SENIOR PRESIDING JUDGE
FOR ENGLAND AND WALES

THE RT HON LADY JUSTICE MACUR

Advocates' Graduated Fee Scheme Dispute

NOTE FROM THE SENIOR PRESIDING JUDGE

1. This guidance is issued in respect of publicly funded defence cases where the representation order was granted on or after 1 April 2018.

2. This guidance only applies to cases sent to the Crown Court during the period of the dispute between the legal profession and the Lord Chancellor. It has no wider application.

3. The aim is to ensure uniformity of approach by all judges sitting at the Crown Court and to assist defendants who appear in the Crown Court unrepresented by either counsel or solicitors.

4. There must be no suggestion that the judiciary are anything other than neutral in this dispute between the profession and the government. This guidance seeks only to address practical issues in the management of cases in the Crown Court.

5. The work of the court must continue to be listed appropriately with the expectation that those instructed to attend will do so and fulfil their commitments to their clients and the court. Any application to vacate or adjourn a case should be decided on its merits and in the interests of justice. It is important to keep an accurate factual record of the impact on the working of the court of any action, including the name and details of any cases affected.

Over Arching Principles

6. The following principles apply and must govern practical steps taken by the court:

Royal Courts of Justice Strand London WC2A 2LL
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(1) The duty of the judge is to secure a fair trial. **Article 6** of the **Convention** makes this a basic and uncontroversial prerequisite.

(2) The judge will continue to have regard to the 'Overriding Objective' in Part 1 of the **Criminal Procedure Rules 2015** when making decisions.

(3) It is not the role of the court (judge or court staff) to provide legal representation for those who are unrepresented before a court.

(4) It is the duty of the judge to make appropriate allowances and offer what assistance it can to those defendants who are unrepresented, including matters that would ordinarily be explained by counsel or solicitors privately in a conference or consultation.

(5) The court (judge or court staff) cannot give legal advice to any defendant. The judge may explain the law, but may not give advice. Where neither HCAs nor Counsel are available, the judge may seek assistance from the Public Defender Service (PDS) to provide defence representation in all types of legally-aided criminal cases in the higher courts. The PDS can be instructed by any solicitor firm and may be able to assist in cases which a judge deems appropriate for hearing by video on line link.

Process:

Prior to the PTPH

7. In any case where solicitors have a representation order, the defence solicitors to be required to upload to the DCS the following information:

(1) Whether the defendant will be represented at the PTPH and, if so, whether representation will be by counsel or solicitor.

(2) The proposed plea(s) to the indictment.

(3) The essential issues in the case if a trial is anticipated.

(4) The information should be contained in a note uploaded to Section U of the digital file. This information should be provided the day prior to the PTPH hearing date.

At the PTPH

8. If the defendant's solicitor attends the PTPH s/he may be permitted to address the court and to engage in the PTPH process, either as a solicitor advocate or by assisting the defendant to represent themselves. Every case will need to be assessed on its own merits. The default position should be that arraignment will take place and the PTPH form will be completed and a trial date set.

9. If the defendant attends the PTPH unrepresented, the judge must deal with the hearing on a case by case basis. The default position should be that the defendant will be arraigned and case management orders made, though it will be for the judge to assess the circumstances in each case. Before doing so judges should discuss with the local CPS representatives the assistance required to ensure such hearings are fair and effective and may include requesting/ requiring the CPS:

    - to provide relevant documentation/exhibits to an unrepresented defendant without access to the DCS;
    - to facilitate the access to/viewing of audio/ video/cd/cctv as/if appropriate by attending a CPS office or police station;
    - to provide a clear succinct outline of the case against the defendant; and
    - provide a note setting out their assessment of the relevant range for sentencing, together with a copy of the relevant extract from any sentencing guideline. This note should confirm whether the defendant's antecedent history could bring them within the scope of Section 83 of the Powers of Criminal Courts (Sentencing) Act 2000.

    Every case will need to be assessed on its own merits.

10. In accordance with the BCM handbook for judges, https://intranet.judiciary.gov.uk/?p=22677 the PTPH "must be held within 28 days of sending". This also states PTPHs may be listed on a day exceeding 28 days, so long as the day is not more than 35 days from sending, and then only if it is necessary in order to:

    (1) Take into account Saturdays, bank holidays and court closure days.

(2) Accommodate smaller courts by allowing them to group their newly sent cases into hearings on only one or two days per week

(3) Accommodate the listing patterns of larger court centres where the volume of sent cases are better handled if they can list a similar number of cases per day across the week

(4) Enable the trial advocate to attend the PTPH or resolve legal aid issues.

11. The judge presiding over the PTPH must explain to each unrepresented defendant the regime for credit in respect of guilty pleas and the credit to be obtained at each stage of the process. This will be a simple statement of the guidance given by the Sentencing Council. It will be emphasised that the court is simply communicating the stated public guidance and is not an indication of advice or pressure to take any particular course.

12. If a defendant wishes to plead guilty at the PTPH, s/he should be allowed to do so, but before doing so, the court should require a brief summary of the case against him/her to be provided orally in court.

13. At every PTPH the issue of reporting restrictions must be considered. The fairness of a potential future trial before a jury must not be imperilled by unwarranted reporting.

14. If reporting restrictions are needed an order under section 4(2) of the **Contempt of Court Act 1981** is the correct method to achieve that. The reasons for the order should be publicly stated and endorsed upon the order.

Trials

15. In relation to trials where the representation order post-dates 1 April 2018 the defence solicitors shall be required to upload to the DCS at Section U a note stating whether the defendant will be represented by an advocate at trial and, if not, the steps taken to obtain such representation at trial. This note should be uploaded no later than 14 days prior to the date fixed for trial.

16. If no such note is uploaded or if the court is informed that the defendant will not be represented by an advocate at trial, the case should be listed no later than 7 days prior to the date fixed for trial with the defendant to attend. The judge at that

hearing will investigate the defendant's position in relation to representation and whether the trial can proceed as listed.

17. Experience of trying criminal cases where a defendant is unrepresented shows that such cases usually take longer than cases where there is a defence advocate. It is advisable that the judge establish and/or confirm procedure and timetable at the outset of the trial.

18. When considering applications to adjourn trials judges may be assisted by the guidance provided in R V Crawley and Walker:

    https://www.judiciary.gov.uk/wp-content/uploads/2014/05/r-v-crawley-others-21052014.pdf

Committals for sentence and appeals from magistrates' courts

19. Defence solicitors should be required to upload a note to the DCS at Section U no later than 14 days prior to the date fixed for the hearing of the committal or inform the listing officer no later than 14 days prior to the date fixed for the appeal hearing advising whether the defendant will be represented by an advocate at the hearing.

20. If no such note is uploaded or if the court is informed that the defendant will not be represented by an advocate at the hearing, the case should be listed no later than 7 days prior to the date fixed for the hearing with the defendant to attend. The judge at that hearing will investigate the defendant's position in relation to representation and whether the case can proceed as listed.

21. When investigating if a committal for sentence can proceed the judge should consider whether the defendant may be within the scope of Section 83 of the Powers of Criminal Courts (Sentencing) Act 2000 as non-compliance with this section will render the sentence unlawful.

Custody Time Limits

22. It will be made clear to an unrepresented defendant that the Custody Time Limits (CTL) apply to his case. The court must set a timetable in compliance with the statutory regime.

23. Any application to extend the CTL in any case involving an unrepresented defendant should be determined by the Resident Judge or his nominee. An unrepresented defendant must be advised of the relevant law and how he may make any representations or submissions prior to the hearing of the application.

24. For further guidance on extension of Custody Time Limits please see R v Bennett and Feeney (attached at **Annex A**)

Days of action

25. If a 'day of action' is called and the courts have notice, the Judge should consider whether a PTR is necessary (with or without the defendant) to make an assessment as to the impact on the commencement of a trial. If the 'day of action' impacts on an ongoing trial, the judge should proceed on the basis that an advocate will consider it a professional duty to attend to continue the trial and the judge must have regard to ensuring the efficient administration of justice and due process in the case before them, with particular regard for vulnerable witnesses and defendants.

JULIA MACUR

12 May 2018

Annex A

Case No: T20137601

T20137594

Manchester Crown Court

Date: 20/03/2014

Before :

MR JUSTICE TURNER

Between :

REGINA	**Prosecution**
- and -	
(1) TYLER BENNETT	**Defendants**
(2) AIDEN FEENEY	

- -
- -

Mr Barrie Darby for the Prosecution
Mr Michael Lavery for Bennett
Mr Michael Johnson for Feeney

Hearing dates : 20th March 2014
- -

Approved Judgment

Mr Justice Turner:

INTRODUCTION

This judgment relates to an application made by the prosecution to extend the custody time limits in circumstances where a trial which would otherwise have been effective has not proceeded as a result of the unavailability of an advocate to represent the interests of one of the defendants.

BACKGROUND

The defendants in this case are jointly charged with arson with intent to endanger life. Feeney is additionally charged with two offences of putting a person in fear of violence by harassment.

The prosecution case is that Feeney conducted a campaign of harassment against the complainant over a period of about a month during August and September 2013. A brief dalliance in the middle of August had encouraged Feeney to believe that they would continue thereafter in a steady relationship. The complainant refused to entertain this idea whereupon Feeney responded with repeated acts of harassment and intimidation. These are alleged to have included not merely threats of violence

delivered by text but no fewer than five acts of criminal damage on her home and her car.

Matters came to a head on 18 September 2013 when, it is alleged, Feeney recruited Bennett to set fire to the complainant's house in Walkden. At about 5am Bennett allegedly arrived at the complainant's address with firelighters. The Prosecution is that he used them to set fire to the house. At the time, it was occupied by the complainant's sister and a friend. The resultant blaze caused about £10,000 worth of damage. Neither of the women in the house was physically injured.

Both defendants have pleaded not guilty to the count of arson with intent to endanger life and nothing I say in this judgment should be taken as any indication whatsoever as to the respective strengths of the cases for the prosecution and defence. This matter is published openly with my leave and with the encouragement of the legal representatives with the aim of achieving some consistency of approach in the event that similar issues arise in other cases.

PROCEDURAL HISTORY

The defendants were arrested, charged and prosecuted. On 10 October 2013 the preliminary hearing took place and the matter was listed for trial on 17 March 2014. The court correctly noted and recorded at the time that the custody time limit was due to expire in respect of Bennett on 21 March 2014. Doubtless the trial date was fixed with this consideration firmly in mind.

The plea and directions hearing took place before the Honorary Recorder of Manchester on 13 December 2013. The defendants both pleaded not guilty to count one on the indictment under which they were charged with the offence of committing arson with intent to endanger life. Feeney pleaded guilty to the second and third counts which related to the acts of harassment which he had perpetrated over the period prior to the fire.

On 12 February 2014, in the context of a long running dispute between the publically funded bar and the Lord Chancellor relating primarily to legal aid rates, it was announced that, as from 7th March 2014, a "No returns policy" would begin. It was expected to extend, at all events in the first instance, over a period of four weeks. After this time the matter was to be reviewed. Such review has not yet been undertaken. The members of the executive of the Criminal Bar Association signed up to the policy and individual barristers were invited to consider whether or not to follow suit.

On 6 March 2014, the prosecution served a notice of application to extend the custody time limits in this case on the court and the defence. The notice was served on the precautionary basis that the trial was listed to commence only a matter of a few days prior to the expiry of the time limits. It did not make any reference to the enhanced risk that the trial date could be in jeopardy if either of the advocates for the defence should become unavailable and replacements could not be found as a result of the "No returns policy".

On 10 March 2014, those acting for Bennett made an application to vacate the trial on the grounds that counsel originally instructed to appear on his behalf would not be available and, in consequence of the "No returns policy", no advocate could be found who was willing to replace him. This application was refused. It was noted on the court file that the next available date for trial would not be until July 2014.

By letter dated 14 March 2014, counsel for Bennett wrote to the court pointing out that the author was committed to another trial in Leeds which would prevent him from representing him at the trial on the following Monday. He requested that the trial be adjourned on the basis that it was unlikely that any advocate would be found to accept the brief if an attempt were made to return it.

On 17 March 2014, the defendants were produced from custody for their trial. Counsel for the prosecution and a solicitor advocate representing Feeney were in attendance. However, there was no advocate to represent the interests of Bennett. The case was then transferred to this court. I was informed by Bennett's solicitor that he had been completely unable to find any advocate willing to represent his client at trial. I adjourned the matter to today for a full hearing of the outstanding prosecution application to extend the custody time limits.

I ordered that counsel originally instructed on behalf of Bennett should provide written details of the circumstances in which he came to be unavailable to attend and this order was promptly complied with.

I further ordered that Bennett's solicitor should send me a list of all chambers which he had approached in an effort to obtain representation for his client before me today. Again, this order was complied with. The list comprised no fewer than forty-eight chambers in Manchester, Preston, Liverpool, Leeds and London. No barristers from any of these chambers were both willing and able to accept the return of the brief to represent Bennett.

However, at the eleventh hour, counsel who had originally been instructed to act for Bennett came unexpectedly free and so he was able to attend to make representations on behalf of his client.

The matter now comes before me for the determination of the prosecution's application to extend the custody time limits in respect of the charge of arson with intent to endanger life.

THE STATUTORY FRAMEWORK

Section 22 of the Prosecution of Offences Act 1985, in summary, empowered the Secretary of State to make provision by regulations as to, amongst other things, the maximum period during which an accused could be held in custody while awaiting trial in the Crown Court.

The Prosecution of Offences (Custody Time Limits) Regulations 1987 (as amended) were made pursuant to section 22 and laid down the limits beyond which the accused was not to be detained in custody in respect of any given pending offence.

Section 22(3) of the 1985 Act, however, provides for the extension of custody time limits 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 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 offences; or

(iii) some other good and sufficient cause; and

(b) that the prosecution has acted with all due diligence and expedition."

There is no suggestion in this case that the prosecution has not acted with due diligence and expedition. Accordingly, the issue to be determined is whether or not there is "some other good and sufficient cause" to extend the time limit.

THE CASE LAW

The general approach to be applied to any application to extend the custody time limits was set out in the judgment of the court in McAuley, R(on the application of) v Crown Court at Coventry [2012] 1 W.L.R. 2766 at paragraphs 25 to 29 inclusive:

"**The general approach to custody time limits**

25 The time limit placed on trying those in custody is a vital feature of our system of justice which distinguishes it from many other countries. It puts a premium on careful management of all resources and the efficient conduct of business by the court administration under the direction of the judiciary. Not only does it provide sure means of compliance with a principle of the common law as old as Magna Carta that justice delayed is justice denied, but it has the collateral benefit that money is not squandered by the unnecessary detention of persons in prison awaiting trial at significant cost to the taxpayer.

26 The general approach of the court to an extension of a CTL is set out in R (Gibson) v Crown Court at Winchester (Crown Prosecution Service intervening) [2004] 1 WLR 1623 where a Divisional Court presided over by Lord Woolf CJ, with Rose LJ (the Vice-President of the Court of Appeal (Criminal Division)), was specially constituted to consider the proper approach of a Crown Court where an issue arose as to the availability of judges able to try homicide cases. The court reviewed the authorities, including the decision of R v Manchester Crown Court, Ex p McDonald [1999] 1 WLR 841 where Lord Bingham of Cornhill CJ observed at p 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."

27 Lord Woolf CJ then commented [2004] 1 WLR 1623, para 29:

> "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."

28 Lord Woolf CJ then referred to the availability of resources and the observations in R (Bannister) v Crown Court at Guildford [2004] EWHC 221 (Admin), where May LJ had said, at paras 11 and 21:

> "11. As has been said on a number of occasions, indiscriminate use of the power to extend 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."

> "21. 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?"

29 Lord Woolf CJ then continued [2004] 1 WLR 1623, para 31:

> "31. I fully understand most of the reasoning of May LJ 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 LJ'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."

This case could not, on any analysis be categorised as anything other than routine. There are no likely complexities of either fact or law.

In McAuley, the court went on to deal with the proper approach to the extension of time limits in routine cases where the delay is due to a lack of resources:

> "**The approach the Crown Court should take in a routine case where the extension is sought because of a lack of resources**
>
> 33 In Gibson's case [2004] 1 WLR 1623 , the guidance given primarily related to the availability of judges to try homicide cases; in Ex p McDonald [1999] 1 WLR 841, the guidance was more general. It may be helpful therefore to reiterate guidance in relation to purely routine cases. If in a routine case, where there should ordinarily be no difficulty in the availability of a judge or a physical courtroom, an issue as to the availability of money by way of sitting day allocation arises, then the case must be referred to the resident judge well in advance of any issue arising as to CTL. As Annex F to the consolidated criminal practice direction makes clear, listing is a judicial responsibility and it is the resident judge who is responsible under the guidance of the presiding judges for determining listing practice, for prioritising one case over another and deciding upon which date a case is listed and before which judge. The listing officer carries out the day-to-day operation of that listing practice under the direction of the resident judge. That did not happen in this case.
>
> 34 As the extension of custody time limits involves the liberty of a defendant, the resident judge (or his designated deputy if the resident judge is away from the court centre) must be provided with information on a regular basis, so that there can be proper monitoring of cases nearing their CTL. In a small court centre, such as Coventry, budgets and other resources have to be looked on in a wider context. Such information must therefore include available alternative locations, the availability

of judges, the budgetary allocation to the court and other such matters. Provided the experienced listing officer at each court gives the resident judge such regular information and there is close co-operation between courts, routine cases should be managed in such a way that money is always available to enable a case being heard within its CTL. It is, of course, essential that bail cases are not delayed and a sufficient budgetary allocation made so that justice is not denied in cases where the defendant is bailed. If more funds or judges are needed at a court centre, then that information must be passed to those responsible for the provision of money who can then review the position with the judges responsible for the listing of cases. It is wrong in principle and contrary to the terms of the practice direction for decisions to be made which are not made under the direction of the judges responsible for listing.

35 If, despite such careful management, an application has to be made to extend a CTL in a routine case because the funds by way of allocated sitting days are insufficient to enable the case to be heard within the CTL, then the application must be heard in open court on the basis of detailed evidence. It is clear from Ex p McDonald [1999] 1 WLR 841 , 846 that it is for the prosecution to satisfy the court of the need to extend CTL. It must follow that evidence from the senior management of HMCTS must be provided well in advance of the hearing to the defendant and adduced by the CPS to the court. The judge must then subject the application and the evidence to that rigorous level of scrutiny which is required where a trial is to be delayed and a person confined to prison because of the lack of money to try the case. Although other considerations may apply to cases which are not routine, lack of money provided by Parliament in circumstances where the custody time limits are unchanged will rarely, if ever, provide any justification for the extension of a CTL. If the Ministry of Justice concludes that it does not have sufficient funds for cases to be tried within CTL, then the Secretary of State must amend the Regulations and seek the approval of Parliament. If that is not done, the court has no option but to apply the present CTL and HMCTS must find the necessary money or face the prospect of a person who may represent a danger to the public being released pending trial.

36 The judge hearing the CTL application must give a full and detailed judgment. As we explain at para 43, this court recognises the decision is for the judge, but will scrutinize the matter rigorously. Without a full and detailed judgment, finding the facts and setting out all the considerations, this court cannot do this speedily and economically.

37 We make these observations because experience has shown that there has been a tendency to deal with these applications on a less than satisfactory basis.

38 In the present case, it is clear from the transcript of the hearing before Judge Carr that the CPS did not provide any

> evidence; the practice seems to have been followed of information being provided by the court staff to the judges. That was wholly inadequate. The case was not given that intense level of scrutiny required. We hope that the guidance we have given will ensure that if such a case occurs in the future, the application will be heard in the manner we have set out."

In this case, there is no issue relating to the unavailability of a judge or courtroom. The delay has been occasioned entirely by the absence of representation for Bennett.

The question arises as to whether any material distinction can be drawn between the correct approach in routine cases subject to delay through lack of availability of a judge or a court caused by a lack of resources and the unavailability of an advocate in circumstances such as those pertaining in the present case.

Article 6 of the European Convention on Human Rights provides insofar as is material:

> "3.Everyone charged with a criminal offence has the following minimum rights:
>
> > (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require…"

The question therefore arises as to whether the interests of justice require Bennett to have representation at his trial for arson with intent to endanger life. The proper approach to this issue is to be found in the case of Benham v The United Kingdom (1996) 22 EHRR. The applicant in that case complained that under the legal aid scheme then in force he was not entitled to free representation before the magistrates for proceedings for his committal to prison for non payment of the community charge. The "Green Form" scheme provided for two hours' worth of advice and assistance from a solicitor but not for representation at court. The applicant contended that this was in breach of Article 6.

The court agreed holding:

> "57. The applicant submitted that the interests of justice required that he ought to have been represented before the magistrates. He referred to the facts that lay magistrates have no legal training and in this case were required to interpret quite complex regulations. If he had been legally represented the magistrates might have been brought to appreciate the error that they were about to make. He asserted, further, that the Green Form and ABWOR schemes which were available to him were wholly inadequate.
>
> 58. The Government contended that the legal-aid provision available to Mr Benham was adequate, and that the United Kingdom acted within its margin of appreciation in deciding that public funds should be directed elsewhere.
>
> 59. For the Commission, where immediate deprivation of liberty was at stake the interests of justice in principle called for legal representation.

> 60. It was not disputed that Mr Benham lacked sufficient means to pay for legal assistance himself. The only issue before the Court is, therefore, whether the interests of justice required that Mr Benham be provided with free legal representation at the hearing before the magistrates. In answering this question, regard must be had to the severity of the penalty at stake and the complexity of the case…
>
> 61. The Court agrees with the Commission that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation…In this case, Mr Benham faced a maximum term of three months' imprisonment.
>
> 62. Furthermore, the law which the magistrates had to apply was not straightforward. The test for culpable negligence in particular was difficult to understand and to operate, as was evidenced by the fact that, in the judgment of the Divisional Court, the magistrates' finding could not be sustained on the evidence before them.
>
> 63. The Court has regard to the fact that there were two types of legal-aid provision available to Mr Benham. Under the Green Form scheme he was entitled to up to two hours' advice and assistance from a solicitor prior to the hearing, but the scheme did not cover legal representation in court… Under the ABWOR scheme, the magistrates could at their discretion have appointed a solicitor to represent him, if one had happened to be in court... However, Mr Benham was not entitled as of right to be represented.
>
> 64. In view of the severity of the penalty risked by Mr Benham and the complexity of the applicable law, the Court considers that the interests of justice demanded that, in order to receive a fair hearing, Mr Benham ought to have benefited from free legal representation during the proceedings before the magistrates. In conclusion, there has been a violation of Article 6 paras. 1 and 3 (c) of the Convention taken together…"

There can be no doubt that applying this approach to the circumstances of the present case it would be a breach of Bennett's Convention rights if he were denied representation at trial. Doubtless, the application of the common law would also have precluded the suggestion that the trial could properly have proceeded with him representing himself against his own wishes.

It is not, in my view, open to the state to distinguish Benham by contending that convention rights are protected where legal aid is provided for in a representation order even where, as a matter of practice, no such representation is available. As the court held in Artico v Italy (1981) 3 EHRR 1:

> "The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive… As

> the Commission's Delegates correctly emphasised, Article 6 par. 3 (c) …speaks of "assistance" and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) and the structure of Article 6 taken as a whole; in many instances free legal assistance might prove to be worthless."

I am therefore satisfied that in approaching an application for the extension of a custody time limit, the court should be no less vigilant in scrutinising the background circumstances when a defendant who, as here, is entitled to free representation and does not have it than when he arrives at court to find that there is no judge or no courtroom. All reasonably practicable efforts must be made to find proper alternative representation and evidence of such efforts should, as in this case, be before the court.

However, the fact that a defendant entitled to representation in any given case finds that his advocate is absent from court and that there is no substitute does not automatically mean that there can never in such circumstances be a good and sufficient cause to extend the custody time limit over the period of such adjournment as may be necessary to afford him such representation.

Those representing the defendants in this case invite me to draw a parallel between the facts of this case and those cases in which the courts have expressed reluctance to grant extensions of time owing to what amounts no more than chronic budgetary compromises leading to the unavailability of judges or courtrooms.

The feature in this case, however, which to my mind distinguishes it from those cases in which it is alleged that the timetabling of a routine case has been undermined by systemic failures of resourcing is the element of the timing of the "No returns policy". At the time this matter was listed for trial, no-one could have predicted that the date fixed would be likely to be imperilled by a dramatic and relatively sudden change in the approach taken by the publicly funded bar to the issue of doing returns.

A proper distinction can be drawn between the chronic and predictable consequences of long term underfunding on the availability of courts and judges and the impact of an unheralded implementation of a "No returns policy" As the Privy Counsel held in Dyer v Watson and Another [2004] 1 A.C. 379 at paragraph 55:

> "It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system… Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise, or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a

court may be increased by a sudden and unforeseen surge of business."

It is the case that Dyer, a Scottish case, was not concerned directly with the provisions of the 1985 Act but the approach to convention principles provides useful and pertinent guidance to the correct approach to the circumstances arising in this case.

Taking into account the sequence of events leading up to this application, I am satisfied that the absence of counsel on the first day of trial provides "good and sufficient cause" to extend the custody time limit in this case. I take the view, notwithstanding the defence representations to the contrary, that it would be unrealistic to expect that effective steps could have been taken to avoid the procedural derailment of this trial which I take to be broadly comparable to the "sudden and unforeseen surge of business" referred to in Dyer.

I must, however, sound a note of caution. The state is under a continuing duty to comply with Article 6(3) of the Convention. If the unavailability of representation for defendants were to become a persistent and predictable background feature of publicly funded criminal litigation in this jurisdiction then those making applications for extensions to the custody time limits might increasingly struggle to establish a "good and sufficient cause". The longer the present state of affairs persists the less sudden and unforeseen will be its consequences.

Furthermore, challenges are likely to arise even now when applications are made for the extension of custody time limits and the defendant is not represented to oppose them. I foresee that there will be particular problems in such cases. The liberty of the subject is at stake and the right to free legal representation may, depending upon the circumstances of the individual case, have been compromised. The court would have to exercise particular care in determining the proper way forward in the event that such a situation were to come about.

CONCLUSION

For the reasons given above, I find that in this case that there is good and sufficient cause to extend the custody time limit in respect of count one in relation to both defendants. Appropriately strenuous efforts have been made to find the earliest possible date upon which the trial can be listed as a result of which there is no longer the imminent threat that this matter will be have to be put off until July. The trial can now commence on 7 April 2014 and so I will extend the time limit to 10 April 2014. If there is any further threat to this trial date then any application to extend the time limits, if so advised, must be made promptly and will be considered on its merits upon which it would be unnecessary and inappropriate for me to speculate.