

R v PKA and PJA

Before the Recorder of Leeds

Application for 2 juniors

1. I have received applications on behalf of the two defendants in this case to extend the representation order in each case to provide for them to be represented by two junior counsel.

2. On 08.10.08 I gave a ruling in the case of *R v Various Defendants (including Z, W & D)* reversing an earlier grant of a certificate for 2 juniors and declining applications in relation to two other defendants for such certificates. I also gave guidance as to how I would approach such applications in the future. There have been very few such applications since then for certificates for two junior counsel. I have however granted a substantial number of certificates for QC and junior and some for QC only.

The New Regulations

3. This is the first application that I have received for such representation since the regulations were changed in 2013. It is apparent from the number of applications that I have dealt with recently which still rehearse Regulation 14, including both these applications, that many practitioners are not aware of the changes that have been made to the regulations. During 2013 there were two alterations to the regulations. Prior to 01.04.13 these matter were dealt with under regulation 14 of the Criminal Defence Service (General)(No.2) Regulations 2001 as amended. There had been several amendments to Regulation 14 in 2007 and 2009, but nothing of any substance. The 2001 Regulations were replaced in their entirety on 01.04.13 by SI 2013 No. 614, the Criminal Legal Aid (Determination by a Court and Choice of Representative) Regulations 2013. The relevant regulation is Regulation 18.

4. There have already been two significant amendments to SI No. 614 made by SI 2013 No. 2814. First, a gloss has been introduced on Reg 18(7) to provide that equality of numbers of advocates for the prosecution is not per se a qualifying factor but it must be the view of the court making the determination that the defendant will be or will be likely to be prejudiced if they too were not represented by two or more advocates. Second, the determination by a circuit judge (usually the resident judge) must be approved by a presiding judge of the circuit or by a judge nominated by him/her for the purpose of giving such approval.

5. These new regulations in part use different language from the previous regulations. Whereas the previous regulations spoke about **the opinion of the court**,

the new regulations provide that **the relevant court may determine** that an individual can select a Queen's Counsel (Reg 18(2)), or two junior advocates (Reg 18(3)), or a Queen's Counsel and a junior advocate (Reg 18(4)) if "that individual's case involves substantial novel or complex issues of law or fact which could not be adequately presented except by" (an) advocate(s) of the rank and number applied for. Additionally before the right to select such (an) advocate(s) can be granted, one of two other conditions must be met. Those are (i) the 'exceptional condition' and (ii) the 'counsel condition' and/or 'the prosecution condition'. The 'exceptional condition' means that the individual's particular case is exceptional compared with the generality of the cases involving similar offences. The 'counsel condition' means that a Queen's Counsel or senior Treasury Counsel has been instructed by the prosecution. The 'prosecution condition' means that in relation to the particular case either (i) two or more advocates have been instructed on behalf of the prosecution, (ii) the number of prosecution witnesses exceeds 80, or (iii) the number of pages of prosecution evidence exceeds 1000.

6. Much of this phraseology is familiar to the court as it was used in the 2001 regulations, although it has now been grouped under generic headings.

Analysis of the changes introduced

7. The background and purpose of some of the changes is well known. The government published its consultation paper on "Transforming Legal Aid" in the spring of 2013. It proposed various changes to the funding of criminal legal aid. The relevant passage in relation to the new Regulation 18 is the section at part 3 of chapter 5 headed "Reducing the use of multiple advocates". Concern was expressed that in recent years there had been the appointment of leading or multiple counsel in cases where it was not absolutely necessary. It was noted that some 50% of these cases were heard in a relatively few court centres. It was also said that the form introduced in 2008 (Form 5138) had resulted in some reduction in the grant of more than one advocate but that it was still considered that grants were being made in some cases where they were not needed. It was these concerns that caused led to the introduction of the two amendments to the regulations in SI 2013 No. 2814.

8. The reference in the consultation document to the increased number of cases in which orders were made authorising more than one advocate did not give any indication whether this was an increase in grants of QC and junior or grants of two juniors. Based on anecdotal information, the belief amongst judges is that there has been a significant increase in many court centres of grants of two junior certificates.

9. It seems to me that the approach I must take is to examine the case, and in a multi handed case to examine the case for each defendant separately and to assess what level of representation is required so that given the novelty or complexity of the law and/or the facts in the case the case for the particular defendant I am considering can be presented adequately.

10. The question I have had to consider is whether the new regulations have altered or in some way sharpened how I should approach any application to extend the representation order. Whether there is a substantial difference between a court being

of ‘an opinion’ and a court making ‘a determination’ may be a moot point. What the new wording has made clear for me is that when I am presented with an application to vary the representation order from a sole junior I must make an assessment of the case and make a determination as to what is the appropriate level of representation. I must decide what level of representation the defendant requires in order to be represented adequately and I must say what that is. If it is something different from what is applied for then I must say what is appropriate and decline the application for what is in my determination inappropriate.

11. In that respect there are two issues – one is rank and the other is quantity.

Rank of advocate(s) required

12. I deliberately use the word rank rather than quality. I do so because there are obviously some juniors who are seen by solicitors as being as able as those advocates who have been granted the rank of silk, but who for one reason or another have chosen not to apply for the rank or who have not yet been awarded the rank. However the regulations recognise the existence of the rank and that there are some cases that in order for the defendant’s case to be presented adequately s/he should be represented by someone who has attained the level of quality which is recognised by the award of silk.

13. Of course there are a few juniors who could present such a case adequately, and that is because they are worthy of the rank but have not yet been awarded it. Last week a new list of silks was announced. Of course the advocates whose names were on the list did not assume a new quality overnight; but their quality was at that point recognised and acknowledged to the world. It has long been recognised that admission to the rank is an acknowledgment of excellence. Further it is an acknowledgment of what has been independently and objectively established by those responsible for the appointment, currently the QC Appointments Panel and prior to that the Lord Chancellor.

14. The regulations recognise that there are some defendants whose cases require a particularly high level of representation. The regulations have put into the hands of the judges the responsibility for deciding which are the cases where a defendant requires representation of the standard recognised by the award of silk. That provides an assurance to the defendant that in the appropriate case they will have the highest level of representation that is available and it also provides an assurance to the Legal Aid Authority which is providing the funding that the necessarily increased expenditure will only be incurred where it is absolutely necessary.

15. Of course a defendant may have great confidence in a senior junior advocate and choose not to ask for a QC. That is their choice in connexion with which of course they will be advised by their solicitor.

16. It seems to me to follow from this, that if a solicitor has confidence in such a senior junior and wishes to entrust the case to them but I as the judge am satisfied that the case is one where the appropriate rank of advocate is that of a silk, then I am not permitted to grant the choice of 2 juniors, and the advocate will have to do the case

unassisted. If it is case requiring silk level representation with the assistance of junior then that is the only level of representation I can grant and when that certificate is granted the defendant should be represented by such advocates rather than a sole junior.

17. I am conscious that there is an approach which says that if a case meets the standard for two advocates, perhaps on the basis of substantial factual complexity and the prosecution having two advocates then the solicitor has a choice as to whether to pitch for a QC and junior or on the other hand to bid low and only ask for 2 juniors. In my judgment that is a wrong approach. The solicitor must decide whether it is one of the top level of cases that require an advocate whose excellence has been recognised by the award of silk or not. If it does then that is what s/he should apply for. If they underbid then in my judgment the judge can and should determine that they have underbid and tell them so and invite them to apply for what the judge regards as the appropriate level – namely silk alone or silk and junior. It will then be for the solicitor and defendant to decide whether to accept the judge’s determination or to abandon the application and rely on the sole junior.

Number of advocates required

18. In relation to the number of advocates required in a case, I have previously addressed this issue in *R v Various Defendants* (supra). It remains very important to examine any assertions as to the number of advocates required very carefully and to do so at the stage in the case when the issues are clearly defined and the work to be done in preparation and at trial is clear rather than speculative. All the matters I rehearsed in 2008 are still relevant and I do not consider that the new regulations have affected them at all.

Applying all that to this case

19. The defendants, who are brothers, are jointly indicted with 2 counts of fraudulent trading, relating to the sale of apartments in several sites in Bulgaria and Cape Verde. The loss to customers runs to several million pounds. I have read a copy of the prosecution case summary and the defence statements for both defendants. There are 106 witnesses (but 517 witness statements) and 9322 pages of prosecution evidence. The prosecution are represented by 2 juniors. The defence allege complex fraudulent activity by corrupt foreign lawyers, officials and builders against the background of a difficult market. There is also a very substantial amount of unused material (contained on 5 hard drives and two memory sticks).

20. I am satisfied that this is not case where the complexity of either the law or the evidence requires the level of experience and excellence of a QC; I am quite satisfied that experienced junior counsel are well able to deal with this case. So this is not a case in which I can or should determine that either defendant’s case involves issues which could not be presented except by a QC whether acting alone or assisted by a junior.

21. The trial date is fixed for the 27th May 2014. I have seen the proposals set out by both the currently instructed juniors as to what work still needs to be done prior to the trial and how it will be divided between litigator and counsel and between the two counsel if the certificate is extended. Similarly I have seen the proposals as to what each advocate will be doing during the trial process. I am satisfied that this is all real and substantial work. I have also been told that it is proposed that the 2nd juniors will both be counsel experienced in fraud cases. I am quite satisfied that the appropriate determination for me to make in each of these two cases is that the defendant's case involves substantial complex issues of fact which could not be adequately presented by a single advocate including a QC alone and that the prosecution condition is met in that all three potentially qualifying conditions (2 advocates for the prosecution, witness count, and page count) are satisfied.

Postscript

22. I intend to make this ruling public so that people will know the approach that I will be taking when dealing with all applications to extend the representation orders. In doing so I need to make it clear that I regard this grant of a certificate for 2 juniors as being quite exceptional. I do not expect that there will be many cases which will require two counsel that do not also require the added quality brought by a QC. There will be very few cases in which the degree of complexity of law or fact that can be handled by a junior will require another junior to assist him/her, given the work that the court is entitled to expect the litigator to do in support of that junior advocate.

HHJ Peter Collier QC
The Recorder of Leeds

26th February 2014