36 CRIME

lccsa London Criminal Courts Solicitors' Association

Section 41 YJCEA 1999

Mary Prior KC and Emma Fielding

THE HISTORY

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- IN 1973 RAPE CRISIS WAS ESTABLISHED IN ENGLAND AND WALES
- IN 1976 COMPLAINANTS IN RAPE CASES GAINED ANONYMITY
- 1988 THE PROTECTION OF ACCUSED PERSONS WAS REPEALED (PROTECTED 1976-1988)
- 1992 ANONYMITY FOR COMPLAINANTS IN SEXUAL OFFENCES OTHER THAN RAPE SEXUAL OFFENCES (AMENDMENT) ACT 1992 S(1) (1) AND S5

HISTORY

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- 1976 SEXUAL OFFENCES AMENDMENT ACT
- PREVIOUS SEXUAL HISTORY EVIDENCE LIMITED WITH PERSONS OTHER THAN THE DEFENDANT
- APPLIED WHEN THE DEFENDANT WAS CHARGED UNTIL 1988 CRIMINAL JUSTICE act s158(2)

HOME OFFICE REPORT –JUNE 1998

- SPEAKING UP FOR JUSTICE
- LED TO YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

SECTION 41

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- IN FORCE FROM 04 12 2000
- APPLIES TO ANY OFFENCE TRIED
- DATE OF THE OFFENCE IS IRRELEVANT
- 1976 ACT HAD NO RELEVANCE
- OLD CASES ON CONSENT AND CREDIBILITY MAY HAVE SOME RELEVANCE

THE TEST

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- CROSS-EXAMINATION ON PREVIOUS SEXUAL BEHAVIOUR IS FORBIDDEN UNLESS
- EVEN IF IT IS RELEVANT TO AN ISSUE IN THE CASE
- AND THE TEST IN S41(3) A-C IS MET
- THE COURT MAY NOT GIVE LEAVE UNLESS A REFUSAL TO ADMIT THE EVIDENCE MIGHT RENDER THE CONCLUSION OF THE JURY UNSAFE ON A RELEVANT ISSUE IN THE CASE
- R v Abdelrahman (2005) EWCA Crim 1367
- Section 41 – purpose includes protection from having to re-live personal sexual experiences

Lack of discretion

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- If the criteria is established the Judge cannot prevent its admission
- R v F (2005) 2 Cr App R 13
- R v T (2013) Crim LR 596

EXCEPTIONS

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- SECTION 3 OR 5 MUST APPLY
- SECTION 3(A) IT IS NOT AN ISSUE OF CONSENT OR
- SECTION 3(B) IT IS AN ISSUE OF CONSENT AND THE SEXUAL ACTIVITY OCCURRED AT OR ABOUT THE SAME TIME AS THE OFFENCE
- SECTION 3(C) IT IS AN ISSUE OF CONSENT AND THE SEXUAL BEHAVIOUR IS SO SIMILAR
- (1) TO THE SEXUAL BEHAVIOUR OF THE COMPLAINANT WITH THE DEFENDANT
- (2) TO THE SEXUAL BEHAVIOUR OF THE COMPLAINANT WITH ANOTHER
  THAT THE SIMILARITY IS NOT A COINCIDENCE

CONSENT

- THE ISSUE OF CONSENT DOES NOT INCLUDE BELIEF IN CONSENT
- THE QUESTION IS WAS THE COMPLAINANT CONSENTING
- THE ERROR IS TO CONSIDER THAT THE PREVIOUS CONDUCT OF THE COMPLAINANT MADE THE DEFENDANT BELIEVE THAT THE COMPLAINANT WOULD CONSENT THIS TIME
- THREE FILTERS ARE REQUIRED BEFORE ADMISSION
- MUST PASS THROUGH S41(3)(B) OR C
- SUBSTANTIAL PROBATIVE VALUE IN RELATION TO THE CASE AS A WHOLE
- IS NOT TO IMPUGN CREDIBILITY

CONSENT

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- Gabbai [2019] EWCA Crim 2287
- G WAS UNAWARE OF C'S PREVIOUS SEXUAL HISTORY
- C HAD A TENDENCY TO ENGAGE IN HIGH RISK SEXUAL ENCOUNTERS, ALLEGE RAPE AND THEN SAY SHE WAS NOT SURE SHE HAD BEEN RAPED
- DID NOT SAY NO OR DEMONSTRATE A LACK OF CONSENT
- RELEVANT AND ADMISSIBLE

GREEN LIGHT ARGUMENT

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- CASES WHERE C TOLD D OF PREVIOUS SEXUAL ENCOUNTERS AS A MECHANISM OF FLIRTING
- A BELIEF THAT C IS PROMISCUOUS AND THEREFORE WOULD INEVITABLY CONSENT TO INTERCOURSE IS NOT ADMISSIBLE
- IF FACTS DIAMETRICALLY OPPOSED UNLIKELY TO BE ADMISSIBLE
- LOW INTELLECT AND MENTAL HEALTH CONDITIONS MAY HAVE SOME RELEVANCE TO THIS B. v The Queen [2013] EWCA Crim 3.

BIAS

- BIAS OR A MOTIVE TO FABRICATE WOULD BE A GATEWAY
- NOT EASY TO DEMONSTRATE
- SEXUAL HISTORY WOULD HAVE TO HAVE SOME RELEVANCE
- SEE R V MOCKREVOKAS 2002 1 Cr App R 20
- R v MH EWCA 2003 CRIM 1066
- C COMPLAINED OF RAPE AFTER DISCOVERING POLICE OFFICER WHO SHE HAD SEX WITH HAD A WIFE
- PREVIOUS SEXUAL HISTORY WAS RELEVANT TO IMPORTANT ISSUE IN THE CASE

MOTIVE

- R V F 2005 2 CRIM APP R 13
- D WAS ALLOWED TO ADDUCE EVIDENCE OF PREVIOUS CONSENSUAL RELATIONSHIP WITH STEP DAUGHTER V WHO ACCUSED HIM OF HISTORIC RAPE AS A CHILD

  D HAD ENDED THE RELATIONSHIP
- TRIAL JUDGE HAD REFUSED TO ALLOW QUESTIONS RE SENDING OF INDECENT IMAGES OF ADULT C TO D

CREDIBILITY

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- S41(4) PREVIOUS SEXUAL HISTORY IS IRRELEVANT IF ITS PURPOSE IS TO UNDERMINE CREDIBILITY

APPLICATION

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- Newton hearings
- Appeals
- Applications to dismiss
- Trials
- Applications must be heard in private s43 YJCEA 1999 – if held in public reporting restriction under s46 difficult
- DECISIONS, SCOPE AND REASONING GIVEN IN PUBLIC

CROSS-EXAMINATION

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- Section 41 can apply if evidence adduced in cross-examination
- Only if it is not deliberately elicited
- R v Hamadi (2008) Crim LR 635

procedure

- At least 10 business days notice is required
- Court must be satisfied it has taken account of complainant's rights
- Can discharge or avey a previous order made.
- Court hears first from applicant
- Then each of the other parties
- Then further directions from the applicant
- It is possible to withhold information from the other party

questions

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- The proposed questions must be provided to the Court in writing
- All must be particularised
- Failure to do so is a serious and inexcusable breach of CPR

When prosecuting

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- You can adduce previous sexual history
- Failure of s41 to include the prosecution is not unfair Soroya [2006] EWCA Crim 1884.
- Can use s78 PACE to exclude such evidence if unfair to the defence
- Prosecution often lead evidence of virginity and pregnancy
- Can be admitted and lead to myths and misconceptions
- No application to the Judge to consider relevance or admissibility

SPEAKING TO WITNESSES AT COURT

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- ENSURE ACCOMPANIED BY CPS STAFF
- SEND RECORD OF MEETING TO DISCLOSURE OFFICER FOR DISCLOSURE EXERCISE TO BE CONSIDERED
- VULNERABLE WITNESSES SHOULD BE ADVISED PRE-TRIAL OF S41 DECISION
- CAN ALSO ADVISE THAT APPLICATION REFUSED BUT MUST EXPLAIN A FURTHER APPLICATION CAN BE MADE

- Late applications must be scrutinised with particular care R22 A.5
- Can be refused if D is seeking to manipulate the Court process to prevent the prosecution from formulating an adequate response.
- Aggressive, repetitive and oppressive questioning will be stopped.
- If application has to be made in trial must still be written. Mandatory.

The complainant

- Must inform the complainant as soon as practicable
- Court must allow prosecutor sufficient time to comply with paragraph 1 and the code of practice section 32 DVCV Act 2004

HOUSE OF LORDS

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- READ DOWN INTO ORIGINAL LEGISLATION THAT EVIDENCE WOULD BE ADMISSIBLE IF ITS ABSENCE WOULD CAUSE AN UNFAIR TRIAL
- R v A (no2) (2002) 1 AC45
- Lord Hope gave examples of when evidence might be admissible:
- Honest belief in consent
- Bias
- Motive to fabricate
- Explanation for physical conditions relied upon by the prosecution.
- Why a young complainant could describe sexual events.

PHYSICAL CONDITIONS

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- R V L 2015 EWCA CRIM 741
- FACT CHILD WAS RAPED IN NIGERIA AGED 5 WAS RELEVANT TO FINDINGS OF DAMAGE TO THE HYMEN WHEN A TEENAGER WHICH WAS SAID TO BE EVIDENCE AGAINST D
- ALSO APPLICABLE IF EXPLANATIONS OF UTI OR STD NEEDED
- OR PREGNANCY SCARE

Individual approach

- Each case depends on its facts
- Too rigid an approach may render a conviction
- unsafe
- R V Andrade (2016) Crim LR 424
- R v Soroya (2007) Crim LR 181

Each case turns on its own facts

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- R V HARRIS (2010) CRIM LR 54
- YOU CAN OBTAIN A FURTHER STATEMENT FROM THE COMPLAINANT
- BEFORE THE S41 APPLICATION IS HEARD
- IF THE COMPLAINANT REFUTES THE PREVIOUS CONDUCT THE JUDGE WILL TAKE ACCOUNT OF IT
- DEAL WITH THE S41 APPLICATION
- R V T (2004) 2 CR APP R 32
- S 41(3) c NO REQUIREMENT OF A TEMPORAL LINK

Common errors

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- THE VISUALLY RECORDED INTERVIEW OF A COMPLAINANT OFTEN CONTAINS S41 MATERIAL
- VIRGINITY
- NO OTHER PARTNERS THAT DAY
- WHEN A COMPLAINANT LAST ENGAGED IN SEXUAL ACTIVITY
- S41(5) If the PROSECUTION calls evidence of the sexual behaviour of the complainant The defence can adduce evidence which goes no further than necessary to enable the evidence to be rebutted or explained.
- R v Funderbunk 90 Cr App R 406

IT CAN BE DIFFERENT FOR THE FAMOUS

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- R V CHED EVANS 2017 1 Cr App R 13
- Wished to call evidence that C in the days leading up to the incident :
- instigated sexual activity with two males,
- used specific words of encouragement and
- told them of positions to adopt.
- Court said relevant and admissible

R v Martin (2004) 2 Cr App R 22

- M visited C's flat.
- Allegation pestered for sex – return – rape
- Counter allegation – sexual activity and then
- rejection
- Admissible

OTHER COMPLAINTS TO THE POLICE POST OFFENCE

- Can adduce if C failed to mention it: when making an earlier complaint.
- On an occasion when could reasonably be expected to have mentioned it.

REBUTTAL

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- R V F (2008) EWCA CRIM 859
- C SAID SHE WAS SCARED SHE WAS PREGNANT AS A RESULT OF RAPE
- EVIDENCE FROM GP THAT SHE SAID PREGANCY SCARE AS A RESULT OF CONDOM ADMISSIBLE
- S41(5) EXTENDS TO EXPLANATION

ADDUCED BY THE PROSECUTION

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- WILSON AND SMITH (2024) EWCA CRIM 1514
- A FAILURE TO EDIT A S28 RECORDING TO REMOVE EVIDENCE OF PREVIOUS SEXUAL HISTORY
- DID THIS AMOUNT TO EVIDENCE ADDUCED BY THE CROWN?
- DEFENCE SOUGHT TO "EXPLOIT" THIS FAILURE
- NOT EVIDENCE ADDUCED BY THE PROSECUTION

QUESTIONING

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- PROSECUTOR MUST TAKE CARE NOT TO FALSELY REFLECT THE EVIDENCE IN XD
- P ADDUCED FACT NO CONTRACEPTION WAS USED AND EFFECTIVELY ASKED JURY IF C WOULD HAVE CONSENTED WITHOUT IT
- GP RECORDS SHOWED PREVIOUS SCARE AFTER NON-PROTECTED SEX
- APPLICATION TO ADDUCE REFUSED
- R V SULTAN MOHAMMED 2020 EWCA CRIM 790

WILSON AND ANOTHER 2024 EWCA CRIM 1514

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- This is an important judgment
- First to properly consider the scope of s.41(2)(b). It
- CARRIES ACROSS THE S100 BAD CHARACTER TEST TO S41 .
- COURT ASKS WHETHER THE EVIDENCE HAS SUBSTANTIAL PROBATIVE VALUE
- IN RELATION TO A MATTER IN ISSUE
- AND IS OF SUBSTANTIAL IMPORTANCE IN THE CONTEXT OF THE CASE AS A WHOLE
- AND RENDERING A CONVICTION UNSAFE

When section 41 isn’t section 41

False sexual complaints as non-defendant bad character

Emma Fielding

False complaints and credibility

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- Section 41 restricts questioning about credibility where it concerns previous sexual behaviour.
- A false complaint of sexual assault or rape is different: the proposed questioning goes to lies and fabrication, not to whether the sexual behaviour occurred.
- The evidence may therefore engage section 100 CJA 2003 (non defendant bad character), but not section 41 YJCEA 1999 (previous sexual behaviour).

The proper evidential basis test

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- The first hurdle is having a proper evidential basis for asserting that the earlier complaint was false.
- Without that foundation, questioning may cross the line into previous sexual behaviour and engage section 41 and is likely to be refused due to section 41(4) because the main purpose would be to attack the credibility of the complainant.
- The court must balance protection against improper questioning with the defendant's right to a fair trial.

R v AM [2009] EWCA Crim 618

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- AM was convicted of sexual assault, the complainant was a woman who was known to him, but his case at trial was that her account was fabricated.
- The defence sought to rely on an earlier complaint of rape, they maintained was false.
- The trial judge excluded the evidence under section 41, finding no proper evidential basis for falsity.
- The Court of Appeal disagreed held that the judge had applied the wrong approach and allowed the appeal.

AM: what amounts to a proper evidential basis?

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- “It is less than a strong factual foundation for concluding that the previous complaint was false. But there must be some material from which it could properly be concluded that the complaint was false.” - Murray [2009] EWCA Crim 618
- The exercise is fact-sensitive and is not an exercise of discretion, the court is making an evaluation about the quality of the evidence (Hurley [2025] EWCA Crim 642)
- The judge must ask themselves whether, on the material before them and depending on the answers given by the complainant, the jury could have been satisfied that the previous complaint was false
- Is the material capable of leading to a conclusion that the earlier complaint was false

R v Garaxo [2005] EWCA Crim 2820

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- The prosecution alleged an assault following rejected sexual advances; the defence alleged that payment for sex had been requested and denied any assault.
- The complainant had made two previous rape allegations. The trial judge refused cross-examination about them.
- The Court of Appeal held that the questioning should have been permitted.

In what kind of cases has the proper evidential test failed?

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- An acquittal: Gorania [2017] EWCA Crim 1538.
- A decision not to prosecute: Davarifar [2009] EWCA Crim 2294.
- A decision not to pursue a complaint: Al-Hilly [2014] 2 Cr App R 33.
- A number of allegations that were not proceeded with: A [2012] EWCA Crim 1273.
- The court will examine why a complaint was withdrawn, particularly where the complainant was vulnerable
- Historic police decisions require care: Hurley emphasises that earlier investigative attitudes may differ from modern practice.

Section 100 and the enhanced relevance test

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- A previous false complaint will always be non-defendant bad character: alleged misconduct or other reprehensible behaviour under section 112(1) CJA 2003.
- Section 100(1)(b) requires the enhanced relevance test:
- the evidence must have substantial (but not necessarily conclusive) probative value in relation to Y's credibility; and
- such credibility must be a matter in issue of substantial importance in the proceedings as a whole.
- 'substantial' means more than trivial, but need not be conclusive (Scott [2009] EWCA Crim 2457)

Where to look to establish your proper evidential basis for a false allegation

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- Seek disclosure of crime reports, GP, social services, school and mental health or counselling records
- Once there is a reference to a potentially false allegation, look for credible supportive material: withdrawal or a reluctance to prosecute, CCTV or medical evidence, delays in reporting and any motive
- It is important that you are proactive in seeking disclosure on this issue. Make any section 41 and section 100 application early.

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Custody Time limits

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Custody Time Limits

Diana Wilson

Arguing CTLs at First Instance

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This will cover:

- Definition of a Routine Case.
- Procedural steps to take at first instance.
- Summary of some important case law at first instance.
- However see CPS website see:

https://www.cps.gov.uk/legal-guidance/custody-time-limits

S22(3) of the Prosecution of Offences Act 1985

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- S22(3) of the Prosecution of Offences Act 1985, states that:

- 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.

Important to consider

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As the remedy is judicial review a first instance decision will only be overturned if no reasonable decision maker could come to the same decision. The test is not the same as for a case stated. Therefore the first instance decision is unlikely to be overturned where there is a discretion.

Defence are expected to assist in expediting the case.

Lack of Due Diligence and Expedition

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- If complain on this ground make sure defence have done everything properly in a timely way. See *R. (Damji) v Wood Green Crown Court* [2025] EWHC 258 (Admin), [2025] Crim.L.R. 626, DC.
- Also the delay must be due to the lack of due diligence and expedition by the Crown.
- If the delay is due to a third party forensic provider that may not be attributable to the Crown and CTLs may be extended. Therefore important any delay is attributable to the Crown.

Some other Good and Sufficient Cause - 'Systemic failure'

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- Most common reason currently Crown are seeking to extend CTLs is there is no court date within CTLs.
- In routine cases the lack of availability of a judge or court room would not in itself be enough. (*R (Gibson) v Winchester Crown Court* [2004] EWHC 361 (Admin))
- However the lack of a court/judge might be enough in cases requiring a specific judge etc.
- In routine cases, if the lack of resources was accepted too readily the purpose of the legislation would be undermined (*R (Bannister) v Guildford Crown Court* [2004] EWHC 221 (Admin)).

- Routine cases must be listed within the CTL. If there is difficulty in finding a courtroom or a judge, the court must take the initiative, which includes searching neighbouring regions to list a case. If it is not possible to list a case within a CTL, **the court must provide evidence of the attempts made to list the case so that it can be rigorously scrutinised (***R v Luton Crown Court, ex parte Raeside* [2012] EWHC 1064 (Admin) and (*R v Coventry Crown Court, ex parte McAuley* [2012] EWHC 680 (Admin)).

Routine Case

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- One definition of a routine case is a case that is estimated to take 2 weeks or less. (*R v Luton Crown Court, ex parte Raeside* [2012] EWHC 1064 (Admin) and (*R v Coventry Crown Court, ex parte McAuley* [2012] EWHC 680 (Admin))
- Never before has the PTPH time estimate for trial been more important.
- In short there should be no excuse for a routine case to be fixed outside of CTLs at the PTPH.

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- The CTL Protocol with HMCTS sets out the tasks Court Listing Departments are required to undertake.

- CF situation at Isleworth where evidence will not be provided unless requested. [see Marten as to whether this would be likely upheld on J.R.]

What cannot be good and sufficient cause to extend

- The protection of the public is not, in itself, a good and sufficient cause to extend a CTL. However, the interests of justice in trying jointly charged defendants together is capable of being a good and sufficient reason for extending a CTL of one or more of them (*R v Central Criminal Court, ex parte Abu-Wardeh* [1997] 1 WLR 1083).

Lack of a Court Time/available judge

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- Two occasion this was good and sufficient cause for routine cases:
- Covid - *R (Director of Public Prosecution) v Crown Court at Woolwich; Regina (Lucima) v Central Criminal Court [2020] EWHC 3243 (Admin*) [2021] 1WLR 938
- CBA action - *R (DPP) v the Crown Court at Bristol and Manchester and Dursley, Smedley and Mayall* [2022] 2415 (Admin).

Two occasions it was not

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- R (Marten) v Crown Court at Lincolnshire [2022] EWHC 2283 (Admin)
- R (Bernard) v Snaresbrook Crown Court [2025] EWHC 3055 (Admin) [2026]

Remember the discretion

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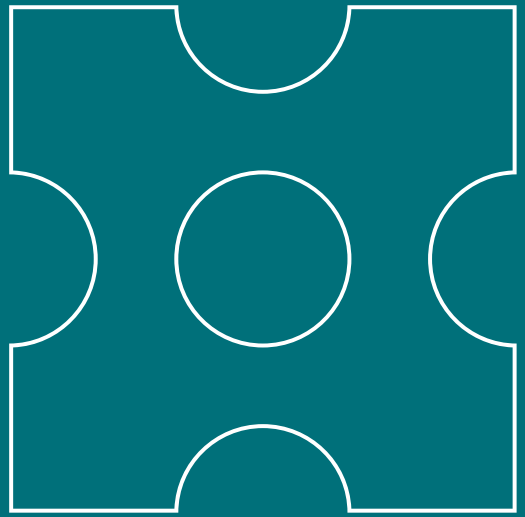
- See paragraph 44(iv) Lucima:
- a) The likely duration of the delay before trial;
- b) Whether there has been any previous extension of the CTL;
- c) The age and antecedents of the defendant;
- d) The likely sentence in the event of conviction. A defendant should rarely be kept in custody if he had served, or come close to serving, the likely sentence were he convicted;
- e) The underlying reasons why bail was refused;
- f) Any particular vulnerabilities of the defendant which make remand in custody particularly difficult.

- In multi-handed trials, consideration should be given by the parties and the court to whether delay could be reduced by separate trials.
- Burden on the prosecution
- Extensions should be short – no more than 3 months.



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