



Neutral Citation No. [2023] EWHC 3035 (SCCO)

Case No: T20217283

SCCO Reference: SC-2023-CRI-000035

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 21st November 2023

Before:

COSTS JUDGE WHALAN

R

v

KYI-REECE SYLVESTER

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

Appellant: Mr William Sneddon, Counsel

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

The appropriate additional payment, to which should be added the sum of £300 (plus any VAT payable), and the £100 paid on appeal, should accordingly be made to the Appellant.

COSTS JUDGE WHALAN

Introduction

1. Mr William Sneddon, Counsel ('the Appellant') appeals the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in respect of a claim for considering unused material under the Advocate's Graduated Fees Scheme ('AGFS'). The Appellant submitted a claim for 40.25 hours work (more than the 3-hour fixed fee), but the Respondent allowed 14.5 hours.

Background

2. The Appellant represented Mr Kyi-Riece Sylvester ('the Defendant') who was charged at the Central Criminal Court with one co-defendant on an indictment alleging murder and robbery. It was alleged that the Defendant was affiliated to a North London gang known as the 'Northumberland Park Killers' or 'NPK'. It was alleged that he had taken part in an altercation whereupon the victim was robbed of his mobile phone and stabbed in the leg with a 'zombie knife'. He died ten days later.
3. It is common ground that the unused material comprised 227 pages of witness statements, 168 pages of schedules and 6641 pages of documentary exhibits, a total of 7036 pages. The Appellant submitted to the Respondent a detailed Work Log which recorded his 'consideration' of this unused material.

The Regulations

4. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), apply, as amended in September 2020 by the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2020 ('the 2020 Amendment Regulations').
5. The relevant provision is at paragraph 17A of the 2020 Amendment Regulations, 'Fees for consideration of unused material'. The applicable sub-paragraph provides as follows:

17A ...

(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; and*
 - (b) *the amount of the additional fee corresponds to the category of the advocate concerned specified in the table following paragraph 24.*
- (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 as documents that 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.*

The submissions

6. The Respondent’s case is set out in Written Reasons dated 4th April 2023. No attendance was made at the appeal hearing on 13th October 2023. The Appellant’s case is set out in Grounds of Appeal submitted on 13th April 2023. The Appellant attended (remotely) and made oral submissions at the hearing on 13th October 2023.

My analysis and conclusions

7. The Respondent, in summary, submits that the words ‘consideration of the unused material’ in para. 17A of the 2020 Amendment Regulations, should be considered and construed in the same way as to the equivalent (unamended) provision in the 2013 Regulations, which referred to ‘reading the unused material’. There is, submits the Respondent, no material difference between ‘reading’ and ‘consideration’, as the latter was invoked to acknowledge the fact that as evidence in criminal trials was

developing, there was much greater reliance on digital material (such as CCTV evidence), which would have to be considered but which, technically, could not be 'read'. Insofar as the original provision was considered narrowly, so that an advocate would only be paid for the time taken to read the material, in contrast to the time spent analysing and 'working on' the same, then consideration in 17A should also be construed narrowly. The DO, referring to the Appellant's Work Log (reproduced on p.3 of the Written Reasons), notes his repeated citation in the column "Description of work done" of phrases like "Updating witness list" and "Drafting chronology". This type of work, argues the DO, does not amount to reading and, in turn, considering the unused material. Applying, therefore, a strict interpretation of the Amendment Regulations, the claim for 40.25 hours was reduced to 14.25 hours.

8. The Appellant, in summary, advances two broad propositions.
9. First, he interprets his Work Log differently. He explained in oral submission that the time claimed was, as a matter of fact, spent reading the unused material. Phrases like 'Updating witness list' and 'Drafting chronology' constituted his usual notation for this basic process. He points out that 43.25 hours (i.e. the basic 3 hours + the claimable 40.25 hours) was actually a modest period of time for reading 7036 pages of material.
10. Second, the Appellant submits that the relevant provision in para. 17A of the 2020 Amendment Regulations should be construed differently to the equivalent, restricted provision in the 2013 Regulations. There is, he submits, a notable, practical distinction between reading and consideration, with the latter permitting a more involved, proactive engagement.
11. I have carefully considered the Appellant's oral submissions and am satisfied that his interpretation of the Work Log should be preferred to that of the Respondent. Even if, as the DO contends, the word 'consideration' should be accorded a restrictive meaning, equivalent to merely 'reading' the material, it seems to me that 43.25 hours is a relatively modest claim in respect of over 7000 pages of unused material. It is never appropriate to apply a standard, empirical allowance for reading material. Assessments based on 30 seconds or 1 minute per page are flawed invariably, as each page of material will contain a different volume of datum, comprising material which

may be of variable significance. Some pages will require careful reading, other pages will be passed over quickly. Yet, 43.25 hours equates to 2595 minutes, which is, in my view, a relatively modest period to read in excess of 7000 pages of material. Any advocate would struggle to read this volume of material in the 17.25 hours (or 1035 minutes) allowed by the DO. Preferring, therefore, the Appellant's submission of fact to the interpretation of the DO, I am satisfied that this appeal should be allowed.

12. I would add that I have some sympathy for the Appellant's interpretation of the wording 'consideration of unused material', in the (relatively new) para. 17A of the 2020 Amendment Regulations. Given the fee paid for unused material (£59.01 per hour for junior counsel) it was obviously in the interests of the LAA and, in turn, the public purse, for claims to be submitted and considered under this provision, rather than by an assessment which concludes that a proportion of the unused material was relevant to the extent that it should be classified as 'pages of prosecution evidence' ('PPE'). It seems to me desirable, therefore, to accord a relatively broad interpretation of the phrase 'consideration of unused material' in para. 17A of the 2020 Amendment Regulations, not least because the phraseology is undoubtedly (and notably) different to the equivalent provision in the 2013 Regulation. In this instance, however, I do not need to apply that conclusion to this appeal, which I have allowed on the Appellant's first proposition.
13. The appeal is allowed and I direct that the Appellant's claim considering the unused material should be allowed at 40.25 hours.

Costs

14. The Appellant has been successful and I award costs of £300 (+ any VAT payable), in addition to the £100 paid when lodging the appeal.

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