



R (Director of Public Prosecutions) v Bristol Crown Court and others
(CO/3263 & 3263/2002)

Press summary: for release at 10.30am on 28 September 2022

This summary does not form part of the judgment.
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Result

1. The Divisional Court today decided that two judges made errors of law when they refused to extend custody time limits. In both cases, the trial had to be adjourned due to the unavailability of counsel in the context of action by the Criminal Bar Association.

Background

2. Some of those accused of criminal offences before magistrates' courts or the Crown Court are remanded in custody. Under powers conferred by statute, the Secretary of State for Justice has set maximum periods for which defendants can be held in custody awaiting trial.
3. 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.
4. Since the spring of 2022, the CBA has encouraged barristers to engage in various forms of action. On 22 August 2022 the CBA announced that it would invite barristers to refuse most publicly funded work indefinitely with effect from 5 September 2022, subject to consideration of individual circumstances.
5. These cases involve decisions by judges in Bristol and Manchester. In each case 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 to extend the custody time limit.

The issues

6. The substantive issues were:

- (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?
- (2) Were the challenged decisions lawful?
- (3) If so, does the Crown Court have power to extend custody time limits after their expiry? Does the Administrative Court have power to substitute decisions extending the custody time limits in these cases? What relief, if any, should be granted?

The Court's conclusions

7. The Court 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 Prosecution of Offenders Act 1985 (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 the Court readily acknowledged the difficulties of resolving applications to extend custody time limits in the current situation. Nonetheless, 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 the Court granted the DPP permission to apply for judicial review, it refused to quash the decisions.
- (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 would be required.

Ends