



SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2020-CRI-000129 and SC-2020-CRI-000130

Dated: 11th January 2021

ON APPEAL FROM REDETERMINATION

REGINA v IVOSKUS and URBONAS

CROWN COURT AT SOUTHWARK

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

CASE NO: T20190475 and T20190475

LEGAL AID AGENCY CASE

DATE OF REASONS: 18th May 2020 (and duplicated thereafter)

DATE OF NOTICE OF APPEAL: 19th June 2020

APPLICANTS: Mr Simon Walters and Mr Charles Kellett, Counsel

The appeals have been dismissed for the reasons set out below.

**MARK WHALAN
COSTS JUDGE**

REASONS FOR DECISION

Introduction

1. Mr Simon Walters and Mr Charles Kellett, Counsel ('the Appellants') appeal the decisions of the Determining Officer at the Legal Aid Agency ('the Respondent') in relating to claims submitted under the Advocates Graduated Fees Scheme ('AGFS'). The issue in dispute concerns the Banding of Offences in version 1.2 (December 2018), as applied in Schedule 10 of the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'). The Appellants have claimed a fee based on Band 9.2 whereas the Respondent has assessed the case as Band 9.5.

Background

2. The Appellants represented Egidijus Ivoskas and Ovidijus Urbonas who were two of four defendants charged at Ipswich Crown Court on an indictment alleging that they were concerned in the production of a controlled Class B drug, namely cannabis. The prosecution alleged that all four were engaged in large-scale, commercial cannabis production. Police raided agricultural premises and seized a total of 2,758 cannabis plants being cultivated in a "well equipped growing environment".
3. Mr Robert Ostler, a Police Staff Investigator and Drug Expert Witness, signed a statement on 19th November 2019 in which he stated, inter alia, that:

The Drug Expert Witness and Valuers Association recommends a yield range of 28g-84g per plant (1oz-3oz) and, while I consider the lower figure to be a very conservative estimate, this is what I use. ...The yield from 2758 plants would be 77,224g (2,758oz) to 231,672g (8,274oz).

4. On 18th November 2019 all four defendants pleaded guilty to the one count on the indictment. They re-appeared on 6th March 2020 for sentence. Ivoskas was sentenced to 42 months' imprisonment and Urbonas was sentenced to 20 months' imprisonment.

The Regulations

5. Schedule 1 of the 2013 Regulations applies at paragraphs 1(7)/ (8) and 3 a categorisation of offences set out in a document entitled 'Banding of Offences in the Advocates Graduated Fees Scheme (AGFS) Version 1.2'. Table A categorises (albeit in fairly broad terms) the principle offences upon which a defendant is likely to be charged. Banding 9 includes drugs offences. The relevant extracts are as follows:

Band 9.2:

Class B

Importation S3 Misuse of Drugs Act/S170 Customs and Excise Management Act;

Or over 5000 pages of evidence;

Or weight over: 20kg amphetamine, 200kg cannabis, 5kg ketamine.

...

Band 9.5:

Class B

1000 pages of evidence;

Or weight over:

4kg of amphetamine, 40kg of cannabis, 1kg ketamine.

6. By applying a yield range of 28g-84g per plant, the prosecution estimated a total potential yield of 77kg to 231kg. Given the expert's preference for accepting the lower figure, the weight yield was estimated at 77kg, which put this case into Band 9.5.

Case references

7. I am referred by the Appellants to the decision of Costs Judge James in R v. Trung [2019] SCCO Ref: 244/19. In that case, the Master considered (albeit as a subsidiary issue) banding in a similar case involving the growing of cannabis on a commercial scale. In Trung, as in this case, a Police Drugs Expert Witness had estimated the potential weight yield from 478 cannabis plants, using the

same range of 28-84 grams per plant. The Appellants point out that Costs Judge James adopted (without addressing the issue directly) the top end of the range when approaching the question of banding.

The submissions

8. The Respondent's case is set out in Written Reasons dated 25th November 2020 (which seems to be a typing error, given that the appeals were filed in May and September 2020), and in Written Submissions drafted by Ms Francesca Weisman dated 15th July 2020. The Appellants' case is set out in their Grounds of Appeal. Mr Walters, representing both Appellants and Ms Weisman, for the Respondent, attended the telephone hearing on 4th December 2020.
9. The Respondent, in summary, submits that on the facts of this case, it was reasonable to adopt the lower weight yield estimate, equating to 77kg and, in turn, place the case within Band 9.5. Ms Weisman points out that during the substantive prosecution, the Crown cited and relied on the lower range estimate of 77kg. This contrasts with the facts in Trung (ibid), where the range was in issue during the proceedings. Trung is distinguished further on the grounds that banding was a small and apparently uncontested part of the issues considered on appeal. At no stage did Costs Judge James consider the procedure to be adopted in cases such as this or elect explicitly to prefer the upper to the lower weight range.
10. The Appellants, in summary, point out that the defendants were sentenced on the basis of cannabis cultivation in "industrial quantities for commercial use". The cannabis plants were grown in a "well equipped growing environment" with specialist equipment, fertiliser and chemicals. The police noted that the cannabis plants were all healthy with no sign of disease or pest damage. All these factors, in other words, pointed ultimately to a large yield. As such, following the approach set out in Trung, the court should accept an estimated weight yield of 231kg and, in turn, inclusion within Band 9.2.

My analysis and conclusions

11. It is clear – indeed it is essentially common ground between the parties – that considerations of weight for the purposes of banding should be approached by reference to the cannabis plants potential yield, as opposed to the actual size, weight or yield at the date of seizure. I cite this specifically as it was suggested (albeit obliquely) within some of the papers produced to me that the latter should be preferred to the former. Although a somewhat artificial approach, it is necessary to rely on potential yield, calculated by reference to a (really quite broad) weight range, as an alternative to obliging the police to engage in the (probably impossible) task of weighing and assessing the plants actually seized.
12. Given, therefore, that this process relies on an estimated weight yield, as opposed to actual weight recorded, it seems desirable to me that there be some common, predictable and consistent approach to use and application of the empirical calculations.
13. I agree with Ms Weisman that the decision of Costs Judge James in Trung (ibid) does not really assist the Appellants or the court in determining these appeals. In a complex judgment, the Master was concerned primarily with whether two indictments were heard consecutively or concurrently. She cited, without critical comment, the upper cannabis weight limit as this was the figure relied on by the prosecution.
14. Nor do I think that cases like this should be determined by subjective reference to factors relevant to each particular case. Drugs expert witnesses, when assessing cannabis plant weight yield, apply a range of 28g-84g per plant. This is, as noted already, a fairly broad range, so that the upper limit is exactly three times the lower range. This must invoke and allow for most of the variables (quality of stock, care of planting and cultivation, use of specialist fertiliser and lighting, presence or otherwise of pests or disease) relevant to the successful cultivation of a cannabis plant. It would place an impossible burden on Determining Officers if every such case had to be determined by reference by case specific factors that may or may not be correctly reported by the parties.

15. Notwithstanding the Crown's apparent tendency to choose either the top or bottom of the range in prosecutions of this type, it seems to me that as a rule of general approach, a fair, accurate and consistent method would be to use a median average of the estimated weight yield for the purposes of banding. The median in this case would be about 148kg, which is, in my conclusion, the figure that should be adopted on these appeals. As a weight of 149kg still places the case within Band 9.5, my conclusion is that these appeals should be dismissed.

TO:

Mr Simon Walters and Mr
Charles Kellett
Drystone Chambers
35 Bedford Row
London WC1R 4JH
DX332 LDE

COPIES TO:

Legal Aid Agency
DX10035 Nottingham

Ms Francesca Weisman
DX 328 London