



SENIOR COURTS
COSTS OFFICE

SCCO Ref: 05/19

Dated: 26th March 2019

ON APPEAL FROM REDETERMINATION

REGINA v SAJID KHAN

CROWN COURT AT BRADFORD

**APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID
(REMUNERATION) REGULATIONS 2013**

CASE NO: T2017 7217

LEGAL AID AGENCY CASE

DATE OF REASONS: 18th October 2018

DATE OF NOTICE OF APPEAL: 29th October 2018

APPLICANT: COUNSEL

Mr Jonathan Turner
Kenworthy Chambers
DX 718200 Manchester 3



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

The appropriate additional payment, to which should be added the sum of £250 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

**ANDREW GORDON-SAKER
SENIOR COSTS JUDGE**

REASONS FOR DECISION

1. This is an appeal by Mr Turner against the calculation of an advocate's graduated fee by Mr Gallagher, a Determining Officer at the Legal Aid Agency.
2. Mr Turner represented Sajid Khan who was charged with two others with one offence of conspiracy to supply diamorphine, a Class A controlled drug, and one offence of transferring criminal property, namely cash. The prosecution case was that Khan travelled from Birmingham to Bradford to deliver the diamorphine to his co-defendants. When he was arrested on his return journey, Khan had about £32,000 in plastic bags, in one of which were two "dealer" bags containing traces of heroin. Khan pleaded not guilty. The co-defendants pleaded guilty.
3. Mr Turner claimed a graduated fee for trial on the basis that there were in excess of 10,000 pages of prosecution evidence. Initially the fee allowed was calculated on the basis that there were 1,274 pages and none of the documents served electronically was included. On redetermination, the Determining Officer allowed 679 pages served electronically and by his written reasons he increased that to 1,968 pages, giving a total of 3,242 pages of prosecution evidence.

A preliminary point

4. A preliminary issue arose as whether the appeal had been properly served. This was articulated in the written submissions of Mr Rimer, on behalf of the Lord Chancellor, dated 4th March 2019. Regulation 29(4) of the Criminal Legal Aid (Remuneration) Regulations 2013 provides that the notice of appeal must be accompanied by "the information and documents supplied to the appropriate officer under regulation 28", when the request for redetermination was made. It is clear that the Determining Officer had the discs containing the electronic evidence. However Mr Rimer complained that the discs had not been sent back to Mr Rimer's office at the Legal Aid Agency when the appeal was served.
5. It seems to me that the difficulty with that complaint is the wording of the regulations. Regulation 29(2) requires the appellant to give notice in writing to the Senior Costs Judge. Regulation 29(3) provides that a copy of the notice of appeal should be sent to "the appropriate officer". The appropriate officer would be the person designated as such by the Lord Chancellor (reg.2(1)) who, in this case, would be Mr Gallagher. Although his written reasons indicated that any notice of appeal and supporting documents should be sent to Mr Rimer's office, that is not what the regulations require. According to Mr Turner the discs were sent to the Legal Aid Agency's office in Nottingham, where Mr Gallagher is based, on 1st November 2018. They were returned on 6th December 2018. When Mr Rimer indicated on 28th February 2019 that he had not received the discs they were sent to him and were delivered on 1st March 2019.
6. It seems to me that in sending the discs to Mr Gallagher, the appropriate officer, Mr Turner did comply in that respect with regulation 29(4). If Mr Rimer needed

the discs in advance of the hearing he should have raised that earlier than a week before the hearing.

7. It is also arguable, although I was not addressed on the point, that regulation 29(4) relates only to the notice of appeal that must be given to the Senior Costs Judge and does not apply to the copy of the notice of appeal that must be sent to the appropriate officer (who would, of course, already have seen those documents). The need for a requirement to send back to the appropriate officer that officer's own reasons is not obvious.
8. It can be said that Mr Turner did not comply with regulation 29(4) by his failure to send the discs to the Senior Costs Judge with his appeal. My experience of deciding these appeals over some years is that discs are sent with the appeal notice in about 50 per cent of cases. Until recently it made no difference as costs judges did not have the equipment necessary to view the discs reliably and in practice I rarely looked at the discs as they would cause my computer to crash. We do however now have the necessary equipment.
9. Mr Turner's failure to serve the discs on the court should not however be fatal to his appeal if such failure is either not relevant or can easily be remedied. In this case it was remedied by the fact that he served a detailed list of the files that were on the disc.

The merits of the appeal

10. The representation order was granted on 3rd May 2017 and so the claim is governed by the Criminal Legal Aid (Remuneration) Regulations 2013.
11. Paragraph 1 of Schedule 1 provides:
 - (2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
 - (3) The number of pages of prosecution evidence includes all—
 - (a) witness statements;
 - (b) documentary and pictorial exhibits;
 - (c) records of interviews with the assisted person; and
 - (d) records of interviews with other defendants,which form part of the served prosecution documents or which are included in any notice of additional evidence.
 - (4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.
 - (5) A documentary or pictorial exhibit which—
 - (a) has been served by the prosecution in electronic form; and
 - (b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances.

12. There is no apparent issue that the documents served on disc were documentary exhibits. The only issue on the appeal is whether the Determining Officer should have decided that it was appropriate to include the number of pages served electronically as contended for by counsel.
13. The documents served electronically consisted of the data that was downloaded from the defendants' mobile phones. Khan was found in possession of 3 mobile phones, one of which was not capable of analysis. Mr Turner has produced a letter from Mr Rhys Evans, an E-Discovery and Digital Forensic Consultant, to his instructing solicitors dated 19th February 2018 which lists the files that were served on disc. I am happy to accept that the total number of pages served electronically was 17,105.
14. As I understand it that does not include the 882 pages of call and cell site data obtained from the mobile phone company (J0004-J0008 and J0032-J0040) that were uploaded to the digital case system and which were included in the page count.
15. In his written reasons the Determining Officer explained how he had arrived at the 1,968 pages. He had disallowed files which would not need to be considered in detail such as system files, device information, cookies and images. He had also disallowed excel files with the same file names as the pdf files which he did allow. He accepted that some of the phone evidence will have been of central importance to the prosecution case, in particular evidence of communications between the defendants. However technical data to do with the configuration and operation of the phone would not have been relevant and insofar as it was served and so had to be considered, the time spent considering it would more properly be paid as a fee for special preparation.
16. Mr Turner explained the obligations of defence counsel to consider all of the evidence served by the prosecution, including raw phone data from which the Crown had extracted the evidence on which it wished to rely. In this case the phone evidence was at the very core of the prosecution case to prove a conspiracy between the defendants in which contact between them was largely by mobile phone.
17. Khan's case was that he went to Bradford to collect money owed in respect of the sale of a car. He was a heroin user and the traces found in his car was for his own personal use. There was no evidence of contact with the other conspirators. There was evidence on his phones that he had been asked to collect money in relation to the sale of cars on previous occasions and that he had photographs of the cars concerned. There was evidence on his phones, he said, of contact with his regular drugs supplier.

18. Mr Turner submitted that device information, for example, was important because it recorded the name of the owner of the phone, which was in issue. Analytics information showed the names stored in the phone, the number of calls made to them and their email addresses. Similarly call logs, contacts, emails and text messages were central to the case. There are a large number of images listed in the breakdown, but Mr Turner submitted that it would have been negligent not to consider them, if, for example, they included pictures of the other conspirators or the drugs.
19. Mr Turner pointed to the fact that the Determining Officer had allowed only one page in respect of the 2,926 pages of a file named "DJM/1 handset cellbrite logical report" which contained the information used by the Crown to create the prosecution schedules which were included in the jury bundle. In oral submissions he explained that there were 2,229 pages of call data which had to be considered in relation to whether there was contact with the other defendants.
20. In the event it was the phone evidence which was inconsistent with Khan's defence that led him to change his plea during the trial.
21. The importance of the phone evidence in this case is clear from the prosecution opening. However I cannot be satisfied that all of the files served electronically were of such significance that it would be appropriate to include them in the page count. The breakdown provided by Mr Turner shows that a considerable number of the files were images. While some of these may have been photographs which counsel may have needed to consider, many of them would be system files. Similarly I am also satisfied that many of the files related to the configuration and operating system of the phones which would not need consideration. Files of a type which counsel would not have needed to consider should not be included in the page count.
22. My conclusion is that the Determining Officer should have allowed more than 1,968 pages of electronic evidence. In his written reasons Mr Gallagher accepted that counsel would have been required to look at most of this material (for example the cellbrite logical reports) but "not in detail". However I am not persuaded that even as many as 10,000 of the 17,105 electronic pages should be included.
23. It seems to me that in these circumstances there is no reason why a Determining Officer (or costs judge on appeal) should not take a broad approach and conclude that as only a proportion of the images may be of real relevance to the case, only that proportion should be included in the page count. Inevitably that will be nothing more than "rough justice, in the sense of being compounded of much sensible approximation": per Russell LJ in *In re Eastwood* [1974] 3 WLR 454 at 458. But that is the nature of the assessment of costs.
24. Doing the best that I can I would allow 25 per cent of the electronic evidence as pages of prosecution evidence. That achieves a balance in a case where the phone evidence was central to the prosecution case but where much of the evidence would not require detailed consideration. The result is that 4,276

pages of electronic evidence should be allowed which, in addition to 1,274 pages of paper evidence, would give a total page count of 5,550.

25. The appeal is allowed to that extent.



TO: Mr Joe Gallagher
Legal Aid Agency
DX 10035 Nottingham

COPIES TO: Mr Jonathan Turner
Kenworthy Chambers
DX 718200 Manchester 3

Mr Michael Rimer
Legal Aid Agency

The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247. When corresponding with the court, please address letters to the Criminal Clerk and quote the SCCO number.