SENIOR COURTS
COSTS OFFICE

SCCO Ref: 85/18

Dated: 10 January 2018

ON APPEAL FROM REDETERMINATION

REGINA v KHADIR

MANCHESTER CROWN COURT

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20157085

LEGAL AID AGENCY CASE

DATE OF REASONS: 20 APRIL 2018

DATE OF NOTICE OF APPEAL: 15 MAY 2018

APPLICANT: MIDDLEWEEKS	SOLICITORS	

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment should accordingly be made to the Applicant.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. This appeal concerns payment to defence solicitors, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013 (as applicable before 1 April 2018) for working on evidence received from the Crown. Payment is claimed under the provisions of the Litigators' Graduated Fee Scheme set out at Schedule 2 to the 2013 Regulations.

2. Payment for working on evidence served by the Crown is made by reference to the number of Pages of Crown Evidence ("PPE"), subject to an overall "cap" of 10,000 pages.

3. Paragraph 1, (2)-(5) of Schedule 2 explains how, for payment purposes, the number of pages of PPE is to be calculated:

> "(2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
>
> (3) The number of pages of Crown 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 Crown documents or which are included in any notice of additional evidence.
>
> (4) Subject to sub-paragraph (5), a document served by the Crown in electronic form is included in the number of pages of Crown evidence.
>
> (5) A documentary or pictorial exhibit which—
>
> (a) has been served by the Crown in electronic form; and
>
> (b) has never existed in paper form,
>
> is not included within the number of pages of Crown evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of Crown evidence taking into account the nature of the document and any other relevant circumstances."

4. Paragraph 20 of Schedule 2 makes provision for payment on a different basis for served documents which are not considered by the Determining Officer to be appropriate for inclusion within the PPE:

> 20.— Fees for special preparation
>
> (1) This paragraph applies in any case on indictment in the Crown Court—
>
> (a) where a documentary or pictorial exhibit is served by the prosecution in electronic form and—
>
> (i) the exhibit has never existed in paper form; and
>
> (ii) the appropriate officer does not consider it appropriate to include the exhibit in the pages of prosecution evidence or
>
> (b) in respect of which a fee is payable under Part 2 (other than paragraph 7), where the number of pages of prosecution evidence, as so defined, exceeds 10,000,
>
> (2) Where this paragraph applies, a special preparation fee may be paid...
>
> (3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable..."

5. The Appellant firm appeals the decision of the Determining Officer to calculate a graduated fee on the basis of 3,000 pages of PPE, on the basis that some of the material served electronically was not sufficiently relevant to justify its inclusion. The Appellant seeks remuneration on the basis of 10,000 PPE
.

6. Mr Rimer for the LAA submits that the appropriate page count is 3,051 pages, a small increase on what has already been allowed.

The Background

7. I am grateful to both parties for their written submissions, from which I have extracted the following summary of the background to this appeal.

8. The Appellant represented Sulayman Khadir ("the Defendant") in proceedings before the Manchester Crown Court. The Defendant faced a single charge of conspiracy to deal in goods in an attempt to evade UK Duty and Excise. The Appellant was tried alongside his co-defendant and cousin, Ismail Abubakir. A third conspirator, Aiden Jaff, pled guilty to involvement in the conspiracy.

9. It was the Crown's case that from October 2012 to April 2013 the three men played significant roles in a well organised and large-scale warehousing and distribution network of non-UK duty paid cigarettes and tobacco products. The Defendant and his cousin Mr Abubakir were alleged to have orchestrated the storage and distribution of the products, using two Polish food stores that they owned as a base for their operation. Would-be purchasers of cheap non-duty paid cigarettes and tobacco would contact Mr Abubakir, who would arrange for the contraband to be loaded into their vehicles. Aiden Jaff was alleged to have to have acted as the "warehouse man", taking instructions about movement, loading and delivery of the goods from Mr Khadir and Mr Abubakir and physically loading vehicles.

10. The case against the conspirators was based on surveillance evidence and telecommunications data. According to the Appellant, officers of HMRC conducted hundreds of hours of surveillance and examined dozens of phones. Through this forensic process, they built a picture of the various roles the defendants were said to have occupied in the conspiracy. Some 1,364,540 cigarettes and 551.8 kg of tobacco were seized. The total figure for duty evaded was £389,563.22.

11. Six telephone numbers were attributed to Aiden Jaff, three to Ismail Abubakir and three to Sulayman Khadir. Other phones were attributed to other defendants or related persons such as Sandra Abubakir (wife of Ismail Abubakir).

12. The Crown relied upon telephone contact and text messages between the defendants, between the defendants and customers, and cell site evidence. The telephone evidence was served in a variety of formats including on paper and electronically, on six discs. Four of the discs contained downloads from Aiden Jaff's telephones, one downloads from Ismail Abubakir's and one downloads from Sandra Abubakir's. None were from the Defendant.

13. Communications between Sulayman Khadir, Ismail Abubakir and Aiden Jaff were analysed in detail by HMRC and the Crown. The analysis was set out in Case Summaries and Attribution Charts.

The Determining Officer's Decision and the Grounds of Appeal

14. The Determining Officer noted that the Appellant had claimed payment on the basis of the maximum 10,000 PPE. The Dterrmining Officer's count however was of 263 pages of statements, 2459 pages of exhibits and an additional 278 pages of "Examination Reports" served on disc in PDF format. Everything else on disc, the Determining Officer found, duplicated the content of the Crown's "Examination Reports", albeit in other formats. The Appellant was invited to submit reasons why the individual underlying documents might need to be considered rather than the "Examination Reports", in which case the Determining Officer was willing to reconsider the PPE count.

15. That invitation was not taken up, and the Appellant's case as put to me by Mr Shafi of counsel is that no payment for duplicated material is sought. To the extent that the PPE count needs to be adjusted accordingly, that is conceded.

16. Mr Shafi's primary contention is that all served evidence must be included within the PPE count, without exception or reservation. It is not incumbent upon a litigant (or an advocate under the equivalent provisions of Schedule 1 to the 2013 regulations) to establish that it was either relevant to or impacted upon a particular defendant. Such an interpretation, he says, is not supported by authority.

17. Mr Shafi relies upon *R v Furniss* [2015] 1 Costs LR 151 and the judgment of Master Simons in *R v Chilton* (SCCO Ref: 400/14, 15 June 2015), in which he followed *R v Furniss.*

18. In the alternative, Mr Shafi submits that all of the electronic evidence was in fact of central importance. The defence team had to check the Crown's reports against the underlying electronically served evidence. It was necessary to verify their accuracy and integrity; to identify any patterns relating to telephone traffic; to put that telephone traffic in context; and to put in context text messages relied upon by the Crown. key text messages for example, utilised cell sites common to the Defendant and his co-defendant Mr Abubakir, each of whom denied that the relevant telephone numbers were attributable to them. This gave rise in each case to a "cutthroat defence" and led the necessity to look at all the underlying evidence to identify the extent to which it could help one defendant and hinder the other. By Mr Shafi's calculation, the total PPE count including electronically served evidence (subject to duplication, as conceded) is 18,178 pages.

19. Before me, Mr Shafi argued that it is not possible for a defence team, upon receipt of served electronic evidence, to know what use is going to be made of it. The development of a trial is "organic" in the sense that what is not relied upon at the outset may become important. For that reason, the defence team must read everything that is served. That the evidence was served is not, for the purposes of this appeal, in issue. If the Crown does not make any distinction as to the significance of the served evidence, nor he says can the defence team. They can only accept in good faith what is served and give it due priority on examination.

20. The relevance of documents may be perfectly clear 18 months or more after the event, but that cannot he submits be determined in advance, and it is wrong to make an ex post facto decision as if it were.

21. The defence team, says Mr Shafi, has a duty to consider all served evidence, and will be answerable for any breach of that duty. He himself has found hugely exculpatory material buried in volumes of electronic evidence, which may make the difference between conviction and acquittal. It is, he says, wrong to assign to any of it a lower priority and exclude it from the PPE count.

22. It is he submits equally wrong that different advocates representing different defendants on in the same indictment can find themselves being paid different fees. Further, in respect of another client tried on the same indictment, he is instructed that he has received payment on a higher PPE count than his instructing solicitors, which he describes as an absurdity.

The LAA's Submissions

23. Mr Rimer, for the LAA, confirms that (as Mr Shafi says) it is not in dispute that the electronic evidence in issue for the purposes of this appeal was served by the Crown as used material. The point he says is whether, taking into account the nature of the document and any other relevant circumstances, the Determining Officer exercised reasonable discretion to include only 287 pages of that evidence (comprising only electronic copies of the Crown's examination reports) in the PPE count.

24. Mr Rimer does not accept the Appellant's argument that where it can be established that the material was served as evidence in the case it should be included within the PPE without exception or reservation. The 2013 Regulations expressly provide that electronically served evidence is not included in the number of pages of prosecution evidence but that the Determining Officer can decide to include some or all of this evidence taking into account the nature of the document and any other relevant circumstances.

25. It is, Mr Rimer says, well established by judicial authority that a Determining Officer is not only permitted but bound to carry out a qualitative assessment of the material on disc when exercising appropriate discretion under paragraph 1(5) of Schedule 2 and that the relevance of material to the case against the Defendant will be an important consideration for the Determining Officer. He refers me to Paragraph 50(ix) of the High Court decision in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB):

> "If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately."

26. Generally, in accordance with the Crown Court Fee Guidance, the Determining Officer will consider whether the material was of pivotal to the case and the amount and nature of the work required to be done, including whether the evidence required a similar degree of consideration as a page of evidence served in paper format.

27. Where, taking into account the nature of the document and any relevant circumstances, the Determining Officer does not consider it appropriate to include electronically served evidence within the pages of prosecution evidence

an additional payment, at the appropriate hourly rates, may be made in respect of reasonable time spent viewing or considering the electronically served material under paragraph 20(1)(a) of Schedule 2.

28. Mr Rimer refers me to paragraph 10 of the judgment of Master Simons in *R v Sana* [2014] 6 Costs LR 1143:

> "A line has to be drawn as to what evidence can be considered as PPE and what evidence can be considered to be the subject of a special preparation claim. Each case depends on its own facts. The regulations do not state that every piece of electronically served evidence, whether relevant or not should be remunerated as PPE. Quite the contrary, as electronically served exhibits can only be remunerated as PPE if the Determining Officer decides that it is appropriate to do so, taking into account the nature of the documentation and all the relevant circumstances."

29. Applying those principles to this case, Mr Rimer points out that none of the electronic data in issue refers directly to the Defendant. In particular, Sandra Abubakir was not a conspirator and there is no suggestion that her husband used her telephone in order to conduct his criminal activity. Anything extracted from her mobile telephone could only, he submits, be of peripheral relevance to the case against the Defendant and as such should not be included within the PPE count. Time spent viewing such material should be claimed by way of special preparation, based in accordance with Paragraph 20 of Schedule 2 on reasonable viewing time.

30. Mr Rimer also refers me to the general content of the electronic evidence that has not already been allowed as PPE. It contains a mixture of communications data, contact lists, call logs, messages, social data, web history, audio files, images, technical data, document files, database files, unrecognised files, archive files and extraction data (relating to the technical extraction process itself rather than the data extracted).

31. He submits that there is a clear distinction, in a case of this kind, between core communications data, for example calls, contacts, and messages which may contain direct evidence of the defendants' criminal behaviour (and from which pertinent data was extracted and included in the jury bundle and various Prosecution Schedules) and the sort of social data found on most modern smartphones. That would include calendars, audio/video files, applications, games, web history and sections containing technical data about the configuration of the telephone, none of which will have much bearing upon any of the real issues.

32. It cannot he suggests be said that, for example, messages and e-mails can only be properly understood or fairly interpreted in light of, for example, technical data about the handset or details about the defendant's web history or calendar. Again, time spent for viewing such material (if only to discount for relevance) should he submits be remunerated by way of special preparation.

33. By way of an example of obviously irrelevant data, Mr Rimer refers me to documents described as 'handset files', which account for a large number of pages within the Appellant's PPE claim. Those files contain primarily technical data about the configuration of the phone and metadata relating to audio, image, and video files downloaded to the telephone. They usually comprise long, largely incomprehensible strings of letters and numbers.

34. Mr Rimer has provided a very full breakdown of the data from each of the six discs claimed as PPE. He points out that the electronic copies of the Crown's examination reports, allowed by the Determining Officer as PPE, were also served in paper format and as such already included in the PPE count. Arguing that it is plainly not reasonable to include both the paper and electronic versions of these reports in the PPE, he submits that the PPE count should in that respect be reduced by 278 pages.

35. There is also, he submits, a great amount of overlap between the data presented in the examination reports and the same data in alternative formats such as Excel spreadsheets, HTML documents, XRY files, Plain Text files and JPEG files. Such duplicated data, he suggests, plainly did not require separate consideration in multiple formats. He points out that, having conceded that no duplicated material should be included in the PPE count, the Appellant has not reformulated the claim to allow for that. The Appellant's page count is based on all of the formats together, regardless of duplication.

36. The fact that material was so heavily duplicated is he says a relevant consideration that the Determining Officer was bound to take into account. To include the same material multiple times within the pages of prosecution evidence would artificially inflate the graduated fee and disrupt the fair and predicted economic balance of remuneration paid for a case, contrary to the principle identified at paragraph 29 of *R v Napper* [2014] 5 Costs LR;

> "...the Determining Officer must consider 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."

37. Where evidence is, as here, served in multiple electronic formats it is, submits Mr Rimer, reasonable for the Determining Officer or Cost Judge to conclude that the format that most closely approximates a page of paper evidence should be used to calculate the graduated fee. That is the PDF version (which was, in this particular case, also printed and served in paper format).

38. Excel and XRY formatted material is primarily designed to be manipulated and analysed electronically via the application of various tools & filters. It is designed to be viewed electronically and unlike PDF material, not 'read' in the same way as paper. It is difficult to ascertain a representative page count for a report in

XRY or Excel format. Any estimated page count generated using the "print preview" function Excel will often bear little or no resemblance to an actual 'page' of information and is not representative of what the viewer will have considered on the screen. A printed copy of an Excel document will split various columns and rows that are readable on single screen across several, often un-sequential, pages. Each single page will be of limited use as it will be isolated from its original context and order.

39. XRY reports, he says, tend to calculate the number of individual records rather than the number of pages. So, for example, the XRY viewer may calculate that a document has 164 separate entries, whereas if converted to PDF, the format most obviously compatible with a printed document, the relevant entries may comfortably be contained on 8 to 10 A4 pages.

40. Mr Rimer accepts that the Defence may well have to consider duplicated material but argues that the proper method of remuneration for time spent considering duplicate versions of the data served on paper or PDF is a claim for special preparation under Paragraph 20 of Schedule 2.

41. By reference to his detailed breakdown, Mr Rimer has identified a small amount of non-duplicated data sufficiently relevant to the case against the Defendant to merit its inclusion within the PPE. This, by his count, amounts to 329 pages and would therefore result in a small increase of 51 pages to the PPE when the 278 pages of duplicated extraction reports are set off against it.

Conclusions

42. I do not understand the proposition that it is inherently inappropriate that representatives for different defendants on the same indictment might find themselves being paid different amounts. I would have thought that what is due to the representative of a particular defendant will be dependent at least to some extent upon the work that has to be done for that particular defendant. So, for example, I recently allowed an appeal by Mr Shafi in an unconnected case in which his grounds for appeal, accepted by me, included that in the particular circumstances of that case, he bore a heavier burden than counsel for his client's co-defendants.

43. The Crown may well serve upon the defence team for every co-defendant the same body of evidence. It cannot, to my mind, follow that every part of that evidence is going to have the same significance for every defendant. Quite plainly it may not. If that results in different representatives for different defendants receiving different payments in accordance with the 2013 regulations, that to my mind is unsurprising.

44. As for the complaint that Mr Shafi has in respect of another client been paid on the basis of a different PPE count than his instructing solicitors, I have no information on how that might have come about, nor how it might be said to have any bearing upon this appeal.

45. I do not accept that it is open to the Appellant to rely upon *R v Furniss*. The reasons for that are set out in full in the judgment of Master Rowley in *R v Jagelo* (SCCO Ref: 96/15, 6 January 2016) and in my own judgment in *R v Ralph and Ors* (SCCO Ref: 100/15, 101/15, 209/15, 18 April 2016). In brief we concluded, as have other judges since, that *R v Furniss* does not represent binding authority and we declined to follow it.

46. *R v Furniss* has in any event been superseded by binding authority, to be found in the judgments of Mrs Justice Nicola Davies DBE in *The Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and of Mr Justice Holroyde in *The Lord Chancellor v SVS Solicitors*.

47. Holroyde J emphasised at 50(ix) of his judgment in *The Lord Chancellor v SVS Solicitors* the importance of the discretion to be exercised by the determining officer in accordance with paragraph 1(5) of Schedule 2 and the LAA's Crown Court Fee Guidance. The importance of the evidence, the degree to which it is central to the case and the extent to which must be considered in detail, must be appropriate factors to consider when exercising that discretion.

48. The Appellant's primary case to the effect that all served evidence must be included within the PPE count is at odds with the wording of the 2013 Regulations themselves and with the guidance given by Holroyde J. For that reason it is not sustainable.

49. I cannot in any case accept that a defence team must treat all served data as equally relevant, or potentially relevant. At least some of it is likely to be self-evidently of limited or no relevance from the outset, as Mr Rimer's analysis in this case demonstrates. As for the complaint that relevance cannot be judged after the event, that is what the rules require the Determining Officer to do (albeit with due regard to the position as known to the defence team at the relevant time).

50. The Appellant has presented an alternative argument based upon the importance of the evidence considered, but (other than that everything served should be included) no clear case is advanced as to what the appropriate PPE count, on that basis, should be. The same goes for the Appellant's very proper concession that duplicated material should not be included. As Mr Rimer says, the Appellant has not presented an alternative PPE count based upon the removal of duplicated material.

51. Mr Rimer has, in contrast, evidently gone to a good deal of trouble to examine the content of the electronic material which the Appellant argues should be included within the PPE count. On his effectively unchallenged analysis it is rife with duplication, in particular between the same material presented in different formats.

52. I agree with Mr Rimer's submission that, for the purposes of identifying an appropriate page count (whether for a PPE purposes or for the purposes of considering a special preparation claim) the best starting point is to consider the volume of evidence in PDF format (which is designed to mimic presentation

on paper and which, for that reason, gives the best idea of an appropriate page count) and to exclude from the PPE count any presentation of the same data in other formats such as Excel.

53. Mr Rimer's submissions in that respect seem to me to be right. I have previously reached the same conclusion in in *R v Muiyoro* (SCCO 70/18, 1 November 2018) and *R v Simpson* (SCCO 44/18, 26 November 2018), as did Master Brown in *R v Daugintis & Ors* (SCCO 154/17, 155/17 & 177/17, 8 January 2018) and *R v Ladic* (SCCO 73/17, 28 February 2018), and Master Rowley in *R v Simpson* SCCO 148/17, 16 April 2018).

54. The Appellant also appears to have extracted a page count from other electronic formats in a way that inflates the total. To cite one example given by Mr Rimer ("Handset XRY" from JDT/6) 742 individual data entries are presented as 742 pages, which if exported to PDF would come to 23 "paper" pages.

55. I have not lost sight of Mr Shafi's argument that the content of the "Examination Reports" had to be checked against underlying data. Bearing in mind however that (as I understand it) reports in PDF format can be automatically generated by the downloading software, it is not a foregone conclusion that anything has to be cross-checked at all. It is for the Appellant to make its case in that respect, identifying the material to be checked and the extent to which it should add to the PPE count. That case has not been made out.

56. I have identified no basis for concluding that the mass of co-defendant data analysed by Mr Rimer would have had any significant role to play in putting any of the Defendant's actions in context. Nor does the "cutthroat" defence seem to me to have any real bearing on the PPE count. The significance of the relevant cell site data was that it might have been attributable to telephone activity by the Defendant. If not, it will by definition have been attributable to someone else. The fact that that other person may have been a co-defendant does not seem to me to add in any material way, from the Defendant's perspective, to the significance of the data itself or the detail which it needed to be examined.

57. For those reasons, my conclusion is that the PPE count should be increased by the 51 pages conceded by Mr Rimer, but no more. Because, in effect, the Appellant has had some limited success on this appeal only because of Mr Rimer's efforts, I do not consider it appropriate to award to the Appellant any of the costs of the appeal.

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