SENIOR COURTS
COSTS OFFICE

SCCO Ref: 205/19

Dated: 10 December 2019

**APPEAL FROM REDETERMINATION**

**REGINA v BAKER**

THE CROWN COURT AT WOOLWICH

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

CASE NO: T20157361

LEGAL AID AGENCY CASE

DATE OF REASONS: 2 July 2019
DATE OF RECEIPT OF NOTICE OF APPEAL: 18 July 2019

APPLICANTS/APPELLANTS: Advocate,
GT Stewart Solicitors

This appeal is unsuccessful for the reasons set out below.

**SIMON BROWN**
**COSTS JUDGE**

## REASONS FOR DECISION

1. The Appellant is appealing a decision of a DeterminingOofficer in respect of the fees claimed by an employed advocate under the Advocate's Graduate Fee Scheme. The Advocate is a former employee of GT Stewart Solicitors and Advocates and they bring the appeal (no issue arising as to their locus to do so). I shall refer to them as the Appellant.

2. The issue arising in this appeal is as to 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 detailed 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 telephone evidence served in electronic form should count toward the PPE.

3. At the hearing on 5 December 2019 the Appellant was represented by Ms. Krudy, solicitor of GT Stewart Solicitors and Advocates. The Legal Aid Authority ('the LAA') were represented by Mr. Rimer, an employed barrister.

4. The Defendant had the benefit of a Representation Order dated 7 August 2015. She was charged with conspiracy to conspiracy to commit robbery and assault by beating and was found guilty after a full trial of both counts. The Defendant Zubair Shakeel pleaded guilty to the conspiracy offence and provided a basis of plea in which he blamed this Defendant. The Prosecution's case was the Defendants were equally involved in the conspiracy and each had equal (leading) roles to play.

5. The disputed material was contained on the download from this Defendant's mobile telephone. At the conclusion of the case the Appellant submitted a claim for their Graduated Fee under the scheme. In the relevant determination for these purposes, the Determining Officer allowed PPE of 356 pages in respect of the paper evidence and 419 pages of relevant electronic evidence. The Appellant appeals that decision seeking PPE in respect of the electronic evidence of 1,097 pages; that is, a further 678 pages.

6. There is no dispute that the material is to be treated as served under the scheme and at least some of the telephone evidence was central to the case against the Defendants. All the communications data (consisting chats, calls messages and Device information) on the telephone downloads, has counted towards the PPE. What is disputed are other sections referred to as SIM Data, Acquisition information, User Accounts, File System, Calendar and Wi-Fi Networks/Web History.

7. The Determining Officer held that the balance of the information which he disallowed consisted were mostly what is referred to as generic or technical information about the phone and the calendar entries. He says he received no submissions as the relevance of this material in the sections SIM Data, Acquisition information, User Accounts, and Wi-Fi Networks/Web History. He said that the vast majority of the material in the section referred to as File Data(or Systems) consisted of image files (being personal photographs of children, extended family holiday snaps, photographs of food, sporting events and celebrities alike, cached file (internal databases), configurations (that is preferences and settings) and Cookies. The Determining Officer accepted that a Special Preparation Fee might be sought by the advocate in respect of the material not allowed as PPE

**The Regulations**

8. Paragraphs 1(2) to 1(5) of Schedule 1 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.*

9. The Appellant argued that the Determining Officer was wrong to treat the material as being capable of being subdivided. Ms. Krudy's argument appeared to be that so long as one page within a disc (or presumably) a memory stick were relevant the whole of the rest of the material should be allowed.

10. I reject this argument. It seems to me to clear from the terms of Regulation 1 (5) that it is not of itself enough for the material to count as PPE that it be 'served'. It is also clear that downloaded material need not be regarded as one integral whole, as a witness statement would be and that when exercising the discretion under paragraph 1(5) a qualitative assessment of the material is required having regard to the guidance in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *SVS* (including in particular para. 44 to 48), and the Crown Court Fee Guidance (updated in March 2017) and I have considered them in this context.

11. In his judgment Holroyde J, when dealing with the issue as to whether served material should count as PPE, 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".*

12. 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*."

13. 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*.

14. 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. 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. 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]

15. It is evident that if Ms. Krudy 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. It seems to clear that, on the contrary, the Regulations require the Determining Officer, and the Costs Judge on appeal, to view the download not as one document (which it plainly is not) but rather like a filing cabinet (to use the analogy of Holroyde J), so that a download may consist of various sections and documents.

16. Ms. Krudy also argued that the Determining Officer did not deal at all with a point raised by the Appellant that the material was of crucial importance to the Defendant's case despite it being phone download relating to a co-defendant. It is submitted that given this was a conspiracy where, it was said, the only evidence against the Defendant was the download of a co-defendant's phone. Given that the LAA have paid the co-defendant's representative in full, the refusal to pay the Appellant's fee on the same basis, is characterised as unjustifiable.

17. Whether or not the material evidence was the only evidence against this Defendant, it seems to me clear that the Determining Officer did have regard to the importance of the evidence. He allowed a significant amount of the evidence from the relevant telephone download but he was not satisfied that all the material was sufficiently relevant or required such close consideration as to make it appropriate to include it within the PPE. That is a different point which I will deal with below. The fact that others may have been paid on the basis that all the material was to be regarded as PPE is not determinative. The Determining Officer had to make the decision on the

material before him. It is clear that he was unable to justify the inclusion of all the material, having, in his view, been provided with insufficient basis to justify the inclusion of this material.

18. Further, Ms. Krudy argued that the material should be included because it would previously (prior to 1 April 2012) have been printed. It seems to be clear however that the question as to whether the material would have been printed is merely a factor to be taken into account and is not determinative as to whether or not the material should be included in the PPE, (see R v *Napper* [2014] 5 Costs LR 9470. Moreover, it is difficult to see how such an approach might now properly address the statutory criteria. In any event I was not satisfied that the disallowed material, if it it did not contain anything of any relevance, would have been printed and served in paper form prior to 1 April 2012.

19. Even if the material is not appropriately to be regarded as PPE then it may be remunerated by a Special Preparation fee, pursuant to provisions in Schedule 1 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.*

20. Such a fee would be based on time actually spent; that is to say, the number of hours the Determining Officer considers reasonable to view the evidence. The LAA accepts much of the material in this case, which I consider has been served, should be compensated by such a fee. I take the following passage from *R v Sana* [2016} 6 Cost LR 1143:

"*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 side is that it is appropriate to do so, taking into account the nature of the documentation and all the relevant circumstances*."

I do not accept Ms. Krudy's argument that it is unduly onerous for an Applicant to be required to be keep a note of time spent undertaking work that might be subject of any Special Preparation fee claim. This is particularly so, if the time taken were substantial.

21. I would accept Ms. Krudy's argument to the effect that the determination of the PPE is not done with the benefit of hindsight, and that to the extent that a document needed to be considered closely, even though it did not in the event prove to be of relevance, it may be included in the PPE. As the decision of Holroyde J in *SVS* makes clear the approach is multi-factorial but I agree that properly read the rules cannot require Costs Judges and Determining Officers to conduct mini- trials on relevance using the benefit of hindsight.

22. However, having considered the material itself, I am not satisfied that the disputed material (being material on a co-defendant's telephone) did require close consideration even discounting hindsight. All the communications data has been allowed, this include all pages recording telephone calls and all SMS and WhatsApp messages even though it is clear that substantial sections of this material would not have required close consideration (and thus on Mr. Rimer's case it might be regarded as an already generous assessment.)

23. I was not satisfied in any event that the Determining Officer's description of the images and other data in the File System section and eslewhere was inaccurate. Indeed Ms. Krudy's case was not that any of the material did prove to be of relevance to any issue arising, merely that it needed to be checked. Her point was a general one, namely that there might be material served in paper form that did not need in fact to be considered closely, such as pages which might relate to a co-defendant or were not otherwise relevant; such pages would not require any close consideration, so that even if the pages in question in this case did not require any close consideration, nevertheless no lesser (or greater) scrutiny was required of the electronic evidence than of some evidence which was served on paper. I think that clearly overlooks what was implicit in the decision in *R v Jalibaghodelezhi*, and confirmed in *SVS*, that evidence served in paper form is assumed in general to require relatively close consideration.

24. In any event applying the relevant factors (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) having looked at the relevant material it was not clear to me that any issue arose requiring consideration by the advocate of the SIM Data (one page) or any other meta data relating to Facebook accounts or the like, or that the extraction data needed to considered closely, or indeed that there was anything on the Calendars (one or two pages) in this case, that required close consideration; similarly in my

judgment the data on the Files sections. In short I was not satisfied that consideration of the disputed material would have been more than cursory.

25. In any event I was not satisfied that the allowance of 419 pages already allowed in respect of the electronic evidence for the advocate should be increased. Instead, it seems to me, consideration of the disputed material is more appropriately to be compensated by a Special Preparation fee.

26. Accordingly this appeal is dismissed and I will leave it to the parties to agree a timetable for the submission of a Special Preparation fee.

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