



Neutral Citation No. [2023] EWHC 742 (SCCO)

Case No: T20217069

SCCO Reference: SC-2022-CRI-000118

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 20 March 2023

Before:

COSTS JUDGE LEONARD

R

v

Adeyanju

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

Appellant: G T Stewart Solicitors

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

The appropriate additional payment, to which should be added the sum of £600 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE LEONARD

1. The Appellant represented David Adeyanju (“the Defendant”) in the Central Criminal Court, under a Representation Order made on 5 March 2021. This appeal concerns the remuneration payable, under paragraph 17A of Schedule 1 of the Criminal Legal Aid (Remuneration) Regulations 2013 (“the Regulations”) for advocacy-related work undertaken by Mr Ronnie Manek, a partner in the Appellant firm.

2. Paragraph 17A reads as follows:

17A.— Fees for consideration of unused material

(1) This paragraph applies in respect of any case on indictment in the Crown Court, in respect of which a graduated fee is payable under Part 2 or Part 3, other than a guilty plea.

(2) In any case to which this paragraph applies, a fee ("the basic consideration fee") is payable to a trial advocate in respect of the consideration of unused material which corresponds to the category of the advocate concerned specified in the table following this sub-paragraph, whether or not such consideration has actually occurred...

(3) This sub-paragraph applies where—

- (a) a trial advocate has undertaken the consideration of unused material; and
- (b) the advocate has spent in excess of three hours undertaking that consideration.

(4) In a case where sub-paragraph (3) applies—

- (a) a fee ("the additional fee") is payable to the trial advocate in addition to the basic consideration fee...

(5) The additional fee is payable only where the appropriate officer considers it reasonable to make such a payment.

(6) A trial advocate claiming the additional fee must supply such information and documents as may be required by the appropriate officer in support of the claim.

(7) In determining whether it is reasonable to pay the additional fee, the appropriate officer must take into account—

- (a) the reasonableness of the hours claimed in respect of the case taken as a whole; and
- (b) the reasonableness of the hours claimed in respect of the consideration of the unused material.

3. Paragraph 2.17A of the Legal Aid Agency’s Crown Court Fee Guidance (“CCFG”), as in effect on 5 March 2021, says at subparagraph 2:

“... If the time for considering unused material is in excess of 3 hours a claim must be made using form AU1 together with a supporting work log (for claims in excess of 10 hours). The schedule of unused material and Disclosure Management Document (DMD) or other documentation evidencing disclosure of unused material must also be provided with your claim.”

4. At subparagraph 3 it repeats the requirement of paragraph 17A that the Determining Officer take into account the reasonableness of the hours claimed in the context of the case as a whole, and adds:

“The larger the claim the more detailed justification would be expected.”

5. Appendix E, paragraphs 10-12, say:

“10. When submitting a claim for unused material the first three hours of work should be deducted, as these are covered by the fixed fee payment applicable to all trials and cracked trials. An hourly rate is payable for reasonable time spent in excess of the first three hours; e.g. if 10 hours have been worked in total, payment for the first 3 hours will be covered by the fixed fee, and an hourly rate would be claimed for the remaining 7 hours.

11. Claims should be submitted based on work actually done, but as a guide the LAA would usually allow between thirty seconds (for example documentary exhibits such as images and invoices) and up to two minutes (for example documentary statements, comment interviews, medical records, expert reports, MG6Cs, DMDs) per page for the consideration of unused documentary material. The determining officer may allow a rate outside these guidelines based on the facts of the case and/or where justification has been provided...

12. The time paid for unused material is for the consideration i.e. reading/viewing of the material only. It does not include time spent cross-referencing, noting, scheduling or any other ancillary work.”

The Background

6. The Defendant was one of six defendants tried for Conspiracy to steal, Conspiracy to rob, Manslaughter and Murder. After a 55-day trial, he was acquitted of murder and convicted on the other charges.
7. The murdered man was a cab driver, Mr Gabriel Bringye. He was murdered in the last of a series of fourteen robberies between January and February 2021 in which the Defendant and his co-defendants, all of whom were aged between 15 and 17, ordered taxis with the intention of robbing the drivers.
8. The Appellant advises me that although a co-defendant accused the Defendant of carrying a knife at the robbery, the evidence indicated that two of the defendants had knives, and he was not one of them. They were co-defendant A (who was thought to have committed the murder, and who proved unfit to plead) and co-defendant B. There was no evidence that the Defendant had had a knife in his possession at the time of the murder, and the Crown conceded that it could not prove that he had.
9. The Defendant was assessed by three psychologists, who jointly prepared a 32-page report indicating that the Defendant had learning disabilities, suffered from ADHD and had a raised level of overall suggestibility.

The Claim and the Determining Officer's Conclusions

10. The Appellant submitted a claim for 89.8 hours to consider the 3,255 pages of unused material. The Determining Officer allowed 38 hours.
11. The Determining Officer's allowance was based on the type of material provided. These were organised in four groups: UND1 to 4.
12. UND 1 was found by the Determining Officer to comprise 271 pages of which 11 were letters disclosing material and so not claimable as unused material. The remaining 260 pages were allowed at 2 minutes per page in accordance with the CCFG.
13. UND2, according to the Determining Officer, comprised 321 pages including a one-page letter disclosing material, 216 pages of custody records, 8 pages of handwritten notes 8 Pages of a CV for Julia Heller, Psychologist, and 2 pages of discourse notes. With the exception of the letter disclosing material, these were allowed at 30 seconds a page as in the Determining Officer's view they could be scanned quickly and were of limited potential relevance. I will mention here that the Determining Officer's description of the contents of UND 2 comes to 234 pages rather than 320, but it looks as if 320 pages have been allowed at 30 seconds per page.
14. UND3 was found to comprise 139 pages of unused statements, allowed by the Determining Officer at 2 minutes per page.

15. The final section, UND4, was the largest. It contained a mixture of items over 2,396 pages. These included, but were not limited to, redacted and unredacted social services reports in which in some cases whole pages were removed; PNC print outs of previous offences alongside items such as occurrence reports; CCTV reports, including stills and photographs; and 691 pages of crime reports. The Determining Officer allowed 59 pages of psychiatric reports at 2 minutes per page but noted that the crime reports were often limited in content or only covered half a page. He took a “swings and roundabouts approach” to that material, on the basis that whilst some pages might have taken a little longer to be considered due to their density, others were redacted. From the overall allowance made by him, it would appear that in doing so he allowed 30 seconds per page.

The Appellant’s Submissions

16. The Appellant points out that Mr Manek, who undertook the work, has been working in criminal law for over 20 years. He qualified as a solicitor in 2004, obtained his higher rights qualification in 2007 and was called to the Bar in 2014. Mr Manek has worked almost exclusively as an advocate in the Crown Court since 2007. For the past 8 years he has, says the Appellant, been instructed on the most serious of cases either on his own, as lead counsel, or as junior to Kings Counsel.

17. This case involved in excess of 10,000 pages of served material and in excess of 3255 pages of unused material. Mr Manek has claimed just over 89 hours for consideration of the unused material because that is how long it took him to consider it. The Appellant argues that all of the time spent should be paid as claimed. Mr Manek does not work slowly and would not have claimed any more than was absolutely necessary to consider the material. He has provided a detailed work schedule in support of the work that he carried out on the unused material.

18. In light of the supporting documentation, says the Appellant, it cannot be right for the Determining Officer to make a massive deduction of almost 52 hours from the time he has claimed. That could only be justified on the basis that Mr Manek is an extremely slow worker, or that the claim has been exaggerated, neither of which is the case.

19. The case was CCTV heavy. The Crown relied upon CCTV evidence of the movements of all five defendants on the day of the murder and CCTV evidence of their involvement in 13 previous robberies over a two-month period between January and February 2021 leading up to the murder. Every CCTV log needed to be scrutinised with care, caution and detail. The time claimed by Mr Manek excludes viewing the CCTV evidence, which he undertook in his own time, and extends to work on the unused material over weekends and in the evenings.

20. The Crown's opening note and sentencing note illustrates the complexity of the case. Bad Character formed a large part of the Crown's case, as is evident from the skeleton arguments and agreed facts. There were hundreds of pages of CRIS (Crime Reporting Information System) reports for every robbery and theft that founded the conspiracy counts 1 & 2 and also CRIS reports and MG5 police summary reports in respect of previous offences and convictions.
21. It was essential to analyse the Bad Character material in depth in order to respond to and consider the propensity issues surrounding every factual element of the previous thefts and robberies that the Crown were seeking to rely upon as "strikingly similar", particularly where a co-defendant was accusing the Defendant, falsely, of carrying a knife at the time of the murder. It is it is, the Appellant submits, wrong to decide that this is standard material to be paid at 30 seconds a page. The majority of the pages were dense in content.
22. Co-defendant A's phone downloads and video clips had to be considered. The psychiatric reports on co-defendant A were very detailed and (as the Crown had not committed itself pending cross-examination) required close consideration so as to argue for its admission in support of the proposition that he was the principal offender. Social services records and third party reports had to be considered in order to be in a position to mount a bad character application against other defendants if they chose to give evidence. This was a complex conspiracy case and murder case involving young defendants and an especially vulnerable Defendant who had to be assisted by an intermediary.
23. The Appellant argues that one must take into account the context of this case, its complexity, the 12-week trial, the Defendant's vulnerability and the sheer volume of material that had to be considered. It was not just a matter of reading and moving onto the next page. Mr Manek had to think about the material, its context and its impact on other evidence.
24. Custody records were also densely detailed in parts of the detention log. They needed to be scrutinised to ensure there were no breaches of PACE; to feed into the agreed facts; and to identify whether there was anything within the detention log that could assist with preventing a section 34 (Criminal Justice and Public Order Act) inference direction to the jury.
25. Although the Determining Officer recognised the complexity of the psychiatric reports and allowed 2 minutes per page for these documents, he only allowed 30 seconds per page consideration for most of the documents and made no allowance for pages that would have taken in excess of 2 minutes to review.
26. The Appellant points out that the Legal Aid Agency guidance on "consideration" restricts its meaning to exclude, for example, crossover referencing for the documents, but the word "consideration" in the Regulations themselves is not defined. The Appellant argues that this restrictive approach to what can be claimed is not sustainable. "Consideration" cannot be confined to the mere reading of the material but must be given a wider interpretation. This must include making notes, thinking, cross referencing, considering the impact of the material on other evidence, on the defence, on the agreed facts and on the advice to be given to a client.

Conclusions

27. In relation to claims for reviewing unused material, the CCFG starts with a requirement to file form AU1 along with a supporting work log for any claim for over 10 hours' work. The Regulations require that the Determining Officer give consideration to the reasonableness of the hours claimed, in the context of the case as a whole. The CCFG indicates that this is to be done by reference to the justification given for the time taken. It follows that due consideration must be given by the Determining Officer to the work log submitted with form AU1 and to any other justification given for the time taken.
28. The CCFG at Appendix E starts with a statement to the effect that claims should be based upon work actually done. The 30 second/2 minute criteria that follow are expressly offered as a guide only, adding that the Determining Officer may come to a different conclusion depending upon the facts of the case and (again) the justification provided for the work done.
29. The Appellant's claim was, as required, made on form AU1 and accompanied by a detailed work log measuring in minutes the work undertaken in reviewing identified documents. It falls into four columns: time, exhibit, the nature of the evidence and comments on its significance (or lack of it). Unlike many work logs I have seen, it reads as a cogent and convincing record of a careful sift and analysis of the evidential potential of the unused material. Material of little or no significance is quickly disposed of in two-minute entries. Material of greater significance is accompanied by longer entries, as one would expect.
30. The Determining Officer seems to have based his conclusions entirely upon a broad review of the unused material, variously allowing 2 minutes or 30 seconds per page to various categories of document on a broad-brush basis. I cannot see that he has given much, if any, thought to the work log. This is not, in my view, what the Regulations or the CCFG require. It seems to me that the approach taken by the Determining Officer in this case has led to the arbitrary disallowance of a very substantial amount of working time without any real consideration having been given to whether it was reasonably claimed.
31. I agree with the Appellant's contention that there is nothing in the Regulations to justify the narrow construction imposed by the CCFG upon the word "consideration". It has to be borne in mind that the law is to be found in the Regulations, not in the CCFG, which in itself has no legal force. If the Regulations had intended that the advocate be paid only for reading the unused material, they would say so, and they do not. I agree that scheduling and other ancillary work should be excluded, but I do not agree with the complete exclusion of notetaking or cross-referencing to other documents, which seems to me to be a necessary part of the consideration of the unused material. To exclude them entirely is in my view artificial.

32. Having reviewed the work log, I can find nothing to fault it. The broader justification offered for the claim, in particular the factual complexities and the need for consideration of CCTV evidence over a long period, is sufficient to support a claim that, overall, comes to less than two minutes per page. As the Appellant points out, there is no reason to suppose that Mr Manek's work was slow or that time has been overclaimed.
33. It follows that the time claimed should be allowed in full, and that this appeal succeeds.