



Neutral Citation No. [2022] EWHC 2663 (SCCO)

Case No: T20207280  
SCCO Ref: SC-2022-CRI-000004

**IN THE HIGH COURT OF JUSTICE**  
**SENIOR COURTS COSTS OFFICE**

Thomas More Building  
Royal Courts of Justice  
London, WC2A 2LL

Date: 11/10/2022

**Before :**

**COSTS JUDGE NAGALINGAM**

**Between:**

**R**

**-v-**

**Kwaysy Khaliq**

**and**

**IN THE MATTER OF AN APPEAL AGAINST REDETERMINATION**

**Damian Nolan**

**Appellant**

**- and -**

**The Lord Chancellor**

**Respondent**

Hearing date: 02/09/2022

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 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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**COSTS JUDGE NAGALINGAM**

### **Costs Judge Nagalingam:**

1. The appeal has been successful for the reasons set out below. The appropriate additional payment, to which should be added the sum of £100 paid on appeal and £50 costs, should accordingly be made to the Appellant.
2. The Appellant is an advocate who represented the Defendant and subsequently submitted a claim for 73 hours in special preparation in relation to an agreed page count of 2,618.
3. The Determining Officer originally allowed 15 hours. Upon redetermination this was increased to 25 hours. The disallowance of the balance is based on the Respondent's concerns as to precisely how the time was spent and the extent to which that time is within the scope of the regulations governing a claim for special preparation.
4. This is an appeal against the decision to disallow the balance of 48 hours.

### **Background**

5. The defendant was charged with the following three offences on a 5 count indictment:  
  
Count 1 - Conspiracy to transfer prohibited weapons, contrary to section 1(1) of the Criminal Law Act 1977. Namely, that the Defendant, along with seven others, between 21 and 24 August 2020, conspired together and with others, to transfer prohibited weapons, namely pistols which had barrels less than 30 centimetres in length and were less than 60 centimetres in length overall, without the authority of the Secretary of State, contrary to section 5(2A)(b) of the Firearms Act 1968.  
  
Count 2 – Conspiracy to transfer ammunition, contrary to section 1(1) of the Criminal Law Act 1977. Namely, that the Defendant, along with seven others, between 21 and 24 August 2020, conspired together with others, by way of trade, to transfer ammunition to which Section 1 of the Firearms Act 1968 applied, not registered as firearms dealers, contrary to section 3(1)(a) of the Firearms Act 1968.  
  
Count 5 – Failing to comply with a notice requiring disclosure, contrary to section 53(1) of the Regulation of Investigatory Powers Act 2000. Namely, that between 26 October and 2 December 2020, the Defendant knowingly failed to disclose his personal identification number (PIN) access code for his mobile phone, to allow access to the phone and the electronic data stored within it.
6. All of the co-defendants pleaded guilty pre-trial save for one who pleaded guilty on day 2. The Defendant was the only one who pleaded not guilty and went to a full trial, where he was acquitted on all counts faced.

### **Regulations**

7. The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020 (the regulations) at paragraph 17 provide that:  
  
(1) This paragraph applies where, in any case on indictment in the Crown Court in respect of which a graduated fee is payable under Part 2 or Part 3 –

(a) it has been necessary for an advocate to do work by way of preparation substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue, or

(b) the number of pages of prosecution evidence, as defined and determined in accordance with paragraph 1(2) to (5), exceeds –

(iic) in cases falling within bands 12.1 to 12.3 (firearms offences), 750; and the appropriate officer considers it reasonable to make a payment in excess of the graduated fee payable under this Schedule.

(2) Where this paragraph applies, a special preparation fee may be paid, in addition to the graduated fee payable under Part 2 or Part 3.

(3) The amount of the special preparation fee must be calculated -

(a) where sub-paragraph (1)(a) applies, from the number of hours preparation in excess of the amount the appropriate officer considers reasonable for cases of the same type;

(b) where sub-paragraph (1)(b) applies, from the number of hours which the appropriate officer considers reasonable to read the excess pages;

(4) Any claim for a special preparation fee under this paragraph must be made by an instructed advocate, whether or not the instructed advocate did the work claimed for.

(5) An instructed advocate claiming a special preparation fee must supply such information and documents as may be required by the appropriate officer in support of the claim.

(6) In determining a claim under this paragraph, the appropriate officer must take into account all the relevant circumstances of the case, including, where special preparation work has been undertaken by more than one advocate, the benefit of such work to the trial advocate.

## **Decision**

8. PPE in this matter is composed of 952 pages on the CCDCS and 2,417 pages of electronic evidence, thus giving a total page count of 3,368. The special preparation threshold for firearms offences is 750 PPE and thus the special preparation claim is based on 2,618 pages.
9. The pages in question are sourced from the Defendant's mobile phone. The phone in question was what is colloquially referred to as a 'spoof' phone. A spoof phone cannot be rung back because a new 'spoof' number is generated on the display of the recipient's phone every time the spoof phone is used to place a call or send a text message. Further, if the recipient then tries to call or text the generated number it simply will not work.
10. Ownership of a spoof phone is not illegal. However, the crown accused the Defendant of using a spoof phone for nefarious purposes. Namely, the transfer of weapons and ammunition.

11. The Defendant did not deny ownership of the phone. However, he did deny attribution with respect to use of the phone said to link him with the firearms charges faced.
12. Attribution of use of a spoof phone is complicated by the fact that such phones work on a cloud based system. In this regard, analysis of cell site data and commonly appearing numbers in *other* billing data become relevant to the question of attribution and use of the spoof phone.
13. The Defendant was accused of being the hub of the criminality relating to the firearm charges. Had he been found guilty, he would have been facing not less than 16 years in prison, and would have been likely to serve two thirds of any sentence received given his previous offences.
14. At trial, the court concluded that the Defendant did not own a spoof phone for the purpose of the offences with which he was charged. In fact, and whilst not a feature of the charges faced, it appears the Defendant's ownership of a spoof phone was linked to the sale of cannabis.
15. It is also the case that others, namely some or all of the co-defendants, were aware the Defendant owned such a phone. An element of the defence in this matter concerned threats of violence to members of the Defendant's family who were already in prison, along with allegations of coercion. Thus a substantial element of the defence relied on demonstrating that the spoof phone was under the control of others during the alleged period of offending with respect to the firearms offences.
16. It is in this regard that consideration of the billing data of all phones belonging to the Defendant and all of the co-defendants became relevant. It is the billing data of some 20 phones in total plus the spoof phone which the pages considered by the Appellant refer to.
17. The 73 hours claimed as special preparation appear in a schedule of time produced by the Appellant. The schedule is separated by columns for the date on which the work was done, the number of hours incurred, and a description under a column headed "Material Considered".
18. The written reasons reflect the Appellant's claim that 100% of the time claimed for special preparation concerns mobile phone billing data.
19. The Determining Officer sought to break down the 73 hours claimed into three broad categories of work, split as 17 hours for 'cross-referencing', 34 hours for 'drafting / editing / preparing', and 22 hours for "PPE only" for which it is argued the deployment of digital search techniques would have yielded time savings.
20. The written reasons also contain what appears to be a rather generic observation that "phone reports often contain irrelevant data which will have no bearing on the evidence such as metadata and installed applications etc.." before proceeding to list categories of report sections which do not in fact feature in the Appellant's claim.
21. The Appellant in oral submissions accepted the general notion that the deployment of digital search techniques in many cases is more time efficient and cost-effective when searching for common numbers or commonly repeating numbers.

22. However, I accept that the usefulness of such techniques rapidly diminishes where firstly, there is a dispute as to attribution in terms of which defendants were using the spoof phone at which times, and secondly where the generation of a new number with every call or message results in a number on a recipient's data which is unique. That of itself adds an additional layer of complexity to the question of attribution, and where attribution was a key limb of the defence presented.
23. In my view, and uniquely because of the use of a single spoof phone by potentially multiple defendants in a case where attribution was of central importance, and where the Defendant faced the threat of a substantial custodial sentence, a greater reliance on physical rather than digital search techniques is justified. That is a conclusion which will be relevant to the reasonableness of the amount of time claimed.
24. The Respondent however takes a more fundamental point. One of scope. The Determining Officer is required by the regulations to consider the number of hours reasonably required to read the excess pages. In determining the claim, "the appropriate officer must take into account all the relevant circumstances of the case, including, where special preparation work has been undertaken by more than one advocate, the benefit of such work to the trial advocate".
25. In this case, there was no work of other advocates to assist the Appellant. With respect to the Respondent's references to 'cross-referencing', I accept the general proposition as set out by Master Leonard in *R v Swaby*. However, I do not consider the index appeal to be wholly analogous in terms of what was being read and done. In this case, cross-checking numbers across billing records is part of the process of reading the same.
26. That said, I do consider the Determining Officer was correct to raise concerns as to time claimed as special preparation for work done in drafting, editing and trial preparation.
27. Taking all of the above factors into account, and looking at the schedule of time spent as a whole, I consider 40 hours of time spent in special preparation to be reasonable.
28. The appeal is therefore allowed.