



Neutral Citation No. [2022] EWHC 2928 (SCCO)

Case No: 201203467 A1

SCCO Reference: SC-2022-CRI-000093

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 15 November 2022

Before:

COSTS JUDGE LEONARD

R

v

NELSON

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **Philip Rule (Counsel)**

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE LEONARD

1. This appeal concerns the Appellant’s right to payment for representing a publicly funded defendant to a prosecution, which is governed by the provisions of the Criminal Legal Aid (Remuneration) Regulations 2013. The Representation Order in this case is dated 16 January 2020, so the 2013 Regulations apply as at that date.
2. Schedule 3 to the 2013 Regulations relates to proceedings in the Court of Appeal. Sub-paragraph 1(2) of Schedule 3 reads:

“In determining fees the appropriate officer must, subject to the provisions of this Schedule-

- (a) take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and
- (b) allow a reasonable amount in respect of all work actually and reasonably done.”

3. Sub-paragraph 6(2) of Schedule 3 provides that the appropriate officer may allow the following classes of fee to an advocate:

“(a) a basic fee for preparation including preparation for a pre-trial review and, where appropriate, the first day’s hearing including, where they took place on that day, short conferences, consultations, applications and appearances (including bail applications), views and any other preparation;

(b) a refresher fee for any day or part of a day during which a hearing continued, including, where they took place on that day, short conferences, consultations, applications and appearances (including bail applications), views at the scene of the alleged offence and any other preparation;

(c) subsidiary fees for—(i) attendance at conferences, consultations and views at the scene of the alleged offence not covered by paragraph (a) or (b);

(ii) written advice on evidence, plea or appeal or other written work; and

(iii) attendance at pre-trial reviews, applications and appearances (including bail applications and adjournments for sentence) not covered by paragraph (a) or (b)...”

4. A table at paragraph 9(1) of Schedule 3 provides prescribed fees for counsel of the types referred to in paragraph 6(2).

5. Sub-paragraph 9(4) reads:

Where it appears to the appropriate officer, taking into account all the relevant circumstances of the case, that owing to the exceptional circumstances of the case the amount payable by way of fees in accordance with the table following sub-paragraph (1) would not provide reasonable remuneration for some or all of the work the appropriate officer has allowed, the appropriate officer may allow such amounts as appear to the appropriate officer to be reasonable remuneration for the relevant work.”

The Background

6. The Appellant represented Keith Nelson (“the Defendant”) before the Court of Appeal on a renewed, out of time application for permission to appeal, and on the successful appeal itself.
7. On 10 May 2012 in the Crown Court at Exeter the Defendant, having pleaded guilty to making threats to kill, had been sentenced to imprisonment for the public protection with a minimum term of 3 years. The Crown Court had made a hospital direction incorporating a limitation direction under Section 45A of the Mental Health Act 1983. Concurrent terms of 2 years’ imprisonment were imposed for earlier guilty pleas to racially aggravated assault and damage to property. Counsel who had represented the Defendant at the time had drafted Advice and Grounds of Appeal against sentence but leave to appeal had been refused by a single judge on 18 July 2012.
8. On 13 March 2017 the Legal Aid Authority had approved funding to allow the Appellant to consider all the documents in the case and to finalise Advice and Grounds of Appeal. On 22 October 2018 a renewed application for leave to appeal against sentence was made, supported by a 43 page Advice and Grounds drafted by the Appellant and dated 11 August 2018.
9. On 16 January 2020 the Full Court considered the renewed application and granted leave to appeal against sentence. I have not seen the court’s order of that date, but according to the Appellant’s written submissions the pertinent paragraph for present purposes was paragraph 9, which read:

“Granted a Representation Order to Solicitors for the preparation of the appeal against sentence, and to junior Counsel for the preparation and presentation of the appeal against sentence and for today’s attendance.”
10. I have seen the Representation Order made on 20 January 2020, which reads:

“Full Court, in accordance with the above provisions, hereby grants a representation order to the applicant for the following purpose:

Preparation and presentation of an appeal against sentence and presentation of the renewed application for leave to appeal against sentence on 16 January 2020.

The order consists of representation by Counsel only”
11. The appeal was listed for a full day on 24 November 2020 before the Full Court, which heard submissions from the Appellant and from Prosecution Counsel, who had been directed to attend. The court reserved judgment to 2 December 2020, when the Defendant’s sentence was varied to a Hospital Order under Section 37 of the Mental Health Act 1983 with a Restriction Order under Section 41.

12. I have read the Court of Appeal's judgment, which runs to 10 pages and bears neutral citation [2020] EWCA Crim 1615. It has been reported in the Mental Health Law Reports at [2021] M.H.L.R. 219. Notably, two consultant psychiatrists gave oral evidence on the appeal and were examined by counsel, and the court made a point of thanking both counsel for their very helpful written and oral submissions.
13. The court's decision turned upon its conclusion that the variation of the Defendant's sentence would meet, as far as appropriate, the requirement for punishment; would facilitate the continuing treatment of the Defendant's severe mental disorder (the main cause of his offending) which had already been notably successful; and would best protect the public from the consequences of a relapse which would be more likely to occur were his sentence not varied.

The Claim for Payment

14. The Appellant claimed a fee of £4,350 which according to the Determining Officer represented 20.25 hours' work prior to the hearing on 16 January 2020 and attendance at Court on the day (from the Appellant's work log I make it 20.15 hours' preparation, including a note to the Registrar and a skeleton argument, plus 30 minutes at court and 30 minutes reporting to instructing solicitors) and £7,500 for a further 32 hours' work done after 16 January 2020 and the full day court attendance on 24 November 2020.
15. The Determining Officer allowed an attendance-only fee of £150 for 16 January 2021 and a brief fee of £4,000 to include 32 hours' work done after 16 January 2020 (which he considered reasonable) and 5 hours' attendance at court on 24 November 2020. Recognising the exceptional features of the appeal, he took the view that the fee allowed equated to an hourly rate of over £100 which was comparable to the rates allowed for "Very High Cost Cases" (VHCC) in the most serious Crown Court cases, and so represented reasonable remuneration for the work done.
16. On allowing only an attendance fee for the leave to appeal hearing of 16 January 2020, the Determining Officer compared the wording of the court's orders in relation to that hearing with the wording for the appeal itself. Noting that for the appeal, the orders expressly authorised funding for preparation and presentation, whereas for the 16 January 2020 application for leave it referred only to attendance at court and the presentation of the application, he rejected the Appellant's contention that preparation for the hearing of 16 January 2020 should be understood to be within the scope of the authorised funding. He took the view that had such been the court's intention, the court would have included the word "preparation" in its order, as it did in relation to the appeal itself, and that the court had been at pains to limit public funding for the application for leave to attendance at the application hearing.

Submissions

17. Counsel submits that it is a viable reading of the court's orders of 16 January 2020 that they simply treat preparation of the application for permission as part of the preparation for the appeal generally.

18. With regard to the appeal itself, the Appellant points out that the Defendant, a mentally vulnerable individual who had already spent almost a decade in hospital for treatment of his mental disorder, was appealing against an indefinite sentence of imprisonment. To persuade the court to vary the Defendant's sentence almost ten years later required counsel to address extensions of time, the admission of fresh evidence on appeal, and a wealth of information including multiple expert reports and records concerning the appellant during a decade in a secure hospital.
19. The appeal addressed, on the facts of the case and on legal principle, the advantages and disadvantages of a hybrid order under the Mental Health Act 1983 combining an indeterminate imprisonment with a hospital direction and limitation direction, on the one hand, and a hospital and restriction order under on the other. In the case of the Defendant, a violent offender who would always suffer from some form of mental disorder, but who had responded well to treatment and supervision in hospital, the Court agreed with the Appellant's submission that the order that would best protect the public and assist in his recovery was a hospital and restriction order.
20. The subject matter of the appeal required expertise and a great deal of work. Given the Defendant's vulnerability and mental health difficulties, the appeal placed a considerable responsibility upon counsel to properly apply the developing law governing appeals by those with mental health issues where hybrid orders, IPPs, or life sentences had been passed. The evidence and law had to be addressed with skill and thoroughness.
21. The fact that Prosecution counsel was directed to appear at the hearing reflected, says the Appellant, the seriousness of the case of the case and of the gravity and complexity of the issues that had to be grappled with. The giving of live evidence by two experts was in itself very exceptional.
22. The Appellant emphasises that no part of the fees claimed by him on this appeal fall within the scope of the LAA's authority of 13 March 2017, for which the Appellant will never be paid, due to his instructing solicitors becoming insolvent at a point when they were holding the fees then due to him.

Conclusions

23. I am very sorry to note that counsel has not received due payment for the work undertaken by him under cover of the LAA's authority of 13 March 2017, although of necessity that can have no bearing upon the outcome of this appeal.
24. Turning to the issues on the appeal, I start with the scope of funding authorised by the court's orders of 16 January 2020. I do not agree with the Determining Officer's interpretation and application of those orders. That is partly because it seems to me to be contrary to the provisions of the 2013 Regulations and partly because I do not believe that it is consistent with established principles of interpretation. Those two points overlap, as I shall endeavour to explain.

25. Starting with the principles of interpretation of court orders, those principles were helpfully summarised in the judgment of Chief Chancery Master Marsh (as he then was) in *Coward v Phaestos Ltd and others* [2021] EWHC 9 (Ch). In his judgment, referring to *Feld v Secretary of State for Business, Innovation and Skills* [2014] EWHC 1383 (Ch), *Brennan v Prior and others* [2015] EWHC 3082 (Ch) and *Sans Souci Ltd v VRL Services Ltd* [2012] UPKC 6, the Master helpfully summarised the principles applicable to the construction of court orders in the following terms.
26. The exercise of construction is to establish what the court making the order would objectively be understood to have meant by the words used in the order. The general approach to construction of written instruments or documents applies, with the necessary changes, acknowledging that construing an order is "distinctly different" from construing a contract or statute. The question is what a reasonable person, having all the background knowledge which would have been available at the time to the maker of the document, would have understood the court to be using the language in the document to mean.
27. This takes me back to the 2013 Regulations. Any court order made for the purposes of those regulations stands to be interpreted and applied consistently with their provisions. As noted above, sub-paragraph 6(2)(a) provides for an advocate to receive a "basic fee" for preparation and, "where appropriate", the first day of a hearing. It follows that preparation is, within the regulations, an essential element of the basic fee, which cannot be excluded to allow only a fee for attendance at a hearing. Further, sub-paragraph 1(2)(b) of Schedule 3 requires the Determining Officer (and me) to allow a reasonable amount in respect of all work actually and reasonably done. None of this is discretionary.
28. It would follow that an order authorising, for the purposes of payment under the 2013 Regulations, "today's appearance" or the "presentation" of the application for leave will, without the need to make further specific provision to that effect, extend to work done on the preparation of the application, for which the Appellant must be paid a reasonable fee. I doubt that the court could have any jurisdiction to make an order that disapplies the 2013 Regulations so as to provide otherwise.
29. Even if any of that is wrong, it seems to me that the restrictive interpretation of the court's order adopted by the Determining Officer is at odds with established costs principles which would be known to a reasonable person with the relevant background knowledge. Counsel's brief fee for appearing before the court on any application will always and of necessity incorporate an element of preparation time (a principle reflected by the wording of the 2013 Regulations to which I have referred). That is why counsel is not entitled to charge separately for elements of preparation that are covered by the brief fee.

30. The point is perhaps best illustrated by the fact that some 5.25 hours of the preparation time claimed by the Appellant for the hearing of 16 January 2020 were spent on the preparation of a skeleton argument. The skeleton argument is itself an essential part of the “presentation” of the application and as such must, on any interpretation, be within the scope of the court’s Representation Order of the same date. That alone, to my mind, establishes that the appearance at court and the preparatory work necessarily attendant on that appearance cannot be severed as neatly as the Determining Officer’s interpretation requires.
31. It seems to me that funding for the “presentation” of the application for leave or for “today’s attendance”, must, in the normal way, extend to any work that would normally fall within a brief fee. That, according to the Appellant’s work record, would account for some 14 hours of the total 21.15 hours’ preparation claimed.
32. For the reasons I have already given, however, my conclusion is that the Appellant is entitled to be paid for all preparation work necessarily attendant on the application, whether or not it would fall within the normal scope of a brief fee.
33. Bearing that in mind, it is necessary for me to undertake the exercise not undertaken by the Determining Officer, of calculating a payment which will incorporate reasonable remuneration for the written work undertaken by the Appellant in the run-up to the application hearing, and a reasonable brief fee.
34. I do not take issue with the reasonableness of the time fully accounted for by the Appellant’s work log.
35. As to calculating a fee for that time, one can apply an hourly rate on remunerating written work but I have, on previous appeals of this kind, referred more than once to the observations of the Senior Costs Judge in *R v Day* (SCCO 190/19, 13 November 2019) and *R v Hale* (SCCO 191/19, 12 November 2019), to the effect that it is inappropriate to calculate a brief fee purely by reference to an hourly rate. One must identify a basic fee which reflects reasonable remuneration having regard to all the relevant circumstances of the case including (by reference to The Taxing Officer’s Notes for Guidance) the nature, importance, complexity or difficulty of the work and the time involved. I have also referred to the fact that breaking down a brief fee into an hourly rate can nonetheless be useful for illustration purposes.
36. As far as an hourly rate is to the point, the Appellant’s fees appear to be based on an hourly rate of over £200, which to my mind is too high. I agree however with the Appellant, for the reasons given by Costs Judge Rowley in *R v Costello* [2022] EWHC 1273 (SCCO), that VHCC rates are irrelevant.
37. The Appellant has in support of his appeal cited a number of costs Judge decisions which are of necessity fact-specific, but which do tend to indicate that an hourly rate of in the region of £150 has been found to be reasonable in the context of appeals which might be said to be less weighty, complex and significant than the instant case, and in which the advocate has not borne quite the same weight of responsibility.

38. I would mention however that some care has to be taken when considering *Evans v The Serious Fraud Office* [2015] EWHC 1525 (QB), which has been referred to by the Appellant (although he does not purport to justify comparable hourly rates). As the Senior Costs Judge pointed out in *R v Day*, *Evans* provides valuable guidance, but the assessments in that case were based on the fees of privately instructed counsel. In the assessment of publicly funded work, it is not appropriate to use privately funded comparators, because privately funded work is essentially market driven, whilst publicly funded work is closely regulated and the Lord Chancellor is constrained by legislative requirements.
39. These are my conclusions on appropriate fees.
40. For the avoidance of doubt, and as the Determining Officer's decision on the hearing of the appeal itself indicates, this is a case to which paragraph 9(4) of Schedule 3 to the 2013 Regulations applies: the prescribed fees would not represent reasonable remuneration.
41. Bearing in mind the particular circumstances of this case and the authorities and principles to which I have been referred, I have come to the conclusion that an appropriate fee for the hearing of 16 January 2020, to include all elements of preparation, would be £3,250. An appropriate fee for the appeal hearing would be £6,000. The appeal succeeds to that extent.