SENIOR COURTS
COSTS OFFICE

SCCO Ref: 168/19

Dated: 24th September 2019

ON APPEAL FROM REDETERMINATION

REGINA v KIEWAN

CROWN COURT AT SOUTHAMPTON

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

CASE NO: T20187104

LEGAL AID AGENCY CASE

DATE OF REASONS: 30th May 2019

DATE OF NOTICE OF APPEAL: 19th June 2019

APPLICANT: Mr Philip Kazantzis, Counsel

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

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. Philip Kazantzis, Counsel ('the Appellant') appeals against the decision of the Determining Officer of the Legal Aid Agency ('the Respondent') in a claim submitted under the Advocates Graduated Fees Scheme ('AGFS'). The issue is the classification of the case under Scheme 10. The Respondent placed the case in Band 9.4 whereas the Appellant submits that it should be Band 9.1. The determinative question concerns whether or not the pages of prosecution evidence ('PPE') exceed 5,000.

Background

2. The Appellant represented Lukasz Kieiwan ('the Defendant') who was one of two co-defendants charged at Southampton Crown Court on an indictment alleging six counts of conspiracy to supply class A and B drugs, and possession of a firearm and ammunition. During the prosecution, the Crown served electronic datum downloaded from a mobile telephone seized from the defendants. The dispute concerns the extent to which this material should be included or excluded from the PPE count.

The Regulations

3. The Representation Order is dated 20th September 2018 and so the applicable regulation is The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'). Specifically, the case falls under Scheme 10, wherein drugs offences are categorised in Band 9.1-7. The classification turns, in part, on the type, weight or quantity of the drugs in the prosecution. Further, or alternatively, classification turns on the PPE count. Band 9.4, for example, is reserved for cases of over 1000 pages of evidence, whereas Band 9.1 is reserved for cases with over 5000 pages of evidence.

4. Insofar as the PPE count is relevant, reference is made to paragraph 1 of Schedule 2 to the 2013 Regulations, which provides (where relevant) as

follows: Paragraph 1 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

> "*1. Interpretation*
>
> *…*
>
> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all –*
>
> *(a) witness statements;*
>
> *(b) documentary and pictorial exhibits;*
>
> *(c) records of interviews with the assisted person; and*
>
> *(d) records of interviews with other defendants,*
>
> *which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.*
>
> *(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.*
>
> *(5) A documentary or pictorial exhibit which –*
>
> *(a) has been served by the prosecution in electronic form; and*
>
> *(b) has never existed in paper form,*
>
> *is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances*".

Case guidance

5. Authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50) these principles:

> "*(i) The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.*

(ii) *In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.*

(iii) *Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.*

(iv) *"Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispense with the need for service of a notice of additional evidence, before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.*

(v) *The phrase "served on the court" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. I do not think that "service on the court" is a necessary pre-condition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages could be excluded from the count of PPE merely because the notice had for some reason not reached the court.*

(vi) *In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE.*

(vii) *Where the prosecution seek to rely on only part of the data recovered from a particular source, and therefore served an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. The resolution of such issues would depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all*

concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.

(viii) *If – regrettably – the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Office (or, on appeal, the Costs Judge) will have to determine it in the light of the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) will be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE. Again, this will be a case-specific decision. In making that decision, the Determining Officer (or Costs Judge) will be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the Determining Officer (or Costs Judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.*

(ix) *If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures the public funds are not expended inappropriately.*

(x) *If an exhibit is served in electronic form but the Determining Officer (or Costs Judge) considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2.*

(xi) *If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be*

included in the number of PPE. In such circumstances, the discretion under paragraph 1(5) does not apply."

6. The Appellants have also cited the judgment of Nicola Davies J. in Lord Chancellor v. Edwards Hayes LLP [2017] EWHC 138 (QB).

The submissions

7. The Respondent's case is set out in Written Reasons dated 30th May 2019. The Appellant's case is set out in Grounds of Appeal lodged on 19th June 2019, and in a typed Additional Information dated 12th November 2018. No request was made for an oral hearing and I have determined this appeal on the papers.

8. The Respondent, in summary, calculates a notational PPE count of 2961, comprising 1065 pages of paper evidence (124 pages of statements and 941 of exhibits), plus an additional 1896 pages of electronic datum. The latter comprises 1827 pages from exhibit CS-201A-03 and marked as "*Potentially OK*" and 69 pages from a PDF Report exhibit JPG/201A12/AK1. The Determining Officer excluded electronic datum including photographs or images (except for 69 pages of images of messages), and the pages exhibiting texts, SMS and other messages, user account and history, voicemails and video and the Timeline, much of which was held to be duplicative. Thus, at 2961 pages, the PPE count fell short of the "over 5000 pages" required for inclusion in Band 9.1.

9. The Appellant submits that the PPE count "*easily exceeded*" the 5000 page threshold. His submissions rely in part on the assertion that; "*The whole download is the served evidence and so it MUST be counted as PPE*" (Additional Information, bundle p.12). Further, or alternatively, he argues that the Respondent's assessment was far too conservative, and wrongly excluded messages, notes, searched items, web history, wireless networks, the Timeline and, most importantly, all images and thumbnails. Some relevant duplication is acknowledged but his calculations allow appropriate deduction. Insofar as the issue concerns a distinction between converting the electronic datum into PDF or Excel format, the Appellant submits that the latter is preferable. His

submissions, in summary, do not proffer an exact PPE count, but the total count exceeds easily the 5000 page threshold.

My analysis and conclusions

10. There is no dispute that the electronic datum was served by the prosecution in its entirety pursuant to the requirements of para. 1(2) of Schedule 2 to the 2013 Regulations. Insofar, therefore, as the PPE count is relevant to classification under Scheme 10, the issue is the inclusion or exclusion of the pages of electronic datum and the exercise of the discretion at para. 1(5) of Schedule 2.

11. I reject the Appellant's contention that if "the whole download is served as evidence it must be counted as PPE". This ignores the discretion retained at para. 1(5) which, as Mr Justice Holroyde noted in Lord Chancellor v. SVS Solicitors (ibid) at para. 50(ix) operates as an "important and valuable control mechanism which ensures that public funds are not expended inappropriately". I also the reject the submission that all the images and thumbnails should be included as they "all had to be reviewed for relevant content". There are, for example, 4307 thumbnails which, according to the Appellant, should comprise 4307 pages included in the PPE. This approach lacks the necessary discrimination relevant to the exercise of the discretion. I am satisfied nonetheless that the Respondent's calculation is wrong. The Appellant, in my judgment, makes a good case for inclusion of messages, notes, searched items, web history, networks and the Timeline. This adds at least 800 pages to the PPE count. I am satisfied also that a proportion of the images and thumbnails should be included. The Respondent, in fact, concedes the inclusion of some photographs. I am told that many of the images were screenshots of text and relevant to the prosecution. It seems to me, therefore, that a broad estimate of the electronic datum to be included in the PPE compels the conclusion that the count exceeded the 5000 page threshold for inclusion in Band 9.1.

12. This appeal is allowed accordingly and I direct that the case be classified as Band 9.1.

TO:

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