



Neutral Citation No. [2023] EWHC 3125 (SCCO)

Case No: 22CA1196621

SCCO Reference: SC-2023-CRI-000062

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

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

Date: 1 December 2023

**Before:**

**COSTS JUDGE LEONARD**

**R**

**v**

**ALLEN**

**Judgment on an application for an extension of time under Regulation 31 of the  
Criminal Legal Aid (Remuneration) Regulations 2013**

**Applicant: Riley Hayes (Solicitors)**

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

**COSTS JUDGE LEONARD**

1. This is an application for an extension of time to file an appeal under regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013.
2. The Applicant represented Kane Allen (“the Defendant”) before the Crown Court at Worcester. The Applicant’s right to payment for that work is governed by the Litigators Graduated Fee provisions in Schedule 2 to the 2013 Regulations, as they applied on 22 July 2021, the date that a Representation Order was made granting legal aid to the Defendant.
3. The Applicant wishes to appeal from a decision of the Legal Aid Agency (“LAA”)’s Determining Officer. Regulations 28 and 29 of the 2013 Regulations set out the process for reviewing and appealing the decisions of Costs Officers.
4. In short, the process is this. Under regulation 28 the litigator may apply to the Determining officer, within 21 days of receiving payment, for a redetermination of the Graduated Fee payable. Within 21 days of notification of the redetermination the litigator may require that the Determining Officer give written reasons for the redetermination.
5. Within 21 days of receiving the written reasons under regulation 28, the litigator may file at the Senior Courts Costs Office (SCCO) a notice of appeal against the Determining Officer’s decision.
6. Those time limits may “for good reason” be extended under regulation 31. The decision as to whether to extend the time limit for filing a notice of appeal at the SCCO will be made by a Costs Judge. At sub-paragraph (2), regulation 31 says:

“(2) Where a representative without good reason has failed (or, if an extension were not granted, would fail) to comply with a time limit, the appropriate officer, a Costs Judge or the High Court, as the case may be, may, in exceptional circumstances, extend the time limit and must consider whether it is reasonable in the circumstances to reduce the fees payable to the representative... provided that the fees must not be reduced unless the representative has been allowed a reasonable opportunity to show cause orally or in writing why the fees should not be reduced.”
7. In this case, the Determining Officer’s written reasons were dated 30 November 2022. The Applicant’s appeal notice was filed on 25 June 2023, about 6 months late. The appeal notice confirms that an extension of time is needed and gives these grounds:

“This is a matter where, having received written reasons, it was necessary to liaise with counsel as to appealing this matter. Unfortunately, counsel has been very busy and arranging to have a full discussion about this matter has taken some considerable time. We did not have that full discussion until 14th June 2023 and have now expedited pursuing the matter. We should be grateful therefore if an extension of time could be allowed.”
8. There had been no previous request for an extension of time.
9. The appeal was referred to me and I listed it for a hearing to consider only whether an

extension of time should be granted.

### **The Case against the Defendant**

10. The Defendant was indicted on two counts of possession of a Class A controlled drug with intent to supply. He had been arrested after vacating the front passenger seat of a car in which he had been observed by police and which held concealed Class A drugs in packaging which, it was subsequently established, bore his fingerprints. A mobile phone was taken from the Defendant, and two more taken from the car.
11. The following account of subsequent events is taken from an advice given to the Applicant by Mr Stephen Tettey, counsel who represented the Applicant on the hearing of the application for an extension of time.
12. At the time of the Defendant's arrest, another male was present, but he escaped and was never identified.
13. The Defendant had been in communication with a number of family members and associates around the time the offences were committed. None of those persons were charged, although the communications were reviewed by the police. The Defendant had had telephone contact with a very large body of additional persons, of whom 65 were identified.
14. The Defendant had a number of conferences with Counsel and Instructing Solicitors. He gave clear and unambiguous instructions denying the offence.
15. At the outset of the case, the Prosecution case relied upon the Defendant's presence in the vehicle at the time of arrest, the presence of drugs in the vehicle and the recovery of multiple phones. Additionally, the vehicle in which the Defendant had been observed by police was not registered to him nor to an address in Worcester. These facts all gave the case against the Defendant the hallmarks of a small to medium-sized Class A drugs conspiracy involving 'county lines' and the trafficking of drugs from Wolverhampton to towns in Worcestershire.
16. Based on the evidence initially disclosed and the Defendant's instructions, a very detailed Defence Case Statement was prepared. In response the Prosecution re-investigated the matter, re-appraised their case and served substantially more new evidence. That evidence included amongst other things, further witness statements, further exhibits, further drug expert evidence and cell-site reports, and voluminous evidence relating to the possibility of devices co-locating.
17. The Defendant was advised in relation to the new Prosecution evidence. He maintained his innocence and further trial preparation continued. There was a wealth of material to be considered by Counsel and Instructing Solicitors prior to the conference with the Defendant.
18. During a number of conferences, the Defendant maintained his innocence. Further trial preparation was now necessary as was the consideration of the evidence with a view to instructing Defence experts.

19. Two of the telephones recovered by the police could, based on their contents and cell-siting, conceivably be attributed to someone other than the Defendant. One of the devices when reviewed properly (including cell-site material) was undeniably that of the Defendant, used by the Defendant either at or close to his home.
20. There was no CCTV footage or other recordings of the Defendant, nor any Automatic Number Plate Recognition (“ANPR”) evidence. The only observation of the Defendant purportedly involved in drug supply was by police officers when he was with another person in a vehicle registered to a third party. This placed greater emphasis on the telephone download evidence and the billing records of the various phones attributed to the Defendant. That evidence identified communications rather than times between the Defendant and drug users with whom he was familiar; the provision of postcodes or other information linking the Defendant to the addresses of drug users; and the potential recruitment of another person to the drug dealing enterprise.
21. Despite advice in various conferences the Defendant maintained his innocence until the day of trial, when he changed his plea to guilty and the matter was adjourned. The Defendant then provided instructions that resulted in a Basis of Plea to the effect that the Defendant was acting in concert with another person or persons for the supply of drugs, but was not recruiting any person to the enterprise.
22. The Defendant’s Basis of Plea was initially rejected in its totality by the Prosecution and the Court directed a Newton Hearing. The Prosecution subsequently conceded parts of the Basis of Plea. On 13 October 2022 the Defendant’s case came before HHJ Burbidge at Worcester Crown Court for a Newton hearing which did commence, but which led to a complete agreed resolution in which the Basis of Plea was largely accepted, avoiding the need for lengthy cross-examination of either the Defence or the Prosecution experts and the risk of the Defendant, for the purposes of the sentencing guidelines, being found to have played a leading role in the conspiracy. It also achieved a significant saving to the public purse.

### **Pages of Prosecution Evidence**

23. The graduated fee due to the Applicant is calculated by reference, along with other factors, to the number of served Pages of Prosecution Evidence (“PPE”). PPE, broadly speaking (and subject to the guidance of Holroyde J, discussed below) describes the evidence upon which the Prosecution relies, as distinct from “unused material”, upon which the Prosecution does not rely but which it is obliged to disclose under the provisions of the Criminal Procedure and Investigations Act 1996 (broadly speaking, material that might undermine the Prosecution or assist the Defence). The Determining Officer’s decision in relation to the PPE count is the subject of the Applicant’s appeal in this case.
24. The relevant provisions for calculating the PPE count are at paragraph 1, (1)-(5) of Schedule 2 to the 2013 Regulations. Those paragraphs explain how, for payment purposes, the number of pages of PPE is to be calculated:

“(2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in

accordance with sub-paragraphs (3) to (5).

(3) The number of pages of Crown 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 Crown in electronic form is included in the number of pages of Crown evidence.

(5) A documentary or pictorial exhibit which—

- (a) has been served by the Crown in electronic form; and
- (b) has never existed in paper form, is not included within the number of pages of Crown evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of Crown evidence taking into account the nature of the document and any other relevant circumstances.”

25. The PPE count is subject to a maximum figure, which for present purposes is 10,000.
26. I should also mention that paragraph 20 of Schedule 2 makes provision for a “special preparation” payment for the perusal of electronic evidence that has not been included within the PPE count, although that is less remunerative to the litigator than the inclusion of the evidence within the PPE count.
27. PPE appeals concerning electronic evidence have tended to turn upon either or both of two issues. The first is whether evidence which the Applicant wishes to include within the PPE count should properly be considered as served or as unused.
28. The second is whether electronic evidence which has never existed in paper form, and which will accordingly only be included within the PPE count if the Determining Officer considers that appropriate, is of sufficient importance to the case against the relevant defendant to justify inclusion within the PPE count.
29. Authoritative guidance on both issues has been provided by two decisions of High Court Judges, both of which establish that it may be appropriate to include evidence within the PPE count even if it has not been formally served.
30. The first is the judgment of Mrs Justice Nicola Davies DBE (as she then was) in *Lord*

*Chancellor v Edward Hayes LLP & Anor* [2017] EWHC 138 (QB). Davies J concluded that, given the importance to the prosecution in that particular case of text messages, it was incumbent upon the defence team to look at all the underlying data from which the prosecution had extracted the evidence upon which it relied. The defence needed to test the veracity of text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown, and to check the accuracy of the data finally relied on by the Crown. The underlying data should accordingly (although never formally served) be included within the PPE count.

31. *Hayes* is often quoted as authority for the proposition that if the Prosecution relies upon a report extracted from any part of the served electronic evidence, all of it must all be included within the PPE count. That, in my view, is clearly wrong. *Hayes* does mean however that where key prosecution evidence is extracted from a particular category of electronic data, one would normally expect all of the electronic evidence in that category (in *Hayes*, messaging data) to be included, or (see *The Lord Chancellor v Lam & Meerbux Solicitors* [2023] EWHC 1186 (KB)) at least an appropriate proportion of it.
32. Further, detailed guidance was offered by Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB). The following passages are extracted from paragraph 50 of his judgment:

“The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE... Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE “includes” such material: it does not say that the number of PPE “comprises only” such material... “Service” may therefore be informal... non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE... If – regrettably - the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Officer (or, on appeal, the Costs Judge) will have to determine it in the light of all the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) would be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE...”

### **The Underlying Appeal**

33. It would appear from a letter and a Disclosure Management Report produced by the Applicant that the Prosecution formally served extracts from mobile telephone

download reports, but supplied the totality of the download reports themselves from which extracts were relied upon) as unused. Presumably, a similar approach was taken to other electronic data such as cell site reports

34. According to the Determining Officer's written reasons, the Applicant claimed payment on the basis of 10,000 PPE. The claim was based on 62 pages of Statements, 171 pages of exhibits and 21,869 pages of electronic data. The Determining Officer allowed 240 pages, including 62 pages of statements, 171 pages of exhibits and 7 pages of streamlined Forensic Reports. Nothing at all was allowed for electronic evidence.
35. The Determining Officer's reasoning included these passages:

“... The only documentation from the CPS confirms the data was served as unused. The sols have indicated that the data was relevant to the defence, however there is nothing from the prosecution to confirm that they ever relied on the data. In order for data to be considered as PPE we would require some form of evidence from the prosecution that they relied on the data in question.

The CPS letter confirms that the phone downloads were unused material. Following the CPS letter, there was no confusion regarding the status of the material. Unused Material is not payable as PPE.

Lord Chancellor v SVS paragraph 50 confirms... The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.

Where it is unclear if material has been served, we can rely on submissions as to relevancy of the material to consider if it should be considered as PPE, as per SVS, however in this case, the CPS has specifically stated the material was unused, as such not payable as PPE, however a claim can be made under the unused preparation provisions...”

36. The importance of the PPE count, for the purposes of calculating the Graduated Fee payable to the Applicant, is underlined by the fact that the claim based on a PPE counter £10,000 was for a payment of £89,975.11, whereas the amount allowed by the Determining Officer on the basis of a count of 240 was £3,864.24 (albeit with the possibility of a much less remunerative claim for special preparation).

### **Conclusions: Good Reason**

37. The stated reason for the Applicant's delay in submitting this appeal patently does not constitute a good reason. Mr Tetley provided the Defendant with a written advice on its costs claim on 13 November 2022 (the same advice from which I have extracted much of the history of this case). That seems to have prompted the Applicant's request for written reasons.
38. A vague reference to counsel being busy cannot explain or justify the subsequent six-month delay in submitting this appeal. Mr Tetley tells me that he did have some

telephone conversations with the Applicant after delivering his written advice, but nothing I have heard suggests that the Applicant was not in a position to submit its appeal in good time. I appreciate, as Mr Tetley explains, that the Applicant's expertise lies in the conduct of criminal cases rather than costs, but the 21-day period for appealing is not only set out in the 2013 Regulations but was expressly referred to at the conclusion of the Determining Officer's written reasons. The Applicant was told what it needed to do.

### **Conclusions: Exceptional Circumstances**

39. The Lord Chancellor, through the Legal Aid Agency, has taken a neutral position on this application, leaving it to the court to decide whether the extension of time sought by the Applicant should be granted. I am however bound by the provisions of the 2013 Regulations: for an extension to be granted, there must either be good reason or exceptional circumstances
40. Bearing that in mind, at the hearing of this application I indicated to Mr Tetley that I was unlikely to find that either that there was a good reason for the delay, or that exceptional circumstances could justify a six-month extension of the time allowed for submitting this appeal. Mr Tetley referred me to the very substantial discrepancy between the amount claimed by the Applicant and the amount allowed by the Determining Officer, but that is not unusual in PPE appeals, which tend, even if successful, to involve a partial rather than a complete allowance of the total PPE claimed.
41. In the course of preparing this decision I have, however, come to a different view. It seems to me that there is one exceptional aspect of this case which does justify the extension of time sought.
42. I am presently unable to recall any Crown Court costs appeal, at least since *Hayes* and *SVS* were decided, in which (as in this case) the Prosecution has relied upon extracts from electronic evidence such as call records, cell site data and messaging, but no allowance at all has been made within the PPE count for the wider body of electronic data from which it has been extracted. That approach does not seem to me to be consistent with the authorities to which I have referred, in particular *Hayes*.
43. In seeking to understand why the Determining Officer came to exclude the electronic evidence in its entirety I reviewed his reasoning, which appears to me (as the extract set out above show) to incorporate a conclusion to the effect that the explicit service of evidence as unused material entirely precludes any possibility subsequently of including it within the PPE count.
44. Without in any way intending to prejudge the outcome of this appeal, and whilst being open to further submissions on the point, that is certainly not my current understanding. To my mind, Holroyde J in *SVS* made it explicitly clear that the view taken by the Prosecution as to the status of the relevant evidence may be decisive, but is not necessarily so.
45. The same principle is, in my view, illustrated by the many cases in which a Crown Court judge has been persuaded to order that the Prosecution serve the body of



electronic data in its entirety, rather than purporting only to serve those extract upon which it explicitly relies.

46. From the documentation I have seen, the Applicant seems to be justified in saying that the electronic evidence in this case was crucial in establishing the nature and extent of the Defendant's involvement in supplying controlled drugs, which was the key issue for the purposes of the Newton hearing (which, under the provisions of Schedule 2, is treated as a trial). So much is evident, for example, from the Prosecution's response to the Defendant's Basis of Plea.
47. As I have said, I am not prejudging the appeal. From what I have seen so far however, it seems likely that the Determining Officer based his conclusions entirely upon the approach taken by the Prosecution without giving due consideration to the principles established by *Hayes* and *SVS*, leading to an unusual decision which might well be unfair to the Applicant.
48. For that reason, I have concluded that there is an exceptional element to this case and that, notwithstanding the absence of any good reason for the lengthy delay in submitting this appeal, the extension of time sought by the Applicant should be given.
49. I will, in consequence, listed the appeal for a full hearing and send out appropriate directions. Assuming that the appeal enjoys any degree of success, any question of a reduction, by reference to Regulation 31(2), of the amount payable to the Applicant can be considered at the appeal hearing.