



Neutral Citation Number: [2022] EWHC 2283 (Admin)

Case No: CO/2155/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/09/2022

Before :

MACUR LJ
WALL J

Between :

The Queen (LEE COLIN MARTEN)
- and -
CROWN COURT AT LINCOLN

Claimant

Defendant

-and-
CROWN PROSECUTION SERVICE

Interested Party

Mr Christopher Jeyes (instructed by Bird & Co) for the Claimant
Mr Lyndon Harris (instructed by CPS) for the Interested Party

Hearing dates: 24th August 2022

Approved Judgment

Macur LJ :

1. This is a judgment of the Court.

Introduction

2. The physical restrictions upon the conduct of Crown Court trials introduced during the Covid-19 pandemic are no longer necessary, but the backlog of cases awaiting trial is, and will be for some considerable time, extensive. This claim for judicial review arises from a successful application by the Crown Prosecution Service (“CPS”) to extend custody time limits (“CTL”) in a ‘routine’ criminal case in which “the prosecution has acted with all due diligence and expedition.”

Background

3. The Claimant is awaiting trial on indictment for four offences which were allegedly committed in September 2021, including assault by beating of his previous partner, possession of a bladed instrument, doing acts tending to pervert the course of justice and criminal damage. He was remanded in custody by the Magistrates, and subsequent bail applications on his behalf have been refused, understandably so in view of his previous criminal convictions which include failure to surrender to bail. The CTLs expired on 21 March 2022.
4. The trial was originally fixed at a pre-trial preparation hearing on 19 October 2021 for a three-to-four-day hearing on the 14 March 2022. This listing was confirmed by the court on 23 February 2022.
5. On 4 March 2022, the Prosecution served a pre-emptive written application for extension of the CTL which confirmed that the prosecution was ‘trial ready’.
6. The trial was not listed on the 14 March but instead the listing officer notified the claimant’s solicitor that the case would be mentioned the following day “so that a new trial date can be identified, and the CTL’s can be discussed...”
7. On 15 March 2022, HHJ Hirst sitting in the Crown Court in Lincoln determined that the trial could not be heard that week “because of court availability” and that the earliest date when it could be relisted was 12 September 2022. Consequently, he extended the claimant’s CTL from 21 March 2022 to 16 September 2022.
8. On 14 June 2022, the claimant sought permission to judicially review the decision asserting error of law, that is, that the judge failed to take into account relevant matters and give full reasons for his decision and, in the alternative, had made an excessive extension to the CTL. His application was refused on the papers, renewed, and heard by Dove J on 28 July 2022. Consequently, permission was granted to apply for judicial review and directions made for the service of any application to amend the claim to be made by 3 August 2022, and for the defendant, the Crown Court at Lincoln, and interested party, the CPS, to serve “any detailed grounds of resistance, and any evidence necessary for the proper determination of this claim by 4pm on 15 August 2022.”

9. The CPS have filed detailed grounds of resistance and appear in this Court by Mr Harris who did not appear below. However, neither the CPS nor the Crown Court at Lincoln (which was not represented by counsel before us), has filed any evidence in connection with the events on 15 March 2022 which we now review.
10. The claimant is represented by Mr Jeyes, who did not appear below. An application to amend the grounds of review has been made in accordance with Dove J's directions. The nature of the amendment is to seek damages for what is claimed to be the claimant's unlawful detention since 21 March 2022 but does not seek to join the Lord Chancellor to the proceedings. By virtue of section 9(3)–(5) of the Human Rights Act 1998, any award would be made against the Crown through the Lord Chancellor as the "appropriate person". However, no award may be made unless the appropriate person is joined. We therefore do not address this point in this judgment.

The legal framework

11. The power of the Secretary of State to make regulations to set time limits in relation to preliminary stages of criminal proceedings for an offence, and the period which an accused may be in custody in relation to that offence, is provided by section 22 of the Prosecution of Offences Act 1985. The regulations relevant to this case are the "Prosecution of Offences (Custody Time Limits) Regulations 1987 (SI 1987/299). By regulation 5, the applicable time limit was 182 days, which in the relevant circumstances was sought to be extended in accordance with section 22(3)(a)(iii) of the 1985 Act for "some other good and sufficient cause".
12. Mr Jeyes rightly identifies these Regulations as "well-travelled" in this Court, and we would add, of common currency at this time in Crown Courts sitting throughout England and Wales.
13. The topic of CTLs last received substantive examination in a Divisional Court presided over by Lord Burnett of Maldon CJ sitting with Holroyde LJ in *Regina (Director of Public Prosecutions) v Crown Court at Woolwich; Regina (Lucina) v Central Criminal Court [2021] 1 WLR 938*, in the context of delays caused as a result of the Covid-19 pandemic, due to a lack of available courtrooms in which jury trials for defendants in custody could be safely heard. The judgment documented the steps taken by and on behalf of the Lord Chief Justice in relation to listing trials during the "lockdown" and the evidence produced regarding the steps taken by the government and Her Majesty's Crown and Tribunal Service ("HMCTS") in response to the pandemic in relation to the Crown Court and jury trials. The Court found the "ubiquitous nature of the problems facing the Crown Court during the pandemic" to be entirely different from localised problems arising from a shortage of courtrooms for a particular period in a particular area or a reduction in the number of sitting days allocated to particular court centres during the relevant fiscal year. Formal evidence about the impact of the pandemic was unnecessary, "if the need for an extension of a CTL results from a shortage of suitable court rooms caused by the Covid emergency, which provides a good cause within the meaning of section 22(3)(a)(iii) of the 1985 Act."
14. Notably, however, the Court did not detract from the long- and well-established jurisprudence in the field, stating:

“ 41 That is not the end of the inquiry. Subsection (3)(a)(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 ...”

15. The Court proceeded in [44] to provide some “non-exhaustive principles relevant to applications for extensions of CTLs during the pandemic”. These principles hold good for applications for extensions which are made post pandemic restrictions; namely, assuming there was a good cause for an extension:

“44 ...

(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. ... 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.

...

(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.”

16. We see no need to refer in this judgment to the overriding purposes of the CTL regime as articulated by Lord Bingham of Cornhill CJ in *R v Manchester Crown Court, Ex p McDonald* [1999] 1 WLR 841. However, we have reminded ourselves of the guidance in relation to the extension of CTL in ‘routine’ cases provided by a Divisional Court presided over by Sir John Thomas P, as he then was, in *R (McAuley) v Crown Court at Coventry (Practice Note)* [2012] 1 WLR 2766.
17. After referring to *R(Gibson) v Crown Court at Winchester (Crown Prosecution Service intervening)* [2004] 1 WLR 1623, which considered the proper approach of a Crown Court where an issue arose as to the availability of judges able to try a homicide case, the Court addressed ‘systemic failures’. Noting that there had not been “any amendment to the time limit set out in the Regulations ... [therefore] it must be inferred that the Secretary of State and Parliament considered that those responsible for the day-to-day management of HMCTS would be able to manage the money provided to them so that in routine cases, ... it would not be necessary to extend a CTL unless there were exceptional or unusual circumstances”.
18. The Court proceeded to detail the approach the Crown Court should take in routine cases where the extension is sought because of lack of resources as follows:

“ 33. ... listing is a judicial responsibility and it is the resident judge who is responsible under the guidance of the presiding judges for determining listing practice, for prioritising one case over another and deciding upon which date a case is listed and before which judge. The listing officer carries out the day-to-day operation of that listing practice under the direction of the resident judge. ...

34 As the extension of custody time limits involves the liberty of a defendant, the resident judge (or his designated deputy if the

resident judge is away from the court centre) must be provided with information on a regular basis, so that there can be proper monitoring of cases nearing their CTL. In a small court centre, such as Coventry, budgets and other resources have to be looked on in a wider context. Such information must therefore include available alternative locations, the availability of judges, the budgetary allocation to the court and other such matters. Provided the experienced listing officer at each court gives the resident judge such regular information and there is close co-operation between courts, routine cases should be managed in such a way that money is always available to enable a case being heard within its CTL. It is, of course, essential that bail cases are not delayed and a sufficient budgetary allocation made so that justice is not denied in cases where the defendant is bailed. If more funds or judges are needed at a court centre, then that information must be passed to those responsible for the provision of money who can then review the position with the judges responsible for the listing of cases. It is wrong in principle and contrary to the terms of the practice direction for decisions to be made which are not made under the direction of the judges responsible for listing.

35 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.

...

36 The judge hearing the CTL application must give a full and detailed judgment. ...

37 We make these observations because experience has shown that there has been a tendency to deal with these applications on a less than satisfactory basis.

38 In the present case, it is clear from the transcript of the hearing before Judge Carr that the CPS did not provide any evidence; the practice seems to have been followed of information being provided by the court staff to the judges. That was wholly inadequate. The case was not given that intense level of scrutiny required.”

Application of the law in the circumstances of this case

19. There is no indication in the transcript of the proceedings which took place on 15 March 2022 of the nature or source of the evidence provided to the judge regarding the availability of a court to host the claimant’s trial. What is apparent is that the evidence was not ‘presented’ by the prosecution in open court and does not appear otherwise to have been made available to prosecution and defence counsel.
20. Following a brief exchange with defence counsel, His Honour Judge Hirst delivered judgment extending CTLs and adjourning a bail application to the week following. In giving reasons for his decision the judge referred to the requirement for “careful consideration and rigorous scrutiny” of the CPS application and said:

“This case was listed in the warned list for this week. It cannot get on because of court availability. The custody time limits are due to expire on 21 March; that is to say, on Monday of next week. The earliest date that can be given for this trial is 12 September. I am entirely satisfied, from enquiries made recently of other courts, that there is no prospect at all of this case getting on any sooner anywhere else. It is not suggested that the prosecution have not acted with all due diligence and expedition. I remind myself that the court may, at any time before the expiry of the time limit, extend the time limit, provided that the court is satisfied that the need for an extension is due in this case to a good and sufficient cause, and that the prosecution has acted with all due diligence and expedition. ... I bear in mind the requirement for careful consideration and rigorous scrutiny. The case law is clear, authority being DPP v Williams & Lucima [2020] EWHC 3243 (Admin), that the unavailability of a court is capable of being a good and sufficient cause. ... I still remind myself of the requirement that the court must exercise its discretion to grant an extension, even if the statutory matters are set out, and I bear in mind all the matters at paragraph 44 of *Williams & Lucima* ...”
21. As indicated above, there has been no evidence filed by the defendant or interested party. The only evidence is produced by the claimant and consists of a listing notice headed “Court 4 – sitting at 10.30 am [Judge] to be named , sitting at Lincoln Magistrates Court, In the event that a recorder is not provided, the following cases[including the claimant’s trial] will be adjourned as indicated- to reserve for the rest of the week”, in association with an e mail sent on 14 March at 1503 stating that the case would be listed on the 15 March 2022 “due to us not being able to accommodate it for trial this week...” and for CTL to be “discussed”.
22. In these circumstances, we agree with Mr Jeyes that we must presume that the judge was informed, by or on behalf of the listing officer, that a Recorder was not available. However, it is impossible for us to discern from the transcript of the proceedings or the judgment why a Recorder was not “provided” or whether his reference to court availability referred to property or judicial resource.

23. Mr Jeyes' short point is that there was no opportunity for the defence to scrutinise the evidence in advance, nor to submit what further inquiries must necessarily be made before the judge was able to find that the lack of a court, assuming this phrase to include available judicial resource, was a 'good and sufficient' reason. There was no indication that inquiries had been made of all other proximate court centres, and not merely those on Circuit, or whether other non-custodial cases which were listed could appropriately be adjourned. In the absence of any detailed reasons in the judgment, regardless that the judge said he had regard to [44] in *Woolwich*, he submits it appears that the judge did elide "good" and "sufficient" reason in his application of the law to the facts.
24. Mr Harris concedes that it would have been better if the judgment was more closely reasoned, but albeit "sparse", the transcript sufficiently bears out that the correct legal test was applied. The issue is one of substance and not form. The judge did not elide to two concepts, having (a) used the appropriate statutory language; (b) read a passage in the decision of *Woolwich* which addressed the fact that they are two distinct concepts; and (c) approached other aspects of the exercise with care and by reference to the appropriate factors. It is clear that listing the trial at other court centres was properly explored; the fact that the judge did not specify which court centres had been contacted, how the enquiry had been phrased and whether there were non-custody cases which could be moved to accommodate the Claimant's trial is irrelevant. This Court is entitled to rely upon the judge's statement that inquiries had been made and satisfied the judge that there were no other courts that could accommodate the trial prior to September 2022.

Discussion

25. It appears to us that the submissions made by Mr Harris, and in the skeleton argument filed, on behalf of the CPS implicitly seek to pray in aid that the continuing impact of the pandemic, which is said to be a major contributory factor in the backlog and therefore as a cause of significant delay, reduces the level of investigation necessary into whether a good reason is also a sufficient reason. However, this argument is not compatible with *Woolwich* or *McAuley* and we reject it.
26. The restrictions upon Crown Court estate dictated by lockdown measures are no longer necessary. The extension to the time limits to 238 days made pursuant to the Prosecution of Offences (Custody Time Limits)(Coronavirus)(Amendment) Regulations 202/953, ended on 28 June 2021. There has been no attempt to persuade parliament to extend them again. This supports the view that it is 'business as normal' and possible to identify those cases which will constitute the 'routine' criminal trial.
27. The judiciary and court staff are making Herculean efforts to address the backlog and, as was HHJ Hirst in this case, often fielding applications in the midst of ongoing trials. Consequently, we recognise that efforts may be made to trim the procedure that should be followed, but equally understand why these attempts may result in such a challenge as this.
28. We do not accept Mr Jeyes' argument that a failure to strictly adhere to the procedure suggested by *McAuley* will necessarily lead to a successful judicial review. As envisaged in [34] of *McAuley*, relevant information should be regularly provided to the Resident Judge, or his/her deputy, with a view to monitoring those cases nearing their CTL. This information may be disseminated within the court centre, and we are aware

that judges dealing with applications for extension of CTL will often call upon the listing officer for updates of the information referred to in [34] of *McAuley* prior to the hearing. If so, it is incumbent upon the judge to provide the detail of this information in open court and to recognise that the application to extend CTL is that of the CPS and not that of the court.

29. Prosecution and defence advocates need to be adequately informed to advance their submissions so to assist the court in the necessary rigorous scrutiny of good and sufficient reason. If the transcript of the proceedings demonstrates such rigorous scrutiny then, although the reasoning in the judgment is sparse, the applicant for judicial review may not be able to establish that lack of the *McAuley* procedure made a material impact upon outcome.
30. That is not the position in this case. We receive no assistance from the transcript of proceedings or the judgment as to the rigour which the judge applied in scrutinising the information he was given that the claimant's trial could not be accommodated for six months. Defence counsel's submission was of the most general and answered with reference to unspecified enquiries made 'recently' of other courts which showed "there is no prospect at all of this case getting on sooner anywhere else." The issue had been identified as lack of judicial resource, but there is no information as to why a Recorder was not 'provided,' and particularly whether because of a 'systemic failure.'
31. Mr Jeyes refers to the six-month extension of CTL as an indication that there was a lax approach to the imperative task of seeking to accommodate a defendant-in-custody's 'routine' criminal trial, quite apart from the indication given in [44] (vii) of *Woolwich* that generally an extension of CTL should not exceed three months so that the Crown Court retained power to review the position in the light of changing circumstances. We consider that he has established an error of law without recourse to this point, for the reasons we give above.
32. In the circumstances we do not address the alternative ground. The judgment in *Woolwich* does not support the argument that any extension longer than three months in a routine case will render the decision unlawful. This is a decision that is fact specific.

Conclusion

33. There is no proper basis that is disclosed upon which the prosecution could show that the need for an extension was due to good and sufficient reason. We grant the application for judicial review and quash the decision. Pursuant to CPR 54.19 (2)(a) we remit the matter to the Crown Court in Lincoln to reach a decision in accordance with the judgment of the court and to determine the conditions of the claimant's bail as deemed appropriate.