

HANDLING CASES WITH CUSTODY TIME LIMITS

A GUIDE FOR ADVOCATES REPRESENTING THE PROSECUTION

INTRODUCTION

- 1) This guidance is circulated to assist advocates who represent the CPS in prosecutions where there are custody time limits (CTL) active in the case. Some of the guidance is based on situations that have previously proved problematic; its inclusion is designed to avoid similar problems in future.
- 2) The proper observance of the statutory requirements will assist in the preservation of public confidence in the justice system by ensuring that defendants are not inappropriately released from custody due to the some act or default of the prosecution.
- 3) The language of the primary¹ and secondary² legislation is complex and a considerable number of decisions have been made by the Appellate Courts. Advocates will need to make themselves thoroughly familiar with the legal authorities in order to effectively represent the prosecution in these cases.

CONSEQUENCES OF A FAILURE TO EXTEND A CTL

- 4) The inappropriate release of a defendant to bail following a CTL failure is classified as a major corporate risk for the CPS; details have to be reported to the Director of Public Prosecutions personally. Internal disciplinary action may follow where the act or default of the person responsible is serious enough to merit it following an investigation. All advocates representing the CPS need to understand how seriously it considers the failure of a CTL to be.
- 5) The definition of a failure of a CTL includes the failure to make a valid application and to the finding by the court that the prosecution has not acted with the necessary due diligence and expedition. These failures must be reported urgently to the level D or level E legal manager at the relevant CPS office by the advocate. The Chief Crown Prosecutor for that Area will report the failure to the Director via the Operations Directorate at CPS Headquarters.
- 6) Where the advocate is an agent or counsel and it transpires that there has been a failure to comply with the requirements set out in this guidance, including a failure by the advocate to act in accordance with the requirements of the Protocol agreed between the CPS and HMCTS (see below), it is likely, if the situation merits it, that the matter will be reported to the Senior Partner or Head of

¹ Section 22, Prosecution of Offences Act 1985

² The Prosecution of Offences (Custody Time Limits) Regulations 1987 (as amended)

Chambers as appropriate. The CPS may take further action as seems appropriate and reasonable in all the circumstances. This may include a referral to the Joint Advocate Selection Committee who could decide to that the advocate should no longer be instructed to prosecute cases for a period or indefinitely.

HMCTS AND CPS PROTOCOL

- 7) A revised protocol for the effective handling of CTL has been agreed between the CPS and HMCS and approved by the Senior Presiding Judge. It came into force on 5th February 2013. A copy of the Protocol is to be found on the CPS website (www.cps.gov.uk) following the link through Prosecution Policy and Guidance > Legal Guidance > A-C > Custody Time Limits at Appendix A.
- 8) All advocates should make themselves thoroughly familiar with the requirements of the Protocol.

ANNOUNCING THE CTL EXPIRY DATE AT COURT

- 9) An important obligation under the Protocol is that the prosecuting advocate should announce the CTL expiry date to the court (and agree it with the court) at the first and every subsequent appearance at court. This has the benefit of ensuring that the court registers an agreed date on the court's papers and IT system which in turn assists the correct priority listing of a trial within the CTL.
- 10) A note that the announcement was made must be endorsed on the papers by the advocate. Failure to do so will in future be regarded as a significant failing.
- 11) In order to make the announcement, the advocate will have to have correctly calculated the CTL expiry date before hand.

CALCULATING CTL

- 12) Every advocate should be equipped with the CPS CTL calculator. A copy can be obtained from the CPS website as the next item below the CTL Guidance.
- 13) This spread sheet has been developed to help advocates and all CPS staff. It enables complex calculations to be carried out speedily and accurately whether dealing with the first or any subsequent remand. It contains its own instructions. It is very simple to use and can be downloaded onto a laptop. However, it must be refreshed every January when the dates of court closures and public holidays for the coming year are known and allowed for.
- 14) Also on the website is a copy of the CTL ready reckoner which can be downloaded and printed. It will assist where the advocate will not have access to a computer at court. However, the calculator is to be preferred to the ready reckoner and should be used wherever

possible as the ready reckoner will only be accurate when calculating the first day of remand of a CTL. This is due to an allowance being made in it under Regulation 2(4) (*ibid*) to discount the first day of any initial remand.

DEALING WITH MIXED PLEAS IN CTL CASES

- 15) The advocate is reminded that each and every count on an indictment for which a defendant is remanded in custody carries its own CTL. Where an acceptable plea is given in respect of a count, the CTL continues on any others. If necessary, an application may be necessary to extend a time limit if it is possible that the case against the defendant in outstanding matters will still be brought to trial.
- 16) The public interest in continuing the prosecution in mixed plea cases may not be known until sentence is passed on the admitted matters. In other cases, victims may have to be consulted and an explanation given for the decisions that have to be made and their views considered before a case is discontinued. These difficult judgements are recognised by the judiciary.
- 17) If however, the matters outstanding are never going to be brought to trial, no application should be made to extend the CTL; instead an indication can be given that they will be discontinued or an application made for them to lie on file.

PRIORITY LISTING OF CTL CASES

- 18) Where defendants are remanded in custody, the advocate should always request that the trial take place within the CTL. If this is not initially possible, the reasons should be thoroughly explored with the court and every effort made to delay other non custodial work or seek an alternative venue.
- 19) The cases of [*R v Luton Crown Court, ex parte Raeside \[2012\] EWHC 1064 \(Admin\)*](#) and [*R v Coventry Crown Court, ex parte McAuley \[2012\] EWHC 680 \(Admin\)*](#) provide the authority that senior managers in HMCTS must provide the CPS with written reasons if the court is unable to fix the case either in that court or a neighbouring Crown Court centre within the CTL. These will be served on the defence and the judge so that the situation can be transparently and thoroughly scrutinised
- 20) If the court makes an order which will result in the CTL expiring before the start of the trial, it should immediately be drawn to the attention of the court. Any refusal by the court to refix the trial within the CTL should be prominently endorsed on the case papers with reasons given by the Court. This must be brought to the attention of the CPS office as a matter of urgency.

- 21) It should be remembered that the court has the power to waive the requirements to give notice to extend a CTL (see Regulation 7(4) of The Prosecutions of Offences (Custody Time Limits) Regulations 1987 (as amended)).

MAKING AN EFFECTIVE APPLICATION TO EXTEND A CTL

- 22) When making an application to extend a CTL, the advocate must ensure that he or her is in possession of sufficient information to satisfy the court that the conditions set out in the Prosecution of Offences Act 1985 are met: i.e. that there is good and sufficient cause to justify an extension and that the prosecution has acted with all due diligence and expedition (see section 22(3) *ibid*). It will be important in making the application to ascertain whether the defence object to the extension sought.
- 23) In particular, the advocate should ensure that the court is in possession of the case chronology (which should have been previously submitted to the court with the notice to extend the CTL by the CPS) and the written pleading that accompanied it. The case of ([*R v Manchester Crown Court ex parte McDonald \[1999\] 1 Cr. App. R. 409*](#)) is particularly helpful.
- 24) The advocate should be mindful that the defence will have received a copy of these papers and will have been asked whether they intend to oppose the application. Notice of any authorities to be quoted will have also been requested.
- 25) The advocate should remember that the Divisional Court held in ***Wildman v Director of Public Prosecutions TLR 8 February 2001, (Archbold 1-272)***, that the procedures for applying to extend the CTL can be more informal than a normal trial process and that it is unnecessary to comply with the formal rules of evidence.
- 26) There are occasions when the making of an application appears difficult and a refusal likely. However, any allegation of inefficiency attributable to prosecution does not make the defendant suddenly suitable for bail to be conceded. The decision to grant bail is a matter for the court after they have considered full argument from both parties. The burden of satisfying the tests rests on the Crown on the *balance of probabilities*. An inappropriate concession to bail will be regarded as a reportable failure to the Director.
- 27) To satisfy the court that this condition (*acting with all due diligence and expedition*) 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 ([McDonald](#) above).

- 28) What the court must require is such diligence and expedition as would be shown by a competent prosecutor conscious of his duty to bring a case to trial as quickly as is reasonably and fairly possible ([McDonald](#) above).
- 29) The judge may properly extend a custody time limit even where the prosecution had not acted with all due diligence, if the prosecution's failure is not itself a cause for the required extension (***R (Gibson) v Winchester Crown Court [2004] EWHC 361 (Admin)***).
- 30) All concerned with the prosecution are not required to act as though this was their only task at hand; all due expedition meant the expedition appropriate in the circumstances (***Norwich Crown Court ex parte Parker [1993] 96 Cr. App. R. 68***).
- 31) Delay by the forensic service provider is not a failure by the prosecution to act with all due diligence and expedition, but the prosecution must do everything possible to ensure that the evidence is available on time and this will include making the relevant laboratory aware of relevant court dates and time limits (***R v Central Criminal Court, ex parte Johnson [1999] 2 Cr. App. R. 51***). But in ***R (Holland) v Leeds Crown Court [2002] EWHC 1862 Admin***, failure to inform the laboratory of the time constraints was fatal to a claim of due expedition.
- 32) Delay occasioned by the non-availability of a prosecution witness will only lead to a lack of due expedition where it could not be shown that the prosecution had not taken reasonable steps in the circumstances to ensure the attendance of the witness. The prosecution cannot be expected to 'nursemaid' their witnesses at all times (***Leeds Crown Court ex parte Redfearn [1998] COD 437***).
- 33) Advocates attention is particularly drawn to the case of ***R v Ipswich Crown Court ex p CPS [2010] EWHC 1515 (Admin)***. Keith J said: "The question under section 22(3) (b) of the 1985 Act is whether the prosecution has acted with all due expedition with respect to the period to which the custody time limit relates. Delays in arrest and charge are quite immaterial to that question." The principle is highly relevant where there is delay while the police investigate a possible co-defendant and that case is progressed with a view to joinder.
- 34) In such cases, delay is relevant only for the exercise of a judge's discretion to grant bail. It does not mean that the prosecution will have failed to expeditiously deal with the defendant for whom an extension is being sought. Nevertheless, investigation of

co-defendants and their subsequent case progression will be prioritised: the advocate should be aware that the CPS will oversee such cases ensuring minimum time is taken.

- 35) It will be occasionally necessary to ask the court to deal with the extension of a CTL in the absence of the defendant. This may be due to a failure in the transportation of prisoners to court, adverse weather or, as happens, the defendant refuses to leave his cell. Provision is made for this in the Criminal Procedure Rules at Rule 19.2 (1) (c) (ii) which allows for a CTL extension to be made in the defendant's absence where the court is satisfied that it would be just to do so.

EARLY ASSESSMENT OF THE PROSECUTION CASE

- 36) It should be standard practice for advocates to check instructions at an early stage to determine if there are any active CTL in the case that are relevant to its handling. Advocates that make unexpected applications on the day that threaten the fixture cannot expect the court to be sympathetic to a CTL extension application that became necessary.

- 37) Accordingly, advocates should not hesitate to ask the CPS office, lawyer or caseworker, or Unit Head if there is any uncertainty about their instructions, or missing information relevant to the making of a CTL extension application or they would want to present the case in manner that is substantially different from the way that the case has been prepared in the instructions.

- 38) An important consideration for the court will be whether the CPS has complied with the court orders for an efficient case progression. It is not unknown for there to be delays in the provision of reports from forensic or other experts. The CPS is required to comply with court orders or seek more time with an explanation for non compliance. The advocate will need to be instructed in every case where there has been a failure to comply with an order so that the court can be updated on the latest situation and with the efforts that are being made to progress the case. Advocates should carefully check the CTL extension application and seek further instructions as a matter of urgency where a delay is otherwise unexplained.

- 39) The advocate should be particularly careful in taking last minute decisions that may give the appearance that the prosecution has not acted with all due diligence and expedition. For example, conceding disclosure of unused material on the morning of the trial of material already considered by the reviewing lawyer as not considered assisting or undermining, especially where no previous section 8 application for disclosure to the court had been made or no proper defence case statement has been served. Advocates should be alive to this concern and carefully discuss issues and concerns with a CPS

representative, preferably the Unit Head, well in advance of the hearing date.

- 40) Work undertaken by the Advocate in the case will itself be taken into consideration as to whether the prosecution has acted with all due diligence and expedition. The Advocate should be mindful of the need for early case conferences, where necessary, and in compliance with Bar Standards for particular cases. (e.g. Rape prosecutions).

AN EFFICIENT SYSTEM AT CHAMBERS

- 41) Additionally, the Advocate will need to make sure that they are supported by an efficient referral system of correspondence and phone messages from and to the CPS by Chambers or their office. Delays and poor actioning of messages by Chambers have occurred which have directly led to CTL failures.

BAIL AT THE EXPIRY OF A CTL

- 42) Where the Crown Court refuses to extend a CTL, problems are experienced where the release to bail takes place leaving a very short amount of the CTL left to run (e.g. 2 days). In the event of an arrest for breach of bail, it is very likely that the time taken from a magistrates' remand and the next appearance at the Crown Court will have resulted in the expiry of the CTL, leaving the court with no option but to release the defendant again.

- 43) Where little time remains before the expiry of a CTL and the court has decided to grant bail, the advocate should apply for the release of the defendant at the expiry of the CTL in accordance with Reg. 6(6) *ibid*. This will ensure that a release on bail is in consequence of the expiry of a CTL. Under section 22 (5) Prosecution of Offences Act 1985, such a release will ensure that no CTL will apply if the defendant is subsequently remanded back into custody following a breach of bail.

- 44) It is hoped that the advocate will find this additional guidance helpful. Any queries should be addressed to david.evans@cps.gsi.gov.uk.

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