



Neutral Citation No. [2023] EWHC 3037 (SCCO)

Case No: T20217283

SCCO Reference: SC-2023-CRI-000015

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 21st November 2023

Before:

COSTS JUDGE WHALAN

R

v

MUHIBUR RAHMAN

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

Appellant: Mr Robert Smith, Counsel

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

The appropriate additional payment, to which should be added the sum of £100 paid on appeal, should accordingly be made to the Appellant.

COSTS JUDGE WHALAN

Introduction

1. Mr Robert Smith, Counsel ('the Appellant') appeals against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in relation to a claim submitted under the Advocate's Graduated Fees Scheme ('AGFS'). The appeal raises an issue relating to the calculation and payment of a 'hardship payment' made to another advocate, and the calculation of the final graduated fee of the Appellant.

Background

2. The Appellant represented Mr Muhibur Rahman ('the Defendant') who was charged with five co-defendants at Manchester (Minshull Street) Crown Court on an indictment alleging five counts of kidnapping, conspiracy to kidnap, ABH and assault by beating.
3. On 2nd October 2019 the case was listed for a pre-trial preparation hearing ('PTPH') and the Defendant pleaded not guilty. The trial was listed on 27th January 2020.
4. On 4th December 2019, at a further PTPH, the trial was re-listed for 18th May 2020, as further defendants had been added to the indictment.
5. At a succession of hearings between May 2020 and April 2022, the trial was further adjourned, and it was eventually set down to commence on 11th April 2023.
6. On 1st September 2022, the case listed for a hearing on 9th November 2022, for the court to hear 'Goodyear application'. At the hearing on 9th November, the Judge gave a Goodyear indication, whereupon the Defendant pleaded guilty to one count of kidnapping.
7. On 19th December 2022 he was sentenced to 3 years' imprisonment.
8. The Defendant was represented originally by Ms Lauren Saertz. She returned the brief in October 2019, when Mr Patrick Cassidy was instructed. Mr Cassidy represented the Defendant until October 2020, when the case was returned to Ms Nicola Gatto. Ms

Gatto eventually returned the brief and Mr Smith, the Appellant, was instructed in or about November 2022.

9. On 9th May 2020, Mr Cassidy submitted to the Respondent a ‘hardship claim’ for the fees incurred up to the point of his withdrawal, namely about October 2020. The Determining Officer assessed that the sum due to him was £5264.18 + VAT. The Appellant submitted his claim to the Respondent on 9th January 2023, after the conclusion of the case. He was paid a total of £151.20, comprising £126 + VAT. (He was, I understand, also paid the fees owing to Ms Gatto, comprising £455 + VAT.)

The Regulations

10. The Criminal Legal Aid (Remuneration) Regulations 2013 (‘the 2013 Regulations’), as amended in 2018, apply. I am referred to Schedule 1, Part 1 and the definition of ‘Case’, paragraphs 2 and 4, regarding the definition of ‘trial advocate’ and ‘main hearing’ and paras 21, 22 and 26 relevant to the assessment of ‘hardship payments’. The hardship payments provision was introduced during the pandemic and I understand that the provision ended on or about 6th December 2021.

The submissions

11. The Respondent’s case is set out in Written Reasons dated 30th January 2023 and in Submissions drafted by Ms Francesca Weisman, a Senior Legal Adviser at the LAA, on 11th October 2023. The Appellant’s case is set out in Grounds of Appeal. The Appellant attended and made oral submissions at the hearing on 13th October 2023.

My analysis and conclusions

12. The Respondent’s case is summarised at para. 20 Ms Weisman’s Written Submissions. First, it was appropriate to make the hardship payment to Mr Cassidy in or about May 2020, as “there was clear regulatory provision for him to make a claim for an interim hardship payment in the circumstances at the time”. Second, the regulations provide that when the final case payment was submitted and assessed, it was appropriate to deduct the amount of that interim payment from any balance of payment due, with consequential discussion or dispute to be settled by the advocates concerned. In other

words, insofar as the Appellant is entitled to further payment (and this fact seems to me to be axiomatic), the burden falls on him to recover it from Mr Cassidy.

13. The rationale for the calculation of the payment made to Mr Cassidy in May 2020 is explained at para. 7 of Ms Weisman's submissions:

The Determining Officer assessed that the sum due was £5,264.18 plus VAT, on the basis that there had already been a PTPH at which a not guilty plea had been entered, and on the face of it the matter was proceeding towards trial, and so the minimum case fee payable would be a cracked trial fee.

14. The Appellant, in summary, accepts that Mr Cassidy was entitled to submit a hardship claim in May 2020, but argues that "where the totality of his own claim and the interim claim exceeded the total case fee, it was appropriate to recoup payment as appropriate from the earlier instructing advocate". The burden of recoupment, in other words, should fall on the Respondent and not the Appellant. Further, he submits "that the interim payment made to Mr Cassidy was calculated in error and overpaid, given that he received a cracked trial fee despite withdrawing from the case prior to the main hearing taking place". Instead, submits the Appellant, the DO ought to have paid Mr Cassidy a series of fixed fees in accordance with hearings attended up to that point.
15. The Appellant's second point, it seems to me, is correct undoubtedly. Mr Cassidy was instructed until about October 2020, and the trial listing on 18th May 2020 was adjourned until (ultimately) 11th April 2023. It is hard to see how, at that point, the case could be classified as a 'cracked trial'. It wasn't; the Defendant had pleaded not guilty and his trial listing had been adjourned. Paragraph 21(5) of the 2013 Regulations states, inter alia, that the "*amount of any hardship payment is at the discretion of the appropriate officer, but must not exceed such sum as would be reasonable remuneration for the work done by the representative in the proceedings up to the date of the application*". Up until May 2020, when Mr Cassidy submitted his hardship claim, not guilty pleas had been entered and the trial had been listed, but then adjourned. It was not a cracked trial and Mr Cassidy's fees should not have been calculated as such. I find, therefore, that the Appellant's submission that Mr Cassidy received an overpayment is correct.

16. Accordingly, it seems to me that the Appellant should be classified as the ‘trial advocate’ who conducted the ‘main hearing’ in the case. It follows that he should have received the main payment. Having represented the Defendant at the substantive hearing in November 2022, his fees should certainly not have been limited to £126 + VAT. (This reality is, I think, accepted by the Respondent.) In these circumstances – namely where an interlocutory advocate has received a payment calculated incorrectly by the LAA – it should not be the responsibility of the trial advocate to attempt to recoup this overpayment. It is a matter for the Respondent as to whether it now seeks to recover monies from Mr Cassidy. I am satisfied, and I find, that the case fees should be recalculated and paid to the Appellant, less the value of the standard appearance fees payable to Mr Cassidy. The appeal is allowed.

Costs

17. The Appellant should receive additionally the £100 paid to lodge the appeal. No other claim for costs is made.

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