

Compass Chambers



# Criminal Appeals Practicalities & Procedure

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Compass Chambers

22 November 2024



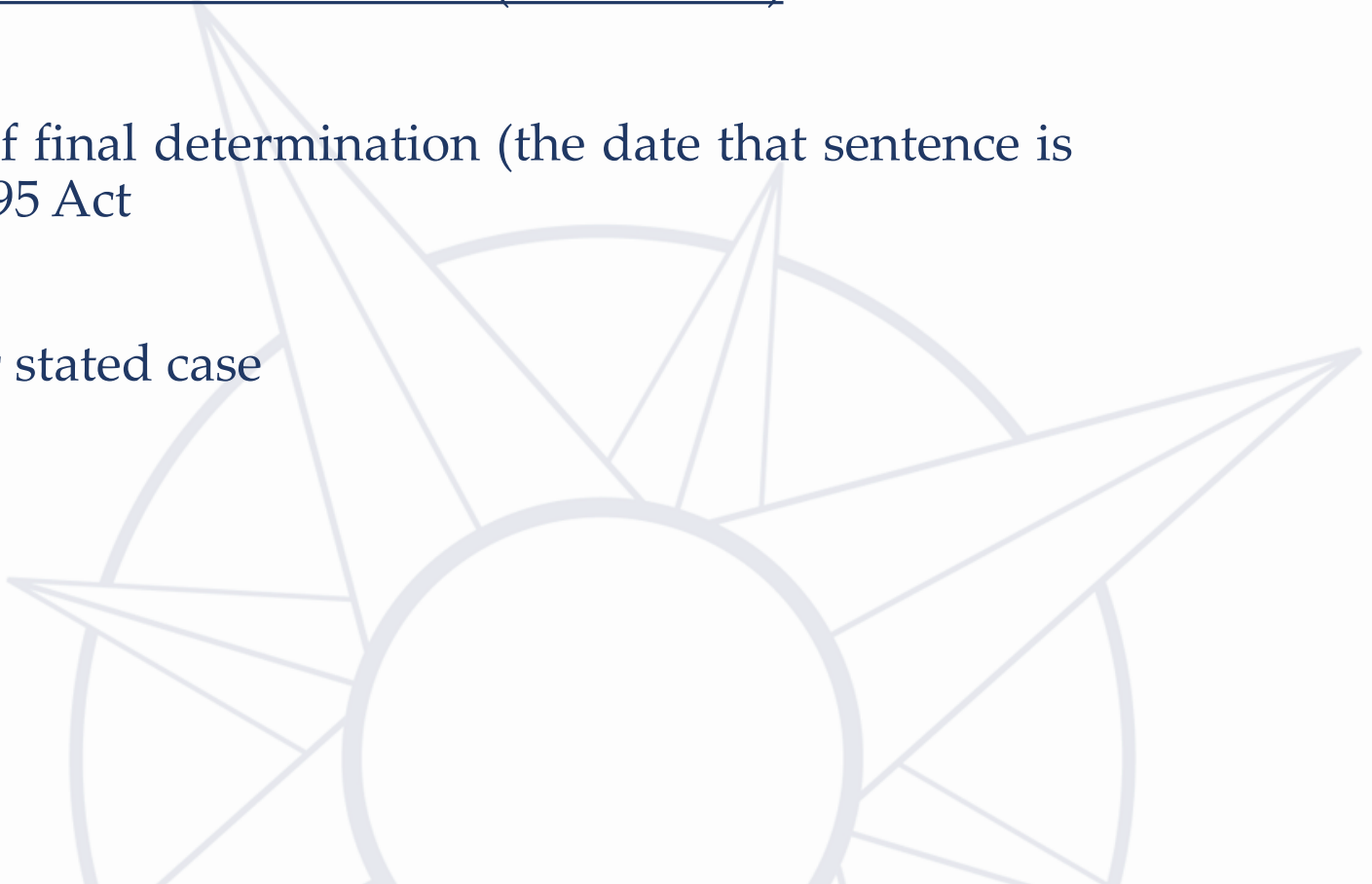
# Time Limits





## Time Limits

### Summary - Sheriff Appeal Court – Conviction (& Sentence)

- 7 days from the date of final determination (the date that sentence is passed) – sec 176(1) 1995 Act
  - Mode - Application for stated case
- 



## Time Limits

### Summary - Sheriff Appeal Court – Sentence only

- 7 days from the date of final determination (the date that sentence is passed) – sec 186(2) 1995 Act
  - Mode - Note of Appeal
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## Time Limits

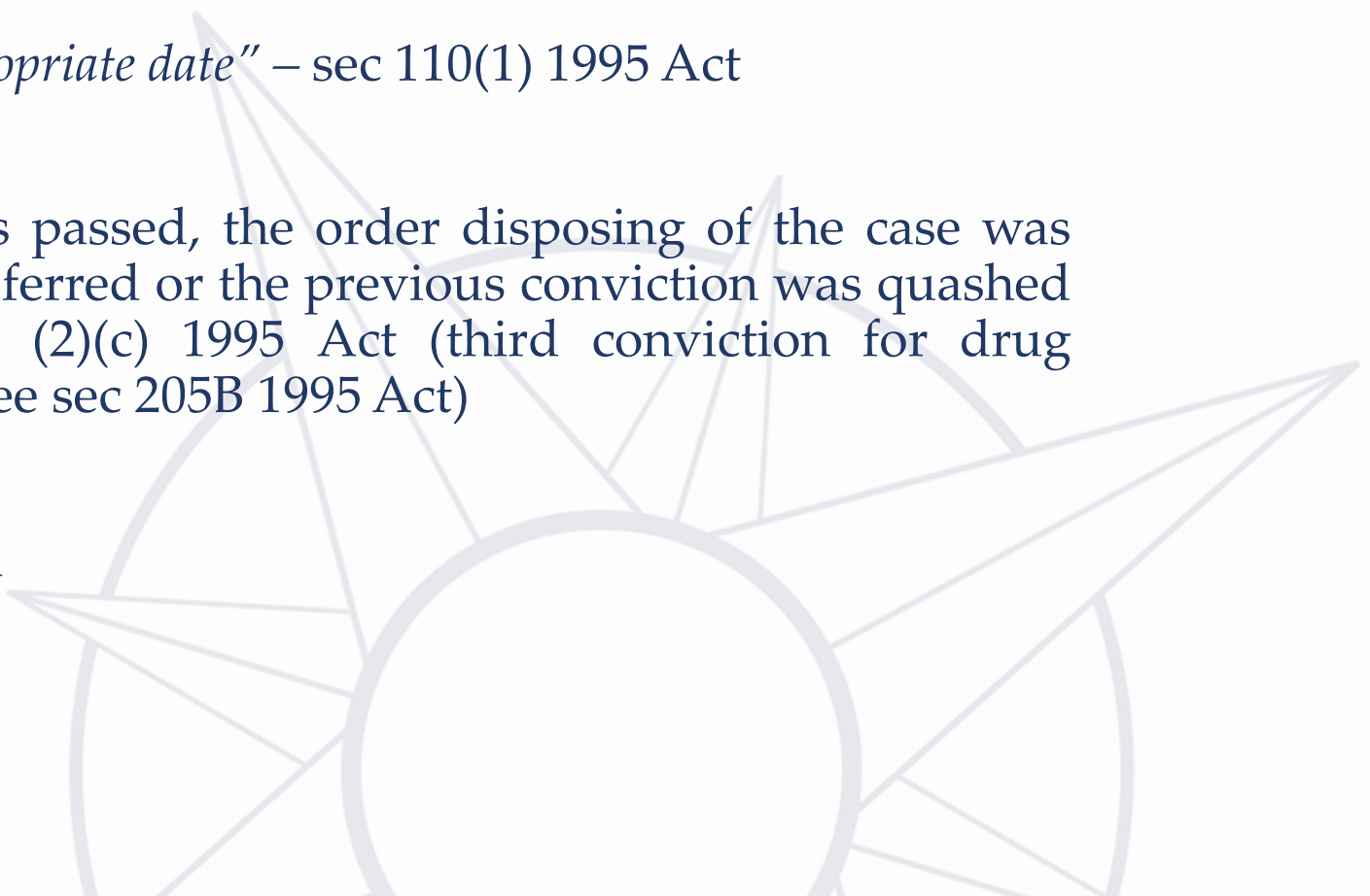
### Solemn – High Court of Justiciary – Conviction (& Sentence)

- 14 days from the date of final determination, lodge notice of intention to appeal – sec 109(1) 1995 Act
- When several people are charged on the same indictment, this means the determination of the proceedings against all of them – *Evans, Ptr* 1991 SCCR 160
- Within 8 weeks of lodging the note of intention to appeal, the written Note of Appeal must be lodged – sec 110(1)(a) 1995 Act



## Time Limits

### Solemn – High Court of Justiciary – Sentence only

- 14 days from the “*appropriate date*” – sec 110(1) 1995 Act
  - The date sentence was passed, the order disposing of the case was made, sentence was deferred or the previous conviction was quashed per sec 106A(1)(c) or (2)(c) 1995 Act (third conviction for drug trafficking offences – see sec 205B 1995 Act)
  - Mode - Note of Appeal
- 



## Time Limits

### Sec 194ZB – Appeal from the SAC to the HCJ

- 14 days from the date of the SAC's decision– sec 194ZB(4) 1995 Act
  - Mode - Note of Appeal
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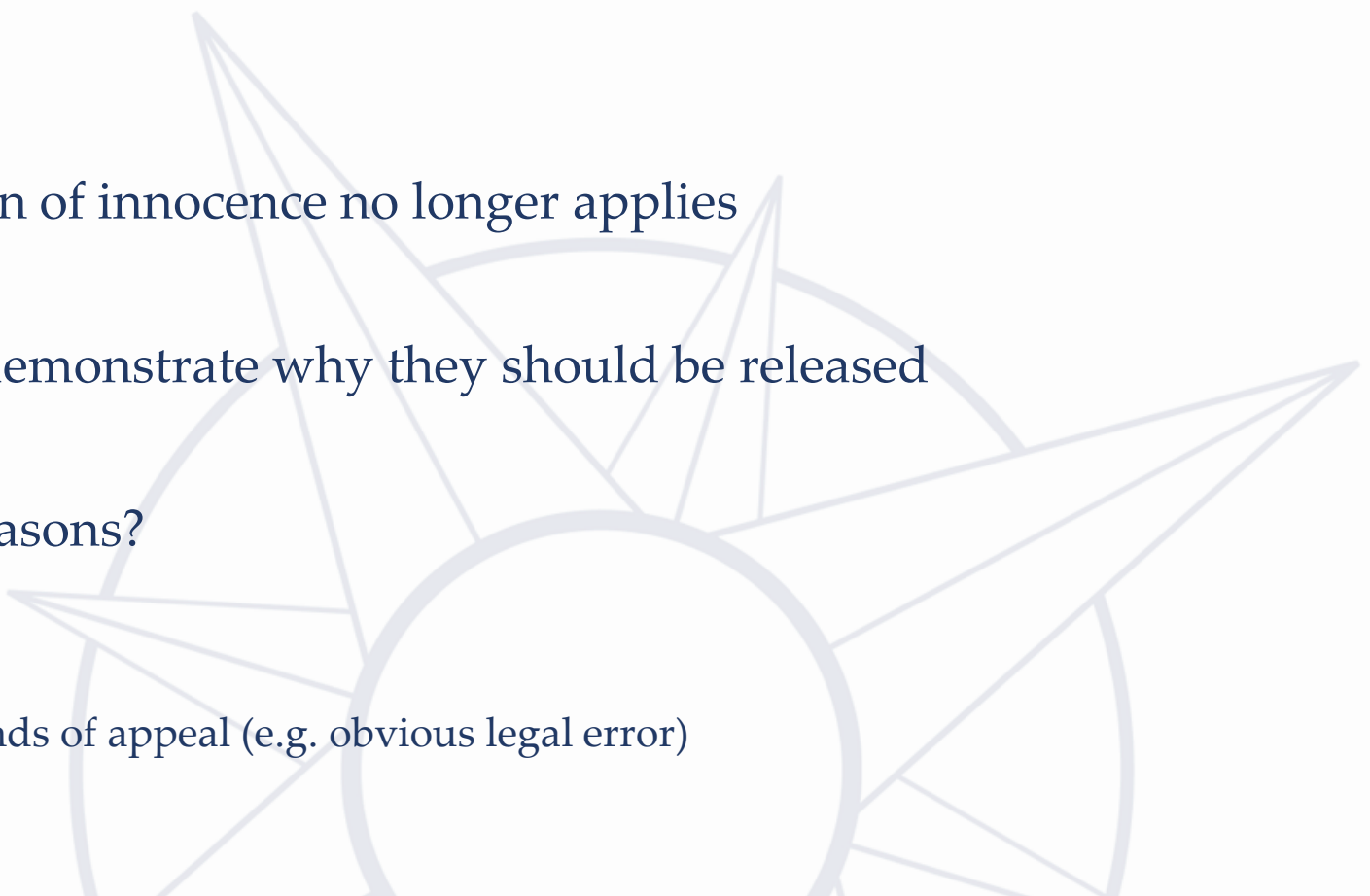
# Interim Liberation





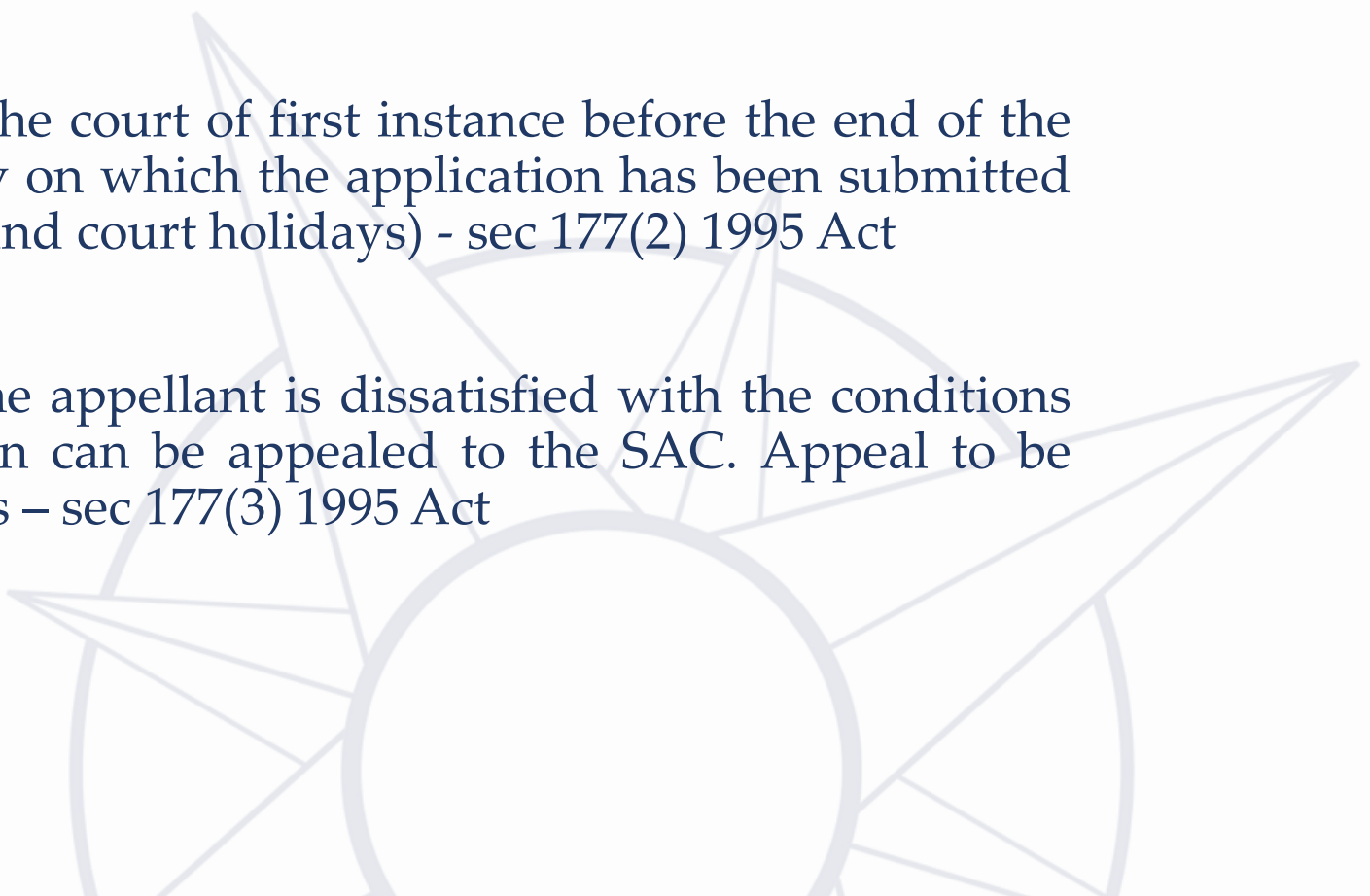


## Interim Liberation

- Is the prospective appellant likely to be released from custody if their appeal succeeds?
  - If not, why apply?
  - High test - presumption of innocence no longer applies
  - Onus on appellant to demonstrate why they should be released
  - What are your good reasons?
    - Medical
    - Strong *prima facie* grounds of appeal (e.g. obvious legal error)
    - Caring responsibilities
- 



## Interim Liberation - Summary

- Application seeking bail to accompany application for stated case or note of appeal – secs 177 and 186(10) 1995 Act
  - To be disposed of by the court of first instance before the end of the court day after the day on which the application has been submitted (excluding weekends and court holidays) - sec 177(2) 1995 Act
  - If bail is refused (or the appellant is dissatisfied with the conditions imposed), that decision can be appealed to the SAC. Appeal to be lodged within 24 hours – sec 177(3) 1995 Act
- 



## Interim Liberation - Solemn

- Right to seek interim liberation arises from intimation of the note of intention to appeal – sec 112(5) 1995 Act
- *However*, if no Note of Appeal is lodged under sec 110(1)(a), or when the Lord Advocate is the appellant, then the court can only grant bail where there are *exceptional circumstances* – sec 112(2A) 1995 Act
- Where no Note of Appeal has been lodged under sec 110(1)(a), the application seeking interim liberation needs to set out the proposed ground of appeal – sec 112(2)(ii) 1995 Act
- In conviction appeals it is tactically better to apply once the Note of Appeal has been lodged




*What's this case all about?*



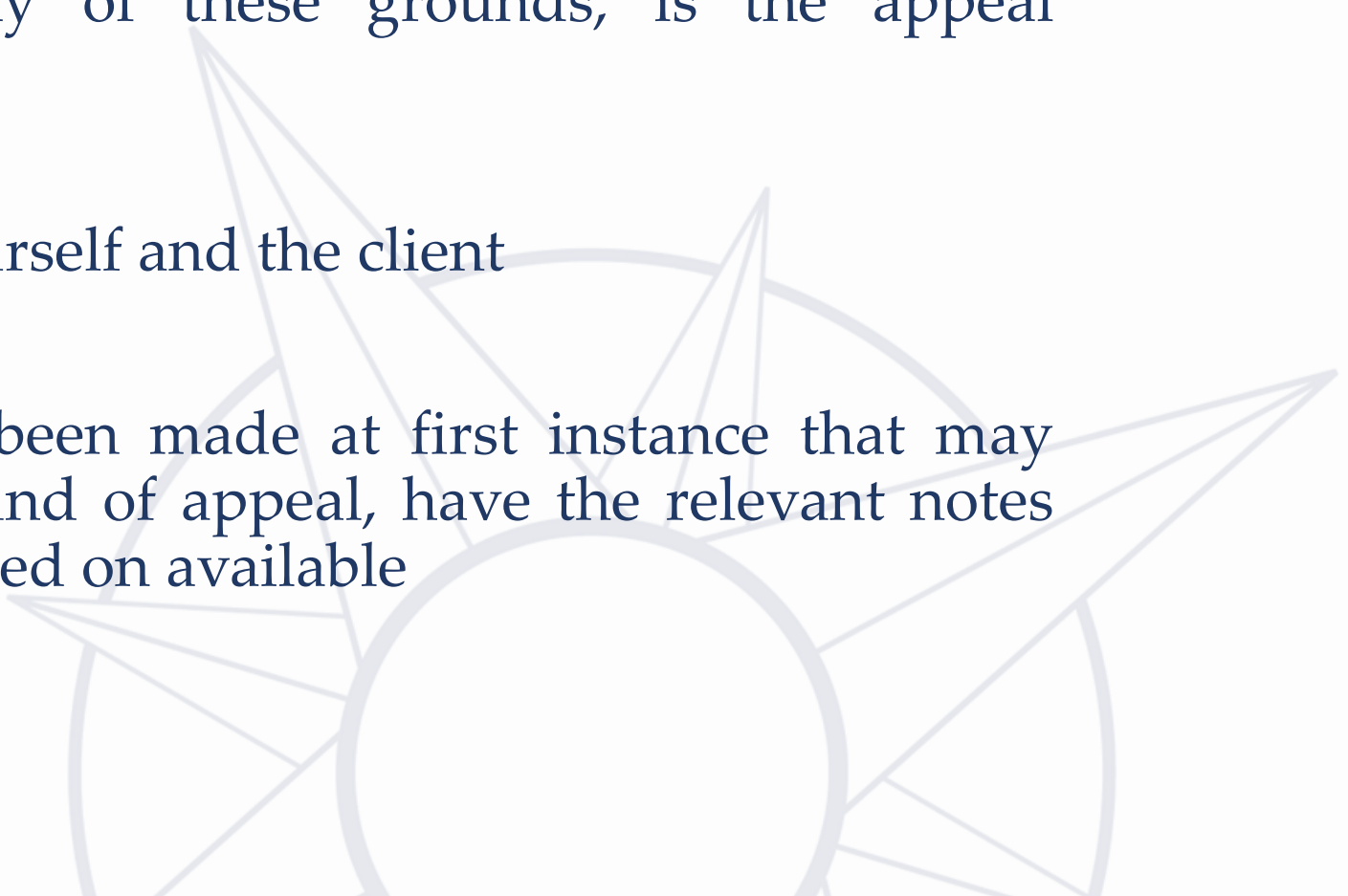


## Conviction Appeals

- An appeal is always against a miscarriage of justice. But what was the nature of that miscarriage?
  - Typically, there are six:
    1. Objections to admissibility of evidence
    2. Lack of sufficiency of evidence
    3. Unreasonable verdict
    4. Misdirection
    5. Fresh evidence
    6. Defective representation
- 



## Conviction Appeals

- In relation to any of these grounds, is the appeal stateable?
  - Be honest with yourself and the client
  - If decisions have been made at first instance that may give rise to a ground of appeal, have the relevant notes and authorities relied on available
- 



## Conviction Appeals

*“First, a judge’s directions must be looked at in the context of the oral tradition in which they are given as part of the trial process. The words should not be scrutinised in isolation or as if they were part of a conveyancing document or a provision in a penal statute. Minor deviances from standard formulae will not normally be regarded as productive of miscarriages of justice, if the directions on a particular topic are, when the charge is read as a whole, clear and correct. Secondly, where an allegation of imbalance is made, it is not sufficient, for the purposes of advancing a successful appeal, to say that a judge has failed to mention a particular point made (or perhaps one not made) by a party. The contention must be ‘a substantial one ... going to the whole “tenor” or “purport” of the charge’. Thirdly, a charge is not to be scrutinised as if the jury had not heard the evidence and the speeches. Fourthly, it is primarily for the parties to address the jury on what parts of the evidence are, or are not, significant. The judge does not require to conduct an independent audit of the evidence in order to extract all the points which may favour one party or the other.” – Sim v HM Advocate 2016 JC 174, [32]*

- Misdirection alone is not enough, it must be material (e.g. *Faulkner v HM Advocate* 2024 JC 235, [12] and [21])



## Conviction Appeals

- ‘Fresh evidence’ appeals – sec 106 (3)(a), (3A) to (3D) 1995 Act
- There must be a reasonable explanation as to why the evidence was not heard
- This reasonable explanation of why the evidence was not used at the trial must come from an independent source.
- It is improbable that ‘fresh evidence’ can ever be information that an appellant knew before trial, and it is most unlikely it can come from witnesses who gave evidence or who trial counsel chose not to call.



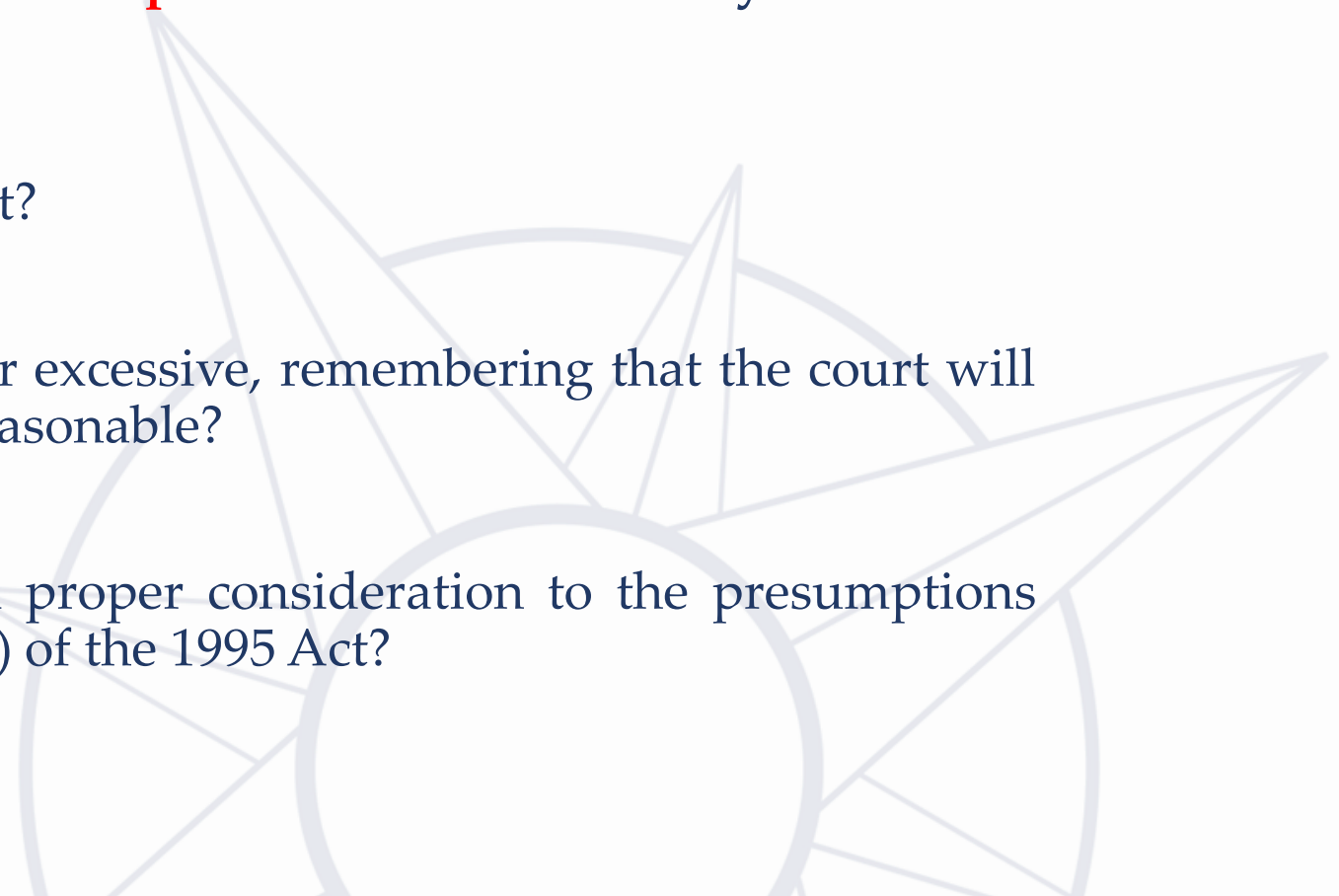


## Conviction Appeals

- Defective representation is a high test to meet. It is **not** enough for an appellant to simply argue that the defence should have been presented in a different way with a greater emphasis on a particular line/lines
- “[It] is not a performance appraisal in which the court decides whether this question or that should or should not have been put; or whether this line of evidence or that should or should not have been pursued. The appellant must demonstrate that there was a complete failure to present his defence either because his counsel or solicitor advocate disregarded his instruction or because he conducted the defence as no competent practitioner could reasonably have conducted it ... That is a narrow question of precise and limited scope.” – *Woodside v HM Advocate* 2009 SCCR 350, [45] cited with approval in *Guthrie v HM Advocate* 2022 JC 201, [45]



## Sentence Appeals

- The court can put sentence **up** as well as down. Do you want to appeal?
  - Is the sentence competent?
  - Does the sentence appear excessive, remembering that the court will only interfere if it is unreasonable?
  - Has the sentencer given proper consideration to the presumptions under sec 204(2) and (3A) of the 1995 Act?
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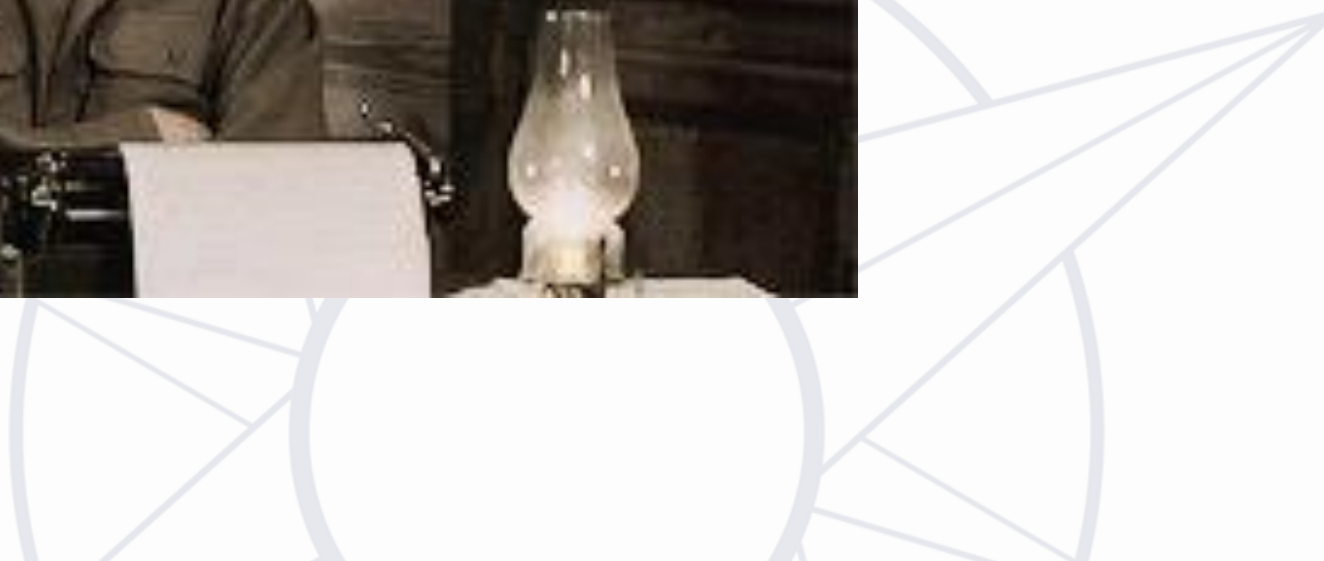


## Sentence Appeals

- Has the sentencer applied the relevant guidelines, and if so, have they been applied appropriately?
- Has the sentencer had due regard to (i) the totality principle and (ii) time already served on remand?
- Has the sentencer appropriately considered any discount?
- *McDonald & Milligan v HM Advocate* 2023 JC 14 – A reduction from a period of imprisonment to a CPO with an unpaid work requirement with the maximum number of hours (300) is a valid form of discount

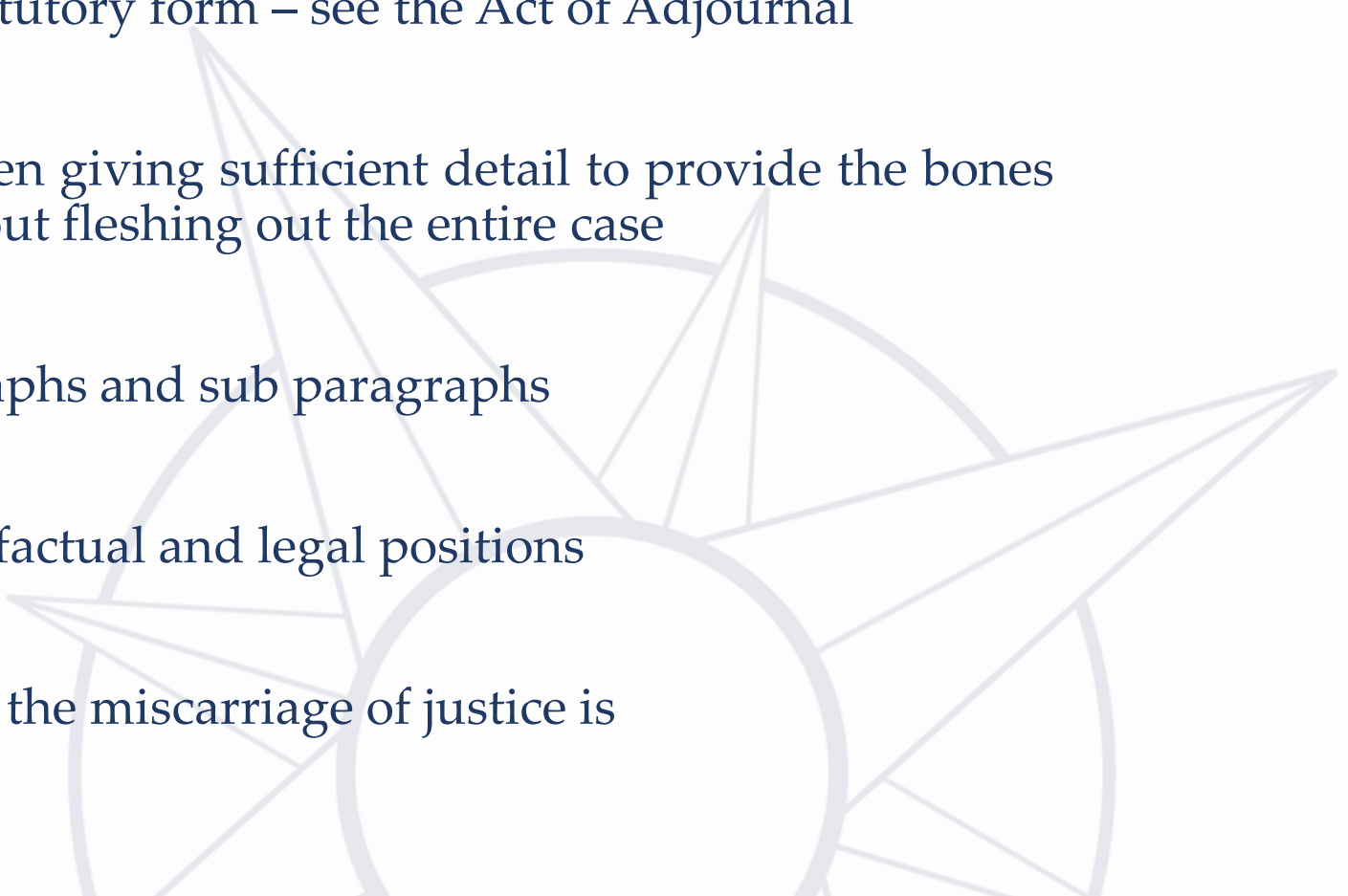


## Drafting Grounds of Appeal



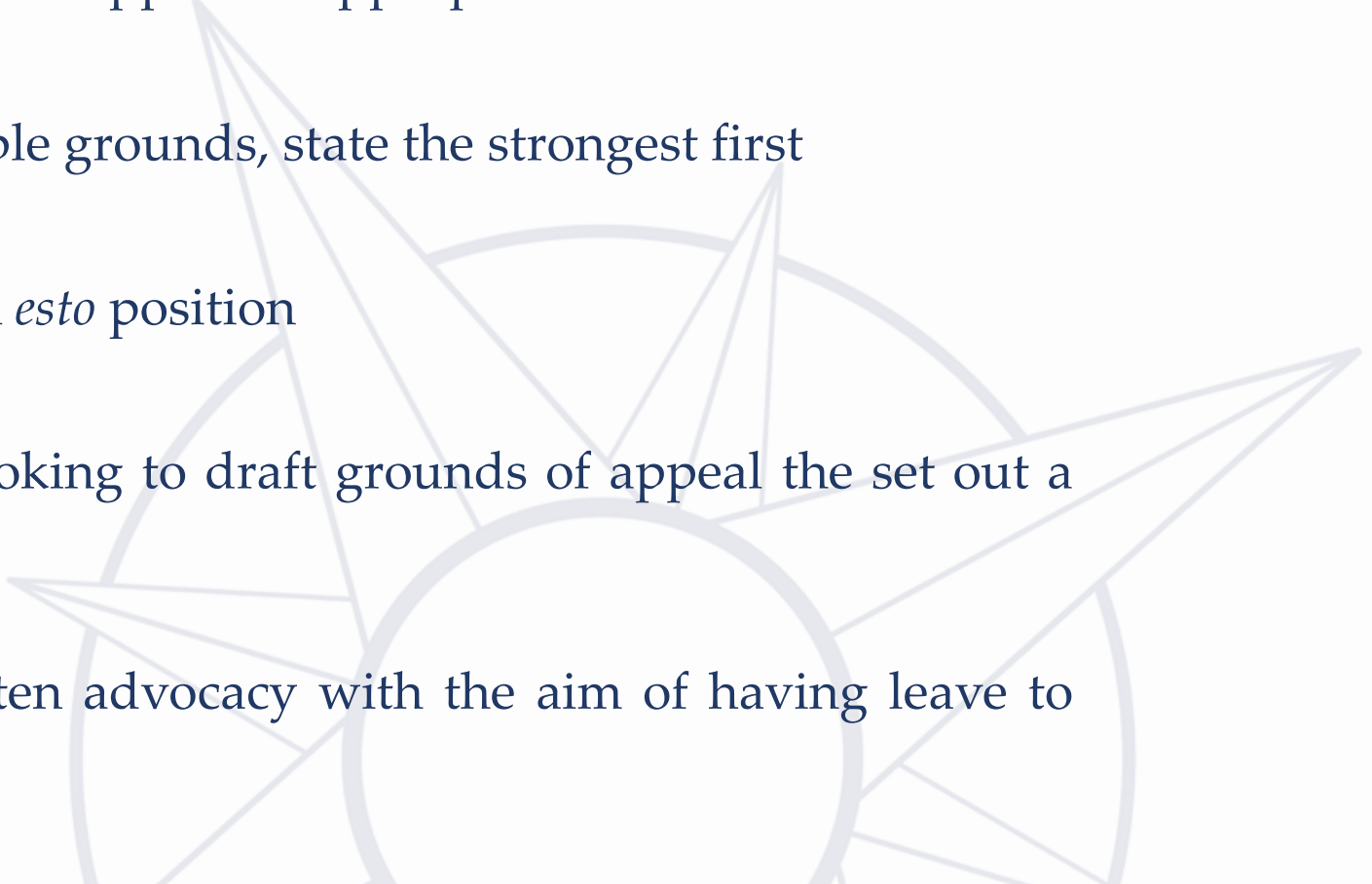


## Drafting Grounds of Appeal

- Follow the relevant statutory form – see the Act of Adjournal
  - Strike a balance between giving sufficient detail to provide the bones of the argument, without fleshing out the entire case
  - Use numbered paragraphs and sub paragraphs
  - Be prepared to set out factual and legal positions
  - Expressly set out what the miscarriage of justice is
- 



## Drafting Grounds of Appeal

- Have multiple grounds of appeal as appropriate
  - Where there are multiple grounds, state the strongest first
  - Be prepared to state an *esto* position
  - Remember, you are looking to draft grounds of appeal the set out a stateable appeal
  - This is a form of written advocacy with the aim of having leave to appeal granted
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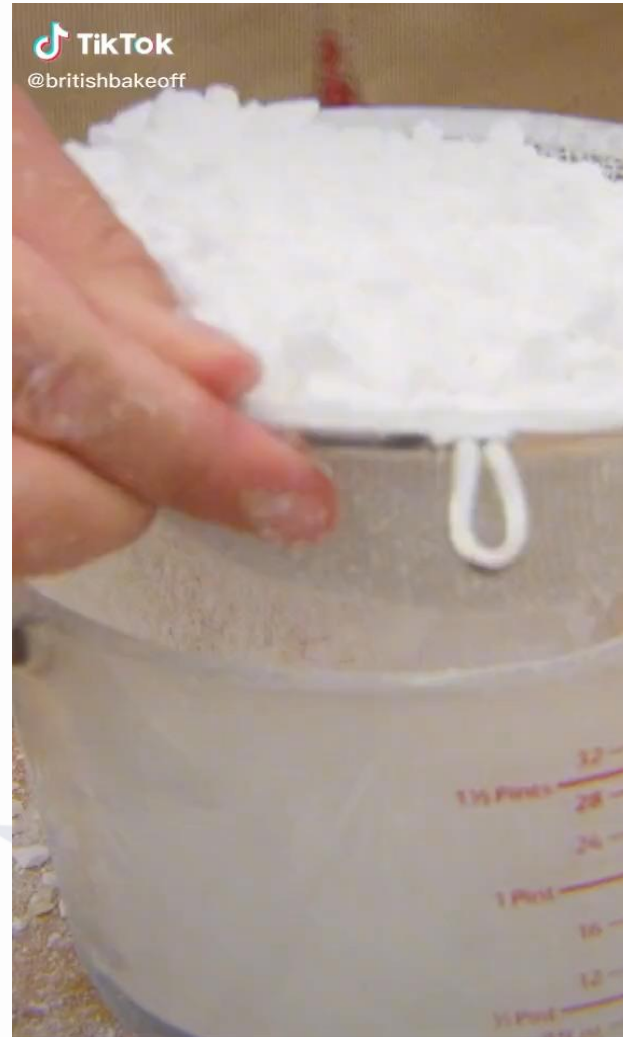


## Points to bear in mind for appeals by Stated Case

- **Positively engage** in the process of adjusting the draft stated case. The SAC can consider rejected adjustments and the basis for their rejection – sec 179(7) 1995 Act
- **The questions posed in the stated case are important** – they form the limit of the appeal, **not** the grounds of appeal stated in the application – *Wallace v Thomson* 2009 SCCR 421, [13]
- If a finding in fact is disputed and it is crucial to a point at issue in the appeal, the fact finder stating the case should pose the question in the form “*Was there sufficient evidence to entitle me to make finding-in-fact [X]?*”
- Be prepared to make such an adjustment, or the SAC may be unable to look behind the findings in fact and consider the evidence directly– *Prentice v Skeen* 1977 SLT (Notes) 21 and *AB v Brown* 2024 SC (SAC) 35, [37] - [39]



# Sifting



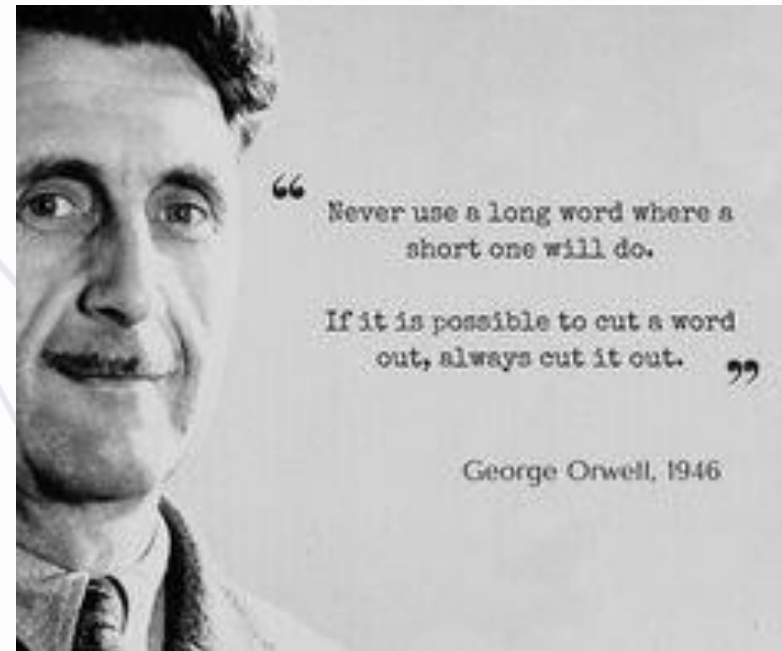
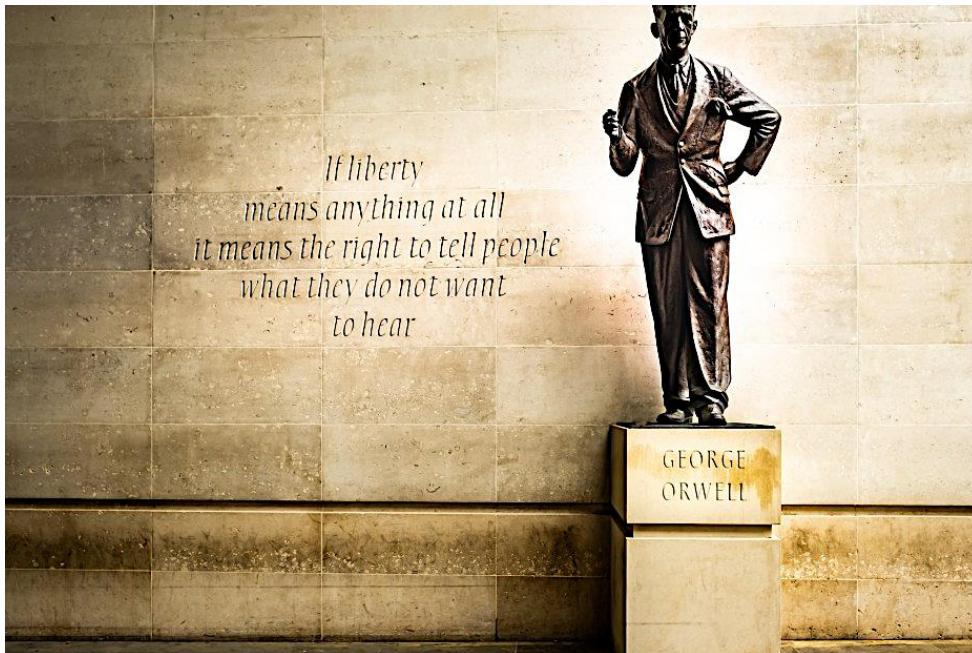




## Sifting

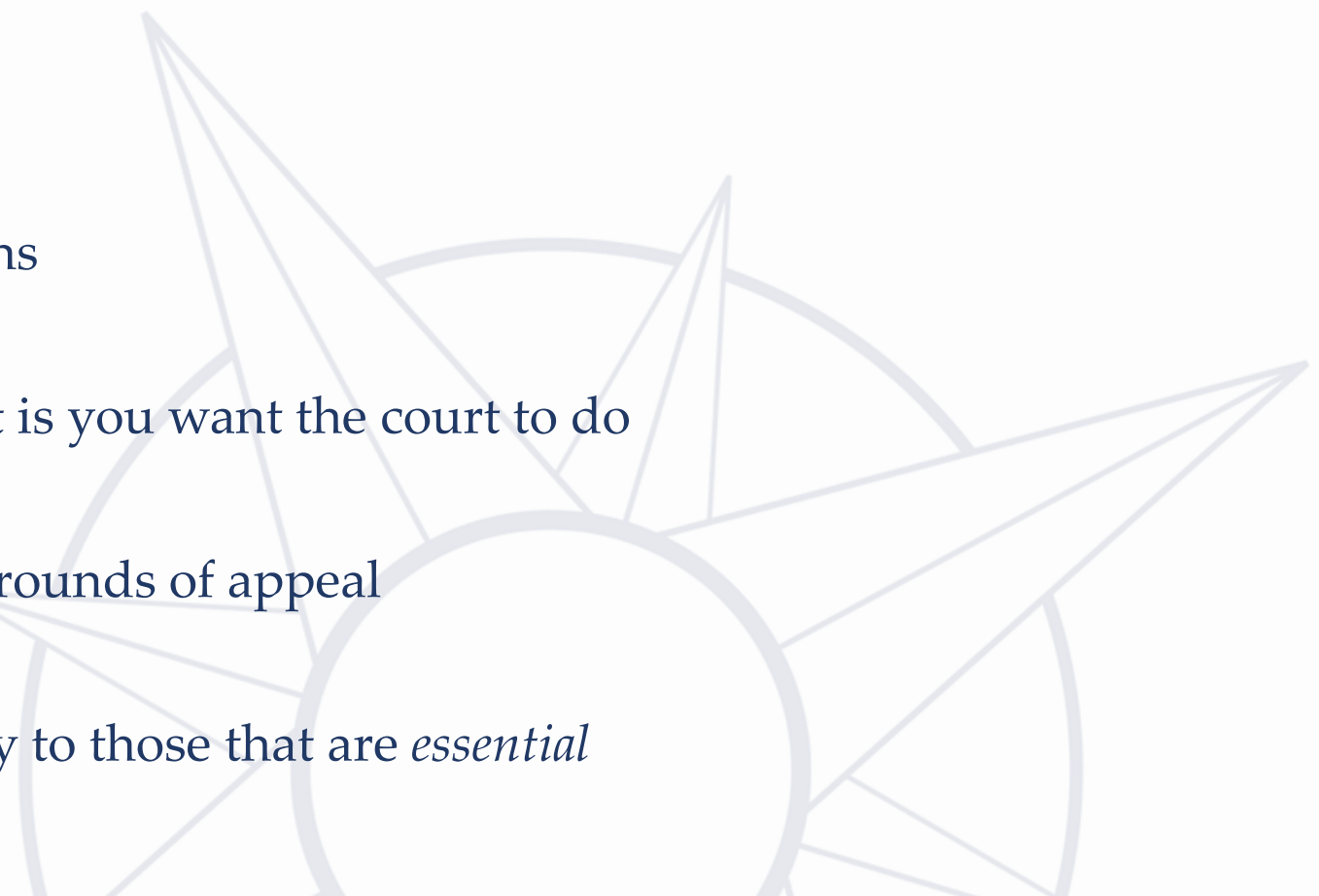
- Leave can be granted in whole or in part
- If leave has been refused, **is your case stateable?**
- If leave has been refused in your sentence appeal, are you sure you want to press on given the risk that sentence may go **up**?
- 14 days to submit an application to the second sift – secs 107(4), 180(4) and 187(3)
- If you are going to submit an application to the second sift, this represents a good point to flesh out what will become your case and argument

# Case and Argument



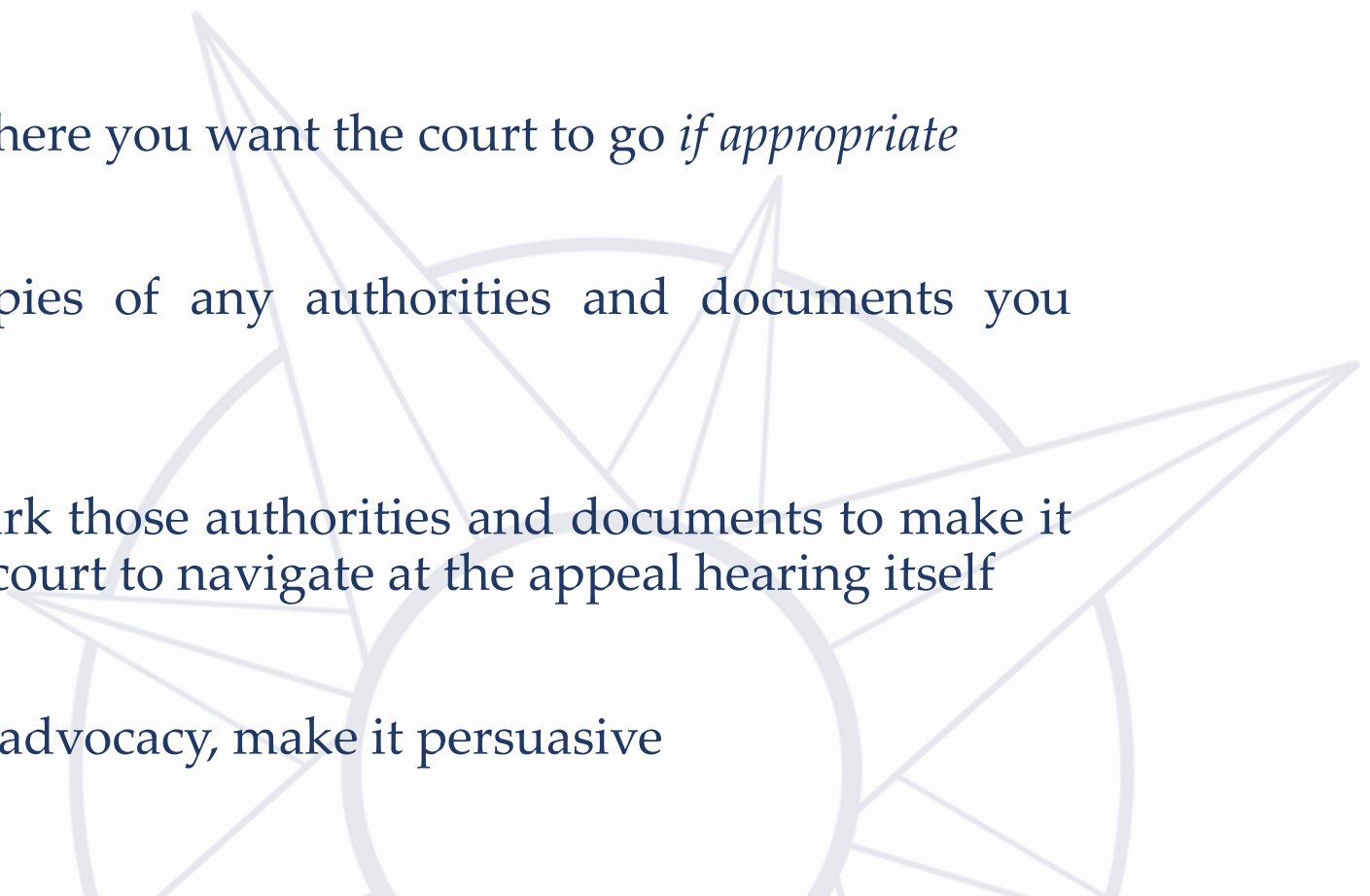


## Case and Argument

- Always submit a case and argument or written submission even if not required to do so by the court (e.g. appeals by stated case)
  - Keep it clear and concise
  - Use numbered paragraphs
  - State at the outset what it is you want the court to do
  - Follow the order of the grounds of appeal
  - Minimise use of authority to those that are *essential*
- 



## Case and Argument

- **Clearly identify** why you say the court of first instance has erred, that this error is material and that there has been a miscarriage of justice
  - On sentence, set out where you want the court to go *if appropriate*
  - Provide electronic copies of any authorities and documents you intend to rely upon
  - Highlight and bookmark those authorities and documents to make it easier for you and the court to navigate at the appeal hearing itself
  - This a piece of written advocacy, make it persuasive
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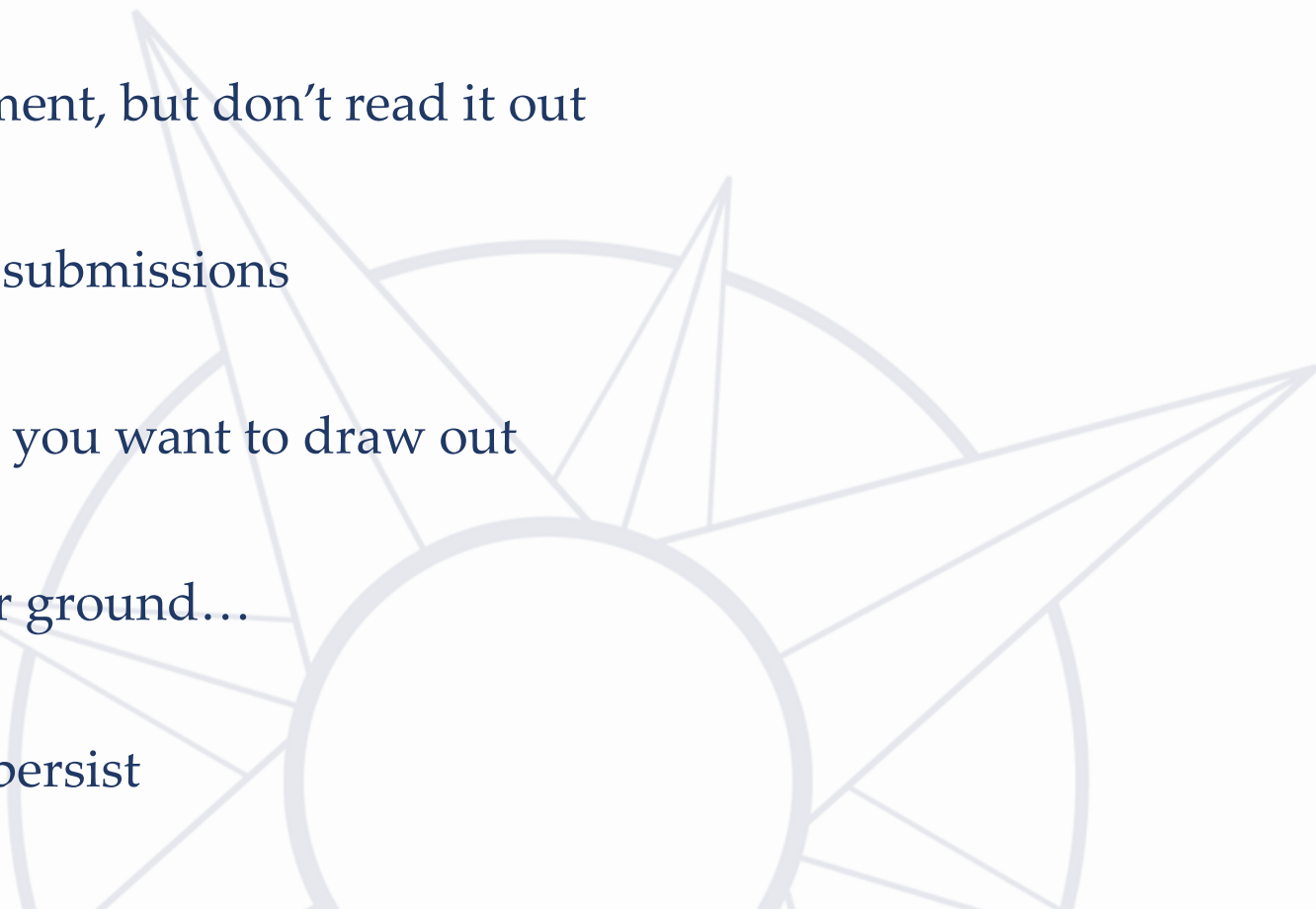
## The Appeal Hearing





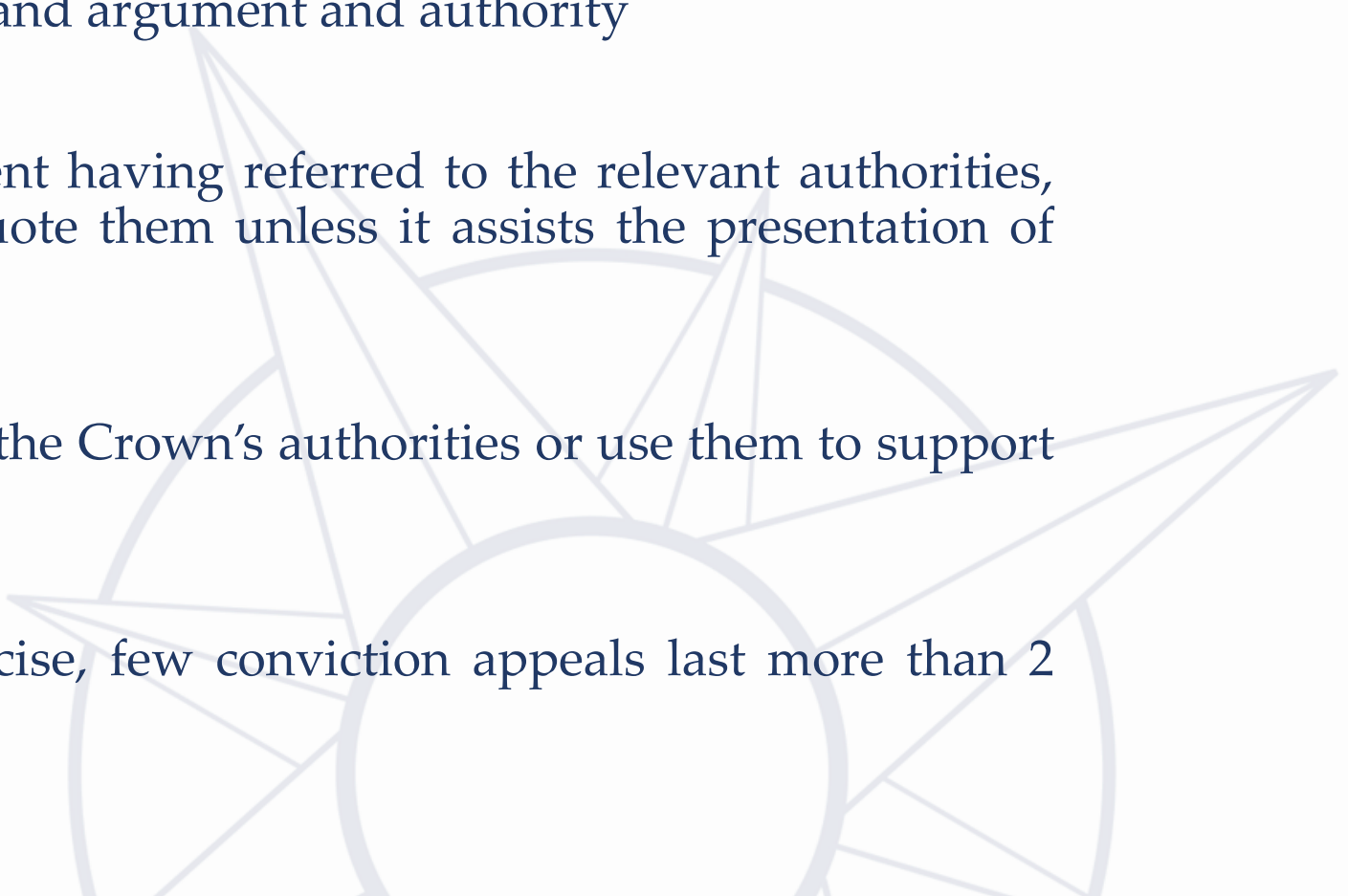
## The Appeal Hearing

- Know your case and argument before going in, use it as a route map
- Adopt the case and argument, but don't read it out
- Engage with the Crown's submissions
- Emphasise the key points you want to draw out
- Be prepared to stand your ground...
- ...but know when not to persist





## The Appeal Hearing

- Address questions from the bench fully, where possible with reference to your case and argument and authority
  - Your case and argument having referred to the relevant authorities, there is no need to quote them unless it assists the presentation of your argument
  - If you can distinguish the Crown's authorities or use them to support your argument, do so
  - Keep it clear and concise, few conviction appeals last more than 2 hours in total
- 



## The Appeal Hearing

- Just because you succeed, the matter does not necessarily end
- sec 118 & 119 1995 Act – new prosecution – an example is *LC v HM Advocate* [2022] HCJAC 47
- If you are unsuccessful, the SAC's decision can be appealed to the HCJ on a point of law – examples are *PF, Edinburgh v Aziz* 2023 JC 51 and *Stuart Kennedy v PF, Aberdeen*
- Second appeal - sec 194ZB(3) test is a high one to meet
- Supreme Court – compatibility issues only





Questions?



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