Neutral Citation Number: [2020] EWHC 3243 (Admin)

Case No: CO/3349/2020; CO/3511/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2020

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
THE RT HON LORD JUSTICE HOLROYDE

- -

Between:

CO/3349/2020	**The Queen on the applications of** **DIRECTOR OF PUBLIC PROSECUTIONS**	**Claimant**
	- and -	
	CROWN COURT AT WOOLWICH	**Defendant**
	- and -	
	(1) TESFA YOUNG-WILLIAMS **(2) HM COURTS AND TRIBUNALS SERVICE** **(3) THE LORD CHANCELLOR**	**Interested Parties**
CO/3511/2020	**JAYANO LUCIMA**	**Claimant**
	- and -	
	THE CENTRAL CRIMINAL COURT	**Defendant**
	- and -	
	(1) THE CROWN PROSECUTION SERVICE **(2) THE LORD CHANCELLOR**	**Interested Parties**

- -
- -

Louis Mably QC and Simon Ray (instructed by **CPS Appeals and Review Unit**) for the **DPP**
Sir James Eadie QC, Miss Melanie Cumberland and Miss Celia Rooney
(instructed by **Government Legal Department**) for **the Lord Chancellor and HMCTS**
Paul Keleher QC and Miss Kate O'Raghallaigh
(instructed by **Morrison Spowart**) for **Tesfa Young-Williams**
Benjamin Aina QC and Piers Kiss-Wilson (instructed by **Stephen Fidler & Co**) for **Jayano Lucima**

Hearing dates: 04 November 2020

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Approved Judgment

The Lord Burnett of Maldon CJ and Lord Justice Holroyde:

1. These two unconnected claims for judicial review raise issues about the correct approach in the criminal courts to applications to extend custody time limits ("CTLs") during the Covid-19 pandemic. In Tesfa Young-Williams the Director of Public Prosecutions seeks permission to apply for judicial review of the decision of HH Judge Raynor sitting in the Crown Court at Woolwich on 8 September 2020, refusing to extend the CTL. Jayano Lucima seeks permission to apply for judicial review of the decision of HH Judge Hillen sitting in the Central Criminal Court on 3 September 2020, extending the CTL in his case. Both cases have been listed for rolled-up hearings. This is the judgment of the court to which we have both contributed.

Tesfa Young-Williams: The Facts

2. On 21 October 2019, Tesfa Young-Williams was arrested in possession of 843.9g of cocaine, 5.44g of diamorphine (heroin), a quantity of cannabis and £2,180 in cash. He was charged with three counts of possession of a controlled drug with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971, and one count of possession of criminal property, contrary to section 329(1) of the Proceeds of Crime Act 2002. On 23 October 2019 he was sent to the Crown Court for trial and remanded in custody, with a CTL expiring on 20 April 2020. A trial date within that CTL was vacated at a time when for reasons of safety Crown Court trials were temporarily suspended. At a hearing on 16 April 2020, the CTL was extended by Her Honour Judge Downing to 22 June 2020. On 17 June 2020 it was further extended by His Honour Judge Miller to 10 September 2020. Both those judges found that the difficulty of holding a trial during the pandemic amounted to a good and sufficient cause of the need for an extension.

3. In January 2020 Mr Young-Williams had been charged with offences of supplying cocaine and supplying heroin, both contrary to section 4(3)(b) of the Misuse of Drugs Act 1971, and having an offensive weapon, contrary to section 1(1) of the Prevention of Crime Act 1953. Following the hearing before Judge Miller the prosecution served a written application for joinder of those further charges. At a hearing before His Honour Judge Raynor on 23 July 2020, the application for joinder was granted. The defence submitted, however, that the continued prosecution of Mr Young-Williams should be stayed as an abuse of the process of the court, for reasons which are not material to these proceedings. Judge Raynor listed the abuse application for hearing on 12 October 2020.

4. On 21 August 2020 the prosecution made a written application for extension of the CTL, once again citing the pandemic as good and sufficient cause. That application was heard on 8 September 2020, by which date Mr Young-Williams had been held in custody for 139 days beyond the original CTL. Judge Raynor refused the application, holding that the lack of available courtrooms to hear jury trials for defendants in custody was neither a good nor a sufficient cause to extend the CTL in his case. He also refused the extension on the ground that the prosecution had not acted with due diligence and expedition.

Jayano Lucima: The Facts

5. Jayano Lucima, who is now 18, was aged 17 when charged on 6 January 2020 with the murder of William Blaise Algar. His CTL expired on 6 July 2020 but was extended to

4 September 2020 by Her Honour Judge Dhir QC as other suspects were to be joined to the murder allegation. His Honour Judge Hillen then further extended the CTL to 17 September 2020 because of the pandemic. Neither of those extensions was contested by Mr Lucima.

6. On 16 July 2020 the murder charge was abandoned, and Mr Lucima was instead proceeded against for acts tending and intended to pervert the course of public justice. The prosecution case is that he bought cleaning materials for his co-defendants to enable them to cover up the murder of Mr Algar. The prosecution successfully applied to sever his case and to try him after the conclusion of the murder trial. That is fixed for 15 March 2021. The prosecution applied for a further extension of the CTL, which Mr Lucima opposed. On 3 September 2020 Judge Hillen granted a further extension to 19 February 2021.

The Covid-19 pandemic and response

7. On 23 March the Prime Minister announced a "lockdown" which took effect through regulations which came into force on 26 March. On 28 March guidance on social distancing was given by the Government which advised that those who were not members of the same household should stay two metres apart. That guidance was varied from 26 June to the "1m+ rule", which advised that individuals could be one metre apart provided other precautionary measures were in place.

8. On 17 March the Lord Chief Justice decided that no new trials with an estimated length of more than three days should start and indicated that the position would be kept under review. Events moved quickly. On 23 March the Lord Chief Justice made a listing decision suspending jury trials to allow appropriate precautions to be put in place.

9. On 27 March a Coronavirus Crisis Protocol for the Effective Handling of Custody Time Limit Cases in the Magistrates and the Crown Court ("the Protocol") was agreed between the President of the Queen's Bench Division, the Chief Executive and deputy Chief Executive of Her Majesty's Courts and Tribunals Service ("HMCTS") and the DPP. The Protocol set out rules of practice for the handling of cases involving a CTL. It did not create legal obligations or restrictions, was to be reviewed regularly, and did not "override independent judicial discretion" to decide every case on its own merits. The Protocol contained rules of practice only and the relevant law is unaffected.

10. In early April a Jury Trial Working Group ("the Working Group") was established under judicial chairmanship to consider the measures needed to enable courts to resume jury trials. It involved not only HMCTS but the key players in the criminal justice system, including the legal profession. On 11 May 2020 two trials which had been adjourned resumed at the Old Bailey and on 18 May new trials started in a handful of courts, expanding thereafter across the country.

11. On 24 August the SPJ and Deputy SPJ published a Memorandum ("the August Memorandum") which summarised the measures taken to date, including in relation to increasing capacity for jury trials in the Crown Court. At that stage, 91 courtrooms were able to accommodate jury trials. The Memorandum forecast that that number would increase to 250 courtrooms by November.

12. With effect from 3 September the Protocol was withdrawn, by which stage 102 courtrooms were able to accommodate jury trials.

13. On 6 September HMCTS published its recovery plan in a "Covid-19 Update on the HMCTS response for criminal courts in England and Wales". In a joint foreword, the Lord Chancellor and the Lord Chief Justice said that Covid-19

> "has been the biggest peacetime challenge facing our justice system."

The update indicated that the most significant challenge was the difficulty of accommodating jury trials whilst maintaining social distancing. Extra funding had been provided to support the increased running costs of the courts, the hiring of additional staff, further adaptations to the court estate, and the establishment of further "Nightingale" courts. These are ad hoc courts located in non-HMCTS premises. The aim was to enable 250 courtrooms to be able simultaneously to hear jury trials by the end of October. That goal was reached. On 2 November there were 255 such courtrooms within the HMCTS estate and, in addition, 11 Nightingale Courts available to hear jury trials.

14. For the purposes of this hearing, Ms Gemma Hewison, Director of Strategy and Change at HMCTS, provided a comprehensive witness statement dated 27 October 2020 which summarised the steps taken by the government and by HMCTS in response to the pandemic with reference to the Crown Court and jury trials. She referred to practical difficulties which affect jury trials during the pandemic. They require the physical presence of the jury, advocates, judge and others, even if some of those who usually attend for the whole of a trial may join remotely for some or all of the time. The governing concern was to provide a physical environment in the courtroom and throughout the court building complying with advice from Public Health England and Public Health Wales ("the Public Heath Bodies") to mitigate the risk of Covid. This was "extremely difficult". She pointed to problems with ensuring that social distancing was adhered to throughout the building with adverse impacts on the number of hearings that could safely be heard at any one time. She explained the difficulties, obvious to anyone with knowledge of how jury trials work, connected with the assembly of jurors in advance of trials starting in a Crown Court building and in providing jurors with retiring rooms. HMCTS worked closely with others to achieve maximum throughput of cases whilst "still ensuring that all court users were safe."

15. Ms Hewison noted judicial initiatives to enable pre-sentence reports to be prepared in advance of anticipated guilty pleas and the accelerated roll-out of pre-recorded cross examination pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999 as examples of steps being taken to speed up the rate at which cases were disposed of. Ms Hewison noted that changes to judicial listing practices were needed to reduce footfall generally in the buildings which had an impact on trial throughput. She referred also to problems with social distancing in the cells which provided another constraint.

16. Ms Hewison described the work of the Working Group and the principles and assumptions that underpinned its work. Those included that the principle of open justice (i.e. allowing public and press access) must be maintained; that absent Parliamentary intervention jury numbers would remain the same; that social distancing and hygiene standards must meet relevant guidance and follow the advice of the Public

Health Bodies; that legal representatives must have a safe and private opportunity to speak to their clients; that prosecution lawyers must have similar opportunities to speak to witnesses; and that witnesses should have appropriate support. She summarised measures which had been adopted to increase the capacity for jury trials, including the use of "plexiglass" screens; the use of portacabins as jury deliberating rooms; adjustments to court docks to enable them to accommodate a number of defendants whilst maintaining social distancing; the establishment of some "Nightingale" courts; and the exploration of alternative and longer opening hours. A checklist endorsed by the Public Health Bodies had been developed to assist in determining the steps necessary to make a court (including support from other parts of the building) suitable for a jury trial.

17. Ms Hewison explained the difficulties surrounding hearing trials with large numbers of defendants in custody and the work being done to accommodate increasing numbers of such trials.

18. She dealt with funding as a discrete issue within her statement. Authority was given from the outset to spend some money in support of Covid related measures, a government wide measure, but in due course two tranches of additional money, £142m in July and £83m in September, were authorised by the Treasury for HMCTS. The first was designed to provide funds for a wide range of Covid related actions, including improving more than 100 courts. The second was earmarked to fund 1,600 additional members of HMCTS staff to assist in recovery, increased running costs of the courts, further adaptations to courts and increased capacity in Nightingale Courts. The funding was not, of course, exclusively for the Crown Courts. Ms Hewison gave details of discussions involving the Ministry of Justice, Treasury and No. 10 Downing Street in respect of £30m of additional funding for Covid recovery in the Crown Courts which had not been concluded at the date of her statement. The details of the request are set out in a submission from Ministry of Justice Finance to the Treasury dated 12 October 2020. This funding is to support the creation of a further 40 Nightingale Courts to conduct jury trials as well as an additional 40 jury trial courts within the HMCTS estate. The request also sought additional funding to support Crown Courts working Covid operating hours. Those are courts which sit for two four-hour sessions dealing with two jury trials on the same day, one starting earlier than is usual and the other ending later. That model is under trial in various places. The funding request also sought money for the necessary additional judicial and ancillary costs of increased numbers of jury trials.

19. The rate of disposal of jury trials per court week was 1.33 historically but the submission to the Treasury recognised that it has slipped to 1.13, the inevitable consequence of social distancing and other precautions slowing things down.

20. The figures given by Ms Hewison showed that between March and October the outstanding case load in the Crown Court had grown by 25% from about 39,000 to 49,000. That outstanding case load included cases not ready to be tried. Most of the cases are non-custody cases. A large proportion will not result in trials because they end up as guilty pleas or are not proceeded with. On 30 June the number of people in custody on remand was 11,388, but that included those awaiting sentence as well as those awaiting trial. She noted that "from the beginning of the pandemic, remand cases have been prioritised (alongside other cases, such as youth cases or those involving

defendants with particular psychological needs)." Such prioritisation is a judicial matter.

21. Looking to the future, Ms Hewison stated that it is impossible to predict the date on which the outstanding caseload will return to pre-Covid levels. She referred to modelling which had been carried out by HMCTS, which necessarily involved the making of assumptions, so that it was not possible to draw any definite conclusions. She indicated that the latest modelling suggested, subject to various caveats (including as to future funding), that the outstanding jury trial caseload may be reduced to pre-Covid levels by March 2023.

22. The focus in these applications has been the Crown Court. The recovery plan spoke also of the position in the Magistrates' Courts where CTL issues can arise, although much less frequently.

The statutory framework:

23. Section 22 of the Prosecution of Offence Act 1985 ("the 1985 Act") provides:

> "**22. Power of Secretary of State to set time limits in relation to preliminary stages of criminal proceedings.**
>
> (1) The Secretary of State may by regulations make provision, with respect to any specified preliminary stage of proceedings for an offence, as to the maximum period—
>
> (a) to be allowed to the prosecution to complete that stage;
>
> (b) during which the accused may, while awaiting completion of that stage, be—
>
> (i) in the custody of a magistrates' court; or
>
> (ii) in the custody of the Crown Court; in relation to that offence.
>
> (2) The regulations may, in particular—
>
> …
>
> (c) make such provision with respect to the procedure to be followed in criminal proceedings as the Secretary of State considers appropriate in consequence of any other provision of the regulations;
>
> (d) provide for the Magistrates' Courts Act 1980 and the Bail Act 1976 to apply in relation to cases to which custody or overall time limits apply subject to such modifications as may be specified (being modifications which the Secretary of State considers necessary in consequence of any provision made by the regulations); …

(3) The appropriate court may, at any time before the expiry of a time limit imposed by the regulations, extend, or further extend, that limit; but the court shall not do so unless it is satisfied—

(a) that the need for the extension is due to—

(i) the illness or absence of the accused, a necessary witness, a judge or a magistrate;

(ii) a postponement which is occasioned by the ordering by the court of separate trials in the case of two or more accused or two or more offences; or

(iii) some other good and sufficient cause; and

(b) that the prosecution has acted with all due diligence and expedition.

…

(5) Where—

(a) a person escapes from the custody of a magistrates' court or the Crown Court before the expiry of a custody time limit which applies in his case; or

(b) a person who has been released on bail in consequence of the expiry of a custody time limit—

(i) fails to surrender himself into the custody of the court at the appointed time; or

(ii) is arrested by a constable on a ground mentioned in section 7(3)(b) of the Bail Act 1976 (breach, or likely breach, of conditions of bail)

the regulations shall, so far as they provide for any custody time limit in relation to the preliminary stage in question, be disregarded.

…

(11) In this section—

"appropriate court" means—

(a) where the accused has been sent for trial or indicted for the offence, the Crown Court; and

(b) in any other case, the magistrates' court specified in the summons or warrant in question or, where the accused has

> already appeared or been brought before a magistrates' court, a magistrates' court for the same area; …
>
> "custody time limit" means a time limit imposed by regulations made under subsection (1)(b) above or, where any such limit has been extended by a court under subsection (3) above, the limit as so extended;
>
> "preliminary stage", in relation to any proceedings, does not include any stage after the start of the trial …"

24. Section 22(3) requires judges and magistrates to approach their CTL decisions in three stages. First, is the need for an extension due to one of the factors identified in subsection (3)(a)(i) or (ii) (illness etc. or separate trials) or to some other good and sufficient cause; secondly, whether the prosecution has acted with all due diligence and expedition; and thirdly whether the court should exercise its discretion to grant an extension.

25. Regulations have been made pursuant to the power conferred by section 22(1): The Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987/299), from time to time amended. Regulation 5 specifies the maximum period for which an accused may be held in custody between the date when he is committed or sent to the Crown Court for trial and the date when his trial begins. In each of these cases, that maximum period is 182 days. By an amendment made pursuant to the Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 (SI 2020/953), that period has now been extended to 238 days for cases committed or sent for trial on or after 28 September 2020. It does not apply to these cases.

Relevant case law:

26. There are no previous decisions of this court which, in factual terms, are remotely similar to the impediment to conducting jury trials that was and is caused by the Covid pandemic. Nonetheless, important general principles may be found in the approach in more routine circumstances of difficulty. In *R v. Manchester Crown Court, ex parte McDonald* [1999] 1 WLR 841, Lord Bingham CJ at p846D-F identified the three overriding purposes of the CTL regime:

> "(1) to ensure that the periods for which unconvicted defendants are held in custody awaiting trial are as short as reasonably and practically possible; (2) to oblige the prosecution to prepare cases for trial with all due diligence and expedition; and (3) to invest the court with a power and duty to control any extension of the maximum period under the regulations for which any person may be held in custody awaiting trial. ... Any judge making a decision on the extension of custody time limits must be careful to give full weight to all three."

27. He continued that the prosecution must "satisfy the court on the balance of probabilities that both the statutory conditions in section 22(3) are met." If the court is so satisfied it may, but need not, extend the CTL.

28. As to what may constitute a good and sufficient cause for an extension of a CTL, Lord Bingham said, at p847H-848A:

> "... there is an almost infinite variety of matters which may, depending on the facts of a particular case, be capable of amounting to good and sufficient cause. It is neither possible nor desirable to attempt to define what may or may not amount to good and sufficient cause in any given case, and it would be facile to propose any test which would be applicable in all cases. All must depend on the judgment of the court called upon to make a decision, which will be made on the peculiar facts and circumstances of the case in question, always having regard to the overriding purposes to which we have made reference above."

29. He recognised that the unavailability of a suitable judge or a suitable courtroom within the maximum period specified in the regulations could "in special cases and on appropriate facts, amount to good and sufficient cause for granting an extension of the custody time limit": see p848B and the cases there cited. But he emphasised the need to avoid subverting the statutory purpose of speedy trials for persons remanded in custody.

30. In *R (Gibson) v. Crown Court at Winchester* [2004] 1 WLR 1623, two defendants were awaiting a four to five-week trial for murder before a High Court judge. Lord Woolf CJ observed at [29] that a court should go to considerable endeavours to avoid extending a CTL because of the unavailability of a court room or a judge. The court evaluated the importance of a High Court judge conducting the trial. He continued:

> "In addition, it has to be recognised that resources are not unlimited. The resources that are available have to be taken into account. So have the requirements of other cases also awaiting trial to be taken into account."

31. He reiterated, at [31], that

> "The courts cannot ignore the fact that available resources are limited, they cannot ignore the fact that occasions will occur when pressures on the court will be more intense than they usually are. In such a situation it is important that the courts and the parties strive to overcome any difficulties that occur. If they do not do so, that may debar the court from extending custody time limits. … However, it is not correct, as has been submitted before us, that judges are entitled to ignore questions of the non-availability of resources."

32. That approach was followed in *R (Kalonji) v. Wood Green Crown Court* [2007] EWHC 2804 (Admin), in the context of listing delays caused by the closure of a court centre in London, the carrying out of extensive refurbishment at another, and the consequent increase in the number of cases being heard at Wood Green. Latham LJ at [18] said:

> "... where there are real pressures on a court which have been created by exceptional circumstances the court should be careful to examine what the reason is and the proposed solution to it and come to a judgment as to whether or not it can properly be said that the reason is one which is exceptional, on the one hand, and the steps that are proposed to alleviate it appear to have a prospect of success on the other. If the delays which are being experienced by a court are not being alleviated by any steps that are being taken, the judge may be forced to conclude that the position has become one where there is a systemic failure to be able to provide for trials within the custody time limits … ."

33. *R (McAuley) v. Crown Court at Coventry* [2012] 1 WLR 2766 concerned a CTL which had been extended in a routine case because of a reduction in the number of sitting days allocated to particular court centres during the relevant financial year. Sir John Thomas P, giving the judgment of the court, referred to *Gibson* and *McDonald* and said at [34] that routine cases should be managed in such a way that they could always be heard within their CTLs but that if sitting days at a particular court were said to be an impediment to hearing the case within the CTL the prosecution, upon whom the burden lies in such applications, would have to produce evidence from HMCTS in advance of a hearing. He continued at [35]:

> "The judge must then subject the application and the evidence to that rigorous level of scrutiny which is required where a trial is to be delayed and a person confined to prison because of the lack of money to try the case. Although other considerations may apply to cases which are not routine, lack of money provided by Parliament in circumstances where the custody time limits are unchanged will rarely, if ever, provide any justification for the extension of a CTL. If the Ministry of Justice concludes that it does not have sufficient funds for cases to be tried within CTL, then the Secretary of State must amend the Regulations and seek the approval of Parliament. If that is not done, the court has no option but to apply the present CTL and HMCTS must find the necessary money or face the prospect of a person who may represent a danger to the public being released pending trial."

34. In *R (McKenzie) v. Crown Court at Leeds* [2020] 4 WLR 106, the extension of a CTL was challenged on the grounds that the Lord Chief Justice's statement on 23 March 2020 that jury trials should be paused for a short time could not amount to a good and sufficient cause for an extension, and that the Protocol was unlawful because it subverted the statutory scheme and/or fettered the discretion of a judge hearing an application for an extension of a CTL. The court rejected those challenges and emphasised the continuing need for a judge considering an application to extend a CTL to assess the specific circumstances of the case being considered.

The principles to be applied to CTL extensions during the pandemic:

35. The Covid 19 pandemic is unprecedented. The suspension of jury trials was necessary in the public interest to protect the health of all those who attend the Crown Court. The practical consequences of securing appropriate social distancing in courtrooms and all

parts of Crown Court buildings present formidable challenges to the efficient and timely conduct of the business of the criminal courts. There is an imperative need for all participants in court proceedings to remain safe. Jury trials, necessarily requiring the participation of a significant number of people even in a short, single-defendant trial, pose the most severe problems. For multi-handed trials the problems multiply.

36. The ubiquitous nature of the problems facing the Crown Courts during the pandemic is entirely different from the localised problems considered by Latham LJ in *Kalonji* which concerned a discrete listing problem arising from a shortage of courtroom accommodation for a period in a particular area or the issue faced in *McAuley.*

37. The evidence in the HMCTS recovery plan and earlier public documents describing the efforts made to restart jury trials and then enhance the capacity of the Crown Courts to hear jury trials demonstrates that timely and careful steps were taken. That evidence has been expanded upon by the statement of Ms Hewison, which reinforces that conclusion. Jury trials restarted during the first period of lockdown when there was palpable nervousness surrounding the process. The relevant regulations exempted involvement in legal proceedings from the restrictions on movement. Numbers increased, slowly at first but then gathered pace. The goals set in the public documents for the capacity that would be available by the end of October have been achieved. The aim was to have capacity to hear 250 simultaneous jury trials by the end of October, but the number was exceeded. That is not simply the result of the efforts of HMCTS but of all the crucial participating groups in the process, including the legal profession, the CPS, prisons and probation and many others.

38. The problems in accelerating the capacity of the system to hold jury trials have been practical and logistical, rather than financial. The evidence shows that additional funding has been secured and that further funding is being sought to support the continued expansion of the number of court rooms capable of holding a jury trial whilst social distancing remains a requirement. The evidence of Ms Hewison and the supporting documentation show that both the Ministry of Justice (which secures money from the Treasury for the courts) and HMCTS have kept a careful eye on expenditure. That is understandable, indeed unavoidable, but the pace of fitting out courts and making adjustments in court buildings has been dictated by practical concerns. In any event, courts are very slow to intrude upon funding decisions which form part of a large and complex picture and where difficult choices are made by Government. In the context of the courts, the Ministry of Justice must allocate money to HMCTS which is concerned not only with the Crown Court but also the Magistrates' Courts, the Family Court, the Civil Courts and Tribunals, all of which face pressures as a result of Covid. CTL applications are not the place to second guess fine judgements about funding. For the moment, the constraint on increasing the number of simultaneous jury trials has been the availability of suitably adapted court rooms in otherwise Covid-safe buildings.

39. That position could change. If extensions to CTLs were sought in circumstances where there was capacity to hear the case in the sense that a suitable court room was available, a judge could be found and the other necessary participants were ready, but financial constraints prevented a trial, the position might be different. That was made clear by Sir John Thomas P in *McAuley.* The underlying premise of the CTL regime is that Government is obliged to fund the courts with an expectation that shortage of money itself will not place defendants in jeopardy of spending longer in custody than the periods prescribed by Parliament pending trial.

40. In our judgment, if the need for an extension of a CTL results from a shortage of suitable court rooms caused by the Covid emergency that provides a good cause within the meaning of section 22(3)(iii) of the 1985 Act.

41. That is not the end of the inquiry. Subsection 3(iii) is concerned with not only a good cause but also a "sufficient cause". It therefore contemplates that there may be a "good" cause which is not "sufficient". A lack of capacity which results from too little space (or indeed a lack of judges or available lawyers, for example) would constitute a "good" cause for needing an extension for a CTL because on that hypothesis there would be no possibility of the trial in question proceeding whatever was done. Such a good cause may not necessarily be a sufficient one. That might be because of systemic failures or circumstances attaching to the case or defendant. At a systemic level, it is possible to envisage that a shortage of judges and recorders resulting from a dogged determination not to authorise the appointment of sufficient numbers would engage the question whether the shortage (a good cause for needing to extend a CTL) was also a sufficient one. So too if the inability to conduct a trial within the CTL were the result of systemic financial constraints which could not be overcome by moving the case to another Crown Court or substituting it for a non-custody trial about to be heard (see *McAuley* para [39] above).

42. We have quoted from the judgment of Lord Bingham in *McDonald* where he indicated the impossibility of defining what may or may not amount to a good and sufficient cause. He continued by quoting with approval a passage from the judgment of Auld LJ in *R v. Central Criminal Court, ex parte Abu-Wardeh* [1998] 1 WLR 1083 at 1090. In the context of a case where a judge of particular seniority was said to be needed to conduct the trial, he concluded that the question of 'sufficiency' (the threshold of whether the cause was good having been surmounted) depended on the individual facts of the case. This supports the proposition that no case during the pandemic can be regarded as "routine" in the sense in which Sir John Thomas P used the term in *McAuley*.

43. In the context of the cases we are considering, the factors which might come into play in deciding whether the lack of safe available court space for a trial, whilst a good cause for extending a CTL, is also a sufficient cause overlap with matters of discretion.

44. With those considerations in mind, we turn to some non-exhaustive principles relevant to applications for extensions of CTLs during the pandemic:

    i) Delay attributable to the pandemic, which means that it is neither practicable nor safe to hold the trial in question within the CTL, provides a good cause for an extension.

    ii) Whether it provides a sufficient cause depends on an examination of the individual facts of the case and of the defendant in question.

    iii) The normal requirements of exploring administratively whether a trial can be brought on elsewhere within the CTL should be followed; so too whether any non-custody cases listed for hearing can be vacated to enable a custody case to come into the list. For the moment, neither may often be feasible but as additional court rooms come on stream the position may change. The

underlying purposes of the CTLs explained by Lord Bingham in *McDonald* remain as potent as ever.

iv) If practical arrangements cannot be made, it does not follow that it will be appropriate to extend the CTL in every case even though the need to delay a trial will be clear. In some cases, a defendant should be released subject to exacting bail conditions. Factors which may come into play include:

a) The likely duration of the delay before trial;

b) Whether there has been any previous extension of the CTL;

c) The age and antecedents of the defendant;

d) The likely sentence in the event of conviction. A defendant should rarely be kept in custody if he had served, or come close to serving, the likely sentence were he convicted;

e) The underlying reasons why bail was refused;

f) Any particular vulnerabilities of the defendant which make remand in custody particularly difficult.

v) In multi-handed trials, consideration should be given by the parties and the court to whether delay could be reduced by separate trials.

vi) The burden is on the prosecution to satisfy the statutory criteria for the granting of an extension. No formal evidence about the impact of the pandemic will be needed in the light of the publicly available material and this judgment. All parties can be expected to be familiar with the steps taken to date by HMCTS and the courts. Judges and magistrates hearing contested applications to extend CTLs should inform the parties of the listing position at the court concerned, having regard to available and anticipated capacity, and of any inquiries made to see whether an earlier trial slot is available elsewhere.

vii) Any extension of a CTL should be for a comparatively short period, generally not exceeding about 3 months, so that the court retains the power to review the position in the light of changing circumstances.

The case of Tesfa Young-Williams:

45. In refusing the application for an extension of the CTL, Judge Raynor concluded that at the heart of the problem in restarting and then increasing the volumes of jury trials was a lack of funding by HMCTS and the Ministry of Justice. He considered that there was a broad systemic failure by both to provide for jury trials within CTLs. He decided that the measures indicated in the Recovery Plan did not have a realistic prospect of success in the sense that they will significantly reduce the backlog of outstanding trials for those in custody. He identified nine steps that could have been taken but "to [his] knowledge" had not been taken, which in his judgment would have "indicated adequate funding".

46. We agree with the submissions of Louis Mably QC and Sir James Eadie QC, that these conclusions are not sustainable.

47. The materials publicly available describing the efforts made by the Working Group and HMCTS to get jury trials up and running after lockdown at the end of March 2020 demonstrate the deep practical problems which had to be overcome. The problem was not lack of funding nor systemic failure.

48. Moreover, Judge Raynor's focus on funding was infected by a misunderstanding of article 6 of the European Convention on Human Rights which guarantees (amongst much else) a trial "within a reasonable time". We observe that the time which has elapsed since Mr Young-Williams was arrested (a little over a year) is, on any view, far removed from giving rise to a violation of article 6. Judge Raynor stated at [59] in his reserved judgment,

> "The proposed new measures fall a long way short of the Article 6(1) "regardless of cost" benchmark. The state has failed in its duty to organise its legal systems so as to allow the courts to comply with the requirements of Article 6(1) whether the appropriate test is "regardless of cost" or even a lesser requirement of "high cost" or "cost proportionate to the exceptional situation"."

49. He referred to the decision of the Strasbourg Court in *Zimmermann v. Switzerland* (1983) 6 EHRR 17 in support of his asserted test of "regardless of cost". *Zimmermann*, however, provides no support for that proposition. We understand that there were no submissions on this aspect of the judge's decision, because the parties were not alerted to the point.

50. In coming to his various conclusions, the judge relied on other material which had not been the subject of any evidence or argument: for example, he referred to a webinar organised by the National Judicial College of the USA in support of an assertion that other countries had made timely preparations at the start of the pandemic and that measures taken in South Korea and Spain "show what can be done when systems are funded at an appropriate level". The evidence now before us shows that South Korea does not have jury trials. Mr Keleher confirmed that this and many other details referred to by Judge Raynor in his reserved ruling, were not referred to during the hearing and the judge gave no opportunity for either comment or, if necessary, evidence on the topics.

51. We have mentioned that the judge identified a series of factors which might have been taken. On none of them did the judge ask for evidence. They included using police stations and military facilities, special constables, more external space (including cinemas), re-opening closed courts, introducing a reliable testing procedure for those working in courts and a reliable track and trace system, both of the last implicitly criticising the wider governmental response to the pandemic. But in all these suggestions the judge gave no opportunity for the legal and practical implications of what he was proposing to be considered by the parties before him. Unsurprisingly, Ms Hewison explains in her statement why some are not feasible, others impractical or not preferable to the options being pursued.

52. We mention in more detail two examples from the judge's list. He said that there should have been "a more robust approach to ensuring that MoJ/HMCTS staff return to working at court, rather than at home". The reference to Ministry of Justice staff was an error, they do not work in the courts, but what he had in mind by "a more robust approach to ensuring HMCTS staff" did not work at home is not explained. In any event there was no evidence before him on the matter nor was there any discussion. The judge also suggested "the extensive use of our excellent Recorders to assist with making a significant contribution to reducing the backlog of trials". This is undoubtedly a good idea and, as the number of trials being conducted at any one time expands, will undoubtedly be necessary. But this observation exposes the judge's failure to appreciate that judicial resources have had no impact on conducting jury trials thus far. The problem has been in expanding quickly the number of trial court rooms.

53. Mr Keleher, for whose help we are grateful, was unable to support the judge's approach in many respects, most especially in relying on matters of which the parties were given no notice and of which there was no evidence, save the judge's own private internet researches. He nonetheless supported the overall conclusion that the approach of the Government to the pandemic as it bore on the criminal courts was inadequate. It did not provide good and sufficient cause for an extension.

54. We have explained why we do not accept that Judge Raynor's conclusion on this issue can stand.

55. Judge Raynor did not need to decide the matter because quite separately he concluded that the CPS had not acted with due diligence and expedition. Mr Mably has not sought to overturn that conclusion. We are, nonetheless, satisfied that the judge's decision that the prosecution had not shown that the need for an extension to the CTL was due to a good and sufficient cause was one that was not open to him. We make a declaration to that effect.

The case of Jayano Lucima:

56. Judge Hillen granted the prosecution a CTL extension to February 2021, finding that the public health crisis created by the pandemic amounted to good and sufficient cause. He said:

> "I have no doubt that it can be argued that even more should be done to mitigate the effect of the cessation of trials in March 2020. However, there needs to be realism as to the ability of Her Majesty's government to return the system to the previous state in the short term."

57. Judge Hillen noted that the situation was a dynamic one and would be kept under review in accordance with the progress or retreat of the disease. He considered the Memorandum of 24th August and the Update issued in September and found that those documents provided evidence of the adequacy of HMCTS' response to the pandemic and showed that efforts were being made to regularise the criminal justice system.

58. Mr Aina QC, for Mr Lucima, submits the judge was wrong to treat the current policy as amounting to a good and sufficient cause for an extension, did not in any event apply

that policy to the circumstances of the case, and did not allow Mr Lucima to scrutinise the policy.

59. Mr Mably and Sir James Eadie submit that it is not arguable that the judge's decision, that there was good and sufficient cause to grant an extension, was irrational or otherwise unlawful. The judge took into account all the relevant facts and circumstances of the specific case, and rightly concluded that it was neither practicable nor safe for a trial to be heard within the CTL, which he was entitled to find was a good and sufficient cause for an extension. He rightly limited the extension to a period which was reasonable in all the circumstances.

60. In our view, Judge Hillen considered all relevant matters, and correctly followed the principles stated in *McDonald* and *Gibson*. We recognise that Mr Lucima is very young, and we see the force of Mr Aina's submission that the stage may quite soon be reached when Mr Lucima will have been in custody for the equivalent of the sentence he could expect to receive if convicted. We accept that Judge Hillen might have given more weight than he did to those factors when exercising his discretion. We can well see why he limited the length of the extension and thus provided an opportunity for review in the near future. We can however see no arguable ground on which his decision can be said to have been unlawful. It follows that we see no basis on which it would be appropriate to grant permission to apply for judicial review.

Conclusions:

61. For those reasons, our decisions in the two cases are as follows:

    i) In the case of Mr Young-Williams we grant permission, grant the application for judicial review, and declare that the decision of Judge Raynor that the prosecution had not shown that the need for an extension to the CTL was due to a good and sufficient cause was one that was not open to him.

    ii) In the case of Mr Lucima, we refuse permission to apply for judicial review.