Neutral Citation No.[2024] EWHC 3126 (SCCO)

Case No: T20220460/ T20230146/ T20230483

SCCO Reference: SC-2024-CRI-000088

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 3 December 2024

Before:

COSTS JUDGE LEONARD

R
v
ANJUM

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **Mr Abdul S. Iqbal KC (Counsel)**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. Mr Abdul S. Iqbal KC ("the Appellant") represented Sameer Anjum ("the Defendant") in proceedings before the Crown Court at Leeds and Sheffield and in the Central Criminal Court. The defence was funded by Criminal Legal Aid under a Representation Order dated 18 March 2022. The Appellant is, accordingly, entitled to payment from public funds in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013, as in effect on the date of the order. Schedule 1 to the 2013 Regulations incorporates the "graduated fee" payment scheme for advocates such as the Appellant.

2. The Appellant argues that under the 2013 Regulations, case fees are payable for two stayed indictments as well as for a third indictment. The Legal Aid Agency ("LAA")'s Determining Officer has concluded that only one case fee is payable.

Rules and Authorities

3. The appeal turns on whether, for the purposes of calculating payment under the 2013 Regulations, there was one case, or more than one case, against the Defendant. The relevant provisions are to be found in Schedule 1.

4. Schedule 1 starts at paragraph 1(1), with this definition:

> "In this Schedule—
> 'case' means proceedings in the Crown Court against any one assisted person-
> (a) on one or more counts of a single indictment…"

5. The particular significance of that definition, for the purposes of this appeal, is that a fee is payable for each case. For that reason, if for example an indictment against a defendant is severed into two separate indictments, there may be two cases under the 2013 Regulations and the litigator or advocate representing that defendant may in consequence receive two case fees. In contrast, if two separate indictments against a given defendant are joined into one, then there may be only one case against that defendant and only one case fee payable. It follows, inevitably, that the fee or fees payable to a litigator or advocate in either circumstance may not reflect the amount of work undertaken.

6. Also relevant, for present purposes, is the definition of a "cracked trial" at paragraph 1 (1) of Schedule 1:

> "… a case on indictment in which—
>
> (a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea and—
>
> (i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and
>
> (ii) either—
>
> (aa) in respect of one or more count to which the assisted person

> pleaded guilty, the assisted person did not so plead at the first hearing at which he or she entered a plea ; or
>
> (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which the assisted person entered a plea, declare an intention of not proceeding with them…"

7. I have been referred on this appeal to a number of Costs Judge decisions, including *R v Sharif,* (SCCO 168/13, 19 February 2014) R *v Moore* [2022] EWHC 1659 (SCCO), and *R v Rafiq* [2024] EWHC 1319 (SCCO). The decisions of Costs Judges are not binding and I do not find it necessary to refer to them in detail here because they are, necessarily, fact-specific.

8. I should, however, explain that the current approach of Costs Judges to the issue of whether there has been more than one "case" reflects the practice and procedure necessarily attendant upon the use of the Crown Court's Digital Case Management system ("DCS"), through which indictments are now preferred.

9. Costs Judge Rowley, in *R v Shabir & Khan* [2022] EWHC 2232 (SCCO), at paragraphs 6 to 8 of his judgment, explains that approach in this way:

> "Prior to the digital age, it was clear which indictment a defendant faced since it was produced on paper. If it was replaced by another indictment then some action, such as quashing or staying indictment A had to be taken and this would lead to a fee being payable in respect of that first indictment such as occurred in the case of *R v Sharif* (168/13). A further fee would be payable in respect of indictment B when the case concluded. If the paper indictment was simply amended, then the typed or manuscript amendment would be clearly seen on the indictment.
>
> The preferment of the indictment is now usually carried out by the uploading of it onto the Digital Case System. Where the prosecution reviews the counts on the indictment and wishes to change them, then a new document may be uploaded rather than any amendment being made to the original document even where what would traditionally have been described as an amendment, rather than a new indictment, was required.
>
> From the appeals now regularly being received by costs judges, it would appear that this change in practice has resulted in there being numerous iterations of indictments existing on the DCS and which need to be dealt with at the end of the trial. As a result, numerous claims have been brought for more than one fee which was a comparative rarity prior to the use of the DCS..."

10. At paragraphs 34 to 36 of his judgment he added:

> "… Unless there has been a severing of the indictment so that the defendant has to face two separate trials, or there is something equally distinct about the indictments being faced by a defendant… then the process of amendment of the indictment up to and including the trial is only one case which the

> defendant is facing and entitles the defendant's legal representative to one graduated fee.
>
> The court is regularly faced with appeals where the advocate or litigator is seeking two trial fees where the first trial has proved ineffective for some reason. The regulations clearly do not provide for this and a reduced fee is payable for one of the trials…
>
> In a similar way, in this situation, the trial judge may quash earlier iterations of the indictment as a matter of housekeeping as clearly occurred in this case. But that does not necessarily mean that there have been two (or more) cases for the purposes of claims for graduated fees. Where an indictment is quashed in circumstances such as in *R v Sharif* so that the prosecution has essentially to start again, then two fees may clearly be claimed. But that is, I suspect likely to be a relatively rare event, and is not to be equated with a proliferation of indictments which has grown out of an iterative attempt to be efficient in the use of modern technology. That is the situation here and does not provide the solicitors with the opportunity for claiming more than one fee."

11. As I made clear in *R v Thomas* [2022] EWHC 2842 (SCCO), I agree with all of those observations. In *R v Thomas* I put the point in another way by considering what is meant at paragraph1, Schedule 2 to the 2013 Regulations by "a single indictment". My conclusion was that, in a working environment in which even minor changes to an indictment might be (or might have to be) implemented by the preferment of a second form of indictment and the quashing or stay of the first, rather than the physical alteration of an existing one, it would be inconsistent with the purpose of the 2013 Regulations and unworkable in practice to reach the conclusion that two graduated fees are, in consequence, payable.

12. There must be a real distinction between the relevant indictments, sufficient to justify the conclusion that there has been more than one case against a defendant. Otherwise there is, for the purposes of the 2013 Regulations, a single indictment.

The Procedural History of This Case

13. In the following narrative I will refer to the various iterations of the indictment against the Defendant as "indictment A", "indictment B" and "indictment C". That is only for the purposes of narrative clarity: the use of those terms is not intended to have any bearing upon whether or not there was, as a matter of fact and law, more than one case against the Defendant for the purposes of the 2013 Regulations.

14. The Defendant, between 26 September 2022 and 17 January 2023, was tried ("the first trial") on a four-count indictment ("indictment A"). With his co-defendant Al-Arfat Hassan ("AAH") he was charged with the preparation of terrorist acts (count 1). Count 2, against AAH alone, was of possessing a video ("You Must Fight Them Oh Muwahid") likely to be useful to a person committing an act of terrorism, to which I shall refer as "the YMFT video". The Defendant alone faced two further counts (3 and

4) of the dissemination of terrorist publications.

15. The jury on the first trial convicted AAH on count 2, but was unable to reach a verdict in respect of the Defendant, and was discharged.

16. The Defendant was then charged with possession of the YMFT video. A new indictment was preferred for that offence ("the possession indictment"). The Prosecution applied for joinder of the possession indictment to indictment A, but then decided not to pursue the dissemination charges. Permission to prefer a three-count indictment ("indictment B") was, accordingly, given on 9 May 2023. Count 1 remained the count against the Defendant and AAH of the preparation of terrorist acts; count 2, against AAH only, was of the possession of an explosive substance; and count 3, against the Defendant only, was possession of the YMFT video.

17. A trial on indictment B ("the second trial") started with a preparatory hearing on 17 Fabry 2023 and ended on 19 July 2023, when the jury was discharged due to irregularities.

18. A further trial ("the third trial") was fixed for 22 January 2024. The Appellant says that pending the third trial, the Prosecution and Defence teams undertook detailed discussions with a view to a possible compromise of the case. As a result, the Prosecution preferred a new eight-count indictment ("indictment C") on 10 November 2023.

19. On indictment C count 1, against both the Defendant and AAH, remained the preparation of terrorist acts and count 2, against AAH alone, was again the possession of an explosive substance. Counts 3 and 4 were the two dissemination charges against the Defendant that had been incorporated in indictment A, but left out of indictment B. Count 5, against the Defendant, was possession of the YMFT video. Count 6, against AAH, was possession of the YMFT video (AAH's conviction on that count being noted on the indictment).

20. There were two new counts: count 7, against AAH, of possessing articles for terrorist purposes and Count 8, against the Defendant, of failure to disclose information about acts of terrorism by AAH.

21. At a pre-trial review on 10 November 2023, the Defendant was not re-arraigned on counts 1, 3, or 4. He was arraigned on, and pleaded guilty to, counts 5 and 8. AAH was arraigned on, and pleaded guilty, to new count 7. The Prosecution accepted those pleas, and the other counts were not pursued.

22. Both defendants were sentenced on 2 February 2024. At that sentencing hearing, Mr Justice Baker formally stayed indictments A and B.

Submissions

23. The Appellant has been paid trial and re-trial fees, but says that he is due an additional cracked trial fee, with uplift, for the stayed indictments A and B. The Determining Officer did not accept that any additional graduated fee was due for indictments A or B. In her view, there had in reality only been one indictment, and so one case, against

the Defendant.

24. In her written reasons, the Determining Officer referred to the court log from 9 May 2023 which in her view indicated that the change from indictment A to indictment B was an amendment on joinder, and to a very clear log record from 10 November 2023 to the effect that the Prosecution proposed a "consolidated and amended" indictment incorporating only one new count against each defendant. She also referred to the fact that the Defendant was not re-arraigned on any of the original counts accept count 5, in respect of which his change of plea had been accepted. Her conclusion was that there had been only one case against the Defendant.

25. The Appellant argues that indictment B represent a significant change from indictment A. The dissemination counts were dropped and a new count of possession added. That represented a tactical, legal and factual shift by the Prosecution between the first and second trials. Indictment C contained an entirely new charge, and again represented a substantial tactical shift. The Defendant was now no longer accused of having any terrorist intention himself and the Prosecution now accepted his culpability was limited, in that he was in possession of terrorist material and failed to disclose the terrorist activities of his co-accused, AAH.

26. In support of the contention that there were three sperate indictments against the Defendant, the Appellant refers to the fact that the prosecution made applications to prefer a new indictment on each occasion; the fact that the court assigned a fresh and unique "T number" to each indictment; the fact that the Defendant faced a separate trial in respect of each trial indictment; the fact that each indictment contained entirely new criminal charges (and serious criminal charges alleging terrorism offences) against the Defendant; and the fact that the High Court Judge and leading counsel for the prosecution acceded to the stay of the trial 1 and trial 2 indictments.

27. As for the fact that the Defendant was not, on 10 November 2023, re-arraigned on any of the "old" counts other than that to which intended to plead guilty, that, says the Appellant, is irrelevant.

Conclusions

28. I admit to some difficulty in following the proposition that the Appellant should be paid a cracked trial fee for indictments A and B when the Defendant has been tried on both, the Appellant apparently receiving trial and retrial fees accordingly.

29. By reference to the definition I have quoted above, a cracked trial fee is payable only for a case that does not go to trial. It is an alternative to a trial fee, not an addition. As far I can see the Appellant's arguments, if accepted, would lead rather to the conclusion that he should have received a full trial fee for the second trial on indictment B (following which indictment C, as another entirely separate indictment, would presumably be paid as a guilty plea).

30. Be that as it may, the Appellant has not (as far as I am aware) made such a claim, and if he had I could not agree with him. I agree with the Determining Officer that there was only ever one indictment against the Defendant for the purposes of the 2013

Regulations.

31. The definition of a "case" at Schedule 1 refers to one or more counts of a single indictment. The addition or removal of counts from an indictment against a given defendant can be achieved by joinder and/or amendment and does not in itself support the conclusion that there has been more than one case. For the reasons I have given, it would be wrong to conclude that there has been more than one case only because the practicalities of working within the DCS dictate that an indictment is formally stayed rather than amended.

32. For that reason, the procedural and administrative formalities relied upon by the Appellants do not assist him. Nor are changes in Prosecution tactics or strategy to the point. As I have observed, one must identify a distinction between indictments which is sufficient to justify the conclusion that there has, as a matter of law rather than of administrative convenience, been more than one indictment against the Defendant.

33. Here, all of the counts against the Defendant, albeit varying from time to time, arose from a course of conduct that exposed him to terrorism charges, all of which appear to have been connected. The most serious was count 1, a constant through indictments A, B and C.

34. As the Determining Officer says, the change from indictment A to indictment B should properly be viewed as amendment on joinder. Indictment B was the product of the joinder of the possession indictment to indictment A, combined with the dropping (for the time being) of the dissemination counts. The second trial should, accordingly, properly be viewed as a re-trial rather than a fresh trial on a new indictment.

35. Following the collapse of the second trial, all of the counts on indictments A and B then became the first six counts on indictment C. The Defendant was not re-arraigned on counts 1, 3, or 4 of indictment C because he had already pleaded to those counts and was not going to change his plea. Nor was AAH re-arraigned on counts to which he had already entered a not guilty plea.

36. I do not regard that as irrelevant. It is part of a body of evidence demonstrating that the preparation of indictment C was a necessary act of housekeeping, through which all existing counts against both defendants were consolidated and disposed of. Hence, for example, the inclusion of count 6, of which AAH had already been convicted.

37. Count 8 was added to indictment C so that the Prosecution could accept the Defendant's plea on counts 5 and 8. There is nothing about that which could justify the conclusion that there had been more than one indictment against the Defendant.

38. The stay of indictments A and B was a part of the consolidation and disposal exercise. The same outcome might presumably (but for the practicalities of working within the DCS) have been achieved by joinder and amendment rather than by a formal stay, but the exercise was in any event an administrative one.

39. For those reasons, there is no justification for the conclusion that there was, for the purposes of the 2013 Regulations, more than one case against the Defendant. This appeal must be dismissed.