



SENIOR COURTS
COSTS OFFICE

SCCO Ref: 190/19

Dated: 13th November 2019

ON APPEAL FROM REDETERMINATION

REGINA v DAY

COURT OF APPEAL (CRIMINAL DIVISION)

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

CASE NO: 2017/04335/C5

REGISTRAR OF CRIMINAL APPEALS CASE

DATE OF REASONS: 11th June 2019

DATE OF NOTICE OF APPEAL: 2nd July 2019

APPLICANT: COUNSEL
Mr Paul Taylor QC
Doughty Street Chambers
DX 223 Chancery Lane

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £875 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

**ANDREW GORDON-SAKER
SENIOR COSTS JUDGE**

REASONS FOR DECISION

1. This is an appeal by Mr Paul Taylor QC against the determination of his fees by Mr Greenhill, a Determining Officer, on behalf of the Registrar of Criminal Appeals.
2. Mr Taylor was instructed, as junior counsel, by the Registrar to advise on the merits of an appeal against conviction. Jeremy Day had been convicted at a re-trial of 3 counts of indecent assault against a 13 year old girl in the 1990s. Day was a teacher, previously of good character and 72 years' old at the time of conviction. The complainant had been his pupil. Following conviction Day drafted his own grounds of appeal, which were extensive and raised a number of issues. The single Judge concluded that he could neither grant leave to appeal nor refuse it. He adjourned the application for leave and suggested that independent counsel be instructed to examine the grounds.
3. In the event Mr Taylor concluded that there were no arguable grounds of appeal and consequently he could not act further in the matter. His clerk submitted a claim for fees of £10,591 plus value added tax. The work done was set out in detail in counsel's fee note and an accompanying schedule. The total time spent was 75 hours and 29 minutes. Dividing the fee claimed by that time gives an hourly rate of £140.
4. Mr Greenhill allowed a fee of £5,500 plus value added tax which he confirmed on redetermination. In his subsequent written reasons he explained that he had accepted all of the matters raised by counsel in his note on taxation and accepted the time spent as reasonable. He noted that over 70 of the 75 hours were spent in considering the papers and writing the advice, with about 4 hours spent in communications with Day's daughter and counsel instructed at trial. Mr Taylor did not have to prepare submissions for or attend court and did not have to deal with an opponent. Mr Greenhill considered that an hourly rate of about £75 would be reasonable for this work.
5. Mr Greenhill commented that he was aware of a number of decisions by costs judges on appeal from decisions in his section concerning the same counsel (not Mr Taylor) in which hourly rates of between £80 and £150 had been allowed. Mr Greenhill wondered whether too much reliance was being placed on the hourly rates allowed in those cases:

“... over 5,000 payments have been made by this Court to over 1,000 different counsel of which over 99% have not resulted in an appeal to a Costs Judge *despite only 60% of the overall total amount being claimed*. Hourly rates paid to and accepted by counsel have been considerably less than those allowed by the Costs Judges ...”
6. Mr Greenhill then listed a number of decisions in which rates of between £50 and £75 had been claimed and allowed.

7. In his written submissions Mr Taylor argued that Mr Greenhill's reasoning amounted to an abuse of process. The Lord Chancellor had not pursued an appeal against any of the costs judges' decisions referred to and it was not now open to Mr Greenhill to do so. Further, the reasoning lacked merit. The rates allowed in the costs judges' decisions were based on the decision of Hickinbottom J (as he then was) in *Evans & Others v SFO* [2015] EWHC 1525 (QB). In support of the hourly rates claimed Mr Taylor relied on two of the decisions referred to by Mr Greenhill: *R v Palmer* [2017] in which Master Whalan allowed a rate of £125 for an appeal against sentence where the defendant was found guilty of two offences of sexual activity with a 15 year old complainant; and *R v Younas* [64/18] where Master Whalan allowed £150 per hour for an appeal against sentence in a case involving two counts of rape of an 8 year old child.
8. The representation order was granted on 2nd February 2017 and accordingly the claim is governed by the provisions of the Criminal Legal Aid (Remuneration) Regulations 2013. Schedule 3 relates to proceedings in the Court of Appeal. Sub-paragraph 1(2) provides that:

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. Sub-paragraph 6(2) provides that the appropriate officer may allow the following classes of fee to an advocate: "a basic fee for preparation including ... where appropriate, the first day's hearing"; refresher fees; and subsidiary fees for conferences, written work, applications and the like.
 10. The table under sub-paragraph 9(1) provides prescribed fees for counsel of the types referred to in sub-paragraph 6(2), namely basic fees, refreshers and subsidiary fees. The only hourly rates specified in the table are £33.50 for junior counsel and £62.50 for leading counsel in respect of "Attendance at consultation, conferences and views". For junior counsel, the "maximum amount" for "written work" is £58.25 "per item".
 11. Sub-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.

12. The provisions of schedule 3 (and indeed the amounts of the prescribed fees) were unchanged from the provisions of schedule 4 of the Criminal Defence Service (Funding) Order 2007.
13. Clearly in the present case Mr Greenhill has, quite rightly, concluded that a fee of £58.25 would not provide reasonable remuneration for the work reasonably done by Mr Taylor; effectively 2 weeks' work.
14. Mr Taylor is therefore entitled to a fee for the advice which reflects reasonable remuneration having regard to all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved.
15. Conventionally counsel's fees for drafting and advising (but not brief fees) are charged and allowed by reference to the time reasonably spent and an hourly rate.¹ The Taxing Officer's Notes for Guidance (2002) list at paragraph 1.11 the factors relevant in every case in determining the reasonable amount of counsel's fees:
 - (i) the importance of the case, including its importance to each defendant in terms of the consequences to his livelihood, standing or reputation even where his liberty may not be at stake;
 - (ii) the complexity of the matter;
 - (iii) the skill, labour, specialised knowledge and responsibility involved;
 - (iv) the number of documents prepared or perused with due regard to difficulty and length;
 - (v) the time expended; and
 - (vi) all other relevant circumstances, including hotel and travelling expenses, where appropriate.
16. It has long been recognised that the fees paid for criminal work (particularly publicly-funded criminal work) will be lower than those paid for civil work: *R v Martin* [2007] 1 Costs LR 128 (Master Rogers at paras 22-24). It has also long been recognised that the reasonable rates payable for publicly-funded work will be lower than the reasonable rates payable for privately-funded work and that it is inappropriate to use one as a comparison for the other.
17. In *Lord Chancellor v Rees* [2008] EWHC 3168 (QB) Sir Charles Gray said at paragraph 63:

I am nonetheless unpersuaded that it is legitimate to use privately funded cases as comparators in the assessment of publicly funded work. The reason is a simple one: privately funded criminal work is market-driven and is the subject of negotiation between the barrister's clerk and those instructing him, whether they be privately instructed solicitors. By contrast publicly funded work is closely regulated and, as has been seen, the Lord Chancellor is constrained by the requirements contained in the Access to Justice Act, 1999.

¹ Friston on Costs (3rd ed) 53.107 to 53.113. Dr Friston suggests that the practice of lawyers charging by hourly rates and time began in the United States as late as 1940: para 51.05.

18. While *Evans* provides valuable guidance as to the approach to take to assessment, the assessments in that case were of the fees of privately-instructed counsel under s.19 of the Prosecution of Offences Act 1985.
19. As so often is the case on the assessment of costs, the assessor is required to make a value judgment based on an appraisal of the work done against the factors identified in TONG (and sub-paragraph 1(2)(a) of the regulations) and the assessor's own experience of similar cases, avoiding comparison with that which is inappropriate. As Russell LJ commented, assessment consists of much "rough approximation".²
20. In the present case Mr Taylor assumed a significant burden. Day was a man of previously good character aged in his 70s who had been sentenced to a term of 4½ years' imprisonment. Counsel had to unpick the grounds which Day had drafted, consider the substantial evidence at trial including the transcripts, the extensive medical records of the complainant and the proposed evidence of a number of new witnesses. He also had to discuss the case with Day's daughter and with leading and junior counsel instructed at trial and re-trial. His written advice canvasses in detail the possible inconsistencies in the prosecution case and the complainant's medical history.
21. As Mr Taylor pointed out at the hearing of the appeal, reaching a negative view in a case like this is not easy and cannot be undertaken lightly. He specialises in criminal appeals and, at the time this work was done, he was a very senior junior (called in 1989).
22. Mr Greenhill has considerable experience in the determination of fees for criminal appeals. However in my judgment the fee allowed does undervalue the weight of the case, the importance of this matter to Day, the burden placed on Mr Taylor, his seniority and specialism, and the complexity of the task. Reasonable remuneration in this case, in my view, would be a fee for the advice of £9,000 which would equate to an hourly rate of £120. That rate reflects the factors set out in TONG and my experience of legal rates generally (avoiding comparison with the inappropriate). While avoiding that comparison I observe that the rate I would allow is (as it should be) significantly lower than the rates allowed for junior counsel in *Evans* and lower than the trainee/paralegal rates for work done in London in the Guideline Rates for Summary Assessment (2010). The appeal is allowed to that extent.
23. Mr Greenhill did produce, at Mr Taylor's request, a bundle of documents relating to the 11 cases referred to in Mr Greenhill's written reasons where counsel had claimed hourly rates of between £50 and £75. Anybody involved in the assessment of costs on a daily basis will see a wide range of rates claimed for similar work.
24. Of the 5,000 payments made by Mr Greenhill's section since 1st January 2017, 40% of the overall total have been disallowed on assessment. The assessment of costs requires the assessor to allow the reasonable rate, not to

² Re Eastwood [1975] Ch 112.

fix the going rate. It may well be that if only 60% of the costs claimed are being allowed some counsel may be moderating their claims to the rates that they think will be allowed.

25. Mr Taylor should be entitled to his costs of the appeal. In respect of this case and *R v Hale*, which were heard together, he spent about 12½ hours in preparation and the hearing lasted less than an hour. As one expects with him, but sadly of few others, the papers he lodged were in impeccable order. I think that a reasonable fee for presenting the 2 appeals would be £1,750 and I allow a moiety for this appeal. As I explained to him at the hearing, and he accepted, I would not be minded to allow a fee for leading counsel for appearing on this appeal; so that is what I consider to be the appropriate fee for a junior.

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