



Neutral Citation Number: [2019] EWHC 2821 (QB)

Case No: QA-2019-000088

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On Appeal from Costs Judge Whalan

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2019

Before :

MR JUSTICE STEWART
(sitting with Master Brown as assessor)

Between :

THE LORD CHANCELLOR

Appellant

WOODFINES SOLICITORS LLP
MR KANNAN SIVA
MR TOMAS QUINN

Respondent (1)
Respondent (2)
Respondent (3)

Mr Julian Milford for the the **Appellant**
(Instructed by the Government Legal Department)
Mr Sailesh Mehta for the **First Respondent**
The Second and Third Respondents appeared in person

Hearing dates: 15 October 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE STEWART

Mr Justice Stewart:

Introduction

- 1 By Appellant's Notice dated 4th April 2019 the Lord Chancellor appealed the order made on 27th February 2019 by Costs Judge Whalan at the Senior Court Costs Office. In his Order Master Whalan allowed an appeal pursuant to regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013 ("The 2013 Regulations"). Relevant provisions in the 2013 Regulations are set out in the Appendix to this judgment.
- 2 In brief an appropriate officer can re-determine fees under Regulation 28 in respect of claims for Solicitors' Fees under the Litigator Graduated Fee Scheme ("LGFS") and a claim by Advocates under the Advocates Graduated Fee Scheme ("AGFS"). An appeal lies from that decision to a Costs Judge under Regulation 29, with the Costs Judge having the same power as the appropriate officer under the Regulations. If the Lord Chancellor wishes to appeal the decision of the Costs Judge, the appeal is brought under Regulation 30 in the Queen's Bench Division, essentially following the procedures set out in Part 52 of the Civil Procedure Rules. It is to be heard and determined by a single judge whose decision will be final and, by Regulation 8, the judge has the same powers as the appropriate officer and a Costs Judge under the Regulations.

Background Facts.

- 3 The first Respondents are Solicitors and the second and third Respondents Leading and Junior Counsel. They represented a defendant, Ayanleh Hosh, who was one of the Defendants tried at the St Albans Crown Court in a trial lasting some 41 days. Sentence was passed by the trial Judge on 2 convicted co-defendants on 17th August 2017.
- 4 There were two counts on the indictment. The first count was "Conspiracy to evade the prohibition on the importation of prohibited firearms, contrary to section 1(1) of the Criminal Law Act 1977." The particulars of the offence were:

"Ayanleh Hosh, Ikram Zaman and Khalid Hussain between the first day of January 2016 and the 31st day of May 2016, conspired together with Muzaffer Ali, Haroon Kahatab, Sajid Khan, Stewart Fitzimmons and other persons to evade the prohibition on the importation of firearms contained within Article 1 of the Import of Goods (Control) Order 1954, in contravention of Section 170 (2) of the Customs and Excise Management Act 1979."

[There is in the Appeal Bundle a different copy of the indictment which is particularised somewhat differently to include other co-Defendants. However, in respect of Mr Hosh, the difference is not material.]

- 5 Count 2 was in exactly the same terms save that the alleged conspiracy was to evade the prohibition on the importation of ammunition, rather than the importation of prohibited firearms.

6 The prosecution case, summarised in the prosecution opening, was:

“The Defendants were all involved in an ongoing agreement to import firearms and ammunition into the United Kingdom (UK) between February and May 2016. Firearms and ammunition, supplied by criminals in Holland, were smuggled into the country of two occasions during that period... the firearms and the compatible ammunition, must have been destined for those who were prepared to use them; they were weapons that would inevitably have been used to threaten, seriously injure, and even kill in the advancement of crime.”

7 Co-Defendants were sentenced as follows:

- i. Muzaffer Ali: Life imprisonment on Count 1 with a notional determinate sentence of 22 years. The reason a sentence of Life Imprisonment could be passed on this Defendant was that the guns were prohibited by the specific “restriction on the importation or exportation of any weapon or ammunition that is of a kind mentioned in Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) or (c) or (1A) (a) of the Firearms Act 1968”. The maximum sentence had been 7 years imprisonment, but was amended on 14th July 2014, pursuant to Section 111 of the Anti-Social Behaviour Crime and Policing Act 2014, by Article 6(d) of SI 2014/949. Other sentences passed on Mr Ali were determinate concurrent sentences or less.
- ii. Haroon Kathatab: 19 years imprisonment in respect of Count 1.

8 The Respondents say that the types of firearms imported into the country were of crucial importance. Because, and only because, they contravened the above new sub-sections, the maximum sentence was increased from 7 years to Life Imprisonment. They say that this new species of importation of firearms recognised the danger of bringing such particularly dangerous weapons into the country.

Master Whalan’s Judgment

- 9 In paragraph 3 Master Whalan succinctly set out the procedural background to the claims made by the lawyers under the LGFS and AGFS. All three claimed that the charges faced by the Defendant should be categorised as Class B offences in the Table of Offences listed in Part 7 to Schedule 1 of the 2013 Regulations. The solicitors’ claim had been initially assessed by reference to Class B, while counsel’s claims had been assessed as Class F. In November 2017 the “appropriate officer” reconsidered the claim of the solicitors and re-categorised the offences as Class F. This led to a recoupment of over £55,000 from the sums originally paid. The classification of both solicitors’ and counsel’s fees were the subject of the appeal to Master Whalan
- 10 The Lord Chancellor did not appear before Master Whalan but submitted detailed written submissions. The Master identified two questions for his determination.

- 11 The first question was whether the lawyers had a right of appeal. Master Whalan found that they did under Regulation 29(1) in conjunction with Regulation 29(12). The Lord Chancellor says that there was a misunderstanding by the Master of the point made on his behalf. It is common ground that the lawyers did have a right of appeal pursuant to Regulation 29.
- 12 The second question was whether the offences with which the Defendant had been charged should be classified as Class B or Class F. The Master said this:

“18...First, by any reasonable interpretation of the Table of Offences, conspiracy to import firearms, specifically automatic weapons that “would inevitably have been used to threaten, seriously injure and even kill in the advancement of crime”, must come within “Class B; offences involving serious violence or damage, and serious drug offences”, rather than Class F, which, in this context, is concerned predominantly with the fraudulent invasion of excise duty. Although the indictment specifies section 170(2) of the 1979 Act, the contravention constituted simultaneously offences under the Firearms Act 1968, most of which (e.g. possession of firearms with intent to endanger life, use of firearm to resist arrest, possession of firearm with criminal intent, possession or acquisition of certain prohibited weapons etc.), are categorised as Class B. Compared to Class F, G and K, where the distinction turns on whether the value involved exceeds £30,000 (G), £100,000 (K) or otherwise (F), it is preferable undoubtedly. HHJ Carroll’s sentencing remarks refer to the Defendants intending to use the weapons in “terrorising, intimidating and causing serious injury and death”, meaning that the weapons were of the type categorised in section 5(1) of the 1968 Act. Secondly, so far as the Defendant was charged under section 170(2) of the 1979 Act, he was simultaneously brought within the ambit of section 4A of the Act, which was an amendment introduced by the ... (“the 2014 Act”), and which increased the maximum term of imprisonment from 7 years to life imprisonment. Insofar as the 2014 Act post-dated the 2013 Regulations, it is not surprising altogether that the latter does not address the categorisation of these offences adequately, or at least leaves the issue open to confusion or doubt. Put simply, a conspiracy involving the importation of prohibited, automatic firearms and ammunition, in circumstances where the weapons were intended to be used for serious criminality and violence, in circumstances where a co-defendant convicted of the same offences alleged against the Defendant was sentenced to 19 years’ imprisonment, should be classified as Class B, offences involving serious violence or damage, and not Class F, other offences of dishonesty.”

19. I conclude...that the analysis of the Appellants is to be preferred to that of the Respondent. Given, specifically, the facts of this prosecution, it seems clear to me that the offences should be categorised as Class B and not Class F. Conspiracy to import a cache of automatic weapons and ammunition, with the intention of using them to commit crimes of significant criminality and violence, subject

to a maximum penalty of life imprisonment, must reasonably be a Class B offence of violence, and not a Class F offence of fraud or dishonesty.... ”

- 13 Schedules 1 and 2 to the 2013 Regulations set out the AGFS and LGFS schemes. Paragraph 3 of each Schedule is in the same terms. For that reason this judgment will refer only to Schedule 1. A relevant factor is the class of offence for which the defendant has been tried (see below). Paragraph 3 contains a detailed description of classes of offences. The key sub paragraphs are:

“3. Class of Offences

3 (1) For the purposes of this Schedule—

(a) every indictable offence falls within the Class under which it is listed in the Table of Offences and, subject to sub-paragraph (2), indictable offences not specifically so listed are deemed to fall within Class H;

(b) conspiracy to commit an indictable offence contrary to section 1 of the Criminal Law Act 1977 (the offence of conspiracy), incitement to commit an indictable offence and attempts to commit an indictable offence contrary to section 1 of the Criminal Attempts Act 1981 (attempting to commit an offence) fall within the same Class as the substantive offence to which they relate;

(c) where the Table of Offences specifies that the Class within which an offence falls depends on whether the value involved exceeds a stated limit, the value must be presumed not to exceed that limit unless the advocate making the claim under regulation proves otherwise to the satisfaction of the appropriate officer;

.....

(e) where an entry in the Table of Offences specifies an offence as being contrary to a statutory provision, then subject to any express limitation in the entry that entry includes every offence contrary to that statutory provision whether or not the words of description in the entry are appropriate to cover all such offences;...”

Lord Chancellor v Ahmed [2014] 1 Costs LR 21; [2013] EWHC 3642 (QB)

- 14 In this case Andrews J considered the AGFS in circumstances where an offence could potentially fall within Class K as well as Class B in the table of offences. She held that it was for the advocates and not a taxing authority to choose into which two equally viable classes of offence, the offence in question should fall. She said at [21]:

“The paying authority can only interfere if the claim that was made was clearly made under the wrong Class, and in this case the claim made by Mr Ahmed was valid because it was made under one of the two equally apposite Classes that this indictment covered.”

- 15 In the Ahmed case the particulars stated “in contravention of section 170”. As Andrews J noted at [17] “they do not say, as they could have done, “in contravention of section 170(2) ””. In relation to the activities of importing Class A drugs – the facts in that case – the judge noted at [7] that it was clear from the language of section 170 that the activity could equally appositely be charged as an offence under subsection (1) or subsection (2).

- 16 Classification of an offence is a matter of first construing the indictment to determine what offence has been charged and then locating that offence in the Table of Offences. If it is specifically listed, that is an end of the matter. There is no discretionary assessment to be made. Sometimes, as in the Ahmed case, there is a genuine choice as to categorisation. In such a case it is the lawyer who can choose, rather than the determining officer.
- 17 Before turning to the appropriate route to classification of the indictment offences with which the Defendant was charged, it must be noted that it is also common ground based on Schedule 1 paragraph 3(b) that conspiracy falls within the same class as the substantive offence to which it relates.

Classification of Offence

- 18 I will set out section 170(2) of the Customs and Excise Management Act 1979 (“the 1979 Act”) since it was the evasion on the prohibition on importation of firearms/ammunition which was alleged to be the subject of the conspiracy to evade, in contravention of that subsection. The section provides:

“(2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion –

...

(b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment...

he shall be guilty of an offence under this section and may be arrested.”

- 19 The submission on behalf of the Lord Chancellor in the present case is as follows:

- (i) The conspiracy counts faced by the Defendants were conspiracies clearly particularised as being in contravention of section 170(2) of the 1979 Act.
- (ii) Offences under section 170(2) are to be found in four places in the Table of Offences: (i) Class A and B drugs are in Table Class B, (ii) Class C drugs are in Table Class C and (iii) evasion in respect of counterfeit notes or coins is in Table Class G; (iv) under the heading “Classes F, G and K: Other offences of dishonesty” is:

“The following offences are in Class G if the value involved exceeds £30,000, Class K if the value exceeds £100,000 and in Class F otherwise.

....

Fraudulent evasion: not elsewhere specified Customs and Excise Management Act 1979, s170(2)(b), (c)...”

(iii) by paragraph 3(1)(c) the value is presumed not to exceed the limit unless the advocate/litigator making the claim proves otherwise. In this case no issue is taken about the value. Therefore the Lord Chancellor submits that the offence should be re-classified as Class F.

20 The Respondents’ submission is:

(i) The increase in the maximum sentence brought in on 14 July 2014, whereby certain firearms importation could be sentenced to life imprisonment rather than a maximum of seven years, was a new type of importation of firearms offence. It fell outside the existing categories of the 2013 Regulations. It therefore should have been classified as Class H and then re-classified as Class B. This would bring Count 1 into line with other firearms offences within Class B which attract life imprisonment.

(ii) Regulation 3(1) provides that indictable offences not specifically listed in the Table of Offences are deemed to fall within Class H. The mechanism then is under Regulation 3(2), whereby an advocate or litigator dissatisfied with the classification within Class H of an indictable offence not listed in the Table of Offences may apply to the appropriate officer to reclassify the offence.

21 The mechanism referred to above is uncontroversial. The question is whether the offences with which the Defendant was charged were offences not specifically listed in the Table of Offences such that they were deemed to fall within Class H. The Respondents say that the substantive offences to which the conspiracy relates, namely the importation of particularly dangerous firearms, are not classified in Class A-G. The argument is that Parliament created a new offence contrary to subsections 170(2)(b) and (4A) of the 1979 Act, targeting the gravity of trafficking in firearms and simultaneously targeting both importation and particular types of firearms.

22 Section 170 (4A), so far as material says:

“In the case of:

(a) an offence under subsection (1) or (2) above committed in Great Britain in connection with a prohibition or restriction on the importation or exportation of any weapon or ammunition that is of a kind mentioned in section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) or (c) or (1A)(a) of the Firearms Act 1968,

...

Subsection (3)(b) above shall have effect as if for the words “imprisonment for a term not exceeding 7 years” there were substituted the words “imprisonment for life”.”

23 The essential difficulty which the Respondents have is that the Defendant was specifically tried for conspiracy to evade the prohibition on the importation of

firearms “in contravention of section 170(2) of the Customs and Excise Management Act 1979.” There is no reference to section (4A). Further, section (4A) by its very wording substitutes the maximum sentence of 7 years with one for life in respect of “an offence under subsection (1) or (2) above”. Both the indictment itself and the terms of section 170 (2) and (4A) make it clear that the offence is under section 170(2). There is no separate offence under section (4A).

- 24 Mr Mehta put his oral argument in a different but related way. The other Respondents adopted this. He said that the offence with which Mr Hosh was charged had, subsumed within it, a possession of firearms offence which would have been Class B. He also submitted that Paragraph 3(1)(a) refers to “every indictable offence falls within the Class within which it is listed....”, rather than to the offence on the indictment. In those circumstances, he said that the Court could achieve fairness by classifying the offence as Class B. I do not accept this submission. Schedule 1 para 4 to the 2013 Regulations deals with the calculation of trial advocates’ fees. The formula pursuant to which the graduated fee “must be calculated” includes: “B is the basic fee specified in the table following paragraph 5 as appropriate to the offence for which the assisted person is tried.....”. There are similarly worded provision for litigators in Schedule 2 paragraphs 7 & 9. Further, it cannot be right that the civil courts might be called upon to decide whether a count on the indictment necessarily had subsumed within it another offence which would have come within a Class attracting higher remuneration.
- 25 There is no lacuna in the 2013 Regulations. The statutory wording is clear and unambiguous. I was referred to the case of *Duport Steels Ltd v Sirs [1980] 1 All ER 529*. The passages of the speeches of Lord Diplock at p541 h-i and Lord Scarman at p551 d-f are particularly in point. As Lord Scarman said: “..in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments”. It must follow from the wording of the 2013 Regulations that this offence was properly classified as Class F.
- 26 The Respondents set out a number of reasons why the offence should not be Class F. These reasons would fall for consideration if there was a discretion in classification or some ambiguity in the 2013 Regulations. However, there is no discretion in classification if an offence is listed within a specific class, such as Class F; nor is there any ambiguity. Nevertheless, I shall briefly refer to the remainder of their argument.
- 27 The Respondents provide an analysis of offences where the maximum sentence is unfettered. These offences, such as homicide and related grave offences and offences involving serious violence or damage, and serious drugs offences fall within Class A or B. Similarly, life imprisonment firearms offences such as offences under section 16, 17 and 18 of the Firearms Act are Class B.
- 28 The Respondents also referred to the fact that, on 1 April 2018, the new AGFS Scheme 10 was introduced after a period of consultation. It was given statutory force by the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018 (“the 2018 Regulations”). There is a new classification system. There is some doubt as to how the offences with which Mr Hosh was charged fall within the new scheme and I do not propose to try to resolve that doubt. Suffice it to say that:

- (i) The new scheme does not have any impact on the effect of the 2013 Regulations which were in force at the time relevant to this appeal. This is obvious, but is in any event made clear in Regulation 34 of the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018.
 - (ii) It cannot in any way be inferred from the new system that there was a lacuna in the 2013 Regulations in classifying those section 170 (2) offences which, by the 2014 amendment in s170 (4A) increased the maximum penalty to one of Life Imprisonment
- 29 In summary, therefore, a section 170(2) offence, conspiracy to commit which was contained in the counts with which the Defendant was charged, is specifically listed in the Table of Offences in the 2013 Regulations. In this regard reference should also be made to paragraph 3(1)(e) of Part 1 to the 2013 Regulations. This is reproduced in the Appendix, but I repeat it here. It states
- “(e) where an entry in the Table of Offences specifies an offence as being contrary to a statutory provision, then subject to any express limitation in the entry that entry includes every offence contrary to that statutory provision whether or not the words of description in the entry are appropriate to cover all such offences; (*my underlining*)
- 30 It follows that the appeal must be allowed.