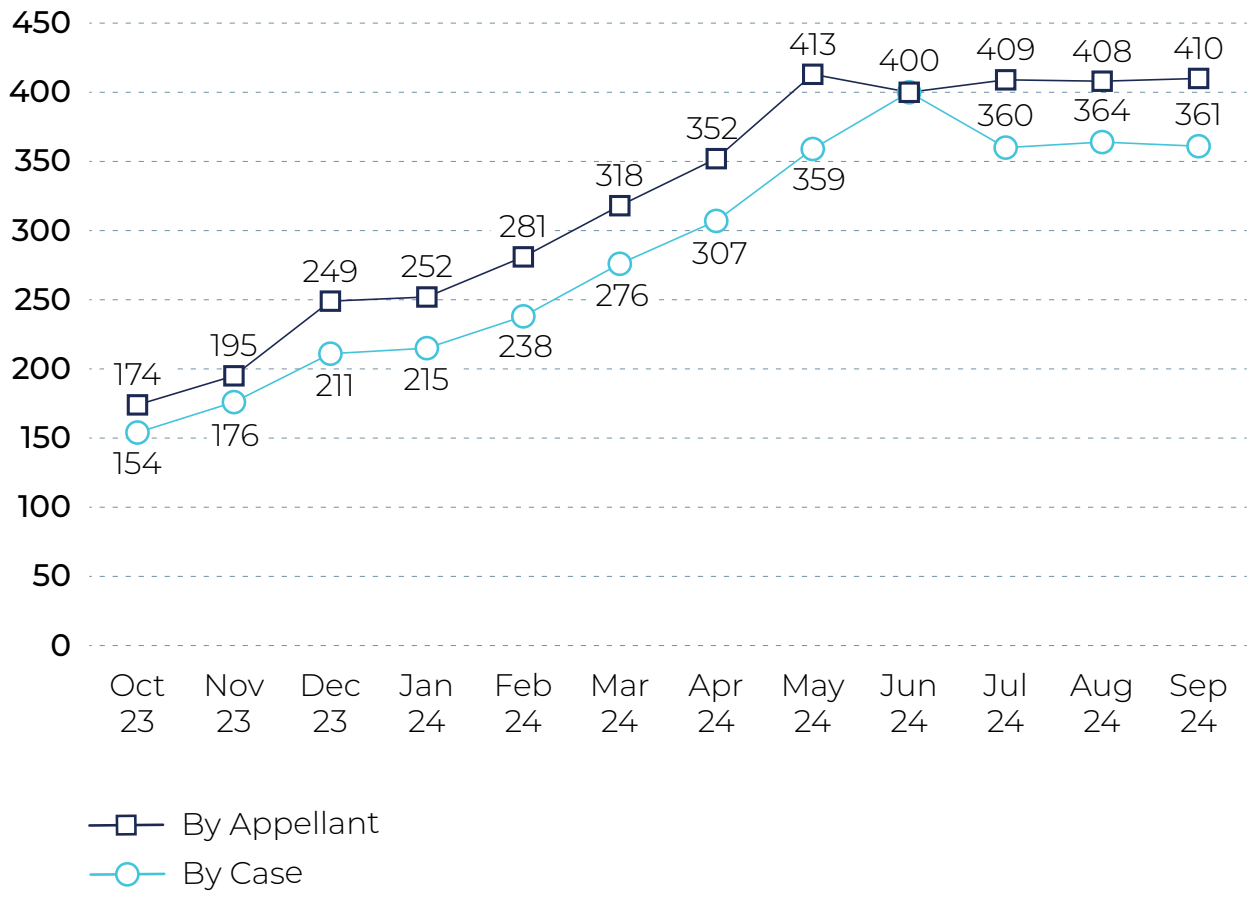

1,200
1,000
800
600
400
200
965
954
1,053
1,052
1,060
556
600
641
653
710
409
354
412
399
350
Oct 2019 – Sep 2020
Oct 2020 – Sep 2021
Oct 2021 – Sep 2022
Oct 2022 – Sep 2023
Oct 2023 – Sep 2024
Sentence Total
Sentence Granted and Referred
Sentence Renewals Received

Annex H – Old Cases

Conviction old cases – outstanding over 10/13 months



Sentence old cases – outstanding over 5 months



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