R. v. MANCHESTER CROWN COURT, ex p. McDONALD
R. v. LEEDS CROWN COURT, ex p. HUNT
R. v. WINCHESTER CROWN COURT, ex p. FORBES
R. v. LEEDS CROWN COURT, ex p. WILSON AND MASON

QUEEN'S BENCH (DIVISIONAL COURT) (The Lord Chief Justice (Lord Bingham) and Mr Justice Collins): November 9, 1998

CUSTODY TIME-LIMITS

Extensions

Guidance—Prosecution of Offences Act 1985 (c. 23), s.22(3).

By section 22(3) of the Prosecution of Offences Act 1985:

> "The appropriate court may, at any time before the expiry of a time-limit imposed by the regulations, 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."

In linked applications for judicial review challenging decisions to extend custody time-limits beyond the maximum period provided in regulation 5(3) of the Prosecution of Offences (Custody Time Limits) Regulations 1987, the court gave the following guidance on the law governing such decisions:

(1) When making a decision on the extension of custody time-limits the judge has to be careful to give full weight to the three overriding purposes of the 1985 Act and the 1987 Regulations, namely, to ensure that the periods for which unconvicted defendants are held in custody awaiting trial are as short as reasonably and practically possible; to oblige the prosecution to prepare cases for trial with all due diligence and expedition; and to invest the court with the power and duty to control any extension of the maximum period under the regulations for which any person may be held in custody awaiting trial.

(2) 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 a balance of probabilities that both the statutory conditions in section 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 so satisfied it may not do so. If it is satisfied it may, but

need not, do so. The requirement for the court to be satisfied means that the court can never abdicate its responsibility by making orders of extension without investigating the matter, or simply because the parties agree or no objection is raised. The court has to be adequately and fully informed; whether evidence will be necessary, or whether the court can rely on information supplied by counsel, will depend on the nature and extent of any controversy.

Sheffield Justices, ex p. Turner [1991] 2 Q.B. 472 and *Norwich Crown Court, ex p. Parker* (1993) 96 Cr.App.R. 68 applied.

(3) In order to satisfy the court that the prosecution has acted with all due expedition, the prosecution has to show that it has used 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 has been met, the court has to have regard to the nature and complexity of the case, the extent of the preparation necessary, the conduct 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.

(4) It is neither possible nor desirable to attempt to define what may or may not amount to good and sufficient cause in any given case. All has to depend on the judgment of the court called upon to make a decision, which will have to be made on the peculiar facts and circumstances of the case in question.

Governor of Winchester Prison, ex p. Roddie (1991) 93 Cr.App.R. 190, [1991] 1 W.L.R. 303 and *Central Criminal Court, ex p. Abu-Wardeh* [1999] 1 Cr.App.R. 43, [1998] 1 W.L.R. 1083 considered.

(5) The jurisprudence of the European Court with regard to Article 5(3) of the European Convention of Human Rights does not throw any doubt on the English law.

Wemhoff v. Federal Republic of Germany (1968) 1 E.H.R.R. 55, *Stögmüller v. Austria* (1969) 1 E.H.R.R. 155, *Zimmermann and Steiner v. Switzerland* (1983) 6 E.H.R.R. 17 and *W v. Switzerland* (1993) 17 E.H.R.R. 60 considered.

(6) When ruling on an application for an extension, 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. In a case where 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 reasons for the refusal.

Leeds Crown Court, ex p. Briggs (No. 1) [1998] 2 Cr.App.R. 413, applied.

(7) Where a court has heard full argument and given its ruling, the High Court will be most reluctant to disturb that decision. The 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. Parties

who make challenges have to take care to ensure that there are proper grounds for making application and that they are not inviting the High Court to trespass into a field of judgment which is reserved to the court of trial.

(For custody time-limits, see *Archbold* (1999), paras 1–270 to 1–275.)

Applications for judicial review.

The applicant, Wayne McDonald, applied for judicial review by way of an order of certiorari to quash decisions of Judge Burke Q.C. sitting in the Crown Court at Manchester on April 14 and August 5, 1998, to extend the time of his remand in custody. A concurrent application for habeas corpus was dismissed.

The applicant, Colin Arthur Hunt, applied for judicial review by way of an order of certiorari to quash the decision of Judge Hoffman, sitting in the Crown Court at Leeds, to extend the time of his remand in custody. The concurrent application for habeas corpus was dismissed.

The applicant, Stuart David Forbes, applied for judicial review by way of an order of certiorari to quash the decision of Judge Brodrick, sitting in the Crown Court at Winchester, to extend the time of his remand in custody.

The applicants, Marvin Lee Wilson (a.k.a. Thain) and Stuart Mason, applied for leave to move for judicial review of a decision of Judge Cockcroft, sitting in the Crown Court at Leeds, to extend the time of their remand in custody.

The facts and grounds of the applications appear in the judgment of Lord Bingham C.J.

Kris Gledhill for the applicant McDonald.
Michael Murray for the prosecution.

Kris Gledhill for the applicant Hunt.
Roger Birch for the prosecution.

John Lofthouse for the applicant Forbes.
Stephen Parish for the prosecution.

Guy Kearl for the applicants, Wilson and Mason.

LORD BINGHAM C.J.: The five applicants now before the Court all, for differing reasons, challenge judicial decisions to extend custody time-limits. Such applications have proliferated in recent months. In this judgment of the court we seek to give guidance on the law governing such decisions.

Everyone has a basic right to personal liberty. That is a right respected by the common law, and expressed in the European Convention of Human Rights which provides in Article 5:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

A (a) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; . . .

B 3. Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. . . ."

The general presumption in favour of liberty is reflected in section 4(1) of the Bail Act 1976 which grants a right to bail unless conditions specified in Schedule 1 to the Act are satisfied. Schedule 1 provides that an accused but unconvicted defendant need not be granted bail if a court is satisfied that
C there are substantial grounds for believing that he would, if released on bail (whether subject to conditions or not), fail to surrender to custody, or commit an offence while on bail, or interfere with witnesses or otherwise obstruct the course of justice; and there are other situations in which a defendant need not be granted bail, as (for example) where he is accused of an indictable or either-way offence and is alleged to have committed that
D offence while on bail in earlier criminal proceedings, or if the court is satisfied that he should be kept in custody for his own protection. In taking decisions on the grant of bail the court is required by para. 9 of the Schedule to have regard to such of the following considerations as appear to it to be relevant, namely:

"(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),
E (b) the character, antecedents, associations and community ties of the defendant,
(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings,
(d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted."

F Thus the general right of any unconvicted person to remain at liberty until convicted may be curtailed if certain stringent conditions are shown to be satisfied.

If the law ended at that point it would manifestly afford inadequate protection to unconvicted defendants, since a person could, if the Bail Act conditions were satisfied, be held in prison awaiting trial indefinitely, and
G there would be no obligation on the prosecuting authority to bring him to trial as soon as reasonably possible. It was no doubt to rectify that defect that Parliament, in section 22 of the Prosecution of Offences Act 1985, empowered the Secretary of State by regulation to make provision as to the

maximum period for which an accused person might be held in custody at different stages of the proceedings against him. The Secretary of State has exercised that power to make the Prosecution of Offences (Custody Time Limits) Regulations 1987 (S.I. 1987 No. 299) which, as amended, provide in regulation 5(3) that:

> "The maximum period of custody—
> (a) between the time when the accused is committed for trial and the start of the trial; ...
> shall, subject to the following provisions of this Regulation, be 112 days."

Section 22(3) of the 1985 Act, however, provides:

> "The appropriate court may, at any time before the expiry of a time-limit imposed by the regulations, 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."

All the applications before us challenge decisions to extend the maximum period of custody beyond the period of 112 days provided in regulation 5(3).

The 1985 Act and the 1987 Regulations as amended 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 duty to control any extension of the maximum period under the regulations for which any person may be held in custody awaiting trial.

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.

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 section 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.

The requirement in section 22(3) that the court must be "satisfied" means that the court can never abdicate its responsibility by making orders of extension on the nod, or simply because the parties agree or no objection is raised. It is necessary that the court "should be seized of the question and

should address [its] mind[s] to section 22(3) and especially the two matters of which [it has] to be satisfied" (*per* Taylor L.J., *Sheffield Justices, ex p. Turner* (1991) 93 Cr.App.R. 180 at 184, [1991] 2 Q.B. 472 at 477). It is clear, as Jowitt J. pointed out in *Norwich Crown Court, ex p. Parker* (1993) 96 Cr.App.R. 68 at 70, that a court making a decision under section 22(3) must always be adequately and fully informed of the matters which affect the decision. Whether evidence will be necessary, or whether the court can rely on information supplied by counsel, will depend on the nature and extent of any controversy. If, for example, the prosecutor outlines the history of the proceedings and suggests, without contradiction by the defence, that the prosecution has acted with all due diligence and expedition, the court will be more readily satisfied on that score than if that condition is the subject of a substantial contest. It is, however, always for the court and not for the parties to be satisfied.

The condition in section 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 period of 112 days specified in the Regulations is a maximum, not a target; and that it is a period applicable in all cases. As Lloyd L.J. pointed out in *Governor of Winchester Prison, ex p. Roddie* (1991) 93 Cr.App.R. 190, 193, [1991] 1 W.L.R. 303, 306, the court will not, in considering whether this condition is satisfied, pay attention to pretexts such as chronic staff shortages or, we would add, overwork, sickness, absenteeism or matters of that kind.

Under section 22(3)(a) the court must be satisfied that there is good and sufficient cause for extending or further extending the maximum period of custody specified in the Regulations. The seriousness of the offence with

which the defendant is charged cannot of itself be good and sufficient cause within the section: see *Governor of Winchester Prison, ex p. Roddie* (*supra*), at pages 193 and 306. Nor can the need to protect the public: see Auld L.J. in *Central Criminal Court, ex p. Abu-Wardeh* [1999] 1 Cr.App.R. 43, 48, [1998] 1 W.L.R. 1083, 1088. If conditions of that kind are not satisfied, the defendant is entitled to bail and the question of extending custody time-limits will not arise. Nor, as again Lloyd L.J. held in *Roddie*'s case at pages 193 and 306, can it be a good cause that the extension is only for a short period. As Auld L.J. said in the *Abu-Wardeh* case at page 48:

> "To amount to 'good . . . cause' there must be some good reason for the sought postponement of the trial carrying with it the need to extend the custody time-limit."

While it is possible to rule that some matters, such as those we have just mentioned, are incapable in law of amounting to good and sufficient cause for granting an extension, there is an almost infinite variety of matters which may, depending on the facts of a particular case, be capable of amounting to good and sufficient cause. It is neither possible nor desirable to attempt to define what may or may not amount to good and sufficient cause in any given case, and it would be facile to propose any test which would be applicable in all cases. All must depend on the judgment of the court called upon to make a decision, which will be made on the peculiar facts and circumstances of the case in question, always having regard to the overriding purposes to which we have made reference above.

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: see, for example, *Norwich Crown Court, ex p. Cox* (1993) 97 Cr.App.R. 145; *Maidstone Crown Court, ex p. Freeman* (Rose L.J. and Potts J., unreported, October 25, 1994); *Central Criminal Court, ex p. Abu-Wardeh* (*supra*); *Birmingham Crown Court, ex p. Bell* [1997] 2 Cr.App.R. 363; *Blair and Bryant* and *Taylor* (Toulson J., unreported, October 7, 1998). This is, however, a cause to be approached with great caution. We respectfully adopt the observation of Auld L.J. in *ex p. Abu-Wardeh*, at pages 51 and 1090, where he said:

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

We also adopt observations very recently made by Toulson J. sitting in the Crown Court at Winchester in *Blair and Bryant* and *Taylor* (*supra*):

"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 cased 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."

We have helpfully been referred to cases decided by the European Court of Human Rights under Article 5(1)(c) of the Convention, which we quoted at the outset of our judgment. In *Wemhoff v. Federal Republic of Germany* (1968) 1 E.H.R.R. 55 at 77 the Court said:

"16. In these circumstances, the Court could not conclude that there had been any breach of the obligations imposed by Article 5(3) unless the length of Wemhoff's provisional detention between 9 November 1961 and 7 April 1965 had been due either (a) to the slowness of the investigation, which was only completed at the end of February 1964, or (b) to the lapse of time which occurred either between the closing of the investigation and the preferment of the indictment (April 1964) or between then and the opening of the trial (9 November 1964) or finally (c) to the length of the trial (which lasted until 7 April 1965). It cannot be doubted that, even when an accused person is reasonably detained during these various periods for reasons of the public interest, there may be a violation of Article 5(3) if, for whatever cause, the proceedings continue for a considerable length of time.

17. On this point, the Court shares the opinion of the Commission that no criticism can be made of the conduct of the case by the judicial authorities. The exceptional length of the investigation and of the trial are justified by the exceptional complexity of the case and by further unavoidable reasons for delay.

It should not be overlooked that, while an accused person in detention is entitled to have his case given priority and conducted with particular expedition, this must not stand in the way of the efforts of the judges to clarify fully the facts in issue, to give both the defence and the prosecution all facilities for putting forward their evidence and stating their cases and to pronounce judgment only after careful reflection on whether the offences were in fact committed and on the sentence."

In *Stögmüller v. Austria* (1969) 1 E.H.R.R. 155, a defendant accused of fraud offences was arrested and detained for just over two years. The Court in its judgment, at page 191, observed:

"Article 5(3), for its part, refers only to persons charged and detained. It implies that there must be special diligence in the conduct of the prosecution of the cases concerning such persons. Already in this respect the reasonable time mentioned in this provision may be distinguished from that provided for in Article 6.

A On the other hand, even if the duration of the preliminary investigation is not open to criticism, that of the detention must not exceed a reasonable time.

Thus, Article 5(3) appears as an independent provision which produces its own effects whatever may have been the facts on which the arrest was grounded or the circumstances which made the preliminary investigation as long as it was. The Court is therefore unable to consider as decisive some of the facts referred to in
B argument such as the point whether there are too few investigating judges in Austria or whether the system of assigning cases makes it possible to avoid that some of them are too busy to be able to dispose at a satisfactory rate of the cases allocated to them."

Zimmermann and Steiner v. Switzerland (1983) 6 E.H.R.R. 17 was not a case under Article 5(3) of the Convention but Article 6(1). It concerned an
C 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
D European Court held that there was no violation of Article 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
E 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
F granted, for holding the conditions in section 22(3) to be fulfilled: see *Leeds Crown Court, ex p. Briggs (No. 1)* [1998] 2 Cr.App.R. 413, DC, Kennedy L.J. and Maurice Kay J. In a case where 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 reasons 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
G 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. It is almost inevitable in cases of this kind that one or other party will disagree, often strongly, with the decision of the trial court, whatever it is. Such disagreement, however strong, is not a ground for seeking judicial review of the decision. Those who make applications of this kind must take care to ensure that there are proper grounds for making application and that they are not inviting this Court to trespass into a field of judgment which is reserved to the court of trial.

It is now necessary to consider the individual cases before the Court in the light of the principles we have set out.

1. Manchester Crown Court, ex p. McDonald

The application when originally lodged sought to challenge a decision of Judge Burke Q.C. on August 5, 1998 to extend custody time-limits until November 7, 1998. It was not until the matter was further investigated following the grant of leave to move that it transpired that Judge Burke had on April 14, 1998 extended custody time-limits until November 12, 1998 and that regrettably neither he nor counsel for the prosecution, who had attended on both occasions, had remembered that extension on August 5. Accordingly, since it was necessary to challenge the decision of April 14, 1998, those advising the applicant were aware that they might be faced with a contention that there had been undue delay in making the application, with the result that leave to amend might be refused; they accordingly lodged a concurrent application for habeas corpus.

The history is not uncomplicated. On December 18, 1996 the applicant was committed to the Bolton Crown Court on a charge of supplying some 10,000 Ecstasy tablets (the "Ecstasy offence"). The trial was fixed for September 1, 1997, the applicant being on bail. He failed to surrender to his bail and a bench warrant was issued. On November 13, 1997 he was arrested for possession of cocaine with intent to supply (the "cocaine offence"). A search of premises occupied by a co-defendant disclosed firearms, but at the time there was no evidence that the applicant had had any connection with them. On January 6, 1998 the cocaine offence was committed to the Manchester Crown Court. On February 2, 1998, following discovery of his fingerprints on at least one of the firearms, the applicant was charged with what we shall refer to as the "firearms offences", and on March 16, 1998 was committed to Manchester Crown Court in respect of them. On February 20, 1998 the trial of the Ecstasy offence had been fixed to be heard at Manchester Crown Court on August 3, 1998 and the custody time-limits extended to August 7, 1998. On the same date the applicant was arraigned on the cocaine offence and pleaded not guilty.

On April 14, 1998 the applicant and his co-defendant in relation to the firearms offences appeared before Judge Burke. They were arraigned and each pleaded not guilty. It was proposed that the firearms offences should be tried on November 3, 1998. What led the judge to decide on that date is

not apparent from the transcript of the hearing with which we have been provided. There certainly was no discussion with counsel whether any earlier date might be possible.

That date having been fixed, it was necessary to consider the extension of the custody time-limits. Counsel for the Crown (Mr Portnoy) raised the question with the judge.

The discussion about this is recorded at pages 9F to 10B of the transcript of this hearing. We should set it out in full. It reads:

> "*Mr Portnoy:* Your Honour, if we are fixing the trial in relation to the two new committals or contemplating fixing it for November, custody time-limits will expire. I am not quite sure when they expire at the moment in relation to those matters but what is clear, they will have expired by November 3. In fact there is the trial in August to take place and custody time-limits I think in respect of everything have been extended, my note says in respect of everything, have been extended to August 7.
>
> *Judge Burke:* I think that's my note too.
>
> *Mr Portnoy:* What I need to do if we are talking about a trial in November is make application for that to be further extended. It can be either done now or in August.
>
> *Judge Burke:* You don't know when it expires at the moment, do you?
>
> *Mr Portnoy:* August 7, your Honour extended it to then.
>
> *Judge Burke:* In all matters, yes. What do the defendants say about this?
>
> *Mr Gray:* Your Honour, there is no objection so far as I am concerned.
>
> *Mr Ford:* No, your Honour.
>
> *Judge Burke:* I will extend the custody time-limit in relation to these two defendants.
>
> *Mr Gray:* Your Honour it is only McDonald.
>
> *Judge Burke:* In relation to Mr McDonald to November 12."

Mr Ford was counsel for the applicant's co-defendant and Mr Gray counsel for the applicant.

On August 5, 1998 the applicant again appeared before Judge Burke. By then he had changed his legal representatives on the Ecstasy offence, and Mr Brown Q.C., instructed only in relation to the Ecstasy offence, appeared to represent him. That matter was adjourned to August 10, and the custody time-limits in respect of it were extended until August 31. It seems that the Crown Prosecution Service, counsel and the judge must have forgotten about the extension on April 14 because notice had been served notifying an intention to seek extension of the time-limits in respect of the cocaine and the firearms offences. Mr Brown made it clear that he was not

instructed on those matters and could not consent to those extensions. The judge, who does not seem to have sought or been given any information to enable him to satisfy himself of the requirements of section 22(3), stated:

> "Custody time limits in relation to other matters [*viz.* the cocaine and firearms offences] will be extended to November 7."

There was thus, it would seem, total failure by the judge to apply his mind to the requirements of section 22(3). Furthermore, counsel had not accepted, since he was without instructions on the two indictments concerned, that an extension should be permitted. It seems, to make things worse, that the applicant may not even have been in court when the extension was granted: his solicitor's recollection is that he was not. Accordingly, had the extension granted on August 5 been the decision which needed to be challenged, we would have had no hesitation in saying that it could not stand.

It is, however, apparent that the custody time-limits were in fact extended to November 12 on April 14. In the light of the confusion created by the events of August 5 and our concerns that the extension granted on April 14 may, notwithstanding counsel's failure to object to it, have been granted without proper consideration being given by the judge to the requirements of section 22(3), we granted the applicant leave to amend the form 86A to enable him to challenge that extension. That renders consideration of the habeas corpus application unnecessary and we shall formally dismiss it.

Mr Murray on behalf of the Crown Prosecution Service accepts that there is nothing in the transcript of the hearing on April 14 which assists in identifying the reason for the need to fix a trial date as long ahead as November. But he submits that the judge was entitled to accept from counsel's failure to oppose the application to extend the time-limits that it was not disputed that the requirements of section 22(3) were met. We feel sure that the judge, in common with all who sit regularly in the Crown Court, was aware of the requirements of section 22(3). However, it should not have been assumed that counsel's failure to raise any objection necessarily indicated a positive acceptance, following proper consideration, that the requirements were met. We entirely accept that the consent of experienced counsel will carry considerable weight and may relieve a judge of the need to go into all the details. But the judge must always inform himself fully and satisfy himself that it is proper to allow an extension. Here, the judge asked no questions and, since he gave no reasons for his decision, we are unable to know why he decided that it was necessary to fix the trial in November.

We are therefore left in the position of being unable to identify any good or sufficient reason for the extension. It may be that one existed, but we cannot speculate, particularly when a person's liberty is at stake. Accordingly, we are driven to quash the extensions granted on both occasions.

2. Leeds Crown Court, ex p. Hunt

A The applicant was arrested on November 25, 1997 for conspiring to import 534 kilograms of cannabis resin into the United Kingdom to a value in excess of £2 million. Following extension of the custody time-limits granted by the magistrates, a contested committal hearing took place on March 25, 1998 following which two co-defendants were discharged and the applicant was committed in custody to Leeds Crown Court to stand his B trial. There was a plea and directions hearing on April 22, 1998. The Crown was in the process of seeking further evidence and the matter was adjourned. On July 9, 1998 there was a further hearing before Judge Hoffman, who was the nominated trial judge. Since the custody time-limit was due to expire on July 15, application was made for an extension. The estimated length of the trial was given as five to seven days. Judge Hoffman ascertained that the first available date was December 14, 1998. C Counsel for the applicant objected to the extension and so there was a hearing in the course of which Judge Hoffman heard evidence from the Customs officer in charge of the case, since one of the grounds for the extension sought was the need for the Crown to await the obtaining of further evidence in Spain, the country from which the cannabis resin had come. Following the hearing, Judge Hoffman extended the time-limit until D December 15, 1998. That decision is now challenged both by judicial review and by way of habeas corpus.

It is clear that Judge Hoffman had the requirements of section 22(3) well in mind. He gave a detailed reasoned judgment after, as he said, he had "heard submissions from both sides at considerable length".

Two matters were relied on by the prosecution as good and sufficient cause for the extension. First, enquiries were being pursued in Spain and E the Spanish authorities were, despite being pressed, taking a long time to respond. Secondly, there was no court available until December 14 to try the case.

We must refer briefly to the background of the allegations against the applicant in order to understand the need for the additional evidence. The cannabis resin was hidden in packing cases which had been taken by a man F called Graham Macfarlane to a transport depot in Estepona. They were collected by two men when they arrived in England who said, when questioned, that they had been paid £50 for collecting and delivering the cases to the applicant. When the applicant was arrested, he said he was awaiting a delivery address from one Graham of a firm called Macs Movers which was based in Spain. He had about a week earlier been in Spain, but he denied that that visit had had anything to do with Graham or G cannabis resin. He did not know what was in the cases. Mr Macfarlane arrived at Dover on August 8, 1998, whereupon he was arrested. He was given an account of his involvement with the cases, the effect of which is that they were from a man called Gordon who unfortunately cannot now

be traced. It is intended that Macfarlane be tried at the same time as the applicant.

As must be apparent from the brief outline of the circumstances, it was necessary to make enquiries in Spain. The thrust of the applicant's counsel's submissions before Judge Hoffman was that the Customs & Excise had not made sufficient efforts and in particular had let too long a time elapse before asking the Spanish authorities to permit them to pursue enquiries there or to carry out such enquiries themselves. They had not, it was submitted, acted with all due expedition. It followed that the need to await further evidence from Spain was not a good or sufficient cause for the extension. In addition, counsel submitted that the length of the extension, namely 156 days, was excessive inasmuch as the prosecution was only asking for an extension for some six to eight weeks to obtain the extra evidence. The balance was due to lack of an available court and this did not justify an extension for such a long period. Greater efforts should be made to achieve an earlier hearing.

Mr Webster, the Customs officer in charge of the investigation, was called to give evidence. He explained the steps that had been taken to get the evidence from Spain. He confirmed that it was necessary for the Spanish authorities to act at the request of the English He described the response as "a gradual creeping response". He agreed that a commission rogatoire was not completed until April, but that had had to await the receipt of sufficient information to justify making it.

In his judgment, Judge Hoffman directed himself that there was no reason why this lack of a court or non-availability of a judge to hear a trial were not capable of coming within the phrase "good and sufficient cause" and that the circumstances of each case must be considered independently. He accepted that Mr Webster had done his level best to progress his enquiries in Spain. He took the view that the lack of any available judge or court, coupled with the need to make further enquiries, constituted a good and sufficient cause for the extension and he was satisfied that the prosecution had acted with all due expedition. He also stated that the lack of an available court would by itself have constituted a good and sufficient cause for the extension.

Mr Gledhill has criticised the judge for relying on either of the grounds. He argues that an affidavit submitted by Mr Webster in this application, which gives a somewhat more detailed account of the efforts made, shows that Judge Hoffman was inadvertently misled. He suggests that the judge was told that the commission rogatoire was issued in March, whereas it was not until April. That it was April was stated by Mr Webster in cross-examination. He further submits that no proper explanation was advanced to explain why it was not issued earlier.

There was in our view no misleading of the judge. It is important to remember always that this is judicial review of, and not an appeal against, the judge's decision. We can only intervene if persuaded that his decision was perverse or that there was some failure to have regard to material

considerations or that account was taken of immaterial considerations or that there was some material misdirection. We cannot consider fresh evidence unless perhaps it establishes that the judge was misled by the prosecution. Still less can we be persuaded by arguments that the judge should have reached a different conclusion because he should have attached more weight to one rather than another factor.

We are satisfied that the judge was entitled in law to reach the decision that he did. We can detect no misdirection and it is in our judgment quite impossible to say that the decision was perverse. He clearly recognised that the effect of his decision was, as he put it, that the applicant would have to languish in custody and he stated that he extended the time-limit with reluctance.

It follows that we dismiss these applications. The concurrent application for habeas corpus was wholly unnecessary and served only to increase costs unnecessarily. It should not have been made.

3. Winchester Crown Court, ex p. Forbes

On September 2, 1997 the applicant was arrested and charged with a number of offences of burglary and conspiracy to burgle. He was committed to the Crown Court on November 27, 1997. The custody time-limits were due to expire in March 1998. Unfortunately, the applicant had some difficulties with his representation and lost faith in the counsel instructed on his behalf. In due course, the trial was fixed for June 29, 1998 and the custody time-limit was extended to June 30. At some stage, the trial date was put back to July 13, 1998 at the request of counsel for the applicant or his co-defendant and the custody time-limits were extended accordingly.

Unfortunately, Judge Webster, who was to conduct the trial, fell ill. On July 10, 1998 application was made to Judge Brodrick to extend the custody time-limits since it had been impossible to find another judge to try the case. After hearing argument and considering objections on behalf of the defendants, Judge Brodrick ordered that custody time-limits be extended to November 24, 1998, since November 23, 1998 was the first date on which all witnesses and counsel could attend a trial. The judge was informed that no less than 43 live witnesses were to be required by the defence to attend to give evidence. It is not surprising in those circumstances that there were difficulties in finding dates which enabled all those witnesses to attend.

Mr Lofthouse on behalf of the applicant has attacked the judge's decision on a number of grounds. But in the course of argument he accepted that, subject to one matter, he could not complain about the inability to find an earlier date than November 23, if it was proper to have lost July 13. The non-availability of witnesses and, having regard to the applicant's loss of confidence in his previous counsel, the need for him to have counsel of his choice represented good and sufficient cause for the extension. He did, however, submit that the date of November 23 was, as he put it, plucked from the air when there was no guarantee that the trial could be heard then.

We have been told that it is a fixture for that date and a judge has been nominated to try it. There is therefore nothing in that complaint.

The real compaint is that when it was discovered that Judge Webster was ill and would be unable to conduct the trial on July 13, insufficient efforts were made to find another judge. When the application was before Judge Brodrick, he believed that it was only towards the end of June that it became clear that Judge Webster would be unable to sit. It now transpires that the Crown Court had decided that the trial would be unable to go ahead on July 13, unless perhaps, some other suitable judge's case went out of the list, on or about June 22, 1998. The material put before Judge Brodrick coupled with his own investigations with the list officer at court led him to make these findings, which are set out at page 4 of the transcript of his reasons:

> "Efforts were made by the listing office to identify either another judge or another court that could take this case or a Recorder who would take the case. Unfortunately, the person who made those enquiries, the senior listing officer, is on leave and I have only been able to speak to somebody else in the listing office who, while knowing that enquiries were made, is unable to provide any details of those enquiries, but in general terms they involve seeking a further full-time judge—I interpose to say at that sort of timescale, short of a case collapsing, it was going to be extremely unlikely that a full-time judge would be available, certainly at this court. Efforts were made to transfer the case to both Portsmouth and Southampton but without success and efforts were made to find a Recorder. Having regard to the fact that this is a serious allegation of a number of burglaries, including conspiracy to burgle, having regard to the value of the property alleged to have been stolen, and having regard to the likely length of the case, namely two to three weeks, it seems to me to be immediately apparent that it is not the sort of case that can be put before any Recorder. If it is to go before a Recorder it would have to be a hand-picked Recorder, senior and experienced. The chances of getting such a Recorder to be able to take a two to three week case at two to three weeks' notice, seems to me to be really very slight indeed."

The judge went on, in a lengthy and detailed judgment, to direct himself accurately on the requirements of section 22(3), and concluded that good and sufficient cause had been shown.

Mr Lofthouse submits that insufficient efforts were made to find another judge for July 13 and Judge Brodrick should have concluded that no good and sufficient cause for an extension had been shown. He went so far as to submit that the illness of a judge could not (save where the illness was very temporary and required a short period before the judge was better) constitute good and sufficient cause. Illness was foreseeable and there should be spare judges suitably qualified, available within the system to

take over if a particular judge fell ill. That submission we are wholly unable to accept. We see no error of law in the conclusions reached by Judge Brodrick on the material before him. No doubt with hindsight it is possible to identify further steps which might have been taken, but that does not mean that the judge erred in concluding as he did. We have no doubt that the judge was entitled to decide as he did notwithstanding that the extension was substantial. He fully considered all the relevant factors. Accordingly, we dismiss this application.

4. Leeds Crown Court, ex p. Wilson and Mason

This is an application for leave to move for judicial review of a decision of Judge Cockroft on September 22, 1998 to extend custody time-limits until January 4, 1999, when the trial is to commence. In fact, they were extended until March 13, 1999 to enable one of the defendants to have counsel of his choice and no complaint is made about that further extension.

There is no transcript of the judge's reasons for granting the extension and at present we are reliant on a note made by counsel who appeared.

It seems that the main, perhaps the only, matter relied on as good and sufficient cause for the extension was lack of a court or a judge. This, it is submitted, could not justify an extension of as much as 104 days.

Since we do not know the ground of the judge's decision we feel bound to conclude at this stage that the point is arguable and so we will grant leave. A transcript of the judge's reasons must be obtained and counsel should reconsider the matter when he has received it in the light of this judgment.

Orders accordingly.

Solicitors: Nicholas Green, Halifax for McDonald and Hunt; Crown Prosecution Service, Manchester. Solicitor, Customs and Excise. Addison Madden, Portsmouth for Forbes; Crown Prosecution Service, Eastleigh. McCormicks, Leeds for Wilson and Mason.

D.J.