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15 March 2007

Dear Sirs(s)

APPEAL PURSUANT TO THE COSTS IN CRIMINAL CASES (GENERAL) REGULATIONS 1986 AND THE LEGAL AID IN CRIMINAL AND CARE PROCEEDINGS (COSTS) REGULATIONS 1989/PURSUANT TO REGULATION 20(7) OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2001/CRIMINAL PROCEDURE RULES 2005

KINGS LYNN CROWN COURT

REGINA v SOLOMKA CASE NO: T2004 7061

RECEIVED

27 MAR 2007

PUBLIC LEGAL SERVICES DIVISION

CENTRAL TAXING TEAM CASE: YES

COURT REF:

SCCO REF: 305/06

DATE OF REASONS: 26-09-06

DATE OF NOTICE OF 30-10-06

APPEAL: APPLICANT: MS CLAIRE MATTHEWS
1 PAPER BUILDINGS
COUNSEL TEMPLE
LONDON EC4Y 7EP

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

The appropriate additional payment, to which should be added the sum of £200 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

Yours faithfully

P R ROGERS
COSTS JUDGE

REASONS FOR DECISION

The short but important point in this appeal, upon which there appears to be no authority one way or the other, is whether if counsel has to incur travel time (an expenses) to inspect documents in respect of which a successful claim for preparation is made, he or she

can also claim (at the lower travel rate) for travel to and from the site where the documents are situated?

2. The situation arises in this way. There was a two or three year investigation of gang masters' importation of illegal immigrants to work in this country conducted both in England and Scotland and involving three police forces. As a result a massive amount of material was accumulated, to such an extent that it occupied 36 crates and a whole room in Norfolk Police Headquarters at Wymondham.

3. This defendant was charged with three others on one count of conspiracy to facilitate the commission of breaches of immigration law by persons who were not citizens of the European Union; one count of conspiracy to transfer the receipts of criminal conduct, and one count of money laundering. Other defendants pleaded guilty but this defendant maintained his not guilty plea even after the addition of a further nine counts. At the conclusion of his trial he was found guilty and after the obtaining of pre-sentence reports received a sentence of seven years' imprisonment together with an order disqualifying him from being a company director for a similar period.

4. The defence team representing Solomka sought to be served with copies of the unused material so that they could inspect it but the prosecution refused to disclose it indicating that if they disclosed it to one defence team they would have to disclose it to all of them and the bulk was such that this was impracticable and not a financial burden which should be placed on the prosecution.

5. Ms Matthews, who attended the oral hearing of the appeal tellingly informed me that when this matter was mentioned to the judge he indicated that counsel would have to go to the material and inspect it because he was not going to adjourn the case. Accordingly Ms Matthews and her leader, Mr Carter, paid several visits to Wymondham Police Headquarters to inspect the material and indeed their quest was successful to the extent that they were able to abstract from the 45 crates' worth of papers material to fill three lever arch files which form the basis of the defence bundle put before the jury.

6. The Determining Officer accepted that the work involved in considering and analysing this unused material amounted to justification for a claim for special preparation under paragraph 17 of Schedule 4 to the Criminal Defence Service (Funding) Order 2001 and made an allowance of 20¹/₂ hours for Mr Carter and 33¹/₄ hours for Ms Matthews. However she disallowed the travel time for expenses on the basis that there was no provision for it in either the Regulations or the Graduated Fee Guidance issued to Determining Officers by the Department.

7. Mr Carter does not appeal, I was told by Ms Matthews, because he has a home in Norfolk and the amount of travelling in his case was therefore much reduced and did not justify the expense and cost of an appeal.

8. In her excellent Written Reasons the Determining Officer refers to paragraph 19(1) of Schedule 4 to the Criminal Defence Service (Funding) Order 2001 and in particular paragraph 19(I)(b) which reads:

"Travel for the purpose of attending a conference with the assisted person, where the appropriate officer is satisfied where the assisted person was unable or could not reasonably have been expected to attend a conference at the trial advocate's office or chambers."

9. She also referred to paragraph 25 of the same schedule to the same Order, which reads:

"25. Where a person is instructed to appear in court which is not within 40 kilometres of his office or chambers, the appropriate officer may allow an amount for travelling and other expenses incidental to that appearance; provided that the amount shall not be greater than the amount, if any, which would be payable to a trial advocate from the nearest local Bar or the nearest advocate's office (whichever is the nearer) unless the person instructed to appear has obtained prior approval under CDS Regulations for the incurring of such expenses or can justify his attendance having regard to all the relevant circumstances of the case."

10. Reference is also made by the Determining Officer to two paragraphs in the Graduated Fee Scheme Guidance. The first is M4 which is in the section dealing with special preparation, which reads as follows:

"M4 The following **should not** be included **in** the time allowed for special preparation: any travelling or waiting time, any submissions or documents that were not for the main hearing, any conferences not with the defendant or any oral advice on evidence."

11. Secondly, paragraph 04 of the Guidance which deals with conferences, views, travelling to defendants and taped evidence:

"04 Travel time, travel expenses or a fee for attendance are not allowed to views of a locus in quo, conferences with non-expert witnesses, or visits to see prosecution evidence."

12. The Determining Officer accordingly concluded that there was no power to make such a payment.

13. When the matter was placed before me for listing it seemed to me that the court might well benefit from any representations which the Department might choose to make and I therefore invited the Department to make such representations.

14. The Department replied on 27 November as follows:

"We do not intend to make full written representations, or to be represented at the hearing, being content to rely on the Determining Officer's Written Reasons. We do not, of course, rule out later representations being made under paragraph 22 of Schedule 1.

We would however like to point out an error in Section 04 of the Graduated Fee Guidance. Time reasonably spent travelling to a view is allowed under the provisions of paragraph 19(1)(b) of Schedule 4. That said, we would submit that the accepted understanding of a view is that of a view of a locus in quo should not be extended to viewing unused material, as in the case in question, and for which we would argue there is no provision to pay for time spent travelling."

15. Counsel's case is concisely put in paragraph 7 of her Grounds of Appeal:

"7. Logically, it cannot be fair that many hours go completely unpaid when it is accepted (by virtue of the payment of special preparation for hours at the police station) that the work carried out was necessary for the case. If a professional is expected to travel many miles and for many hours to carry out necessary work it must follow that they must be entitled to fair remuneration for the travel time (and expense thereof)."

16. The appellant also argued that the Graduated Fee Guidance is no more than that and is certainly not binding on Costs Judges who must make their decisions based on their interpretation of the proper meaning of the relevant Regulations and this must of course be right. Although obviously it is right that the Department has "corrected" paragraph 04 in this case, it is to be hoped that an addendum will be sent out to all Determining Officers because as published at the moment it is of course wrong in that respect.

17. As I indicated above, counsel attended the oral hearing of the appeal and made a telling point that the material had to be inspected at the direction of the judge and in situ, because he was not going to grant any adjournment. Ms Matthews said that the only alternative which she could think of would have been to have asked the judge to empanel the jury and then to send them away for two weeks while she and her leader went to Wymondham Police Headquarters to inspect the documents. Clearly that was not a course which appealed to her and would certainly not have been likely to have appealed to the judge (let alone the jury).

18. I agree that the matter is not covered by the Regulations one way or the other. The reason for that I think is when special preparation was "created" the assumption which it was a perfectly reasonable one to make, was that counsel would carry out that preparation either in chambers or at home, because normally it would involve research into law or perusal of a volume of documentation.

19. However in the rare case (and I think this probably is such a rare case) where in order to carry out the work that leads to a successful claim for special preparation extensive travel is claimed, there is in my judgment no bar in the Regulations to that travel being remunerated and as counsel said in her Grounds of Appeal it would be grossly unfair if all the travel time was effectively to be subtracted from the special preparation fee which the Determining Officer felt to be appropriate.

I

20. I am also impressed by the fact that the appellant sought travel time at the lower travel rate and not at the special preparation rate. This must of course be right because when she was driving to and from Wymondham Police Headquarters she would not be doing any work on the papers, or indeed anything else other than concentrating on the road.
21. Accordingly the Regulations being entirely silent and the Graduated Fee Guidance being in no sense binding and based on no regulatory support, I reject any suggestion that travel time should be restricted as suggested in the Department's representations and accordingly allow this appeal in full and direct the Determining Officer to pay the additional sum claimed by Ms Matthews or to reduce or eliminate the overpayment for which she seeks repayment from her as the case may be.

TO: MRS A TOMLINSON
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