



Neutral Citation Number : [2023] EWHC 2196 (SCCO)
Case No: T20207079

SCCO Reference: SC-2023-CRI-000040

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30/08/2023

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Ziyad El-Hachloifi and R v Mouhamed El-Hachloifi
Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration)
Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations
1986

EBR ATTRIDGE LLP

Appellant

-and-

THE LORD CHANCELLOR

Respondent

The appeal has been unsuccessful for the reasons set out below. There shall be no order as to the costs of the appeal.

REASONS FOR DECISION

1. The issue that arises in these appeal is as to the correct classification of the offences in respect of which the Appellants provided representation to the Defendants. Such classification affects the level of fees due to the Appellants as ‘litigators’ under the Graduated Fee Scheme.

2. At the hearing on 10 August 2023 Mr. Brazier, solicitor, appeared for the Appellant firm. Ms. Weisman, employed solicitor, provided written submissions on behalf of the Legal Aid Authority (‘the LAA’) but did not attend the hearing.

3. A Representation Order was issued to the Appellants in respect of Ziyad El-Hachloifi (‘D1’ for these purposes) on 12 March 2020, and in respect of Mouhamed El-Hachloifi (‘D2’ for these purposes) on 18 March 2020.. D2 was charged with others on a 3 count indictment, which included conspiracy to throw a List B prohibited article into prison; and by Count 2, conspiracy to throw or convey List C articles into prison. D1 was charged only with a conspiracy to throw or convey List C articles into prison.

4. Section 40C (1) of the Prison Act 1952 makes it an offence for a person who, without authorisation, brings, throws or otherwise conveys a List B article into or out of a prison; List B items in general include alcohol, mobile telephones, cameras and sound recording devices. Section 40C (2) of the same Act makes it an offence without authorisation to bring, throw or otherwise convey a List C article into a prison intending it to come into the possession of a prisoner; List C items in general include tobacco, money, clothing, food, drink, letters, paper, books, tools and information technology equipment.

5. It was alleged that the offences took place whilst D2 was a serving prisoner at HMP Ford and he was the principal organiser of a scheme to enable mobile phones, SIM cards and other accessories, ‘List B’ articles, to be brought into HMP Ford. The Defendants are brothers. There was a separate count in respect of D1 and D2 relating the conveying of List C items only, being food. D2 admitted this role in the conspiracy. I understand that one of the key witnesses in the case, a prison officer, witnessed two males carrying out a “drop” at the perimeters of the prison grounds, and this led to further searches of relevant parties both inside and outside prison.

6. Paragraph 3 of Schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013 (‘the 2013 Regulations’) deals with the classification of the offences for litigators. It provides:

Class of Offences

3.—(1) For the purposes of this Schedule—

(a) every indictable offence falls within the Class under which it is listed in the Table of Offences and, subject to sub-paragraph (2), indictable offences not specifically so listed are deemed to fall within Class H;

.....

(2) Where a litigator in proceedings in the Crown Court is dissatisfied with the classification within Class H of an indictable offence not listed in the Table of Offences, the litigator may apply to the appropriate officer, when lodging the claim for fees, to reclassify the offence.

(3) The appropriate officer must, in light of the objections made by the litigator—

(a) confirm the classification of the offence within Class H; or

(b) reclassify the offence,

and must notify the litigator of the decision.

7. The offences alleged in this case were not specifically listed in the categories of offences in the Table of Offences. The Determining Officer classified the offences for these purposes as Class H, declining the request to re-classify them as Class C, as contended for by the Appellants.

8. It is common ground between the parties that although these offences falls initially within Class H, there is the scope for them to be reclassified at the Determining Officer's discretion. It is further accepted that there are no offences listed specifically within Class H which are factually closely analogous to those charged here.

9. The Appellants argued that the offence which bore the most similarity to the ones with which these Defendants were charged was Breach of Prison, which fell within Class C, making this the most appropriate Class for fee paying purposes. Breach of Prison is a common law offence which involves the threat or use of force to person or property in an escape or attempted escape from prison. The facts of the matter are far more akin, they argue, to a prison break than any offence listed within Class H.

10. In support of this argument Mr. Brazier refers to the decision of *R v Flanagan*, SCCO Ref: 215/13, 268/13 & 317/13), in which the now Senior Costs judge, Master Gordon-Saker, held that an offence of depositing controlled waste was to be reclassified as Class K because on its facts the matters alleged bore most resemblance to a dishonest enterprise. Classes F, G and K include offences of dishonesty including, pertinently for the purposes of considering the decision in *Flanagan*, the fraudulent evasion of duty under Customs and Excise Management Act 1979 s.170(1)(b).

11. There is no clear guidance in the statutory provisions themselves as to how the Determining Officer should re-classify otherwise unclassified offences. References are made in *Flanagan* to the need for the Determining Officer to consider allocation to an appropriate class. However it seems to me to be clear, and I did not understand Mr. Brazier to dissent from this, that the Determining Officer's discretion is to be exercised having regard to the underlying purpose of the rules and therefore regard is to be had to the extent to which the re-classification might provide or ensure appropriate compensation for work done by the legal representatives. Thus, as it was suggested, a decision to re-classify an offence in Class A merely because an offence carries unlimited sentencing powers would not be right. In determining the appropriate category the Determining Officer is generally required to take into account factual similarity and similarity in terms of complexion and gravity. It seems to me that the Determining Officer is ordinarily expected to have regard to the gravity of the offences (and of the alleged offending) since in general terms the adequacy of the compensation should reflect the degree of responsibility taken by the legal representatives (as it does generally in the assessment of costs); in general terms, the greater the responsibility taken by the legal representatives, the higher the compensation.

12. In *Flanagan* the Senior Costs Judge considered that the Determining Officer should have regard to the nature of the actual wrongdoing alleged and not confine their consideration to specific legal requirements of the offence charged. The Defendants in that case were in effect accused of a dishonest enterprise and having regard also to the sums involved this meant re-classification to Class K was appropriate even though the offence itself was one of strict liability.

13. Class B is described as including 'Offences involving serious violence or damage, and serious drug offences' Class C is headed 'Lesser offences involving violence or damage and less serious drugs offences': in addition to Breach of Prison it includes 'Unlawful wounding (without intent) and Carrying a loaded firearm in public place and Harboursing escaped prisoners under the Criminal Justice Act 1961, s.22 and Assisting prisoners to escape under section 39 of the Prison Act 1952'.

14. Whilst Class C includes offences where the activities concerned took place in prison and are in relation to prisoners or concern imprisonment, I do not accept that merely because the offences took place in or around prison or were related to D2's imprisonment, that is sufficient basis to say that the offences should be re-classified from Class H to Class C - as Mr. Brazier, it seems to me, argued. This would not I think be sufficient justification for the payment of the additional fees associated with the work done in cases of this category.

15. I acknowledge the seriousness of the offences in this case, including in particular the conveying of mobile telephones into prison. As I understand it prisoners are in general only allowed to use telephones which are made available to them by the prison authorities and then only to call specific numbers; further, their calls are recorded. This safeguard also prevents them from calling someone who might not want to have any contact with the prisoner, The use of mobile phones in prison generally might permit prisoners to undertake serious criminal activity such as dealing in controlled drugs from prison.

16. I also agree that sentencing powers alone are not determinative of gravity or at least of classification (Mr. Brazier told me and I understand it to be correct that some of the offences in Category H have unlimited sentencing powers). However, as Mr Brazier appeared to accept, and as is plainly the case, set sentencing powers can give some indication of the gravity of the offences. The offence relating to List B articles carries a maximum period of imprisonment of two years, whereas for the offence relating to list C articles the maximum sentence is as I understand it, a fine.

17. It seems to me in any event that Ms. Weisman is right to say that when one looks at the gravity of the offences charged here that Category C is not the appropriate classification. Quite apart from the offence of Breach of Prison itself which to my mind, involving as it does an escape from prison, was in general a more serious offence than those charged here (as Mr Brazier appeared to accept) the same also (it seems to me) can be said in relation to the other offences in the category too.

18. It seems to me notable that the offences in section 40C (referred to by Ms. Weisman as 'conveying' offences) feature items that are not illegal *per se*, and the activity is illegal only by virtue of the articles being conveyed into prison. This is contrast to the offence under section 40B relating to the conveying of List A articles into or out of prison (List A articles include controlled drugs, explosives, firearms. ammunition or any other offensive weapon). Indeed the other prison related offences including Breach of Prison, harbouring escaped prisoners and assisting prisoners to escape, carry very substantially greater sentences.

19. In the course of the hearing the potential for the offences to be re-classified to another class, and not just class C, was considered but Mr. Brazier did not appear to argue that any other class was appropriate. Plainly categories A and B are for more serious offences; other categories including Sexual offences and offences against children, seem to me offer little analogy either factually or in terms of seriousness or complexity (see also, for instance, Class E, Burglary etc).

20. As I have noted there are no offences listed specifically within Class H which are closely analogous to those charged here, and a wide variety of offences are included there. However, I do not think that prevents these offences being so classified: it is necessarily the case that Class H, which is headed 'Miscellaneous Other Offences', is 'catch all' in nature. Indeed it contains many offences which (it seems to me) can reasonably be considered as serious as these offences, in any event not significantly less serious.

21. In the course of the hearing Mr, Brazier started to develop a fresh argument to the effect that the offences charged conspiracy on a 'factory scale' involving 37 phones and on this alternative basis it might be re-classified from Class H. I expressed concern that this was not an argument which appeared to have been raised before and that if it were to be pursued it may be necessary for the Respondents to have time to respond to it. In the light of this indication the argument was not pursued.

22. In these circumstances and for these reasons, it follows that this appeal fails and is, accordingly, dismissed.

COSTS JUDGE BROWN