In the Court of Appeal (Criminal Division)

2016-17

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Introduction

Speaking after his appointment in October 2017 as Lord Chief Justice of England and Wales, Lord Burnett of Maldon said:

> "At times of great change the central role of the judiciary upholding the rule of law remains a constant, as do our impartiality and independence. These features are embedded in the oath I have taken. They are fundamental to our justice system and underpin the effective and smooth functioning of our society. I believe we should be better at explaining our role and the vital importance of our independence and impartiality".

On another occasion he said:

> "I doubt whether most people appreciate the nature of the work done by our judges on a day-to-day basis".

It is hoped that this Review will provide a little insight into the work of judges sitting in the Court of Appeal (Criminal Division). The importance of the Court's work can be summarised very simply. It is there to ensure that so far as humanly possible convictions which are unsafe are set aside, and sentences which are either manifestly excessive or unduly lenient are corrected. Convictions which are safe and sentences which are appropriate must be upheld. That simple summary of the objective of the Court reveals its importance, and the high level of responsibility which all who work in the Court, whether in the office or in the Court itself, must carry.

Master Egan QC, Registrar of Criminal Appeals

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There have been some important changes for the Court of Appeal (Criminal Division) office this year. We have said farewell to Lord Thomas, who will be missed not just for his great legal acumen but as a true leader of the Judiciary who was, without fail, a great support to my staff. Lord Lloyd Jones has moved (inevitably) from the Court of Appeal to the Supreme Court, we will all miss not just his intellectual contribution but his great personal charm.

Applications for leave to appeal lodged by applicants acting in person continue to rise and now stand at approximately 9.80%[1], just short of the 10% I predicted last year. I have instituted new procedures at the pre leave stage to assist Single Judges to deal with these applications, which involves an increased workload for my Office[2]. This combined with the case-management of the considerable number of References by the Attorney General in relation to sentence[3] and an increasing number of Interlocutory Appeals necessarily balances the reduction in CACD receipts from the Crown Court.

In the Review last year I said following the retirement of some key members of staff, that the Criminal Appeal Office has always strived to replace retiring staff with outstanding new recruits. I am glad to say that this has again proved to be possible and it means that my office has now a strong and motivated team of lawyers and administrative staff who are able to assist me with the important work my office does in appellate justice. I was particularly pleased that Lord Thomas appointed Alix Beldam as my Deputy last year. Her experience in the Criminal Appeal office is without parallel

Sadly this year has seen the deaths of Lord Toulson and Lord Justice Pitchford. Lord Toulson is remembered here as a great Lord Justice of Appeal with a real understanding of crime and Lord Justice Pitchford was one of the mainstays of CACD since his promotion to the Court of Appeal in 2010. Both will be greatly missed.

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1 Percentages for previous years are; 2016: 9.21%, 2015: 6.6%, 2014: 5%, 2013: 3.4% and 2012 2.53%.

2 Last year we introduced a system whereby all Grounds by Applicant's in Person are reviewed by lawyers and a summary prepared before the permission stage. Frequently lay persons have understandable difficulty in identifying the difference between arguable grounds and matters that go no further than assertion. We are finding that this does help to ensure that genuine grounds are identified at an early stage.

3 At 183 a very slight reduction on what has hitherto been a steadily increasing trend, the previous years are; 2016: 189, 2015: 149, 2014: 130, 2013: 77 and 2012: 72.

Cases of Note

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

"Householder defence" – Section 76(5A), Criminal Justice and Immigration Act 2008

In ***R v. Ray*** [2017] EWCA Crim 1391 the Court (LCJ. Davis LJ. Treacy LJ. Sweeney and Spencer JJ.) was concerned with the correct interpretation of the defence of self-defence in so-called "householder cases" (section 76(5A), Criminal Justice and Immigration Act 2008). The Court said that the section had been correctly interpreted in the Divisional Court case, *R (Denby Collins) v. The Secretary of State for Justice* [2016] EWHC 33 (Admin) and said: "In our view the interpretation placed in *Denby Collins* on the householder's defence under s.76 of the 2008 Act as amended by the 2013 Act was correct. Once the jury have determined the circumstances as the defendant believed them to be, the issue, under s.76(3), for the jury is (as it always has been at common law) whether, in those circumstances, the degree of force used was reasonable. In determining the question of whether the degree of force used is reasonable, in a householder case, the effect of s. 76 (5A) is that the jury must first determine whether it was grossly disproportionate. If it was, the degree of force was not reasonable and the defence of self-defence is not made out. If the degree of force was not grossly disproportionate, then the effect of s.76(5A) is that the jury must consider whether that degree of force was reasonable taking into account all the circumstances of the case as the defendant believed them to be. The use of disproportionate force which is short of grossly disproportionate is not, on the wording of the section, of itself necessarily the use of reasonable force. The jury are in such a case, where the defendant is a householder, entitled to form the view, taking into account all the other circumstances (as the defendant believed them to be), that the degree of force used was either reasonable or not reasonable".

Joint Enterprise post "Jogee"

The Court (LCJ. PQBD and VPCACD) in ***Johnson and Others*** [2016] EWCA Crim 1613 considered the impact on convictions of the Supreme Court's decision in *R v. Jogee, Ruddock v. R* [2016] UKSC 8 ("Jogee": Joint enterprise).

The Court said that in considering the effect of the decision in *Jogee* on prior convictions it is necessary to distinguish between appeals brought within the time limit of 28 days specified in section 18(2) of the Criminal Appeal Act 1968 and those brought outside that time.

Appeals against conviction brought within time

The Court said:

> "Appeals against conviction brought in time must be judged in accordance with the well-established statutory requirement identified in s.2(1) of the Criminal Appeal Act

1968: it is not sufficient only for there to have been some misdirection or error in the conduct of the trial. What is critical is that the verdict is thereby rendered unsafe.

The decision in any case must be fact sensitive: a misdirection of law which was not, in reality, in relation to a true (or real) issue in the trial, does not thereby (and certainly not necessarily) render a conviction unsafe.

That a successful appeal will not necessarily follow from a conviction based on the pre-*Jogee* law was also emphasised by the Supreme Court which made it clear that the approach applies to convictions however recently determined. Thus, in *Jogee*, Lord Hughes and Lord Toulson said (at [100]):

> "The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in *Chan Wing-Siu* and in *Powell and English*. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction."

Thus, even in relation to in time appeals, the fact that the jury was correctly directed in accordance with the then prevailing law does not automatically render the verdict unsafe".

Applications for exceptional leave

The Court said:

"In relation to appeals brought out of time, leave is required and an extra hurdle is introduced into the process.

The Supreme Court in *Jogee* approved the practice of the Court of Appeal of England and Wales, which Lord Bingham described in *Hawkins* [1997] I Cr App R 234 at 240 of asking whether any substantial injustice had been done.

The judgment in *Jogee* set out the position in a passage (at [100]) in these terms:

> "Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken. This principle has been consistently applied for many years. Nor is refusal of leave limited to cases where the defendant could, if the true position in law had been appreciated, have been charged with a different offence. An example is *Ramsden* [1972] Crim LR 547, where a defendant who had been convicted of dangerous driving, before *Gosney*

> (1971) 55 Cr App R 502 had held that fault was a necessary ingredient of the offence, was refused leave to appeal out of time after that latter decision had been published. The court observed that alarming consequences would flow from permitting the general re-opening of old cases on the ground that a decision of a court of authority had removed a widely held misconception as to the prior state of the law on which the conviction which it was sought to appeal had been based. No doubt otherwise everyone convicted of dangerous driving over a period of several years could have advanced the same application. Likewise in *Mitchell* [1977] 1 WLR 753, 757, (1977) 65 Cr App R 185, 189, Geoffrey Lane LJ re-stated the principle thus:
>
> > 'It should be clearly understood, and this court wants to make it even more abundantly clear, that the fact that there has been an apparent change in the law or, to put it more precisely, that previous misconceptions about the meaning of a statute have been put right, does not afford a proper ground for allowing an extension of time in which to appeal against conviction.'"

The Court continued:

> "In our view, as was accepted, the fact that there has been a change in the law brought about by correcting the wrong turning in *Chan Wing-Siu* and *R v Powell, R v English* is plainly, in itself, insufficient. As the Supreme Court stated at paragraph 100, a long line of authority clearly establishes that if a person was properly convicted on the law as it then stood, the court will not grant leave without it being demonstrated that a substantial injustice would otherwise be done. The need to establish substantial injustice results from the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law. The requirement takes into account the requirement in a common law system for a court to be able to alter or correct the law upon which a large number of cases have been determined without the consequence that each of those cases can be re-opened. It also takes into account the interests of the victim (or the victim's family), particularly in cases where death has resulted and closure is particularly important.
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> Thus, it will be for the applicant for exceptional leave to appeal out of time to demonstrate that a substantial injustice would be done. That is a high threshold.
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> In determining whether that high threshold has been met, the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. If the particular crime is a crime of violence which the jury concluded must have involved the use of a weapon so that the inference of participation with an intention to cause really serious harm is strong, that is likely to be very difficult. At the other end of the spectrum, if the crime is a different crime, not involving intended violence or use of force, it may well be easier to demonstrate substantial injustice. The court will also have regard to other matters including whether the applicant was guilty of other, though less serious, criminal conduct. It is not, however, in our view, material to consider the length of time that has elapsed. If there

> was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and remains an injustice.
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> We invited submissions on whether it was appropriate for the court to take into account the observations of the judge when sentencing in determining the factual basis for the conviction. In our view, the court should not do so.
>
> If exceptional leave is granted, the court will then, and only then, consider the question as to whether in the light of the direction given to the jury the conviction is unsafe".

Other cases

The Court said

> "Although in our judgment, the considerations we have set out will govern the large majority of appeals, there are cases where appeals or applications for leave to appeal grounds were pending.
>
> One type of case is where an application for leave to appeal was made within 28 days on non-*Jogee* grounds and either granted or refused, but renewed to the Full Court. Subsequently, an application was made to add grounds based on the decision in *Jogee*. It was submitted that exceptional leave was not needed or alternatively leave should readily be granted as these were cases where there had been no finality and thus the considerations of establishing substantial injustice did not arise. In such cases, leave to put forward the new grounds is required. As we have set out above, the general principle is that where a defendant was properly convicted on the law as it then stood, the court will not grant leave without it being demonstrated that a substantial injustice would be done. The court will therefore generally apply the same principle to applications to put forward new grounds based on the decision in *Jogee*.
>
> A second type of case is where the application was made within 28 days on non-*Jogee* grounds, but the issue of leave to appeal not determined by either the Single Judge or the Full Court, as progress in the case was adjourned by the Registrar pending the decision in *Jogee*. An application was then made on *Jogee* grounds. The appeal of Terrelonge and Burton is an illustration of such a case, but with the particular feature that counsel in the case drew the attention of the trial judge to the fact that the Court of Appeal had certified a question for the Supreme Court in the appeal of *Jogee*. Counsel was therefore, in effect, asking the trial judge to reserve the question as to the correctness of the decision of the Court of Appeal in *Jogee*. In such circumstances, it is just to allow the issue to be argued.
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> The final scenario is one in which one appellant appealed on *Jogee* grounds in time and a co-defendant (who did not) then seeks to appeal on similar grounds out of time. Given that the appeal in time has to be determined in accordance with the usual principles (unhampered by the need to seek exceptional leave), the potential substantial injustice as between defendants is likely, depending on the circumstances, to require that a co-defendant who seeks leave should be permitted to argue his appeal".

Sentencing: Geriatrics

The Court (VPCACD. Rafferty LJ. Treacy LJ. Sweeney and Goss JJ.) in ***R v. Clarke and Cooper*** [2017] EWCA Crim 393 considered two appellants aged 101 and 96 respectively who were sentenced for sexual offences some time before when each was younger and fitter and when there was no question of their culpability being reduced by any matter relating to their mental health or age. The Court noted that there are about 4,400 prisoners aged 60 or over at present. Ministry of Justice figures show that as at 31 December 2016, there were 219 offenders in prison aged between 80 and 89, 14 aged between 90 and 99, and one aged 100 or more, giving a total of 234. The overwhelming majority of those aged between 80 and 89 are sex offenders and virtually all of those aged 90 or over are sex offenders. The Court having reviewed the relevant authorities said that it was not persuaded that there should be any change in the position. Whilst it considered that an offender's diminished life expectancy, his age, health and the prospect of dying in prison were factors legitimately to be taken into account in passing sentence, they had to be balanced against the gravity of the offending, (including the harm done to victims), and the public interest in setting appropriate punishment for very serious crimes. Whilst courts should make allowance for the factors of extreme old age and health, and whilst courts should give the most anxious scrutiny to those factors as was recognised in *Forbes* [2016] EWCA Crim 1388 (see below), the approach of taking them into account in a limited way was the correct one.

Further Guidance in Sentencing Historical Sexual Offences

In ***Forbes and Others*** [2016] EWCA Crim 1388, a 5-judge Court (LCJ. VPCACD. Treacy LJ. McGowan J DBE and HHJ Peter Rook QC) heard a number of appeals together involving historic sexual offences since they raised related issues that had arisen in sentencing in such cases. The Court outlined the applicable general principles. The guidance in *R v H* [2011] EWCA Crim 2753 had been codified by the Sentencing Council in Annex B of the Definitive Guideline on Sexual Offences published in 2013. The offender must be sentenced in accordance with the regime applicable at the date of sentence. The court must therefore have regard to the statutory purposes of sentencing, and to current sentencing practice. The fact that attitudes have changed is of no moment. The sentence that can be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum has been reduced, when the lower maximum will be applicable. Whilst these principles were clear, a number of issues had arisen in relation to their application.

Terrorism

In ***Abdallah and Others*** [2016] EWCA Crim 1868 the Court (LCJ. Treacy LJ. and Leggatt J.) considered sentence applications in respect of terrorist offences. The Court referred to the recent guideline case of *R v Kahar and Others* [2016] EWCA Crim 568 and made clear that none of the cases before it provided any basis for reconsidering the guidance given in that case. However, there were two matters the Court wanted to highlight: (i) The practice of some advocates in seeking to address the court on a comparison between the facts of cases; and (ii) the meaning of "members of the public" in s.226A(1)(b) of the Criminal Justice Act 2003. Insofar as the first point the Court said:

> "We wish to emphasise that this type of argument is misconceived and should not be attempted. This court has made it clear repeatedly that such an approach is unhelpful when considering guidance given by this court and when considering the application of a guideline of the Sentencing Council.
>
> One of the chief purposes of giving guidance in *Kahar* was precisely to avoid attempts to make detailed comparisons between cases which are highly fact sensitive. For the same reasons, the descriptions of the guideline levels are not intended to be mechanistically applied. They deliberately focus on "typical" cases. For these reasons this court will not pay any regard to such comparisons".

In one of the appeals a question of statutory interpretation was raised, namely whether the phrase "members of the public" in s.226A(1)(b) of the CJA 2003 referred only to members of the public in the UK or whether it included members of the public in countries other than the UK. The sub-section refers to a necessary precondition for an extended sentence as being a "significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences". It does not define "members of the public".

The Court concluded:

> "We consider that, in the context of section 226A(1)(b), although the territorial scope of "the public" is not expressly defined, the phrase must be intended to include the public in other countries. It will, nevertheless, only be relevant to consider the risk of harm to such persons where the further specified offences in contemplation are offences which, in view of their territorial scope, are capable of causing harm abroad".

Victims of trafficking

In ***R v. Joseph and Others*** [2017] EWCA Crim 36 the Court (LCJ. VPCACD and Goss J.) considered offending by victims of trafficking where there was a nexus between the crime committed and the trafficking. In 2015 Parliament made comprehensive provision in respect of human trafficking by the enactment of the Modern Slavery Act 2015 ("the 2015 Act") (brought into force as regards the material provisions on 31st July 2015). Until that Act there was no statutory provision which transposed into the law of England and Wales the obligations of the United Kingdom under the international conventions towards those victims of human trafficking for the purposes of exploitation who committed crimes in England and Wales where there was a nexus between the crime committed and the trafficking. However, the 2015 Act was not drafted to provide retrospective protection and therefore the regime developed by the courts will continue to apply to those not within the scope of the Act. The Court set out the principles as developed in the cases of (i) *R v M(L), B(M) and G(D)* [2010] EWCA Crim 2327; (ii) *R v N, R v Le* [2012] EWCA Crim 189; and (iii) *R v L(C), N, N & T* [2013] EWCA Crim 991.

A large percentage of the Court's business relates to appeals against sentence including confiscation and references by the Attorney General (unduly lenient sentences). A number have already been mentioned. Whilst the majority of cases stand alone in terms of their circumstances and facts, some provide useful guidance in terms of procedure and jurisdiction.

The Law Commission are presently codifying and streamlining existing sentencing law with a view to a consolidated sentencing Act being enacted. The Law Commission identified that:

> ***"Currently, the law lacks coherence and clarity: it is spread across many statutes, and frequent updates are brought into force at different times by different statutory instruments and have a variety of transitional arrangements. This makes it difficult, if not impossible at times, for practitioners and the courts to understand what the present law of sentencing procedure actually is. This can lead to delays, costly appeals and unlawful sentences."***

The observations of the Law Commission resonate with the Court of Appeal which regularly has to rectify unlawful sentences.

Guidelines

In ***Ahearne*** [2017] EWCA Crim 506 (11.04.17) the Court (Treacy LJ. Green and Picken JJ.) said that a judge was obliged to apply the guideline in force at the relevant time. The Court said:

> "As explained by Hughes LJ, as he then was, in *R v Boakye and Others* [2012] EWCA Crim 838 at paragraph 17 when dealing with the situation where new guidelines have been issued by the Sentencing Council:
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> > "Guidelines such as these make essentially prospective and not retrospective changes to sentencing practice. They apply to sentencing which takes place after, but not before, they come into operation."

Giving sentencing reasons in public

In ***Billington*** [2017] EWCA Crim 618 the Court (Treacy LJ. Green and Picken JJ.) was concerned with *inter alia* the judge's failure to set out his sentencing remarks in public. Sentence was pronounced but the reasons were handed down 3 days later in writing. In dismissing the appeal the Court made the following comments:

> "We commend the judge for reducing his remarks to writing and for the care that he adopted in their preparation. We recognise that sentencing can frequently be complex and technical and the analysis which must occur in relation to an extended sentence might well be a good illustration of the sort of sentence where a judge feels the need to adjourn to consider carefully either sentence or how it should be explained. But where this happens it is crucial that the articulation of the reasoning takes place orally in public. This is to ensure that the public at large, which includes the press who might

> cover a sentencing exercise, are made fully aware of the reasons for the sentence passed. Transparency in the working of the justice system is integral to the maintenance of public confidence in that system. Transparency is equally critical in ensuring that the defendant knows exactly why the sentence has been passed and it facilitates consideration of possible grounds of appeal. For similar reasons it enables the Crown to know whether they should oppose an appeal and, if so, upon what basis and even whether they would wish to challenge a sentence as unduly lenient. We would draw attention to section 174(2) Criminal Justice Act 2003 which when referring to the duty to give reasons for sentences stipulates that such reasons must be given in "*open court*" and using "*... ordinary language and in general terms*". This is for the salutary reasons of policy that we have identified.
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> None of this, of course, prevents the increasingly common practice of the judge handing out printed copies of the sentencing remarks to those in court once they have been delivered. In the present case, we are told that the sentencing remarks were neither read out in public nor sent to the Crown. Indeed, we are informed by the Crown that they obtained copies of the judge's remarks only in the course of preparing for this appeal.
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> With respect to the Recorder, who otherwise clearly devoted considerable care and attention to the preparation of his remarks, this was a serious failure in good practice".

Factual basis on sentencing

In ***R v. King*** [2017] EWCA Crim 128 the appellant was acquitted of murder but convicted of manslaughter. He was sentenced to 12 years' imprisonment. The argument advanced by the appellant in his first ground of appeal against sentence gave rise to the consideration of what was the correct approach by the judge, after a trial, to the determination of the factual basis upon which to pass sentence. In particular, as to whether, when positive cases have been advanced at trial (*Fleury* [2014] 2 Cr.App.R. (S.) 14), and there is evidence to support two or more possible versions of events consistent with the jury's verdict(s), sentence must be passed on the basis that is most favourable to the defendant (*Stosiek* 4 Cr.App.R. (S.) 205 and *Tovey* 14 Cr.App.R. (S.) 766). The Court (Sharp LJ. Sweeney J. and HHJ Dean) dismissed the appeal and said:

> "In our view the correct approach by the judge, after a trial, to the determination of the factual basis upon which to pass sentence, is clear. If there is only one possible interpretation of a jury's verdict(s) then the judge must sentence on that basis. When there is more than one possible interpretation, then the judge must make up his own mind, to the criminal standard, as to the factual basis upon which to pass sentence. If there is more than one possible interpretation, and he is not sure of any of them, then (in accordance with basic fairness) he is obliged to pass sentence on the basis of the interpretation (whether in whole or in relevant part) most favourable to the defendant".

Low value shoplifting

An area that has caused difficulty is low value theft. In ***R v Maxwell*** [2017] EWCA Crim 1233 the court dealt with a myriad of technical defects. A key principle identified was that unless a defendant has **elected** to be tried in the Crown Court upon a low value shoplifting charge (value below £200 in the aggregate) it remains summary only. The offence is not listed in s.40 CJA 1988 so it cannot be included in the indictment unless the defendant has elected trial by jury on that charge. In the absence of an election any conviction upon a count included in the indictment falls to be quashed. When aggregating the values of goods stolen, where an offender is charged with more than one low-value shoplifting offence, to determine if their aggregate value exceeds £200, any offence must be disregarded if it is not itself a low-value shoplifting offence (e.g. if goods stolen for that offence exceed £200).

Confiscation

In ***R v. Halim*** [2017] EWCA Crim 33 the Court (Simon LJ. Blake J. and HHJ Leonard) dealt with a prosecution application under section 31 of the Proceeds of Crime Act 2002 ("POCA") against a ruling where the Crown Court refused to find retrospectively that there were "exceptional circumstances" within the meaning of section 14(4) of POCA and dismissed the prosecution application for a confiscation order. The Court set out section 14 of POCA, headed "Postponement", which provides: "(1) The Court may – (a) Proceed under section 6 before it sentences the defendant for the offences (or any of the offences) concerned, or (b) Postpone proceedings under section 6 for a specified period. (2) A period of postponement may be extended. (3) A period of postponement (including one as extended) must not end after the permitted period ends. (4) But subsection (3) does not apply if there are *exceptional circumstances* (emphasis added). (5) The permitted period is the period of two years starting with the date of conviction". The Court noted that there was an imprecision of the statutory phrase "exceptional circumstances" and said:

> "In *Johal* [2014] 1 WLR 146 the Court posed three questions. The first of these questions was: what is the proper approach to the application of the requirement in s.14(4) of exceptional circumstances? Having reviewed a number of authorities, the Court said this:
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>> "Standing back from all the authorities, it is clear in our judgment that the intention of Parliament was that a broad approach should be taken to what constitutes 'exceptional circumstances'. Indeed, in the approach to section 14 generally, Parliament's intention must be taken to be to ensure that confiscation proceedings go ahead and are effective without technical problems of timing and timetabling acting as a bar to recovery. Adherence to the timetable is an obligation, as we shall re-emphasise later in this judgment, but the approach to strict failures to comply should reflect that intention of Parliament".
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> This passage indicates that Courts should adopt an approach which keeps in balance the importance of the prompt resolution of the confiscation proceedings (within 2 years of conviction) and the practical difficulties of timing and timetabling that this may involve. It is also clear from *Johal*, at [38], that where the court adjourns a case before the expiry of the permitted time, without a consideration of whether there were exceptional circumstances, it is permissible for the court subsequently to conclude that there had

been exceptional circumstances at the time of the adjournment, see also *R v. T* [2010] EWCA Crim 2703.

We doubt that it is either possible or desirable to provide an all-embracing definition of what may amount 'exceptional circumstances', but a consideration of the circumstances will plainly involve looking at the entire history of the proceedings to see whether circumstances exist which may exceptionally justify a postponement".

The Duty of Due Diligence and Fresh Representatives. This has been an issue for the Court since the decision in *McCook* [2014] EWCA Crim 734.

Over the reporting year, the Court has again examined the duties of fresh representatives when settling grounds of appeal. This duty was first examined by the Court in ***R v Achogbuo*** [2014] EWCA Crim 567, ***R v McCook*** [2014] EWCA Crim 734 and ***R v Lee*** [2014] EWCA Crim 2928.

In ***R v Achogbuo*** [2014] EWCA Crim 567, grounds of appeal were lodged by fresh legal representatives alleging incompetence of the trial representatives. No enquiry was made with the trial representatives as to the basis of the allegations and the Registrar instigated the waiver of privilege procedure. The allegations were subsequently revealed to be groundless and the application was summarily dismissed by the full Court (LCJ. Royce J. and HHJ Tonking) under Section 20 of the Criminal Appeal Act 1968. In dismissing the application, the Court said that fresh representatives should not just accept the word of a convicted criminal when settling grounds of appeal and must (in order not to fail in their duty to the Court of Appeal) **exercise due diligence** to obtain objective and independent evidence before submitting grounds of appeal, including **but not limited to** contacting the previous lawyers.

In ***R v McCook*** [2014] EWCA Crim 734, the Court (LCJ. PQBD and VPCACD) was concerned that an application had been founded on factual errors, facts which that could have easily have been rectified, had the fresh representatives communicated with the trial representatives. The Court said that in any case where fresh representatives are instructed, it is necessary for them to approach the solicitors and/or counsel who acted at trial to ensure that the factual basis upon which the grounds are premised is correct.

The Court in ***R v Lee*** [2014] EWCA Crim 2928 further extended *Achogbuo* beyond complaints of trial representatives and assertions from the applicant. In all fresh representative cases there is now a requirement that the representatives not only contact the trial representatives but also obtain objective and independent evidence to substantiate the facts relied on. The Court has re-examined this duty and how it can be discharged in a fresh evidence case, where the Court is required to apply Section 23 of the Criminal Appeal Act 1968. That provision means that the applicant must provide a satisfactory explanation as to why the evidence was not adduced at trial. This is often a problematic area to fresh representatives and one which also requires the Court to understand what occurred during the trial.

In ***R v Singh*** [2017] EWCA Crim 466, the Court said that in ALL fresh evidence cases argued by fresh representatives, either a waiver of privilege will be required to enable the Registrar to seek the comments of the trial representatives as to why the evidence was not available at trial or a written statement must be provided from the representatives as to the exceptional circumstances relied on as to why waiver does not apply/would not assist the Court.

In ***R v McGill and Others*** [2017] EWCA Crim 1228, it was asserted that McGill was unable to participate in the trial and was therefore denied a fair trial (McGill was a youth with limited intellectual functioning). The Court further clarified that even where express criticism is not being

made of the trial representatives, the fresh representatives must make all proper and diligent enquiries of previous counsel, advocates and solicitors, so that they (and the Court) have all the information properly to understand what took place prior to and during the trial and the grounds must expressly certify that this has been done. It is not enough that the draft grounds are sent to the trial representatives for comment. Specific questions must be put to the trial representatives before the grounds are settled. It is also no excuse to say the previous representative is now a Judge or has left the profession.

Accordingly, these authorities all demonstrate what the Court now firmly expects from fresh representatives in settling grounds of appeal and how their duty of due diligence can be discharged.

The jurisdiction of the Court to re-open a final determination

In ***R v Hockey*** [2017] EWCA Crim 742, the Court (PQBD. Haddon-Cave J. and HHJ Inman) considered the jurisdiction of the Court to re-open a final determination. This involved a detailed analysis of ***R v Yasain*** [2015] EWCA Crim 1277, when the Court initially considered the circumstances in which a final determination of the Criminal Division could be re-opened. Two established categories of cases were identified:

(1) Where the decision has **not been entered into the record** it was agreed the Court had a wide power to revise any order pronounced.

(2) Where the decision had been entered into the record, but either:

a. On a proper analysis **the order was a nullity** (as in ***R v Majewski*** (1976) 62 Cr App 5); or

b. There had been some **defect in procedure which may have led to a real injustice** (following the line of authority set out in ***R v Daniel*** (1977) 64 Cr App R 50, [1977] QB 364).

Cases which rely on defects in procedure (*Daniel*) are more commonly argued within this jurisdiction. Such defects might include the Court failing to notify an applicant's counsel of the hearing date. However, over the reporting year, the Court (Davis LJ. King and Andrews JJ) in ***R v Weekes*** [2017] EWCA Crim 819 clarified that if an applicant wishes to apply to re-open on the basis of a defect in procedure, they must act without delay because it is not the purpose of the discretion to re-open a case to allow an applicant an extensive period of time to build their case, before applying to re-open it.

The Court, in both *Yasain* and *Hockey*, then went on to consider a third category of cases based on the principles set out in ***Taylor v Lawrence*** [2002] EWCA Civ 90, [2003] QB 528.

(3) Where the decision had been entered into the record, but it was necessary for the Court to re-open that decision in order to avoid real injustice, the appellate Court had an implicit power/jurisdiction to re-open the case in exceptional circumstances, where there was no other effective remedy.

In applying those principles to the Criminal Division, there were three further interests particular to the criminal jurisdiction: a. The interests of the State (including finality of proceedings); b. The interests of the defendant; and c. The interests of the victim

In the absence of any current Criminal Procedural Rules, the Court in *Hockey* gave some guidance where a party wishes to rely on the implicit jurisdiction of the Court to reopen a case. That was

intended to provide the Criminal Procedure Rules Committee with the framework to set out this procedure.

Hockey is an important authority, as the Court expressly reiterated that the Criminal Cases Review Commission must be considered and will normally always be an effective remedy, as it is a tried and tested route to achieve the objectives of an appellate Court.

Hockey confirms that the implicit or inherent jurisdiction of the Court to re-open a final determination is very limited and no other remedy should be available. It should not be used as a means to improve the efficiency of proceedings. In conclusion the Court stated:

> "Given the pressure on the Court of Appeal (Criminal Division) to deal with outstanding appeals and applications, it is therefore appropriate to underline the truly exceptional nature of this type of application and the strict need to justify attempts to bring cases within its remit".

The Work of the Criminal Appeal Office

Lawyers at the Criminal Appeal Office ("CAO") work closely with the Registrar to ensure that cases are guided through the appeal process efficiently and justly. They provide case summaries which are invaluable to the Court and practitioners. They also provide advice on procedural matters to practitioners and applicants in person. They are supported by dedicated teams of administrative staff support who are responsible for the preparation and progression of the majority of sentence only cases, obtaining advice from CAO lawyers as necessary. They write the case summaries on all but the most complex sentence cases and also provide essential back office support. They also deal with specialist matters such as the assessment of costs and the listing of cases. Court clerks sit as the Registrar in Court.

The Registrar's staff play a proactive role in preparing cases for the Single Judge and indeed the Full Court. One clear example of this is in respect of unlawful sentences. In some instances, the failure by the Crown to provide the sentencing judge with proper information as to sentencing and indeed defence counsel's apparent misunderstandings of sentencing provisions has 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 many instances the staff of the CAO are the first to identify that a sentence is in fact unlawful and draw that to the attention of the parties and the Court

The legal team is headed by three Senior Legal Managers, who are responsible for the throughput of all work in the CACD. Their work however is not confined to the management of staff and work, but also encompasses specialist training both internally and externally, maintaining best practice and assisting the Registrar in carrying out his statutory functions.

Summary and Statistics

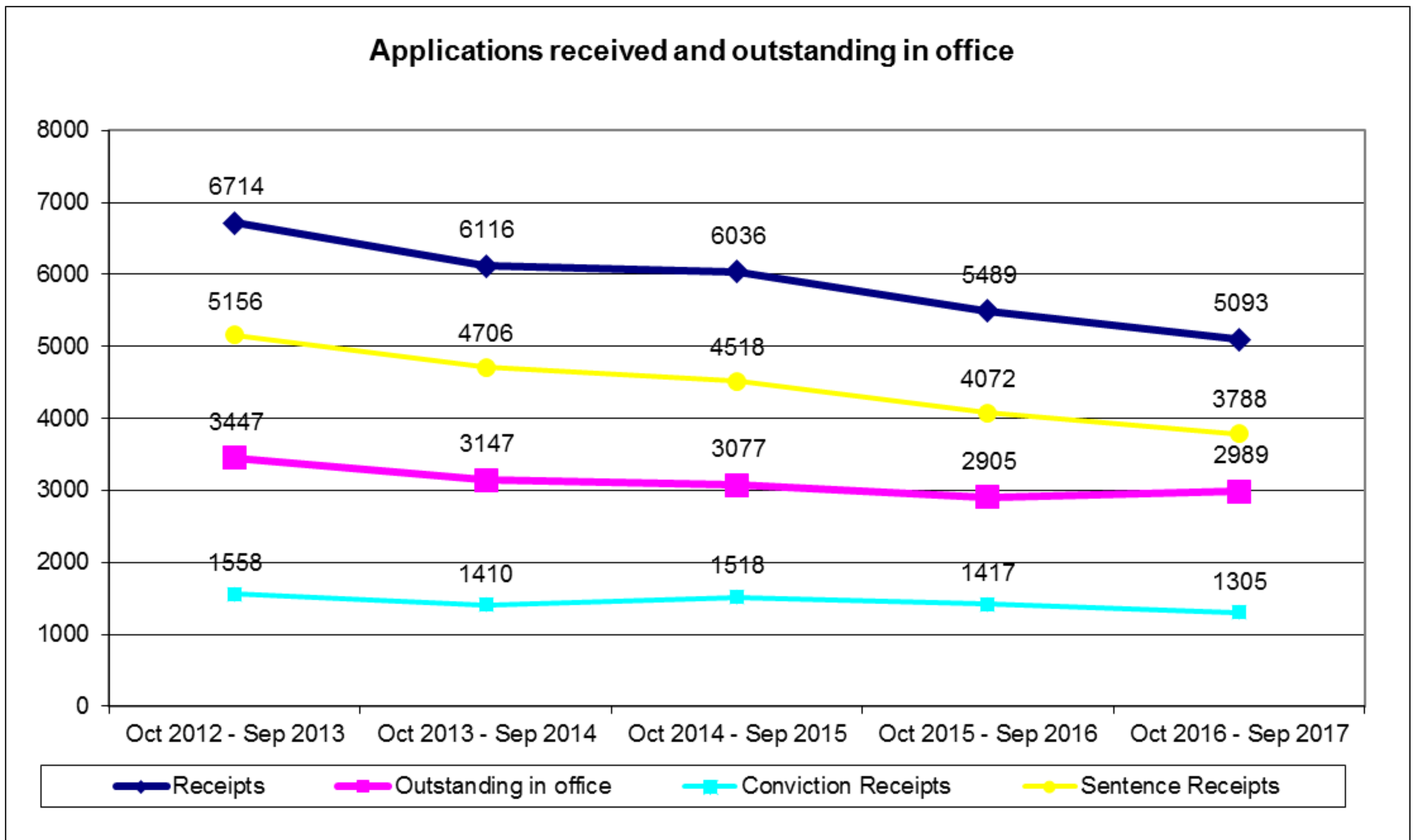
1st October 2016 to 30th September 2017

Over the reporting year there has been a decrease in the number of both conviction and sentence applications (see Annex A).

The average waiting time for conviction grants/referrals has seen a steady fall whilst there has been an increase in respect of sentence cases (see Annex B).

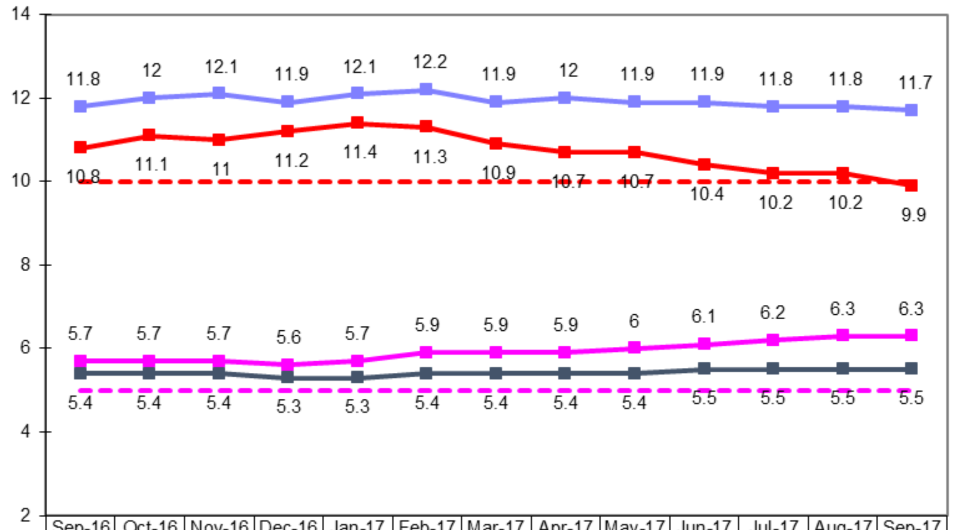
There are certain factors that affect the working of the Court and the figures seen in the different Annexes need to be put into some form of context. As mentioned by the Registrar in his Foreword, the Court has seen a continuing increase in applicants in person which involves an increased workload for the Office, a considerable number of References by the Attorney General in relation to sentence and an increasing number of Interlocutory Appeals.

Annex A



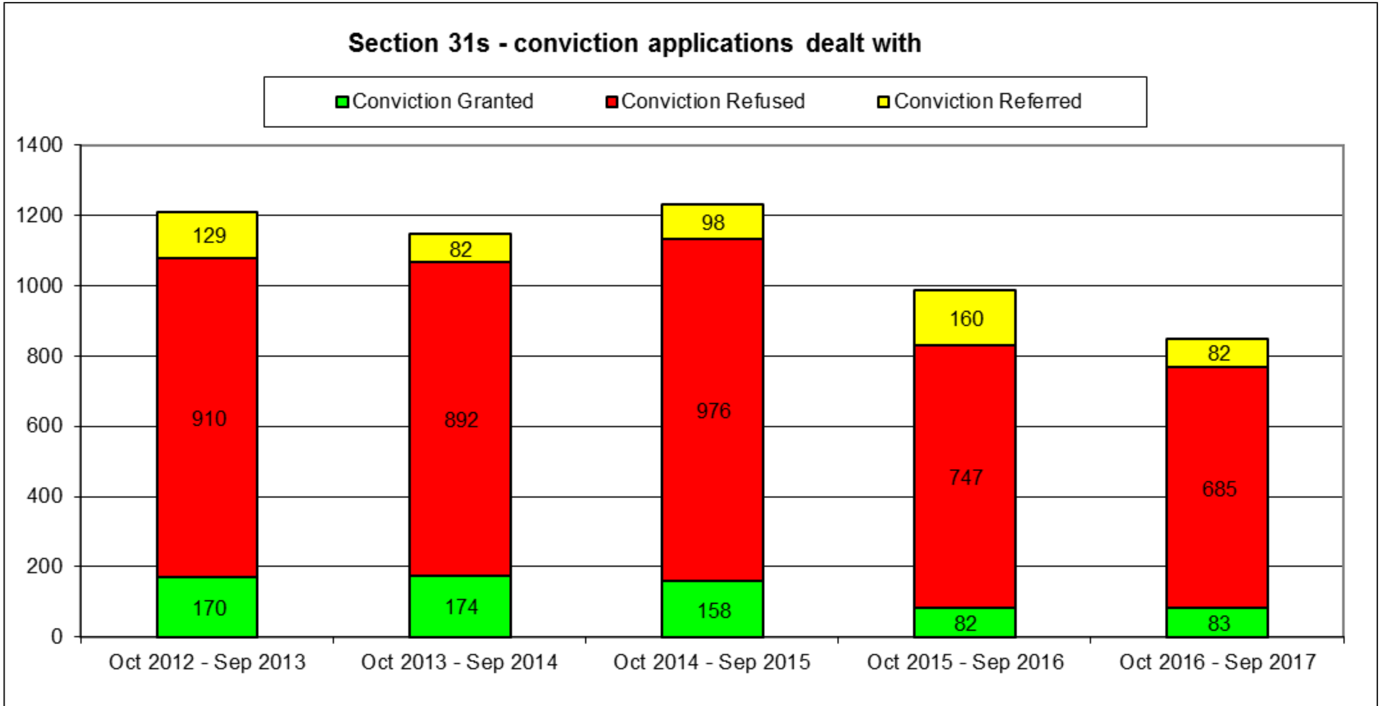
Annex B

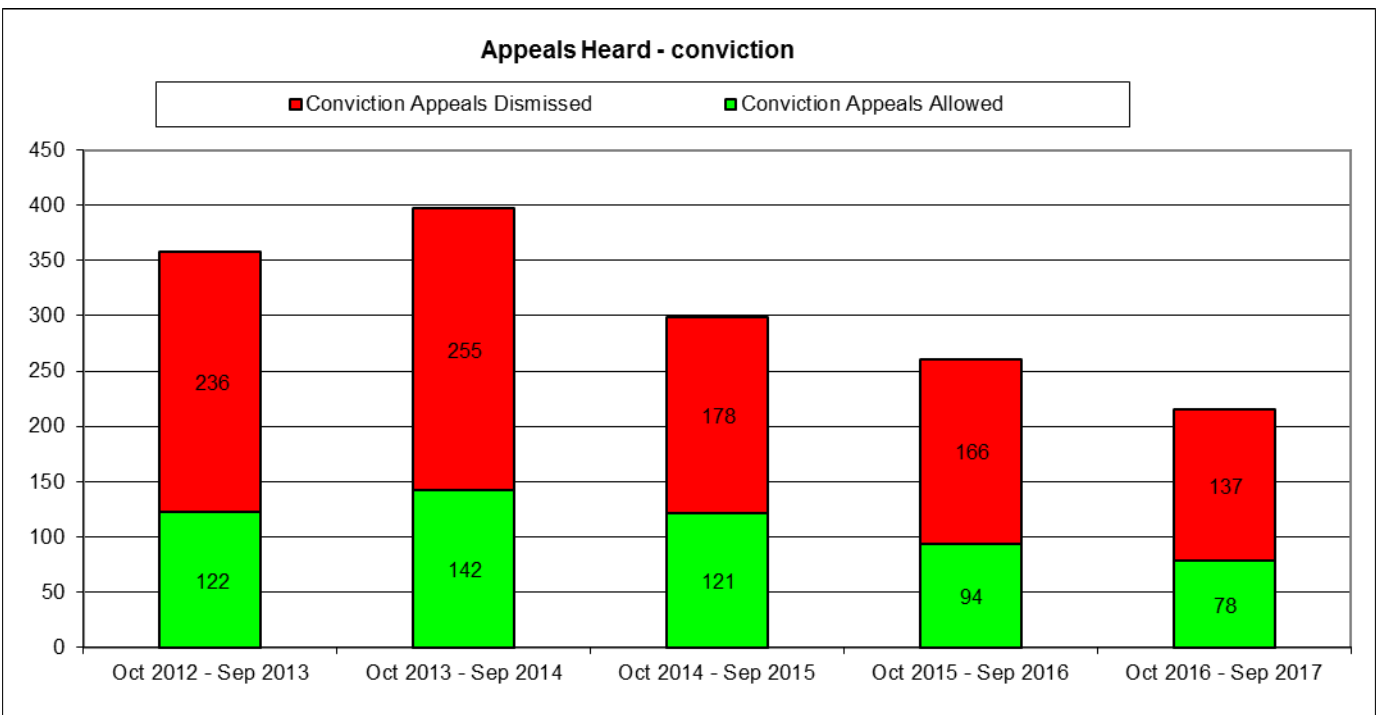
Average waiting times (in months)
Rolling average of cases disposed by full court over previous 12 months



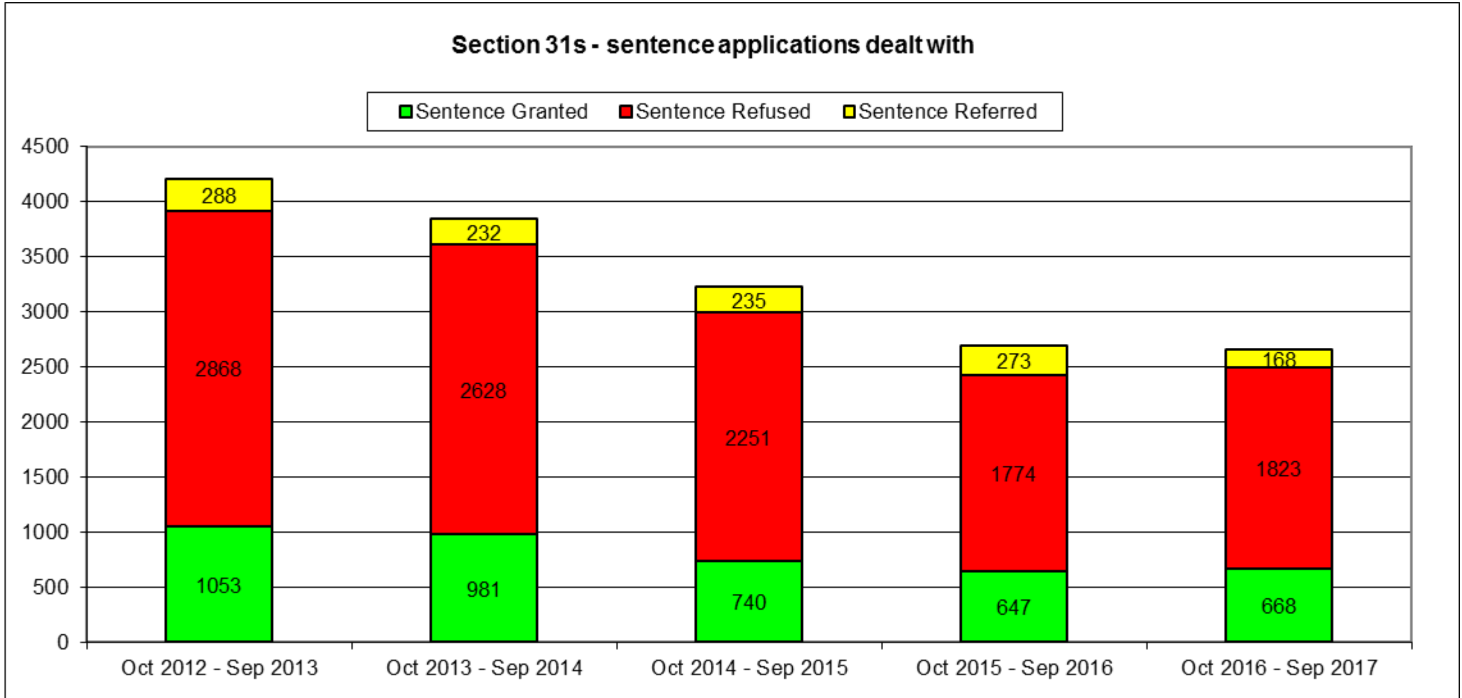
	Sep-16	Oct-16	Nov-16	Dec-16	Jan-17	Feb-17	Mar-17	Apr-17	May-17	Jun-17	Jul-17	Aug-17	Sep-17
CON OVERALL	11.8	12	12.1	11.9	12.1	12.2	11.9	12	11.9	11.9	11.8	11.8	11.7
CON GRANTED / REFERRED BY SJ ONLY	10.8	11.1	11	11.2	11.4	11.3	10.9	10.7	10.7	10.4	10.2	10.2	9.9
SEN OVERALL	5.7	5.7	5.7	5.6	5.7	5.9	5.9	5.9	6	6.1	6.2	6.3	6.3
SEN ONLY*	5.4	5.4	5.4	5.3	5.3	5.4	5.4	5.4	5.4	5.5	5.5	5.5	5.5
CON GRANT / REFERRAL TARGET	10	10	10	10	10	10	10	10	10	10	10	10	10
SEN ONLY TARGET	5	5	5	5	5	5	5	5	5	5	5	5	5

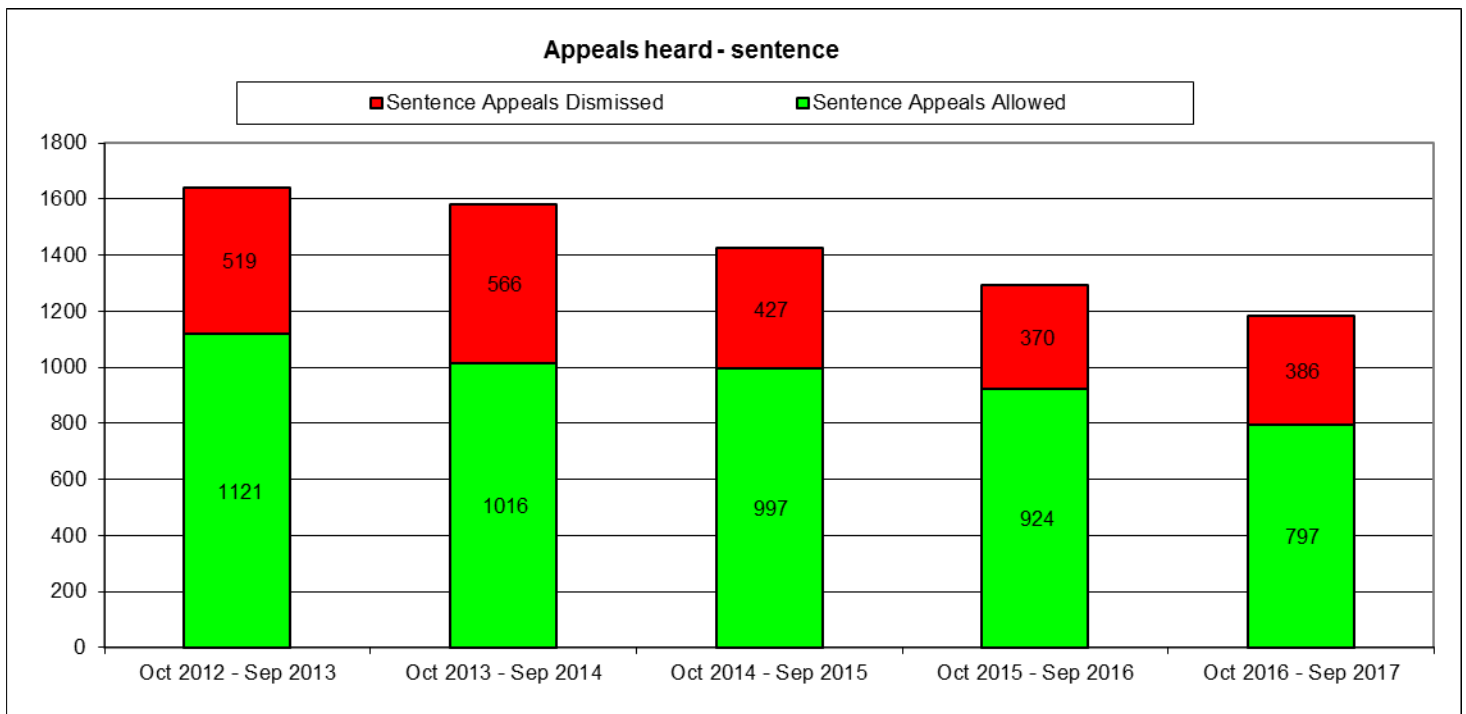
Annex C



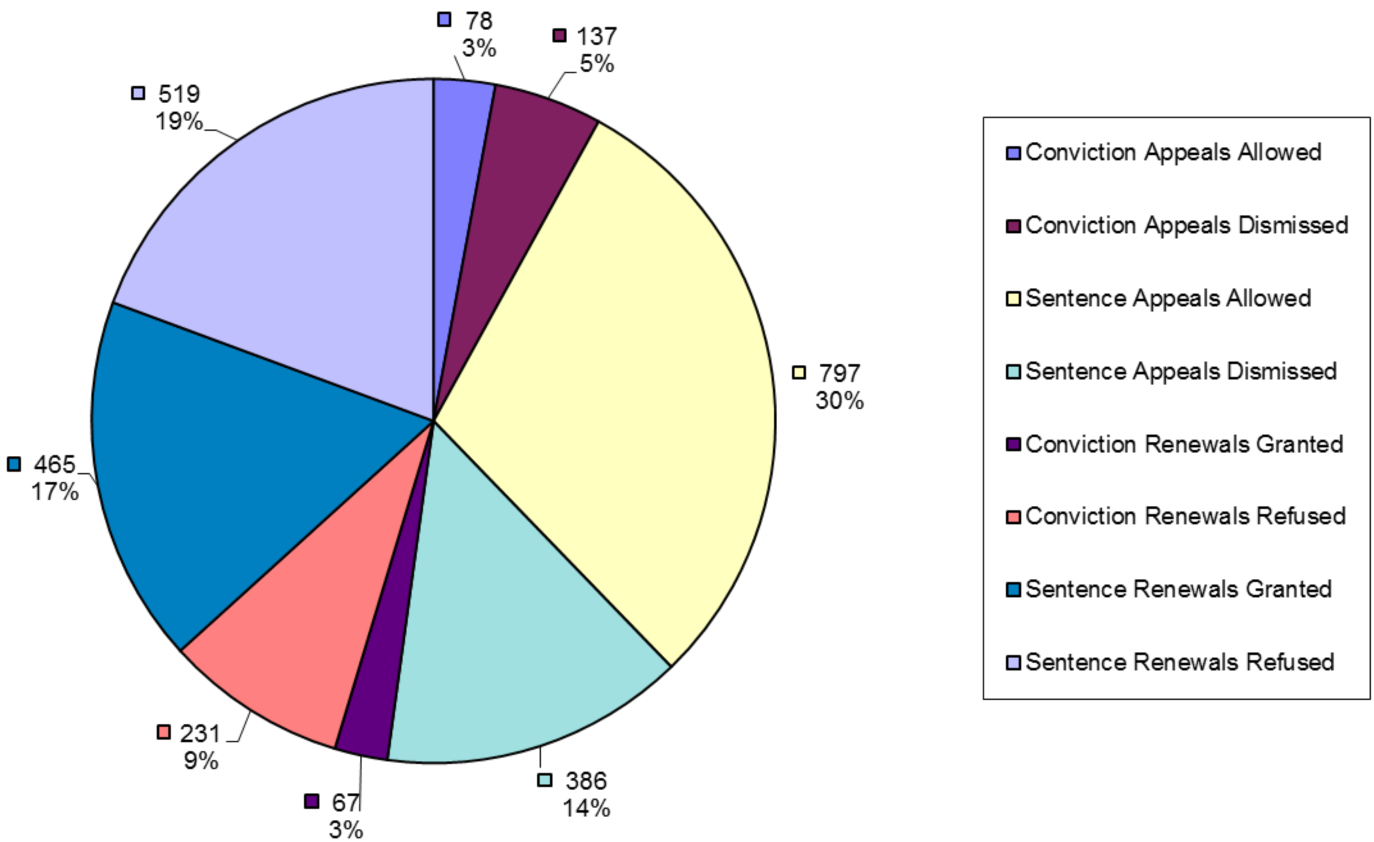


Annex D

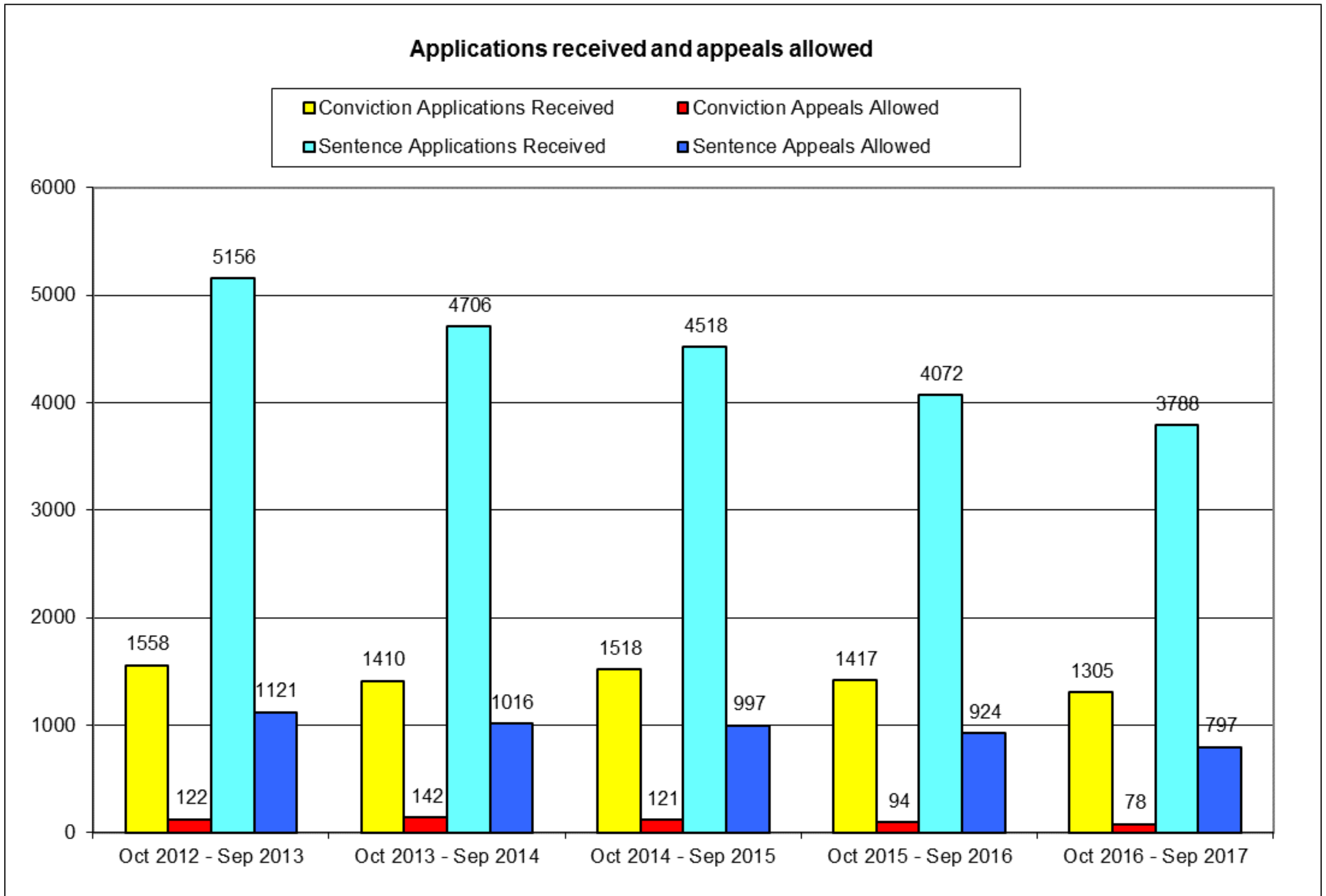




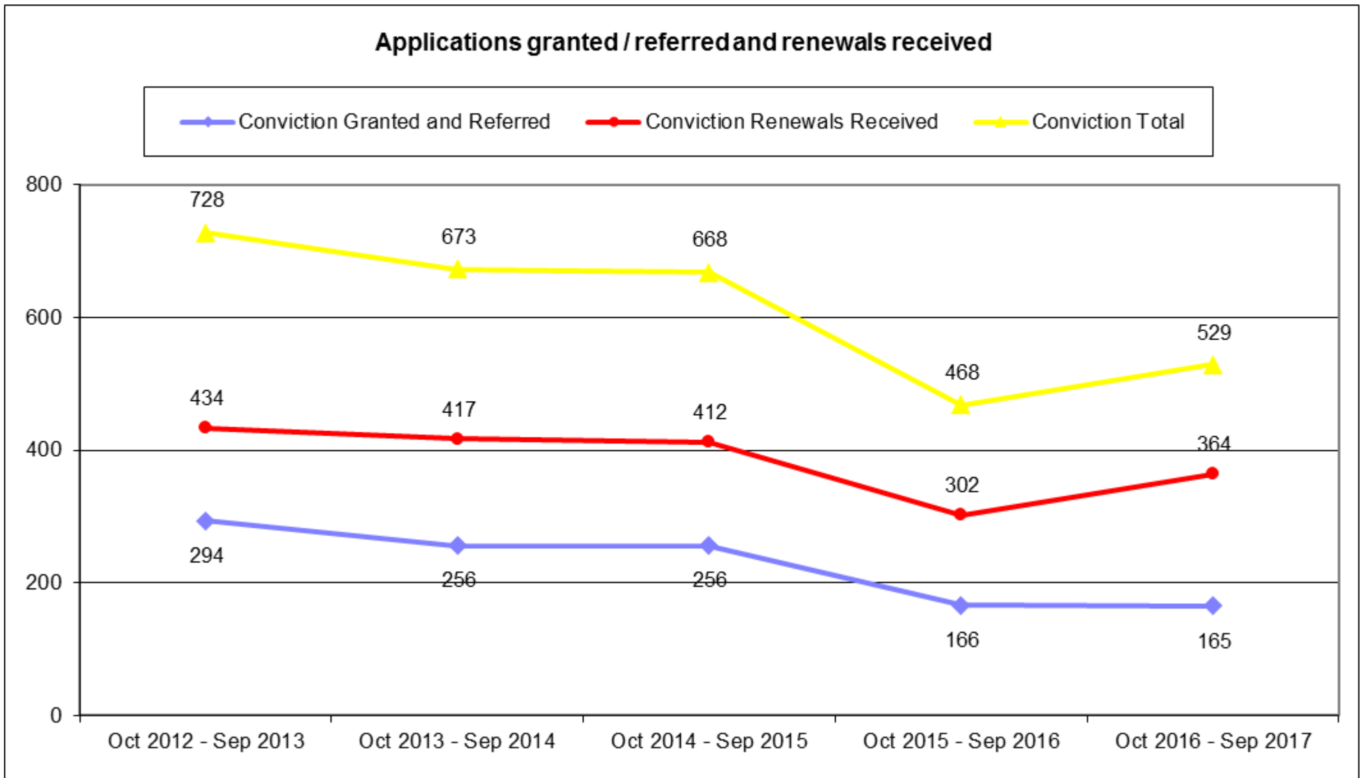
Annex E

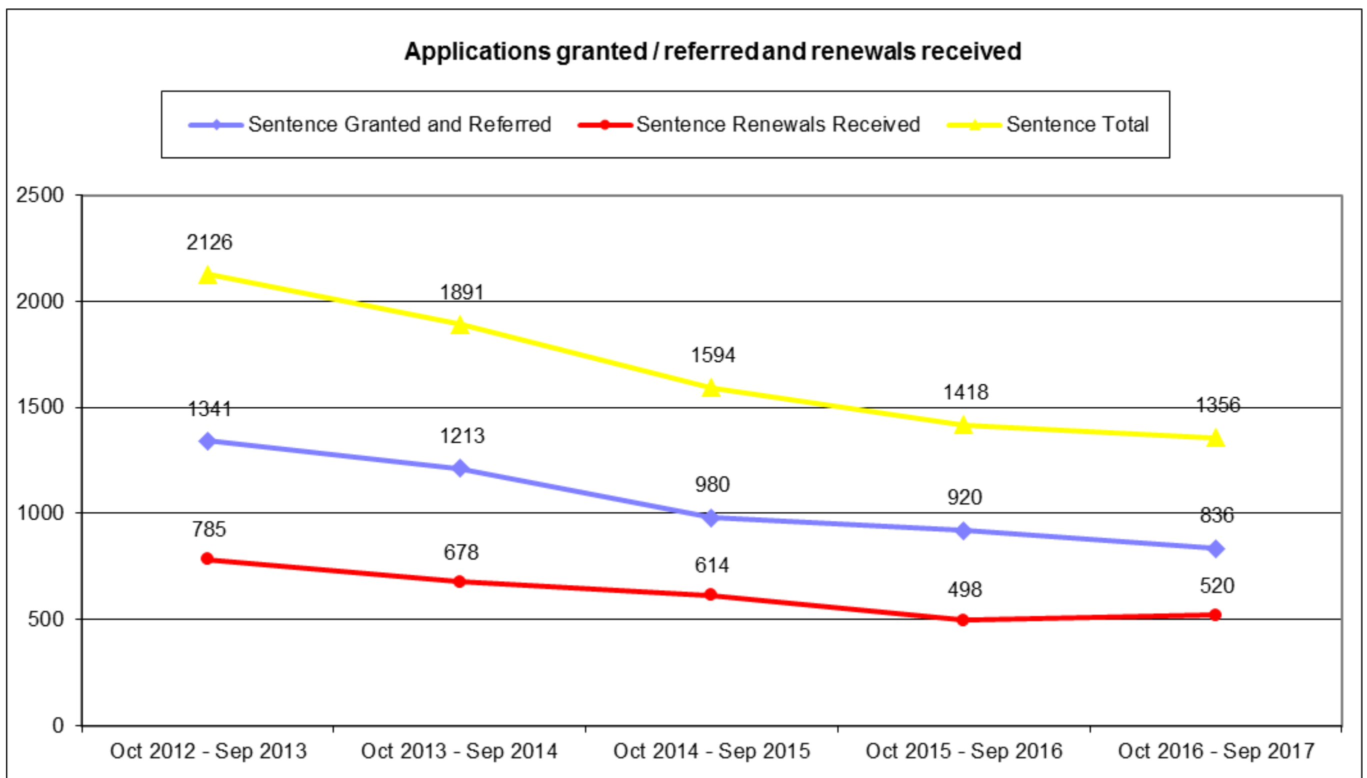


Annex F



Annex G





Annex H