Neutral Citation Number: [2023] EWHC 1187 (Admin)

Case Nos: CO/1217/2023 & CO/1447/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Thursday, 18th May 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

THE KING (on the application of (1) MICHAEL SIEROTKO (2) PETER DOWNS)	**Claimants**
- and -	
CROWN COURT AT MANCHESTER CROWN SQUARE	**Defendant**
-and-	
CROWN PROSECUTION SERVICE	**Interested Party**

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Tim Forte (instructed by Abbey Solicitors) for the **First Claimant**
Oliver Cook (instructed by Jon Mail Solicitors) for the **Second Claimant**
The **Defendant** did not appear and was not represented
Mark Kellet (instructed by CPS) for the **Interested Party**

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Hearing date: 11.5.23
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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a judicial review case about extending custody time limits ("CTLs"). There was before me a renewed application for permission for judicial review brought by Mr Sierotko. Listed at the same time was an application for permission for judicial review brought by Mr Downs. Mr Sierotko's judicial review claim was commenced on 30 March 2023. Permission for judicial review was refused on the papers on 4 April 2023 by HHJ Davies. He made directions that the parties should be prepared at any renewal hearing to deal with the substantive legal merits on a "rolled-up" basis, if I considered that appropriate. Mr Downs's judicial review claim was commenced on 17 April 2023. It was adjourned into open court by HHJ Davies on 9 May 2023. That was so that these two cases could be considered together, if I considered that appropriate. A three-hour hearing took place before me on 11 May 2023.

2. I am satisfied that permission for judicial review should be granted in both cases. I think the arguability threshold has been crossed. No delay point is taken in Mr Sierotko's case. Delay is raised by the Interested Party ("the CPS") in the case of Mr Downs. I reject that objection. Its logic, in a case concerned with the liberty of the individual, would mean this. Mr Sierotko's claim would be considered on its legal merits. Were Mr Sierotko to succeed, he would be released on bail. The extension of CTLs would be quashed in his case. That would be for legal reasons, equally applicable to Mr Downs, whose case was also before this Court. However, Mr Downs would remain on remand, pursuant to that same legally flawed decision to extend CTLs. That is not a position which I could countenance. I will decide both cases on their legal merits.

3. In doing so, I am satisfied that it is appropriate to deal with both cases on a "rolled-up" basis. All parties have had a full and fair opportunity to provide materials and make submissions. The Defendant is the Crown Court. It is not participating in these judicial review proceedings. But everyone who is participating agrees that this Court should have access to the Crown Court materials, found in the Digital Case System ("DCS"). The CPS did not advance any positive case for any grant of permission to be followed by a short period to allow further evidence to be adduced. There has been a suitable and sufficient opportunity for the CPS to adduce evidence and give an explanation, as there was when the CTLs were extended in the Crown Court. I do not consider that a further evidential enquiry, directed by this Court, is necessary or appropriate.

4. Mr Sierotko and Mr Downs ("the Claimants") are co-defendants in criminal proceedings. Together with Mr Harrison, they are facing trial in the Crown Court. That trial is now scheduled to begin on 3 July 2023. The case involves the EncroChat system of encrypted communication. The police investigation arose from Operation Venetic, in which the National Crime Agency ("NCA") looked into the use for criminal purposes of encrypted EncroChat devices. The specific police investigation was Operation Butmir. As HHJ Field KC had explained in reasons dated 1 August 2022 for a ruling on 29 July 2022 extending CTLs:

> ***The defendants face an indictment containing 5 counts alleging conspiracies to transfer firearms and to supply cocaine and diamorphine to which all defendants are said to be***

> ***party (Counts 1, 2 & 3), a conspiracy involving Sierotko and Downs to supply cannabis (Count 4) and an allegation of possession of cannabis with intent to supply against Harrison alone (Count 5). The conspiracies are said to have existed between March and June 2020. This is a case that arises out of Operation Venetic and the obtaining of EncroChat data by the NCA. The principal evidence relating to each of these defendants is derived from that data.***

5. Mr Forte (representing Mr Sierotko) explained to me the basic objections which can be raised to prosecution reliance on EncroChat evidence: "admissibility" (ie. a legal bar to the evidence being adduced); "attribution" (ie. whether the data relates to a given device); and "reliability" (ie. whether the data is an accurate picture of the device's communications). Within "reliability", Mr Forte locates "incompleteness" (ie. whether there is missing data). The central Prosecution EncroChat witness, throughout these criminal proceedings, has been the NCA's Luke Shrimpton. Various statements of Mr Shrimpton had been served on the defence in March 2022. When these cases were originally sent for trial on 17 November 2021 the known issues were recorded to include "attribution". As at 1 August 2022, HHJ Field KC had observed that "the main issues seem to relate to the attribution of the EncroChat handles". When Mr Sierotko served his First Defence Statement on 30 May 2022: issues were raised about "attribution"; "points of law" were raised about "admissibility"; a point was raised about missing data; and Mr Shrimpton was listed as a required witness. Apart from the missing data point, these same features were to be seen in Mr Sierotko's Second Defence Statement (28 October 2022). His Third Defence Statement (18 January 2023) also referred to "attribution", and again listed Mr Shrimpton as a required witness. On 31 October 2022, the solicitors for Mr Downs wrote to the CPS to say they were "in the process of instructing Duncan Campbell, an expert well known to the Crown in the wider Venetic cases", who was being asked by them to report on "provenance and reliability issues". Mr Shrimpton and Mr Campbell were experts who had provided analysis in the leading EncroChat case of R v A [2021] EWCA Crim 128 [2021] QB 791 (5.2.21), as can be seen at §14 of the judgment in that case.

6. The target decision for the Claimants' judicial review challenges is the decision of HHJ Conrad KC ("the Judge") on Friday 3 February 2023, granting a Prosecution application (opposed by the Claimants) extending CTLs to 7 July 2023. Two days earlier, on Wednesday 1 February 2023, the Judge had made another decision. He had granted the Claimants' application (opposed by the Prosecution) to vacate the three-week trial which was then scheduled to commence on Monday 6 February 2023. The Claimants have been remanded in custody since 17 November 2021. That is now 18 months. The trial had originally been scheduled for 1 August 2022. That date was vacated, in circumstances which included the ongoing impacts of the Covid pandemic and the Criminal Bar Association action. The CTLs were originally 18 May 2022. They had been extended, by HHJ Field KC on 29 July 2022, to 14 October 2022. They had been extended again, by HHJ Dean KC on 13 October 2022, to 10 February 2023.

Late Service of the Prosecution Report

7. In his ruling on 1 February 2023, acceding to the Claimants' application to vacate the trial scheduled for 6 February 2023, the Judge had said this:

> ***I am going to vacate the case because of the late service of the prosecution report, that is the principal reason.***

To explain "the late service of the prosecution report", I start with "the prosecution report". The Judge was referring to a "Reliability Report – Op Butmir" dated 23 January 2023 ("the Specific Reliability Report"). It refers to "reliability statistics that may be relevant when considering the reliability of the Venetic data", which statistics were described in an earlier "Expert Report – Reliability" written by Mr Shrimpton on 10 June 2022 ("the Generic Reliability Report"). The Specific Reliability Report was "automatically generated" using a "Reliability Script", explained in "Reliability Script Instructions" written by Mr Shrimpton on 11 October 2022. The Reliability Script is designed to be "run … on a set of Venetic packs". It "computes a number of statistics that may be relevant when considering the reliability of the Venetic data and automatically generates a report detailing those statistics". In a witness statement dated 18 October 2022, Mr Shrimpton explains that he produced the Reliability Script on 14 October 2022 and, in a form which could be opened by Law Enforcement, by 18 October 2022. In a witness statement dated 23 January 2023, Detective Sergeant Peter Nuttall – who is in charge of the Greater Manchester Police ("GMP") Cyber Crime Unit – explains that on 18 October 2022 he received the Reliability Script. He says: "On 23rd January 2023 I executed the code within [the Reliability Script] against all the exhibits processed in Operation Butmir and this generated an automatic report" (the Specific Reliability Report) which was "then provided to DC Watson-Perry of GMP.

8. I turn to the "late service". At 09:10 on the morning of 1 February 2023 the Specific Reliability Report (23.1.23) was uploaded to the DCS, together with the Generic Reliability Report (10.6.22), and the Nuttall witness statement (23.1.23). The hearing before the Judge, of the Claimants' applications to vacate the trial, was taking place at 10:00. The Judge was told that the Claimants required consideration of this late evidence by their own expert Mr Campbell. The Judge was told that this could not be accommodated during the 3 week trial slot commencing on Monday 6 February 2023 trial slot. Mr Cook (representing Mr Downs) told the Judge that the defence simply could not respond to the report (the Specific Reliability Report) by the start of the trial. Mr Forte told the Judge that the defence did not have the ability to deal with the new reports (the Specific Reliability Report and the General Reliability Report). The trial hearing was vacated. The Reliability Instructions (11.10.22) and the Shrimpton witness statement (18.10.22) were uploaded to the DCS the next day, on 2 February 2023, and were available to the Claimants and the Judge for the hearing on 3 February 2023.

Representation at Trial

9. Another feature of the case was raised at the hearing on 1 February 2023. Mr Cook and Mr Forte both brought to the attention of the Judge that they were not, as things stood, going to be able to represent their clients at the trial due to start the following Monday (6.2.23). They made clear that this was not the "basis" of any application to vacate the trial. Their position was – and is – that it would not have been right for Counsel to be making an application to vacate a trial without making the Court aware of this additional feature. Mr Cook was in an ongoing trial. He had already made an unsuccessful application, on 23 January 2023, to vacate the trial to avoid the risk of Mr Downs being an unrepresented defendant at trial. He told the Judge that efforts

continued to be made to find alternative counsel but that, at the moment, there was no alternative that he could put forward. Although this was not the basis of the application to vacate the hearing, he agreed with the Judge that it was "a practical consideration". Mr Forte told the Judge that he was in another case, with a jury out, and could not be released. As Mr Forte later put it (on 3.2.23), this was something which he had "raised as a factor" (on 1.2.23).

The Impugned Ruling

10. The Judge announced his decision on extending CTLs at the hearing on 3 February 2023, with reasons to follow. The Judge's 10-page reasoned Ruling was uploaded shortly thereafter. It had the following features.

i) The Judge recorded that:

> ***It is of great importance that Defendants in custody awaiting trial are not detained for longer than is necessary. In order that that is achieved, engagement and action is needed by both Prosecution and Defence. The Prosecution must serve their case promptly and within time limits, and must respond quickly to proper requests from the Defence. Equally, the Defence must act speedily to identify the issues and focus any applications on material which is properly needed for the preparation and presentation of their case.***

ii) The Judge then described the "background", including this description of vacating the trial two days earlier:

> ***This case came before me on the 1st of February for an application to vacate the trial fixed for Monday the 6th February on the basis that two of the defendants said that they could not be ready for trial. The trial had been fixed following the earlier trial date of August 2022 being unable to take place for the reasons set out in the Chronology detailed later in this ruling. The application to vacate was made on behalf of Downs and Sierotko. The Prosecution stated that they were ready for trial and wished the case to go ahead, as did Harrison (who had already pleaded guilty to certain Counts).***
>
> ***A Prosecution reliability report had very recently been uploaded and the Defence required consideration of that by their expert which they told me could not be accommodated during the trial slot. I did not make any finding as to the reason for the late service of the prosecution report – simply that it was very close to trial and that it ought to be possible for the defence to have an opportunity to deal with it. I did not make any findings against the Prosecution- I was simply concerned that there should be a fair trial.***
>
> ***That was one consideration which I had in ordering the trial be vacated. The other important consideration was that on behalf of two of the Defendants (namely Downs and Sierotko) I was told that counsel would not be available for the trial due to other commitments and the efforts so far to find other counsel to take on the matter had not been successful and that therefore the likelihood was that the defendants would appear unrepresented on very serious charges due to no fault of their own-a situation which the court could not countenance.***
>
> ***In those circumstances I vacated the trial notwithstanding that the prosecution would have been ready.***

iii) The Judge next identified the central issue:

> ***The Defendants Downs and Sierotko object to the application to extend submitting that the prosecution have not shown due diligence and expedition. It is submitted by them that the real reason for the trial having to go back is the late service of the Prosecution's reliability report. The Prosecution do not accept that.***

iv) Then, with this introduction, the Judge set out the Prosecution's Chronology over the course of 5 pages of the Ruling:

> ***It is therefore important to consider how this situation has come about. This is a complex case with a long history, and I set out the (largely undisputed) chronology, taken from the Prosecution's application…***

v) The Judge set out the relevant statutory test for an extension of CTLs, adding this from the case-law (§11 below) which had been cited to him:

> ***Good and sufficient cause – "What amounts to good and sufficient cause to extend a custody time limit is a matter for the court on the facts of the case." There are an almost infinite variety of matters which may, depending on the facts of a particular case, be capable of amounting to a good and sufficient cause [citing McDonald]***
>
> ***Due diligence and expedition –This is a question to be determined on the facts of this case , which is a complex matter with a considerable history. I also note that the judge may properly extend a custody time limit even where the prosecution had not acted with all due diligence, if the prosecution's failure is not itself a cause for the required extension [citing Gibson]***

vi) Next, the Judge addressed "good and sufficient cause". He said this:

> ***There is, I find here, good and sufficient cause to extend the Custody Time Limits ,for the reasons set out in the chronology , and as a result of the case not being able to be tried on the 6th of February due to the Defence wishing to challenge the issue of reliability by introducing expert evidence and/or the prospect of at least one Defendant, through no fault of his, risking being unrepresented at trial . Pressures of Listing have meant that the earliest trial date for this case is now the 3rd of July.***

vii) The Judge then addressed "due diligence and expedition". He said this:

> ***The focus – as was the case in the arguments advanced before me – is therefore on due diligence and expedition.***
>
> ***In considering whether the Prosecution have acted with due diligence and expedition I have taken into account: The nature of the case, the compliance on both sides with time limits, the volume of material involved, Defence engagement and the nature of requests made and trial readiness.***
>
> ***While it is argued by the Defence that it is because of failings by the Prosecution that the Prosecution are trial ready and the Defence are not, I am not persuaded by that argument in the light of the history of this matter. The Prosecution were trial ready in August 2022, at which time the "reliability" issue giving rise to the Prosecution report had not been raised by the Defence. That came considerably later. It was only on the 31st October 2022 that the Defence notified the Prosecution of their intention to instruct an expert , giving rise then to the Prosecution having to instruct an expert in November 2022 , on a topic which until then , they did not know would be in issue. The Prosecution would also have been trial ready for the 6th of February 2023.***

> ***Having considered all of the representations made by the Defence, both orally and in writing, I reject the assertion that the Prosecution have not acted with due diligence and expedition. I am satisfied that they have so acted. If I am wrong about that , I am satisfied that any failure by the Prosecution is not in itself a cause for the required extension.***

viii) Finally, this decision in the exercise of his discretion:

> ***I am satisfied that it is proper to grant the extension.***

The Law: Extending CTLs

11. As the Judge's Ruling recorded (§10v above), the relevant statutory test pursuant to section 22(3) of the Prosecution of Offences Act 1985: the Judge could only extend the CTLs if satisfied – by the Prosecution on the civil standard – that "the need for the extension" was "due to … a good and sufficient cause" and that the Prosecution had "acted with all due diligence and expedition"; if so satisfied, the discretion to extend the CTLs arose. At the hearing before me, reference was made to the commentary on CTL-extensions in Archbold, Criminal Pleading Evidence and Practice (2023) (see especially §§1-427, 1-436, 1-442 to 1-453). Counsel referred me to R v Leeds Crown Court, ex p Briggs (No.2) (4.3.98); R v Manchester Crown Court, ex p McDonald [1999] 1 WLR 841 (9.11.98); R v Chelmsford Crown Court, ex p Mills (17.5.99); R v Leeds Crown Court, ex p Bagoutie (18.5.99); R (Holland) v Leeds Crown Court [2002] EWHC 1862 (Admin) (29.7.02); R (Gibson) v Winchester Crown Court [2004] EWHC 361 (Admin) [2004] 1 WLR 1623 (24.2.04); R (Thomas) v Central Criminal Court [2006] EWHC 2138 (Admin) (7.7.06); and R (Raeside) v Luton Crown Court [2012] EWHC 1064 (Admin) [2012] 1 WLR 2777 (23.4.12). These cases (and many others) are referenced in Archbold. As reflected in his Ruling (§10v above), the Judge was referred to McDonald and Gibson.

12. Mr Forte – whose submissions were adopted by Mr Cook – emphasised the following in particular. From McDonald (Archbold §1-442) as described at Gibson §11:

> ***[T]he Act and the regulations have three overriding purposes: (1) to ensure that the periods for which unconvicted defendants are held in custody awaiting trial are as short as reasonably and practically possible; (2) to oblige the prosecution to prepare cases for trial with all due diligence and expedition; and (3) to invest the court with a power and a duty to control any extension of the maximum period under the regulations for which any person may be held in custody awaiting trial… [T]hese are all very important objectives. Any judge making a decision on the extension of custody time limits must be careful to give full weight to all three of the "overriding purposes".***

Also from McDonald (Archbold §1-436):

> ***[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…***

From Mills at §27 (Archbold §1-436):

> ***[W]hen a contested application is made for the extension of a custody time limit and the issue turns wholly or in part on whether the prosecution have acted with all due expedition and diligence, it is very highly desirable that the judge who is to rule on that issue be given a detailed chronology, preferably agreed, showing the dates of all material events and***

> ***orders. Without such a document the judge is confronted with an oral recitation of dates which is very difficult to absorb and very difficult to analyse. These tasks are the harder where there are disputes about what was done or ordered on particular dates.***

From Raeside (at §§17, 30, 33), in the context of "good and sufficient cause":

> ***We must emphasise again the necessity in every case that the court in an application to extend a CTL gives detailed scrutiny to the evidence to see if the Crown has proved that there is good and sufficient cause… In the absence of express consent to the extension of the CTL, the court must … rigorously scrutinise the evidence to see if it is satisfied there is good and sufficient cause to extend the CTL… This case demonstrates again the necessity of treating the CTL in each case and any application to extend it in the very serious manner required of the statutory provisions which Parliament, consistent with the long tradition of the common law, has enacted to ensure cases are tried speedily and those who have not been convicted are not deprived of their liberty beyond the time specified without good reason. A person should not be deprived of his liberty where the state cannot meet the duty to try him speedily and within the time limit specified without detailed evidence that is then subject to vigorous and stringent examination to see if the state has established good and sufficient cause to deprive him of his liberty beyond that time limit.***

13. To these, I add this from McDonald (Archbold §1-445):

> ***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.***

14. Mr Forte drew my attention to Holland. That was a case where the judicial review claimant was facing serious criminal charges of conspiracy to commit armed robberies (§2). In that case "there was a clear failure of the prosecution to act with all due diligence and expedition in the progress of the case to the point where the need arose for an adjournment so that the claimant's team could consider the late forensic evidence" (§33). In extending the CTL "the judge … reached a decision to which he was not entitled to come on the material before him" (§40). Holland is one of the cases discussed in Archbold at §1-452, which gives these examples:

> ***R v Central Criminal Court, ex p Behbehani [1994] Crim LR 352 DC (prosecution had not acted with all due expedition where there had been unwarranted delay in serving important evidence upon the defence, which had consequence of delay in the proceedings to enable defence to consider same); … R v Central Criminal Court, Ex p Johnson [1999] 2 Cr App R 51, DC (delay by independent science service is not a failure by the prosecution to act with due expedition, but obligation exists for prosecution to do everything possible to ensure evidence available on time, including making laboratory aware of relevant dates and time limits); and R (Holland) v Leeds Crown Court [2002] EWHC 1862 (Admin) [2003] Crim LR 272, DC (clear failure to act with all due diligence and expedition where scientific evidence served so late that long-standing fixture had to be broken to enable the defence to deal with it; although forensic science service had acted diligently, being unaware of the relevant dates, the prosecuting authority had failed to communicate effectively with that service, with the defence and with the court; had the problem been raised earlier it was***

> ***likely that the trial could have been refixed for a date earlier than the earliest date that was available once the matter in fact came to the attention of the court).***

Mr Forte emphasised that the NCA and GMP are not an "independent" service (as there was in Johnson) but are part of the prosecution (as to which, see Archbold §1-452).

15. On the question of "causation", I was referred to Gibson §§21-28 and to these passages in Archbold at §§1-443 and 1-444:

> ***In Bagoutie …, Lord Bingham CJ, with whom Ognall J agreed, held that, on a proper construction, the statutory provision as to "due expedition" is linked to the provision as to "good and sufficient reason", in that, when seeking an extension, the Crown "must show that the need for the extension does not arise from lack of due expedition or diligence on its part". His Lordship said that this had not been made plain in Ex p McDonald because the issue had not arisen there, and went on to say that the court is not obliged "to refuse the extension … because the prosecution is shown to have been guilty of avoidable delay where that delay has had no effect whatever on the ability of the prosecution and the defence to be ready for trial on a pre-determined trial date". This approach was upheld in Gibson …***
>
> ***In Thomas … it was held that, notwithstanding the absence from s.22(3)(b) of the words "that the need for the extension is due to", which appear in respect of the criteria set out in paragraph (a), where an application for a further extension is made, paragraphs (a) and (b) work in tandem and are both focussed on the need for a further extension; thus, the defendant may only rely upon delay prior to the original extension if such delay is the root cause of the need to seek the further extension …***

I was also referred to this description of Bagoutie, in Holland at §24:

> ***In Bagoutie, this court held that if the prosecution was able to establish good and sufficient cause for an extension, such an extension might be granted, despite a want of due expedition on the part of the prosecution, provided that the court was satisfied that such failure had neither caused nor contributed to the need for the extension.***

The Law: Judicial Review

16. It is a golden rule of judicial review that the reviewing Court must have in mind the true nature of its supervisory function, as it operates in the specific context and circumstances of the case. In Gibson the Divisional Court observed (at §38) that, in a judicial review challenge to an extension of CTLs, the "intensity of review" in the High Court involves a duty to "scrutinise" the decision "rigorously", but "at the same time recognising that the decision is for the judge in the court below to make", so that unless the High Court concludes that the crown court judge has "wrongly" exercised their discretion (or, I would say, judgment), the judicial review Court "will not interfere". This approach recognises "the primacy of the Crown Court judge's role in exercising discretion [and judgment] in relation to custody time limits" (see Gibson §48). As Archbold puts it, citing McDonald and other cases: "where full argument has been heard and the [crown] court has given its decision, with reasons, the [High] Court will be most reluctant to interfere, its role being confined to review, with relief being granted only on one of the familiar grounds for founding a successful application for judicial review" (at §1-436); and "to succeed on such a challenge it will be necessary to establish the existence of one of the conventional bases for judicial review; the mere fact that the judges hearing the challenge might have reached a different decision at first instance will not suffice" (at §1-441).

The Generic Reliability Report Point

17. I turn now to analyse the issues and arguments in these cases. With one exception, the claims for judicial review rest on events on and after 31 October 2022. Other points, previously relied on by the Claimants relating to earlier events, are no longer relied on. The one exception is that Mr Forte argues – in essence, as I saw it – as follows. A material failure of "all due diligence and expedition" had already arisen in this case from 10 June 2022 onwards. The Generic Reliability Report had been produced on that date. It was work relating to a method for testing the reliability of the EncroChat evidence. It should have been disclosed by the Prosecution, at least as unused material. In fact, Mr Sierotko's First Defence Statement had "flagged" a "reliability" issue about the EncroChat evidence. That means a "reliability" challenge "was there" from 30 May 2022. The very fact, moreover, that Mr Shrimpton was a required witness in that First Defence Statement (30.5.22) was also a sufficient trigger for the Prosecution. The Prosecution should have realised, as they ultimately did, that "reliability" was in issue. Had the Generic Reliability Report been promptly disclosed after 10 June 2022, Mr Sierotko's legal team would have been "in a position" to raise "reliability" issues. This was therefore a pre-October 2022 material default.

18. In my judgment, these arguments do not materially assist, to bring forward (to prior to 31.10.22) any question of prosecutorial lack of due diligence and expedition. Mr Kellet (for the CPS) acknowledges that the Generic Reliability Report should have been disclosed as undisclosed material. But the position on the ground, so far as the implications of that Report are concerned, are powerfully illustrated by the position of the Downs team. The Downs team was, as Mr Cook candidly told me, well aware (from other cases) of the Generic Reliability Report. They did not request its disclosure in the present proceedings. That report was, as Mr Cook put it, "just generic". Furthermore, it was open to the Sierotko and Downs defence teams to raise an issue of "reliability" at any stage if they wished to do so. An issue was raised in Mr Sierotko's First Defence Statement of 30 May 2022. But it was a specific issue about missing data. The issue was that the served phone data was said to be incomplete. By 28 October 2022 that missing data issue had been removed from Mr Sierotko's Second Defence Statement. The reason is not difficult to find. In a document dated 15 July 2022, relating to an application to vacate the trial, previous Counsel acting for Mr Sierotko recorded what had happened. The Prosecution were described in that document as having provided the missing data (the relevant cell site data) on 27 June 2022 and 14 July 2022. The issue raised had been resolved. In addition, there is this point. The Chronology, which the Judge incorporated within the Ruling, recorded that the Prosecution response of 27 June 2022 had "included [a] request for full details of challenges made to each Operation Venetic witness". So, it was all the more conspicuous that the 28 October 2022 Second Defence Statement of Mr Sierotko raised no EncroChat "reliability" issue. The Judge plainly did not consider that any failure to serve the Generic Reliability Report could constitute a material failure of due diligence and expedition. He found that the "reliability" issue was not raised until the Downs solicitors' letter of 31 October 2022. That conclusion, in my judgment, is unassailably right and justified.

The Requested Packages Point

19. Mr Cook, for his part, sought to rely on a distinct point. It arose out of that letter of 31 October 2022. As I have mentioned already, that letter stated that the solicitors for Mr

Downs were "in the process of instructing Mr Campbell, an expert well known to the Crown in the wider Venetic cases, to provide a report on provenance and reliability issues for Mr Downs case". The further point which Mr Cook emphasises – in essence as I saw it – is this. The specific request in that letter (31.10.22), and in two chaser letters (11.1122 and 19.12.22) was a request for "original NCA Operation Venetic Packages" for 7 EncroChat "handles". Those data packages were requested so that Mr Campbell could "undertake that task we require". They were required, and were not received, notwithstanding those requests. This, says Mr Cook, is itself a material part of the absence of Prosecution due diligence and expedition.

20. In my judgment, these arguments do not materially assist to expand (beyond the late Specific Reliability Report) any question of prosecutorial lack of due diligence and expedition. The Judge did not consider that any non-disclosure of original data packages constituted a default or want of due diligence and expedition. His focus was squarely on the Specific Reliability Report. Mr Cook emphasised in his reply that the Criminal Procedure Rules require, when an expert report is served, disclosure of the subject material or an application relating to that material (if sensitive) being withheld. That point emphasises that the Judge focused correctly on the Specific Reliability Report and the timing of its service. That, in my judgment, is where any relevant default of due diligence and expedition was to be found. The Judge's approach was plainly correct and fully justified.

<u>The Late Prosecution Report Point</u>

21. Having cleared away the two distinct points, this is the critical focus so far as the Judge's finding of due diligence and expedition is concerned. It is the heart of the case. The Judge rightly recognised that. Mr Forte and Mr Cook submitted, in essence as I saw it, as follows.

i) The Specific Reliability Report was produced and served late, at 10:10 on Wednesday 1 February 2023. The Prosecution accepts that service was late. It was the lateness of that Report, given the inability for the Downs defence expert Mr Campbell to deal with it, which led to the trial being vacated. This was the express "principal reason" which the Judge articulated when he vacated the trial by his decision on 1 February 2023. Even if not raised by Mr Sierotko earlier (§18 above), the issue of "reliability" had squarely been raised at least from 31 October 2022, in the Downs solicitors' letter. That was 3 months before the trial that was known to have been fixed for 6 February 2023. The letter had confirmed that Mr Campbell was being instructed "to provide a report on provenance and reliability issues for Mr Downs". That letter triggered the need for the Prosecution to adduce evidence on the issue of reliability, as indeed the Prosecution recognised. In fact, the listing in Mr Sierotko's First Defence Statement of 30 May 2022 and Second Defence Statement of 10 November 2022 of Mr Shrimpton as a "required witness" itself triggered such a need. This too came to be recognised by the Prosecution, in its ultimate response on 31 January 2023 to the Third Defence Statement of 18 January 2023.

ii) The problem is that the matter was actioned in a way which manifestly did not constitute "all due diligence and expedition". Indeed, it failed to constitute "any" due diligence – or "any" diligence – as well as "any" expedition. From

18 October 2022, DS Nuttall had the Reliability Script, together with the Reliability Script Instructions of 11 October 2022. All DS Nuttall needed to do was 'press a button'. That needed to happen and it needed to happen promptly. The Specific Reliability Report needed to be generated, produced and served. When on 31 January 2023 the Prosecution filed its Response to the required witnesses listed in the Third Defence Statement of Sierotko (19 January 2023), they did so by reference to the Specific Reliability Report which was said to have been "served". But it had not been served. The required witness (Mr Shrimpton) to which there was this response was the very same required witness included within the original Defence Statement of 30 May 2022, and repeated in the Second Defence Statement of 10 November 2022.

iii) The default is wholly unexplained. The NCA and the police were not external agencies but parts of the Prosecution. There is no explanation, still less an adequate explanation. There is no evidence, still less adequate evidence. There was no, still less an adequate, "Chronology" of the key sequence of events. The Prosecution knew what they needed to explain. They knew what had been the "principal reason" for the trial date being vacated. And as had been submitted to the Judge (for the hearing on 3.2.23) in a written Note, this was a case of a further period of delay and yet further extension to the CTLs which was "entirely due to an absence of any, let alone due, diligence and expedition from the Crown from October 2022 to February 2023". The Judge's own reasoning recognises that it was on 31 October 2022 that "the Defence" notified the Prosecution of their intention to instruct an expert. He reasoned that that was a topic which, until then, the Prosecution did not know would be in issue. But that placed the focus squarely on what had happened after 31 October 2022.

iv) Absent from the Prosecution "Chronology", which the Judge incorporated into his Ruling, was any description to explain, still less justify, the action and inaction between 31 October 2022 and 1 February 2023. Worse still, the Judge referred to the prosecution "having to instruct an expert in November 2022". That is not correct. The correct position, if the Judge had interrogated it, was that everything was in place for DS Nuttall including the Reliability Script and Instructions. The Reliability Script simply needed to be "executed against the exhibits" to produce the "automatically generated report". DS Nuttall had everything he needed by 18 October 2022. But DS Nuttall only "executed the code" on 23 January 2023. By then, it was already fatally late, so far as the trial is concerned. But the Specific Reliability Report was not served, even that stage. It was only uploaded on the morning of 1 February 2023, for a hearing that morning at which vacating the trial the following Monday was being considered. All of this unexplained delay and inaction was against the backcloth of knowing full well, throughout, that the trial was fixed for 6 February 2023. The trial had already been vacated of 1 August 2022. The CTLs had already twice been extended. As in Holland, the default is "astounding" . There was no explanation, no evidence and no rigorous scrutiny. The Judge's conclusion finding due diligence and expedition was not open to him on the evidence. There was an insufficiency of evidence. There was an insufficiency of enquiry. The decision was wrong, and unjustified. The decision to extend the CTLs must be quashed.

22. I cannot accept these submissions. My reasons are as follows:

i) It is true that in the case of Mr Sierotko there had been three Defence Statements served: on 30 May 2022; on 28 October 2022; and on 18 January 2023. It is also true that in each of those Defence Statements, listed as a "required witness", was Mr Shrimpton. But the fact remains that the Defence Statements, which had raised "attribution" specifically as an issue in the proceedings, did not raise "reliability". Mr Forte rightly recognised – when I put it to him – that "reliability" was never "expressly" raised on behalf of Mr Sierotko. What was raised, as I have explained, in the First Defence Statement was a specific point about missing data. But, as I have also explained, that had been dealt with. Not only that, but it was dealt with at a time when the Prosecution had specifically flagged up the need for the defence to give "full details" of "any challenge". Part of the Chronology which the Judge incorporated – and which the Claimants criticise – is that the Prosecution response on 27 June 2022 had included a request from the Sierotko team of "full details" of any challenges being made to each Operation Venetic witness, including Mr Shrimpton. It was in that context that the Second Defence Statement of 10 November 2022 dropped the missing data point – that having been resolved – and raised no "reliability" issue at all. As I have explained already, reliability could have been raised as an issue at any time, by and on behalf of Mr Sierotko. It was never raised, including in the Second Defence Statement. Nor, again, was it raised in the Third Defence Statement of 19 January 2023 in the run up to the trial.

ii) Following the Third Sierotko Defence Statement, and in the run up to the trial, there was a conference with new trial counsel for the Prosecution. That conference was on 26 January 2023. It too was recorded by the Judge within the Chronology in the Judge's Ruling. The Prosecution Response (31.1.23) to the witness requirements from the Third Defence Statement (19.1.23) did not accept that "reliability" had been placed in issue. Far from it. The Response was dealing with witnesses in respect of which the issue of reliability had not been raised. The Response recorded – once again – that the defence had not set out with "what issues" the required witnesses were being required to deal. The Prosecution maintained that this was not permissible. The defence needed to set out what the required issues were. That was repeating what had been said by the Prosecution on 27 June 2022, recorded in the Chronology within the Ruling, which had still not resulted in any issue being identified. The Prosecution went on to record in the Response (31.1.23) that the defence were requiring the attendance of witnesses without providing any details of what issue there will be required to deal. Then, in a passage in the Response dealing with witnesses "for whom no or an adequate explanation has been given as to why they are required", Mr Shrimpton was listed. The issue of "admissibility" was identified with prosecution observations. The issue of "reliability" was identified, recording that the Prosecution had served a report "dealing with the question of reliability of the EncroChat material in this case" and that "if" there was now any challenge to the principles or results of the analysis, the defence would need to set it out in writing. This shows that it was intended that the Specific Reliability Report be served. But, so far as the Sierotko team was concerned, this was all under protest in the context of engagement which

was emphatically unsatisfactory. That was the context in which Mr Forte was effectively telling the Judge at the hearing on 1 February 2023 that Mr Sierotko was – now, and after all – raising an issue of "reliability". It is true, and was recognised by Mr Kellet before the Judge, that the Specific Reliability Report was "late", which raised "an issue". But, so far as Mr Sierotko is concerned, that does need to be seen in the context of the prior and ongoing absence of proper engagement. That lack of engagement had continued, so far as Mr Sierotko was concerned, after the letter of 31 October 2022 had been written by the solicitors acting for Mr Downs. Mr Sierotko's team knew nothing of that letter.

iii) Turning to Mr Downs, it is true that the letter of 31 October 2022 referred to his team instructing Mr Campbell as expert "to provide a report on provenance and reliability issues". The Judge recognised that. In his Ruling, the Judge described that as being a notification of an intention to instruct an expert on a topic which, until then, the Prosecution did not know would be in issue. It is also true that the letter of 31 October 2022 was recognised on the Prosecution side as having given that indication. On the other hand, it is also right that no Defence Statement had ever been filed by or on behalf of Mr Downs. The Judge recorded, within the Chronology, that as at 23 January 2023 still no Defence Statement had been received from Mr Downs. In the Ruling, under a heading "Defence Statements", the Judge recorded that: "There has been nothing, even at this stage from Downs". The Judge considered that to be of significance. He was, in my judgment, plainly entitled to take that view. As with the failure within the Defence Statements of Mr Sierotko to raise an issue relating to reliability, so to the failure on the half of Mr Downs to provide any Defence Statement – at all – was relevant to the context and circumstances with which the Judge was concerned, in considering what "diligence" was "due". The important point in all of this is that the unsatisfactory nature of the defence "engagement" did not end as at 31 October 2022. It continued after 31 October 2022, and it had continued all the way up to 1 February 2023.

iv) As the Judge was careful to explain (§10vii above), the question of whether the Prosecution had acted with "all due diligence and expedition" was to be approached taking into account the nature of the case, the compliance on both sides with time limits, the volume of material involved, the defence engagement, the nature of requests made and trial readiness. The Judge had begun (§10i above) with observations fitting with the overriding purposes (§12 above), but which also included the importance of defence engagement. He was approaching "due" diligence and expedition in the context and circumstances. I can see no misdirection or error of approach.

v) In the course of his submissions that the Crown had acted with due diligence and expedition, Mr Kellet did give the Judge an explanation. The Judge had listened to it and engaged with it. He did not require further assistance. This was the backcloth against which he was giving his Ruling to an informed audience who knew what representations had been made. The explanation is to be found within the transcript of the hearing. The points being made by Mr Kellet, discerned and illuminated in the context of the materials, included these. (1) The Prosecution had addressed issues which had been raised only

"tangentially" by the defence. (2) So far as Mr Sierotko was concerned, reliability issues had not been "clearly raised" prior to the Third Defence Statement (19.1.23). (3) The Third Defence Statement itself simply "reiterated" the requested "Venetic witnesses". (4) The position had been considered at the conference (with new Prosecution Counsel, on 26.1.23, described in the Chronology). (5) The position was that the Prosecution had previously (and, as I have explained, unsuccessfully) been seeking clarification from the defence as to "what are the issues for these witnesses to address". (6) There had been a "defence reluctance to set out exactly what the issues were". (7) The "only reason for the Venetic witnesses" would be "admissibility or reliability". (8) The view on the Prosecution side, in November 2022, had been that "reliability needn't be dealt with". (9) So far as Mr Downs was concerned, what had happened after the 31 October 2022 solicitors' letter was that contact had been made with the "specialist prosecutor" in relation to the "requests for packs" for the various "handles" (that being the focus of that letter). (10) The answer which had come back (from the specialist prosecutor) was that packs for third party handles would never be disclosed because of a "sensitivity" (which Mr Kellet explained to the Judge and the Judge accepted). (11) However, the packs which had been requested on behalf of Mr Downs "would be put through the Reliability Script". (12) That course had been started in November 2022 but was "actually taken from Mr Shrimpton in the uploading at the end of last month/beginning of this month". (13) That needed to be seen in the context of a number of further points. One was that the case had been ready for trial in August 2022. Another was that it had never been raised by the defence that the trial could not go ahead because of the absence of "these reliability scripts". Next, there was the point that the recent "application to vacate" (refused on 13.1.23) and recent "application to dismiss" (refused on 23.1.23), both of which on behalf of Mr Downs, had not been based on any issue relating to EncroChat "reliability". The application to vacate had "never mentioned that the absence of the reliability scripts was an issue". The application to dismiss "specifically said that the weakness in the case was the attribution, not the reliability". That was a reference to an application for dismissal which had been made on behalf of Mr Downs and heard on 13 January 2023, and an application to vacate made on behalf of Mr Downs and heard on 23 January 2023. The two recent applications to which Mr Kellet referred had both featured in the Chronology, provided by the Prosecution and incorporated in the Judge's Ruling, as follows:

> ***13/01/23 Application to Dismiss by Downs. Issue attribution. Refused. Downs arraigned. NG pleas. PTR listed 23/01/23. Defence indicate may be application to vacate to await outcome of linked Venetic/Encro rulings. Further applications to be uploaded by 20/01/23.***
>
> ***23/01/23 Listed at defence request. No applications to vacate uploaded. Downs indicate that Mr Cook in difficulties re: trial. Application to vacate refused. No application to vacate by Sierotko. No defence statement received from either Downs or Harrison. Prosecution to deal with disclosure requests by 27/01/23 (CPS conference with new trial counsel fixed for 26/01/23).***

vi) It was in the context of all of this that Mr Kellet's ultimate submission to the Judge was as follows:

> ***so the greatest failure, late as it is, it's because of a lack of engagement in terms of the issues…***

vii) I cannot see the Judge's finding of "due diligence and expedition" as involving a failure rigorously to scrutinise the position, including specifically the position after 31 October 2022. The Judge was given an explanation of the ongoing position on the Prosecution side, as well as on the defence side. The Judge was not persuaded by the sustained defence arguments made to him, that it was failings by the Prosecution that meant that the parties were not trial ready. The Judge said that he was not persuaded of that "in the light of the history of this matter". He clearly accepted, in light of "everything that he had read and heard" including the points relating to "defence engagement" – and including the ongoing position after 31 October 2022 – that the Prosecution had acted with "due diligence and expedition". In my judgment, there was no error of approach. The Judge reached a conclusion which was open to him, on the evidence, in all the circumstances.

viii) Given the reliance that has been placed on the Holland case, it is worth returning to that case. That was a case in which the trial had been fixed for 22 April 2002. A court-imposed deadline had been laid down of 17 January 2002 for the disclosure of the Prosecution forensic evidence. At a hearing on 23 January 2002 the crown court had extended that court-imposed deadline for that disclosure, to 31 January 2002. There was also a subsequent hearing on 22 February 2002. In the event the Prosecution forensic evidence was only obtained on 28 March 2002 and not served until 10 April 2002, as a result of which the trial was vacated. What had happened was that the Officer in the Case on 9 January 2002 had agreed with the Forensic Science Service that they would have until the end of March 2002 to provide the forensic evidence. That was an agreement wholly incompatible with the deadline laid down by the crown court. It was wholly incompatible with the extended court deadline. The Forensic Science Service were not told about the court-imposed deadline. And the position relating to the agreed March 2002 date was not disclosed to, and was unknown by, the crown court at the hearings on 23 January 2002 and 22 February 2002. There was a clear, and causative, failure of "all due diligence and expedition". The agreement clashed with the dates set by the crown court. The crown court was not told about the agreed position. Moreover, if the court had been told, there could have been a promptly rescheduled trial for early June 2002, instead of the trial at the end of October 2002 which was the consequence of the default. That was the context in which the Prosecution action was described as "astounding" (§36). Each case turns on its own individual facts, and it as well to recognise the nature of those facts.

ix) The law on due diligence and expedition requires (§13 above) the application of the standard of a competent prosecutor, conscious of their duty to bring the case to trial as quickly as reasonably and fairly possible. It requires avoiding "hindsight". It applies the competent prosecutor standard, having regard to the nature and complexity of the case, and the conduct of the defence. The law of judicial review requires (§16 above) that I remember the primacy of the Judge's role, in what was an exercise of judgment and appreciation. In my judgment, the Judge's decision was not "wrong". It follows that the claims must fail.

The Unrepresented Defendants Point

23. There was another issue. Mr Kellet has submitted that there is a further reason why these claims for judicial review cannot succeed. His argument, in essence as I saw it, was as follows. Even if the Judge's conclusion finding "due diligence and expedition" were successfully impugned, there remains the Judge's independent basis for his Ruling. As the Judge put it (§10vii above): "I am satisfied that any failure of the Prosecution is not in itself a cause for the required extension". That conclusion can be seen to flow from the "other important consideration" emphasised by the Judge. That concerned the likelihood that the defendants would appear unrepresented on very serious charges due to no fault of their own (§9 above). The Judge described that situation in the Ruling in emphatic terms (§10ii above), as a situation "which the court could not countenance". And as the Judge said during the hearing, the fact was that these defendants were going to be without Counsel if the case stayed in. The Judge said he "wasn't going to have a case like this conducted on serious charges with defendants unrepresented through no fault of their own". That was a freestanding reason why – in the Judge's view – the trial would in any event have been vacated. It does not matter that this was not "the principal" basis for the decision to vacate on 1 February 2023. It does not matter that this was not the basis of the Claimants' applications to vacate the trial. The trial was vacated. The question – in considering extensions to CTLs – now became whether the trial could not have gone ahead anyway. Even if the Late Prosecution Report involved a lack of due diligence and expedition, and even if that alone meant the trial date was bound to be lost, that still did not in fact "impact" on the delay giving rise to the need for the extension of CTLs. This is because the delay giving rise to the need to extend the CTLs would have arisen, in any event, on a freestanding basis. That was the Judge's view, as is the clear implication from his Ruling. That conclusion was open to him on the evidence. This Court should uphold it was lawful and justified.

24. This analysis was resisted by Mr Forte and Mr Cook who submit, in essence as I saw it, that Mr Kellet is wrong at every step in his logic. Once it is recognised that "the principal reason" for vacating the trial was the Late Prosecution Report, that is the end of the matter. The necessary "impact" of the absence of due diligence and expedition is logically unavoidable. The default must at least have "contributed" to the delay. It must have been "a reason". Indeed, it was the dominant reason (or, put another way, the root cause). There was no room for a conclusion that the defendants being unrepresented was a 'freestanding' reason why the trial would have been vacated. Nor did the Judge reach any such conclusion. There was no express finding by the Judge in the Ruling that the trial would, still less inevitably, have been vacated on this 'freestanding' basis. Nor was there some "implied" finding to that effect. Nor, in any event, could such a conclusion have been justified on the evidence. As recently as 23 January 2023 an application to vacate on behalf of Mr Downs had been refused, by reference to this very point. The position of Counsel and their availability was not the basis of the applications to vacate the trial. It was not the basis, nor articulated even as a basis, for vacating the trial in the Judge's decision on 1 February 2023. It could not in those circumstances suddenly become a basis, still less a freestanding basis, on 3 February 2023. Moreover, the Judge would certainly not have vacated the trial on 1 February 2023 on this basis. He would have expected further attempts to be taken. As it was, Mr Forte had become available for the trial as at 3 February 2023. He informed the Judge at that hearing that this was now the case. Mr Cook, for his part, remained

unavailable. But the continued efforts would have been made to find replacement counsel – which could very well have succeeded – had been discontinued for good reason. It was because the trial was vacated on the Wednesday morning of 1 February 2023 that those efforts were discontinued. For all these reasons, the CPS arguments cannot be accepted.

25. In any event, say Mr Forte and Mr Kellet, there is a remaining fundamental legal objection. Its essence, as I saw it, was as follows. Suppose there are indeed two "freestanding" bases on which a trial would have been vacated. Suppose that were this case (though it is not). Suppose that one of these bases is a lack of due diligence and expedition on the part of the Prosecution. That must, of itself, be fatal to there being any extension in the CTLs. The Judge (§10v above) recorded the principle in Gibson as being whether the prosecution's failure "is not itself a cause for the required extension". That was how Gibson was characterised by the CPS, in the application for an extension to CTLs (reflecting, I interpose, a description of Gibson in Blackstone's Criminal Practice (2023) at §D15.31). It is nothing to the point if there is some other freestanding reason would have led to that same delay. The statutory scheme imposes a discipline, reflected in the overriding purposes (§12 above). A lack of due diligence which – of itself – means the trial date will be lost and a CTL extension will be needed is fatal to the extension of CTLs. It is no answer that there is, fortuitously to the Prosecution, some other feature which – of itself – would have had the same consequence. That does not absolve the Prosecution, whose own actions have forfeited the State's ability to maintain continuing pre-trial deprivation of liberty. That is how the statutory scheme is framed and operates, having regard to purpose and policy. It is also how the discretion as to CTL extensions would, in any event, need to operate.

26. I have explained why, in the circumstances, this issue has become academic. I will, however, indicate what my conclusions in this case would have been, based on the arguments I heard, and the materials cited to me. I start with the facts and circumstances of this case. The 'unrepresented defendants' point was an operative concern in the mind of the Judge, at the time when the trial hearing was vacated on 1 February 2023. It was a "consideration" identified at that hearing, by the Judge. It was the reason why the Judge used the language of the "principal" reason. He was conscious of something else which could also be a reason. He did not get into it in making that decision. He did not need to. That, however, did not preclude the Judge from revisiting that concern two days later, on 3 February 2023, in the context of CTLs. He was entitled to ask himself whether this would have been, or would have become, a freestanding reason why the trial could not in any event have gone ahead. He was plainly revisiting that concern on 3 February 2023. And he expressed himself in emphatic terms. At the hearing on 3 February 2023 the Judge said he "wasn't going to have a case like this conducted on serious charges with defendants unrepresented through no fault of their own". In his Ruling he said that such a situation was one which "the court could not countenance". I think Mr Kellet is right to describe the clear implication of what the Judge was saying as expressing a conclusion that this trial would have been vacated in any event. That explains why the Judge (§10vii above) was identifying a second basis for his Ruling; something which meant "any failure by the Prosecution is not itself a cause for the required extension". He was saying that the extension of CTLs would have been required anyway, on this freestanding basis. That, moreover, was a conclusion open to him on the evidence. I

can see the force in the arguments that the Judge would not have vacated the trial unless it were a last resort; that by Friday 3 February 2023 Mr Forte was available; and that efforts to replace Mr Cook had rightly been discontinued on the morning of Wednesday 1 February 2023. On the other hand, those efforts to find new Counsel for Mr Downs had been being taken from 16 January 2023. They had been fruitless 7 days later, as at 23 January 2023, when the application to vacate was made. That application was rejected. That meant heightened efforts were now needed. Those had been undertaken. They had themselves been fruitless 8 days later, on 1 February 2023. A trial, in this heavy case, was now due to commence just 3 working days later. Mr Cook's other trial commitments remained as at 3 February 2023. In my judgment, it was open to the Judge to conclude that the trial would have been vacated for this reason, in any event. In my judgment, that is what he did conclude.

27. That leaves the contentious legal issue (§25 above) about freestanding bases on which the delay would have arisen. I cannot see this issue as having been resolved by any case or commentary which I have been shown. I can see that where there is a combination of linked features, and delay has resulted requiring a CTL extension, it helps to ask whether a lack of prosecutorial due diligence and expedition "caused" or at least "contributed" to the delay (Holland §24, citing Bagoutie); or to ask whether the lack of prosecutorial due diligence and expedition was the "principal factor" (Gibson §26); or to ask whether it was the "root cause" (Archbold §1-444, citing Thomas). But what I am addressing is freestanding features. The closest comparative scenario which I have been able to find touched on, in the materials cited to me, is the case of R v Central Criminal Court, ex p Bennett (The Times 25 January 1999), as discussed in Gibson at §22. The Bennett case evidently discussed a prosecutorial lack of due diligence in circumstances where "the trial could not have gone ahead in any event because of the alleged victim's illness". I can quite see, as was evidently said in Bennett, that this would be "irrelevant" when deciding whether there had been "all due expedition". But I am dealing not with that question but a question of causation, arising from the subsequent Bagoutie line of cases (discussed in Gibson at §§24-26). It seems that arguments in Gibson, built on Bennett and scenarios such as the "illness or absence of a judge, a witness or a defendant" (Gibson §27), did not find favour in Gibson (see §28). But I do not read Gibson as confronting the issue of two 'freestanding' reasons each of which, in and of themselves, mean that the delay in question would have arisen. Absent further researches from Counsel and direct authority on that specific point, I would have returned to 'first principles' from Bagoutie at §§14 and 16 (cited in Gibson at §24):

> ***If … the Crown is seeking an extension of the time limit it must show that the need for the extension does not arise from lack of due expedition or due diligence on its part. It seems clear to me, however, that the requirement of due expedition or due diligence or both is not a disciplinary provision. It is not there to punish prosecutors for administrative lapses; it is there to protect defendants by ensuring that they are kept in prison awaiting trial no longer than is justifiable…***
>
> ***I can see no reason why Parliament should have wished to oblige the court to refuse an extension of a custody time limit because there has been some avoidable delay, even where this has not had any effect on the beneficial object which the statute is intended to achieve, namely the keeping defendants in prison awaiting trial for no longer than is justifiable.***

If there is a sustainable and clear finding that the very same delay would have arisen in any event, for a 'freestanding' reason wholly independent of the default of due

diligence by the Prosecution, I do not see the defendant as being kept in prison awaiting trial for "longer than is justifiable". In this case, in my judgment, that is the position. The Judge considered that the trial date would have been lost in any event because of the prospect of at least one defendant facing trial without representation, which the Judge could not have countenanced. Had it arisen, I would therefore have rejected the judicial review claims on this alternative basis.

Deferred Quashing

28. Finally, I record one other thought that arose. All Counsel were agreed on this: if the claims for judicial review had succeeded, on the basis that it was wrong to extend the CTLs, the outcome would need to have been quashing orders in this Court and the setting of bail conditions in this Court. Remittal to the crown court for bail conditions to be dealt with in that Court were – all Counsel agreed – problematic if this Court made quashing orders. That was because a quashing order would logically lead to entitlement to immediate release without any conditions. I raised, by way of a thought, at the hearing whether this could be a candidate situation for the newly articulated power in section 29A of the Senior Courts Act 1981, by which the High Court can make a deferred quashing order (Administrative Court Judicial Review Guide (2022) §§12.3.4 to 12.3.7). I add that this might be especially important if – as I think is logically possible – there were some error of approach in the extension of CTLs, which calls for the matter to be remitted for reconsideration by the Crown Court, rather than being determined in this Court. I have not needed to consider any of this further, because a quashing order does not arise.

Conclusion

29. For the reasons which I have given, I grant permission for judicial review in both cases, but I refuse the substantive applications for judicial review.