



Neutral Citation No. [2024] EWHC 523 (SCCO)

Case No: T20227426

SCCO Reference: SC-2023-CRI-000095

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

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

Date: 7 March 2024

**Before:**

**COSTS JUDGE ROWLEY**

**R**

**v**

**STALLARD**

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

Appellant: Lawrence Selby (Counsel)

The appeal has been dismissed for the reasons set out below.

COSTS JUDGE ROWLEY

**Costs Judge Rowley:**

1. This is an appeal by Lawrence Selby of counsel against decisions of the determining officer when calculating the fees and expenses payable under the Advocates Graduated Fee Scheme set out in the Criminal Legal Aid (Remuneration) Regulations 2013.
2. Counsel, together with leading counsel, was instructed on behalf of Nicholas Stallard in respect of an indictment containing charges of murder and robbery which was heard at the Crown Court in Birmingham between 24 April 2023 and 31 May 2023. At the end of the trial Stallard was convicted of manslaughter and robbery.
3. The trial dates had originally been listed prior to the defendant's arraignment. As I understand it, the defendant's pleas of not guilty were taken at a hearing on 26 January 2023 and at which time the listing of the trial for four weeks from 24 April 2023 was confirmed.
4. The trial went ahead (although Mr Selby unfortunately had to attend via video for the first week as he was suffering from the effects of Covid.) Thereafter, he travelled by train from London to Birmingham (unless there were train strikes and in which case he travelled by car.) Having taken the precaution of seeking prior authority from the Legal Aid Agency, he was granted approval for reasonable travelling and/or accommodation expenses for the hearing to be incurred.

Expenses including VAT

5. Subject to the question of VAT, those disbursements have been paid along with taxi fares. The only category of claim that has not been settled in full is the question of subsistence.
6. The extent of the recoverable expenses has been through the redetermination and written reasons procedure. Having not been satisfied by the outcome of that procedure counsel has appealed to a costs judge in accordance with the standard rubric at the end of the determining officer's letter.
7. Counsel provided submissions in respect of those expenses and I tested those submissions at some length at the hearing at which counsel attended. It was not apparent to me then, as it is now, that the exercise undertaken by counsel, the determining officer and myself has been unnecessary.
8. Following the first draft of this decision, I came across the decision of Costs Judge Leonard in R v Humfrey (SC-2020-CRI-000138) on this subject. He considered paragraph 28 of the Criminal Legal Aid (Remuneration) Regulations 2013 which establishes the statutory jurisdiction of the determining officer. That paragraph enables challenges by advocates to the number of hours claimed by way of special or wasted preparation. It also enables trial advocates to challenge fees claimed under Schedule 1 to the 2013 Regulations regarding attendances and the calculation of the graduated or fixed fees. Finally, it allows for "banding" challenges to the classification of the offence.

9. There are similar challenges available regarding the fees of litigators. But neither is entitled to challenge the expenses claimed by virtue of paragraph 28. The limitation of the redetermination procedure is described at 28(6) as follows:

“... the advocate, trial advocate or litigator, as the case may be, may apply to the appropriate officer to redetermine those fees, to review that decision or to reclassify the offence, as appropriate...”
10. The appeal to the costs judge in paragraph 29 may only concern matters brought before the determining officer and consequently can only relate to the challenges available in paragraph 28.
11. Consequently, there is no remedy available to the dissatisfied advocate or litigator regarding expenses and that must be the end of the appeal regarding the challenge to subsistence sums allowed. The same is true in respect of VAT on disbursements which has been removed by the determining officer.
12. Nevertheless it is appropriate, in my view, to deprecate the lack of any satisfactory reasoning given for the deduction of VAT which has, at least in part, led to this appeal occurring. For example, the Crown Court Fee Guidance states that where travel has been authorised, the LAA will use guide rates “(excluding VAT)” when assessing travel and accommodation claims, for example the hotel rate is either £85.25 or £55.25 depending upon location. The reader of the Guidance, it seems to me, could very well understand these provisions to mean that a hotel which charged £102.30 (i.e. £85.25 plus VAT) would be payable by the LAA because it was no more than the guide rate excluding VAT.
13. The determination of this claim shows that this is not how the Guidance is applied in practice. The determining officer refers to the Guidance but does not explain why a VAT exclusive figure is to be allowed. She simply states that the Guidance clearly does not allow the VAT element. As I have indicated in the previous paragraph, I am not entirely convinced it is clear that “excluding VAT” means that it is not allowed rather than that the guide rates are simply to be compared to the VAT exclusive sum claimed before VAT is then paid (as occurs with the graduated fee itself).
14. If no VAT is to be paid on expenses, it would seem to be appropriate for some explanation of why that was so to be included in the Guidance. It may be that there is some assumption that the VAT can be recovered by the advocate as input tax and so there is no need for the LAA to compensate the advocate (or litigator) for this. But, this is entirely speculative as there appears to be nothing to suggest this is indeed the reasoning for the approach taken.
15. Moreover, if the advocate was not VAT registered, as certainly occurs with some counsel, then there would be no option for the VAT on these items to be used to offset VAT otherwise payable to HMRC. The possibility of non-VAT registered trial advocates is expressly set out in subparagraph 10 of paragraph 1.4 as part of the implications of different advocates being instructed where only some are VAT registered.

16. Therefore, although the appeals in relation to subsistence and VAT cannot succeed, I would hope that some explanatory wording regarding VAT would be included in future editions of the Guidance.

TNP Fees

17. There were several days during the 5½ weeks of trial where the court did not sit. Those days were discussed early in the trial and I set out the determining officer's description of these days from her written reasons as follows:

“The court logs show that, during the course of the trial which started on 24/4/23, the issue of scheduled no sitting days was discussed and it was confirmed on 2/5/23 the court would not sit on 5/5/23 (His Honour had an engagement) or 11/5/23 (for counsel convenience). On 19/5/23 the previously raised issue of jury unavailability on the afternoon of 25/5/23 and all of 26/5/23 was discussed and, at lunchtime on 25/5/23 the judge sent the jury home to resume their deliberations on Tuesday 30/5/23 after the long (Bank Holiday) weekend.”

18. The three full days on which the court did not sit form the centrepiece of this appeal. Counsel claimed an ineffective trial fee (“Trial Not Proceed” or “TNP”) for each day and they have all been disallowed by the determining officer.
19. The relevant provision in the 2013 Regulations can be found at paragraph 16 of Schedule 1 under the heading “Fees for ineffective trials”:

“The fee set out in the table following paragraph 24 as appropriate to the category of trial advocate is payable in respect of each day on which the case was listed for trial but did not proceed on the day for which it was listed, for whatever reason.”

20. There is no dispute that the case did not proceed on the three days in May 2023. The difference between the determining officer and counsel is as to whether the case was “listed for trial.” In support of her reasoning, the determining officer has produced copies of the cause lists for the relevant days which show that the case against the defendant was not listed for hearing on those days. On the basis that it was not listed, then there was no need to consider whether the case actually proceeded in any fashion.
21. In support of his appeal, counsel relied upon several documents published by the LAA. First, in the June 2019 version of the Crown Court Fee Guidance at paragraph 2.16, paragraph 16 of Schedule 1 (as above) is recited. It then goes on to consider the relevant factors when the determining officer is assessing whether an ineffective trial fee or a daily attendance fee (“DAF”) (which would go towards the graduated fee) is payable for a listed trial day.
22. The 2019 Guidance says that a daily attendance fee would be paid where the advocate reasonably attended court for at least part of the day (guidance which was confirmed by Costs Judge Whalan in R v Sarfraz (SCCO Ref 122/16)). By contrast:

“an ineffective trial fee is likely to be payable where:

- advance notice is given that the court would not sit on a day previously or originally listed for trial
- the judge stated that the trial would not sit on the day listed, but would remain listed for conference purposes.”

23. If the first of the two sentences above is taken in isolation, then without doubt, it covers the situation in this case. Advance notice was given that three days would not be sitting days even though they comprised part of the original listing. If, however, the second sentence adds to the first, then it is not so clear that this case comes within it, because the case did not remain listed for conference (or indeed any other) purposes.

24. In the latest version of the Guidance, subparagraphs 3 and 4 of paragraph 2.16 state:

“3. An ineffective trial fee is likely to be payable where:

- the case was listed for trial and remained in the final daily list (whether as a floating trial or backing trial) and did not proceed on the day it was listed

4. A daily attendance fee (DAF) will be payable:

- In circumstances where the trial has commenced and the advocate attends court on a day listed for trial, irrespective of whether it is called on. The advocate should ensure they have signed in.
- As paragraph 4 of Schedule 1 expressly sets out, a DAF is payable in respect of daily attendance at court for the number of days by which the trial exceeds 1 day.

The regulations do not permit payment of a DAF where the trial has not commenced, or the advocate is not required to attend court on a day originally listed for trial.”

25. The description of an ineffective trial fee in this later version does not deal directly with the present situation. It requires a listing for trial which would only proceed if other cases did not. Once a trial has started, the Guidance only relates to a DAF fee. That payment also requires an attendance at court. That leaves open the appropriate fee, if any, where the advocate is not required to attend. It might simply be that no fee is payable, which seems to be the determining officer’s approach. In counsel’s submission, it could mean that a TNP fee is payable to reflect the fact that the trial is on foot but is not actually proceeding on the three relevant days. Literally, the trial did not proceed on those days and so the trial was ineffective.

26. Counsel considered his trump card to be the LAA’s description of the updated fee guidance on 10 March 2022 as set out on the Government’s website as follows:

**“Ineffective trials**

Guidance changes include a revised approach to fees for ineffective trials. These are likely to be payable where the case was listed for trial but did not proceed on the due date.

Daily attendance fees are payable where the trial has begun and the advocate attends court on a listed trial date. This applies irrespective of whether the case is called on to proceed on the day. The advocate should ensure they have signed in.

Reasons for ineffective trials include court administrative problems, absent defendants, absent witnesses, and the defence or prosecution being 'not ready'.

This change follows feedback from the Bar Council.”

27. If TNP fees are payable once a trial has started, the list of reasons as to why a trial might be ineffective is clearly not exhaustive since it does not mention the possibility that the judge might be required elsewhere (as occurred here). Counsel also suggested that the advocate for the Crown or another defendant might find themselves called on before the Court of Appeal at short notice which would take precedence to the trial.
28. In counsel's submission, this sort of last minute issue highlighted the unrealistic suggestion that other work might be done on ineffective days. The judge had given some notice of his unavailability, but the last of the three days was an example of a trial day becoming ineffective at very short notice.
29. The change in the Guidance as described by the LAA's website entry, plainly states, in counsel's view, that TNP fees are likely to be payable where the case was listed for trial but did not ultimately proceed on that date.
30. The determining officer relies upon the case of R v Durnin (SCCO ref: 57/13), a decision of Andrew Gordon-Saker, now the Senior Costs Judge, dated 9 May 2013.
31. In Durnin, a two day trial was fixed to begin on 19 April 2012 but the day before, the court took the case out of the list and adjourned it to a date to be fixed as a result of another case overrunning. The appellant advocate in that case sought a TNP fee for 19 April 2012 but this was disallowed by the determining officer and that decision was upheld on appeal. Costs Judge Gordon-Saker said the following:

“11. Criminal trials often have to be moved, adjourned or vacated, sometimes at short notice and sometimes well in advance. I suspect that most criminal advocates would be surprised if they were told that they would be entitled to a fee under [the provision in the previous regulation] every time that a trial in which they were instructed was moved.

12. It seems to me in the present case the trial was not listed on the day on which it did not proceed. It had been listed for 19 April 2012 but, as at 19 April 2012 when it did not proceed, it was not listed. It had been taken out of the list on 18 April 2012.

13. The obvious intention of [the previous provision] is to compensate advocates who attend for a trial on the day on which the trial is listed but have a wasted day because the trial does not proceed.”
32. The determining officer describes these comments as being very clear that a TNP fee is not payable if a case had been removed from the list prior to the date of the claimed ineffective listing.
33. Counsel sought to distinguish between the facts of Durnin, where the case had been taken out of the list before the trial started, and the situation here where the case was listed on the days immediately before and after the relevant days as part of the trial proceeding.
34. In my judgment, counsel is right to distinguish this case from Durnin. In that case, the advocate was informed on 18 April that the case would not proceed on 19 April (or indeed 20 April) and so was free to take another brief for those days and any further days should that have suited his diary. In this case, the advocates on the three separate days, would inevitably be constrained in their ability to take any other brief given the preparation required and the possibility of the new case overrunning.
35. As such, counsel’s argument – that the lower payment of a TNP fee is the appropriate compensation where a trial which is running is unable to proceed on a particular day – has some attraction.
36. However, I do not think that this is the intention or the meaning of the Regulations as described in the Guidance or the Government website. Indeed, I do not think there is any material difference between the website description of the approach taken and the 2022 version of the Guidance.
37. The website wording describes “ineffective trials”. The first paragraph deals with the situation of the trial becoming ineffective before it starts. If, as in Durnin, a TNP fee is not payable, then no other fee is payable. The second paragraph deals with ineffective days once the trial has started, as in this case. In my view, the website wording is clear that if a DAF fee cannot be claimed, then no other fee can be claimed either.
38. The wording of the Guidance at 2.16 similarly distinguishes at sub-paragraphs (3) and (4) between pre-commencement and post-commencement of trial scenarios. In either situation, a single kind of fee is potentially payable – a TNP pre-trial and a DAF during the trial – but if the listing / attendance requirements of the fee are not met, then there is no fee payable at all. There is no room, in my judgment, to interpret a lower fee to be payable during the trial if a DAF cannot be claimed.
39. Consequently, counsel has been unsuccessful in this appeal. I do not think the expenses element of the appeal was likely to have been pursued without the TNP appeal. But even if it were, then I consider the TNP appeal would have been brought in any event and that is the cause of the court fee being paid. Therefore, whilst I might have ordered the refund of the appeal fee where the appeal simply could not be brought, I do not think that is appropriate in the circumstances of this case.