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Case No: T20207263

SCCO Reference: BRO/SC-2021-CRI-000088

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 17/05/2022

Before:

COSTS JUDGE BROWN

IN THE MATTER OF:

REGINA
v

JAVAD ARABHALVAEI

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

Appellant

-and-

THE LORD CHANCELLOR

Respondent

The appeal has been successful in part for the reasons set out below. I allow a further 96 pages of PPE. The appropriate additional payment should accordingly be made to the Applicant. There shall be no order as to the costs of the appeal.

1. The issue arising in this appeal is as to the correct assessment of the number of pages of prosecution evidence when determining the fees due under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known and explained in more detail in the decision of Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the 2013 Regulations, the PPE (subject to a cap of 10,000 pages), and the length of the trial. The particular dispute in this case concerns the extent to which evidence served electronically in the form of four telephone downloads (in four separate exhibits), should count toward the PPE.

2. At the hearing on 11 May 2022 the Appellants were represented by Counsel, Mr. McCarthy, and the Legal Aid Agency ('the LAA') was represented by Mr. Orde, an employed barrister.

3. The Appellants acted for the Defendant under a Representation Order which was transferred to them on 21 December 2020.

4. The Defendant was indicted with two counts of serious violence, including attempted murder and wounding with intent having violently stabbed his son and Ms Parissa Ali-Kaei (with whom he had been in a relationship) with a kitchen knife on or about 20 August 2002. The case was tried at the Central Criminal Court.

5. The Defendant and Ms Ali-Kaei had, as I understand it, married in 2002 but, it appears that it had been a troubled relationship and there had been a number of separations and divorces. The Prosecution case was that the Defendant had discovered that Ms Ali-Kaei had remarried another man in Iran and that the Defendant was very possessive and intended to kill or cause her really serious harm. The Defendant claimed self defence. As I understand it, an issue arose as to whether they had had remained a couple whilst they were living together from March 2020 in the course of lockdown or whether they had lived together out of necessity. A further issue arose as to whether the Defendant had contrived to take photographs of the two of them together which he could then use in order to unsettle the person in Iran with whom the victim, Ms Ali-Kaei, was having a relationship.

6. In their initial claim and in this appeal (until very shortly before the hearing), the Appellants claimed an entitlement to a graduated fee on the basis of PPE of 10,000 pages. The Determining Officer allowed a total PPE of 1543 consisting of paper PPE of 298 pages and an additional 1245 pages in respect of the electronic material with the option that the Appellant may also claim a Special Preparation fee. It is not in dispute that relevant electronic material in this case was 'served' for the purposes of the regulations.

5. Paragraphs 1(2) to 1(5) of Schedule 2 of the 2013 Regulations provide as follows:

> *(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 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 into account the nature of the document and any other relevant circumstances."

6. It is clear from the terms of Regulation 1(5) that in considering whether material should count as PPE it is not of itself that it be 'served'. When dealing with the issue as to whether served material should count as PPE, Holroyde J, said this:

> *"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 that public funds are not expended inappropriately.*
>
> *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".*

7. It is also clear that downloaded material need not be regarded as one integral whole, as a witness statement would be, and that when exercising the discretion under paragraph 1(5) a qualitative assessment of the material is required, having regard to the guidance in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *SVS* (including in particular para. 44 to 48), and the Crown Court Fee Guidance (updated in March 2017) and I have considered them in this context.

8. The Crown Court Fee Guidance, which was updated in March 2017, prior to the decision in *SVS*, provides as follows:

> *"In relation to documentary or pictorial exhibits served in electronic form (i.e., those which may be the subject of the Determining Officer's discretion under paragraph 1(5) of the Schedule 2) the table indicates –*

"*The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account 'any other relevant circumstances' such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the Defendant*." [my underlining]

9. At paragraph 38 of Appendix D, the Guidance gives examples of documentary or pictorial exhibits which will ordinarily be counted as PPE. They include –

"*Raw phone data where a detailed schedule has been created by the prosecution which is served and relied on and is relevant to the Defendant's case*.

Raw phone data if it is served without a schedule having been created by the prosecution, but the evidence nevertheless remains important to the prosecution case and is relevant to the Defendant's case, e.g., it can be shown that a careful analysis had to be carried out on the data to dispute the extent of the Defendant's involvement.

Raw phone data where the case is a conspiracy, and the electronic evidence relates to the Defendant and co-conspirators with whom the Defendant had direct contact.

10. In his decision Holroyde J also cited, with apparent approval, part of the decision of Senior Costs Judge Gordon-Saker in *R v Jalibaghodelezhi* [2014] 4 Costs LR 781. That decision concerned a Funding Order, which was in force at the material time and is, in material respects, similar to the 2013 Regulations; the relevant passages are at paragraph 11:

"The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically 'taking into account the nature of the document and any other relevant circumstances'. Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper. So, in a case where, for example, thousands of pages of raw telephone data have been served and the task of the Defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count." [my underlining]

11. In *R v Sereika (2018) SCCO Ref 168/1* Senior Costs Judge Gordon- Saker said as follows:

"In this particular case, the exercise of that discretion is not easy. On the one hand the prosecution chose to serve this evidence as an exhibit. The solicitors were under a

professional obligation to consider it. Given the nature of the defence, that the phone was used by others, it is not difficult to conclude that the solicitors will have wished to look for photographs indicating that use. On the other hand, it is unlikely that the vast majority of those photographs will have been relevant to that task. It would seem unlikely that the solicitors will have looked in detail at each of the 20,608 images served on disc. Most will have required a glance or less.

In short, it is clear that the evidence on the phone was central to the case against Sereika and his assertion that others had used the phone was central to his defence. The solicitors were required to consider the phone evidence carefully. However, much of the evidence on the phone would not require consideration.

It seems to me that in these circumstances there is no reason why a Determining Officer (or costs judge on appeal) should not take a broad approach and conclude that as only a proportion of the images may be of real relevance to the case, only that proportion should be included in the page count. Inevitably that will be nothing more than "rough justice, in the sense of being compounded of much sensible approximation": per Russell LJ in In re Eastwood [1974] 3 WLR 454 at 458. But that is the nature of the assessment of costs".

12. Even if material is not appropriately to be regarded as PPE, then it may be remunerated by a Special Preparation fee as provided for in paragraph 20 Schedule 2 of the 2013 Regulations. Such Fee is based on time actually spent; that is to say, the number of hours the Determining Officer considers reasonable to view the evidence other than that allowed as PPE. The following passage, taken from R v Sana [2016] 6 Cost LR 1143, indicates the approach to be taken:

> "*A line has to be drawn as to what evidence can be considered as PPE and what evidence we considered the subject of a special preparation claim. Each case depends on its own facts. The regulations do not state that every piece of electronically served evidence, whether relevant or not, should be remunerated as PPE. Quite the contrary, as electronically served exhibits can only be remunerated as PPE if the Determining Officer decides that it is appropriate to do so, taking into account the nature of the documentation and all the relevant circumstances*."

13. Turning back to this case, no Grounds of Appeal were served with the Notice of Appeal (itself filed on or about 13 July 2021) but they were served and filed later. Those grounds are, as is accepted by Mr. McCarthy, in broad terms. The Standard PPE Directions cases such as this were sent to the parties on 22 January 2022. Mr. Orde's written submissions, dated 13 April 2022 (and filed shortly afterwards), asserted that it was very difficult to know on quite what grounds the Appellants was relying. Such a criticism seems to be made out. I had the same concerns preparing for the case.

14. I understand that Mr McCarthy was instructed very shortly before the hearing. He prepared written submissions dated 10 May 2022. Whilst no criticism is to be made of him personally they were submitted late. The Standard 'PPE Directions require the submission of this document and any Scott Schedule 14 days before the hearing. The purpose of these directions is to ensure that both sides know what the other is going to say. This affords the parties an opportunity to seek to reduce the extent of any disagreement at the hearing; they

also provides focus for the hearing itself. An assessment of PPE can in many case be unusually time consuming and intricate, requiring on occasions, in my experience at least, detailed examination of served material and consideration of the issues in this case.

15. Mr. McCarthy's submissions were helpful. They were expanded upon modestly at the hearing and Mr. Orde made some offers or concessions in respect of a modest number of pages which the Appellants, through Mr. McCarthy, intimated were acceptable.

16. There is to be an additional allowance 6 pages per exhibit giving a total of 24 additional pages in respect of the opening pages of 4 separate downloads of four phones said to belong to the Defendant: JAD1 being the download form Samsung phone, JD2 being the download from Huawei phone, DRB 2 being the download form a disc or memory care and DRB 3, the download of an Appeal phone.

17. The main battleground in the hearing was in respect of the Images section of exhibit JAD 1. Mr. McCarthy says that the page count was some 24,318. The Determining Officer allowed 1184 pages from this section as 5% of 23,680 pages. The index to the download suggests that the Officer was right about the number of pages in in this Section. Be that as it may, the Appellants' case was they were required to look at the section in detail in order to ascertain whether there were any images which went to the issues which arose in this case- including in particular those issues which I have identified above. As I have indicated above, as I understand it there was an issue as to whether the victim was right to allege that the Defendant contrived situations which he would seek to evidence by taking photos and which would be stored on his phone in order to give, as the victim alleged a misleading impression as to the nature of the relationship. The Appellants were specifically instructed by the Defendant to check the downloads and in any event were required to do so in order be able to pursue the Defendant's case that no photographs were taken of the sort alleged. This consideration, it was said, went beyond just checking the material relied upon by the Prosecution.

18. It was however not clear to me on sampling the material that there were more than a few, or at least a small number of possible relevant images (little more than a handful) in this section. As I commented in the course of the hearing there appeared to be a very considerable amount of pre-loaded images and I had considerable difficulty identifying any material of any potential relevance. Mr. Orde's consideration of the material was as I understood it, to similar effect. In the event it appeared that the principal point being made on behalf of the Appellants was not that there was a significant amount of relevant material, or even potentially relevant material, but that there was none, or at least very little, and that the absence or lack of material was supportive of the Defendant's case. The material had to be checked carefully to ensure that this was the case. This merited a higher allowance by way of percentage determination of the Images section.

19. It seems to me that addressing the statutory test and *taking into account the nature of the document and any other relevant circumstances* is, as Mr McCarthy accepted, a fact specific exercise. I do not think that the finding of another Costs Judge (in *R v Eve Carter* SCCO Ref: SC-2020-CRI-000100) that a 10% allowance was appropriate even if no or not significant relevant material was found necessarily assists, particularly as there appear to have been special factors in that case. There is no set scale and as the Senior Costs Judge said in *Sereika* there will inevitably be an element of rough justice about this assessment.

20. Moreover and perhaps more importantly, the provision requires the Determining Officer, and on appeal the Costs Judge, to consider whether the material required close consideration (*R v Jalibaghodelezhi).* All served (and unused material) needs to be considered but it does not necessarily therefore count as PPE; that has repeatedly been made clear in many cases since. I have to consider whether it was readily apparent that the material in this section was relevant or not, and to what extent; if, on a cursory examination, it is clear that it is not then it seems to me that it is clear that it cannot be PPE (albeit it can be compensated by a Special Preparation Fee). In this case, as far as I could tell, it was readily apparent on a cursory examination that at least the vast bulk of the material was fairly obviously irrelevant (many of the pages I looked were of images taken in or around 2009) and it was difficult to see how a great deal of time could have been required scrolling through the pages of material to see if any of it was of potential relevance the issues arising on the charges. This is particularly since sampling suggested that much of the material consisted of stock pre-loaded images (the constant pressing of the down key/scrolling down enables the reader to pass over such images fairly quickly).

21. Mr. McCarthy, whose instructing solicitor was also attending the hearing, struggled to identify any more than a small number (if not a few) images in the course of the hearing which required anything more than such a cursory view. In circumstances where the premise of the claim was that there were a substantial number of images which did require close consideration, the solicitors might have been expected to have noted those images which were relevant or potentially relevant. In any event it seemed to me that I could not be satisfied that a greater allowance should be made in this case than had been made by the Determining Officer. The allowance of over 1000 pages in respect of this section was substantial and would have reflected a considerable amount of work. Indeed there seemed to be some force in the suggestion that the allowance made was generous, albeit Mr. Orde did not ask me to revise the allowance downwards. I should say that in a case where particular images have required close consideration one would ordinarily expect to see those images particularised (or categories of documents) identified in the appeal grounds, or at least substantially in advance of the hearing but in any event at the hearing itself.

22. Mr. McCarthy was able to identify some potentially relevant images in the Images section of DBR2 (8 pages were specifically identified as relevant in that they had the potential to support or undermine the case of the prosecution or of the defence). No allowance had been made by the Determining Officer in respect of this section. Mr. Orde suggested that in view of the allowance of 5% in JAD 1 it might have been reasonable not to allow anything for this section but in the event conceded that it be reasonable to allow 5%. Whether this offer was strictly accepted or not it is clear to me that Mr McCarthy did not argue substantially against such an allowance, accepting that there were very few relevant images in this section. I was not satisfied in any event on the information provided to me that an allowance of greater than 5% was appropriate and in view of Mr. Orde's stance I allow a further 5% of this section which the parties agreed equated to 69 pages.

23. There were further sections of material in Images section of DBR 3 and on the further explanation provided the Respondent conceded the additional 3 pages claimed.

24. I therefore allow a further 96 pages of PPE.

25. Whilst I accept that a very large amount of information was served, very little of it, it seemed, had to be considered closely. Nevertheless I think the work involved in

considering the material that has not been allowed as PPE was not insubstantial. The appropriate way to compensate for this is by way of a Special Preparation fee. I will leave it to the parties to agree a timetable for submission of any application for such a fee.

26. As to the costs of the appeal, it is clear that I have a discretion which is be exercised judicially. The first point to be made is that against a claim for additional PPE of some 8-9,000 the Appellant has achieved very modest success: 1-2% might be regarded as somewhat marginal. And indeed the Appellants have lost on what struck me as the major issue, the allowance of images in JAD 1 (albeit this could have had implications for DBR 2). Secondly, and perhaps more significantly, notwithstanding Mr McCarthy's helpful and considered submissions, I am concerned that the Appellants had really not made their case clear in the course of the appeal until the eve of the hearing (and after instructing Mr. McCarthy). Had they done so earlier it strikes me that that there is at least a real prospect that many, if not all of the matters, which have been conceded by Mr Orde would have been conceded in advance of hearing. It is in any event unsatisfactory that four weeks before the hearing of the appeal, the Respondents still should not know how the case is to be put (a matter that the Standard Directions in PPE was intended to address). Both points might well independently of each other have justified no order as to costs. Looking at them together and having regard to all the circumstances including the limited success of the Appellants, confirms in my mind that no order as to costs is appropriate.

Costs Judge Brown