



Neutral Citation Number: [2020] EWHC 1867 (Admin)

Case No: CO/1737/2020

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15 July 2020

Before :

**THE RT HON LADY JUSTICE RAFFERTY**  
**THE HON SIR MICHAEL SUPPERSTONE**  
**SITTING AS A HIGH COURT JUDGE**

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Between :

<b>R</b>	<b><u>Claimant</u></b>
<b>(on the application of ANTHONY McKENZIE)</b>	
<b>- and -</b>	
<b>CROWN COURT AT LEEDS</b>	<b><u>Defendant</u></b>
<b>- and -</b>	
<b>(1) THE LORD CHANCELLOR</b>	<b><u>Interested</u></b>
<b>(2) THE DIRECTOR OF PUBLIC</b>	<b><u>Parties</u></b>
<b>PROSECUTIONS</b>	
<b>(3) THE LORD CHIEF JUSTICE OF ENGLAND</b>	
<b>AND WALES</b>	

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**Rupert Bowers QC and Victoria Smith-Swain**  
(instructed by MAA Solicitors) for the **Claimant**  
**The Defendant did not appear and was not represented**  
**Sir James Eadie QC and Melanie Cumberland and Daniel Cashman** (instructed by **GLD**)  
for the **1<sup>st</sup> and 3<sup>rd</sup> Interested Parties**  
**Tom Little QC** (instructed by the CPS) for the **2<sup>nd</sup> Interested Party**

Hearing date: 16 June 2020  
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**Approved Judgment**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 15/07/2020 at 14:00.**



## **Lady Justice Rafferty DBE and Sir Michael Supperstone :**

### **Introduction**

1. This is the judgment of the Court. The Claimant is in custody on remand, awaiting trial before the Crown Court at Leeds on an indictment alleging offences of attempted murder, wounding with intent and damaging property. His trial (with an estimated length of hearing of four days, which was scheduled to commence on 27 April 2020), was adjourned because of severe disruption to the safe operation to the Crown Court caused by the coronavirus pandemic.
2. On 23 March 2020 the Lord Chief Justice of England and Wales (the “Lord Chief Justice”) announced in a short statement that he had decided that “we need to pause jury trials for a short time to enable appropriate precautions to be put in place”. He stated that “no jury trials or other physical hearings can take place unless it is safe for them to do so”. The statement of the Lord Chief Justice is said by him to be in the nature of a listing decision.
3. On the same day, 23 March, the Director of Public Prosecutions (the “DPP”) made an application in writing to extend the Claimant’s custody time limit (which we shall refer to as the “CTL”), which was due to expire on 1 June 2020.
4. On 27 March 2020 the first iteration of the Coronavirus Crisis Protocol for the Effective Handling of Custody Time Limit Cases in the Magistrates and the Crown Court (the “Protocol”) was agreed. The Protocol was signed by the President of the Queen’s Bench Division, the Chief Executive and the Deputy Chief Executive of HMCTS, and the DPP. An amended iteration of the Protocol was issued on 7 April 2020. The Protocol was to provide “rules of practice” to operate as a “temporary framework during the Coronavirus pandemic for the efficient and expeditious handling of cases that involve a Custody Time Limit”. The terms of the amendment are not material to the claim.
5. On 27 April 2020 the application to extend the CTL was heard by remote link by HHJ Guy Kearn QC, Recorder of Leeds. On 4 May the judge handed down a reasoned written judgment. He extended the CTL to expire on 1 July 2020 (“the decision”). He fixed a date for review on 30 June and set a provisional trial date of 23 October 2020.
6. By amended grounds of claim the Claimant challenges the decision on three grounds: (1) first, he contends that the Lord Chief Justice’s listing decision to suspend jury trials (see para 10 below) was *ultra vires* because it curtails a fundamental constitutional right which could only be curtailed on a blanket basis by primary legislation (**Ground 1**); (2) second, that the suspension of jury trials for an indefinite period by the listing decision could not amount to a “good and sufficient cause” for the purposes of s.22(3) of the Prosecution of Offences Act 1985 (“POA 1985”) to extend the Claimant’s CTL (**Ground 2**); and (3) third, that the Protocol (a) is unlawful because it subverts the statutory scheme, and/or (b) places an unlawful fetter on any judge hearing an application to extend a defendant’s CTL (**Ground 3**).
7. We heard this case on 16 June 2020. At the conclusion of the hearing we gave our decision with brief reasons, stating that a written judgment would be handed down in

due course. We allowed the application to amend the grounds of claim, granted permission to apply for judicial review, but for the reasons given dismissed the claim. We did not consider it necessary, having regard to the conclusion we had reached, for the Lord Chief Justice to be joined as a defendant to the proceedings. Finally, we revoked paragraph 1 of the order of Swift J of 13 May 2020 providing, inter alia, anonymity to the Claimant.

### **The Factual Background**

8. On 17 March 2020 the Lord Chief Justice announced that “the impact of the public health emergency on the operation of the courts has been under constant review”. He said that he had decided that:

“no new trial should start in the Crown Court unless it is expected to last for three days or less. All cases estimated to last longer than three days listed to start before the end of April 2020 will be adjourned. These cases will be kept under review and the position regarding short trials will be revisited as circumstances develop and in any event next week. As events unfold decisions will be taken in respect of all cases awaiting trial in the Crown Court. ... Trials underway will generally proceed in the hope that they can be completed”.

9. Mr Ben Yallop, the Private Secretary to the Lord Chief Justice, said in his witness statement (at para 19) that on 22 March “the Lord Chief Justice was informed that 40% of jurors for the coming week had withdrawn”.

10. In his statement of 23 March (the listing decision, see para 2 above) the Lord Chief Justice stated that with regard to the Crown Courts:

“1. My unequivocal position is that no jury trials or other physical hearings can take place unless it is safe for them to do so. A particular concern is to ensure social distancing in court and in the court building.

2. This morning no new trials are to start. Jurors summoned for this week are being contacted to ask them to remain at home, and contact the court they are due to attend. They will only be asked to come in for trials where specific arrangements to ensure safety have been put in place. In some cases, this may mean that jurors may be called in to start a new trial later on Monday. All hearings in the Crown Court that can lawfully take place remotely should do so and other hearings not involving a jury should continue if suitable arrangements can be made to ensure distancing.

3. Efforts to bring existing jury trials to a conclusion should continue. Social distancing in accordance with PHE guidelines must be in place at all times and at all places within the court building. Considerable imagination and flexibility may be needed to achieve that. This is already happening in some

Crown Courts. HMCTS will continue to work to ensure that safety measures are in place in all parts of the court building in which trials are already taking place. The basic hygiene arrangements urged upon us by the Prime Minister must be available. Resident judges, with HMCTS staff, will determine whether a trial can safely be continued.

4. If it is necessary to adjourn trials already underway for a short period to put those safety measures in place, this must be done.”

11. The Protocol signed on 27 March stated, inter alia:

“2. The purpose of this Protocol is to set a temporary framework during the Coronavirus pandemic for the efficient and expeditious handling of cases that involve a Custody Time Limit (CTL). It does not create legal obligations or restrictions on (any) party. Unless stated otherwise this Protocol applies to both magistrates’ courts and Crown Court cases. The Protocol will be reviewed monthly by the SPJ [Senior Presiding Judge] who will determine when it will cease.

...

5. This Protocol does not override independent judicial discretion and every case must be decided on its own merits. The Protocol contains rules of practice only and the relevant law is unaffected. The judge responsible for deciding each application will apply the law.

#### **Listing of CTL cases**

...

7. No CTL case should be adjourned without a future date and during the period that this Protocol is in operation that date should not be for trial but for mention or further remand...

#### **CTL extensions**

...

15. The Coronavirus pandemic is an exceptional situation and the adjournment of CTL trials as a consequence of government health advice and of directions made by the Lord Chief Justice amounts to good and sufficient cause to extend the custody time limit. ...”

### **The Legal Framework**

12. Section 22 of POA 1985 provides:

“(1) The Secretary of State may by regulations make provision, with respect to any specified preliminary stage of proceedings for an offence, as to the maximum period—

(a) to be allowed to the prosecution to complete that stage;

(b) during which the accused may, while awaiting completion of that stage, be—

(i) in the custody of magistrates’ court; or

(ii) in the custody of the Crown Court;

in relation to that offence. ...

(3) 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...”

13. The Secretary of State made the Prosecution of Offences (Custody Time Limits) Regulations 1987 (the “Regulations”) under s.22(1) POA 1985. Regulation 5(6B) provides for a time limit in custody of 182 days from the sending of the case from the magistrates’ court to the Crown Court which, in the Claimant’s case, occurred on 2 December 2019 from the York Magistrates’ Court.
14. In *R (McDonald) v Manchester Crown Court* [1999] 1 WLR 841, Lord Bingham CJ considered the relevant principles for a judicial review of a decision under s.22(3) POA 1985. He stated (at 846):

“The Act of 1985 and the Regulations of 1987, 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.”

Lord Bingham continued (at 847-848):

“... 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.”

### **Decision of the Judge**

15. The judge set out the reasons for his decision at paragraphs 8-11 of his judgment:

“8. I must determine the application on the law as it exists. I note from the Protocol that it is expressed to ‘set a temporary framework... for the efficient and expeditious handling of cases that involve a Custody Time Limit’ (para 2). It does not ‘override independent judicial discretion and every case must be decided on its merits... [it] contains rules of practice only and the relevant law is unaffected. The judge responsible for deciding each application will apply the law.’ (para 5).

9. I will therefore apply the existing law contained within the Prosecution of Offences Act 1985 to this application. I have been referred to case law, however this can be of peripheral assistance only since I must be guided by the statutory provisions together with the regulations and criminal procedure rules.

10. I have asked myself whether there is some good and sufficient cause to extend the custody time limit in this case. Given that England and Wales are currently in the middle of

the coronavirus pandemic it is plainly obvious that a jury trial cannot take place at present. The safety of all involved in the court process is paramount. Very few if any courts are able to accommodate trials for a variety of reasons, by way of example only; it is impossible to practice social distancing for jurors or advocates in many courts without extensive re-organisation of the court and the court building. That may change and if so the arrangements for listing trials including this one will need to be reviewed. I have little doubt that this is the reason why, in paragraph 7 of the Protocol, the court ought not to adjourn a custody time limit case without a future date, that future date being for mention or further remand rather than trial, in order that a review as to the arrangements then in place can be undertaken. It is clear to me that since no jury trials can take place at present, due to the ongoing coronavirus pandemic, this constitutes a good and sufficient cause to extend the custody time limit in this case. This is an exceptional situation and one which is out of the hands of the courts and the judiciary. It is difficult to conceive of a better or more sufficient cause to extend than a global pandemic with its associated loss of life and risk to the health and welfare of those expected to attend courts for a trial, be they witnesses, jurors, court staff or the defendant. It is critical that the safety of all concerned within the trial process is secured to the satisfaction of HMCTS, PHE and the judiciary before this trial can be commenced. It is not, at present.

11. I will fix a date for review as being 30<sup>th</sup> June 2020 and set a provisional trial date as being 23<sup>rd</sup> October 2020 to secure the defendant's position as far as I am able, although this will depend on the position at that date. The custody time limit will be extended to expire on 1<sup>st</sup> July 2020 when the matter can be reconsidered. A further application to extend will be required for that application."

## **The Parties' Submissions and Discussion**

### ***Ground 1: The listing decision was ultra vires***

16. Mr Rupert Bowers QC, on behalf of the Claimant, contends that the Lord Chief Justice's listing decision was unlawful. He does not argue that the listing decision has removed the Claimant's right to trial by jury but he submits the right has been circumscribed because it is not known when it can be exercised. It is the Claimant's case that the listing decision, which has the effect of delaying or hindering access to justice for every defendant facing trial by jury, on an indefinite basis, is *ultra vires* because it curtails a fundamental constitutional right which could only be curtailed on such a blanket basis by primary legislation.
17. Mr Bowers said that the starting point is that the Claimant's trial would have commenced on 27 April but for the listing decision that was taken by the Lord Chief Justice on 23 March. The Crown Court was conducting business as usual. It is the



Claimant's case that the adjournment of his trial on 27 April was as a direct result of the listing decision; it was not as a result of the global pandemic or any Government guidance.

18. Mr Bowers submits that nothing in the response to the pandemic from the Government or Parliament sought to address or alter the position in relation to the holding of jury trials, or the CTLs applicable to detained defendants awaiting trial. Accordingly, he submits, nothing in law prevented jury trials from taking place at the time the listing decision was made, or indeed since that listing decision was taken. The Coronavirus Act 2020, which is, in every respect, an emergency Act of Parliament making provision for the pandemic, could have addressed, but did not, the impact of the Government advice and guidance as to how persons should conduct themselves during the pandemic upon the rights of criminal defendants to have their trial within a reasonable time and, for those in custody, within their CTL. Mr Bowers submits that it follows that Parliament had no intention of changing the law relating to the right of defendants in criminal trials to have access to justice through the holding of jury trials during the pandemic.
19. Mr Bowers also points to the fact that the Secretary of State for Justice (who is also the Lord Chancellor) already had the power to alter CTLs pursuant to s.22(1) of POA 1985 by amending the Regulations, but he did not do so.
20. The state of the law, Mr Bowers submits, specifically permitted jury trials to begin and to continue; neither the Coronavirus Act 2020 nor the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 made pursuant to the Public Health (Control of Disease) Act 1984 suspended jury trials. The Coronavirus Act 2020 does not suspend jury trials; it provides that hearings, including CTL applications, can be conducted by video link (s.53 and Schedule 23). As for the regulations, regulation 6 concerning restrictions on movement permits persons to leave the place where they are living "(h) to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings", which must cover jury service; and regulation 7(iv) permits gatherings of persons "to participate in legal proceedings" which must include jury service.
21. It is not in issue that listing is a judicial function (see Criminal Practice Directions 2015 Division XIII Listing A) which is ordinarily carried out by individual judges, but responsibility for which ultimately rests with the Lord Chief Justice as President of the Courts of England and Wales and Head of the Judiciary of England and Wales (Constitutional Reform Act 2005, s.7(1)). However, Mr Bowers submits that this decision does not have that quality because there was no consideration given by the Lord Chief Justice to any individual case. Whilst the listing decision was a judicial decision, Mr Bowers submits it has the quality of an administrative decision.
22. In further support of his submission that the listing decision is unlawful Mr Bowers relies on the dicta of Lord Judge CJ in *R v Twomey* [2010] 1 WLR 630 (at para 10):

"In this country trial by jury is a hallowed principle of the administration of criminal justice. It is properly identified as a *right*, available to be exercised by a defendant unless and until the right is amended or circumscribed by express legislation."

Lord Judge continued (at para 16):

“... The right to trial by jury is so deeply entrenched in our constitution that, unless express statutory language indicates otherwise, the highest possible forensic standard of proof is required to be established before the right is removed. That is the criminal standard.”

23. Whilst acknowledging that the listing decision has not removed the Claimant’s right to jury trial, Mr Bowers submits that in suspending jury trials indefinitely the Claimant’s right of access to the court for a determination of the criminal charges he faces is curtailed. In *R (UNISON) v Lord Chancellor* [2017] UKSC 51, Lord Reed JSC said (at para 74):

“In English law, the right of access to the courts has long been recognised. The central idea is expressed in chapter 40 of the Magna Carta of 1215 (*‘Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam’*), which remains on the statute book in the closing words of chapter 29 of the version issued by Edward I in 1297: ‘We will sell to no man, we will not deny or defer to any man either Justice or Right’. Those words are not a prohibition on the charging of court fees, but they are a guarantee of access to courts which administer justice promptly and fairly.”

24. Lord Reed (at para 77) quoted Lord Diplock in *Attorney General v Times Newspapers Ltd* [1974] AC 273, 309:

“The due administration of justice requires *first* that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities...”

Lord Reed then went on to consider the cases of *Raymond v Honey* [1983] 1 AC 1 and *R v Secretary of State for the Home Department ex p Anderson* [1984] QB 778 and, he said, (at para 79):

“The court’s approach in these cases was to ask itself whether the impediment or hinderance in question had been clearly authorised by primary legislation. In *Raymond v Honey*, for example, Lord Wilberforce stated, at p.13, that the statutory power relied on (a power to make rules for the management of prisons) was ‘quite insufficient to authorise hindrance or interference with so basic a right’ as the right to have unimpeded access to a court. Lord Bridge of Harwich added, at p.14, that ‘a citizen’s right to unimpeded access to the courts can only be taken away by express enactment’.”

25. We do not accept these submissions. We reject the Claimant’s contention that his right to jury trial has been circumscribed, and not just delayed, as a result of its

suspension for an indefinite period, with the consequence that he will remain in custody for an indefinite period. His constitutional right of access to the courts has not been curtailed, as he contends.

26. We are entirely satisfied that the listing decision of the Lord Chief Justice is lawful. It is limited to the listing of jury trials, on a temporary basis, in respect of the period when it is unsafe for them to continue. We agree with Sir James Eadie QC, who appears for the Lord Chancellor and the Lord Chief Justice, that the position adopted by the Claimant is unrealistic. His trial could not have taken place any sooner without exposing all persons concerned to unacceptable health risks.
27. We also agree with Sir James that what has occurred is an adjournment of his trial, being necessitated by the exceptional circumstances created by the pandemic and in order to protect the safety of all concerned. The Claimant's right to trial by jury has not in our view been circumscribed.
28. Mr Bowers' reliance on the authorities to which he refers is inapt. They do not assist the Claimant. The Claimant's right to trial by jury remains extant. He will exercise it as soon as that can be done safely and practically. The right of access to court which was the subject matter of, for example, the *UNISON* decision, is not in issue; nor is the principle in *Twomey*. The case the Claimant has to meet is a different one. References in *Twomey* to circumscription of the right to jury trial cannot, Sir James submits, sensibly operate to preclude listing decisions or adjournment decisions. *Raymond v Honey* which concerned a statutory power to make rules for the management of prisons also does not assist the Claimant.
29. Further, the listing of jury trials has been, and is being, kept under continuous judicial oversight. Mr Yallop, in his witness statement at paragraph 15, identifies the steps that have been taken from an early stage to recommence jury trials as soon as safely possible in accordance with public health guidance. On 8 April 2020 the Jury Trial Restart Working Group (the "Working Group") was established, chaired by Edis J. The first meeting took place on 9 April with representatives from Judicial Office, MoJ, HMCTS, CPS and the Legal Aid Agency. The Working Group undertook a preliminary assessment of suitable Crown Court centres, with twenty-six locations identified; by 20 April this was short-listed to nine courts under consideration for a possible restart on 11 May 2020. On 23 April the Working Group's membership was extended to include representation from the Law Society, Bar Council, the Criminal Bar Association, and other interested parties. On 1 May the Working Group instigated walk-throughs at the 'Old Bailey' and Cardiff Crown Court in order to test that the Jury Trial Checklist and measures that had been put in place were sufficient to allow a safe jury trial. Between 4 and 7 May Jury Trial Checklist assessments took place at seven further Crown Court sites. From the week commencing 18 May, jury trials commenced in four courts. New trials were listed to start in three further courts from the following week. Work to enable jury trials to occur safely is ongoing.
30. We also agree with Sir James Eadie's submission that the Claimant conflates the period during which there can be detention on remand (i.e. CTLs) and the point in time when a jury trial must be held. Section 22 POA 1985 concerns only the former. Once a CTL has expired and the prosecution has failed to obtain an extension of time under s.22(3) POA 1985, the Defendant must be granted bail (see *R v Sheffield Justices Court ex p Turner* [1991] 2 QB 472). However, beyond the grant of bail, the

expiry of a CTL in a particular case has no effect on the proceedings. In any event the suggestion that the Claimant is being held in detention “indefinitely” is wrong. His CTL was extended only until 1 July 2020, with a review hearing fixed for 30 June 2020. At that stage judicial discretion will be exercised afresh to consider his case in light of the relevant factual position at that time.

31. In conclusion, we do not accept that the subject matter of the listing decision requires Parliamentary approval. Nothing in the statutory material or the case law to which we were referred requires this. The Claimant’s right to jury trial has not, in our view, been circumscribed as he contends.

***Ground 2: The suspension of jury trials for an indefinite period by the listing decision could not amount to a “good and sufficient cause” to extend the Claimant’s CTL***

32. Mr Bowers submits the effect of the pandemic was not the operative reason, as the judge said it was at paragraph 10 of his judgment, that a trial could not commence on 27 April 2020; it was the listing decision. The adjournment of the trial was, he submits, made *de facto* by the listing decision which triggered the application for a CTL extension.

33. That the application to extend the CTL was precipitated not by the pandemic but by the listing decision itself is made clear, Mr Bowers suggests, by three points. First, the notice of application to extend the CTL, on a pro-forma or not, couched the application in the following terms:

“This application is made due to the current public health crisis.

...

The prosecution submits that the coronavirus pandemic is an exceptional situation which amounts to a good and sufficient cause to extend the custody time limit. The steps taken to address the situation are mandated by the Lord Chief Justice and are in accordance with government public health advice.”

34. Second, the Protocol, at paragraph 15, states:

“The coronavirus pandemic is an exceptional situation and the adjournment of CTL trials as a consequence of government health advice and of directions made by the Lord Chief Justice amounts to good and sufficient cause to extend the custody time limit.”

35. Third, the evidence of Mr Yallop indicates the difficulties that were arising that led to the listing decision, but without that decision the Crown Courts would have carried on business. In his witness statement at paragraph 13 he states:

“On 18 March 2020, the Senior Presiding Judge... received feedback from Resident Judges (leadership judges in the Crown Court centres) regarding jury trials. Of the responses which were copied to me, almost all (around a dozen) expressed very

serious concerns about the possibility to continue any jury trials safely.”

36. Mr Yallop continues at paragraph 18:

“On 19 March 2020, the Council of Circuit Judges wrote to the Lord Chief Justice expressing the deep concern of its members that they were still expected to commence jury trials of up to three days.”

37. Mr Bowers submits that if the listing decision had not been taken jury trials would have carried on. If the pandemic had been the real cause of jury trials being paused each Crown Court could have taken such a decision without the need for the listing decision. The practical reality therefore is that trials had been halted by the listing decision and individual judges could no longer order them to proceed. The only reason for the CTL application in this case, and any other similar case where the trial was ready to proceed in time, was the effect of the listing decision.

38. So, if the listing decision is *ultra vires* it could not amount to a good and sufficient reason to extend the CTL. But Mr Bowers submits, even if it is *intra vires* it could not amount to a good and sufficient reason because the ability to apply s.22 of POA 1985, the regulations made thereunder and the principles in *McDonald* proceeds on the assumption that a jury trial is possible. Once that assumption is removed, which it is by the listing decision, certainly in terms of the consideration that each judge can give to an application, then the safeguards that are the purpose of and inherent in s.22 and the Regulations as set out in *McDonald* are, Mr Bowers submits, “set at nought”.

39. Mr Bowers described the listing directions given by the judge at paragraph 11 of his judgment as “cosmetic” in the sense that it cannot be known when the Claimant’s jury trial will be held; that is so because the judge is not able to give any effect at all to the first and third of the overriding purposes set out in *McDonald* (see para 14 above).

40. The judge could not “ensure” that the period in custody would be as short as possible if he could not have any idea when jury trials might recommence. Similarly, the listing decision removed any “power” that the judge had to “control any extension”. In the circumstances the power of the judge, and all judges hearing applications to extend CTLs in similar situations, was, Mr Bowers submits, emasculated by the listing decision.

41. Sir James submits that the short answer to this ground (and indeed the claim as a whole) is that the judge addressed the right question in his judgment, namely whether there was “good and sufficient cause” to extend the CTL of this individual defendant who was charged with attempted murder and wounding with intent. Having addressed the correct question he submits that the judge’s conclusion on the facts was one that he was entitled to reach.

42. The reason the judge extended the CTL in respect of the Claimant was because the “safety of all concerned within the trial process” could “not, at present” be “secured to the satisfaction of HMCTS, PHE and the judiciary” (para 10 of the judgment). The judge’s reasoning and conclusion was, Sir James submits, plainly correct. The trial had to be adjourned from its planned date of 27 April and the reasons for this were

obvious and pressing. The pandemic rendered the trial on that date both impractical and unsafe. It is, Sir James submits, fanciful to suggest that it was not the pandemic that led to those findings and to this situation.

43. The judge's reasoning did not depend on any decision by any other person, whether the Lord Chief Justice or those who promulgated the Protocol, or anyone else. The judge considered the very specific situation that he was deciding, namely whether the trial of this defendant in Leeds could proceed at that time. Paragraph 11 of the judgment, Sir James submits, makes clear that the judge exercised his discretion carefully by ensuring that there was a review date set in the not too distant future, with a provisional trial date designated "to secure the defendant's position so far as I am able".
44. We agree with this analysis. It is clear from the express terms of the judgment that the judge's reasoning did not depend on the listing decision by the Lord Chief Justice. We are satisfied that the judge did not err in the exercise of his judicial discretion, applying the test laid down in s.22(3) POA 1985. We can discern no error in the judgment.

***Ground 3: The Protocol is (a) unlawful because it subverts the statutory scheme, and/or (b) places an unlawful fetter on any judge hearing an application to extend a defendant's CTL***

45. Mr Bowers submits that the Protocol has to be viewed in the context of a *fait accompli* presented to any judge hearing any CTL application, namely that the decision to adjourn the trial has already been made.
46. Paragraphs 2 and 5 of the Protocol, Mr Bowers accepts, state the accurate position at law, but, he submits, these paragraphs are overridden by the fact that jury trials have been suspended. That being so it is nonsense, suggests Mr Bowers, for the Protocol to say, as it does in paragraph 5 that "every case must be decided on its own merits". There can be no individual consideration of a case "on its own merits" because every defendant in custody has been placed in the same position as a consequence of the listing decision. Accordingly, no effective independent judicial discretion can be brought to bear. The reality is, as paragraph 15 of the Protocol recognises, that the decision was made for the judge (and indeed for every judge hearing CTL applications at that time). It is impossible, Mr Bowers submits, to reconcile paragraph 15 with paragraphs 2 and 5.
47. What should have happened in this case, Mr Bowers submits, is that the judge, applying the law, should have done one of two things: either call on the trial (despite the terms of the listing decision) or release the defendant on bail. However, he was prevented from doing either because the listing decision coupled with the Protocol meant that he had no effective discretion left to exercise.
48. In response Sir James submits that the answer to this ground is contained in paragraphs 8 and 9 of the judgment (see para 15 above). In those paragraphs the judge notes the nature of the Protocol and the express terms of the Protocol in paragraphs 2 and 5. The judge evidently, Sir James submits, did not act in a way that could properly be suggested to involve him considering his discretion in fact fettered or dictated in terms of the outcome by the Protocol.

49. A further answer to this ground, Sir James submits, is that the Protocol was in any event careful not to shut down individual case considerations. The mere fact that issues are in play, in terms of public health, that affect multiple courts, does not create unlawfulness. It merely means that common problems require, and can lawfully have, common solutions, but it remains possible to make arguments about “good and sufficient cause”. If a prosecution has not proceeded with due diligence or expedition or if there is some other reason not to exercise the discretion to extend the CTL in the individual case regard may be had to those matters. However, for understandable and lawful reasons courts in general have proceeded, as paragraph 15 of the Protocol does, on the basis that it makes sense to regard the fact that there are not jury trials taking place because of the pandemic as in principle an acceptable, or at least *prima facie*, reason to extend the CTL. That being so, Sir James rejects the description of the decision making in this case as being, as Mr Bowers puts it, “cosmetic”.
50. We agree with Sir James’s submissions. We reject the contention that the Protocol fettered the judge’s discretion. The suggestion that the Protocol is unlawful because it subverts the statutory scheme is, in our view, without foundation.

### **The Anonymity Order**

51. Paragraph 1 of the order of Swift J of 13 May 2020 provided *inter alia* anonymity to the Claimant in accordance with CPR 39.2(4) by allowing him to be referred to as “DAT”. Paragraph 3 of that order provides for reconsideration.
52. The DPP invites the court to revoke the order allowing the Claimant to be referred to as “DAT” in these proceedings.
53. The test under CPR 39.2(4) is that an order can be made “if, and only if” the Court “considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party...”.
54. Mr Bowers submits that having regard to the fact that the Claimant is facing trial for serious offences it is highly likely that this claim will receive at least some publicity, and that the integrity of the future trial requires an anonymity order. He suggests that the publicity of the publication of the Claimant’s name, the fact that he is a serving soldier and that there are serious charges involving a relatively local woman to Leeds may generate a level of publicity in an area which is not directly connected with the circumstances of this claim which could be adverse to the fairness of his trial.
55. We do not accept this submission. We agree with Mr Tom Little QC, who appears on behalf of the DPP, that there is nothing in this judicial review claim which traverses any issue before the Crown Court. We do not consider it necessary to anonymise the Claimant’s name to secure the proper administration of justice.

### **Conclusion**

56. For the reasons we have given the claim is dismissed.