



SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2020-CRI-000158, SC-2020-CRI-000152 and SC-2020-CRI-000123

Dated: 12th January 2021

ON APPEAL FROM REDETERMINATION

REGINA v COTTEE, FRANCIS, KILEY

CROWN COURTS AT SWINDON, INNER LONDON and WOOD GREEN

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

CASE NO: T20197022, T20197093 and T20187109

LEGAL AID AGENCY CASE

DATE OF REASONS: 24th April, 28th April and 19th May 2020

DATE OF NOTICE OF APPEAL: June 2020

APPLICANTS: Ross Solicitors, Ms Joy Lewis, Mr Paul Hodgkinson and Mr Sushil Kumar, Counsel

The appeals have been successful for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £1000.00 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to each Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. The appeals of Mr Robert Ross, of Ross Solicitors and Ms Joy Lewis, Mr Paul Hodgkinson and Mr Sushil Kumar, Counsel ('the First, Second, Third and Fourth Appellants') are heard and determined together as they raise an identical point of principle.
2. All four Appellants were appointed by the court under section 4A of The Criminal Procedure (Insanity) Act 1964 ('the 1964 Act') to represent defendants at hearings to determine their fitness to plead and, in turn, whether they had committed the acts forming the basis of the charges on their respective indictments. The issue in all four appeals is whether the Appellants are entitled to claim payment from central funds on an ex post facto basis, pursuant to section 4A of the 1964 Act, or whether their claims should be submitted and assessed under either the Litigators or the Advocates Graduated Fee Scheme, pursuant to the Criminal Legal Aid (Remunerations) Regulations 2013 ('the 2013 Regulations').

Background

3. The First Appellant represented Mr Dennis Cottee at Swindon Crown Court. Mr Cottee was charged with his son on allegations of historic sexual offences. Legal aid was granted and the Representation Order is dated 11th January 2019. Mr Cottee was diagnosed with Alzheimer's disease and throughout the proceedings his condition deteriorated. On 17th June 2019, HHJ Taylor QC found that he was unfit to stand trial and directed that there be a hearing under s.4A of the 1964 Act to determine whether he had done the alleged act(s). The First Appellant was appointed by the court to represent Mr Cottee in the s.4A proceedings. This hearing took place between 27th August and 2nd September 2019 and it was determined that Mr Cottee had done the alleged acts. On 12th September 2019 he was made the subject of a two-year supervision order and added to the sex offenders' register for five years.

4. The First Appellant then submitted a claim to the Criminal Cases Unit for payment out of central funds in the total sum of £13,014.72. It was determined under the LGFS in the sum of £8,280.
5. The Second Appellant represented Mr Trevor Francis at Inner London Crown Court. Mr Francis was charged with two counts of arson arising from an incident on 18th March 2019, when it was alleged that he had set fire to curtains in his rented accommodation. Legal aid was granted and the Representation Order is dated 24th April 2019. On 2nd October 2019, HHJ Newbury held that Mr Francis was unfit to stand trial and ordered that there should be a hearing under s.4A of the 1964 Act. The Second Appellant was appointed by the court to represent Mr Francis at that hearing, which took place between 28th and 29th October 2019.
6. The Second Appellant submitted a claim for payment out of central funds in the sum of £6,815.50 + VAT. It was assessed and paid by the Criminal Cases Unit pursuant to the AGFS.
7. The Third and Fourth Appellants represented Mr Jake Kiley at Wood Green Crown Court. Mr Kiley was one of seven co-defendants charged on a multi-handed fraud case. Legal aid was granted and the Representation Order is dated 26th February 2018. Representation for two counsel was granted from 9th November 2018. Mr Kiley fell ill during the trial and, on 8th May 2019, the 60th day of the hearing, HHJ Lucas QC declared him to be unfit to stand trial. A hearing under s.4A of the 1964 Act was ordered and the Appellants were appointed to represent Mr Kiley at that hearing. On 25th July 2019, following the s.4A hearing, Mr Kiley was acquitted on all counts.
8. The Third and Fourth Appellants submitted claims to be paid from central funds but, as with the other Appellants, their claims were assessed by the Criminal Cases Unit pursuant to the AGFS.

Statutes and Regulations

9. I am directed in submissions to the following: the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), ss.14, 16, 18-20 and 298(2), the

Criminal Legal Aid (Remuneration) Regulations 2013, reg. 4 and paras. 25 and 31, the Criminal Legal Aid (Determination by a Court and Choice of Representative) Regulations 2013, reg. 9, the Prosecution of Offences Act 1985, s.19(3), the Criminal Procedure (Insanity) Act 1964, s.4A(2) and to Part 38.10 of the Criminal Procedure Rules 2014.

The submissions

10. The Respondent's case is set out in the Written Reasons referred to above and in Written Submissions dated 24th September and 3rd December 2020, drafted by Mr Michael Rimer, a Senior Lawyer at the Government Legal Aid Department. The Appellants' case is set out in the various Grounds of Appeal and in a Skeleton Argument dated 12th June 2020 and drafted by the Second Appellant. The four Appellants then co-operated to file a joint Response to the Respondent's Amended Submissions on or about 9th December 2020. All four Appellants and Mr Rimer attended and made oral submissions at the hearing on 11th December 2020.

My analysis and conclusions

11. The Respondent, in summary, submits that the Determining Officers were correct to assess and pay the Appellants' claims from legal aid via the Litigator's or Advocate's Graduated Fees Scheme. Representation Orders were in place in respect of all the defendants and this representation continues notwithstanding the s.4A hearing. The Appellants' appointments under s.4A did not supersede the grant of legal aid under the Representation Orders. This is because appointment under s.4A of the 1964 Act does not have the effect of automatically superseding the Representation Orders or causing them to be revoked. The court may, in fact, only withdraw a representation order in limited circumstances, as set out in, inter alia, the Criminal Legal Aid (Determination by the Court and Choice of Representative) Regulations 2013. This specific provision is cited at para. 36 of Mr Rimer's Written Submissions.
12. Mr Rimer relied specifically on my decision in R v. Walmsley [2018] SCCO Ref: 104/17. In that case the appellant was representing a defendant at Liverpool Crown Court on an indictment alleging an offence of causing death by

dangerous driving. Legal aid was granted and the defendant appeared at several interim hearings between December 2014 and April 2015. The judge then determined that the defendant was unfit to plead and a s.4A hearing was scheduled. The appellant was appointed by the judge to represent the defendant at the s.4A hearing. In that case, as in these appeals, the appellant's claim for payment out of central funds was refused and he was paid pursuant to the AGFS. My decision – following an appeal on the papers – is summarised at para. 14 of my judgment dated 1st February 2018:

“14. Clearly, as the Appellant accepts, he was instructed initially pursuant to a Representation Order granted in October 2014. He asserts that his subsequent appointment by the trial judge for the s.4A hearing had the effect of automatically superseding or revoking that order. I am not satisfied that the Appellant has advanced any persuasive grounds to establish that this was so. There was, in my view, no reason for the trial judge to state that the Representation Order was superseded or revoked, partly because it was unnecessary but, more particularly, as he had no effective power to do so. Representation under s.4A is not inconsistent with the AGF scheme or the 2013 Regulations, as the latter both anticipates and provides for such payment. The Appellant has an undisputed entitlement to payment but this claim should, in my conclusion, be submitted under the AGF scheme and the 2013 Regulations. His appeal is dismissed.”

13. The Appellants, in summary, submit that there is a fundamental difference between acting in pursuance of a representation order, when counsel is instructed via the nominated solicitors, and in an s.4A hearing, when the advocate is appointed by the judge and appears independent of an instructing solicitor. This is reflective of the more fundamental point, namely that the s.4A hearing is not a criminal proceeding as such, in contrast to the proceedings as a whole. Representation in the s.4A hearing accordingly proceeds on an entirely different, non-criminal basis. Representation pursuant to the court's instruction does not revoke the legal aid representation orders or, in effect, supersede the grant of legal aid. Indeed, the legal aid remains in place and will form the basis of remuneration for both litigators and advocates in the event that the defendant regains capacity and is subject to continuing criminal proceedings. Nonetheless the effect of s.4A instruction is to invoke an entitlement to payment out of central funds as these are non-criminal proceedings not covered by the grant of criminal legal aid.

14. The Appellants rely on the judgment in R v. Norman [2008] EWCA 1810 and, more particularly, the decision of the Court of Appeal (Criminal Division) in R v. Roberts [2019] EWCA Crim 1270. Lord Justice Davis, at para. 49 of his judgment, stated:

“In the Crown Court, as we understand it, the grant of legal aid that will ordinarily have been made in favour of a defendant can extend to the costs of the s.4 hearing: for the criminal proceedings will continue to trial unless a determination of unfitness is first made under s.4: and see s.15 (2) and s.17 (2)(c) of the Legal Aid Sentence and Punishment of Offenders Act 2012. But in cases where a determination of unfitness is made, the position then changes: because the representatives appointed to present the defence case (who will usually be those thus far acting in the earlier stage of the proceedings) will now have been appointed by the court and in circumstances where a s.4A hearing is not a criminal proceeding as such. So the costs order for the s.4A proceedings in the Crown Court appropriately then should be costs out of central funds: that is so provided by s.19 (3) of the Prosecution of Offences Act 1985, and regulations thereunder, and by rule 45.1 of the Criminal Procedure Rules”.

The Appellants submit, therefore, that my decision in Walmsley (ibid) was incorrect.

15. Mr Rimer responds with the submission that the observations in Norman and, more particularly, Roberts were obiter, in that the parties’ funding arrangements were not directly relevant to the issues to be determined in those appeals.
16. I am satisfied that the analysis of the Court of Appeal in Roberts (ibid) sets out the position correctly, notwithstanding that it was, strictly speaking, obiter. Where, as in these four appeals, a determination of unfitness is made, the status and function of the representatives changes, in that the hearing moves from criminal to non-criminal proceedings. The appointment by the judge is merely reflective of that distinction. It does not revoke or end representation under the representation orders, as legal aid may become relevant again should the defendant return to criminal proceedings. When acting in s.4A non-criminal proceedings, however, payment should be made out of central funds, not the legal aid fund. It follows that my decision in Walmsley (ibid) was determined incorrectly. In that case, I considered brief grounds of appeal on

the papers and without oral submissions or the authoritative interpretation of the Court of Appeal.

17. It follows that these four appeals are allowed and I remit each case to the relevant Determining Officer for a quantum assessment of the claims lodged, which are to be paid from central funds.
18. At the hearing on 11th December 2020, I indicated that this written determination will be promulgated in the usual way, without another listing. I added that should any party wish to appeal my decision they should lodge a written request for permission to appeal to me, within 21 days of receiving my written determination.

Costs

19. The Appellants have succeeded and so I order costs of £1,000 (+ VAT, if payable) for each Appellant, plus the £100 that each paid to lodge their appeal.

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