



Neutral Citation Number: [2021] EWHC 2961 (QB)

Case No: QA-2021-000029

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 November 2021

Before:

Mrs Justice Lambert

Between:

The Lord Chancellor

Appellant

- and -

Robert Ross
Joy Lewis
Paul Hodgkinson
Sushil Kumar

Respondents

Florence Iveson (instructed by **Government Legal Department**) for the Appellant
In Person: the Respondents

Hearing dates: 2 July 2021 and 21 September 2021

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 1030 on Friday, 5 November 2021.

Mrs Justice Lambert:

Introduction

1. This appeal concerns the correct mechanism for the payment of a legal representative appointed by the court to act in proceedings under s.4A Criminal Procedure (Insanity) Act 1964 (“the CPIA”) following a finding that the defendant is not fit to be tried. On 12 January 2021, Costs Judge Whalan considered appeals brought by four legal representatives of defendants in criminal proceedings who had been instructed by the court in s.4A CPIA proceedings to put the case on behalf of the accused. Costs Judge Whalan determined that payment to the legal representatives in respect of the s.4A proceedings should be from central funds. The Lord Chancellor appeals that decision. It is submitted on his behalf that the decision is wrong and that the correct mechanism for payment is under the Advocates’ Graduated Fee Scheme.
2. This appeal is brought by the Lord Chancellor under regulation 11 of the Costs in Criminal Cases (General) Regulations 1986 which permits an appeal where the Lord Chancellor is “*dissatisfied with the decision of the Costs Judge on appeal under regulation 10*”. The appeal lies to the Queen’s Bench Division of the High Court. Permission is not required. Part 52 of the CPR applies to the appeal. The High Court has the same powers as the appropriate officer and a Costs Judge under these Regulations and may “*reverse, affirm or amend the decision appealed against or make such other order as the judge thinks fit*”.
3. The Lord Chancellor was represented by Ms Iveson and the respondents represented themselves, although Mr Ross took the lead in submissions before me. I repeat my thanks to all concerned for the clear and focussed way in which their respective arguments were advanced.

The Context: s.4A Proceedings

4. I start with the relevant statutory context of the proceedings in the Crown Court. S.4 CPIA sets out the procedure by which a determination of an accused person’s fitness to be tried is to be made by the court when, during criminal proceedings, an issue arises as to whether the accused is under a disability. If the court determines that the accused person is under a disability and is not therefore fit to stand trial, the jury must determine whether the accused “*did the act or made the omission charged against him as the offence*”.
5. The relevant provisions of the CPIA are:

Criminal Procedure (Insanity) Act 1964

4. Finding of unfitness to plead.

(1) This section applies where on the trial of a person the question arises whether the accused is under a disability, that is to say, under any disability such that apart from this Act it would constitute a bar to his being tried.

...

(5) the question of fitness to be tried shall be determined by the court without a jury.

4A Finding that the accused did the act or made the omission charged against him.

(1) *This section applies where in accordance with section 4(5) above it is determined by a court that the accused is under a disability.*

(2) *The trial shall not proceed or further proceed but it shall be determined by a jury*

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- a. *On the evidence (if any) already given in the trial; and*
 - b. *On such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence,*

whether they are satisfied, as respects the count or each of the counts on which the accused was or is to be or was being tried, that he did the act or made the omission charged against him as the offence.

6. These provisions must be read in conjunction with the Criminal Procedure Rules 2020 which provide at paragraph 25.10(3) that, where the court has determined that the defendant is not fit to be tried:

(a) *the court must exercise its power to appoint a person to put the case for the defence, taking account of all the circumstances and in particular –*

- (i) *the willingness and suitability (including the qualifications and experience) of that person.*
- (ii) *the nature and complexity of the case,*
- (iii) *any advantage of continuity of representation, and*
- (iv) *the defendant’s wishes and needs;*

The Context: Funding of Representation in s.4A Proceedings

1986 Regulations

7. Section 19(1)(3)(a) of the Prosecution of Offences Act 1985 (“the POA”) enables the Lord Chancellor to enact regulations which provide for the payment out of central funds in relation to “*such criminal proceedings as may be specified*” to various individuals involved in criminal proceedings including pursuant to section 19(1)(3)(d) a person “*appointed by the Crown Court under section 4A of the Criminal Procedure (Insanity) Act 1964 to put the case for the defence*”.
8. The Costs in Criminal Cases (General) Regulations 1986 were enacted by the Lord Chancellor pursuant to powers conferred by the POA. Part III of the 1986 Regulations applies to the “*determination of the proper fee or costs of a court appointee*” (Regulation 13A). The definition of a court appointee in Regulation 13C includes “*a person appointed by the Crown Court under section 4A of the Criminal Procedure (Insanity) Act 1964 to put the case for the defence*”.

2001 Funding Order

9. The Criminal Defence Service (Funding) Order 2001 was made by the Lord Chancellor under powers conferred by provisions in the Access to Justice Act 1999. The Order came into force on 2 April 2001. It made no specific reference to the mechanism of payment to advocates appointed

by the court under s.4A CPIA. However, the 2001 Funding Order was amended by the Criminal Defence Service (Funding) (Amendment)(No.3) Order 2001 which came into force on 29 October 2001. By the amendment, paragraph 27 was inserted into Schedule 4, Part 5 of the 2001 Funding Order. It provided for payment of advocates acting for a person found unfit to plead and stated that, where a trial on indictment did not continue or was not held due to a finding that the person was unfit, the “*trial advocate*” must be paid a graduated fee in relation to the fitness hearing itself and subsequent hearing. The meaning of “*trial advocate*” as set out in Part 1 is “*a person instructed in accordance with a representation order to represent the assisted person at the main hearing in any case*”. The Explanatory Note accompanying the Amendment provided for the “*payment of a graduated fee calculated in accordance with a representation order to represent the assisted person at the main hearing in any case*”.

2007 Funding Order

10. The 2001 Funding Order was revoked in April 2007 by the Criminal Defence Service (Funding) Order 2007. The 2007 Funding Order contained a more detailed provision in Schedule 1 for payment under the graduated fee scheme for trial advocates appointed under s.4A CPIA.

26. *Assisted person unfit to plead or stand trial*

Where in any case a hearing is held to determine the question of whether the assisted person is unfit to plead or to stand trial (a “fitness hearing”)

—

(a) *If a trial on indictment is held, or continues at any time thereafter, the length of the fitness hearing is included in determining the length of the trial for the calculation of the graduated fee in accordance with Part 2 or Part 3;*

(b) *If a trial on indictment is not held or does not continue thereafter by reason of the assisted person being found unfit to plead or to stand trial, the trial advocate must be paid –*

i) *A graduated fee calculated in accordance with paragraph 4 as appropriate to the combined length of*

aa) *The fitness hearing; and*

bb) *Any hearing under section 4A of the Criminal Procedure (Insanity) Act 1964 (finding that the accused did the act or made the omission charged against him); or*

ii) *A graduated fee calculated in accordance with paragraph 6 as appropriate for representing an assisted person in a cracked trial,*

whichever the trial advocate elects”

The 2013 Regulations

11. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) came into force on 1 April 2013. Its purpose is, amongst other things, to “*make provision about legal aid; to make further provision about funding legal services; to make provision about costs and other amounts awarded in civil and criminal proceedings*”. Section 14 provides the following definition of criminal proceedings for the purposes of the Act:

14. *Criminal proceedings*

In this Part “criminal proceedings” means –

- (a) proceedings before a court for dealing with an individual accused of an offence,*
- (b) proceedings before a court for dealing with an individual convicted of an offence, including proceedings in respect of a sentence or order,*
- (c) proceedings for dealing with an individual under the Extradition Act 2003,*
- (d) proceedings for binding an individual over to keep the peace or to be of good behaviour under section 115 of the Magistrates’ Courts Act 1980 and for dealing with an individual who fails to comply with an order under that section,*
- (e) proceedings on an appeal brought by an individual under section 44A of the Criminal Appeal Act 1968 (appeal in case of death of appellant),*
- (f) proceedings on a reference under section 36 of the Criminal Justice Act 1972 on a point of law following the acquittal of an individual on indictment,*
- (g) proceedings for contempt committed, or alleged to have been committed, by an individual in the face of a court, and*
- (h) such other proceedings, before any court, tribunal or other person, as may be prescribed.*

12. Pursuant to powers conferred by sections 2(3), 5(2) and (4), 30(2) and 41(1) to (3) of LASPO, for cases governed by LASPO, the funding provisions are set out in Schedule 1, paragraph 31 Criminal Legal Aid (Remuneration) Regulations 2013/435. Although it substantially duplicates paragraph 26 of the 2007 Funding Order, I set it out below.

Assisted person unfit to plead or stand trial

31. *Where in any case a hearing is held to determine the question of whether the assisted person is unfit to plead or to stand trial (a “fitness hearing”) –*

- (a) if a trial on indictment is held, or continues, at any time thereafter, the length of the fitness hearing is included in determining the length of the trial for the calculation of the graduated fee in accordance with Part 2 or Part 3;*
- (b) if a trial on indictment is not held, or does not continue thereafter by reason of the assisted person being found unfit to plead or to stand trial, the trial advocate must be paid –*
 - (i) a graduated fee calculated in accordance with paragraph 4 as appropriate to the combined length of –*
 - (aa) the fitness hearing; and*
 - (bb) any hearing under section 4A of the Criminal Procedure (Insanity) Act 1964 (finding that the accused did the act or made the omission charged against him); or*
 - (ii) a fee calculated in accordance with paragraph 7(b) as appropriate for representing an assisted person in a cracked trial,*

whichever the trial advocate elects; and

(c) if at any time the assisted person pleads guilty to the indictable offence, the trial advocate must be paid either—

(i) a graduated fee calculated in accordance with paragraph 4 as appropriate to the length of the fitness hearing; or

(ii) a fee calculated in accordance with paragraph 7(a) as appropriate for representing an assisted person in a guilty plea,

whichever the trial advocate elects.

The Underlying Facts

13. The underlying facts are not for the most part contentious, nor of central relevance. I therefore take the substance from the skeleton arguments.
14. Mr Cottee faced criminal proceedings at Swindon Crown Court for a number of historic sexual offences. A Representation Order was granted in favour of Ross Solicitors on 11 January 2019 to cover a litigator and junior counsel. Following a deterioration in his mental health during the course of his criminal trial, Mr Cottee was found unfit to stand trial on 17 June 2019 by HHJ Taylor QC. The first respondent, Mr Robbie Ross, a solicitor advocate of Ross Solicitors, was appointed to act for him in the proceedings which then took place pursuant to s.4A CPIA to determine whether the accused had done the acts alleged against him. That hearing took place between 27 August and 2 September 2019. Mr Ross sought payment from central funds in the sum of £13,014.72. Initially, the claim was allowed from central funds in the sum of £8,280. Mr Ross sought a quantum redetermination on 28 January 2020. On 11 March 2020, Ms Keats, the determining officer, informed Mr Ross that, having taken legal advice, she believed her determination that the claim should be paid from central funds had been incorrect. She therefore sought re-payment from Mr Ross of the sum paid to him from central funds and invited him to re-submit his claim, this time under the Advocates' Graduated Fee Scheme.
15. Mr Ross sought a re-determination of this decision, maintaining his position that he should be remunerated from central funds. The determining officer, again Ms Keats, found that payment was due under the provisions of the Advocates' Graduated Fee Scheme rather than from central funds and provided written reasons for her decision on 28 April 2020. She found that appointment under s.4A of CPIA was not inconsistent with payment under the Advocates' Graduated Fee Scheme and that the 2013 Regulations made specific provision for payment for work done in connection with a s.4A hearing; that legal aid representation had been granted on 11 January 2019 and that the appointment of Mr Ross by the court did not have the effect of superseding that grant; that no criminal trial could take place following the accused having been found unfit to stand trial, nonetheless the s.4A hearing formed part of a continuous procedure before a court dealing with a person accused of a criminal offence and was therefore covered by the Representation Order. She made the point that, if the costs of a court appointee were not considered to be part of criminal proceedings for the purposes of the 2013 Regulations, then equally it would not be possible to secure payment from central funds under the POA which was itself expressly limited to costs incurred in criminal proceedings.
16. Ms Lewis acted for Mr Francis in criminal proceedings for the offence of arson. On 2 October 2019 HHJ Newbury found that Mr Francis was unfit to stand trial and appointed Ms Lewis to act for him in proceedings under s.4A CPIA. That hearing took place at Inner London Crown Court

on 28-29 October 2019. Ms Lewis submitted a claim for payment at an hourly rate from central funds. This was rejected by the Determining Officer who indicated that the grant of legal aid was still in place and that payment from central funds was not therefore appropriate. Payment should be made under the graduated fee scheme.

17. Mr Hodgkinson and Mr Kumar represented Mr Kiley, one of 7 defendants in a multi-handed fraud trial, under a Representation Order which provided for the instruction of leading and junior counsel. On 7 May 2019 (on what was day 60 of his trial at Wood Green Crown Court) Mr Kiley became unwell and was found by HHJ Lucas QC to be unfit to stand trial. HHJ Lucas appointed Mr Hodgkinson and Mr Kumar to act for Mr Kiley in proceedings under s.4A CPIA. Both legal representatives then submitted claims for payment which were determined should be made under the graduated fee scheme.
18. Each of the respondents appealed the decisions of the respective determining officers. The appeals were joined on 15 October 2020 because they concerned the same legal issue. The appeals were heard by Costs Judge Whalan on 11 December 2020 and his determination allowing the appeals was handed down on 3 February 2021.

Costs Judge Whalan's Determination

19. Costs Judge Whalan's decision was concise and his reasoning clear. His decision was founded upon his conclusion that following a determination of unfitness, the status and function of the legal representative changes: the hearing moves from criminal to non-criminal proceedings and the appointment of the advocate by the court reflects this distinction. The Representation Order under which the advocate had been acting up to that point in the proceedings was not revoked, because legal aid may form the basis of remuneration in the event that the defendant regains capacity and is subject to continued criminal proceedings. However, so long as the proceedings under s.4A continued, the payment should be made out of central funds, not the legal aid fund.
20. Costs Judge Whalan's decision was influenced by the obiter comments of Davis LJ in *R v Roberts* [2019] EWCA Crim 1270 where at [49] he observed that:

“In the crown court as we understand it the grant of legal aid that will ordinarily have been made in favour of a defendant can extend to the costs of the s. 4 hearing: for the criminal proceedings will continue to trial unless a determination of unfitness is first made under s.4: and see s.15(2) and s 17(2)(c) of the Legal Aid Sentence and Punishment of Offenders Act 2012. But in cases where a determination of unfitness is made, the position then changes: because the representatives appointed to present the defence case (who will usually be those thus far acting in the earlier stage of the proceedings) will now have been appointed by the court and in circumstances where a s.4A hearing is not a criminal proceeding as such. So the costs order for the s4A proceedings in the Crown Court appropriately then should be costs out of central funds: that is so provided by s 19(3) of the Prosecution of Offences Act 1985, and regulations thereunder, and by rule 45.1 of the Criminal Procedure Rules.”

21. It was in the light of those observations that Costs Judge Whalan concluded that his own, earlier, decision in *R v Walmsley* [2018] SCCO Ref 104/17 had been wrongly decided. In *Walmsley*, the appellant had been appointed by the judge to represent the accused during s.4A proceedings. The appellant had claimed payment for his involvement in the s.4A proceedings out of central funds. The claim had been refused and the appellant paid pursuant to the graduated fee scheme. In

refusing the appeal, Costs Judge Whalan had reasoned that the Representation Order under which the appellant had been representing the accused before the finding of unfitness was not revoked or superseded. He added that representation under s.4A “*is not inconsistent with the AGF scheme or the 2013 Regulations as the latter both anticipates and provides for such payment*”.

This Appeal

22. There are three overlapping grounds of appeal. I set them out below in a slightly different order to that presented by Ms Iveson in her written argument together with a summary of her arguments in support.
23. The first, and central, ground of appeal is that Costs Judge Whalan failed to take proper account of the provisions of paragraph 31 of Schedule 1 of the 2013 Regulations which provide expressly for the payment of an advocate instructed by the court in s.4A proceedings to be via the graduated fee scheme. Ms Iveson submits that the statutory scheme (comprising the 2007 Funding Order and the 2013 Regulations) provide a complete scheme for payment of advocates with pre-existing representation orders and lay down that such payment must be via the Advocates’ Graduated Fee Scheme. She observes that the provisions are mandatory in that both the Funding Order and Regulations state that following a finding that the accused is unfit to stand trial under s.4 CPIA the advocate “*must*” be paid via the graduated fee scheme. She makes the further point that the 2007 Funding Order and 2013 Regulations apply only to those advocates who have the benefit of a Representation Order before the finding that the accused was unfit. In those rare instances when an entirely fresh advocate, without the benefit of a pre-existing Representation Order, has been appointed by the court (either because the court exercising its judgement under CPR 25.10(3) considers the case too complex for the advocate already instructed or because the accused was self-represented) then the provisions of the POA provide for the advocate to be paid out of central funds.
24. She submits that there is no statutory or other basis for setting aside these provisions. The observations made by the court in *Roberts* should not be interpreted as setting out a principled basis for recovery of costs from central funds as opposed to via the graduated fee scheme. In *Roberts*, the court was not ruling that advocates should be paid by a particular mechanism, rather it was setting out its understanding of the mechanism for payment in the absence of any submissions on behalf of the Lord Chancellor.
25. Second, Ms Iveson submits that Costs Judge Whalan failed to take account of the very broad definition of criminal proceedings in s.14(a) LASPO. The definition of criminal proceedings covers “*proceedings before a court for dealing with an individual accused of an offence*”. She accepts that proceedings under s.4A are not criminal trials. The proceedings do not result in a conviction and the House of Lords held in *R v H (Fitness to Plead)* [2002] 1 WLR 824 that Article 6 ECHR does not apply to such proceedings. However, in her submission, nothing was said in *R v H* nor in *Roberts* which has the effect of taking s.4A hearings outside the scope of the existing funding regime. She submits that although the courts, when considering other issues, have found that proceedings under s.4A are not criminal trials this is not relevant to the immediate question which concerns the mechanism of payment of advocates appointed by the court in criminal proceedings as defined in LASPO.
26. She makes two further points. First, she observes the linguistic similarity between s.4A proceedings and criminal proceedings, in that the individual found unfit to stand trial is still referred to as the “accused” in the CPIA and the s.4A proceedings are tried before the same court as for a

criminal trial. Second, she makes a point similar to that made by Ms Keats, namely that s.19(1)(3)(a) of the POA is itself part of an Act relating to “*Criminal Cases*” and s.19 appears within a section entitled “*Defence, Prosecution and Third Party Costs in Criminal Cases*”. There is therefore nothing in s.19 POA which makes it more apt to apply to the recovery of costs in s.4A proceedings than the 2013 Regulations.

27. Ms Iveson’s third ground of appeal is that Costs Judge Whalan failed to address s.28(2) LASPO which prohibits a person from taking payment in respect of services apart from payment made in accordance with the arrangements made by the Lord Chancellor for the provision of legal aid. This prohibition is also reflected in Regulation 9 of the 2013 Regulations. She accepts that the mischief which these provisions are intended to address is the payment of private payments to “top up” legal aid payments made to defence lawyers. However, she contends that there is no stated exception to these provisions to cover the remuneration of a court appointed advocate in s.4A proceedings which suggests that no such exception was intended.
28. On behalf of the respondents, Mr Ross submitted that Costs Judge Whalan had been correct in focussing upon the change in the nature of proceedings following a finding of unfitness for two reasons. First, the court is required to appoint an advocate on behalf of the accused because, following a finding by the judge that the accused is unfit, the accused (a beneficiary of a Representation Order by which he or she is able to instruct a lawyer under legal aid) ceases to be capable of giving instructions to that lawyer. At that point, Mr Ross submits, payment of the advocate under the legal aid provisions must inevitably cease. The purpose of a Representation Order is to fund legal counsel via the Legal Aid Scheme. Following a s.4 finding that the accused is unfit, the advocate then instructed by the court is, he submits, in a fundamentally different position to an advocate instructed via a Representation Order. It follows, he argues, that he must therefore be paid via another mechanism, from central funds as provided by the POA and the 1986 Regulations.
29. Second, Mr Ross submits that Costs Judge Whalan was correct to conclude that proceedings under s.4A are not criminal proceedings and that, therefore, they fall outside the scope of the 2013 Funding Order. He submits that it is now settled law that s.4A proceedings are not criminal. There is no trial of mens rea, only the actus reus. The process does not result in a conviction nor does it result in a punishment of the accused. It is not a concluded hearing because if the accused regains fitness and is capable of being tried then a trial can take place.
30. Mr Ross further submitted that neither the 2013 Regulations (nor the 2007 Funding Order) enshrine the self-contained mandatory scheme which Ms Iveson urges upon me. He argues that paragraph 26 of the 2007 Funding Order and paragraph 31 of Schedule 1 of the 2013 Regulations both give the advocate a choice: that choice being to either submit a bill costed via the graduated scheme or a graduated fee appropriate for representing an assisted person in a cracked trial. He tells me that no advocate who has undergone a lengthy s.4A hearing would ever submit a bill costed as if it had been a cracked trial. However, an advocate may choose to submit a bill costed via the graduated fee scheme rather than “go through the rigmarole” as he puts it of seeking to recover costs from central funds.

Discussion and Conclusion

31. I need no persuading that the correct starting point for the determination of the appropriate and lawful mechanism for remuneration of the respondents is LASPO and the 2013 Regulations made pursuant to LASPO. I do not understand it to be disputed by the respondents to this appeal that,

on its face, paragraph 31 of Schedule 1 of the 2013 Regulations appears to provide a scheme for payment for an advocate who was already instructed pursuant to a legal aid order to act for an accused and who is then appointed by the court under s.4A CPIA. The prescribed scheme is the advocates' graduated fee scheme. It seems to me that the issue which arises in this appeal is whether, notwithstanding the wording of paragraph 31 of Schedule 1 of the 2013 Regulations, s.4A CPIA proceedings are not covered by paragraph 31 because they are not "criminal proceedings" as defined in s.14(a) LASPO. At its heart therefore, although not approached in quite this way by the respondents, this appeal is an exercise in statutory interpretation.

32. The definition of criminal proceedings in s.14(a) LASPO is wide. It covers "*proceedings before a court for dealing with an individual accused of an offence*" together with a number of other discrete proceedings (such as extradition proceedings and appeals when the defendant has died). It seems to me that on a straightforward linguistic interpretation of s.14(a), the provision covers proceedings under s.4A CPIA. The proceedings by which the jury determines whether the accused did the act or made the omission charged against him as an offence are "proceedings before a court"; those proceedings concern "an individual who has been accused of an offence" and those proceedings "deal with" such an individual in the sense that they lead to a determination which will result in either the discharge of the accused or the accused being made subject to a hospital order or supervision order. I see no difficulty in reconciling the wording of s.14(a) with the nature of proceedings conducted under s.4A CPIA.
33. It is not suggested by the Lord Chancellor that s.4A proceedings are, or amount to, a criminal trial. Such proceedings do not determine whether the accused had the necessary mental element for the offence; if the jury find that the accused did the act or made the omission, there is no conviction and no punishment as such. It is not disputed that the House of Lords in *R v H* found that Article 6 ECHR does not apply to s.4A proceedings. However, s.14(a) LASPO does not require that those proceedings which may potentially attract the benefit of publicly funded representation bear the hallmarks of a criminal trial. Had that been a requirement then, no doubt, the legislation would have made that plain. Instead, a different and much wider definition of the types of proceedings which may be subject to publicly funded representation is provided. The presence or absence of the features of a criminal trial does not therefore, on my analysis, drive the interpretation of the relevant legislative and regulatory provisions.
34. I also pause to note that my interpretation of s.14(a) as being sufficiently wide to cover s.4A proceedings is supported by the 2013 Regulations themselves. The point is an obvious one, but those who drafted the 2013 Regulations clearly intended that s.4A proceedings should fall within the s.14(a) definition. I accept Mr Ross' submission that the contrary does not necessarily follow, namely, that those who drafted s.14(a) intended that s.4A proceedings would fall within the definition. However, paragraph 31 of Schedule 1 of the 2013 Regulations could not be clearer in prescribing that a court appointed representative subject to a pre-existing Representation Order should be paid via the graduated fee scheme. They are mandatory in their effect. Payment must be via the graduated fee scheme (although the legal representative has a choice between claiming the cracked trial fee or the fee appropriate for the length of the hearing). It would be a curious outcome if, notwithstanding their clarity and express nature, paragraph 31 was robbed of any effect on the basis that s.4A proceedings were not "criminal proceedings" as defined in LASPO.
35. Of course, I note with interest and deference the observations of Davis LJ in *Roberts*. It seems to me to be likely that, but for those observations, the respondent's challenge to the Determining Officer's conclusions would have been robbed of some of its gusto. However, those observations

of Davis LJ must be approached and evaluated in their proper context. That relevant context includes the following:

- i) First, the issue before the court was the merits of the applicant's renewed application for leave to appeal. Although the procedural history which led to the renewed application, involving as it did an unrepresented applicant who had been the subject of a finding that he was unfit to be tried, was the impetus for the court's Practice Note, there does not appear to be any dispute that the observations of the court at [49] were obiter and as such persuasive only.
- ii) Of more importance, however, because the funding arrangements were not central to the issue before the court, the court did not have the benefit of submissions from the Lord Chancellor. It does not appear from the judgment that the court's attention was drawn to the relevant provisions of LASPO or to the 2013 Regulations made thereunder. Although I have not been taken to a transcript the proceedings, when considering funding arrangements, the focus of the judgment is upon the POA and the associated 1986 Regulations (which deal only with remuneration from central funds). At [48] the court refers to *R v Antoine* [2001] 1 AC 352 noting that, in that case, the court had made an order that the appellant should have his costs from central funds. It is not disputed before me that the court in *Antoine* was correct in determining that the advocate appointed by the court for the purpose of representing the interests of an accused person who had become unfit should be remunerated from central funds. But that case was decided shortly before the 2001 Funding Order was made pursuant to powers conferred by the Access to Justice Act 1999. At the time when *Antoine* was decided therefore the relevant Regulations providing for payment via the graduated fee scheme had yet to be made. It is not apparent that this point was drawn to the attention of the court.
- iii) The court also refers briefly to *R v Norman* [2008] EWCA Crim 1810. In this case the court also concluded that payment for s. 4A proceedings should be from central funds. However, again, the court was not resolving a dispute between the parties concerning payment of legal fees and the relevant legislation (which was, at that time, the 2007 Funding Order) was not referred to.
- iv) The court says nothing in *Roberts* which might justify or explain the need for a different funding arrangement in s.4A proceedings to that prescribed in the 2013 Regulations. The Lord Chancellor accepts that advancing the interests of a defendant who has been found unfit to stand trial will raise professional challenges for the court appointed advocate, not least because such an advocate will not have the benefit of an instructing solicitor. Those professional challenges have been acknowledged in *R v Norman* and in *R v H*. However, those particular difficulties are reflected in the exercise to be undertaken by the trial judge in his or her selection of an appropriate advocate which need not necessarily be the advocate funded by the pre-existing Representation Order. If a new advocate is instructed for the purpose of the s.4A proceedings, then that advocate will be remunerated from central funds. The mechanism of remuneration will therefore reflect the advocate's experience, particular qualifications in dealing with persons under a disability, or the particular complexities of the proceedings.
- v) I therefore accept the submission made on behalf of the Lord Chancellor that the comments made by the court in *Roberts* were reflective of the court's understanding of

the funding position, rather than being a principled ruling upon the way in which advocates should be paid.

36. I also accept that, if Mr Ross' submission that s.4A proceedings are not criminal proceedings is made out (which I do not find it to be), then this causes him a similar problem in respect of the application of the POA and his claim for remuneration from central funds. As Ms Keats, the Determining Officer, observed s.19(1)(3)(a) of the POA is within part of the Act entitled "*Defence, Prosecution and Third Party Costs in Criminal Cases*" and empowers the Lord Chancellor to enact regulations which provide for the payment out of central funds in relation to "such criminal proceedings as may be specified". One specified type of criminal proceeding are those under s.4A CPIA. I therefore accept the submission that, if the 2013 Regulations are not apt for the reasons advanced by Mr Ross, then no more are the 1986 Regulations made under the POA.
37. In summary therefore I find that Costs Judge Whalan's conclusion that the correct mechanism for payment of fees of a legal representative with the benefit of a pre-existing Representation Order, who are appointed by the court for the purpose of a s.4A CPIA hearing, should be from central funds under the 1986 Regulations was wrong. Costs Judge Whalan's starting point should have been the legislation and regulations made thereunder rather than the nature of s.4A proceedings and whether those proceedings bore the hallmarks of a criminal trial. On a plain reading of the legislation and the regulations made thereunder, s.4A proceedings are "criminal proceedings" as defined by s.14(a) LASPO; the 2013 Regulations are mandatory and require that payment should be via the graduated fee scheme for those who have the benefit of a pre-existing Representation Order. Given this outcome, it is not necessary for me to decide the third ground of appeal which concerns the combined effect of s.28(2) of LASPO and regulation 9 of the 2013 Regulations. This further ground of appeal adds nothing to my conclusions.
38. I therefore quash the order of Costs Judge Whalan substituting an order that payment to the respondents should be via the graduated fee scheme.
39. I add this postscript to my ruling above. On 21 September 2021, I received further submissions from Mr Ross together with a copy of an order recently made in the Crown Court in s.4A proceedings in which he was involved. The order purported to grant Mr Ross' fees for his representation of an accused person during those proceedings from central funds. I received further submissions in response from the Lord Chancellor. Having considered the matter carefully, I find nothing in Mr Ross' further submission which leads me to conclude that my reasoning above is wrong. I know little about the background to the order made by the Crown Court and the understanding of the person who made that order. I do not know whether there existed a Representation Order before Mr Ross' appointment by the court in that case. I am therefore grateful to Mr Ross for drawing it to my attention, but it does not lead me to change my decision.