Neutral Citation No. [2024] EWHC 307 (SCCO)

Case No: 60EW1009922

SCCO Reference: SC-2023-CRI-000092

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 2/2/24

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v MARTINS
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

HURRAIRAH HARRIS SOLICITORS

Appellants

-and-

THE LORD CHANCELLOR

Respondent

The appeal has been successful for the reasons set out below. I allow a further 22 pages of PPE in addition to those allowed by the Determining Officer and I await confirmation of the position in respect of costs.

REASONS FOR DECISION

1. The issue arising in this appeal is as to the correct assessment of the number of pages of prosecution evidence ('PPE') 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 dispute in this case concerns the extent to which evidence served in electronic form should count toward the PPE.

2. At the hearing on 30 January 2024 the Appellant was represented by a solicitor, Mr. Younis. I received some short written submissions on behalf of the Respondents but there was no attendance on their behalf at the hearing.

3. The Appellant is a litigator (for the purpose of the scheme) who represented the Defendant under a Representation Order, in proceedings before the Crown Court at Mold.

4. On 4 August 2022 the Defendant was arrested with two containers of petrol in the boot of the car he was driving. He was subsequently charged under the Explosives Substances Act 1883. The sole count on the indictment was that he had knowingly in his possession or under his control an explosive substance namely the component parts of two petrol bombs, under such circumstances as to give rise to the reasonable suspicion that they were not in his possession or under his control for a lawful object.

5. The Defendant said he had the petrol in his car because he intended to sell street food at a music festival and the petrol was to enable him to light a barbecue. The Defendant's phone was seized as part of the investigation and at trial the prosecution relied upon a poem (referred to as a doggerel) which was found on the defendant's phone. It was said to contain various lines or lyrics which were said to indicate an intention to use the petrol unlawfully as an explosive (the poem mentions Molotov cocktails).

6. The PPE was initially assessed as 144 pages by the Determining Officer. No allowances were made for contents downloaded into a report in Excel format which constituted the data extracted from the Defendant's phone.

7. However, prior to the hearing the LAA conceded that the report had been served and contained relevant material including the poem and a further 22 pages were allowed on a reassessment by a Determining Officer together with an allowance for special preparation fee for the work considering the electronic material.

The Legal Framework

8. 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."

9. As Holroyde J (as he then was) made clear in *SVS*, material which is, as he put it, only disclosed as unused material cannot be PPE. However, it is clear from the judgment that 'service' for the purposes of the regulations may be informal. 'Served' means served as part of the evidence and exhibits in the case and evidence may be served even though the prosecution does not specifically rely on every part of it.

10. It is clear however from the terms of Regulation 1(5) and the guidance set out above that it is not of itself enough for the material to count as PPE 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".

11. 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 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.

12. 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' <u>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</u>*." [my underlining]

13. 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.*

14. More recently, in *Lord Chancellor v Lam and Meerbux Solicitors* [2023] EWHC 1186 Mr Justice Cotter held at [57]:

> *"The lodestar of the assessment of electronic evidence is the aim to ensure that remuneration is appropriate and to avoid either underpayment, when consideration has been given to its content, or overpayment, through "golden bonuses", simply because there is a large volume of such evidence, even though it has not been considered."*

15. The discretion is an important and valuable control mechanism which ensures that public funds are not expended inappropriately (*SVS,* [50(ix)]). It is intended to cover circumstances of significant overpayment, such as for consideration of pages of an exhibit that required no consideration at all because they were blank or contained no usable data [*Lam* [37]).

16. Both Holroyde J, as he then was, in *SVS* and Cotter J in *Lam* cited, with 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].

17. There is a burden on the Appellant when seeking to assert that a higher assessment should be made, to establish that the material was relevant and needed to be considered closely. In *Lam,* Cotter J appeared to approve a passage to this effect in *R v Lawrence [2022] EWHC 3355* in which I went on to say:

> **"***The Appellant was instructed in the criminal proceedings and will know what issues arose. The Appellant will know what evidence was relied upon by the prosecution and what evidence amongst the material served was relevant. The difficulty with assessing the pages of electronic material is that it tends to include a large amount of irrelevant material. That was the case here. The premise of the claim to include the material as PPE is that it is material that required some consideration as opposed to being material that only required a glance*.[21] "

18. Further, when conducting any assessment of electronic material there is nothing wrong, if it is necessary and appropriate, with a rough and ready analysis; a "sensible approximation". It is an entirely proper approach to consider the content of a documentary or pictorial exhibit and conclude that only a proportion of the pages should count as PPE (*Lam,* [62])

19. Finally it is appropriate to point out, even if by way of emphasis, that if material is not appropriately to be regarded as PPE, then it may be remunerated by a special preparation fee provided for in paragraph 20 Schedule 2 of the 2013 Regulations. Merely because material has to be read by the litigator or the advocate, does not mean it should for that reason alone count as PPE. I do not read the comment in *R v Furniss* [2015] 1 Costs LR 151 of Haddon

– Cave J, as he then was, as requiring otherwise. As appears to me to be clear in *SVS* and has since been confirmed, material that does not need to be looked at reasonably closely does not generally count toward the PPE page count; the material in *Furniss* needed to be looked at closely (see *SVS* [42] citing *Furniss*). A Special Preparation 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 (see too, *R v Sana* [2016] 6 Cost LR 1143).

Application to the facts in this case

19. The Appellants were not content with the allowance of a further 22 pages for the poem which appears in the Notes section of the download. Mr Younis contended that a further allowance should be made for the material on the download. as PPE. It was necessary, he said, to consider the poem in its context. In particular he asked me to make an allowance of the Web History section of the download which was said to consist of over 18,000 pages of material in Excel.

20. Mr. Younis had provided the Court with a copy of the download on a USB stick. There was a very significant amount of material on the USB stick. Unfortunately at the hearing he was not able to read his copy of this material. However, although he was not the fee earner in the case, he said that the material needed to checked for the source of the poem as it may have been unloaded from a particular website. I understood him to indicate that the nature and identity of any such website might be relevant to guilt of the Defendant.

21. The Prosecution were not alleging that the poem had come from particular website or indeed, as I understand it, suggesting that there was anything incriminating in this section, but I understand that the Defendants needed to check it. The material was, I am told, uploaded into a web browser and checked to see whether it contained any indication as to where the poem came from. It may well be that they also needed to check for the source of two videos the use of which was mentioned by Mr. Younis. Apparently, however, nothing could be found. I gave Mr Younis the opportunity to double check his material and come back to me identifying this or any other materials that might illustrate that the data needed to be looked with degree of care that pages in respect of PPE are assumed to be considered. But he did not think this was needed and was content that I should make my decision on the basis of what I had without there being a further hearing. I had made it clear to him that, as I had understood it, the relevant guidance was to the effect that merely because material had been checked in the way he suggested did not mean that it therefore should be considered as PPE. He did not choose to take up the opportunity to come back to me in respect of the material he had provided.

22. Having browsed through some of the material in the section that Mr Younis drew my attention to and noting that nothing of relevance was found it seems to me clear that the work was done by way of checking only and it did not require the degree of consideration that meant it should count as PPE; the review would have been cursory in nature.

23. I do not therefore accept that the material should be considered as PPE. However, I agree that the Appellants should have the option of making a claim for Special Preparation on a time scale to be agreed by the parties within 4 weeks of the receipt of this decision.

20. The appeal might be regarded as having been successful to a modest extent, but Mr. Younis told me that the increase did not make any difference to his payment and that he would need a further 150 or so pages to for it to do so. If this is right then it seems to me, particularly as he lost on the matters that he raised at the hearing after the concession of 22 pages, I should make no order as to his costs. In case this is wrong and some contribution to the costs of preparing the notice of appeal and the fee of £100 for the lodging the appeal were appropriate, I give the parties 7 days from the date of receipt of this decision to email me about this, requesting some alternative direction as to costs. In default of any such request there will be no order as to costs.

COSTS JUDGE BROWN