

***1073 R v Budai**

Case 70

Senior Courts Costs Office

26 October 2010

[2011] 6 Costs L.R. 1073

Before: J Simons , Costs Judge

26 October 2010

Headnote

This costs judge's decision on the correct calculation of an advocate's fee turned on the proper interpretation of [para 13 of Schedule 1 to the Criminal Defence Service \(Funding\) Order 2007](#) .

Reasons for Decision

J Simons

1 Mr Jeffery Israel of counsel appeals against the decision of the Determining Officer to disallow a trial fee for 15 February 2010, and to disallow a refresher fee on 22 February 2010.

2 Mr Israel represented Joseph Budai who, together with two others, was charged on an eleven count indictment with conspiracy to traffic *1074 people into the UK. The case was listed for trial to start on 15 February 2010, and the jury was sworn on 16 February 2010. Budai was convicted on 23 March 2010, and sentenced to a total of eight years' imprisonment. Mr Israel made a claim under the Graduated Fee Scheme for 25 daily attendances, and the Determining Officer allowed 23, having disallowed trial attendance fees on 15 February 2010 and on 22 February 2010.

3 In his written reasons dated 6 July 2010, the Determining Officer stated that the case was listed for trial on 15 February 2010. The jury were not sworn on that date. Mr Israel states in his Grounds of Appeal that the jury panel was selected on 15 February 2010, but not sworn as they were then were sent away to assess their availability. The jury was sworn on 16 February 2010 and the trial then commenced. Mr Israel states that the judge ruled that 15 February 2010 should be regarded as the first day of the trial due to the volume of work done at court, despite the fact that no jury was sworn. The Determining Officer has stated that the trial judge did not have the power to declare February 15 as being the first day of the trial, as it clearly was not so. The Determining Officer relies on the case of R v Rahman (SCCO 119/2000) (26 May 2000) when the costs judge confirmed a Determining Officer's ruling that a trial only started when the jury was sworn.

4 Although in his Grounds of Appeal Mr Israel states that he has not been paid for 15 February 2010, the Determining Officer has since written to the Senior Courts Costs Office providing evidence that Mr Israel was paid a "Trial Not Proceed" fee pursuant to [Schedule 1 Part 4\(13\) of the Criminal Defence Service \(Funding\) Order 2007](#) for 15 February 2010.

5 On Friday 19 February 2010, the trial was adjourned part heard until Tuesday 23 February 2010 as one of the members of the jury had indicated that he or she would not be available to attend court on Monday February 22. However, the court log reveals that the judge adjourned the case until Monday February 22, with only counsel, the defendant and the court interpreters to attend. On Monday 22 February 2010, the three Defence Advocates and two prosecution counsel, and the interpreters attended court for the specific purpose of attempting to reduce 52 pages of texted message evidence that had been served by the prosecution during the course of the trial into a manageable form. Some of the evidence was in Hungarian and that is ***1075** why the Hungarian interpreters were required. By the end of the day, this evidence had been reduced to nine pages. The trial judge was hearing another case on 22 February 2010 but during that day when Mr Israel went into court to retrieve some papers, the judge asked him as to whether or not agreement had been reached with the prosecution with regard to the work that was being carried out, and whether or not the judge's assistance was going to be required. It transpired that the judge's assistance was not required.

6 The Determining Officer has stated that although he acknowledged that the judge may well have been available for consultation, the case was never called on and therefore 22 February 2010 could not be regarded as a day of trial. The Determining Officer acknowledged that the work that was being carried out by counsel that was necessary, but he stated that it was routine for counsel to spend time, even at weekends, working on a case to ensure that court time is not wasted. In summary, the Determining Officer stated that on that day, the case was not heard in court, the court did not sit on the case on that day, and consequently the day could not be described as being a day which forms part of the trial or a day upon which it can be said that the defendant was tried. Consequently, counsel's attendance on 22 February 2010 could not attract a daily attendance fee.

7 In his Grounds of Appeal, Mr Israel states that the case was listed and he had to attend court and consequently he was entitled to an attendance fee.

8 Mr Israel attended before me at the hearing of this appeal. He acknowledged that he had been paid a fee for an ineffective trial for 15 February 2010, but maintained that that day should have been the first day of trial and he should have been paid a trial fee for that date.

9 With regard to 22 February 2010, Mr Israel submitted that the case was listed and work was being carried out for which he was entitled to a payment. This was not preparation that he could do at home as it required the input from the three Defence Advocates, prosecution counsel and the interpreters. This had been recognised by the trial judge who directed that prosecution Defence Advocates and the interpreters attend court on that day. It was also important to note that the judge had indicated that he was available to deal with any issues if required by any of the Advocates.

Consequently, he regarded his attendance as part of the trial process; consequently 22 February 2010 was a day of trial. ***1076**

**“Criminal Defence Service (Funding) Order 2007, Schedule 1
Paragraph 13 – Fees for Ineffective Trials.**

The fees set out in the Table following para 19 as appropriate to the category of trial advocate, will be paid 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.”

10 In R v Rahman (SCCO 119/2000) the costs judge ruled that the trial only started when the jury was sworn. This approach was qualified by Mr Justice Mitting in R v Dean, Smith and Others (unreported) when he stated that “trial means, and should be taken to be, the date upon which those submissions are first made to the trial judge in a continuous process which results in the empanelling of a jury without break of time, and in the leading of evidence and the returning of a verdict”.

11 In that case, important preliminary rulings were made by the trial judge before the empanelling of the jury.

12 In this particular case, the court log shows that on 15 February 2010 the interpreters were sworn, a jury panel of 18 was selected, there was a direction with regard to an amendment of the indictment, and the trial was then adjourned to the following day for the swearing of the jury.

13 In my judgment, the Determining Officer was correct in deciding that the first day of trial was 16 February 2010, and not the 15th. No important preliminary rulings were made on 15 February 2010 to enable this case to fall within the wider definition of a trial given by Mr Justice Mitting in R v Dean, Smith and Others . Consequently, the trial did not begin until the jury was sworn, which was 16 February 2010. Mr Israel was correctly paid a fee for a ineffective trial on 15 February 2010 as the trial did not proceed on the day for which it was listed. Accordingly, Mr Israel's appeal in respect of a trial fee for 15 February 2010 does not succeed and must be dismissed.

14 With regard to 22 February 2010, although I agree with the Determining Officer that this was not a day of trial, nevertheless, in my judgment, Mr Israel is entitled to an ineffective trial fee. The case was listed on that day, Mr Israel had to attend court of that day, but no trial proceeded on that day. I do not accept Mr Israel's submission that ***1077** as the judge was available then that must be a trial day. The jury were not present, no evidence was called, the judge gave no directions and, in my judgment, this cannot be a trial day.

15 To that limited extent the appeal in respect of 22 February 2010 succeeds.

***1078**

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