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Case No: CO/3262/2022
CO/3263/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 September 2022

Before:

PRESIDENT OF THE KING'S BENCH DIVISION
and
MR JUSTICE CHAMBERLAIN

- -

Between:

THE KING **On the application of** **DIRECTOR OF PUBLIC PROSECUTIONS**	**Claimant**
- and -	
(1) CROWN COURT AT BRISTOL **(2) CROWN COURT AT MANCHESTER (MINSHULL STREET)**	**Defendants**
- and –	
(1) WILLIAM DURSLEY **(2) BENJAMIN SMEDLEY** **(3) ADAM MAYALL**	**Interested Parties**

- -

Tom Little KC & Victoria Ailes (instructed by **Crown Prosecution Service**) for the **Claimant**
David Hughes (instructed by **Kelcey and Hall Solicitors**) for the **1st Interested Party**
Barry Grennan (instructed by **Howard Beanstein Solicitors**) for the **2nd Interested Party**
Ben Knight (instructed by **Cuttles Solicitors**) for the **3rd Interested Party**
Louis Mably KC (instructed by the **Attorney General's Office**) as **Advocate to the Court**
The Defendants were not represented

Hearing dates: 26 September 2022

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APPROVED JUDGMENT

Dame Victoria Sharp P and Mr Justice Chamberlain:

Introduction

1. Those accused of criminal offences before magistrates' courts or the Crown Court have a general right to bail. That right is, however, subject to various exceptions under which some are remanded in custody pending trial. Parliament gave the Secretary of State for Justice power to make regulations prescribing the maximum period during which an accused may be in the custody of a magistrates' court or the Crown Court. Maximum periods, known as custody time limits, have been set. In section 22(3) of the Prosecution of Offenders Act 1985 (the 1985 Act), Parliament also conferred on courts the power to extend a time limit if certain conditions are satisfied.

2. In the last few weeks, many trials across England and Wales have had to be adjourned, sometimes for substantial periods, because of the unavailability of barristers to represent defendants. One cause of this unavailability has been a dispute between the Criminal Bar Association (the CBA) and the Ministry of Justice (the MOJ) about the basis and rates of payment for publicly funded legal aid work in the Crown Courts under the Advocates' Graduated Fee Scheme (AGFS).

3. It would not be appropriate for us to enter into the merits of the dispute, but the positions of the parties may be fairly summarised as follows. Both sides acknowledge that modifications to the basis and rates of payment are required. The MOJ has proposed some. The CBA currently considers they are inadequate to address what it regards as an existential threat to the criminal Bar and the wider criminal justice system. The dispute therefore continues, although discussions between the CBA and Ministers have recently taken place and further such discussions are scheduled.

4. Since the spring of 2022, the CBA has encouraged barristers to engage in various forms of action. Initially, this took the form of refusing to accept returns from other counsel. It subsequently escalated to "days of action", in which barristers would refuse to appear on specified days or weeks, subject to consideration of individual circumstances. With effect from 5 September 2022, the CBA has invited barristers to refuse all work under the AGFS indefinitely, again subject to consideration of individual circumstances.

5. In each of the cases now before us, the accused person was remanded in custody awaiting trial, but the trial had to be adjourned because of the unavailability of counsel in the context of the CBA action. In each case, the prosecution applied to extend the custody time limit and the judge concluded that the prosecution had acted with all due diligence and expedition, but nonetheless refused the application to extend the time limit.

6. By these claims for judicial review, the Director of Public Prosecutions (the DPP) challenges the refusal decisions. The substantive issues before us are these:

Issue (1): What principles should be applied by courts when considering applications to extend custody time limits occasioned by adjournments in the context of the present action by the CBA?

Issue (2): Were the challenged decisions lawful?

Issue (3): If so, does the Crown Court have power to extend custody time limits after their expiry? Does the Administrative Court have power under section 31(5) of the Senior Courts Act 1981 (the 1981 Act) to substitute decisions extending the custody time limits in these cases? What relief, if any, should be granted?

A brief summary of our conclusions

7. We have reached the following conclusions:

(a) For the time being, adjournments made necessary by the absence of legal representation in the context of the CBA's indefinite action announced on 22 August 2022 may in principle constitute both a good and a sufficient cause for the purposes of section 22(3)(a)(iii) of the 1985 Act.

(b) The question whether such an adjournment does constitute a sufficient cause for extending the time limit will be case-specific. Judges considering applications to extend custody time limits should consider (i) the likely duration of the delay before the trial; (ii) whether there has been any previous extension of the custody time limit; (iii) the age and antecedents of the defendant; (iv) the likely sentence in the event of a conviction; a defendant should rarely be kept in custody if he has served, or come close to serving the likely sentence were he convicted; (v) any particular vulnerabilities of the defendant which make remand in custody difficult; (vi) in a multi-handed trial where representation difficulties apply to one defendant but not others, whether delay could be reduced by separate trials. Judges should bear in mind that the burden is on the prosecution to satisfy the statutory criteria for the granting of an extension.

(c) In every case, judges should consider whether the public interests served initially by remanding the defendant in custody can now be served by stringent bail conditions. If so, this should be the preferred course.

(d) Any extension of a custody time limit should be for a relatively short period, generally not exceeding about three months, so that the court retains the power to review the position in the light of changing circumstances.

(e) However, if the situation remains as it is now, the relevant point at which the unavailability of legal representation can properly be described as chronic or routine is likely to be reached by the last week in November 2022 (by which time three months will have elapsed from 22 August 2022). Once this point is reached, the absence of legal representation in

the context of the CBA action is unlikely to be capable of supplying a sufficient reason for extending custody time limits.

(f) It is neither necessary nor appropriate for judges to attribute blame for the current dispute between the CBA and MOJ to one side or the other, or to comment on its underlying causes.

(g) Those given the responsibility of considering applications to extend custody time limits are, in general, highly experienced judges, and we readily acknowledge the difficulties of resolving applications to extend custody time limits in the current situation. Nonetheless, we have concluded that in each of the decisions under challenge, the judge erred in law in concluding that the unavailability of counsel could not constitute a sufficient cause for extending the custody time limit.

(h) As the custody time limits in each case have now expired, there is no power in the Crown Court under section 22(3) of the 1985 Act or in this court under section 31(5)(b) of the 1981 Act to extend those limits. There is therefore no point in quashing either of the two challenged decisions. Accordingly, although we grant the DPP permission to apply for judicial review, we refuse relief in the exercise of our discretion.

(i) Where the DPP seeks to challenge by judicial review a decision to refuse to extend a custody time limit, a High Court judge sitting in the Administrative Court may in principle exercise the powers of the Crown Court under section 22(3) of the 1985 Act to grant a short extension of the custody time limit pending any substantive or rolled-up hearing. However, this power should only be exercised if the claim is strongly arguable and the prosecution has shown that all the conditions in section 22(3) are met. In general, an oral hearing will be required.

Procedural matters

8. The claims were received by the Administrative Court Office by email on the evening of 7 September 2022. They were formally filed and issued on 8 September 2022. The DPP did not seek interim relief but requested an urgent rolled-up hearing before the Divisional Court on 9 September 2022, because in one of the cases the custody time limit was due to expire on that day and at that stage it was the DPP's stance that there was no power to extend the time limit after its expiry. The DPP has since changed this stance and argues that, in a case where the Administrative Court quashes a refusal to extend a custody time limit before its expiry, it can substitute a decision to extend under section 31(5) of the 1981 Act, even in a case where the custody time limit has by that time expired.

9. In an Order made on 8 September 2022, the court recognised that the claims raise important points of principle, which are likely to be of relevance across England and Wales, indicated that they were suitable for determination by a Divisional Court and noted that there was a strong public interest in resolving them quickly. Directions were given for a rolled-up hearing on 15 September 2022, a date fixed to allow the Interested Parties time to obtain legal aid and make representations. Because of delays in processing the Interested Parties'

legal aid applications, that hearing was converted to a directions hearing and a new timetable set, leading to a rolled-up hearing on 26 September 2022. Pursuant to our direction, the Director of Legal Aid Casework outlined the regrettable circumstances in which this adjournment became necessary. Those circumstances were described in this court's judgment of 20 September 2022: [2022] EWHC 2347 (Admin).

The submissions of the parties in summary

10. The stance taken by the respective parties appearing before us in outline is as follows.

11. Mr Little KC on behalf of the DPP says that nothing in the claim should be interpreted as expressing any view on the dispute between the CBA and the Government; the Crown Prosecution Service is an executive agency independent of Government and is not a party to the dispute. He submits that it was wrong for the judges in the defendant Crown Courts to consider the substance of the dispute for the purposes of making a decision on an application to extend custody time limits. This, he submits, was an irrelevant consideration. The courts also failed to have regard to a material factor, namely the circumstances of the particular case before them.

12. We are accordingly invited to quash the decisions and, in each case, to substitute a decision under section 31(5)(b) of the 1981 Act extending the custody time limits. It is said that we have power to do this because the original decision refusing to extend the time limits was made before those time limits expired.

13. The Interested Parties each submit that the judge in their case did not err in law in refusing to extend the custody time limit. For Mr Dursley, Mr David Hughes (who was not instructed and did not appear below) submits that the judge in the Bristol case (HHJ Blair KC) was entitled to draw on his own knowledge and experience and to reach the conclusion that the adjournment in that case was attributable to long-term underfunding of the criminal justice system. Having done so, he was entitled to find that the cause for the extension advanced by the prosecution could not be a good and sufficient cause within the meaning of section 22(3) of the 1985 Act.

14. Mr Barry Grennan (who was not instructed and did not appear below) points out that his client Mr Smedley was, in fact represented. His trial had to be adjourned because of the unavailability of representation for his co-accused, Mr Mayall. Mr Grennan submits that the judge in the Manchester case (HHJ Landale) did not enter into the substance of the dispute between the Government and the CBA and in any event was entitled to conclude that the cause was a "persistent and predictable background feature of publicly funded criminal litigation".

15. On behalf of Mr Mayall, Mr Ben Knight amplifies these submissions and makes two additional positive arguments in response to the claim: first, that the judge in his case was wrong to hold that the prosecution had acted with all due diligence and expedition; and secondly, that the decision of the judge refusing

to extend custody time limits was not based on the same considerations as those of HH Judge Blair KC, but mandated by human rights considerations.

16. Mr Louis Mably KC, as Advocate to the Court, submits that the unavailability of representation in the context of the CBA action could in principle constitute a good and sufficient cause for extending a custody time limit, subject to consideration of the facts of individual cases. He accepts, however, that there would come a time when the unavailability of representation had persisted for a significant period of time so that it could be said to be a chronic or routine feature of the system. He accepts (and indeed all counsel agreed) that once that time was reached, the unavailability of counsel could no longer supply a sufficient cause for extending custody time limits.

The statutory framework relating to pre-trial detention

17. The statutory framework relating to pre-trial detention of persons charged with criminal offences is to be found in the Bail Act 1976 (the Bail Act), the 1985 Act and the Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987/299): (the 1987 Regulations).

18. By section 4 of the Bail Act, a person charged with a criminal offence and brought before a court has a general right to bail subject to various exceptions which empower or, as the case may be, require the court to remand the accused in custody.

19. By section 22 of the 1985 Act, Parliament empowered the Secretary of State to make regulations providing for the maximum period during which an accused may be in the custody of a magistrates' court or the Crown Court. The regulations must be made by statutory instrument and are subject to annulment pursuant to a resolution of either House of Parliament: section 29 of the 1985 Act.

20. The regulations now in force are the 1987 Regulations. As amended, these provide, among other things, that in cases sent to the Crown Court under section 51 of the Crime and Disorder Act 1998, the maximum period of custody between the sending and the start of the trial is 182 days: see regulation 5(6B). The period has been varied from time to time, most recently during the Covid-19 pandemic. When such variations are made, the effect of section 29 is to make them subject to Parliamentary scrutiny.

21. Save in cases of homicide and rape, regulation 6(6) requires the Crown Court, on being notified that the custody time limit is about to expire, to grant the accused bail as from the expiry of the time limit, subject to a duty to appear before the Crown Court for trial. Regulation 8 provides that the Bail Act applies to cases to which a custody time limit applies subject to modifications. The effect of these is that, on expiry of a custody time limit, the court must grant bail, may not require sureties or the deposit of a security and must not impose conditions precedent to the grant of bail. The power of a constable to arrest the accused without warrant if he has reasonable grounds for believing that he is not likely to surrender to custody does not apply.

22. However, the grant of bail may be made subject to conditions, such as curfew, residence or reporting to a police station and a constable has power to arrest the accused if there are reasonable grounds for believing that he is likely to break his bail conditions or reasonable grounds for suspecting that he has broken them: section 7(3)(b) of the Bail Act. A person so arrested must be brought before the court, which may remand him in custody or grant bail subject to different conditions if it is of the opinion that he is not likely to surrender to custody or has broken or is likely to break any bail condition: section 7(4) and (5) of the Bail Act.

23. Section 22(3) of the 1985 Act provides as follows:

> "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."

The court is required to be satisfied of these matters on a balance of probabilities.

Case law on section 22(3) of the 1985 Act

24. There is a great deal of Divisional Court authority on the question of what can constitute a good and sufficient cause for extending time under section 22(3) of the 1985 Act.

25. In *R v Governor of Winchester Prison ex p. Roddie* [1991] 1 WLR 303, Lloyd LJ (with whom Tudor Evans J agreed) said at 306 that it would not be desirable to define good cause. This should be left to the good sense of the tribunal. However, since Parliament had decided to set the same time limit for all offences, neither the seriousness of the offence nor the fact that only a short extension is sought could themselves be good reasons for an extension.

26. In *R v Luton Crown Court ex p. Neaves* [1992] Crim LR 721, Mann LJ (with whom French J agreed) said that the formula "good and sufficient" did not limit in any way the categories of cause that could qualify. However, in *R v Norwich Crown Court ex p. Cox* (1992) 97 Cr App R 145, Mann LJ endorsed the view that neither the seriousness of the offence nor the shortness of the extension sought could qualify as sufficient, though Leonard J (who agreed in the result)

thought there were no constraints on what could constitute a good and sufficient cause.

27. In *R v Maidstone Crown Court ex p. Schultz* (1992) 157 JP 601, Beldam LJ and Tudor Evans J accepted that difficulty in listing a trial could in principle be good and sufficient cause, but held that the test was not satisfied on the facts where an extension of 14 days had been granted in the hope that an earlier trial date would be found.

28. In *R v Central Criminal Court ex p. Abdu-Wardeh* [1998] 1 WLR 1083, Auld LJ and (with whom Sachs J agreed) dismissed an application for judicial review of a decision to extend a custody time limit on the ground of the unavailability of a High Court judge to try the case. At 1086, Auld LJ said this:

> "The use in the statutory formula of the two adjectives 'good' and 'sufficient' must, in my view, have some purpose other than mere emphasis. 'Good … cause' must mean some cause for the extension of time sought, not the corresponding need to keep the defendant in custody. 'Sufficient' means what it says, and requires a court when considering a 'good … cause' to evaluate its strength."

29. At 1090-1, Auld LJ added this:

> "After much hesitation, I have come to the view that there is no indication in section 22(3), considered alone or in its statutory context, that the words 'good … cause' should be construed in any stricter sense than that the suggested cause must be a reason for postponement of the trial and, for that reason, an extension of the custody time limit. In applications based on unavailability of a judge or courtroom, as on any other cause, the judge has another means of ensuring that it does not subvert the statutory purpose of speedy trial for those in custody. It is to examine the circumstances rigorously to determine whether the cause is also "sufficient" for any extension and, if so, for the length of extension sought. As the authorities to which I have referred make plain, each case must be decided by the judge hearing the application on its own facts. On such an issue, the issue of sufficiency, I consider that the judge is entitled to have regard to the nature of the case and any particular limitations that that may impose on the status and seniority of the judge to try it and to the difficulty of making such a judge available. He must decide in the circumstances whether any such difficulty is a sufficient cause and a sufficient cause for an extension of the length sought. The function of this court on an appeal from such decision is, of course, much narrower, namely, whether on the material before him the judge's decision was perverse."

30. In *R v Manchester Crown Court ex p. McDonald* [1999] 1 WLR 841, Lord Bingham CJ (with whom Collins J agreed) approved statements in earlier authorities to the effect that neither the seriousness of the offence nor the

shortness of the extension sought could be a good and sufficient cause for an extension. At 846, Lord Bingham identified three overriding purposes of the custody time limit regime, to which any judge considering an application to extend under section 22(3) must give full weight:

> "(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."

31. At 847-8, Lord Bingham said this:

> "While it is possible to rule that some matters, such as those we have just mentioned, are incapable in law of amounting to good and sufficient cause for granting an extension, 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.
>
> The courts have held, although reluctantly, that the unavailability of a suitable judge or a suitable courtroom within the maximum period specified in the regulations may, in special cases and on appropriate facts, amount to good and sufficient cause for granting an extension of the custody time limit."

32. At 848-9, Lord Bingham approved the following passage from the judgment of Toulson J, sitting at first instance at Winchester Crown Court, refusing to extend a time limit when a trial had to be adjourned because of lack of court availability:

> "If difficulties of providing a judge and a courtroom are too readily accepted as both a good and a sufficient reason for extending custody time limits, there is a real danger that the purpose of the statutory provisions would be undermined. These are provisions expressly designed to protect the liberty of the citizen, assumed at the present stage not to be guilty. Of course the decision to place him in custody involves a balance of his interests against those of the public; but to keep him in custody beyond the time reasonably necessary for his case to be prepared for trial, for administrative reasons which are essentially unconnected with his case, is another matter altogether. There is

> no redress against that mischief for somebody who at the end of the day is found to be innocent, and those are all no doubt factors which Parliament had in mind in laying down the provisions that it did. In construing and applying statutory provisions which impose a custody time limit, but create an exception, one must be very careful that the exception is not allowed to grow so as to emasculate the primary provision."

33. In *R (Bannister) v Crown Court at Guildford* [2004] EWHC 221 (Admin), May LJ and Nelson J quashed a decision in a routine case to extend time limits because of listing difficulties at Guildford. May LJ said this:

> "21. I have been unable to detect any particular fact referable to this case which was capable of being a particular good and sufficient cause for extending the custody time limit. That leads to this stark conclusion: Parliament has set custody time limits for various obvious reasons. Parliament ultimately is also responsible for the provision of resources by way of judges, Recorders, courtrooms and staff, to enable cases to be heard within those custody time limits. Is it then, in a routine case, to be regarded as a good and sufficient cause for extending the custody time limit that it is impossible to hear the case earlier because the resources available to listing officers make it impossible?
>
> 22. In my judgment, faced with that stark question, the answer has to be no, it is not a good and sufficient cause. I temper that only by reverting to my suggestion that at the time when cases such as this are fixed for trial, active judicial intervention at an appropriate judicial level often can and always should try to see whether the case cannot, by some means, be heard at an earlier stage. I am confident, speaking generally, that if that is done, in a number of cases an earlier date will, in fact, be found. I am equally confident that in some cases it will not be found. Some of those cases may be cases which, for other particular reasons, do have good and sufficient cause for extending the custody time limit. But a routine case with no particular facts capable of being good and sufficient cause will not qualify for an extension of custody time limits because of the general impossibility of hearing cases earlier. If that were the case, the problems to which Toulson J alluded would unquestionably arise. As he said, if the difficulties of providing a judge and courtroom are too readily accepted as both a good and sufficient reason for extending custody time limits; there is a real danger that the purpose of the statutory provisions would be undermined. He also said that, in construing and applying statutory provisions which impose custody time limits but create an exception, one must be very careful that the exception is not allowed to grow so as to emasculate the primary provision.

> 23. It does seem to me that if the situation in Guildford, or elsewhere up and down the country, is such that in routine cases dates cannot be found within custody time limits, then the balance that Parliament has decreed is that defendants would have to be released on bail. The alternative is for Parliament to provide greater resources. I do regard that as a stark state of affairs, but it seems to me that that is the right way in which to apply this particular statutory provision."

34. In *R (Gibson) v Crown Court at Winchester* [2004] EWHC 361 (Admin), [2004] 1 WLR 1623, Lord Woolf CJ (with whom Rose LJ and Royce J agreed) said at [29] that applications to extend time limits occasioned by judicial unavailability could in principle be granted, though the court would have to evaluate the importance of a judge of the required calibre being available and could take into account that resources are not unlimited. Lord Woolf said at [31] that the approach of May LJ in *Bannister* may generally be appropriate in a routine case. He continued:

> "I do not accept that it is right to regard May LJ's approach as indicating that the availability of resources, whether courtrooms, judges or other resources, are an irrelevant consideration. 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. It may well be that in Bannister further action could have been taken (or action could have been taken earlier) than was taken by the court to ensure that in that case the custody time limit was complied with. However, it is not correct, as has been submitted before us, that judges are entitled to ignore questions of the non-availability of resources."

35. In *R (McAuley) v Crown Court at Coventry* [2012] EWHC 680 (Admin), [2012] 1 WLR 1766, Sir John Thomas P (giving the judgment of the court) noted at [33]-[34] that careful consideration must be given by Resident Judges to listing cases in a way which ensures that custody time limits are met. At [35], he added this:

> "If, despite such careful management, an application has to be made to extend a CTL in a routine case because the funds by way of allocated sitting days are insufficient to enable the case to be heard within the CTL, then the application must be heard in open court on the basis of detailed evidence. It is clear from Ex p McDonald [1999] 1 WLR 841, 846 that it is for the prosecution to satisfy the court of the need to extend CTL. It must follow that evidence from the senior management of HMCTS must be provided well in advance of the hearing to the defendant and adduced by the CPS to the court. 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."

36. In *R v Bennett & Feeney* (a first instance case) the trial had to be adjourned because of the non-availability of counsel due to a no returns policy which the CBA had invited its members to adopt during a dispute over legal aid rates in 2014. Turner J, sitting at Manchester Crown Court, concluded that the absence of counsel, because of the 'No returns policy' was a good and sufficient cause for extending the time limit on the facts of the case before him. He began by noting at [31] that "[a]ll reasonably practicable efforts must be made to find proper alternative representation and evidence of such efforts should… be before the court". He continued:

> "The feature in this case, however, which to my mind distinguishes it from those cases in which it is alleged that the timetabling of a routine case has been undermined by systemic failures of resourcing is the element of the timing of the 'No returns policy'. At the time this matter was listed for trial, no-one could have predicted that the date fixed would be likely to be imperilled by a dramatic and relatively sudden change in the approach taken by the publicly funded bar to the issue of doing returns.
>
> A proper distinction can be drawn between the chronic and predictable consequences of long-term underfunding on the availability of courts and judges and the impact of an unheralded implementation of a 'No returns policy'."

37. In *R (DPP) v Crown Court at Woolwich* [2020] EWHC 3243, [2021] 1 WLR 936 (the *Woolwich* case), Lord Burnett CJ and Holroyde LJ considered a challenge to a refusal to extend custody time limits in the context of adjournments occasioned by the Covid-19 pandemic. The court held that the problems in accelerating the capacity of the Crown Court to hold jury trials were practical, not financial, though the MOJ had understandably been keeping a close eye on expenditure. It continued as follows:

> "38… 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 courtrooms in otherwise Covid-safe buildings.
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> 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 courtroom 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 [2012] 1 WLR 2766. 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."

38. At [40]-[41], Lord Burnett said that adjournments occasioned by the lack of available courtrooms "or indeed a lack of judges or available lawyers, for example" would supply a good cause. It might not, however, be a sufficient cause:

> "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)."

39. At [44], the court identified the following principles as applicable to applications to extend time limits in the context of 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 courtrooms 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.
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> (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 three months, so that the court retains the power to review the position in the light of changing circumstances."

40. Very recently, in *R (Marten) v Crown Court at Lincoln* [2022] EWHC 2283, Macur LJ and Wall J quashed a decision to extend a custody time limit where the decision was inadequately reasoned and there was insufficient evidence to justify the extension. The court in that case was, however, applying well-established principles.

A chronology of the CBA action

41. In order to understand the applications before us, it is necessary to set out an outline of what we have been told by the parties about the underlying causes of the dispute between the CBA and the MOJ.

42. The position of the CBA is that over the last five years, the criminal Bar of England and Wales has lost approximately a quarter of its full-time juniors and full-time KCs. The CBA attributes this to low remuneration and high levels of work-related stresses. At the same time, the backlog of cases in the Crown Court has increased. The figures provided to us by the parties, up to date as at 31 July 2022, and not therefore covering the most recent period of disruption, show a backlog of 59,992.

43. In November 2021, the MOJ published Sir Christopher Bellamy's Independent Review of Criminal Legal Aid. He noted at paragraph 1.33 that:

> "The adversarial system of the CJS cannot function without the defence. If the providers of criminal legal aid defence were to fail or be substantially weakened, the CJS as a whole would grind to a halt, with obvious adverse consequences, not least in the context of reducing the back-log. Moreover, criminal legal aid does not merely support the defence: it is the cradle of many barristers who also prosecute, and of solicitors and others who later join the CPS, or other authorities who need criminal law expertise. Criminal legal aid also provides the training ground for many who later become judges."

44. Sir Christopher made various recommendations. There has since been engagement between the CBA and the MOJ. The MOJ accepts that reform is needed to the basis and rates of payment for publicly funded legal aid work in the Crown Court. However, the CBA took and continues to take the view that the pace and content of the reforms currently proposed are insufficient to meet the scale of the problem facing the criminal Bar and therefore the criminal justice system generally.

45. The result has been a series of ballots of CBA members on proposed forms of action. On 18 March 2022, following a ballot, the CBA announced a no returns policy under which, with effect from 11 April 2022, members were encouraged not to accept returns of briefs funded under the AGFS from colleagues.

46. On 20 June 2022, following a second ballot, the CBA announced that members would be encouraged to accept no new instructions (including returns) and also to participate in days of action in which barristers would not appear on particular days: 2 days in the week commencing 27 June, 3 days in the week commencing 4 July, 4 days in the week commencing 11 July and the whole of the week commencing 18 July. The days of action then covered the whole of every other week in July and August.

47. On 22 August 2022, following a third ballot, the CBA announced that the non-acceptance of new instructions (including returns) would continue and the days of action would be escalated to take place indefinitely from 5 September 2022.

48. Individual barristers were advised to consider whether they should nonetheless appear if the case met certain exceptional criteria, relating inter alia to the vulnerability of the defendant or witnesses.

The Bristol case

49. Mr William Dursley, the first Interested Party, is charged on two indictments and between those two indictments has pleaded guilty to two counts (theft of a bicycle and assaulting an emergency worker) and not guilty to three (including threatening another with a cut-throat razor). The offences are said to have been committed on 8 March 2022.

50. Mr Dursley first appeared at Bristol Magistrates' Court on 10 March 2022, where the Crown applied to remand him in custody. The court acceded to this application on the basis that there were substantial grounds to believe that, if bailed, he would commit further offences and interfere with witnesses. The custody time limit was 8 September 2022. There was a Plea and Trial Preparation Hearing (PTPH) on 8 April 2022 at which his trial on the charges to which he has pleaded not guilty was fixed for 1 September 2022. No bail application was made at the PTPH.

51. On 23 August 2022, a day therefore after the CBA announcement of 22 August 2022, counsel instructed to defend Mr Dursley at trial (who had appeared on his behalf at the PTPH) wrote to the court to indicate that she was participating in the CBA action and would not attend court on 1 September 2022.

52. On 1 September, the Crown was ready for trial. Mr Dursley was produced. The barrister instructed to defend him did not attend; nor did anyone else attend on his behalf. In anticipation of this, the Crown had on 31 August 2022 filed a written application to extend the custody time limit.

53. The application came before the resident judge at Bristol, HHJ Blair KC. He adjourned the trial to 24 October 2022 on the basis that the defendant was unrepresented and refused to extend the custody time limit. The judge reduced the reasons for his ruling to writing. He found as a fact that the prosecution had acted with all due diligence and expedition, so the condition in section 22(3)(b) of the 1985 Act was satisfied. In his view, however, there was no "good and sufficient" cause to extend time. Having cited the relevant paragraphs of *Archbold* and the decision of Turner J in *Bennett & Feeney*, he said this:

> "8. Prosecution counsel in this case… submitted to me that releasing this defendant would give rise to a very high risk of him intimidating and threatening the complainant in this case not to come to court. In my view there is no caselaw which supports the proposition that such a risk can be categorised on its own as 'some other good and sufficient cause'. If that were so, the reasons for almost everyone remanded in custody under the principles of the Bail Act would amount to 'some other good and sufficient cause' and that would make section 22(3)(a)(iii) of the Act and the CTL regime completely toothless and redundant.
>
> …
>
> 10. The overwhelming majority of barristers undertaking legally aided criminal defence work in England and Wales refused to

> take 'returns' of cases from other instructed barristers in April of this year. Very many also refused to take on new legally aided cases. Thereafter they initiated a course of action which involved them declining to attend the Crown Court on alternate weeks. This is one such week. As of next week they are to decline to attend Crown Courts at all.
>
> 11. This is a completely routine type of case. The State has had many many months in which to resolve the current dispute over the requisite level of remuneration to pay in order to attract the services of barristers to act on behalf of people benefitting from Representation Orders. On the one hand the State demands trials to commence within an applicable custody time limit, and on the other it holds the purse strings for remunerating those who are required under our rule of law to be provided with advocacy services. In my view today's predicament arises precisely because of the chronic and predictable consequences of long term underfunding. The unavailability of representation for the defendant today has arisen because of a persistent and predictable background feature of publicly funded criminal litigation.
>
> 12. I am not at all persuaded, therefore, that there is a 'good and sufficient cause' to extend the CTL in the particular circumstances of this case. The duration of the delay is a concern. The reason for there being a delay is the impact of the vast number of extra trials we are having to deal with from the backlog caused by the limitations placed upon our operations by the pandemic. That problem fell on top of a pre-existing trial caseload before 23 March 2020 (when I stopped all new trials for a period because of Covid) which could have been driven down lower, if we had been permitted to do so, by sitting more court days."

54. The consequence was that the custody time limit would expire on 8 September 2022, though Mr Dursley remained in custody in respect of the two offences to which he had pleaded guilty. We were told at the hearing that he remains in custody today, an application for bail having been refused.

The Manchester cases

55. Mr Benjamin Smedley, the second Interested Party, is charged on an indictment containing offences of wounding with intent, affray, criminal damage, making a threat to kill and possession of a bladed article. Mr Adam Mayall, the third Interested Party, is jointly charged on the same indictment with the same offences, apart from making a threat to kill. The offences are alleged to have taken place on 8 March 2022 during a fight in domestic premises and in the street outside. It is alleged that the fight culminated in an altercation with multiple weapons including a machete, a twelve-inch kitchen knife, a bat and a glass bottle and that threats to shoot were made and a victim stabbed, causing a collapsed lung. Damage was also caused to a vehicle.

56. On 14 April 2022, the defendants appeared in the Crown Court at Manchester (Minshull St), where the matter was listed for a PTPH before HHJ Potter. They both pleaded not guilty to all charges save that Mr Smedley pleaded guilty to criminal damage. On the same date, the matter was set down for trial to commence on 5 September 2022 with an estimated length of hearing of 4 days. The custody time limit for Mr Smedley was due to expire on 9 September 2022. The custody time limit for Mr Mayall was due to expire on 21 September 2022.

57. On 5 July 2022, the court heard an application for bail on behalf of Mr Smedley. Bail was refused on the basis that there were substantial grounds to believe that he would commit further offences and fail to surrender. On 7 July 2022, the court heard a bail application on behalf of Mr Mayall. Again, bail was refused. Both Messrs Smedley and Mayall have previous custodial sentences for offences against the person and both have previous convictions for failing to surrender to custody.

58. On 26 August 2022, solicitors for Mr Mayall wrote to the court indicating that he was unrepresented and attempts to find representation had failed. The case was accordingly listed before HHJ Greene on 30 August 2022. Neither the Crown nor Mr Mayall sought an adjournment, but the judge nonetheless decided to adjourn the trial to 31 January 2023, with a time estimate of 4 days. The Crown indicated an intention to apply to extend custody time limits for both defendants.

59. The written application to extend custody time limits was lodged on 1 September 2022 and the application was listed for hearing on 5 September 2022. Counsel for Mr Mayall uploaded a letter making clear that he would not attend on 5 September, citing another professional commitment which was not funded under the AGFS. He nonetheless made written submissions opposing any extension of custody time limits, both on the ground that the prosecution was not trial ready and on the ground that the present crisis in representation had been caused by the state. In this latter regard, he cited an excerpt from the decision of HHJ Blair KC at Bristol.

60. The hearing on 5 September took place before HHJ Landale. Advocates for the Crown and Mr Smedley attended. It was submitted on behalf of the Crown that the prosecution would have been ready for trial. The judge found that the prosecution had acted with all due diligence and expedition, so the condition in section 22(1)(b) was satisfied. She cited Turner J's decision in *Bennett & Feeney* and continued as follows:

> "It is clear that since April 2022, less than one month after the start of these proceedings, the overwhelming majority of barristers undertaking legally aided criminal defence work in England and Wales have refused to take returns of cases from other instructed barristers and have also since then refused to take on new legally aided cases. This has progressed to the extent that as of today, 5th September 2022, they are to decline to attend Crown Courts at all.

> Whilst this is a serious case, I conclude it is a routine type of case. The defendants are entitled to be represented at trial for these serious offences and enjoy the benefit of the representation order to effect that representation. The State has had many months in which to resolve the current dispute over the level of remuneration to pay in order to attract the services of barristers to act on behalf of people benefitting from representation orders. It is the State that requires trial to begin within an applicable custody time limit and it is the State that provides the level of remuneration to fulfil its obligations to provide defendants with advocacy services.
>
> The unavailability of representation for Mr Mayall today has arisen because of a persistent and predictable background feature of publicly funded criminal litigation. I am not persuaded, therefore, that there is a good and sufficient cause to extend the custody time limit in the particular circumstances of this case. Accordingly, the application is refused and the custody time limit will expire on 9th September."

61. As we have said, the present claims for judicial review were not formally filed until the morning of 8 September 2022 and no application for interim relief was made. The court fixed a rolled-up hearing for the first date on which that hearing could fairly take place: 15 September 2022. Accordingly, Mr Smedley was released on 9 September 2022. In the circumstances we have described in our earlier judgment, it was necessary to adjourn the substantive hearing originally fixed for 15 September 2022. Again, no application for interim relief was made. Mr Mayall was released on 21 September 2022.

Other first instance decisions

62. We have been provided with a number of other first instance decisions refusing to extend custody time limits: *R v Lin* (HHJ Hales KC, 5 September 2022); *R v Owen* (HHJ Gilbart, Bolton Crown Court, 6 September 2022); *R v Musonza* (HHJ Lockhart KC, Warwick Crown Court, 6 September 2022); *R v Magezi* (HHJ Raynor, Leicester Crown Court, 8 September 2022); *R v Harlow* (HHJ Hales KC, Woolwich Crown Court, 14 September 2022) and *R v AM* (HHJ Pringle KC, Oxford Crown Court, 16 September 2022). We have read all these decisions carefully. We have however naturally concentrated on the two decisions challenged before us, though the decision of this court will have implications for future custody time limit decisions, a good many of which we understand are currently "waiting in the wings."

Issue (1): The principles and approach to be applied by courts when considering applications to extend custody time limits occasioned by adjournments in the context of the present action by the CBA

63. The present situation is unprecedented. Although barristers have adopted a no returns policy before, there has never been a situation in which barristers have withdrawn their labour indefinitely and in very large numbers. Although individual barristers continue to consider, in each individual case in which they

are instructed, whether to appear on dates fixed for hearings, they have in practice declined to appear in a very large number of cases. The result is that courts across England and Wales have been and are faced with a situation beyond their control in which they have no option but to adjourn the trials in these cases, including many where the defendant is in custody and the relevant custody time limit is about to expire.

64. This presents in stark form a clash between two important sets of public interests. The first are those public interests served by remanding a defendant in custody in the first place, usually for the protection of the public from further offences (often offences of violence) and to preserve the integrity of the trial process (by ensuring the attendance of the defendant and avoiding interference with witnesses). The second are those of defendants who, whatever the circumstances leading to the refusal of bail, enjoy the presumption of innocence. If custody time limits are extended, defendants refused bail will spend longer in custody than the period set by Parliament; and they will have no recourse for any time spent on remand if, in due course, they are acquitted.

65. Balancing these public interests presents particular difficulties where, as here, the need for an extension of the custody time limit, and the cause of the adjournment of a trial, is an industrial dispute between criminal barristers (those represented by the CBA) and the state. Acknowledging that to be so, it is nonetheless a principle of cardinal importance that judges refrain from endorsing the position of either side in such a dispute. Indeed, they must scrupulously avoid appearing to do so, whatever their own personal views about the merits. In short, they must not enter the fray. This does not mean, however, that judges are required to ignore reality. If, as a matter of fact, the effect of the CBA action is to make representation unavailable in a large proportion of cases, that fact must be confronted.

66. The general approach to be adopted when considering applications to extend custody time limits, though placed in the context of the pandemic, can be found most recently in the *Woolwich* case at [44]. Although there is a distinction between the situation which led to that decision, and the situation that has led to the applications to this court, against the background we have described, and for present purposes, we would wish to emphasise the following.

67. First, section 22(3)(a)(iii) imposes two distinct requirements. The cause must be both good and sufficient: *Abu-Wardeh*, 1086 (Auld LJ); the *Woolwich* case, [40]-[41] (Lord Burnett CJ). Since Parliament specified the same limits for all offences (other than treason), neither the seriousness of the offence nor the shortness of the extension sought can qualify as a good cause. The suggested cause must be a reason for postponement of the trial and, for that reason, an extension of the custody time limit. Otherwise, however, there is no constraint on the causes that can qualify as good: *Roddie*, 306 (Lloyd LJ); *Abdu-Wardeh*, 1086 and 1090 (Auld LJ); *McDonald*, 847-8 (Lord Bingham CJ). Accordingly, adjournments occasioned by the lack of availability of court rooms and judges (including for resource reasons) can in principle qualify as a good cause: *Abdu-Wardeh*, 1090 (Auld LJ); *McDonald*, 848 (Lord Bingham); *Gibson*, [31] (Lord Woolf CJ); *McAuley*, [35]. So too can the absence of defence counsel.

68. Secondly, in considering the separate question whether there is a sufficient reason for an extension of time, the court must exercise considerable caution before keeping a defendant in custody beyond the time reasonably necessary for his case to be prepared for trial for administrative or resource reasons unconnected with his case: see the reasoning of Toulson J (as he then was) cited in *McDonald* at 948-9 (Lord Bingham). In the *Woolwich* case at [41], Lord Burnett made clear that causes of delay which are systemic (i.e. which affect the criminal justice system as a whole) are less likely to qualify as sufficient. Sir John Thomas P made a similar point, in *McCauley* at [35].

69. Thirdly, in cases where the cause of delay giving rise to a need to extend custody time limits is systemic, judges must be astute not to exercise the power to extend custody time limits as a matter of routine, and allow the exception to become the norm, as this would undermine the purpose of the statutory regime and remove the element of Parliamentary control which Parliament has required.

70. This latter point is, in our judgment, of considerable constitutional significance. Parliament decided to confer power on the Secretary of State to set maximum periods for those awaiting trial in the Crown Court. It specified that regulations varying those periods should be laid before Parliament and subject to annulment by either House of Parliament. The regime reflects the fact that the setting and varying of custody time limits involves a balancing of public and private interests (the latter being the interests of the individual defendant).

71. Parliament decided that, at the general level, this balancing exercise should be subject to democratic control. It is important not to lose sight of why. A Government which wishes to extend custody time limits will have to explain to Parliament why it considers it is necessary to do so. During the Covid-19 pandemic, and after the decision in the *Woolwich* case, the Secretary of State decided that it was necessary to increase custody time limits. That decision was subject to Parliamentary control. Were the Government to decide it was necessary to vary custody time limits *generally* in the current circumstances (that is, against the background of the CBA action) it would have to explain to Parliament why it considered it was necessary to do so. If the time limits were then increased, this would have been subject to Parliamentary scrutiny.

72. As to what the view of Parliament might then be, this is not territory upon which the courts should venture. Increasing resources for the criminal justice system may of course involve decreasing the resources available for some other beneficial public purpose. As Lord Burnett made clear in the *Woolwich* case at [38], there may be difficult choices here. The trade-offs involved in these kinds of resource allocation questions are, quintessentially, for the executive, subject to Parliamentary control, and not for judges.

73. Fourthly, for similar reasons, it is inappropriate for judges hearing applications to extend custody time limits to enter into the merits of what is now an industrial dispute between the MOJ and the CBA. Different judges may have different views about the rights and wrongs of the dispute. Apart from other considerations, if the outcome of an application to extend a custody time limit depended on the view of the merits taken by a particular judge, the potential for unfairness and inconsistency is obvious.

74. Fifthly, neither is it necessary for any judge to inquire into the root causes of the present dispute. The state as a whole is under a duty to secure the right of those facing a criminal charge who do not have sufficient means to pay for legal assistance, to be given it free, when the interests of justice so require: see Article 6(3)(c) of the European Convention on Human Rights (the Convention). If, in consequence of the present dispute, there is a systemic inability to obtain such assistance, it is unnecessary to attribute that inability to one side or the other. Attribution of fault is irrelevant. The blamelessness of the prosecution is, likewise, irrelevant. Once the stage is reached that the unavailability of legal assistance has become a chronic or routine feature of the criminal justice system it is likely that the absence of representation will not be capable of supplying a sufficient reason for extending custody time limits.

75. Where therefore the trigger for an adjournment is the indefinite action by the CBA, judges should resist the temptation to search for prior causes or to attribute blame to one side or the other to the dispute. Viewed from the perspective of the defendant, it does not matter. The outcome is the same: no representation is available.

76. Sixthly, the unavailability of legal representation which is the result of a development which is relatively recent and could not have been predicted with confidence at the time the trial was listed, or the time limit last extended, can in principle constitute a sufficient reason to extend custody time limits. However, even when the inability to secure representation can constitute a sufficient reason for extending time, the question whether it does so is likely to depend on the circumstances of the individual case and, in particular, on the factors identified by Lord Burnett in the *Woolwich* case at [44].

The heart of the matter

77. The present position is in our judgment, akin to that which faced the court during the Covid-19 pandemic, although not identical to it. As then, the background is a set of circumstances over which the court has no control with an indeterminate endpoint. The court does not have a crystal ball. Set against that is the primary purpose of the legislation, which is to ensure that the periods for which unconvicted defendants are held in custody awaiting trial are as short as reasonably and practically possible: see *McDonald*, 846 (Lord Bingham).

78. In our judgment, the CBA's announcement of indefinite action on 22 August 2022, can, at present and in principle, constitute a sufficient reason to extend custody time limits (as it is the result of development which is relatively recent, and could not have been predicted with confidence at the time the trial was listed or the time limit last extended). But this will not remain the position for long. If the CBA action continues, there will shortly come a time when the absence of representation in the context of the current dispute can be considered chronic and routine. In accordance with well-established principles, once that stage is reached, it is likely that the absence of representation will no longer be capable of supplying a sufficient reason for extending custody time limits.

79. The real difficulty, as was acknowledged by all counsel appearing before us, lies in identifying when that time has come. In the *Woolwich* case, the court

decided that, where an extension of the custody time limit is considered to be justified applying the principles it had identified at [44], the extension should be for a comparatively short period: no more than about three months, so that the court retains the power to review the position in the light of changing circumstances. We consider such an approach should be adopted in the current circumstances.

80. As the DPP acknowledges, there are a large number of cases raising issues similar to those in the cases before us. Guidance is now sought from this court therefore to ensure a consistency of approach and fairness across the criminal courts. In the circumstances, we think it right to indicate our view. We consider that if the situation remains as it is now, the relevant point at which the unavailability of legal representation can properly be described as chronic or routine is likely to be reached by the last week in November 2022 (by which time three months will have elapsed from 22 August 2022). Once this point is reached, the absence of legal representation in the context of the CBA action is unlikely to be capable of supplying a sufficient reason for extending custody time limits.

81. The solution to the current dispute is not a matter for the courts. There are different ways in which the Government could ensure that legal representation is available to defendants at the time of their trial on criminal charges, including laying regulations before Parliament seeking the variation of custody time limits. If the situation remains as it is now however, the statutory scheme ordained by Parliament makes it likely that, once the absence of representation has become chronic or routine, defendants who have the benefit of existing custody time limits (including those whose time limits have already been extended) will have to be released.

Issue (2): Were the decisions before us lawful?

82. In the Bristol case, the experienced Resident Judge concluded that the cause of the adjournment sought in that case fell on the routine side of the line and so could not qualify as a sufficient cause to extend the custody time limits. We are acutely conscious that he and the other circuit judges whose decisions we have considered have a great deal of direct experience of the current difficulties in securing representation in the Crown Courts. Nonetheless, we consider that the judge fell into error in attributing the current unavailability of representation to "long term underfunding". In doing so, his focus moved from the proximate cause of the adjournment – the letter of 23 August 2022 from the defendant's counsel following the CBA's announcement of 22 August 2022 – to the separate question of whether the Government was ultimately to blame for the unavailability of representation.

83. In our judgment, it was neither necessary nor appropriate to consider that question. It was unnecessary because, regardless of the cause of the dispute between the CBA and the Government and the reasonableness of otherwise of their respective positions, it would remain the case that representation is unavailable; and we see no reason why the defendant should bear the consequences, at least once the unavailability of representation has become chronic or routine. It was inappropriate because in ascribing blame to the

Government the judge appeared to endorse the position of one side in the present dispute.

84. The judge should have compared the position on 8 April 2022, when the trial was listed, with the position before him on 1 September 2022. On 8 April 2022, the CBA policy of no returns had already been announced and was about to come into effect. That policy could certainly have been expected to have some effect on the ability to list some cases within custody time limits but could not have been predicted to render it impossible for the trial to take place within the custody time limit. At that stage it was not possible to predict the subsequent days of action announced on 10 June 2022, let alone the indefinite action announced on 22 August 2022. On 1 September 2022, when the Crown's application to extend the custody time limit came before the judge, it was only just over a week since the latter announcement. Counsel's letter informing the court that she would not be attending the trial came on the following day.

85. Accordingly, on 1 September 2022, the cause of the adjournment could not yet be said to fall into the "chronic" or "routine" category. To the extent that he decided that it did, and thus that it could not in principle qualify as a "good and sufficient cause" for extending time under section 22(3)(a)(iii) of the 1985 Act, the judge fell into legal error. He should have gone on to consider on the facts of the case whether the extension should be granted, bearing in mind the factors identified by Lord Burnett at [44] of the *Woolwich* case.

86. The overall position in the Manchester cases is, in our judgment, the same, though it is right to record that HHJ Landale did not attribute the situation before her to historic underfunding. In our view, the stage had not yet been reached when it could be said that the general unavailability of legal representation as a result of the dispute could not constitute a sufficient cause to justify extension of the custody time limits. To the extent that the judge concluded that it could, she erred in law.

87. We have considered carefully the additional points made on behalf of Mr Mayall. In his case, the trial was listed on 14 April 2022, after the no returns policy had begun but before the days of action had been announced and well before the announcement on 22 August 2022 of indefinite action. We are told that the unavailability of his instructed counsel on the trial date had been known since the trial was listed in April 2022 and that he was unavailable because he was instructed on another case, which was not funded through the AGFS and so did not fall within the scope of the CBA's action. Thus, it is said that the real reason for the extension was the no returns policy, which had been announced in March 2022 and was certainly well known when the trial was listed.

88. We do not accept this argument. Neither the court nor the prosecution appears to have been informed at the time when the trial was listed that difficulties with representation were envisaged. In late August, there was a late and unsuccessful attempt to secure the services of an advocate from the Public Defender Service, which suggests that the unavailability of representation was unclear even then. The judge attributed the adjournment not to the no returns policy specifically but to the unavailability of counsel more generally. On the facts of the case, the

unavailability of representation arose from a combination of factors which were not and could not easily have been predicted when the trial was listed.

89. Nor do we consider that human rights considerations dictated the refusal of the application to extend custody time limits in the Manchester case. In England and Wales, the regime prescribed by and under the 1985 Act, as we have interpreted it, discharges the state's duty under Article 6(3) of the Convention. We have been shown no decision of the domestic courts or of the European Court of Human Rights which suggests that this provision precludes a power to extend custody time limits for a cause which cannot yet be described as a chronic or routine feature of the system.

Issue (3): Powers to extend custody time limits after their expiry; relief

90. When the claim was issued, the DPP submitted that once the custody time limit expires, "there is no power for a Crown Court judge retrospectively to grant an extension of custody time limits, and it appears that this limitation remains even if the Administrative Court later quashes a refusal to extend custody time limits."

91. There is Divisional Court authority supporting this proposition. In *R v Croydon Crown Court ex p. Customs and Excise* (unreported, 24 June 1997), Buxton J (with whom Lord Bingham CJ agreed) endorsed the position agreed between counsel that, in a case where the time limit had expired, there was no point in quashing the original refusal and remitting the decision to the Crown Court. This was because "the judge, even if ordered to hear the application by this court, would still have to decide it according to law, and even if he were otherwise disposed to extend the custody time limit he could not do so because by s 22(3) such extension can only be made before the expiry of the existing custody time limit". This, it was said, would be "the insuperable obstacle to the granting of any effective relief in this case". It was suggested that consideration be given to the enactment of a statutory provision suspending the running of time limits pending an application for judicial review (by analogy with section 22(9), which suspends time limits where there is an appeal from a magistrates' court to the Crown Court).

92. In similar vein, in *R v Peterborough Crown Court ex p. L* [2000] Crim LR 470, Rose LJ (with whom Smith J agreed) noted that, on the plain terms of section 22(3), there was no power to extend a custody time limit after its expiry. There had, he said, been repeated unanswered pleas for a statutory amendment suspend the running of the time limit pending application to the Divisional Court. At [14], he added:

> "In the absence of such a statutory provision, where an application is made to the crown court before expiry of the time limit and the judge's decision is thereafter reviewed by this Court, no further application for extension can be made to the Crown Court once the original time limit has expired. The present case demonstrates the problem. If this court concludes that the Crown Court judge was wrong, it is now impossible the time limit having expired on 18th November, for the prosecution

> to make a further application to the crown court for an extension. This is so despite the fact that the prosecution's original application was properly made before expiry of the time limit."

93. For the DPP, Mr Tom Little KC now submits that, despite the language of section 22(3) of the 1985 Act, the lack of any amendment and this authority, the difficulty can be surmounted by using the power conferred by section 31(5)(b) of the 1981 Act. This power was introduced by amendment in the Courts, Tribunals and Enforcement Act 2007 with effect from 6 April 2008 and thus postdates the Divisional Court authority to which we have referred.

94. To evaluate this submission, it is necessary to set out section 31(5) and the immediately succeeding subsections:

> "(5) If, on an application for judicial review, the High Court makes a quashing order in respect of the decision to which the application relates, it may in addition–
>
> (a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or
>
> (b) substitute its own decision for the decision in question.
>
> (5A) But the power conferred by subsection (5)(b) is exercisable only if–
>
> (a) the decision in question was made by a court or tribunal,
>
> (b) the quashing order is made on the ground that there has been an error of law, and
>
> (c) without the error, there would have been only one decision which the court or tribunal could have reached.
>
> (5B) Unless the High Court otherwise directs, a decision substituted by it under subsection (5)(b) has effect as if it were a decision of the relevant court or tribunal."

95. Since the effect of a quashing order is to treat the challenged decision as void ab initio, Mr Little submits that the effect of an order under section 31(5)(b), read with section 31(5B), is to substitute a decision extending the time limit effective from the date of the original decision. If this submission were well founded, the substituted decision would be treated as made before expiry of the time limit.

96. Despite the attractive way in which it was put, we consider that this submission must be rejected, for three reasons.

97. First, the effect of a quashing order, unless made under the new provisions in section 29A of the 1981 Act (as inserted by section 1 of the Judicial Review and

Courts Act 2022), is indeed to treat the quashed decision as void ab initio. It does not follow, however, that whenever a quashing order is made there is power to re-take the quashed decision. In a case where the quashed decision is taken under a statutory power, the question whether there is power to re-take the decision depends on an analysis of the statutory scheme.

98. Secondly, on the question whether the Crown Court has power to extend time after expiry of the relevant limit, it would take a great deal to persuade us to depart from the conclusions reached by previous Divisional Courts, even though in some of the earlier cases it appears that counsel were agreed on the relevant point. In any event, we consider that the language of section 22(3) of the 1985 Act shows the earlier decisions to be correct.

99. Thirdly, there would in our view be serious conceptual difficulties if this court could achieve by an order under section 31(5) of the SCA 1981 what the Crown Court cannot. The logical consequence of this would be that a person who had been released on bail would be treated as having been unlawfully at large during the period between his release and the date on which the substituted decision was made; and any bail conditions subsequently imposed would be retrospectively invalidated. Mr Little sought to convince us that the substituted decision would not necessarily have these consequences, but he did not succeed in explaining why not if (as he submitted) it took effect from the date of the original refusal. In our view, it is plain that section 31(5)(b) confers no power on this court to make an order depriving a subject of his liberty retrospectively; and we can see no route by which an order treated as if made on the date of the original decision could deprive a person of his liberty only with effect from some future date.

100. As least in the present context, the better interpretation of section 31(5)(b) is that where the conditions in section 31(5A) are satisfied, it confers power on this court to do what the Crown Court could do upon remission. In other words, it enables this court to bypass a step (remission) which would add nothing of substance, given that there is – now – only one decision legally open to the Crown Court. Section 31(5B) means that, absent any direction to the contrary, the legal effect of the substituted decision is the same as if the decision had been taken by the Crown Court following remission. It does not, however, enable this court to exercise statutory powers conferred on the Crown Court in circumstances where that court could not do so.

101. Since the custody time limits in the cases before have now expired, it follows that neither the Crown Court nor this court has any power to extend those limits. That being so, no purpose would be served by quashing any of the challenged decisions. Accordingly, although we grant the DPP permission to apply for judicial review, in the exercise of our remedial discretion, we decline to quash the challenged decisions.

102. We do not accept Mr Little's submission that this conclusion deprives the judicial review remedy in the current context of utility. We recognise that decisions to refuse to extend custody time limits are likely to be taken shortly before the limits expire. We accept that, where the DPP wishes to bring judicial review proceedings, in most cases there is unlikely to be enough time to fix a

full judicial review hearing, even on a rolled-up basis, before expiry of the relevant time limit. This does not, however, mean that a claim for judicial review will necessarily be futile. If the DPP can show a strong arguable case that the Crown Court has erred, and a substantive or rolled-up hearing before the Administrative Court is directed, we can see no reason why, in an appropriate case, there should not be a short extension of the time limit to allow the hearing to take place.

103. Any judge asked to make such an extension would, of course, have to be satisfied that there was a good and sufficient cause. Each case would have to be considered on its own facts. However, in our view, a sufficient cause could in an appropriate case be supplied by a pending judicial review claim which the Administrative Court considered to be strongly arguable. The cause for this short extension would be different from the one initially advanced and found not to be sufficient, so there would be no abuse of process. Despite the submission of Mr Mably, we do not consider that the grant of an extension before expiry of the time limit would be inconsistent with the scheme of section 22: section 29(9) identifies a circumstance in which the time limit is automatically suspended; it does not preclude the grant of extensions prior to expiry in other cases.

104. We understand that some such extensions have in fact been granted by Crown Court judges pending our judgment in this case. In the future, we consider that applications for short extensions pending the determination of judicial review proceedings should be made to the Administrative Court, rather than the Crown Court. First, we note that, under section 8 of the 1981 Act, the powers of the Crown Court are exercisable by any judge of the High Court. Secondly, extensions are unlikely to be appropriate in many cases. Given that the effect of the extension would be to deprive the defendant of his liberty in circumstances where a Crown Court judge has refused to extend the time limit, it would be necessary to show a strongly arguable case that the original refusal was unlawful. A judge of the Administrative Court will be best placed to decide if this high threshold is surmounted at the same time as making any directions for an expedited substantive or rolled-up hearing.

105. In addition to a strongly arguable case that the original refusal was unlawful, judges of the Administrative Court will need to be satisfied that <u>all</u> the conditions in section 22(3) are met. Fairness would generally demand that the accused person be given the opportunity to make submissions; and because the application affects that person's liberty, we would expect an oral hearing to be necessary in almost all cases. This makes the timeous grant of public funding applications even more important.

Conclusion

106. For these reasons, we grant the DPP permission to apply for judicial review but decline to quash the challenged decisions. Given the terms of this judgment, there is no need to grant any declaration. We are grateful to all counsel for their able assistance at very short notice.