

## Reviewing Cases in the Coronavirus Era

Jury trials began again last week at the Old Bailey and Cardiff Crown Court, with a handful of other courts to follow imminently. Two trials are running smoothly thus far at the Bailey, one of them a ‘new start’ for which a jury has been selected and sworn in. It is hoped that, over the coming weeks and months, more courts will be assessed as suitable to hear trials by the Jury Trials Working Group working with Public Health England /Wales, however it will be some time before we reach “normality” Both the Crown Prosecution Service and Solicitors will now be very keen to ensure that all their cases are trial-ready, and indeed to determine whether any of them are suitable for resolution without a trial.

In April 2020, following the closure of the majority of Crown Courts and the suspension of jury trials across England and Wales, the Crown Prosecution Service released interim guidance for applying the Public Interest test when reviewing cases during the Coronavirus pandemic [<https://www.cps.gov.uk/legal-guidance/coronavirus-interim-cps-case-review-guidance-application-public-interest-covid-19>].

### PUBLIC INTEREST TEST

Under the Code for Crown Prosecutors, prosecutors must review a decision to prosecute when:

- i. Providing advice to investigators;
- ii. Reviewing charging decisions;
- iii. If there is a change of circumstances warranting a further review;
- iv. Considering whether pleas to lesser offences are acceptable;

- v. Or when reconsidering a prosecution decision.

This review requires application of the full code test, i.e. whether the evidence reveals a realistic prospect of conviction, and whether it is in the public interest to pursue a prosecution. At paragraph 4.14 of The Code, seven questions which ought to be considered as part of the public interest test are set out, noting that any one factor may outweigh a number of others tending in the opposite direction:

- i. How serious is the offence committed?
- ii. What is the level of culpability of the suspect?
- iii. What are the circumstances of and the harm caused to the victim?
- iv. What was the suspect's age and maturity at the time of the offence?
- v. What is the impact on the community?
- vi. Is prosecution a proportionate response?
- vii. Do sources of information require protecting?

## PROPORTIONALITY

At paragraph 9 of the guidance, it is identified that prosecutors should note that the "crisis is producing an expanding pipeline of cases waiting to be heard", case progression will be delayed which may "impact adversely" on all parties, and that each new case further expands the "pipeline and delay". It is due to this unprecedented challenge for the Criminal Justice System that the question of proportionality ought to be reconsidered in the context of both new cases and live cases. The CPS have identified the following factors as likely to be relevant in considering the proportionality of a prosecution in light of the Covid-19 pandemic:

- i. Whether an out of court disposal may be an appropriate response;

- ii. Whether a guilty plea to some, but not all charges, or to a less serious offence, would be appropriate;
- iii. The length of time a defendant has spent on remand;
- iv. The age and maturity of the defendant.

## SUGGESTED FURTHER CONSIDERATIONS

With small impact on the huge numbers of Crown Court cases being made, and more cases being added every day, it has become abundantly clear that jury trials will not restart in full across the country for some time. There can be no question that Covid-19 amounts to a “change in circumstances” and has an effect on the proportionality of a prosecution, however it is submitted that, when considering a case in the round and whether the public interest is still served by pursuing a prosecution, prosecutors should be satisfied that the following factors have been considered and tend towards prosecution:

1. *Does the defendant have previous convictions or out of court disposals for similar offences?*

Prosecutors must always consider the risk of re-offending or escalation of offending by a defendant. There may be cases where a defendant’s previous convictions (or lack of) show that a prosecution which is likely to be delayed for some time, may or may not still be proportionate.

2. *What is the age of the case, and of the offence charged?*

As there will be continued delay and a focus on priority cases, it is important to know whether a case is already old, or revolves around a set of circumstances which are themselves old.

3. *When is the matter likely to be heard?*

As above, the question of delay is the fundamental concern. Cases which are unlikely to be heard for some long time may warrant consideration of other disposals.

4. *What is the likely length of the trial?*

The length of trial is affected by a number of considerations which are dealt with elsewhere in a review, nevertheless the length itself is a factor which has an impact on the backlog.

5. *Does the case involve any vulnerable persons, including those who ought to be “shielded”, and are any further special measures likely to be required?*

Covid-19 has created an extra consideration for all parties required to attend a trial. The effect of delays of a trial and the need for special measures for those vulnerable persons ought to be considered as part of a review.

6. *Are the victims or main prosecution witnesses supportive of prosecution?*

As above, the effect of delays or health risks may create concerns for main witnesses which in turn may have an effect (though not fatal) to the prospect of conviction. This knock-on effect must be considered when determining proportionality.

At the end of 2019, figures showed the Crown Court backlog of cases was over 37,000 cases however, it is estimated that the figure is now towards 40,000 since lockdown was implemented. The Lord Chief Justice, Lord Burnett has made it clear that the gradual re-starting of jury trials will make only make a “small impact” on this backlog. There has perhaps never been a more apposite moment for Counsel to be proactive in reviewing their cases and offering timely advice to solicitors, both prosecution and defence, as we face together the challenge that lies ahead for the criminal justice system.



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