Neutral Citation No. [2022] EWHC 2841 (SCCO)

Case No: 202001396

SCCO Reference: SC-2022-CRI-000072

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 2/11/2022

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Walker
Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

DAVID EMANUEL KC

Appellant

-and-

THE LORD CHANCELLOR

Respondent

1. The issue arising in this appeal was whether the Determining Officer of the Criminal Appeal Office was correct in his assessment of the fees due to the Appellant in respect of his representation of the Defendant in an application for appeal determined by the Court of Appeal.

2. At the hearing on 27 October 2022 the Appellant represented himself. There was no attendance on the part of the Respondent (the Criminal Appeal Office) and I received no representations from them.

Background

3. The Defendant was convicted of murder on 22 October 2004 in the Crown Court at Stafford. His application for leave to appeal against conviction was refused by a Single Judge on 25 July 2006 and, on renewal, by the Full Court on 5 March 2007. On 29 October 2014 he applied to the Criminal Cases Review Commission (CCRC) for a review of his conviction supported by a written advice from fresh counsel, the Appellant, dated 3 October 2014. On 26 September 2017 the CCRC refused to refer the conviction back to this Court, a decision challenged by way of judicial review hearing at which he was represented by the Appellant. Following the Judicial Review judgment on 24 May 2018 the CCRC agreed to undertake a new review of the conviction and referred the case to the Court of Appeal on 15 May 2020. Legal Aid was granted for Mr Emanuel QC to prepare and present the appeal which was heard on 10 December 2020.

4. The Prosecution case was that the Defendant had unlawfully assaulted the alleged victim causing brain injury leading to her death. The issue arising in the appeal with I am concerned was as to the cause of death, in particular whether death resulted from an accidental fall or from an assault. It was contended in the appeal that the Judge's direction on causation and fresh medical evidence might undermine the prosecution, as to which see below. It is clear that the appeal was contested and that the appeal was successful (see [2021] EWCA Crim 3) and a re-trial was ordered. I am told that at the re-trial the defendant was subsequently acquitted on submission after the prosecution case. That decision was upheld on a further appeal. By that time the Defendant had served some 17 years in prison.

5. The Appellant claimed a fee of £12,210 for work on the Grounds of Appeal, other written work and preparation. This work was said to have taken some 55.5 hours and was claimed at £220 per hour. He also claimed £450 for the directions hearing and £750 for attendance at the appeal hearing. The total claim was for £13,410.00 plus VAT.

6. It appears that the Determining Officer considered that the time spent in general preparation and in work on the grounds and other written work was reasonable. However, as appears from the reasons he gave in a letter of 17 May 2022, he reduced the fees claimed on the basis that that £220 per hour was too high and substituting for that a rate of £200. He disallowed the fee for attendance at the appeal hearing; he states that he allowed an element for attendance at court in what he referred to as the 'basic' fee (that is, the fee for other preparation work, claimed at £220 per hour). He allowed the fee claimed for the directions hearing, albeit at a somewhat reduced sum.

7. The Appellant appeals the reduction in his hourly rate and the disallowance of his fee for attendance at the appeal hearing.

8. Paragraph 1 of Schedule 3 of the Criminal Legal Aid (Remuneration) Regulations 2013 provides as follows:

> *(1) The provisions of this Schedule apply to proceedings in the Court of Appeal.*
>
> *(2) In determining fees, the appropriate officer must, subject to the provisions of this Schedule—*
>
> > *(a)take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and*
> >
> > *(b)allow a reasonable amount in respect of all work actually and reasonably done*

9. Paragraph 9 (1) of Schedule 3 prescribes certain rates in respect of work carried out by advocates including what is described as a Basic Fee of £545 per case and an hourly rate of £33.50 for, inter alia, attendance at conferences.

10. Paragraph 9 (4) provides:

> *Where it appears to the appropriate officer, taking into account all the relevant circumstances of the case, that owing to the exceptional circumstances of the case the amount payable by way of fees in accordance with the table following sub-paragraph (1) would not provide reasonable remuneration for some or all of the work the appropriate officer has allowed, the appropriate officer may allow such amounts as appear to the appropriate officer to be reasonable remuneration for the relevant work.*

The hourly rate

11. The Determining Officer has accepted that the prescribed rates do not apply and, by implication, that there were exceptional circumstances. The Appellant contends, implicitly, that the amounts the Determining Officer has allowed do not amount to reasonable renumeration in the circumstances.

12. Guidance as to the correct approach in assessing counsel's fees was given by Pennycuick J in *Simpson's Motor Sales (London) Ltd v Hendon Corporation* [1965] 1 WLR 112. He said (at 118 E-F):

> *"... [O]ne must envisage an hypothetical counsel capable of conducting the particular case effectively but unable to or unwilling to insist on the particular high fee sometimes demanded by Counsel of pre-eminent reputation. One must then estimate what fee this hypothetical character would be content to take on the brief.... There is in the nature of things no precise standard of measurement..."*

13. In a determination of the costs to be paid out of central funds under s 19 of the Prosecution of Offenders Act 1985 in *Evans v The Serious Fraud Office* [2015] EWHC 1525 (QB) the above passages were cited by Hickinbottom J (as he then was). He also noted that Pennycuick J went on to say that the assessment of a fee would be fact-specific ("*the same measure may not always be applicable in the infinite variety of cases which can arise*", at page 118G); and that the appropriate figure must be assessed by the Master or Judge "*using*

his knowledge and experience" (also at page 118G). Hickinbottom J makes reference to a number of other authorities which he describes as "*necessarily fact specific*" and therefore of limited assistance, although he held that the following points could be drawn from them:

> *i) In the assessment of publicly funded work, it is not appropriate to use privately funded comparators: because privately funded work is essentially market driven, whilst publicly funded work is closely regulated (The Lord Chancellor v John Charles Rees QC [2008] EWHC 3168 (QB)). Similarly, it is not appropriate to use publicly funded comparators when assessing privately funded costs (see R v Orrow [2011] 3 Costs LR 519 ("Orrow").*
>
> *ii) Nor do I consider that the time generally allowed for reading documents in Very High Cost Crime Legal Aid cases provides a reliable comparator for reading and digesting the documents in this case, which comprised to a large extent highly technical commercial, planning and property documents.*
>
> *iii) The courts have recognised that those practising in (e.g.) the Commercial Court can command higher fees than those practising in the criminal courts (Higgs v Camden [2003] EWHC 15 (QB) at [49] per Fulford J as he then was); and, indeed, generally those practising in criminal work can reasonably expect to receive less payment for their work than their civil counterparts (R v Martin [2007] 1 Costs LR 128).*
>
> *iv) The fact that insurers have monitored and approved counsel and solicitors' charges as a case progressed is a factor that the court may take into account in determining whether those charges are reasonable, and indeed may be an important factor (Orrow).*
>
> *v) In the case before me, some of the leading criminal counsel involved were paid at rates of £600–750. Looking at the cases as a whole, they do not support the proposition that rates at that level equate with "the going rate" for even the most complex of criminal cases. Whilst the facts were very different, in R v Zinga [2014] EWCA Crim 1823 , a highly complex and lengthy prosecution, an hourly rate of £220 was determined reasonable for the senior junior for the private prosecutor — particularly experienced in the field — being the equivalent of not more than £440 for a leading counsel. In Orrow, an hourly rate of £400 was approved for a privately instructed defence leading counsel in a corporate manslaughter case. Mr Rees QC says, from his own experience, that an hourly rate of £850 has been charged in criminal cases, including by the leading counsel who acted for the respondent in The Lord Chancellor v John Charles Rees QC; but in none of the reported cases to which I was referred does a figure of £500 or more appear to have been approved on an assessment.*

14. He went to say:

> *"26 Whilst complexity of course may warrant a higher fee, where a case involves particularly heavy hours over a lengthy period of time, that may warrant a reduction in the hourly rate to reflect the likely if not guaranteed hours involved. On the other hand, the rate must also reflect the inability of counsel to take on other work during the relevant period, if that indeed be the case."*

15. Having reviewed all the relevant authorities, Hickinbottom J considered that the reasonable hourly rates to be awarded to leading and junior counsel were £480 per hour for leading counsel and £240 per hour for junior counsel. He stated:

"*I consider those rates are "top end" rates for criminal work and, whilst I do not say that in another case they might not be exceeded – although, I suspect, not by very much – they take into account the special experience and expertise of particularly eminent leading counsel, from which flows more efficient working than would be the case with less experienced and expert counsel*".

16. It is important to remember that the work in the case that I am dealing with was publicly funded work.

17. I have also considered the decision of Costs Judge Whalan in *R v Lee* SCCO Ref : SC-2021-and his decision *R v. Rafiq* [2019] SCCO Ref: 27/19 in which he allowed a rate of £250 an hour for Queen's Counsel, in an appeal against conviction in a "modern slavery" prosecution. I note that in *R v. Younas* [2019] SCCO Ref: 64/18I he allowed a rate of £150 an hour for junior counsel, in an appeal against sentence where the defendant had been sentenced to two concurrent life terms of imprisonment, for the repeated rape of an 8-year-old boy in circumstances of 'grooming', and abuse of trust.

18. Whilst noting that his decision was "marginal" the Determining Officer said that the rate he had allowed reasonably reflected the issues and responsibility.

19. The letter in which the Determining Officer sets out his decision in this case also deals with his decision in two other cases (*R v Doak* and *R Lawrence)*. His decision includes the following passage:

> *"As I am sure counsel and the Costs Judges will be aware, Sir Christopher Bellamy has been carrying out an Independent Review of Criminal Legal Aid and published his Report on 29 November 2021. His findings and proposals, most notably for an across the board 15% increase in fee levels, have been accepted in full by the Government. An enormous amount of research into the earnings of counsel and solicitors was carried out and I refer in particular to Paragraph 13.68 of the Report dealing with the fee incomes of criminal barristers. Sir Christopher states "In my view the best guide to assessing barristers' fee income from publicly funded criminal work is the likely ranges of fee income post expenses". Expenses (as described at paragraph 13.43)includes chambers rent and overheads, IT expenses, travel costs, indemnity insurance, accounting, practising certificate and compliance costs, professional subscriptions and other costs, typically accounting for 20-30% of gross fee income. Reverting to Paragraph 13.68 Sir Christopher concludes that paragraph by stating "For a QC taking silk after around 20 years of practice, the midpoint is an initial fee income of around £95,000 (post-expenses) rising to £115,000 or so before dipping down again". These figures relate to 2019/20, just a few months before the work done on these three appeals. Assuming a 36-hour week (and I expect most counsel would work longer hours so the hourly rate would be lower) an annual post-expenses income of £115,000 equates to a little over £60 an hour. Whilst I do not suggest that that is a reasonable rate to pay counsel in these three "high end" cases before this Court, it will be appreciated that I have already remunerated counsel at well over three times this rate in Walker and Lawrence and two and a half times this rate in Doak. I do not consider the rates I have allowed to be unreasonable given the findings of Sir Christopher's review on fee income, notwithstanding the 15% increase he proposed. I would also invite the Costs Judges to reflect upon Sir Christopher's observations on fee income given their recent decisions on much higher rates allowed*

to junior, let alone leading, counsel most recently summarised in Costs Judge Whalan's Judgment in R v Lee 28 April 2022 SCCO Ref : SC-2021 -CRI-0001 12- copy enclosed."

20. Further, it is clear that the Determining Officer took the view that senior counsel's previous familiarity with the case should weigh in favor of a lower hourly rate. He said this:

> *"Counsel picking up an entirely new case has the burden of getting to grips with the case "from scratch". The difficulty and burden and responsibility upon him in doing this is inevitably greater than that upon counsel who is familiar with the facts and issues and knows his client from having represented that client at a previous hearing. The greater responsibility upon new counsel should be reflected in a higher rate. In these three cases, however, counsel was familiar with the facts and issues before Legal Aid was granted. In Walker he had made submissions to the CCRC and had represented the client at the Judicial Review. In Lawrence he had represented the client at the trial and advanced submissions there relating to the appeal issues. In Doak he had represented the client at the second trial and at sentence and had also been funded under the Advice and Assistance Scheme for preparing advice and grounds of appeal against conviction in regard to the first trial.*"

21. Plainly, familiarity with a case will affect a decision as to the number of hours reasonably spent on it. Plainly also, I have to look at the work involved in this appeal, and I note that the work done in this case followed the judicial review proceedings overturning the initial decision of the CCRC. I am bound to say however, even on a cursory analysis, it is difficult to see why familiarity should necessarily feed into the hourly rate in a very substantial way <u>if</u> (as appears here) there was necessary substantial input at a high level, dealing with the issues which arose in this contested appeal.

22. For my own part, I do not think the extrapolation from the 2021 review is helpful. Quite apart from anything else, it is not all clear that it is appropriate to extract 'average' hourly rates for Kings Counsel from the annual earnings figures provided. In any event, as the Determining Officer acknowledged, the rather more obvious point is that the rates of average annual pay were "not generous". Indeed, the comment about average annual earnings of barristers is to be seen in its fuller context:

> *13.69 In my view incomes of this order are not generous by comparison with other public sector emoluments in the various peer groups as set out in Annex I. That is particularly so bearing in mind that the above remuneration does not include any pension, sick pay, maternity leave, paid holiday or other benefits. Younger barristers will also have considerable student debt, an important factor to bear in mind.*

23. It is, of course, also important to note (rather obviously) that Sir Christopher Bellamy recommended a substantial increase of at least 15% (see 1.37 of the report) in the payments to those acting on legal aid. The reasons for that are set out at 1.33 and 1.34 of the report which consider the consideration that "*remuneration should be such as to attract lawyers of the talent and calibre that the system requires...*"

24. Perhaps the most important aspect of this determination is that it is clear from the statutory provisions that the assessment I am required to undertake is case specific. That

makes reliance on extrapolations from the figures referred to by the Determining Officer even more problematic.

25. It is also clear from Court of Appeal's judgment (in the appeal with which I am concerned) that the issues were complex and difficult. In her judgment, Macur LJ referred to the comment of Ouseley J in his decision on the application for Judicial Review of the CCRC that this was a "*highly complex and difficult case*." Indeed, in her own analysis, she goes on to say that "[t]*his was, and remains, a case with inconclusive, complex medical evidence as the judge acknowledged in his summing up to the jury in 2004*." She concluded by saying, "*The context against which the medical evidence was and is to be judged is inherently complicated by several factors*."

26. As the Appellant explained to me, the facts involved unusual circumstances including possible negligence on the part of the emergency services, specifically a paramedic who was alleged to have contributed to the death of the Defendant's partner and, potentially, broken the chain of causation.

26. The matter was plainly serious and of substantial weight and responsibility. This was a murder conviction and as I note above, by the time he had been released, the Appellant had been in custody for 17 years.

27. The statutory provisions require me to consider the nature, importance, complexity and difficulty of the work. Taking account all these matters and the guidance that I have cited above (and noting too that *Evans* was decided in 2015), the hourly rate of £200 per hour is insufficient and, to my mind, £220 is a reasonable rate. It is not excessive or unreasonable even allowing for Counsel's familiarity with the case.

Fee for attending the appeal hearing

28. The Determining Officer referred to Paragraph 6(2) of Schedule 3 of the Criminal Legal Aid(Remuneration) Regulations 2013 which states :

> *(2) The appropriate officer may allow any of the following classes of fee to an advocate in respect of work allowed by him under this paragraph—*
>
> *(a)a basic fee for preparation including preparation for a pre-trial review and, where appropriate, the first day's hearing including, where they took place on that day, short conferences, consultations, applications and appearances (including bail applications), views and any other preparation;*

He said that by allowing an element for the court attendance within the basic fee he was following the format suggested by the Regulations. He said that he was not aware of any other counsel submitting that separate fees should be paid for preparation and the court attendance.

27. I agree with Mr Emmanuel that just because the Regulations say that the basic fee can include the first day of any hearing, it does not follow that it should in all cases. In this regard, the Regulations merely provide a form or structure within which the fee claim may be made. So, I do not think the form of the claim can be determinative. In any event, what I might call, the 'main' fee claimed constituted some 55.5 hours for preparation and written work and did not allow for the first day's hearing. As I understood it, the Determining Officer considered that the number of hours claimed for the work done in respect of the main claim (the 55.5 or so hours) was reasonable (see email 17 August 2021). It followed that the effect of not paying anything additional for the attendance at the hearing was that counsel would not be compensated for it.

28. At the risk of stating the obvious, counsel's attendance of the hearing was on the basis that it would be paid for. If it was not to be paid as a separate brief fee it should have been paid in addition to the fee paid for the preparation work and written work, on the basis of an hourly rate (now £220/hour). Counsel told me that the hearing lasted all day and I understand that he was at court for more than 6 hours. The £750 claimed is clearly less than might have been payable on the basis of an hourly rate times hours spent at court. This appeal was contested. The issues arising were complex and oral advocacy of the highest calibre was required.

29. In my judgment Mr. Emmanuel should be paid this fee as well.

Outcome and costs

30. The fees claimed should be adjusted accordingly.

31. The Appellant has been successful. I also award him his reasonable costs for preparing his Grounds of Appeal, a Note for the benefit of the court, and his attendance together with the Court Fee in the total sum of £1,552.00.

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COSTS JUDGE BROWN