

**R. (GIBSON) v WINCHESTER CROWN COURT**

QUEEN'S BENCH (DIVISIONAL COURT) (The Lord Chief Justice  
(Lord Woolf), Lord Justice Rose and Mr Justice Royce):  
February 24, 2004

[2004] EWHC 361 (Admin); [2004] 2 Cr.App.R 14

<sup>LT</sup> Crown Prosecutors; Custody time limits; Due diligence; Extensions of time;  
human rights; Resource constraints; judge or courtroom, state's inability to  
provide

H1. PRACTICE

**Custody time limit**

*Whether extension to be granted where prosecution not acting with all due diligence if that failure not the cause of delay in bringing case to trial—Whether inability of state to provide suitable judge or courtroom for trial admissible ground for extension—Test to be applied when reviewing decision of judge to extend custody time limit—Prosecution of Offences Act 1985 (c. 23), s.22(3) (as amended by Criminal Procedure and Investigations Act (c. 25), s.71 and Crime and Disorder Act 1998 (c.37), s. 43)*

H2. The claimants were charged with murder and held in custody. The prosecution applied to extend the custody time limit for each claimant. The judge considered s.22(3) of the Prosecution of Offences Act 1985, as amended, which provided that a court should not extend a custody time limit unless it was satisfied "(a) that the need for the extension was due to (i) the illness or absence of ... a judge ... (iii) some other good and sufficient cause; and (b) that the prosecution has acted with all due diligence and expedition." He concluded that the prosecution had not acted with all due diligence and expedition, but that that failure on their part had no causative effect. He decided to extend the custody time limit for 211 days because, despite the court doing its best with the limited resources available, a courtroom would not be free for the trial before a High Court judge until then. The claimants applied for judicial review. They argued that having found lack of due diligence and expedition, the judge had no jurisdiction to extend the limits and the inability of the state to provide a suitable judge and/or courtroom for trial was not an admissible ground for an extension either under s. 22(3)(a)(i) or (iii). Issues also arose as to the test to be applied when reviewing the decision of the judge on an application for judicial review and whether the extension should have been granted on the merits.

H3. **Held**, dismissing the applications, that (1) taking a purposive approach to the language of s.22(3) of the 1985 Act, it was possible for a judge to permit an extension

of a custody time limit even if the prosecution had not acted with all due diligence and expedition provided that was not the cause of the need for the extension. There might be a failure on the part of the prosecution at an early stage of the proceedings which caused no delay, and would never cause any delay to the hearing, but it still would amount to a contravention of the requirement that the prosecution should act with due expedition. In such a situation, for there to be no ability for the prosecution to obtain an extension of the custody time limit would result in significant injustice and could be counterproductive so far as the defence were concerned.

H4. *R. v. Manchester Crown Court, Ex p. McDonald* [1999] 1 Cr.App.R. 409, [1999] 1 W.L.R. 841, DC, considered. *R. v. Leeds Crown Court, Ex p. Bagoutie* [1999] EWHC 454 (Admin) followed.

Dicta of Otton L.J. in *R. v. Central Criminal Court, Ex p. Bennett*, The Times, January 25, 1999 not followed.

H5. (2) The availability of resources, whether courtrooms, judges or other resources, was a relevant consideration. The courts could not ignore the fact that available resources were limited and that occasions would occur when pressures on the court would be more intense than they usually were. In such a situation, it was important that the courts and the parties should strive to overcome any difficulties that occurred. If they did not do so, they might debar the court from extending the custody time limits. The sort of matters that had to be balanced by a judge in deciding if there was good and sufficient cause for an extension was the possibility of moving the trial to another venue or the difficulties that existed with regard to the listing of cases before High Court judges.

H6. Dicta of May L.J. in *R. (Bannister) v. Guildford Crown Court* [2004] EWHC 221 (Admin) explained.

H7. (3) Where a case involved the human rights of a claimant, the High Court hearing an application for judicial review had to scrutinise it rigorously at the same time as recognising that the decision was for the court below to take. Unless it could be concluded that the judge had wrongly exercised his discretion the court would not interfere. In the present case, having regard to the reasoning of the judge, he came to the correct conclusion.

H8. (For s.22 of the Prosecution of Offences Act 1985, as amended, see *Archbold* 2004, para 1-266 to 1-269)

### **Application for judicial review**

H9. The claimants, Leslie Gibson and David Gibson, who were in custody awaiting trial for murder, sought judicial review of the decision of Judge Brodrick in the Crown Court at Winchester on November 11, 2003, to extend their custody time limit until June 10, 2004, under s.22(3) of the Prosecution of Offences Act 1985 (as amended by s.71 of the Criminal Procedure and Investigations Act 1996 and s.43 of the Crime and Disorder Act 1998)

At the hearing of the claim the following additional cases were cited or referred to in the skeleton arguments: *Attorney General's Reference (No 2 of 2001)* [2004] 1 Cr.App.R. 317, [2004] 2 W.L.R. 1, HL; *Dyer v Watson* [2004] 1 A.C. 379, PC *Medicaments and Related Classes of Goods, in re (No2)* [2001] 1 W.L.R. 700, CA; *Porter v Magill* [2002] 2 A.C. 357, HL; *R. v Birmingham Crown Court, Ex p. Bell* [1997] 2 Cr.App.R. 363, DC; *R. v Leeds Crown Court, Ex p. Briggs (No 2)* [1998] 2 Cr.App.R. 424, DC; *R. v Leeds Crown Court, Ex p. Redfearn* [1998] C.O.D. 437, DC; *R. v Norwich Crown Court, Ex p. Cox* (1993) 97 Cr.App.R. 145, DC; *R. (Ellis) v Chief Constable of Essex Police* [2003] 2 F.L.R. 566, DC.

H10. The facts and grounds of the application appear in the judgment of Lord Woolf C.J.

H11. *John Lofthouse* (instructed by Peach, Grey & Co., Southampton) for Leslie Gibson.

*James Leonard* (instructed by Sharman & Co., Southampton) for David Gibson.

*Anthony Hacking Q.C.* (instructed by the Crown Prosecution Service, Eastleigh) for the Crown.

*David Perry* (instructed by the Treasury Solicitor) for the Department of Constitutional Affairs.

**Lord Woolf C.J.** delivered the judgment of the Court

1. So as to avoid defendants being held in custody for unnecessarily long periods of time Parliament enacted legislation limiting time that defendants may be kept in custody ("custody time limits"). However, the legislation gave the court power to extend those limits. That power is the subject to review by this Court. Thus the present cases have been heard to day.

2. The ability of the court to extend time is of importance to defendants. It is also important to the administration of justice and it is important to the public. There have already been a great number of decisions reviewing power of the court to extend time. However this application for judicial review makes it clear that there is need for further clarification. In the hope that that clarification should be provided by the judgments given today, this court has been specially constituted. It consists of the Vice-President of the Court of Appeal, Criminal Division, (Rose L.J.) Royce J. and myself. Our consideration of the present cases should not however be treated as an encouragement for further attempts to obtain clarification as to the extent of the courts' discretion to extend custody time limits. Decisions as to custody time limits are closely related to the listing of the trials and the listing of trials is a judicial function for which the resident judge and the presiding judges of the relevant area have responsibility.

### The Facts

3. The facts giving rise to the present proceedings are as follows. The claimant, Leslie Gordon Gibson, and his son David, who is now also a claimant, are charged with the murder of David's wife, Belinda in February 2002. No body

or trace of a body has been found. There is no witness who has seen a body or witnessed the alleged murder. The murder trial is now fixed for June 9, 2004 before a High Court judge. It is accepted that it is a case which requires the attention of a High Court judge and the number of High Court judges is limited.

4. The claimants were first arrested on May 9, 2002. They were given bail. They were interviewed a number of times. On May 13, 2003 they were both charged with murder. They have been in custody ever since. The plea and directions hearing was held on July 14, 2003. On November 5, 2003 the prosecution applied to extend the custody time limit for each claimant, otherwise the limit would have expired at midnight on November 11, 2003. Earlier that day Judge Brodrick, the resident judge at the Crown Court at Winchester, extended the custody time limit under s.22(3) of the Prosecution of Offences Act 1985 until June 10, 2004. It is to be noted that, notwithstanding that extension, it will be within a year and month of the claimants being arrested and charged with murder that the trial will commence.

5. In extending the time for the custody time limit until June 10, 2004, the judge granted an extension of 211 days, or one month more than the statutory custody time limit, which is 182 days. As the judge indicated, the effect of the extension will be to double the statutory time limit and then add a month. That must be a matter of very grave concern.

6. In giving his reasons for permitting that extension the judge referred to the fact that Court No. 1 in Winchester, which is the place where the trial is due to take place, had been occupied for the best part of a year with a complex fraud case which was transferred there from Bournemouth. The defendant in that case could not properly be tried at Bournemouth because he was too well known. The judge also referred to the fact that in November 2003 there were 30 outstanding murders and 40 outstanding rape or child sex cases. He added:

"... this court has not simply sat back and allowed the outstanding murder and other cases to get completely out of control. We have done our best with the limited resources available, and we have endeavoured to try to keep matters within bounds, not, I am bound to say, entirely successfully, but that is not entirely surprising when you lose a court for the length of time that I have lost Court No. 1."

Brodrick J. as the resident judge at Winchester Crown Court is very familiar with the conditions which apply with regard to arranging the lists at that court for which he has overall responsibility subject to the supervision of the presiding judges of the Western Circuit. It is also right, as Mr Lighthouse who appeared on behalf of Leslie Gibson has stressed, that the judge exercised great care in dealing with the application before him. His ruling is expressed with considerable clarity and deals with the issues with remarkable skill, bearing in mind that it was given immediately after the hearing.

7. The conclusion to which the judge came was that the prosecution had not acted with all due diligence and expedition, but that that failure on their part had no causative effect. However, in accordance with the statutory provisions, there was good and sufficient cause to grant the extension to which I have referred.

**The law**

8. The statutory provisions which the judge had to apply have been amended. They have been amended so as to provide specific examples of what constitutes a good and sufficient cause. The Prosecution of Offences Act 1985 empowered the Secretary of State to make provision by regulations. The terms of the power which is conferred on the Secretary of State are very broad. They are the subject of specific arguments to which I will need to refer hereafter.

9. The amendments which have been made to the Prosecution of Offences Act 1985 were first the result of s.71 of the Criminal Procedure and Investigations Act 1996; and secondly of s.43 of the Crime and Disorder Act 1998. As originally enacted, s.22(3), which is the critical subsection, was in the following terms:

"The appropriate court may, at any time before the expiry of a time limit imposed by the regulations, extend or further extend, that time limit if it is satisfied —

- (a) that there is good and sufficient cause for doing so; and
- (b) that the prosecution has acted with all due expedition." (my emphasis)

The Crime and Disorder Act 1998's amendment resulted in s.22(3) now providing:

"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 separate offences; or
  - (iii) some other good and sufficient cause; and
- (b) that the prosecution has acted with all due diligence and expedition." (my emphasis).

The amendments do not materially effect the working of the provision but (i) and (ii) do clarify the type of matters that can be "good and sufficient cause" but they do not cut down the ambit of (iii) as the word "other" makes clear.

10. The appropriate time limit in respect of the claimants was 182 days. If the time limit is exceeded without being extended, the consequence is that a defendant is entitled to bail, subject to s.25 of the Criminal Justice and Public Order Act 1994. That makes an exception in the cases of murder or rape, after a previous conviction for such an offence. The court is not able to require sureties or any deposit or security, and, following the grant of bail, the accused may not be arrested without a warrant merely on the ground that the police officer believes that he is unlikely to surrender to custody. However, it is open to the court granting bail to impose conditions as to curfew, residence or reporting to a police station etc. The rule that

actual or feared breach of such conditions is a ground for arrest without a warrant applies to an accused bailed on the expiry of a time limit, just as it applies to an accused granted bail in other circumstances.

11. A leading case in respect of custody time limits and the philosophy behind custody time limits is the decision of this court in *R. v Manchester Crown Court, Ex p. McDonald* [1999] 1 Cr.App.R. 409, [1999] 1 W.L.R. 841. That court (Lord Bingham C.J. and Collins J.) looked into the provisions as to custody time limits in some detail. In the course of giving the judgment of the court Lord Bingham indicated that the Act and regulations have three overriding purposes:

- (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 a duty to control any extension of the maximum period under the regulations for which any person may be held in custody awaiting trial.

As the court made clear, these are all very important objectives. Any judge making a decision on the extension of custody time limits must be careful to give full weight to all three of the "overriding purposes". I would respectfully strongly endorse the philosophy indicated in that part of Lord Bingham's judgment.

12. The judgment went on to give certain guidance to which it is desirable to refer. In dealing with the need for expedition Lord Bingham said at pp.413 and 846:

"In any application to the court for an order extending custody time limits beyond the maximum period laid down in the regulations, it is for the prosecution to satisfy the court on the balance of probabilities that both the statutory conditions in s.22(3) are met. If, but only if, the court is so satisfied does the court have a discretion to extend the custody time limit. If it is not satisfied it may not do so. If it is satisfied it may, but need not, do so."

13. A little later Lord Bingham added at pp. 414 and 847:

"The condition in s.22(3)(b) that the prosecution should have acted with all due expedition poses little difficulty of interpretation. The condition looks to the conduct of the prosecuting authority (police, solicitors, counsel). To satisfy the court that this condition is met the prosecution need not show that every stage of preparation of the case has been accomplished as quickly and efficiently as humanly possible. That would be an impossible standard to meet, particularly when the court which reviews the history of the case enjoys the immeasurable benefit of hindsight. Nor should the history be approached on the unreal assumption that all involved on the prosecution side have been able to give the case in question their undivided attention. What the court must require is such diligence and expedition as would be shown by a competent prosecutor conscious of his duty to bring the case to trial as quickly as reasonably and fairly possible. In considering whether that standard is met, the court will of course have regard to the nature and

complexity of the case, the extent of preparation necessary, the conduct (whether co-operative or obstructive) of the defence, the extent to which the prosecutor is dependent on the co-operation of others outside his control and other matters directly and genuinely bearing on the preparation of the case for trial. It would be undesirable and unhelpful to attempt to compile a list of matters which it may be relevant to consider in deciding whether this condition is met. In deciding whether the condition is met, however, the court must bear in mind that the [then] period of 112 days specified in the Regulations is a maximum, not a target; and that is a period applicable to all cases."

14. Lord Bingham indicated the approach in respect of good and sufficient cause. He stressed that this was very much a matter for the judgment of the court on the facts of any particular case. He then said at pp. 415 and 848::

"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 ..."

15. He referred to a judgment of Auld L.J. in *R. v Central Criminal Court, Ex p. Abu-Wardeh* [1999] 1 Cr.App.R. 43, [1998] 1 W.L.R. 1083 and cited a passage therefrom at pp. 51 and 1090:

"After much hesitation, I have come to the view that there is no indication in s.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."

16. Lord Bingham then went on at pp 416 and 848 to adopt the observations of Toulson J. when sitting in the Crown Court at Winchester (with which we are here concerned), which provide some background to the very issue which is before this court. He cites from the judgment of Toulson J., who was then one

of the presiding judges, in *R. v Blair and Bryant*, *R. v Taylor* (unreported) October 7, 1998 as follows:

"Wearing my hat as presiding judge of this circuit I am all too aware of the difficulties faced by listing officers in present circumstances, but at the same time I have to apply the statutory provisions. 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. Of course there may be situations where the particular case can only be tried by a particular class of judge, where such a judge is only going to be available at a particular trial centre for a particular time, where other similar cases are already awaiting trial, and where there is no reasonable alternative but to make the defendant wait because the case cannot readily be transferred to another court centre. I am wholly familiar with these problems as they presently affect this circuit. But in this case we have a case which is serious, but not of exceptional complexity. It can be tried by any circuit judge. It is not estimated to take more than three weeks at worst. Yet I am being asked to extend the 16-week time limit by an additional 17 weeks. If I reached that decision in this case on that ground it seems to me that it is virtually saying that in any case, regardless of what level of judge may try it, listing difficulties may be regarded as a just and sufficient cause for extending the statutory period by a very large margin indeed. I recoil from that, because it seems to me that to do so would indeed be to defeat the statutory purpose."

17. Having made those references to domestic cases, Lord Bingham went on to deal with two decisions of the European Court of Human Rights, *Wemhoff v Federal Republic of Germany* (1968) 1 E.H.R.R. 55, and *Stogmuller v Austria* (1969) 1 E.H.R.R. 155, as to which it is not necessary for me repeat what he says. He then referred to *Zimmermann and Steiner v Switzerland* (1983) 6 E.H.R.R. 17 and said:

"*Zimmermann and Steiner v Switzerland* ... was not a case under Art.5(3) of the Convention but Art.6(1). It concerned an administrative law appeal which the Swiss Federal Court took three-and-a-half years to determine.

The European Court held that the Federal Court's excessive workload and its chronic backlog provided no more than a partial excuse for the delay which had occurred. In *W v Switzerland* (1993) 17 E.H.R.R. 60, a defendant was held in custody for just over four years between the date of his arrest and that of his conviction. A majority of the European Court held that there was no violation of Art.5(3), because of the complexity of the case, the scope of the investigation and the conduct of the defendant himself. It is appropriate that we should bear in mind this jurisprudence of the European Court when considering the effect of our own domestic legislation and applying it. We do not, however, find anything in these European cases which in any way throws doubt on the English law as we have attempted to summarise it. It would indeed appear that the term of 112 days prescribed by the regulations imposes what is, by international standards, an exacting standard.

Any application for the extension of custody time limits will call for careful consideration, and many will call for rigorous scrutiny. When ruling on such an application the court should not only state its decision, but also its reasons for reaching that decision and, if an extension is granted, for holding the conditions in section 22(3) to be fulfilled: see *R. v Leeds Crown Court, Ex parte Briggs*, [1998] 2 Cr.App.R. 413. In a case when an extension is granted, it is particularly important that the defendant should know why; but even when an extension is refused, the prosecution is entitled to know the reason for the refusal. We would, however, emphasise that where a court has heard full argument and given its ruling, whether for or against an extension, this court will be most reluctant to disturb that decision. This court has no role whatever in deciding whether, in any case, an extension should be granted or not. Its only role, as in any other application for judicial review, is to see whether the decision in question is open to successful challenge on any of the familiar grounds which support an application for judicial review."

18. In support of this appeal Mr Lighthouse has identified four issues, of which the first two have been primarily the subject of his argument. The first issue he describes as "whether having found lack of due diligence and expedition the learned judge had jurisdiction to extend the limits". I would refer to that as "the issue as to construction".

19. Issue 2 he identifies as "whether the inability of the state to provide a suitable judge and/or courtroom for trial before June 9, is an admissible ground for an extension either under s.22(3)(a)(i) or (iii) either at all or for so long an extension". I will describe that as the "resources issue".

20. Issues 3 and 4 are as follows: "Whether the test in judicial review on issue 2 is the conventional test" (I would describe that as "the issue as to the intensity of review") and "whether the extension should have been granted applying either the *Wednesbury* test [*Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 K.B. 223] or a more intense approach on judicial review" (this I will refer to as "the merits issue").

**The construction issue**

21. Mr Lighthouse submits that, prior to the decision of this court in *R. v Leeds Crown Court, Ex p. Bagoutie and Another* [1999] EWHC Admin 454, it was generally accepted that failure on the part of the prosecution to show all due diligence and expedition is fatal to an application to extend the custody time limits irrespective of whether the lack of all due diligence and expedition has any impact on the need for an extension. The argument is based upon the language of the statutory provision, and in particular to the fact that the two limbs in the section are linked by the word "and". He submits that they are two separate requirements. Unless in any particular case both requirements are met, there is no power in the court to extend the custody time limits.

22. In relation to that issue he relies on the decision of this court, presided over by Otton L.J., in *R. v Central Criminal Court, Ex p. Bennett*, *The Times* January 25, 1999, of which we have a transcript. In that case the court was concerned with an application in respect of a decision by a judge which undoubtedly was not satisfactorily reasoned. Otton L.J. criticised the judgment in these terms:

"I have no doubt that the learned judge fell into error in reaching the conclusion that he did upon the basis of the reasoning he adopted. Although he acknowledged the necessity to consider subparagraph (a) separately from subparagraph (b) he did exactly the opposite. He went on to consider subsection (b) in the light of subsection (a) and the concession by the defence that there was good and sufficient cause for doing so by virtue of the indisposition of the principal prosecution witness. It was no more permissible when considering whether the prosecution had acted with all expedition to take into account whether there was a good and sufficient cause for doing so to take account of the fact whether the prosecution had or had not acted with all due expedition. In other words, the fact that the trial could not have gone ahead in any event because of the alleged victim's illness was an irrelevant consideration when deciding whether the prosecution had acted with all due expedition."

Having drawn attention to that aspect of the case, this court took the unusual course of granting *certiorari* in respect of the decision of the court below, but refused *mandamus* in respect of the right to bail, which normally would be expected to follow from the quashing of a decision of the judge extending a time limit. However, that apart, it seems to me that, quite clearly in that case, Otton L.J. took the view that the requirements contained in the statutory provisions both have to be fulfilled in order for an extension of a time custody time limit to be extended. It is therefore a decision to which Mr Lighthouse attaches considerable importance. He indicates that it is supported by earlier decisions in *R. v Governor of Winchester Prison, Ex p. Roddie* (1991) 93 Cr.App.R. 190, [1991] 1 W.L.R. 303 and *R. v Luton Crown Court, Ex p. Neaves* [1992] Crim. L.R. 721.

23. Mr Perry, who intervenes on behalf of the Department of Constitutional Affairs on this appeal, accepts that the result in *R. v Central Criminal Court*

*Ex p. Bennett* was right on the facts of that case, but he challenges the extent to which the earlier authorities provided any support for the view the court took as to the interpretation of the section of the Act.

24. The decision in *Ex p. Bennett* certainly provides authority which this court could follow as to the construction of the statute. However, the approach to the construction of the statute was considered by this court in *Ex p. Bagoutie*. In giving the judgment of the court, Lord Bingham C.J. adopted a different approach as appears from the following passages in his judgment:

"14. Much argument before the judge and before us has been based on the decision of this court in *R. v Manchester Crown Court Ex p. McDonald* [1999] 1 Cr.App.R. 409. There is, as it seems to me at least, nothing in that judgment which the court should now seek to vary, modify or retract, assuming that it were open to the court to do so. It is unnecessary for present purposes to make further reference to regulation 5(3) of the Prosecution of Offences (Custody Time Limits) Regulations 1987, as amended, save to point out that it is that regulation which provides a maximum period of custody between the time when an accused is committed for trial and the start of the trial of 112 days. It is s.22(3) which enables a court at any time before the expiry of a time limit imposed by the regulation to extend or further extend that limit if it is satisfied (a) that there is good and sufficient cause for doing so, and (b) that the prosecution has acted with all due expedition. The court made plain in *Ex p. McDonald*, as indeed is plain on the face of the statute, that when seeking an extension or a further extension of a custody time limit the Crown must show that there is good and sufficient reason for making the extension and that it has acted with all due expedition. What, however, was not made plain in *Ex p. McDonald* (because the question did not arise) is that these two provisions are in my judgment linked. It is not in doubt that the Crown must show proper grounds for keeping a defendant in prison awaiting trial for a period longer than the statutory maximum. But the Crown must also show that such an extension is not sought because it has shown insufficient vigour in preparing the case for trial. Put crudely, the prosecution cannot prepare for trial in a dilatory and negligent manner and then come to the court to seek an extension of the custody time limit because the prosecution is not ready for trial. Nor, if the effect of its dilatoriness is to put the defence in a position where the defence is not ready for the trial can the Crown seek an extension and show that it has acted with all due expedition. It is in the ordinary way the business of the prosecution to be ready. If therefore the Crown is seeking an extension of the time limit it must show that the need for the extension does not arise from lack of due expedition or due diligence on its part. It seems clear to me, however, that the requirement of due expedition or due diligence or both is not a disciplinary provision. It is not there to punish prosecutors for administrative lapses; it is there to protect defendants by ensuring that they are kept in prison awaiting trial no longer than is justifiable. That is why due expedition is called for. The court is not in my view obliged to refuse the extension of a custody time

limit because the prosecution is shown to have been guilty of avoidable delay where that delay has had no effect whatever on the ability of the prosecution and the defence to be ready for trial on a predetermined trial date.

15. This construction has been resisted by counsel representing the claimants, although it has been broadly supported by counsel for the Crown. It has been resisted on two substantial grounds. First, as a matter of statutory construction, it is submitted that whether one looks at s.22(3) as it now stands or whether one looks at s.22(3) as it will be when an amendment takes effect, it is plain that these are two separate conditions stipulated to stand alone, independently, and imposing two requirements, each of which the Crown must satisfy.

16. For my part I do not derive that intention from the language of the subsection as it stands or from the subsection in its amended form. It seems to me plain that Parliament has intended to insist that prosecutors cannot seek extensions where the need for the extension is attributable to their own failure to act with due expedition and has been at pains to make that clear by setting the requirement out in clear terms on the face of the statute. It does not, however, appear to me that there is anything in the language of the Act in either version which shows that these are independent and free-standing requirements. I repeat that I can see no reason why Parliament should have wished to oblige the court to refuse an extension of a custody time limit because there has been some avoidable delay, even where this has not had any effect on the beneficial object which the statute is intended to achieve, namely the keeping defendants in prison awaiting trial for no longer than is justifiable."

That decision adopts a different approach, an approach on which both the prosecution and Mr Perry on behalf of the Department rely.

25. Since *Ex p. Bagoutie* was decided it has been applied in a series of cases, namely *R. v Kingston Crown Court, Ex p. Bell* (2000) 164 J.P. 633; *R. (Collinson) v Crown Court at Hull* [2001] EWHC Admin 284 (presided over by Kennedy L.J.); *R. (Crane) v Chelmsford Crown Court* [2001] EWHC Admin 1115 (presided over by Keene L.J.); *R. (Haque) v Central Criminal Court* [2003] EWHC Admin 2457 (presided over by Mitting J.); *R. (Geoghegan) v Birmingham Crown Court* [2003] EWHC Admin 2353 (presided over by Keith J.); and finally *R. (Dawson and others) v Crown Court at Newcastle upon Tyne* [2003] EWHC Admin 3297 (presided over by Elias J.).

26. In the case of *Crane*, to which I have referred, Keene L.J. said:

"As a matter of law, [the judge] was right to approach this case by focusing on what had caused the postponement. The courts have said several times that a lack of due diligence and expedition on some matters will not prevent an extension of custody time limits if that is not the cause of the need for the extension ....

In my view, one has to have regard to what were the factors, or in particular the principal factor which led to the need for the custody time limit to be extended."

27. In support of the argument that the approach adopted by Otton L.J. is the correct approach, Mr Lighthouse submitted as follows:

- (1) The language of the statute is plain.
- (2) Parliament could have had no purpose in including the all due diligence and expedition requirement if the plain language is not followed since, if the need for an extension were occasioned by the fault of the Crown, the application would inevitably fall at the "good" or "sufficient" hurdles.
- (3) The word "all" before "due diligence and expedition" excludes a link such as that indicated by Lord Bingham, since Parliament could otherwise have stated that it was not all, but only such due diligence and expedition as had an impact on the timetable.
- (4) The amendments made by the 1998 Act made this even plainer. The illness or absence of a judge, a witness or a defendant, and the ordering of separate trials cannot realistically ever be envisaged as a possible consequence of lack of all due diligence and expedition, yet that requirement is still retained for each case.
- (5) Finally, if there must be a link, the "all due diligence and expedition" limb becomes of little significance in cases such as this, where the trial dates are so very far away that little that the Crown does can have an impact on the date.

As part of that last point Mr Lighthouse refers to the fact that "diligence", unlike "expedition" has no reference to timing. He also submits that his construction is simple in practice, avoids complex causation arguments and analysis, avoids longer extension hearings and lets both parties know where they stand. He suggested that we should look at material consisting of what was said in Parliament in support of his interpretation. However, under questioning by this Court it appears reasonably clear that this case does not fall within the situation where it would be appropriate to consider that material, having regard to the decision of the House of Lords in *Pepper v Hart* [1993] A.C. 593, and we did not look at that material. We regard this as a case of simple construction where there are arguments to be advanced in favour of the alternative approaches that the authorities indicate.

28. In my judgment the purpose of the legislation has to be taken into account in order to decide the appropriate interpretation of the section. As Mr Perry submitted, absurd results can easily arise where an approach is adopted which ignores the link between the two provisions to which Lord Bingham referred. There may be a failure on the part of the Crown at an early stage of the proceedings which causes no delay, and would never cause any delay to the hearing, but it still would amount to a contravention of the requirement that the Crown should act with due expedition. In a situation of that sort, for there to be no ability for the Crown to obtain an extension of the custody time limit could result in significant injustice and could be counterproductive so far as the defence are concerned. Mr Perry points out that it is the practice regularly at the Central Criminal Court for a defendant to ask for the trial date for a case to be deferred, for example, because the defendant wants a particular counsel to represent him and that counsel is not

available until after the custody time limit has expired. In such a case if there had been any failure of due expedition by the Crown, on the construction contended for by the claimants in this case an extension would not be possible. Such a result can be appropriately categorised as "absurd" and cannot be what Parliament had in mind in legislating in the terms that it did. Thus, although the language used in the section favours the approach submitted for by the claimants, I have no doubt that the correct approach is that which was indicated by the Lord Bingham CJ, the approach which has been followed in many cases since *Ex p. Bagoutie* was decided. I would therefore find against the claimants in the respect of the first issue.

### The resources issue

29. I have already referred to the approach which is indicated in the judgment of Lord Bingham C.J. in *R. v Manchester Crown Court, Ex p. McDonald* [1999] 1 Cr.App.R. 409. Clearly before a court is prepared to grant an extension because of the lack of availability of a courtroom, or a particular judge required to try the case, it should go to considerable endeavours to avoid having to postpone the trial to a date beyond the custody time limits. However, it has to be remembered that the availability of a particular category of judge can be important for the achievement of justice in particular cases. The present case is an example. This is clearly a case which required to be tried by a High Court judge. While expedition is important, so is the quality of the justice which will be provided at the trial. In these circumstances it is necessary for a court considering an application for an extension of custody time limits to evaluate the importance of the judge of the required calibre being available. In addition it has to be recognised that resources are not unlimited. The resources that are available have to be taken into account. So have the requirements of other cases also waiting trial to be taken into account. In this regard there is a very helpful general statement by Sopinka J of the Supreme Court of Canada in *R v Morin* [1992] R.C.S. 771, 794:

"Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s.11(b) of the Charter (the right to a trial within a reasonable time) ... this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. In Utopia this form of delay would be given zero tolerance. There, resources would be unlimited and their application would be administratively perfect so that there would be no shortage of judges or courtrooms and essential court staff would always be available. Unfortunately this is not the world in which s.11(b) was either conceived or in which it operates."

It seems to me that that approach which was specifically relied upon by Mr Perry indicates the difficulty of ignoring resources, which is what the claimants contend should be the approach of a judge considering an application to extend custody time limits.

30. The authority which is relied upon by Mr Lighthouse in support of his contention that resources should be ignored is the recent decision of this court presided

over by May L.J. *R. (Bannister) v Crown Court at Guildford* [2004] EWHC 221 Admin. In considering the views expressed by May L.J. in that case, it has to be recognised that that case is very different from the case which we are considering here. It was, as May L.J. indicated, a "routine case" which was due to be heard in the Guildford Crown Court. However, in the course of his judgment May L.J., in addition to citing the approach indicated by Lord Bingham C.J. in *Ex p. McDonald*, at para.11 said:

"As has been said on a number of occasions, indiscriminate use of the power to extend to the custody time limits would emasculate the Parliamentary purpose. As has also been said, and can be well understood, if Parliament willed that these should be the custody time limits, it was for Parliament also to will and provide the resources to enable courts and judges to achieve those time limits."

At para.21 May L.J. said:

"I have been unable to detect any particular fact referable to this case which was capable of being a particularly 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?"

At para.22 he added:

"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 this 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 [in *R. v Blair and Bryant*, *R. v Taylor*, cited by Lord Bingham C.J.] 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 the

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."

31. I fully understand most of the reasoning of May L.J. in the passage to which I have referred. In respect of a routine case the approach which he indicates may generally be appropriate. In routine cases difficulties that arise can normally be overcome. However, I do not accept that it is right to regard May L.J.'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. Mr Lighthouse said that if we lay down a test which avoids the availability of resources having to be taken into account the matters would be simpler to resolve for judges who have to deal with these issues. That may be true, but, unfortunately, judges at all levels have to deal with difficult issues. It is not appropriate to exclude relevant considerations just to achieve a simpler means of resolving the issue.

32. Different considerations often need to be balanced. I have already paid tribute to the judgment of Judge Brodrick in this case. He identified the sort of matters that have to be balanced by a judge in deciding whether there is good and sufficient cause for an extension. It may have been possible to obtain a date which was a month earlier by changing the venue, but this is a case with a very large number of witnesses. The inconvenience to all involved in moving the trial, say to Bristol, to achieve a date a month earlier would not be justified because of the consequences to the members of the public who would have to make the journey in order to attend the trial at Bristol. It may also be burdensome to the claimants who would either have to be moved from their present prison or would have to make a long journey each day during the trial. It is the task of the judge, as has been indicated by the authorities, to take into account all relevant circumstances when applying the language of the section. It is for the judge to decide whether there is or is not good and sufficient cause for granting an extension.

33. It was also submitted by Mr Lighthouse that problems caused by lack of resources in a centre such as Winchester could be avoided by extending the time limits. In my judgment the suggestion that the Secretary of State should provide the solution to the problems faced by courts up and down the country by extending the time limits is not realistic. As was submitted on behalf of the Department, that would send a very undesirable message. It is better in the majority

of cases to keep to the current time limit, if it can be met, even though in some cases it may result in the time limit having to be extended.

34. In my judgment on the second issue the judge was entitled to take into account the difficulties that exist in the Crown Court at Winchester in regard to the listing of cases before High Court judges and to decide that that should be the basis for extending the custody time limit.

35. It was argued by Mr Lighthouse that the judge had not had regard to the length of the extension he was granting; but in my judgment it is quite clear that he had that very much in mind. To obtain the grant of a long extension, an even stronger case has to be made out to justify the length of extension. All possible steps should be taken to keep the extension to a minimum.

36. Before leaving this issue it is right that I should indicate that there is a history of problems with regard to the need for High Court judges to be available to try cases which warrant their attention at Winchester. The history is now the cause of particular concern. Although the approach of Judge Brodrick, in my judgment, cannot be faulted by this court, this case demonstrates that attention must be given by those responsible for seeing whether there are not, despite the efforts which have been made to resolve the problem, ways of alleviating the difficulties which the evidence indicates are occurring. They are not isolated to the particular situation with which the court had to deal on this occasion of a case being transferred from another court — a case which has occupied one courtroom for a substantial period of time. The judge referred to the number and nature of the cases with which he had to juggle.

37. The length of time which the claimants had to spend in custody before their trial by the standards of some jurisdictions may not be regarded as excessive. However, so far as this jurisdiction is concerned, the standard is set by the statutory provisions. If it should appear that there is undue difficulty in meeting that standard, then there is a very heavy onus upon the judicial and other authorities to ensure that everything possible is being done to avoid those difficulties recurring. In saying what I have, I make no criticism of those responsible for these matters in this area. It is clear from the evidence before us that very considerable efforts were made in respect of the claimants' forthcoming trial. However, nonetheless, despite the efforts which have already been made, there is a need for the position to be reconsidered and attempts made to ensure that there will not be a recurrence.

#### **The issue as to intensity of review**

38. The third issue to which I should refer is that which deals with intensity of review. Mr Perry drew attention to the fact that in his submissions he had not relied on the *Wednesbury* principle, [*Associated Provincial Picture Houses Ltd v Wednesbury*, [1948] 1 K.B. 223]. In my judgment it was correct that he should adopt that approach. This case involves the human rights of the claimants. In those circumstances it is only right that the court which originally considers the question of granting an extension should look at the matter with particular care, as the authorities indicate. Equally, when the matter comes before us we

must scrutinise it rigorously, but at the same time recognising that the decision is for the judge in the court below to make. Unless we come to the conclusion that he has wrongly exercised his discretion we will not interfere.

### The question of the merits

39. It is apparent from what I have already said that although I am concerned by the situation disclosed by this case, I am satisfied by the reasoning of the judge that he came to the correct conclusion. He took into account all the right considerations and so, notwithstanding the arguments which were skilfully deployed on behalf of the claimants, the applications must fail.

40. There is one further point with which I should deal before I end this judgment. There was in effect a cross-application by the Crown Prosecution Service in respect of the judge's decision that the Crown have failed to exercise the necessary expedition in the conduct of the prosecution. It is clear that the judge approached the matter with commendable fairness. He insisted that the prosecution demonstrated that they had exercised the required degree of due expedition. He took the view that they had failed to demonstrate that in relation to one small area. While it would have been a nonsense not to have extended the custody time limits on that ground, I would not interfere with his decision that there had been a minor falling below the required standard by the prosecution in the conduct of the case.

41. It follows from what I have said that I would dismiss these applications.

42. **Rose L.J.** I agree and add only a few observations in relation to the resources issue and the importance of the Crown Court judge's discretion.

43. As Judge Brodrick recognised, in his very careful ruling, this is a disturbing case in that a custody time limit extension was sought and granted, which had the effect of doubling, and then adding a further month to, the statutorily contemplated period of custody before trial.

44. It is also an exceptional case, not one which is "utterly routine", as May L.J. described the circumstances in *R. (Bannister) v Guildford Crown Court* [2004] EWHC 221, Admin (already cited). Here there is a trial for murder involving many witnesses, with an expectation that it will last four or five weeks. Unless released by a presiding judge, which it has not been, it has to be tried by a High Court judge: see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 2 Cr.App.R. 533, [2002] 1 W.L.R. 2870, para.33.1.

45. High Court judges are a limited resource. Resources for the criminal justice system generally are limited. There is competition for the necessary public funding from many other directions, of which the National Health Service, universities and schools provide but three obvious examples.

46. In the Canadian Supreme Court's decision in *R. v Morin* [1992] R.C.S. 771 (cited by the Lord Chief Justice), Sopinka J. in a passage in his judgment, to which Lord Woolf C.J. has referred, dealt with this matter.

47. Furthermore, in cases where custody time limits are in question, judicial review may disrupt the trial process and lead to satellite litigation, contributing

to delay, which is the very feature of criminal litigation which the custody time limits are intended to help minimise.

48. In *R. v Director of Public Prosecutions, Ex p. Kebilene and Others* [2002] A.C. 326, 371 Lord Steyn said:

"The effect of the judgment of the Divisional Court was to open the court too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system."

It is therefore desirable, while recognising the importance of review by this court in exceptional cases, to assert the primacy of the Crown Court judge's role in exercising discretion in relation to custody time limits: see *per* Lord Bingham C.J. in *R. v Manchester Crown Court Ex p. McDonald* [1999] 1 Cr.App.R. 409 subject to the need, as Lord Woolf C.J. has said, for rigorous scrutiny by the Crown Court judge before custody time limits are extended.

49. Accordingly, and for the reasons given by the Lord Chief Justice, with which I agree, I agree that these application should be dismissed.

50. **Royce J.** I also agree that Judge Brodrick was fully entitled to reach the conclusion that he did. Nonetheless, it is right to bear in mind the observations of Toulson J. in *R. v Blair and Bryant, R. v Taylor* (unreported) October 9, 1998, cited with approval by Lord Bingham C.J. in *R. v Manchester Crown Court, Ex p. McDonald*, where he said:

"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."

In my judgment it is important that the exception remains truly an exception. If not, applications for an extension of custody time limits may have to be refused. But for the reasons that have been given by Lord Woolf C.J. and Rose L.J., dismiss these applications.

*Applications dismissed*