



# Custody Time Limits (CTLs)

By Callum Church and Sophie Murray

## **INTRODUCTION:**

Those in Criminal Practice, and beyond, will have seen a number of cases recently in which Custody Time Limits (CTLs) have not been extended during the ongoing CBA Action. Two of these decisions were subject to an application for judicial review by the Director of Public Prosecutions ('the DPP'), in the case of [R \(DPP\) v \(1\) Dursley \(2\) Smedley \(3\) Mayall \[2022\] EWHC 2415 \(Admin\)](#). This article will deal with the background of the case, the decision, and the practical impact going forward.

Where appropriate, square brackets will be used to refer to paragraph references within the judgment e.g. [5].

## **BACKGROUND - THE LAW:**

The Secretary of State for Justice has the power to set the maximum time that a Defendant can be remanded into custody awaiting trial. Currently, that maximum is 182 days in a Crown Court case. Once that time has expired, the Defendant must be released. [1]

Pursuant to s.22(3) Prosecution of Offences Act 1985, the Courts are able to extend CTLs. It requires a 'good and sufficient reason' to extend, along with the prosecution acting with all due diligence and expedition.

A fuller summary of the law can be found within the judgment [17-40]. It is not rehearsed in this article for brevity.

## **BACKGROUND - THE FACTS:**

Whilst there are a number of notable cases around the Country (some illustrative links will be left at the bottom of this article, for those interested), the High Court dealt with decisions made in relation to two indictments.

The first was that of William Dursley ('the Bristol Case'). Mr. Dursley faces an indictment containing 5 counts, of which he had pleaded guilty to two. One of the remaining counts included threatening another with a razor blade. A full timeline can be found in the judgment [49-54].

On 1/9/22 Mr. Dursley's case was called in for trial at the Crown Court at Bristol without any Defence barrister due to the CBA Action. The Crown applied to extend the CTLs stating that the lack of Defence Counsel due to the CBA Action was, of itself, a good and sufficient reason for doing so.

HHJ Blair KC refused that application, stating:

*"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."* [11]

Mr Dursley was not, however, released due to him having previously pleaded guilty to the two other offences on the indictment; these counts, accordingly, do not attract CTLs.

The cases of Smedley and Mayall ('the Manchester Case') were to be heard in Minshull Street. The indictment alleges, against Smedley, s.18 wounding, affray, threats to kill and possession of a bladed article. Mayall is charged jointly with Mr. Smedley on all of the aforementioned offences, save for the threats to kill.

Both Defendants had been remanded into custody, with CTLs due to expire in September 2022. The trial was adjourned, due to Mr. Medley being unable to secure representation due to the CBA action, to January 2023. The case was, therefore, listed before HHJ Landale for an application to extend CTLs. This application was refused, citing much the same reasons as those in the Bristol Case [60-61].

The High Court were asked to rule on 3 questions, namely:

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 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?

### **THE DECISION:**

The decision is summarised at paragraph 7 of the judgment:

*“(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.”*

## **PRACTICAL APPLICATION OF THE DECISION**

Each case will be treated on its own merits. The court will have to first decide whether the Crown has acted with all due diligence and expedition. Then consider the issue of whether the unavailability of defence counsel constitutes good and sufficient cause to extend the custody time limits.

The judgment means where a trial can not proceed due to lack of legal counsel this *may* constitute a good and sufficient cause. The judgment, however, makes clear that by the last week of November 2022, lack of availability of counsel due to the CBA Action is ‘unlikely to be capable of supplying a sufficient reason for extending custody time limits.’[80]. In reaching such a decision the court must have regard to the checklist which needs to be addressed by the applicant in each instance:-

1. What is the likely length of the delay in the extension of time?

At this point the prospects of successfully opposing an application to extend CTLs of any length are unknown whilst the CBA Action continues. The November deadline effectively imposed by the judgment is, however, telling. Should a judge be minded to extend CTLs in the current climate, a date for review ought be set on or around this deadline.

2. Was there a previous extension in the case and what were the reasons for that.

Multiple applications over time may fail, especially in situations where further extensions exacerbate other factors.

3. The age and antecedents of the defendant.

The more familiar with custody and serious the antecedent record the more likely the application will succeed.

4. What the likely sentence would be if the CTLs are extended?

It would not be right that a defendant should serve or come close to serving the likely sentence were he convicted. If any extension is likely to take a Defendant near or past any sentence they would likely receive if convicted, this may be a factor that weighs against extending CTLs.

5. Does the defendant have any particular vulnerabilities?

If the defendant is young or has mental health problems they are more likely to struggle with prolonged periods in detention. Therefore consideration may be given to the impact on such defendants of overly long extensions, or periods already spent in custody.

6. Could the delay incurred be reduced by ordering separate trials in multi-handed cases?

It should be noted that this consideration will have to be balanced against the public interest of holding multiple trials in stretched court centres and witnesses having to give evidence multiple times, much like in a severance argument.

It is for the prosecution to make the application and satisfy the court that the criteria are met in each case. The judge will want to consider whether the public interest which was previously best served by remanding the defendant in custody, could now be equally served by stringent bail conditions. It would be appropriate to consider what if any progress had been made during the period of previous incarceration awaiting trial.

A transcript of the High Court's decision in the above case can be found at:

<https://www.bailii.org/ew/cases/EWHC/Admin/2022/2415.html>



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Law is correct as at 30 September 2022

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