Neutral Citation Number: [2024] EWCR 7

Case No: 01VW0015422

IN THE CROWN COURT AT KINGSTON-UPON-THAMES

Date: 18 October 2024

Before

RECORDER BENJAMIN WOOD

- -

Between:

Mr GRAHAM O'KEEFE

Applicant

- and -

DIRECTOR OF LEGAL AID CASEWORK

Respondent

- -

- -

Written submissions from Nicholas Wayne of counsel (instructed by Old Bailey Solicitors) for **the Applicant**

The Director of Legal Aid Casework (**the Respondent**) sent an email to the Court but did not appear and was not represented

Date of sentence: 22 August 2024
Date of application: 27 August 2024
Initial written decision: 3 September 2024
Request for oral renewal of application: 9 September 2024
Hearing date: 26 September 2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 18 October 2024 by circulation to the parties or their representatives by email.

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1. This judgment concerns a renewed application under Regulation 26 of the Criminal Legal Aid (Contribution Orders) Regulations 2013 ("**Regulation 26**") and is in ten parts:
   a. Introduction
   b. Representation
   c. The applicable law
   d. The grounds of the application
   e. The incident, the indictment and the evidence
   f. Procedural history
   g. The Applicant's argument: analogy with privately paying defendant
   h. The Applicant's submissions on the facts
   i. Discussion
   j. Conclusion

A. Introduction

2. On day one of his trial (22 August 2024), the Defendant, Graham O'Keefe ("**the Applicant**"), pleaded guilty to one of the four counts on his indictment, namely to criminal damage (value not exceeding £5,000). The other counts (administering a noxious substance with intent, making a threat to kill and possession of a bladed article) were left to lie on file. The Applicant was sentenced to a community order, including unpaid work, and he was made the subject of a 2-year restraining order and required to pay £200 compensation to his victim.

3. By an application (in the correct form) dated 27 August 2024, the Applicant applies (through Old Bailey Solicitors, who continue to represent him) for apportionment of his costs, under Regulation 26.

4. The Applicant submits that it would be manifestly unreasonable for him to pay the full costs of his defence and submits instead that a "*three way alternative of 0%, 20% or 25%*" is reasonable.

5. On 3 September 2024, I gave a written decision (refusing the application) which was circulated to the parties' representatives shortly thereafter. I reached that decision without notice of the application having been given to the Director of Legal Aid Casework ("**the Director**") and without a hearing (and therefore without the Applicant having an opportunity to develop his application in oral argument). I considered that the Applicant should be allowed to renew his application at a full hearing, on notice to the Director, and I gave directions to that end. I regarded this as a suitably efficient and proportionate way of dealing with the application that was fair to both parties.

6. By a written request dated 9 September 2024, accompanied by a skeleton argument and other documents, the Applicant requested an oral rehearing. A hearing was fixed for 26 September 2024 but, on 25 September at 15.45, the Applicant's solicitor emailed the Court to state that "*I have been informed that counsel's fee is not covered under legal aid for these types of hearings…* [the Applicant] *is not able to pay privately…*" and, following a request for clarification from the Court, added a few minutes later, "*As funding is not in place, we cannot proceed*".

7. Whilst I might have interpreted that email exchange as signalling a withdrawal of the application, I have concluded that the better course is to treat it as no more or less than an indication that the Applicant cannot afford oral representation. It is clear that the Applicant is not seeking to abuse the right to a reconsideration of his application and to have a second bite of the cherry, because the skeleton argument was plainly lodged in anticipation of the points made being developed in oral argument.

8. I have therefore concluded that, even though I have not had the benefit of oral argument from any party, it is appropriate for me to take into account the written submissions (and the other documents) and to give judgment in light of this further material. To do so avoids (or at least should mitigate) any impression that the Applicant's access to the courts to challenge the Legal Aid position has been stifled by his inability to obtain Legal Aid.

9. Furthermore, and as identified in at least one practitioner textbook, a legal representative may be under a common law duty to advise their defendant client about, and if appropriate, pursue an application under Regulation 26 and the legal representative may incur civil liability to their client if they fail to do so and if that causes the client the loss of an opportunity to avoid paying more than a proportion of the cost of representation. A judgment on the substantive application ought to reduce the possibility of satellite litigation in the civil courts.

10. This is therefore my (final) judgment following a hearing but (because neither party attended) with the benefit only of written submissions.

11. I should make clear that, although this judgment echoes and repeats my earlier decision on the papers, at least in part, I have treated the renewed application as a full rehearing, and therefore I have approached the case afresh and with an open mind as to the outcome of the application.

B. Representation

12. The Applicant has been represented in these proceedings by Old Bailey Solicitors. At the first day of his trial (and therefore his sentencing hearing that same day), Mr Nicholas Wayne of counsel appeared on his behalf. Mr Wayne produced a skeleton argument dated 9 September 2024. I am grateful to Mr Wayne for his assistance by way of those written submissions.

13. The Director did not become aware of the application until I had made my initial decision. On her behalf, a Senior Lawyer in the Central Legal Team / Judiciary, Coroners and Access to Justice Team in the Ministry of Justice has written to the Court and the parties in an email of 24 September 2024. The Director confirmed that she did not wish to participate in the hearing and added that "*the issue here is not related to the contribution itself but the defence costs and what proportion of those costs the defendant should be liable for. We would also agree with the Court's analysis of Regulation 26 of the Criminal Legal Aid (Contribution Orders) Regulations 2013 as set out in paragraph 3.3 of the Judgment of 3 September 2024 that any apportionment relates to the total costs rather than the amount of contributions*". This has therefore been the extent of the Respondent's involvement.

14. The Crown is not directly involved in this application, not least because of Regulation 26(5). Accordingly, the Prosecution has taken no part and agrees that it has no standing to participate.

C. The applicable law

15. Regulation 26 provides as follows:

> ***Assessment by the court of proportion of the cost of representation***
>
> *26.— (1) This regulation applies where an individual is—*
>
> *(a)charged with more than one offence; and*
>
> *(b)convicted of one or more, but not all, such offences.*
>
> *(2) The individual may apply in writing to the judge for an order that the individual pay a proportion of the amount of the cost of representation in the proceedings in the Crown Court, on the ground that it would be manifestly unreasonable to pay the whole amount.*
>
> *(3) An application under paragraph (2) must be made within 21 days of the date on which the individual is sentenced or otherwise dealt with for the offence following conviction in the Crown Court.*
>
> *(4) The judge may—*
>
> *(a) make an order specifying the proportion of the cost of representation for which the individual is liable; or*
>
> *(b) refuse the application.*
>
> *(5) An order under paragraph (4) must not require any other individual to pay any of the cost of the individual's representation.*
>
> *(6) In this regulation "judge" means the trial judge or a judge nominated by the resident judge for the purpose of deciding the application.*

16. The only guidance, therefore, on the face of the Regulation, as to what test should be applied, is one of "*manifest unreasonableness*". The Regulation does not draw attention to any particular factors that the Court ought to take into account (or, for that matter, which it must leave out of account).

17. In preparing my initial written decision, I was only able to identify one reported decision in which Regulation 26 has received consideration: *R (Director of Legal Aid Casework) v. Southwark Crown Court* [2021] EWHC 397 (Admin), [2021] 1 WLR 2779. The decision itself does not shed light upon the test that ought to be applied, although the Adminstrative Court does quote from the first instance decision of His Honour Judge Pegden, QC, at [17]:

However, doing the very best I can, it seems to me that it would be manifestly unreasonable in the circumstances that I have outlined, to use the phraseology of the Regulations, for Professor Swingland to pay the £171,499 which is sought. Exercising my discretion under the Regulations it seems to me that the role in those factors which I have outlined merits an order of something approximating 15 per cent of that figure, and making a rough calculation of that it is £25,000, and that is the order that I make. I exercise my discretion accordingly, for the reasons I have set out, with some little care. Actually, I correct myself, the balance that was sought was £176,724, not £171,000, still, the £25,000 figure is approximately 15 per cent of that figure.

18. At paragraph 13 of his written submissions, the Applicant's counsel has confirmed his agreement that "*there is no caselaw that assists on the question of how the Regulation 26 discretion should be applied*".

19. The Index of Legal terms on Westlaw returns seven results for "*manifestly unreasonable*", of which two are from English decisions and one from a Scottish decision, albeit all of them arise in very different contexts.

20. The first, *Watmore v. Information Commissioner* [2023] UKFTT 205 (GRC), relevantly concerned freedom of information requests that a recipient was entitled to decline to answer if they were "*manifestly unreasonable*" within the meaning of the applicable Regulations. At [57] and [71]-[80], the First Tier Tribunal identified that "*manifestly unreasonable*" (which is the term used in the regulations as they apply to the provision of environmental information) had been given the same meaning in case law as "*vexatious*" (the term used in the Freedom of Information Act ("**FoI**")) and the question of whether something is "*manifestly unreasonable*" should be assessed by undertaking a "*holistic assessment of all the circumstances*", adopting a "*rounded approach, taking into account all the relevant factors, in order to reach a balanced conclusion*".

21. That "*manifestly unreasonable*" should be equated with "*vexatious*", in the FoI context, was the conclusion of the Court of Appeal in the second case, albeit earlier in time: *Dransfield v. Information Commissioner* [2015] EWCA Civ 454, [2015] 1 WLR 5316. At [78] Arden LJ (with the judgment of whom the other two members of the Court of Appeal agreed) noted that "*manifestly unreasonable*" differs on its face from "*vexatious*" because it "*clearly imposes an objective test*", but the Court regarded the difference between the two as being "*vanishingly small*", noting as well that the word "*manifestly*" does not add much in practice, but means that the "*unreasonableness must be clearly shown*".

22. The final, Scottish case, *Lennox v. Iceland Foods Ltd* [2022] SC EDIN 42, concerned a failed personal injury claim and whether the defendant was entitled to recover its costs from the claimant, notwithstanding that a claimant would ordinarily be protected by qualified one way costs shifting (unless – according to the relevant legislation – they have behaved in a manner that is manifestly unreasonable or their claim was otherwise an abuse of process). At [9]-[10] and [30]-[39], the Court considered the meaning of "*manifestly unreasonable*" and determined that it was "*tantamount to that of Wednesbury unreasonableness*", a "*high test*" and also that the words should be given their ordinary meaning, with "*manifestly*" connoting "*a manner which is clearly or unmistakably unreasonable*".

23. I pause to note that "*Wednesbury unreasonableness*" is regarded as a different and stricter test than mere "*unreasonableness*". It is used to describe a decision that is irrational and so unreasonable that no reasonable person acting reasonably could have made it.

24. I am cautious about the extent to which it is appropriate to read across the interpretation of "*manifestly unreasonable*" in any of these decisions for two main reasons. First, the context is very different and, like any phrase, the term "*manifestly unreasonable*" takes colour not only from the words used but also from the specific context in which they are used. Second, the usage of the phrase in the cases above deal not with a state of affairs but with a party's conduct (and thus, for example, one might describe a person's conduct as "vexatious", as in *Dransfield*, but one would never use that adjective to describe a state of affairs).

25. I nevertheless draw out the following points from the case law to which I have referred.

26. First, the test for demonstrating that something is manifestly unreasonable is a higher one than (merely) demonstrating that it is unreasonable.

27. Second, if a party wishes to demonstrate that something is manifestly unreasonable, they are required to show that any other decision would be irrational and so unreasonable that no reasonable person acting reasonably could have made it.

28. Third, the applicant must demonstrate that it would be clearly and unmistakeably unreasonable for any other conclusion to be reached.

29. Finally, the assessment is an objective one, carried out after taking account of all relevant factors.

D. The grounds of the application

30. The application, which was doubtless drafted with an eye on proportionality, was not supported by any evidence. As I indicated above, the notice itself was unsigned (owing, I am told, to the vagaries of the electronic form itself), but I have treated it as if it were signed and therefore properly completed.

31. The grounds are as follows:

The defendant faced a 4 count indictment including offences of:

Making a threat to kill, possession of a bladed article, administering a noxious substance with intent and criminal damage. Not guilty pleas were entered at the PTPH on 21 March 2022 and the case was listed for trial.

On day one of the trial on 22 August 2024, the prosecutor approached defence counsel and indicated that they had concerns about the strength of the evidence given the contents of the CCTV and that they would take instructions.

It was agreed between the parties that a guilty plea would be entered to criminal damage (count 4) and counts 1-3 would be left to lie on file. The indictment became significantly less serious as a result and the matter could appropriately have been dealt with in the Magistrates' Court (had that been the position from the outset)…

There was a contribution order made by the LAA on 8 March 2022 for £10,225.00. or £2,045pcm starting on 5 April 2022. This figure could have been arrived at as there were initially 4 counts on the indictment (one of which was of a higher class to criminal damage - administering a noxious substance) and the matter was to be heard at the crown court.

It is respectfully submitted that this defendant ought to be required to pay 0% of the Contribution Order as the Crown had the CCTV at the outset of the proceedings and, had they recognised the evidential difficulties identified on day 1 of trial and pursued only the criminal damage from the outset, this matter would have either been resolved by a plea or a trial in the Magistrates Court.

In the event that the court does not agree with that proposition, secondly, that had the Crown properly reviewed the CCTV prior to the PTPH on 22 March 2022 the position would have been as it is now, then. Had that been the case, it is likely that the defendant would only have had to pay one contribution (20% of the total order) and therefore it is submitted that 80% of the total contribution should be waived.

Or, in the event that the court does not agree with that proposition, thirdly it is submitted that 75% of the contributions should be waived as this was a matter in which 4 counts have been reduced to one (so the defendant should be liable to pay 25% of the contribution order).

32. I note that, whilst the application is framed in terms of the percentage of the contributions that the Applicant was required to make (or that ought to be waived), that is not how Regulation 26 operates. Rather, and as made clear in the *Southwark* decision, cited above, the Court may only specify the proportion of the cost of representation for which the defendant should be liable (if the application is not refused).

E. <u>The incident, the indictment and the evidence</u>

33. As recorded above, the Applicant faced a four count indictment, albeit that they all arose out of the same incident, which was a violent disagreement between the Applicant and his next door neighbour that took place on 24 January 2022 at about 8am. Much of that incident was captured on CCTV. There is no audio of the incident.

34. The neighbour (who called the police as a result of the incident) gave an account in a witness statement that was taken in the attending officer's pocketbook within about an hour of the incident (in addition to there being a recording of his 999 call). The Applicant made various significant comments to the police when he was detained (some of which were captured on Body Worn Video) and then gave a full comment

interview about 12 hours after the incident (when he was interviewed in the presence of his solicitor).

35. The CCTV (taken from a wide-angled camera that appears to have been on the front façade of the next door neighbour's property) shows the neighbour leaving his own house, walking down his path and onto the pavement (in a built-up residential street) and then back up the path on the adjacent land towards the Applicant's front door. According to his witness statement, the neighbour was irritated by loud music being played by the Applicant at an antisocially early time of day. According to the Applicant's defence statement, he had been playing his music at a volume sufficient to drown out what he says was antisocial activity on the part of the neighbour's family.

36. Something then happens "off camera", on the Applicant's doorstep, and the two men can be seen flailing their arms at each other, with the neighbour retreating down the Applicant's path, towards the road. The neighbour is then seen to go to the back of his van, which is parked on the street, and to take a long object (perhaps 1 metre long) that could be a plank of wood. He returns to the Applicant's front door and – according to the Applicant – the neighbour struck him hard on the chest with the plank (and there were photographs showing a significant bruise on the Applicant's chest). The neighbour then returned to his own property and, it is to be inferred from what happened next, closed his front door behind him.

37. A short while later, the Applicant can be seen with what turned out to be a machete, heading down his path, a few steps along the pavement and then back up his neighbour's path. He slashed at his neighbour's front door with the machete, causing a cut mark to the door frame. This was the criminal damage to which the Applicant pleaded guilty.

38. Apparently, the Applicant had several other weapons (none illegal per se) variously around his home and he panicked, driving a short distance away and attempting to hide the machete and certain other items.

39. The noxious substance was a (legal) dog-repellent spray that the Applicant sprayed towards his neighbour during the altercation on the Applicant's doorstep. The neighbour alleged that the Applicant had threatened to kill him. The Applicant denied that he had made such a threat and, at least according to his defence statement, was acting in self-defence throughout the incident.

40. (The entirety of this section appeared in materially similar terms in my written decision and the Applicant did not take issue with any part of it in his skeleton argument.)

F. Procedural history

41. The incident took place on 24 January 2022 and the Applicant was promptly arrested, interviewed (in the presence of a solicitor) and charged. He first appeared in the Magistrates' Court the following day, 25 January 2022.

42. The Applicant attended and was represented in the Magistrates' Court by a duty solicitor. According to the Better Case Management form, the Applicant indicated guilty pleas to three of the four charges. He indicated that he would plead not guilty to the charge of making a threat to kill. However, because one of those charges (of administering a noxious substance with intent to injure, contrary to Section 24 of the Offences Against the Person Act 1861) is indictable only, no pleas were taken on any of the charges and the Applicant was released on conditional bail and ordered to appear in the Crown Court on 21 February 2022.

43. The first two hearings in the Crown Court were not effective because legal aid was not in place. The adjourned Plea and Trial Preparation Hearing therefore took place on 21 March 2022. The Applicant entered not guilty pleas to all four counts. Stage dates were set and the Applicant remained on conditional bail.

44. The trial was not reached in its first two warned lists. It was therefore relisted in August 2024 and came before me on 22 August 2024.

45. I was informed that the neighbour (who would have been the main prosecution witness) was at court when the case was called on for the trial to begin.

46. As noted above, the Applicant pleaded guilty to causing criminal damage and the other three counts are to lie on the file. At no stage did the Applicant apply to dismiss the charges.

G. The Applicant's argument: analogy with privately paying defendant

47. It is accepted on the Applicant's behalf that there is no case law directly dealing with the test that is to be applied under Regulation 26 and, instead, he seeks to draw an analogy with and relies upon the position as it would have been if he had been paying privately.

48. The Applicant submits that I should therefore consider the law as it would apply in such a scenario.

49. The relevant legislation begins with Section 16(2)(a) and 2(b) of the Prosecution of Offences Act 1985, which provides that:

> *Where—*
>
> *(a) any person is not tried for an offence for which he has been indicted or sent for trial; or…*
>
> *(b) any person is tried on indictment and acquitted on any count in the indictment;*
>
> *the Crown Court may make a defendant's costs order in favour of the accused.*

50. I pause to observe that, were Section 16 to apply to the Applicant, he would seem to me to fall only within the scope of Section 16(2)(a) and not within the scope of Section 16(2)(b), because the three counts were ordered to lie on the file: see

Archbold Criminal Pleading, Evidence and Practice (2024) ("Archbold") at 6-7, citing *R v. Spens (No 2)* [1992] CLY 625.

51. Sub-sections (6), (6A) and (6B) set out the issues for the Court to decide:

(6) A defendant's costs order shall, subject to the following provisions of this section, be for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings.

(6A) Where the court considers that there are circumstances that make it inappropriate for the accused to recover the full amount mentioned in subsection (6), a defendant's costs order must be for the payment out of central funds of such lesser amount as the court considers just and reasonable.

(6B) Subsections (6) and (6A) have effect subject to—

(a) section 16A, and

(b) regulations under section 20(1A)(d).

52. Section 16A, which was inserted in 2012 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, significantly circumscribes the accused's ability to seek payment of their costs out of central funds. In particular, where a costs order is made in favour of a defendant, they are limited to recovering costs at legal aid rates, which means that there will almost inevitably be a shortfall between their outlay and their recovery (and that may be a significant shortfall). It is also appropriate to note that it is "Condition D" that would theoretically apply in the Applicant's case (and therefore open the gateway for him to obtain a defendant's costs order under the 1985 Act) if the Director had made a determination of financial ineligibility (and he would therefore have been required to pay privately for his legal representation).

53. Any application under Section 16 of the 1985 Act would fall to be dealt with under Part 45 of the Criminal Procedure Rules (pursuant to CPR 45.1(1)(a)) and, pursuant to CPR 45.2(3), "*in deciding what order, if any, to make about costs, the court must have regard to all the circumstances, including – (a) the conduct of all the parties*".

54. CPR 45.4 concerns applications for payment of costs out of central funds. CPR 45.4(6) and 45.4(7) relevantly provide as follows:

(6) The general rule is that the court must make an order, but—

(a) the court may decline to make a defendant's costs order if, for example—

(i) the defendant is convicted of at least one offence, or

(ii) the defendant's conduct led the prosecutor reasonably to think the prosecution case stronger than it was;

...

(c) the court may decline to make an order if the applicant fails to provide enough information for the court to decide whether to make an order at all and, if so, whether it should be for the full amount recoverable or for a lesser sum.

(7) If the court makes an order—

(a) the general rule is that it must be for such amount as the court considers reasonably sufficient to compensate the applicant for any expenses properly incurred in the proceedings;

(b) where the court considers there to be circumstances making it inappropriate for the applicant to recover that amount then the order must be for such lesser amount as the court considers just and reasonable; …

55. The Applicant relies upon the commentary in *Archbold* (2024) at 6-11ff., which suggests that guidance may be derived from the *Practice Direction (Costs in Criminal Proceedings)* (2015) at paras. 2.1.1, 2.1.2 (which both apply in a magistrates' court), 2.2.1 and 2.2.2 (which both apply in the Crown Court).

56. The Crown Court provisions include the following:

2.2.1 Where a person is not tried for an offence for which he has been indicted… or has been acquitted on any count in the indictment, the court may make a defendant's costs order in his favour. Whether to make such an order is a matter for the discretion of the court in the light of the circumstances of the particular case. A defendant's costs order should normally be made, unless there are positive reasons for not doing so, for example, where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him was stronger than it was…

2.2.2 Where a person is convicted of some count(s) in the indictment and acquitted on other(s) the court may exercise its discretion to make a defendant's costs order but may order that only a proportion of the costs incurred be paid. The court should make whatever order seems just having regard to the relative importance of the charges and the conduct of the parties generally…

57. There is a little more commentary in *Blackstone's Criminal Practice* (2024) ("Blackstone's") at D33.11ff. At D33.12, the editors cite *R (Stoddard) v. Oxford Magistrates' Court* [2005] EWHC 2733 (Admin), which was a case where a prosecution was withdrawn following the defendant's acceptance of a caution, noting that the defendant thereby stood acquitted for the purpose of the making of a defendant's costs order and therefore the refusal to make the defendant's costs order was quashed.

58. At D33.13, the editors of Blackstone's note that "*Costs should not be denied merely because the prosecution acted properly in bringing the case*" and cite *Birmingham Juvenile Court, ex parte H* (1992) 156 JP 445.

59. At D33.15 (which is entitled "Partial Acquittal"), the editors of Blackstone's address the situation envisaged in paragraph 2.2.2 of the 2015 Practice Direction, but they

refer only to Section 16(2)(b) of the 1985 Act (rather than also to Section 16(2)(a), which applies in the present case).

60. It is not entirely easy to draw the threads together in an internally consistent and coherent way.

61. Certainly, there is a jurisdiction to award a privately paying defendant their costs, where they are not tried for one or more of the offences on their indictment: Section 16(2)(a) of the 1985 Act.

62. However, the circumstances in which that jurisdiction ought to be exercised are less clear. The Practice Direction (which states the law) indicates, on the one hand, that a costs order in favour of the privately paying defendant ought normally to be made (para. 2.2.1); but, on the other hand, it then goes on to make clear (in para. 2.2.2) that where a defendant is convicted on some count(s) and acquitted on other(s), the court should make whatever order seems just, which might include that only a proportion of the costs be paid.

63. The Practice Direction is silent on what order might be made in relation to costs where, for the defendant who has faced counts other than that upon which they were convicted, there is a less good outcome than acquittal (i.e., lying on the file).

64. Finally, CPR 45.4(6)(a) appears to make clear that it is open to a court, in the exercise of its discretion, to decline to make a defendant's costs order where they are convicted of at least one offence, regardless of whether they brought suspicion on themselves or whether their conduct caused the prosecution to think that the case against the defendant was stronger than it really was.

65. I am driven to conclude that the consequence of this lack of coherent guidance means that it is quite possible that two first instance tribunals, faced with materially similar applications under Section 16(2)(a) of the 1985 Act, could reach entirely different decisions, neither of which could be said to be anything other than a proper exercise of discretion.

H. <u>The Applicant's submissions on the facts</u>

66. In his skeleton argument, the Applicant makes four submissions based on the facts of the case.

67. First, if the costs of the Applicant's legal aid were lower than the contribution paid, then he submits that the balance should be refunded to him.

68. Second, the Applicant draws attention to the fact that the Crown was in possession of the key evidence by the time of the PTPH and that "*it should have been obvious to any competent reviewing lawyer that the CCTV evidence fundamentally undermined the prosecution case on Count 1 and Count 2… there was in reality no realistic prospect of conviction*". He further submits that "*The Crown at trial took the view that there was either no public interest or no realistic prospect of conviction on Count 3 (the bladed article)… Bearing in mind how the CCTV footage undermined the*

complainant's case, the conclusion of the Crown that the count should not proceed is readily understandable".

69. Third, the Applicant notes that he gave a full comment interview and that his account was borne out by the CCTV, although at no stage prior to the first day of trial did the Crown give any indication that lesser pleas might be acceptable. I note that the Applicant does not assert that any proposals were made to the Crown on his behalf.

70. Finally, the Applicant observes (correctly) that he "*was ultimately convicted of an offence that would not have been triable on its own in the Crown Court. It was a much less serious charge than the 3 charges which the prosecution chose not to proceed with. It is patently unjust and manifestly unreasonable for the defendant to pay all the costs*".

71. Standing back, the Applicant submits that the same principles as apply to the discretion under Section 16 of the 1985 Act should apply in the present circumstances.

I. Discussion

72. The Applicant's first point is that, if the costs of his legal representation were lower than his contribution, then the balance of his contributions should be returned to him. I agree with this.

73. In my judgment, it would be manifestly unreasonable for the Applicant to be liable for a greater amount than the true cost of his representation and it cannot have been intended that the executive should profit at the expense of an accused, especially in circumstances where the accused is not convicted of all counts on an indictment.

74. The standard wording of a Contribution Order includes the following: "*you are required to make a contribution… towards the cost of your defence*". In other words, any payments made by an accused in excess of the actual costs cannot be treated as a contribution to the general funds for legal aid and retained for that purpose.

75. Rather, the correct approach must be for the Director to confirm the total cost of an accused's representation and, regardless of any application under Regulation 26, to return any surplus contribution to the accused.

76. I should make clear that, in the present case, there is no positive assertion by the Applicant that his costs of representation were lower than the amount of his contributions, and therefore there is no suggestion that the Director has withheld money or that she has applied a different interpretation of the Regulations. However, this judgment may clarify the position if there was previously any doubt.

77. I turn next to the Applicant's invitation to adopt the same approach to an application under Regulation 26 as would be taken to an application made under Section 16 of the 1985 Act.

78. For all practical purposes, in the Crown Court, an application under Section 16 is likely to be made by a defendant who is privately paying (and therefore likely to be

ineligible for legal aid on account of their income or assets), whereas an application under Regulation 26 is likely to be made by someone with a lower income or less valuable assets. Whilst, in the majority of cases, a privately paying defendant will face a shortfall between the amount actually paid and the recoverable legal aid rates, there may be some cases – particularly more straightforward ones – where a privately paying defendant's costs are not substantially more than they would have been under legal aid rates.

79. If that is correct, then I see considerable force in the Applicant's submission that the test under Section 16 ought to be applied to (or should at least be a starting point for) a defendant in his position. Were it otherwise, then it is conceivable that a privately paying defendant might end up better off than the legally aided defendant, if the former is more readily able to obtain reimbursement of some or all of their costs because the test for the latter is more restrictive.

80. This, submits the Applicant, would not be a reasonable outcome and I have sympathy with that analysis.

81. However, that cannot be a complete answer to an application under Regulation 26, for two reasons.

82. First, the tests under the two legislative provisions could have been but are not the same. Indeed, the draftsperson of Regulation 26 could have specified that an application be determined by reading across the Section 16 test and jurisprudence, but they did not.

83. Whilst I agree that this may be an instance where it is helpful to ask oneself whether the applicant would have been entitled to a costs order under Section 16, I would not go so far as to say that it would always be appropriate to do so. In particular, there may be scenarios where an application under Regulation 26 succeeds but where the equivalent application under Section 16 would have failed.

84. That is to say, a Regulation 26 applicant may seek to establish their entitlement to an order in their favour by analogy with Section 16, as a starting point, but that may not be necessary or even appropriate in every case.

85. Turning to my second reason, and even if the Court should apply the Section 16 test, the question under Regulation 26 is not only whether a refusal of the application would be unreasonable but also whether it is manifestly unreasonable.

86. I must therefore consider whether, on the present facts, the Applicant clearly and unmistakeably *would have been* entitled to a defendant's costs order under Section 16, in order to determine whether he *is* entitled to an order under Regulation 26. I regard this as the question that must be addressed not because the test of manifest unreasonableness under Regulation 26 is simply a more stringent version of the test under Section 16, but because, if one accepts the Applicant's submission that one should start with a Section 16 analysis, then logic requires one to consider whether it is manifest that he would have been entitled to an order in his favour under Section 16.

87. On this question, I agree with the Applicant's proposition that the offence to which he pleaded guilty was less serious than others on the indictment. However, I think that there is considerably less force in his assertion that, had the only charge been that of criminal damage (which, because the value of the damaged property was less than £5,000, would – if charged alone in the Magistrates' Court – have been treated as triable only summarily), he would have pleaded guilty to that offence and it would have remained in the Magistrates' Court. It overlooks the fact that one of the charges to which the Applicant indicated a guilty plea in the Magistrates' Court related to an indictable only offence, which meant that his case had to be sent to the Crown Court. Furthermore, that the Applicant faced different counts on the indictment, once he appeared in the Crown Court, does not begin to explain why he continued to contest his guilt in relation to causing criminal damage.

88. Additionally, this is not a case where the Applicant has been acquitted on the other counts, nor is it a case where not guilty verdicts have been entered. Rather, the counts will lie on the file. There was no disagreement about this on behalf of the Applicant, when the Prosecution applied to have the counts left to lie on the file.

89. At no time did the Applicant apply for any of the charges to be dismissed. If I may say so, I can see why he did not. The Applicant did not take issue with allegation that he had used a spray or that he retrieved the machete and "*took a swipe at the complainant's door or window frame*" (according to his defence statement). As indicated above, his defence was one of self-defence and the question of whether he had made the threats to kill would have required an evaluation of his evidence against that of the neighbour.

90. In the application, it is asserted that prosecution counsel on the day of trial "*approached defence counsel and indicated that they had concerns about the strength of the evidence given the contents of the CCTV*" and that it was following this exchange and prosecution counsel's taking instructions that the case was resolved.

91. However, the CPS website says something about the understanding amongst the parties when a count is left to lie on the file, in the context of the various ways in which proceedings might be terminated: https://www.cps.gov.uk/legal-guidance/termination-proceedings-including-discontinuance. In Appendix A of that page, under the comments section alongside "Lie on File", the following is written: "*This is appropriate where there is sufficient evidence to prove the offence but the defendant has entered acceptable pleas to other offences.*"

92. I did not hear any evidence, which means that I did not have an opportunity to evaluate the accounts given by the Applicant or by his neighbour and to form any judgement about whose account was more credible. This is especially important in circumstances where (a) although the CCTV shows the neighbour making the first move, in the sense that he went round to confront the Applicant, the circumstances that caused him to do this are unclear (i.e., whether he was provoked into doing so) and (b) there is no audio, meaning that it does not reveal what each man said (or how he said it). In terms of the threat to kill, the neighbour had made that allegation only a few minutes after he had been sprayed with something and his front door had been hacked with a machete.

93. I can see that it was very possible that a jury would have acquitted the Applicant on the counts relating to the threat to kill (most obviously on the basis that they could not be sure that he had made such a threat) or the administering of the irritant spray (most obviously on the basis that he was acting in lawful self-defence).

94. However, I have some considerable doubt as to whether a jury would have acquitted the Applicant of having the machete in a public place. Given that self-defence requires an evaluation of the reasonableness of the conduct at that particular phase of the incident, I can well imagine that a jury might have accepted that the prosecution had proved its case to the criminal standard, in relation to self-defence. This is because it was the Applicant who, rather than simply closing his front door (and calling the police) following the incident on his property, instead decided to grab a machete and walk around to his neighbour's front door and then slash at it. A jury might have been sure that it was not reasonable for the Applicant to have brought the machete out onto the street at a time when the neighbour had withdrawn inside his own house.

95. It is nevertheless important for me to make clear that I am not, in determining this application, seeking in any way to suggest that the Applicant is guilty of any criminal conduct (other than in respect of the offence to which he pleaded guilty).

96. Criminal cases regularly resolve on the first day of trial. Those resolutions often involve the offering of a guilty plea to some of the indictment with other matters lying on the file. I cannot see anything in the facts of the present case that make it unusual.

97. I accept that, were this an application under Section 16 of the 1985 Act, the Applicant would have been able to rely upon the presumption implied by paragraph 2.2.1 of the Costs Practice Direction. However, the wording of paragraph 2.2.2 of the Practice Direction appears to suggest that partial costs orders should only be made in respect of those who are acquitted of some counts (and not where those counts are ordered to lie on the file, for example). That appears to be the interpretation of the editors of Blackstone's, but I do not think that it is supported by the wording of Section 16(2)(a) of the 1985 Act itself.

98. Nevertheless, I have reached the conclusion that there is a qualitative difference between the case of a defendant who has been acquitted of some counts on their indictment and the defendant whose remaining counts have been ordered to lie on the file.

99. The most significant difference, in my view, is that it is open to the prosecution to apply to revive counts which have been left to lie on the file (in contrast to counts in respect of which a defendant has been acquitted). Whilst I accept that this may be vanishingly unlikely, both generally and in the present case, it could lead to a situation where a defendant has been reimbursed for their costs of defending counts for which they are later convicted.

100. That it is open to the Court to decline to make a costs order in favour of a defendant who is convicted of at least one offence is made clear by CPR 45.4(6)(a)(i).

101. In my judgment, and on the facts of the present case, the Applicant is unable to demonstrate clearly and unmistakeably that he would have been entitled to a costs order under Section 16.

102. Accordingly, and on the footing that I should adopt Section 16 as the appropriate starting point, as the Applicant submits, taking into account all of the matters that I have referred to above, I do not accept that it would be manifestly unreasonable for the Applicant to bear all of his defence costs. The test is a high one and I do not consider that the Applicant has demonstrated that he has a clear and unmistakeable entitlement relieved of liability for a proportion of his costs.

103. I therefore refuse the application (on the basis that the return of any surplus contribution is a separate matter).

104. In light of that conclusion, it is not necessary for me to consider the Applicant's submissions about the proportion of costs.

105. However, in case I am wrong in my primary decision, I make the following four observations about this part of his application. I make a preliminary observation that the prescribed form does not require an applicant to state either the total cost of representation (actual or estimated) or the amount of the contributions. It would have been helpful to know the amounts in question and therefore what was at stake and therefore if the application form had included standard questions to elicit this information.

106. First, and as I indicated above, the application is framed in terms of the Applicant's contribution, rather than his overall liability for costs. That is wrong, because the jurisdiction under Regulation 26 is confined to questions of overall liability. By way of illustration, if a defendant's costs of representation are £100,000 and they have been required to contribute £20,000, an order under Regulation 26 that they be liable for only 25% of their representation costs would have no financial impact. The application appears to have been drafted on the mistaken assumption that such an order (i.e., 25% on a £100,000 bill with £20,000 contribution) would result in a reimbursement (or relief from liability) of 75% of the contribution (i.e., £15,000), leaving the defendant themself to pay only £5,000. In fact, the true position would be that such a defendant would derive no benefit from a Regulation 26 application unless they succeeded in persuading a Court that their contribution to the costs of representation should be less than 20%.

107. Second, this means that the Applicant's alternative submission about being limited to 20%, on the basis that he should be liable only for the contribution that he had made by the time of the PTPH (being the first of five contributions) is legally incoherent, as it focuses on the timing of his contributions rather than the costs of representation.

108. Third, and especially given the lack of an early plea (or even an unacceptable basis of plea) to the criminal damage count (and noting the indication of a guilty plea to the indictable only offence in the Magistrates' Court), I struggle to understand the evidential basis upon which the Applicant could have hoped to persuade a court that this claim would have been resolved in the Magistrates' Court, with the consequence that he should be required to contribute nothing towards the costs of representation.

109. Finally, I do not agree with the logic of the Applicant's second alternative, namely that because he was convicted (upon his plea) of only one quarter of the counts on the indictment, he should be limited to paying only 25% of the costs of his representation.

110. Recognising that I have not heard any argument on the point, it seems to me that the better approach is to ask whether and if so, to what extent, a defendant would have incurred lower costs of representation if they had only faced that count upon which they have been convicted. For example, if it could be shown that the extent of disclosure would have been reduced by half if a defendant had only faced that count upon which they have been convicted and that the trial would have lasted half as long, one could anticipate a strong argument in favour of that defendant being required to pay for only half of the costs of their representation. If, on the other hand, a defendant is convicted of a count that is intricately bound up in the factual matrix of the other counts on an indictment of which they are not convicted, then one could anticipate an equally strong argument for saying that the defendant would have incurred all (or materially all) of the costs even if they had only faced the count upon which they had been convicted. As a further backdrop to this, one must recognise that representation for any matter in the Crown Court comes at some cost. Cases where a defendant's costs will double because they face not one but two counts on an indictment will be few and far between, and rarer still when those two counts arise out of the same incident.

111. Of course, no case will be quite so simplistically disentangled, but it seems to me that, in a Regulation 26 application, the burden is on the applicant not only to demonstrate that there is a proportion of costs for which it would be manifestly unreasonable for them to be held liable but also to demonstrate (to a greater or lesser degree of precision, which is likely to depend upon the complexity of the case and the amounts at stake) how much lower their costs of representation would have been if they had only faced the count(s) of which they have been convicted.

112. In fairness to the Applicant, this is not the approach that that he adopted in his application (other than in terms of the suggestion that the case would have resolved in the Magistrates Court, which I have rejected for other reasons).

113. An applicant in a similar position under Regulation 26 may wish to reflect upon whether, and if so how, they might be able to prove the financial consequences of there being other counts on the indictment.

114. Additionally, and in any event, it is likely to be helpful in any Regulation 26 application if the applicant informs the Court of the total cost of their representation and the total amount of their contributions, at least as a starting point.

J. Conclusion

115. Save to the extent that the Applicant has made contributions in excess of the actual costs of his representations (in which case, the excess should be returned to him), his renewed application is refused.

116. The Applicant has not demonstrated clearly and unmistakeably that he would have been entitled to a defendant's costs order under Section 16 of the 1985 Act and therefore he has not overcome the high threshold for the making of an order under Regulation 26; it is not manifestly unreasonable for him to pay the whole of the costs of his representation (or, if lower, the total of his contributions).

117. The Order that I make is therefore as follows:

(a) The Director shall reimburse the Applicant to the extent that the contributions he has paid have exceeded the actual cost of the Applicant's representation that was covered by the Contribution Order dated 8 March 2022.

(b) Save as set out in the previous paragraph, the Application dated 27 August 2024, and renewed in writing on 7 September 2024, is refused.

Recorder Benjamin Wood
18 October 2024