SENIOR COURTS COSTS OFFICE

SCCO Ref: 227/19 and Case no. SC-2019-CRI-000004

Dated: 30 January 2020

APPEAL FROM REDETERMINATION

REGINA v MICHAEL LONG

THE CROWN COURT IN MANCHESTER

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

CASE NO: T201873770

LEGAL AID AGENCY CASE

DATE OF REASONS: 22 July 2019

DATE OF RECEIPT OF NOTICE OF APPEAL: 12 August 2019

APPLICANT/APPELLANT: Advocate,
Bernard Richmond QC

REGINA v SIMON CHILDS

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Ian Henderson QC

The appeals are unsuccessful for the reasons set out below.

SIMON BROWN
COSTS JUDGE

REASONS FOR DECISION

1. The issue arising in these appeals is as to the correct banding of the cases for the purposes of the fee payable under the Advocate's Graduate Fee Scheme ('AGFS') pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013 (as amended by the Criminal Legal Aid (Remuneration) Regulations 2018 (SI 220)).

2. The Appellant Advocate, Mr. Richmond QC represented the Defendant Long in proceedings in the Crown Court in Manchester pursuant to a Representation Order initially made on 20 November 2018 (later amended on 11 February 209 to cover leading counsel). This defendant was charged with murder, attempted murder, possession of an offensive weapon, causing serious Injury by dangerous driving, possession of a controlled drug class and attempted robbery. He was said by the Prosecution to have entered into an altercation with two men outside a pub. He went on to fetch a knife and followed the two victims down a street before attacking them with a knife. One died of fatal stab wounds; the other survived but sustained serious injuries. Long was convicted of murder and wounding with intent and was sentenced to life imprisonment with a tariff of 25 years and 79 days.

3. The Appellant Advocate, Mr. Henderson QC, represented the Defendant Childs in proceedings in the Crown Court in Manchester pursuant to a Representation Order dated 17 August 2018. This defendant was charged with murdering his 65-year-old mother-in-law and the attempted murder of his 12-year-old daughter by setting fire to a house in which he knew they were both present. He was also charged with intent to endanger life by arson. His motive was said to be revenge and punishment: it was said that he wished to deprive his wife of her mother and daughter because she had left him for another man. The mother-in-law died in the fire and the daughter saved herself by jumping from a bedroom window at the height of the fire, breaking her ankle. Childs was convicted of murder and attempted murder sentenced to life imprisonment with a minimum tariff of 32 years.

4. In both cases the Advocates have argued that their cases should be remunerated on the basis of Band 1.1 of the AGFS. In both cases the Determining Officer rejected the case and determined that the appropriate banding was Band 1.3. It is against these decisions that the Appellants appeal. Although lodged separately the same issues arose in both cases and by agreement they are to be determined together.

5. The appeal hearing took place on 19 December 2019. The Appellants appeared on their own behalf. The Legal Aid Agency ('LAA') was represented by Ms. Weisman, an employed lawyer.

6. Regulation 7 of the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018 (SI 220) removed the previous Table of Offences in Schedule 1 of the 2013 Regulations, which had governed the classification of offences for payment purposes, and replaced it with the AGFS Banding Document. Paragraphs 1(7) and 1(8) of Schedule 1 now read:

> (*7) A reference in this Schedule to a "band" is to the band of the offence concerned set out in Table B in the AGFS Banding Document, as read in conjunction with Table A in that document.*
>
> *(8) Where the band within which an offence described in Table B in the AGFS Banding Document falls depends on the facts of the case, the band within which the offence falls is to be determined by reference to Table A in that document*.

7. The relevant AGFS Banding Document[1] provides as follows:

> *This document sets out the banding of offences under the amended Advocates' Graduated Fee Scheme (the "AGFS"), in force from 31 December 2018. The principal legislation which provides for the AGFS is the Criminal Legal Aid (Remuneration) Regulations 2013 (S.I. 2013/435); in particular, see Schedule 1 to those Regulations.*

[1] It has not been suggested that there is any material difference between version 1.1 and 1.2 of the Banding document for these purposes.

The bands are set out in Table B of this document, which should be read in conjunction with Table A. Where the band within which an offence described in Table B in this document falls depends on the facts of the case, the band within which the offence falls is to be determined by reference to Table A.

In Table A and Table B, "category" is used to provide a broad, overarching description for a range of similar offences which fall within a particular group or range of bands.

8. Table A provides as follows:

Category	*Description*	*Bands*
1	Murder/Manslaughter	***Band 1.1**: Killing of a child (16 years old or under); killing of two or more persons; killing of a police officer, prison officer or equivalent public servant in the course of their duty; killing of a patient in a medical or nursing care context; corporate manslaughter; manslaughter by gross negligence; missing body killing.* ***Band 1.2**: Killing done with a firearm; defendant has a previous conviction for murder; body is dismembered (literally), or destroyed by fire or other means by the offender; the defendant is a child (16 or under).* ***Band 1.3**: All other cases of murder.* ***Band 1.4**: All other cases of manslaughter.*
...	…	…..
3	*Serious Violence*	***Band 3.1**: Attempted murder of a child, two or more persons, police officer, nursing/medical contact or any*

		violent offence committed with a live firearm. *Band 3.2: All other attempted murder.* ***Band 3.3**: S18.* *Band 3.4: s20 Offences Against the Persons Act cases and other serious violence offences specified in Table B*
….	…	….

9. Paragraph 27 of Schedule 1 of the 2013 Regulations provides:

Additional charges and additional cases

Where an assisted person is charged with more than one offence on one indictment, the fee payable to the trial advocate under this Schedule must be based on whichever of those offences the trial advocate selects.

10. Paragraph 3 of Schedule of of the 2013 Regulations now provides:

3.— Bands of Offences
(1) For the purposes of this Schedule—

…..; (b) conspiracy to commit an indictable offence contrary to section 1 of the Criminal Law Act 1977 (the offence of conspiracy), incitement to commit an indictable offence and attempts to commit an indictable offence contrary to section 1 of the Criminal Attempts Act 1981 (attempting to commit an offence) fall within the same band as the substantive offence to which they relate

11. It was, as I understand it, accepted by the Appellants that applying the ordinary and natural meaning of the words used in the ADFS Banding Document neither case met the descriptions of the cases in either Band 1.1 or Band 1.2. On this basis Band 1.3 would be appropriate, covering as it does "[all] *other cases of murder*".

12. Mr Henderson QC argued nevertheless that the matters set out in banding column (that is, the third column) are merely indicative and not determinative of the appropriate banding, so that it was not determinative of the appropriate banding that his case does not fall with the specific descriptions or parameters set out in Band 1. The categories of cases described in the relevant bands were, he argued, merely indicative of the nature of the seriousness required to qualify for the banding; they are examples of the range and type of cases which fall within this band and were not exclusive or exhaustive. On this basis the issue which should be addressed by the Determining Officer, and on appeal by the Costs Judge, is not whether a particular case falls within the specific description of cases said to qualify for a particular band but whether it falls within the range of similar offences in terms of seriousness. Judged

on a scale of other murder cases, so I understand his argument, the case in which he was instructed should be regarded as at the high end of seriousness involving in addition to the murder charge a charge for attempted murder and two victims. Thus, it is said, the Officer ought to have determined that his case fell within Band 1.1.

13. In my judgment the Determining Officer was right to reject this submission Consistent with approach of Master Leonard in the case of *R v Hopkins* (SC-019-CRI-000008) to my mind the proper approach is to treat the description of the cases on the third column as determinative, that is to say as specific criteria which need to be satisfied in order to qualify for the relevant band.

14. I do not accept that the final passage in the introduction to the Banding Document cited at [6] above assists Mr. Henderson. It is clear, when regard is had to the tables, that the term "*broad overarching description"* applies to the range of similar offences in the second column of Table A and the '*Category'* in Table B and not to the banding itself in the third column of Table A.

15. I accept that the manner in which the banding is described in the Banding Document might be more typical of a provision which is intended to indicate rather than prescribe, insofar as it is not set out without numbering and the criteria are not in separate paragraphs. Indeed the wording is somewhat abbreviated. I also accept that under the provisions before amendment Determining Officers, and on appeal Costs Judges, may in limited circumstances consider the appropriate classification of an offence which is not listed in the Table of Offences (see Paragraph 3 of Schedule 1 (2) of the 2013 Regulations, as they then were) and that this can involve some consideration of the seriousness of the offence. Indeed that provision survives (with a change of terminology) to provide for the re-banding of offences not specifically listed within the bands as set out in the AGFS Banding Document.

16. Ms. Weisman said that the regulations were the product of negotiations between the Bar and the Lord Chancellor. I have not however received any evidence about this nor was I pressed to take Judicial Notice of any such matter. Nevertheless, it is clear to me, in their procedural context, that it is unlikely that Parliament would have intended these provisions to be interpreted with the flexibility that Mr. Henderson contends. It seems to me important for me to bear in mind that the provisions are to be applied by Determining Officers and Costs Judges within a civil jurisdiction. To my mind, it is clear Parliament cannot have considered it appropriate for Determining Officers and the Costs Judge in this context to determine the seriousness of an offence or offences and grade them on the basis of the indicative factors to the extent that is contented for. It seems to me that such a task would involve a considerable degree of fact-finding and would be discretionary in nature (if not in pure legal terms), involving reference possibly to sentencing guidelines. Such arguments would have the potential to be substantial and complex in nature in a procedural context which is plainly not suited to such determinations. The more obvious intention underlying the fee scheme is, it seems to me, it to fix fees without requiring Determining Officers and Costs Judges to exercise the sort of judgment which Mr. Henderson's contention would, if correct, entail. Notwithstanding the form of the provisions, seen in its procedural context, it seems to me clear that the language used in the banding is sufficiently specific for it to constitute criteria; moreover, had the nature of jurisdiction had been as Mr. Henderson argued I would have expect the provisions to have made this clear.

17. Some support for this conclusion is to be found in the judgment of Stewart J in *Lord Chancellor v (1) Woodefines Solicitors LLP and others* [2019] EWHC 2821 (QB) at [24]) when dealing with an issue as to Paragraph 3 (1) (a) of Schedule 1 (b) of the 2013 Regulations (before amendment). He held that the civil courts could not be expected to determine a technical issue that arose on an indictment for the purposes of determining whether the material offence was specifically listed within the Table of Offences (in particular whether a count on the indictment necessarily had subsumed within it another offence which would have come within a Class attracting higher remuneration).

18. I accept that determinations have to be made as to whether the criteria set out in the Banding Documents have been satisfied and that these may involve consideration of the facts of the case. *Hopkins* is such an example; in that case Master Leonard was asked to determine the meaning of "*body is… destroyed by fire or other means by the offender*" in Band 1.2. Nevertheless, it is reasonable to anticipate, as Ms. Weisman argued, that in most cases, the issue as whether the criteria are satisfied will be clear from the terms of the indictment, or at least from a cursory consideration of the papers in the case. I also accept that determinations have to be made as to the re-banding of cases which are not specially listed in the Banding Document (see Paragraph 3 (1) (a) (2) as amended) and that this in itself can involve considerations as to the seriousness of the offences and the facts alleged in the offence. However the nature of the jurisdiction which Mr. Henderson urges me to accept that the Determining Officer and Costs Judges possess is, to my mind, of a wholly different scale and nature from that which underlies such determinations.

19. As I understood Mr. Richmond QC's position, he accepted that it was intended that the provisions set out in banding were, when introduced, to be read as

determinative. But he said that this must yield in the event of an absurdity. He argued that Regulation 3 (1) (b) created a presumption such that the inchoate form of the offence was to be treated as the substantive offence and that this should apply in determining whether the words "*killing of two or more persons"* should be taken as including an attempt. I do not think this can be a correct approach given the plain meaning of 'killing' which, by its very nature, excludes an attempt.

20. At the hearing of the appeal a further argument was developed by the Appellants (which had not, it seems to me, been developed in the case that was put to the Determining Officer) to the effect that there was a drafting error in the amended regulations which gave rise to a serious anomaly. In contrast to the pre-existing provisions, there was now a distinction to be made between attempts and substantive offences. Absent re-banding to a higher banded offence (under Paragraph 3 (2) of Schedule 1) attempted murders were now covered by Band 3. Whereas an Advocate instructed in a case involving two attempted murders would be paid the fee due under Band 3.1, the fee payable was greater, and significantly so, than the fee payable under Band 1.3; this was notwithstanding that in the latter case the Advocate may be instructed in a case involving a murder and an attempted murder. This, it was said, was an obvious error which gave rise to an issue of public interest because Advocates instructed in such cases would not be sufficiently rewarded on the basis of Band 1.3; and this in turn gave rise to the possibility that the Advocates would not prepared to undertake the work (there being no 'cab rank rule' in respect of such work) such that the public were affected.

21. It was contended by the Appellants that pursuant to the Court's exceptional jurisdiction, *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586 (recently applied in *Quader v Esure* [2017] 1 WLR 210 to a fixed fee scheme in the civil jurisdiction) I should put right such an error by interpretation even though it required the addition of words; in particular, that I should to read into Band 1.1 words which have the effect of including within this band the killing of one person and the attempted murder of another.

22. In *Inco* Lord Nicholls cited the following comments of Professor Sir Rupert Cross in *Statutory Interpretation*, 3rd ed (1995), pp93-105:

> "*'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text the statutory provision read in its appropriate context within the limits of the judicial role*.'
>
> *This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So, the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words*

Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation..."

23. The Appellants contended that the intended purpose of the provision was that murderous acts, whether they are complete or attempts, are considered to be more onerous than one; it was recognised in Band 3 that it is more onerous to deal with more than one attempted murder than just one such attempt. It followed, so it was argued, that it must be more onerous to deal with the one murder and one attempted murder on the same indictment than it is to deal with an indictment containing a single count (whether that be for murder or for attempted murder). Further, it was contended that as a general proposition, notwithstanding the separate banding of attempted murders and murders, an attempt is to be treated as substantive offence. No allowance however is made in the provisions for the additional work associated with an attempted murder even though this can substantially add to the seriousness of the case. The mistake, it was said, was to ignore the position that someone, as Mr. Richmond put it, begins a murder spree or an attempt to kill more than one person and manages to kill one person but due to some intervention, good fortune or, in the case of Childs, the bravery of the second intended victim, one of the victim lives.

24. The inclusion of an attempted murder count on an indictment is, it was submitted, a serious matter, in particular because an attempt to murder must involve an intention to murder; whereas a murder can involve intention to cause grievous bodily harm. Thus, at least in some cases the inclusion of an attempt might expose a defendant to a greater sentence on conviction. Further, dealing with an attempted murder with a murder charge is at is at least as onerous as a case involving two counts of murder. There is, it was said, the added difficulty of cross examination of the victim who has survived and other issues to dealt arising from the cross admissibility of evidence. The outcome, it was submitted, is illogical and absurd.

25. I acknowledge the force of the contention that the banding of single murders with an attempted murder, such that the fee payable is less that it would be for one involving two attempts, appears anomalous. Indeed I did not understand Ms. Weisman to press me otherwise.

26. The more substantial point Ms. Weisman made was that it was clear that there was an intention to distinguish attempted murders from murder under the scheme and that this thereby led to the possibility that there may be anomalies arising. She pointed out that a case involving a charge against a second surviving victim might be remunerated by means other than re-banding; in particular by payment to reflect the number of days generated by the extra charge. In any event it was not open to me to correct anomalies which are necessarily inherent in any fixed fee scheme.

27. As I have set out above Paragraph 3 (1 (b) of the 2013 Regulations, as amended in 2018, provides that "*attempts to commit an indictable offence contrary to section 1 of the Criminal Attempts Act 1981 (attempting to commit an offence) fall within the same Band as the substantive offence to which they relate.* This provision cannot however sit alongside the provisions of the Banding Document which distinguishes between attempted murder and the substantive offence. It was however

common ground at the hearing that there must have been a drafting error in the formulation of the amendment and that Paragraph 3 (1 (b) must be read as including a provision excluding attempted murders from its coverage. As Ms. Weisman put it, if that were not accepted, everything else descends into chaos.

28. It seems to me however in the circumstances that it is obviously correct that the new scheme does make a distinction between attempted murder and the completed offence. (which was not the case under the previous provisions). And once, as Ms. Weisman put it, this has been recognised then it follows that I cannot be satisfied or indeed abundantly sure of Parliament's intention to treat an attempted murder as a murder for the purposes of the banding- and that is what, in substance, the Appellants are asking me to do.

29. Moreover, the comments by Leggatt J in *Lord Chancellor v Woodhall* [2013] EWHC 764 in respect of an earlier version of the scheme seem to me to apply here: he said that the principle on which that earlier scheme was based was "*not one of providing fair remuneration by reference to the amount of work done, but was a rule-based system".* He went on to quote from *R v Grigoropolou* [2012] 5 Costs LR 982, and the observation of the judge in that case, that "*there is no equity in a scheme which would permit the court to put right perceived injustices, because its modus operandi is one of roundabouts and swings*." I accept that it is in the nature of the fixed fees scheme that it will produce anomalies; there is inevitably a 'price' to be paid for the certainty that comes with such a scheme and that includes the possibility of cases which will attract a lower fee than a less serious and onerous case.

30. I should add that I do not think I can interpret 'abundantly sure' to mean just 'sure' or merely importing a requirement to have very cogent evidence, as Mr. Richmond urged me. That would, it seems to me, cross the boundary between construction and legislation.

31. Even if I were to accept that there must have been an intention to compensate an Advocate instructed on a case involving charges of murder and attempted murder more than the current levels of banding suggest and this must have come about through inadvertence, I could not be abundantly sure of the substance of the provision Parliament would have made (had it realised the scheme contained the error which the Appellants say existed). It is not necessary for me to be satisfied of the precise words that Parliament would have used, had the error been noticed. Fairness might suggest that the appropriate solution would be to add cases involving one murder and one attempt (or possibly multiple attempts) to Band 1. 2 (or even possibly create a separate bracket, 'Band 1.1A') but the range of options in itself indicates the difficulty in reaching a conclusion as to the substance of the provision Parliament would have made.

32. Indeed, as Ms. Weisman argues, if I were to read in words to the scheme, as it is suggested I should, this might give rise to other anomalies; other Advocates might be able to argue, where one murder is charge on an indictment with other offences, that those other offences might render it appropriate to insert further words into Band 1.1 or Band 1.2. As Ms. Weisman also pointed out, had the Defendant Long been charged at the outset with wounding with intent in respect of the victim who survived then no basis for any claim for Band 1.1 could be made out, and yet that matter might

be regarded a serious aggravating feature of the case giving rise to substantial responsibility (albeit not of the same extent as an additional attempted murder charge).

33. In the circumstances the appeals are dismissed.

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