



Neutral Citation No.[2022] EWHC 1541 (SCCO)

Case No: T20217078

SCCO Reference: SC-2021-CRI-000118

**IN THE HIGH COURT OF JUSTICE**  
**SENIOR COURTS COSTS OFFICE**

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

Date: 9<sup>th</sup> June 2022

**Before:**

**COSTS JUDGE WHALAN**

**REGINA**

**v**

**GARY FORBES and MARK LEWIS**

**Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration)  
Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations  
1986**

Appellant: **Kleyman & Co., Solicitors**

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

**COSTS JUDGE WHALAN**

## Introduction

1. Mr Gary Forbes and Mr Mark Lewis ('the Appellants'), who were represented by Kleyman & Co. Solicitors of London N20, appeal the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted pursuant to s.16 of the Prosecution of Offences Act 1985, following the making of Defendant's Costs Orders. The Appellants submitted a bill for £21,012.55 which comprised entirely 'legal costs'. The Determining Officer refused the claim in its entirety..

## Background

2. Messrs Forbes and Lewis ('the Defendants') were tried at Guildford Crown Court on an indictment alleging racially aggravated harassment and/or assault. The allegations arose out of an incident on the London Underground when the complainant alleged that she was racially abused and assaulted. She was a Liberal Democrat councillor and prospective parliamentary candidate and the case attracted considerable media coverage. Following a 5-day trial, both Appellants were acquitted. Defendants' Costs Orders ('DCOs') were made in their favour on 5<sup>th</sup> March 2021. The wording in the two DCOs is identical:

The court has ordered that costs be met from central funds. The amount to be paid will be subject to assessment by the HMCS National Taxing Team.

The Appellants submitted a claim for £21,012.55 comprising 'legal costs'. This was disallowed by the DO who, in summary, concluded that the Appellants were technically ineligible for repayment, as at no point during the proceedings had they or their solicitor applied for a Determination of Financial ineligibility, which is a prerequisite for the recovery of 'legal costs'.

## Statutory framework

3. Section 16(2) of the Prosecution of Offences Act 1985 ('the 1985 Act') governs the making of DCOs and provides:

2. *Where –*

(a) *any person is not tried for an offence for which he has been indicted or sent for trial; or*

(aa) *notice of transfer is given under relevant transfer provision that a person in relation to whose case it is given is not tried on a charge to which it relates;*

(b) *any person is tried on indictment and acquitted on any count in the indictment;*

*the Crown Court may make a defendant's costs order in favour of the accused.*

4. The 1985 Act was then amended by the Legal Aid Sentencing and Punishment of Offenders Act 2012 ('the 2012 Act') and the Criminal Cases (Legal Costs) (Exceptions) Regulations 2014 ('the 2014 Regulations'). Specifically, a new section 16A was inserted into the Act, the relevant provisions of which are as follows:

*16A*

(1) *A defendant's cost order may not require the payment out of central funds of an amount that includes an amount in respect of the accused's legal costs, subject to the following provisions of this section.*

(2) *Sub-section (1) does not apply where condition A, B, C or D is met.*

...

(5A) *Condition D is that –*

(a) *the accused is an individual,*

(b) *the order is made under section 16(2),*

(c) *the legal costs were incurred in relevant Crown Court proceedings, and*

(d) *the Director of Legal Aid Casework has made a determination of financial ineligibility in relation to the accused in those proceedings.*

...

(8) *Where a court makes a defendant's cost order requiring the payment of central funds of an amount that includes an amount in respect of legal cost, the order must include a statement to that effect.*

...

(10) *In this section –*

*“legal costs” means fees, charges, disbursements and other amounts payable in respect of advocacy services or litigation services including, in particular, expert witness costs;*

...

(11) *In subsection (5A) –*

*“determination of financial ineligibility”, in relation to an individual and proceeds, means a determination under section 21 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 that the individual’s financial resources are such that the individual is not eligible for representation under section 16 of that Act for the purposes of the proceedings;*

*“Director of Legal Aid Casework” means the civil servant designated under section 4(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;*

...

### Submissions

5. The Respondent’s case is set out in Written Reasons dated 9<sup>th</sup> August 2021 and in written Submissions drafted by Mr Michael Rimer, a Senior Lawyer with the Government Legal Department, dated 13<sup>th</sup> January 2022. The Appellants’ case is set out in Grounds of Appeal attached to the Appellants’ Notice filed on 1<sup>st</sup> September 2021. Mr Bishop, Counsel for the Appellants and Mr Rimer attended the oral hearing of these appeals on 13<sup>th</sup> May 2022.

### My analysis and conclusions

6. The Respondent, in summary, makes two broad submissions, proffered in the alternative. First, it challenges the court’s jurisdiction to hear these appeals, as the Determining Officer refused remuneration pursuant to a statutory bar, meaning that an assessment pursuant to the regulatory framework was never engaged. Second, and alternatively, the Appellants cannot recover their legal costs, as the DCOs did not include a provision for the payment of legal costs from central funds, demonstrated by the fact that there was no statement pursuant to s.16A(8) of the amended 1985 Act. This was because the Director of Legal Aid Casework had not made a determination of financial ineligibility in relation to either Appellant. The statutory framework is

clear, reasonable and simply disbars the Appellants' claim, in that it was comprised entirely of 'legal costs'.

7. The Appellants, in summary, accept that their claims are predicated on a fundamental, if technical, breach of the requirements under the 1985 Act. Initially, they relied on arguments to mitigate this breach, such as the submission that Kleyman & Co. Solicitors had no Legal Aid contract and there was insufficient time to route an application through a legal aid firm, given the cases' "very high publicity" and the need for a "certain degree of urgency". At the hearing, Mr Bishop submitted that the court should look behind the Appellants' technical failure and, in the interests of justice, order the Determining Officer to assess their legal costs, given that they can demonstrate that had they applied for legal aid in the correct manner, the Director of Legal Aid Casework would inevitably have made determinations of financial ineligibility, thereby entitling the Appellants to recovery.
8. I reject the Respondent's submission on jurisdiction. The judge at Guildford Crown Court made valid DCOs and, in accordance with the directions in the orders, the Appellants submitted a bill of costs. The Determining Officer was entitled to dismiss this claim and this refusal, to my mind, invokes the jurisdiction of this court, in that it properly confers a right of appeal on the Appellants.
9. I am not impressed or persuaded by the Appellants' initial arguments in support of their appeals. It was common ground that Kleyman & Co. could have routed a formal application for legal aid via a contracted legal aid provider. Whilst a fee may have been charged for this, this fee could, Mr Rimer concedes, have then been claimed as part of any DCO claim. There is, moreover, no requirement that these applications be made at the beginning of the case. The applications could have been made at any point throughout the case. Had the applications been made, the Director of Legal Aid Casework may or may not have issued the determination of financial ineligibility, depending upon the Appellants' means, and the technical requirements under the Act would have been fulfilled. Mr Bishop conceded properly that the question of urgency was not the Appellants' strongest point. The alleged offences occurred on 21<sup>st</sup> June 2019. Kleyman & Co. were instructed by the Appellants on or about 24<sup>th</sup> June 2019, three days later. The Appellants first appearance at Highbury Corner Magistrates was not until 16<sup>th</sup> December 2019 and the trial at Guildford Crown Court was delayed

until March 2021. The Appellants, quite clearly, had more than enough time to comply with the formalities of the 1985 Act, had they or their solicitors been minded to do so.

10. Mr Bishop's core submission is that the Appellants entitlement to recovery was frustrated by a technicality which the court should, in the interests of justice, set aside. Had the Appellants, in other words, submitted formal applications for legal aid, their applications would have been refused, as the Director of Legal Aid Casework would undoubtedly have made determinations of financial ineligibility. Thus, with the formality satisfied, the Appellants could have submitted their bill for 'legal costs' under the DCOs made by the court. In support of this submission, Mr Bishop relied on dictum in Evelyn Viscountess de Vesci & Others v. O'Connell [1908] A.C. 298, in which it was held that the literal application of statute can be disregarded, if to apply it would be to produce an unjust result. Mr Bishop accepted that this was a "novel submission" but one nonetheless of persuasive merit, given the Appellants' ability to demonstrate retrospectively had they applied for legal aid, their applications would have been refused on the grounds of financial ineligibility.
11. Mr Rimer rejects this submission. He argues that, with the insertion of s.16A, recovery of legal costs under the 1985 Act became subject to a reasonable and proportionate formality, as designated by Parliament. The Appellants, by their own admission, were in breach of these requirements. It does not in any way follow that the Appellants' applications for legal aid would have been refused, given that their submissions in this regard turn on the use of a broad, online legal aid calculator. Assessment of financial eligibility/ineligibility by the Director of Legal Aid Casework, is an important formality, and the Appellants' breach disqualifies them from recovering their legal costs.
12. I agree with the Respondent's submission and reject the Appellants' arguments on appeal. It is clear to me that the DCOs made at Guildford Crown Court were not intended to allow the Appellants to recover their 'legal costs'. Defendants in criminal proceedings can incur a variety of different costs and disbursements, and not all are classified as legal costs. Had the Court intended these DCOs to include legal costs, they would have had to have included 'statements to that effect', pursuant to s.16A(8) of the amended 1985 Act. The DCOs made did not include such statements and so, as a

matter of legal reality, the orders do not provide for the recovery of legal costs, as defined in s.16A(10). No doubt this was because of the Appellants' failure to comply with the requirements of s.16A(5A)/(D), namely to obtain from the Director of Legal Aid Casework a determination of financial ineligibility. I agree with Mr Rimer that this provision comprises an important formality or safeguard, and it is not satisfactory to purport to demonstrate compliance by means of an ad hoc, ex post facto financial declaration. The Appellants could easily have submitted claims for legal aid and, if and when those claims were refused on the grounds of financial ineligibility, they could have applied for and received DCO's which included the recovery of legal costs. They did not and they have no real explanation for this failure. It is not appropriate, in my conclusion, to simply set aside the regulatory requirements in the manner submitted by Mr Bishop. Quite apart from the fact that it is not all clear to me that the result of disallowance was unjust, it is not appropriate for this court to similarly disregard a regulatory framework that, although complex, was considered carefully by Parliament.

13. I dismiss accordingly the appeals of the Appellants.

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