



Neutral Citation No. [2024] EWHC 104 (SCCO)

Case No: T20220135

SCCO Reference: SC-2023-CRI-000016

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

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

Date: 22<sup>nd</sup> January 2024

**Before:**

**COSTS JUDGE WHALAN**

**R**

**v**

**JAMES DONNELLY**

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

Appellant: Mr Phil Tully, Counsel

The appeal has been successful, for the reasons set out below.

The appropriate additional payment, to which should be added the £100 paid on appeal and assessed costs of £500.00 (+ any VAT payable), should accordingly be made to the Appellants.

## COSTS JUDGE WHALAN

### Introduction

1. Mr Phil Tully, Counsel ('the Appellant') appeals the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in respect of a claim submitted under the Advocate's Graduated Fees Scheme ('AGFS'). Following a Proceeds of Crime Act 2002 hearing, the Appellant submitted a claim for, inter alia, reading 314 pages of evidence connected to the s.16 statement, corresponding to £786 (£655 + VAT of £131). The Respondent assessed the evidence page count at 10, meaning that 304 pages remain in dispute.

### Background

2. The Appellant represented Mr James Donnelly ('the Defendant') who was charged and convicted at Liverpool Crown Court. A POCA hearing took place on 20<sup>th</sup> January 2023. A statement was served by the prosecution under s.16 of the 2022 Act.

### The Regulations

3. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), (as amended) apply. Specific reference is made to sub-section 3 of paragraph 14 to Part 5 of Schedule 1:

#### ***Fees for confiscation hearings***

**14.** ...

(3) *In sub-paragraph (2) "evidence" means –*

(a) *the statement of information served under section 16 of the Proceeds of Crime Act 2002 and relied on by the prosecution for the purposes of the hearing under Part 2 of that Act, or a similar statement served and so relied on for the purposes of a hearing under section 2 of the Drug Trafficking Act 1994 or under section 71 of the Criminal Justice Act 1988 and, in each case, any attached annexes and exhibits;*

(b) *any other document which –*

(i) *is served as a statement or an exhibit for the purposes of the trial;*

- (ii) *is specifically referred to in, but not served with, a statement mentioned in paragraph (a); and*
- (iii) *the prosecution state that they intend to rely on in the hearing; ...*

#### Written Reasons

4. Regulation 29(1) of the 2013 Regulations states: “*Where the appropriate officer has given his reasons for his decision under regulation 28(8), a representative who is dissatisfied with that decision may appeal to a Costs Judge*”. Regulation 28, entitled “Redetermination of Fees by Appropriate Officer”, states at sub-paragraph (8): “*Where the applicant so requests, the appropriate officer must give reasons in writing for the appropriate officer’s decision*”.
5. This appeal is unusual because no formal Written Reasons were prepared by the Respondent. It is suggested that, as such, the Appellant’s entitlement to appeal under reg. 29(1) has not been triggered.
6. The original AGFS claim was assessed on or about 13<sup>th</sup> February 2023. It was challenged immediately by counsel’s clerk and, on 14<sup>th</sup> February 2023, Samantha Holmes, a Case Manager at the LAA, replied setting out brief reasons for the Respondent assessing the s.16 page count at 10. On 16<sup>th</sup> February, counsel’s clerk replied: “*How does counsel appeal this? Do we request Written Reasons?*”. Ms Holmes replied immediately stating, inter alia, that “*Counsel will need to request a redetermination*”. Counsel’s clerk did so and on 21<sup>st</sup> February 2023, Ms Holmes carried out the redetermination, maintaining her original conclusion. She set out detailed reasons for her decision in an e-mail sent at 11:41 hs. On 28<sup>th</sup> February 2023, counsel’s clerk contacted Ms Holmes and asked: “*What is the procedure for counsel to appeal this further?*”. Ms Holmes replied at 17:25 hs on 28<sup>th</sup> February 2023: “*It would appeal to a Costs Judge*”.
7. It seems to me – and I so find – that the Appellant’s entitlement to appeal pursuant to reg. 29(1) of the 2013 Regulations has been properly triggered. The relevant e-mail exchange may be technically confused and arguably inadequate, but it seems clear to me that the Appellant intended to request written reasons and, in turn, that the LAA

thought they had done so effectively by Ms Holmes' e-mail of 21<sup>st</sup> February 2023, which sets out (albeit succinctly) the Respondent's reasons for refusing the claim on redetermination. I find accordingly that the Appellant's right to appeal under the 2013 Regulations was triggered and that this appeal proceeds correctly.

#### The submissions

8. The Respondent's case is set out in written reasons drafted in an e-mail dated 21<sup>st</sup> February 2023. No appearance was made by the LAA at the oral appeal hearing on 4<sup>th</sup> January 2024. The Appellant's case is set out in Grounds of Appeal filed on or about 1<sup>st</sup> March 2023. The Appellant attended and made oral submissions at the hearing on 4<sup>th</sup> January 2024.

#### My analysis and conclusions

9. The Respondent, in summary, concluded that the documents referred to in the prosecution's section 16 statement would not satisfy the provisions of sub-paragraph 3(b) of Schedule 1. Ms Holmes stated:

Having considered counsel's representations, I agree that the documents are referred to in the section 16 statement but not served with that statement. You have also confirmed to me that the CPS relied on those pages at the hearing. Therefore, paragraphs 3(b)(ii) and 3(b)(iii) have been complied with. However, for the pages to be included as "evidence", all three statements of paragraph 3(b) must apply, and it is my view that those pages were not served either as a statement or an exhibit for the purposes of the trial, or the POCA hearing.

10. The Appellant, in summary, states that 304 pages of documentary evidence were served with the 10-page section 16 statements. The relevant documentation was cited and relied on at paras. 7, 9, 10 and 11 of the s.16 statement. This material was all uploaded by the prosecution to the Digital Case System ('DCS'). Specifically, it was uploaded on the same date to the POCA section of the DCS.
11. I am satisfied that the s.16 'evidence' page count should be 314, as asserted by the Appellant, and not 10, as assessed by the Respondent. The material served in this case satisfies the provisions of sub-paragraph 3(a) of Schedule 1 of the 2013 Regulations. It is clear to me that the words '*any attached annexes and exhibits*' in

sub-paragraph 14(3) should be construed practically in the light of evolving criminal practice and the use of the DCS. Insofar as material is now served by the prosecution by digital upload, relevant documentary material is rarely (if ever) appended to statements in the traditional sense, as specific, paginated exhibits. Instead, this documentation would invariably be uploaded as separate files. The key question, in my view, is whether a relevant correlation can be established between this documentation and the s.16 statement. In circumstances where the material is cited and referred to specifically in the s.16 statement, along with the fact that it was uploaded to the POCA section of the DCS at the same time as the s.16 statement, it seems clear to me that the '*any attached annexes and exhibits*' requirement is satisfied. Accordingly, in my conclusion, the 304 pages of documentary material uploaded with the 10-page s.16 statement satisfies the definition of 'evidence' under sub-paragraph 14(3) to Schedule 1 of the 2013 Regulations. This appeal is allowed.

#### Costs

12. The Appellant has been successful and is entitled to the return of the £100 paid to file his appeal. I assess and allow additional costs of £500 (+ any VAT payable).

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