



Neutral Citation No. [2024] EWHC 2486 (SCCO)

Case No: T202000307

SCCO Reference: SC-2024-CRI-000054

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30th September 2024

Before:

COSTS JUDGE WHALAN

R

v

ARKDIUSZ MOTYL

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

Appellants: Abbey Law Solicitors

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

COSTS JUDGE WHALAN

Introduction

1. Abbey Law Solicitors ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted under the Litigator's Graduated Fees Scheme ('LGFS'). The issue for determination is whether the Appellants are entitled to be paid two separate trial fees, as claimed, or a trial and re-trial fees, as allowed.

Background

2. The Appellants represented Arkadiusz Motyl ('the Defendant'), who appeared at Derby Crown Court charged with various offences against children, including the making of indecent photographs and the possession of prohibited and extreme pornographic images. He pleaded not guilty.
3. His trial began on 20th July 2021 before Recorder Reynolds. The jury was sworn and the prosecution opened the case. On 21st July 2021, the second day of the trial, the Judge advised that he had been for a Covid-19 PCR test and was obliged to isolate until he had received the results. The jury was discharged and it was noted that the trial would be re-fixed administratively.
4. Thereafter, there were several unsuccessful attempts to re-fix the trial.
5. On 16th October 2023, the trial was re-listed before Mrs Recorder M. Prior KC. The jury was sworn and the trial began. On 17th October 2023, the second day of the trial, the defendant changed his plea to guilty in relation to three counts, which pleas were accepted by the prosecution. The jury was discharged.
6. On 12th January 2024, the Defendant was sentenced to 23 months' imprisonment, suspended for 24 months.

The Regulations

7. The Criminal Legal Aid (Remuneration) Regulations 2013 (the '2013 Regulations') as amended, apply to this appeal. Reference is made to the definition of 'case' in paragraph 1.1 of Schedules 1 and 2, and then to paragraphs 13 of Schedule 2 which

sets out rules for remuneration in circumstances where the litigator represents a defendant at trial and re-trial:

13(1) Where following a trial an order is made for a retrial and the same litigator acts for the assisted person at both trials the fee payable to that litigator is –

- (a) in respect of the first trial, a fee calculated in accordance with the provisions of this Schedule; and*
- (b) in respect of the retrial, 25% of the fee, as appropriate to the circumstances of the retrial, in accordance with the provisions of this Schedule*

Cases

8. Issues concerning ‘two-fees’ have generated in recent years a significant body of jurisprudence. I am referred to R v. Moore [2022] EWHC 1659 (SCCO), R v. Wharton [2021] SC-2020-CRI-000195, R v. Shabir & Khan [2022] EWHC 2232 (SCCO), R v. Thomas [2022] EWHC 2842 (SCCO), R v. Mane [2022] EWHC 3354 (SCCO), R v. Horsfall [2023] EWHC 3128 (SCCO), R v. Brazendale [2024] EWHC 108 (SCCO), R v. Bernard-Sewell [2022] SC-2021-CRI-000094, R v. Innes [2021] SC-2021-CRI-000141, R v. Sajid [2020] SC-2020-CRI-000020, R v. Khan [2022] EWHC 1274 (SCCO), R v. Sohikul Mohamed [2024] EWHC 308 (SCCO) and R v. Curtis Howarth [2024] EWHC 310 (SCCO).

The submissions

9. The Respondent’s case is set out in Written Reasons dated 15th April 2024 and in Submissions drafted by the Government Legal Department on 21st June 2024. The Appellants’ case is set out in Grounds of Appeal attached to the Appellants’ Notice, and in Further Submissions drafted by Mr Neil Gerrity on 17th May 2024. The Appellants requested that the appeal be determined on the papers and both parties have had the opportunity of submitting additional written submissions.

My analysis and conclusions

10. The Respondent, in summary, submits that the claim should be paid as a trial fee, followed by a re-trial fee. Reference is made to paragraph 13 of Schedule 2 of the 2013 Regulations and it is submitted that in practise there is no practical distinction to be made between a 'new trial' and a 're-trial' as, in general, "the two terms are used interchangeably". In this case, the same litigator represented the Defendant at both hearings, and so paragraph 13 applies.
11. The Appellants, in summary, note that a significant gap of 27 months elapsed between the two hearings, and that the second 'trial' engaged a new Judge, new prosecuting counsel, and new defence counsel. The hearings also took place in two different court centres.
12. Although directed to a large number of previous (and recent) appeal determinations, I have drawn relatively little assistance from these cases, as most concern claims where the assessment turned on findings of one continuous trial, notwithstanding the fact of several hearings over (sometimes) significant time periods, or a trial and a cracked trial, or findings of two trials in circumstances where the indictment and/or evidence has been amended or changed substantively over the relevant period. I am not persuaded by the Respondent's submissions that the terms 'new trial' and 're-trial' are used interchangeably in the Crown Court. While, in practise, a degree of informality (or inconsistency) may be apparent in court practise across the jurisdiction, I see no evidence at all that would justify a finding that the words 'new trial' and 're-trial' are procedurally synonymous. A comparative reference is made by the Respondent to paragraph 2 of Schedule 1 of the 2013 Regulations, applicable to claims submitted under the Advocate's Graduated Fees Scheme. But this comparison, in my view, is relevant to the extent only that it confirms that in both relevant paragraphs (i.e. those applicable to litigators and advocates), the application is limited to cases where the same litigator and/or trial advocate appears at both trials. Given the unavoidable complexity of criminal listings, it is much more likely, I suspect, that between the two hearings there would be a change of advocate than a change of litigator.

13. The Appellants refer correctly to a change of trial venue, judge, prosecution and defence counsel, along with the significant gap of 27 months between the two hearings. All these issues would be of persuasive relevance had the Determining Officer incorrectly assessed the claim as one continuous trial. Yet, it is not suggested that the indictment was amended substantively, so that an original draft was stayed pending the reproduction of a subsequent draft, or that the evidence in the case changed notably between July 2021 and October 2023. It seems to me, therefore, that on the facts of this particular case, the claim properly falls within paragraph 13 of Schedule 2 to the 2013 Regulations, and that whereas there was no change of litigator between both hearings, the claim should constitute the payment of a first trial followed by a re-trial fee. Accordingly, for these reasons, the appeal is dismissed.

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