



Neutral Citation No. [2023] EWHC 2928 (SCCO)

Case No: T20237008

SCCO Reference: SC-2023-CRI-000065

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 10/11/2023

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Cameron Gatherar
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

Appellant

ANDREW BRIAN MARK

-and-

THE LORD CHANCELLOR

Respondent

The appeal has been unsuccessful for the reasons set out below.

REASONS FOR DECISION

1. The issue arising in this appeal is whether, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') (the Advocates Graduated Fee Scheme), the Appellant is entitled to be remunerated on the basis of a fee in respect of a 'cracked trial' or on the basis of a 'guilty plea/s'.

2. At the hearing on 6 November 2023, the Appellant, an 'advocate' under the scheme and a barrister, represented himself. The Legal Aid Agency ('LAA') were unrepresented and relied on the decision of the Determining Officer (from whose decision the Appellants without serving any further written submissions.

The relevant provisions

3. Paragraph 1 of Schedule 1 to the 2013 Regulations, defines cracked trials and guilty pleas as follows:

Interpretation

(1)

...

"cracked trial" means a case on indictment in which—

(a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea and—

(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and

(ii) either—

(aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the first hearing at which he or she entered a plea; or

(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which the assisted person entered a plea, declare an intention of not proceeding with them;

or

(b) the case is listed for trial without a hearing at which the assisted person enters a plea;

"guilty plea" means a case on indictment which—

(a) is disposed of without a trial because the assisted person pleaded guilty to one or more counts;

and

(b) is not a cracked trial;

Background facts

4. The Appellant represented the Defendant in the Crown Court in Newcastle pursuant, as I understand it, to a grant of representation was issued in December 2022.

5. The Defendant was charged on 11 counts on a 12 count indictment which included Possessing a firearm with intent to endanger life, Conspiracy to do an act tending and intended to pervert the course of justice and Conspiracy to supply a controlled drug of class The Defendant was, as I understand it, said to be party, with his co-defendant, to an organised crime gang involved in large scale drug dealing and that the group was said to be dealing from kilo amounts of Class A drugs.

6. The sequence of events in the criminal proceedings has been set out by the Determining Officer in her decision and is, largely, not in dispute.

7. The initial hearing took place on 27 January 2023. The court logs indicated there were what are referred to as system related issues (there had been difficulties, as I understand it, uploading the files to DCS) and the advocates were unable to view the material. At the first Pleas and Trial Preparation Hearing ('PTPH') on 3 February 2023 the Appellant indicated that the Defendant needed to be seen by a psychiatrist, so no plea was taken for him. The Determining Officer says that in her decision that no indication as to how the Defendant might plead is recorded on the court log.

8. On 24 March 2023 case was listed for a Mention for, inter alia, a report into the Defendant's fitness to plead. Neither Defendant was arraigned but the trial date of 15 May 2023 was confirmed with the fitness to plead issue to be determined at the start of the trial. On 13 April 2023, the prosecution indicated that the issue as to fitness to plead had been resolved, that the reviewing lawyer had looked at the case, and that the case needed to be listed when the Appellant was available. The case was thereafter listed on 27 April 2023. On that date the prosecution indicated that guilty pleas offered by the Defendant to a number of counts were acceptable. These counts were put and guilty pleas were entered, with sentencing and disposal of the remaining counts to await the outcome of the co-defendant's trial.

Decision of the Determining Officer

9. The Determining Officer decided that the fees should be paid on the basis of a guilty pleas only. Although she does not say so in terms it appears that limb (a) of definition of crack trial (see above) cannot apply as there was no only one arraignment (hence (aa) cannot apply) - and (bb) not seemingly applying. The issue that the Officer addresses in her decision is as to whether limb (b) applied. She decided it did not apply because it could not be said that the case had been listed for trial without a hearing at which the assisted person enters a plea (applying the reasons set out in the decision of Costs Judge Leonard in *R v Barzey* [2022] EWHC 1775 (SCCO)¹): such a hearing had taken place.

Contention on appeal

10. In his appeal notice the Appellant contented that it was not correct for the Officer to have ignored, as he put it, the earlier PTPH as this would have provided the Defendant with

¹ On the relevant provisions found in Schedule 2 of the 2013 Regulations concerning litigators.

his first opportunity to enter his pleas. Indeed his case was that an indication was given at that stage that the Defendant would plead not guilty. He went on to contend that he undertook a very considerable amount of work as the guilty plea was only entered a matter of a few weeks before the trial would have started.

Decision

11. As Costs Judge Leonard explained in *R v Barzey* there are two situations in which a cracked trial fee will be due under the relevant provisions. The first requires, before any other condition is met, that the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea. The second is that a case is listed for trial without a hearing at which the assisted person enters a plea. The second limb might, as the Judge Leonard notes, be read in one of two ways: that there is no hearing at which the assisted person enters a plea, or that there is such a hearing, but the case is listed for trial before it takes place. It seems to me for the reasons that are given in and are more fully set out in the decisions of Costs Judge Leonard (see also *R v Jarir* [2022] EWHC 2231 (SCCO) and my own decision in *R v Lamin* SCCO 175/19, 7 April 2020 that the first interpretation must be the correct one.

12. The word “*without*” in limb (b) is, to my mind, sufficiently clear to indicate that the provision is meant to apply where there is no hearing at which the assisted person enters a plea. If the 2013 Regulations were intended to provide for a cracked trial fee where a case is listed for trial before, rather than without, a hearing at which the assisted person enters a plea, they would, in my judgment, have said so. That the provisions do not do so is therefore important.

13. To my mind, this interpretation is in accordance with the policy intent which lies beneath the provisions. The evident intention is to provide for a cracked trial fee where a case proceeds toward (but does not reach) trial either on the basis of a not guilty plea, or without any discrete hearing at which a plea can be entered. This interpretation is consistent with the conclusions of Master Gordon-Saker in the case of *R v Rahman*, SCCO 198/13 under the previous (and different) iteration of the rules.

14. In this case there was a hearing at which the assisted person entered a plea with the consequence, it would appear, that limb (b) cannot apply.

15. Mr Mark relied substantially on the decision of a case worker or the LAA in another case to grant him fees on the basis of a ‘cracked trial’ in, I am told and it would appear from the documentation I have been provided, similar circumstances. But plainly any such decision is not binding on me and, to my mind, does not assist on the proper interpretation of the rules.

16. As I have set out above, the Appellant told me that an indication was given that the Defendant would plead not guilty at the earlier PTPH. Any such indication does not appear to have been recorded in the court logs. But in any event no proper plea could be taken at that stage. Further, any such indication, could not mean that a plea had been taken for the purposes of limb (a) (see (aa)) as I understood the Appellant to accept. Nor, to my mind, would that be enough to override the requirements of limb (b) on the interpretation of the rules which I have set out above.

17. The Appellant argued that the decision of the Determining Officer leads to unfairness, in particular as the pleas were not entered until close to the date for trial. He told me that a significant amount of work had been done for trial and that he would be under compensated for the work that he did. However, as explained by other Costs Judge and Courts at higher levels, and as is in any event apparent from the terms of 2013 Regulations themselves, the scheme does not grant or permit Determining Officers or Costs Judges a general discretion to award fees. As it is sometimes said, the scheme is to be applied mechanistically with the result that there will be what are sometimes referred to as 'swings and roundabout'. Whether the listing of cases in the way that took place in this case is a serious problem, as the Appellant suggested, I do not know. It does seem however that if there were a problem this might be mitigated by case management which ensured that any medical report required to deal with fitness to plea is obtained well in advance of trial.

18. In the circumstances I was not satisfied there is any basis under 2013 regulations for awarding the cracked trial fee sought and that the Determining Officer was correct. This appeal is, accordingly, rejected.

COSTS JUDGE BROWN