SENIOR COURTS
COSTS OFFICE

24 APR 2017

Dated: 24 March 2017

SCCO Ref 85/16

ON APPEAL FROM REDETERMINATION

REGINA v USMAN ALI

LEEDS CROWN COURT

CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013 SCHEDULE 1 PARAGRAPHS 1(2) to 1(6).

CASE NO: T20140660

LEGAL AID AGENCY

DATE OF REASONS 13 MARCH 2016

DATE OF NOTICE OF APPEAL: 28 APRIL 2016 (RECEIVED)

APPLICANT: COUNSEL:
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The appeal has been unsuccessful for the reasons set out below.

JR JAMES
COSTS JUDGE

REASONS FOR DECISION

1. Mr Dallas of Counsel appealed against the decision of the Determining Officer at the Legal Aid Agency dated 19 March 2016 to pay him for 31 pages of PPE instead of the 1,211 pages claimed by him. The difference between the PPE claimed and allowed is in respect of 1,180 pages on disc from telephone downloads served as Exhibit 8 by NAE dated 25.09.14 (the remainder being 20 [pages of] Witness Statements and 11 Exhibits, presumably on paper and which were allowed). The Appeal proceeded on the papers only, with neither Mr Dallas nor the LAA appearing before me.

2. Counsel represented Mr Usman Ali under a Representation Order dated 24 April 2014. Mr Ali was charged with importing a controlled Class C drug with intent to evade a prohibition/restriction and possession with intent to supply a controlled drug of Class C. The drugs in question constituted 4,553 Diazepam tablets.

3. Counsel's claim dated 9 February 2015 was initially returned by the LAA on 24 February 2015 because it did not include the LAC1 form or Memorandum of Conviction; the LAA also sent with his returned form some Guidance on electronic evidence (their handwritten note received in Chambers on 9 March 2015 refers).

4. In resubmitting his original claim (and after having sight of the Guidance referred to above) by "Additional Information" dated 15 April 2015, Counsel explained that there was no LAC1 in the case as the Court records will confirm, and as to PPE stated as follows:

"In relation to the PPE, 1180 pages are from telephone downloads served as Exhibit 8 by NAE dates [sic] 25/9/14.

I have counted only the pages of the two main phone downloads.

I rely on the attached case* to support this.

The Disc is also enclosed."

* Counsel attached a printout from Bailii of **R v Furniss and Others [2013] EW Misc. B1 (CrownC) [2015] EW Misc. B1 (CrownC)** the SCCO reference for this case appears below at paragraph 20.

5. The LAA indicated on 21 May 2015 that they could only pay the 31 PPE on paper and that, "…to consider evidence on disc we would require a detailed breakdown of why the evidence was integral to review as part of the case." Counsel responded on 27 July 2015 (via his clerk) stating, "The case of Furness [sic] (attached and sent with the claim) recently confirmed by the very recent Cost Judge case of R v Chilton (now attached) makes it clear that I do not have to justify the claim by reference to actual work done." The SCCO citation for R v Chilton appears at paragraph 20 below.

6. The LAA then responded on 3 September 2015 to state "We do not follow the basis in the cases of Furniss and Chilton. As per the Guidance (attached at the back of the claim) we follow the basis set out in the case of R v Napper. Please provide the relevant material/documents or alternatively please formally request Written Reasons." The SCCO citation for R v Napper appears at paragraph 20 below.

7. Counsel duly did so on 30 September 2015 and received a letter from Elisabeth Cooper at the LAA dated 23 November 2015, headed "Not Written Reasons". In that letter, the LAA set out its position which, briefly stated, is that it disagrees with the proposition in R v Furniss that all telephone, text and cell site evidence served in digital form <u>must</u> now be treated as PPE and paid as such, and that there is no longer any need to demonstrate that digital material is important or central to the Prosecution case and must be treated as PPE. Further, that the LAA disagrees with Costs Judge Simons in R v Chilton that it is no longer necessary for a representative to show that the electronic material was pivotal and had to be considered in detail.

8. Instead the LAA rely upon the definition of PPE within the Regulations (at Schedule 1 Part 1, paragraph 1.1(3) to (5) which they do not set out in the letter but which I reproduce here for ease of reference:

"(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).

(3) The number of pages of prosecution 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 committal or served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which—

(a) has been served by the prosecution in electronic form; and

(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence ***unless the appropriate officer decides that it would be appropriate to include it*** *in the pages of prosecution evidence* ***taking into account the nature of the document and any other relevant circumstances."***

9. The LAA also relied upon the Regulations at Regulation 4(4) and 4(5):

"Claims for fees by advocates – Crown Court

4. (4) An instructed advocate must submit a claim for fees to the appropriate officer in such form and manner as the appropriate officer may direct.

4. (5) An instructed advocate must supply such further information and documents as the appropriate officer may require."

10. Finally, the LAA relied upon **Appendix D to the Crown Court Fee Guidance published August 2015 at points 32-41**: this appears to be the paragraphs concerning Supporting Evidence following the Costs Judge decision in R v Napper and is numbered differently in the 2016 Regulations. At Appendix D paragraph 38 the [2016] Guidance states the LAA will ordinarily count raw phone data as PPE if:

- *A detailed schedule has been created by the Prosecution which is served and relied on and is relevant to the Defendant's case, or*
- *Raw phone data if it is served without a schedule having been created by the Prosecution, but the evidence nevertheless remains important to the Prosecution case and is relevant to the Defendant's case e.g. it can be shown that a careful analysis had to be carried out on the data in order to dispute the extent of the Defendant's involvement or*
- *Raw phone data where the case is a conspiracy and the electronic evidence relates to the defendant and co-conspirators with whom the defendant had direct contact.*

11. Appendix D goes on to state (at Paragraph 40 of the 2016 version):

"40. In order to provide the determining officer with the means to make an informed assessment of your claim, and to complete the assessment and payment as quickly as possible, the LAA requires litigators and advocates to submit the following additional information (relevant to the case in question) for all claims where electronically served evidence is being claimed as PPE:

- *The disc or discs/other electronic service media containing the material*
- *The full prosecution list/s of all evidence served in the case*
- *An explanation as to which of the electronically served exhibits are being claimed as PPE (i.e. for each exhibit listed, explain why you consider that the nature of this document and the relevant circumstances, specific to your client's case, mean that the determining officer should decide that it is appropriate to include this particular item of material within the PPE, and if so, how many additional pages are being claimed from the total page count within that exhibit)."*

12. In short, in the Not Written Reasons of 23 November 2015 the LAA spelled out to Counsel in very plain terms that he was obliged to provide the additional information requested, in particular by Regulation 4(4) and 4(5) as set out in paragraph 9 above, and that no further review of his PPE would be undertaken until he did so.

13. In effect, the LAA in its Not Written Reasons of 23 November 2015 gave Counsel one last chance to comply with the Regulations and set out chapter and verse upon why this was necessary. Counsel's clerk wrote back in an undated letter stating, "Having re-read the Judgment in R v Chilton, I am firmly of the view that the Department cannot simply overlook a Costs Judge decision when it disagrees with

its finding." He went on to add that there was an Appeal on the same point pending with Judgment reserved, and that he would decide upon whether to make a formal Appeal when that Judgment came out. That would appear to be the decision in R v Jagelo (see below paragraph 20 for SCCO citation).

14. After further correspondence in December 2015, January and February 2016, Written Reasons were issued on 19 March 2016 referring to several cases cited in previous correspondence or in the Guidance, as follows:

R v Furniss Nottingham T20137653
R v Chilton SCCO Ref 400/14 (these two were relied upon by Counsel)
R v Napper SCCO Ref 160/14
R v Sana SCCO Ref 248/14
R v Sibanda SCCO Ref 227/14
R v Jagelo SCCO Ref 96/15 (these four were relied upon by LAA)

15. The LAA's position was that Haddon-Cave J's ruling in R v Furniss was legally incorrect and factually inaccurate in several ways, and that the Determining Officer's discretion under the Regulations (in that case the 2012 version) to decide whether a non-paper document or pictorial exhibit should be treated as PPE, could not be overridden by the Trial Judge although they would take any comments by the Judge into account on issues of the nature of the document/other relevant circumstances.

16. The LAA in particular disagreed with the proposition that all telephone, text and cell site evidence served in digital form must now be treated as PPE and paid as such, as the Determining Officer is still required to look at whether the evidence was important to the Prosecution case and whether a careful analysis had been carried out. The LAA preferred the approach per R v Napper to that in R v Chilton.

17. The LAA pointed out that every case must be decided on its own facts and that in R v Sana and R v Sibanda (both citations above at paragraph 20) the Costs Judge had determined that not all of the electronically served evidence was relevant, and that only evidence relevant to <u>this</u> Defendant on the charges <u>he/she</u> faced, should count as PPE.

18. As such, on the facts in this case, (said the LAA) Mr Ali was accused of importing a Class C drug and there was nothing to suggest there was any alleged conspiracy or that Mr Ali had been acting with others. Based upon the lack of any explanation from Counsel, the Determining Officer could not make any determination about what was relevant or relied upon and hence could not determine that it was reasonable in all the circumstances of the case, to take account of this material in determining the PPE. Paragraph 12 above refers to a case of conspiracy etc., which this was not.

19. The LAA added that whereas Counsel relies upon R v Furniss and R v Chilton, the above cases of R v Sana and R v Sibanda, read together with R v Napper and R v Jagelo, all make it clear that under the Regulations the Determining Officer is (still) <u>required</u> to assess whether or not to include electronically-served evidence as PPE and that it is not correct to say that all electronically served evidence (or here, all phone records) "automatically" counts as PPE.

20. Counsel's Appellant's Notice was received at the SCCO on 28 April 2016; although it was somewhat out of time I take no issue with that; Counsel states that he was taking the advice of an independent Costs expert. Counsel stated that, "I maintain that there is no need for me to provide a detailed note of how the evidence (accepted as being correctly served on the Defence team) affects my client and what parts of it affected my client." Since R v Chilton is dated after R v Napper, Counsel's submission, in effect, is that the LAA cannot "cherry pick" which Costs Judge authorities they wish to follow and which they do not.

21. As to any explanation of the reason for considering the documents, the closest that Counsel comes is to say that "This is not a case where there are a multitude of Defendants and where the evidence might not affect my client. He was the only Defendant on the indictment…If the Crown consider that evidence is available that they do <u>not</u> rely on they serve it as unused material – and I fully accept that evidence cannot form any part of a claim for PPE."

22. In other words, Counsel effectively says that if the Prosecution has seen fit to serve this evidence and has not indicated that it is "unused" evidence, that is the end of that; "Evidence served by the Crown HAS to be considered by all the Defence teams involved in the case. To ignore it could mean that evidence vital to a Defendant's defence has not [been] considered and acted upon by clearly negligent Advocates charged with putting forward the Defendant's case based on all the evidence available."

23. In reaching my decision I have of course considered the relevant case law. R v Furniss has been departed from in subsequent cases, not only in R v Jagelo (on "paragraph 57") but in R v Manning and Others, which as set out in paragraphs 26-28 below departed from it in precisely the area covered by this Appeal. As such, the comments in R v Furniss (followed in R v Chilton) regarding PPE, upon which Counsel pins his Appeal, are not helpful to Counsel.

24. R v Chilton was decided on the basis of R v Furniss, and at a time when it was considered that R v Furniss was binding. In fact, in R v Manning another Judge at the same level decided not to follow the decision in R v Furniss and accordingly R v Chilton does not survive either. Counsel's legal research missed a key case.

25. In R v Napper, Master Simons held that, when determining whether electronically-served documents should be included as PPE, the role of the appropriate officer under the Funding Order was much wider than simply to ascertain whether documents had ever existed in paper form, and that he/she was positively required to take into account the nature of the document and all the relevant circumstances (including "*whether the evidence is pivotal, whether the evidence underpins the understanding or admissibility of any other piece of evidence, and whether the volume of evidence disrupts the fair and predicted economic balance of the remuneration paid for a case in the light of the Legal Aid Agency's position statement that the statutory changes were not designed to disrupt the status quo*"; para 29).

26. In the first-instance judgment of R v Manning and Others, HHJ Mansell QC emphasised the fact that the decision in R v Furniss is not binding on any Crown Court judge, and he pulled no punches in stating that the reasoning behind Mr Justice Haddon Cave's decision is *"flawed for a number of reasons"* (para 9). The Learned Judge was firm in his stance that *"it is…no part of the function of a trial judge to dictate to the determining officer how fees in any given case should be calculated, or to dictate to the Crown Prosecution Service how to serve their evidence, provided that they serve it"* (para 10(ii)).

27. The learned Judge in R v Manning and Others therefore upheld Master Simons' decision in R v Napper and added that, in accordance with para 2(C) of the Regulations as the telephone evidence omitted from the page count in R v Manning and Others had *"never existed in paper form"* it could not to be included in the number of pages of prosecution evidence *"unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances"* (para 2(C)). As a consequence the Defence litigators and advocates had either to persuade the appropriate officer to include some or all of the material in the PPE or to claim an hourly rate for reasonable remuneration.

28. It is worth noting that in R v Manning and Others, HHJ Mansell QC went on to make detailed and case specific positive comment about the work undertaken by the Defence litigators and advocates in regard to the omitted evidence under consideration, stating that: *"Applying the criteria as set out in Napper, I regard the telephone evidence against each of these three defendants as absolutely pivotal to the prosecution case against each of them."* In other words, applying the law correctly (he said) HHJ Mansell QC allowed the claims.

29. I do not criticise Counsel for not citing R v Manning and Others, although both the Written Reasons of 19 March 2016 and the Not Written Reasons of 23 November 2015, post-dated R v Manning (in fact the Written Reasons came almost one year afterwards) Counsel may not have known about it and the LAA itself has not mentioned it in any of its correspondence either.

30. However, Counsel has chosen to adopt a risky strategy; upon repeated requests from the LAA to clarify why this evidence was pivotal, or even relevant, he has repeatedly refused, standing upon the point of principle that he derives from R v Furniss and R v Chilton to say that he does not have to do so. Had he been aware of R v Manning and Others he may have chosen to give more detail (or he may have had no more detail to give; I am in no better a position than the Determining Officer to judge as far as that is concerned).

31. R v Manning and Others clearly undermines Counsel's arguments against answering the LAA's perfectly reasonable (and oft-repeated) requests for further detail on the PPE. The case discussed in the legal press by the time of Not Written Reasons on 23 November 2015, at which point the door was still ajar for Counsel to give the detail requested if he had it to give, therefore I take the view that Counsel is the author of his own misfortune.

32. It is clear to me, based upon the current case law above referred-to, that there is no rule as Counsel would have it, that the mere fact of service of evidence (that is not "unused") by the Prosecution means that it is all recoverable whether as PPE or as Special Preparation if it went above 10,000 pages.

33. There still needs to be a qualitative assessment by the Determining Officer as set out in the Guidance and more particularly the Regulations; the Determining Officer has done this to the best of her ability in the Written Reasons dated 19 March 2016 by reference to the type of case, the lack of any allegation of conspiracy and the lack of anything in what she has seen, to suggest criminal interaction with others.

34. Based upon what little the Determining Officer had to work with (and for which Counsel is entirely responsible) I believe that the determination that she made was entirely reasonable and I see no reason whatsoever to criticise it.

35. Accordingly this Appeal is unsuccessful.

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