SENIOR COURTS
COSTS OFFICE

Ref: BRO/SC-2020-CRI-000161

Dated: 19 January 2021

APPEAL FROM REDETERMINATION

REGINA v MEHMOOD

THE CROWN COURT AT LUTON

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

CASE NO: T20180187

LEGAL AID AGENCY CASE

DATE OF REASONS: 18 May 2020
DATE OF RECEIPT OF NOTICE OF APPEAL: 24 June 2020

APPELLANTS: Butt Solicitors

This appeal is unsuccessful for the reasons set out below

SIMON BROWN
COSTS JUDGE

REASONS FOR DECISION

1. The issue arising in this appeal is as to the correct assessment of the number of pages of prosecution evidence ('PPE') when determining the fees due under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known, and explained in more detail in the decision of Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the 2013 Regulations, the PPE (subject to a cap of 10,000 pages), and the length of the trial. The particular dispute in this case concerns the extent to which evidence served in electronic form should count toward the PPE.

2. At the hearing on 14 January 2021 the Appellant was represented by Mr. Cohen, counsel. The Legal Aid Agency ('the LAA') were represented by Mr. Orde, an employed barrister. I am grateful for the assistance I was provided by them, particularly given the difficulties that arose from an apparent failure to serve the Notice of Hearing on the LAA – a matter which was only picked up shortly before the hearing and which led to considerable time pressure when preparing for the hearing.

3. The Appellant represented the Defendant in criminal proceedings under a Representation Order dated 11 October 2018. The Defendant was charged with Being concerned in Supplying a controlled Class A drug contrary to section 4(3)(b) of the Misuse of Drugs Act 197q and Possession with intent to supply a controlled drug of Class A drug contrary to s.5(3) of the 1971. I understand that the Defendant accepted that he was in possession of the drugs but denied being a supplier. In the course of the investigation various mobile phones were seized from the Defendant the contents of which were investigated. The downloads were served on two separate discs LP/5 and LP5/A. A large number of messages were retrieved from the telephone and relied upon by the Prosecution.

4. The Determining Officer allowed 7677 pages of PPE. This comprised 70 pages of paper evidence and 7,607 pages taken from the download of the contents of the Defendant's mobile phone handset report (being 1027 pages from LP/5, and 6580 pages from LP/5A (the 'phone download report')) making a total PPE allowance of 7677 pages. In respect of exhibit LP/5A Mr. Orde calculated the allowances that had been made by the Officer as follows:

- Contacts/Contacts = pages 245-331 (86)
- Contacts/Social Groups = pages 332-371(39)
- Calls = pages 372-440 (68)
- Messages/SMS = pages 466-2005 (1539)
- Messages/MMS = pages 2006-2016 (10)
- Messages/Chat = pages 2017-6313 (4296)
- Web/History = pages 6327-6596 (269)
- Web/Bookmarks = pages 6597-6598 (1)
- Web/Searches = pages 6599-6618 (19)
- Files/Pictures = 240 pages (11% of the images/pages) (240)

By Mr. Orde's calculations this totalled 6,567 which he said differed from the figure reached by the Determining Officer, 6,580, but he did not press me to reduce the figure and was content to allow the higher figure stand.

5. The Appellant appeals that decision in respect of the electronic evidence seeking PPE of 10,000 pages. There is no dispute on the appeal that the material is to be treated as "served" under the scheme.

6. Paragraphs 1(2) to 1(5) of Schedule 2 of the 2013 Regulations provide as follows:

> *(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.*"

7. In SVS Holroyde J, then dealing with the issue as to whether material should be regarded as served under the scheme, said this:

> *It will of course sometimes be possible for the prosecution to sub-divide an exhibit and serve only the part of it on which they rely as relevant to, and supportive of, their case: if a filing cabinet is seized by the police, but found to contain only one file which is relevant to the case, that one file may be exhibited and the remaining files treated as unused material; and the same may apply where the police seize an electronic database rather than a physical filing cabinet. Sub-division of this kind may be proper in relation to the data recovered from, or relevant to, a mobile phone: if for example one particular platform was used by a suspect solely to communicate with his young children, on matters of no conceivable relevance to the criminal case, it may be proper to exclude that part of the data from the served exhibit and to treat it as unused material.*

8. When dealing with the issue as to whether served material should count as PPE, Holroyde J, said this:

> *"If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately.*
>
> *If an exhibit is served in electronic form but the Determining Officer or Costs Judge considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by Paragraph 20 of Schedule 2".*

9. The Crown Court Fee Guidance, which was updated in March 2017, prior to the decision in *SVS*, provides as follows:

> *"In relation to documentary or pictorial exhibits served in electronic form (i.e. those which may be the subject of the Determining Officer's discretion under paragraph 1(5) of the Schedule 2) the table indicates –*
>
> "*The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account 'any other relevant circumstances' such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the Defendant*."

10. At paragraph 38 of Appendix D, the Guidance gives examples of documentary or pictorial exhibits which will ordinarily be counted as PPE. They include –

"*Raw phone data where a detailed schedule has been created by the prosecution which is served and relied on and is relevant to the Defendant's case*.

Raw phone data if it is served without a schedule having been created by the prosecution, but the evidence nevertheless remains important to the prosecution case and is relevant to the Defendant's case, e.g. it can be shown that a careful analysis had to be carried out on the data to dispute the extent of the Defendant's involvement.
Raw phone data where the case is a conspiracy and the electronic evidence relates to the Defendant and co-conspirators with whom the Defendant had direct contact.

11. In his decision Holroyde J also cited, with apparent approval, part of the decision of Senior Costs Judge Gordon-Saker in *R v Jalibaghodelezhi [2014]* 4 Costs LR 781. That decision concerned a Funding Order, which was in force at the material time and is, in material respects, similar to the 2013 Regulations; the relevant passages are at paragraph 11:

"The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically 'taking into account the nature of the document and any other relevant circumstances'. Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. <u>It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper.</u> So, in a case where, for example, thousands of pages of raw telephone data have been served and the task of the Defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count." [my underlining]

12. Even if material is not appropriately to be regarded as PPE then it may be remunerated by a special preparation fee, pursuant to Para. 20 Schedule 2 of the 2013 Regulations which provides, so far as is relevant, as follows:

Fees for special preparation

(1) This paragraph applies in any case on indictment in the Crown Court—

(a) where a documentary or pictorial exhibit is served by the prosecution in electronic form and— (i) the exhibit has never existed in paper form; and (ii) the appropriate officer does not consider it appropriate to include the exhibit in the pages of prosecution evidence; or

…

(2) Where this paragraph applies, a special preparation fee may be paid, in addition to the fee payable under Part 2.

(3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable—

(a) where sub-paragraph (1)(a) applies, to view the prosecution evidence; and

(4) A litigator claiming a special preparation fee must supply such information and documents as may be required by the appropriate officer in support of the claim.

(5) In determining a claim under this paragraph, the appropriate officer must take into account all the relevant circumstances of the case.

13. A Special Preparation Fee is based on time actually spent; that is to say, the number of hours the Determining Officer considers reasonable to view the evidence other than that allowed as PPE. The following passage taken from *R v Sana* [2016] 6 Cost LR 1143 indicates the approach to be taken:

> "*A line has to be drawn as to what evidence can be considered as PPE and what evidence we considered the subject of a special preparation claim. Each case depends on its own facts. The regulations do not state that every piece of electronically served evidence, whether relevant or not, should be remunerated as PPE. Quite the contrary, as electronically served exhibits can only be remunerated as PPE if the Determining Officer decides that it is appropriate to do so, taking into account the nature of the documentation and all the relevant circumstances*."

14. To my mind this permits a Determining Officer, and a Costs Judge on appeal, to allow, for instance, checking of material for potential relevance by way of a Special Preparation Fee.

15. There are four grounds of appeal. It is convenient to take Grounds 1 and 2 together

Grounds 1 and 2

16. The Appellant argued that the Determining Officer was wrong to treat the material as being capable of being subdivided. Mr. Cohen told me that the reference in the Notice of Additional Evidence was to the full pagination of the exhibits namely 11,943 pages which he says indicates that all the pages were relevant. Moreover, as I understood the argument, so long as one page within a disc were served the whole of the rest of the material should be allowed. He further argued that Exhibit LP/5 was a single "*document*" for the purposes of the test in subparagraphs 1(4) and 1(5) of Schedule 2 of the 2013 Regulations: and hence on this further basis it could not be subdivided so that 10,821 pages of the exhibit should be allowed.

17. It seems to me to clear from the terms of Regulation 1 (5) and the guidance set out above that it is not of itself enough for the material to count as PPE that it be 'served'. There is a further test to be applied, as I have set out above, requiring the Determining Officer, and on appeal, the Costs Judge, to exercise a discretion as Holroyde J referred to above, which is qualitative in nature, as to whether to allow the document as PPE. It is plain, moreover, that reference to the pagination of the download in the Notice was not an indication that all the material in the exhibit is relevant rather than an identification of the total length of the exhibit. As Holroyde J indicated an exhibit can include a very considerable amount of material not relied upon by the Prosecution and which is wholly irrelevant.

18. Further, I think it is clear, from the provisions themselves and the guidance set out above, that an electronic download which might be in PDF form is not to be equated with a single document such that there is no discretion to subdivide it. It is evident that if Mr. Cohen were correct it would substantially distort the operation of the fee scheme, since telephone downloads often, if not generally, contain vast quantities of obviously irrelevant material- be it technical metadata or images or photographs of personal nature (selfies etc) or pre-loaded material such as national flags. It seems to be clear that, on the contrary, the more obvious meaning of the Regulations is that they require the Determining Officer, and the Costs Judge on appeal, to view the download not as one document but rather like a filing cabinet (to use the analogy of Holroyde J), so that a download may consist of various sections and documents. This is so even if a download may be described as a "report", since a report may consist of many pieces of written, printed, or electronic matter each of which would satisfy the definition of document.

19. It has previously been argued, somewhat less ambitiously, that sections of material in PDF or other electronic forms are not capable of subdivision. This was not however Mr. Cohen's argument at least under Grounds 1 and 2, as I understood it. I have previously rejected this argument for the reasons given in R v *Mucktar Khan* SCCO (2019) Ref 2/18, as Mr Cohen was aware, and there is no need to repeat the reasons set out in that decision here. I was not expressly asked to re-consider the reasons I gave in that case and I was not in any event persuaded that I should do so. The reasons given in that decision however support my conclusions in this case.

Ground 3

20. Mr. Cohen further argued that the Determining Officer was wrong not to have included further material in electronic form which was in Excel format. I understood that there was material in both formats on the discs served. The LAA asserted that the material was duplicated and that the Officer was correct to make allowances of pages in respect of the material in PDF format only. Mr.Cohen did not point me to any difference in the substance of the material found in the two formats. His point that that duplication of the material could not ascertained without full consideration of the material and therefore it is appropriate for that material to be remunerated as PPE, reliance being placed on the decision of Master Whalan in the case of *R v Everett & Others* SCCO Ref: SC – 2019- CRI- 000038, 224/19, SC – 2019- CRI – 000003, SC – 2019 – 000017 and 157/19.

21. For the reasons I gave in *R v Daugintis and others* SCCO Ref: 154/17. 155/17 and 177/17 at [15], I do not accept that it would be appropriate to allow what is essentially the same material to count in both formats. In considering whether to allow material to count as PPE the Determining Officer and the Costs Judge have a discretion which is to be exercised "*taking into account the nature of the document and any other relevant circumstances*". Duplication of material seems to me to be a material and relevant circumstance. Further, it seems to me clear that in this case the material plainly did not require detailed consideration in both formats and to count the same material twice would give rise to a fee which would be disproportionate to the work reasonably required. Having looked at the material in both formats I was satisfied on the material provided to me that the nature of the duplication would have been readily apparent or at least apparent without the necessity to consider the material twice in both formats with the degree of proximity that is appropriate for all the material to be considered as PPE

22. It was argued, in the alternative, that even if it were appropriate to count the material in only one format, the page count is more appropriately reflected by the page count in Excel format. However, again referring to the reasoning and observations in *Daugintis*, it seemed that PDF format is a more accurate approximation of pages of paper evidence and a more accurate and reliable indication of the degree of consideration which would have been required, if the relevant material had been served on paper.

23. Accordingly I would also reject this ground of appeal.

Ground 4

24. Mr. Cohen argued that there were additional sections of LP/5 that ought to be added to the PPE, in particular the Web Cookies, Documents and Photographs sections.

-Web Cookies- 456 pages:

25. The information on these pages relates to internet browsing on the relevant telephone. I understand that it was the Defence case that the Defendant was involved in car dealing, this being an explanation, as I understood it, or what might have been said to be his expensive lifestyle. It was said that relevant websites might tend to suggest content that was relevant to supporting his Defence at trial. However the Officer has already allowed the Web History section which might be assumed to have contained the relevant browsing history. It was said by Mr. Orde that it was difficult to see how the information which is in the Web Cookies sections, which essentially contained technical metadata, could assist the Defendant. Mr. Cohen's response to that was that it was necessary to check this section for the possibility that the Defendant may have deleted material from the Web History. However even accepting that this may be so, it seemed likely that any checking of this material was unlikely to have required the close consideration necessary for such material to count as PPE. It was not suggested that the checking of any material had in fact revealed any material deletion and it seemed to be that checking of this sort for potentially relevant websites would be undertaken at a glance, or relatively close to it. To my mind the consideration

of this material is, as the Determining Officer indicated, more appropriately considered as part of Special Preparation Fee, not as PPE.

-Documents - 132 pages:

26. It is said any documents on the device for which the document title might tend to suggest an involvement in car dealing would be of assistance to the Defence. In addition, it would be necessary to know whether there were any documents which might suggest involvement in the supply of drugs. However, again it is clear that the information in this section is essentially metadata which is unlikely to provide itself any things of relevance. I accept that it needed to be checked. It was not clear to me that anything of relevance in fact emerged. . Mr. Cohen urged me to accept that there was one entry with the file name "com.apple.vehiclePolicy.DNDMode.plist" which might have indicated something that could have been relevant material. However he said he was not instructed in the case and it appears no request was made to see the document. For my own part it was difficult see that this entry of itself would have provoked much detailed consideration and the link between any vehicle insurance policy (if that is what it was) and the issues in the case was somewhat remote. In any event, looked at overall I was not persuaded that either this particular page or the section as a whole should be included as PPE. It seems to me that a Special Preparation Fee is more appropriate (and indeed neither side seemed to demur from the suggestion that it might provide more generous remuneration to the Appellant than allowing one more page of PPE).

-Photographs

27. The Determining Officer considered that the majority of images in this section fell within the following broad categories:

- Selfies
- Photos of friends/family
- Photos of animals
- Photos of children
- Internet jokes/memes/quotes
- Images of celebrities/politicians
- Pre-installed graphics/logos
- TV/Movie/Album cover imagery

28. Applying an approach which he considered had been endorsed in previous Costs Judge decisions such as *R v Sereika (2018) SCCO Ref 168/1* the Determining Officer has allowed 11% of the 'pages; in PDF format for this section.

29. In *Sereika* Senior Costs Judge Gordon- Saker said as follows:

> *"In this particular case, the exercise of that discretion is not easy. On the one hand the prosecution chose to serve this evidence as an exhibit. The solicitors were under a professional obligation to consider it. Given the nature of the defence, that the phone was used by others, it is not difficult to conclude that the solicitors will have wished to look for photographs indicating that use. On the*

other hand it is unlikely that the vast majority of those photographs will have been relevant to that task. It would seem unlikely that the solicitors will have looked in detail at each of the 20,608 images served on disc. Most will have required a glance or less.

In short, it is clear that the evidence on the phone was central to the case against Sereika and his assertion that others had used the phone was central to his defence. The solicitors were required to consider the phone evidence carefully. However, much of the evidence on the phone would not require consideration.

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".

30. Mr, Cohen submitted that in principle it is it is artificial to allow only a portion of the pages as relevant given that, it was said, it is only after viewing the material that one can ascertain which images are of relevance in this case. He accepted however that if in principle the approach of the Senior Costs Judge in *Sereika* were right the allowance of 11% was a reasonable one.

31. It seems to me that the submission of Mr. Cohen overlooks the guidance given in SVS and the need for a qualitative assessment of the material. In respectful agreement with the approach of the Senior Costs Judge in my judgement the Determining Officer undertook the exercise in accordance with the provision and the guidance on it. As appears not to be in dispute (and as is not untypically the case) the preponderance of images in this section were wholly irrelevant to the case, something which would have been readily apparent on a relatively cursory examination of the images. Accordingly, I reject this ground of appeal.

Conclusion

32. I would add that the decision of the Determining Officer is lengthy and considered. Indeed it is notable that the approach of the Determining Officer has been 'broad brush' in the sense that he has is allowed many of the sections of the material without breaking down those sections and disallowing irrelevant material (as might have been the case with respect to some of the sections he has allowed). Even if there were some proper basis for arguing a slight modification upwards of the page count in respect of some sections it might be open to the LAA to offset such change by readjustment of some of the other sections where full allowance has been made. Inevitably, given the nature of the task, the conclusions reached on PPE are based on a broad assessment which cannot avoid an element of 'rough' justice. Overall I am quite satisfied that the allowance of the PPE was well within the correct range and should not be adjusted upwards.

33. Accordingly, this appeal is dismissed and I will leave it to the parties to agree a timetable for the submission of a claim for a Special Preparation Fee,

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