SENIOR COURTS
COSTS OFFICE

SCCO Ref: 2/18

Dated: 13 September 2019

APPEAL FROM REDETERMINATION

REGINA v MUCKTAR KHAN

INNER LONDON CROWN COURT

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

CASE NO: T20160392

LEGAL AID AGENCY CASE

DATE OF REASONS: 18 September 2017

DATE OF NOTICE OF APPEAL: 8 November 2017

APPLICANT/APPELLANT: Solicitors/Litigators

I have refused to certify the point raised in the letter dated 28 August 2019 from SVS Solicitors ('the Appellants') as a point of principle of general importance.

SIMON BROWN
COSTS JUDGE

REASONS FOR DECISION

1. My decision dated 29 July 2019 was received by the Appellants on 8 August 2019. The request for certification dated 28 August 2019 was received on 30 August 2019. If on a proper construction of the relevant rules (Regulation 30 of the Criminal Legal Aid Remuneration Regulations 2013) the request were out of time, I would extend time as I am satisfied that there is good reason, alternatively exceptional circumstances for such an extension, those being the failure of the Royal Mail Special Delivery service to deliver the letter containing the request the day following posting.

2. I do not, however, accept that a point of principle of general importance arises.

3. The point in respect of which certification is sought is effectively, as I understand it, as follows: whether the Determining Officer, or Costs Judge on appeal, in exercising his or her powers to determine whether a document served in electronic form should count towards the pages of prosecution evidence (PPE) in accordance with Regulation 1 (5) of Schedule 2 Criminal Legal Aid (Remuneration) Regulations 2013, is constrained to allow as pages of prosecution evidence (PPE) all material that is found with a "*given section of electronic material*" [sic] if any part of this "*section*" is accepted to contain "*relevant material*".

4. In my judgment the principles applying to the exercise of discretion under this provision, which were considered by Holroyde J (as he then was) in *Secretary of State for Justice the Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 at inter alia [50 (x)] (QB)('*LC v SVS*'), are clear and do not give rise to any lacuna of the sort contended for.

5. Moreover, (in circumstances where – as I recall it – the point was not developed, or at least not in any detail, at the hearing) I would add as follows:

(1) I am not satisfied that there is any or any proper basis in the relevant provisions or the guidance set out in *LC v SVS* (or for that matter deriving from the decisions of other Costs Judges) for saying as a matter of principle, that there should be such a constraint on the Determining Officer or Costs Judge.

(2) Indeed, in my judgment, it is clear that the Appellant's submission is not sustainable in light of the terms of the statutory provisions which require the officer or judge to "*take into account the nature of the document*" when deciding whether to include it within the PPE (see the decision of the Senior Costs Judge Gordon-Saker in *R v Shepherd* 124/18 to this effect); The 'principle' relied upon by the Appellants would appear to require a blanket allowance of documents falling within a "*section*" which would be incompatible with the terms of the statutory provisions.

(3) Not only would such a constraint run contrary to the guidance set out in LC v *SVS* and the approval of the approach in *R v Jalibaghodelezhi* [2014] 4 Costs LR 781 (cited at [38] of *LC v SVS*) in *LC v SVS* (and the qualitative assessment of the documents which this requires) it would distort the operation of the fees scheme as a whole (see para. 29 of *R v Napper [2014] 5 Costs LR 947* and [50 (ix)] of *LC v SVS*). Not unusually in a telephone download there

might be a large number of photographs or other images in a section or category of material which might run to 1000's of pages but the majority of which are wholly irrelevant (pre-loaded images, emojis and pornography, for instance). If the 'principle' advanced were correct all of the 1000's of pages may, as I understand it, be said to count towards the PPE, so long as a single document within such a section or category was of relevance; yet this would be unrepresentative of the work required. (Alternatively, the provisions may require that none of it would be allowed as PPE if the irrelevant so outweighed the relevant.) The approach advanced by the Appellant would, in my judgement, hinder the ability of the determining officer and the costs judge to achieve a fair and balanced outcome.

(4) I am, moreover, doubtful that the 'principle' asserted would be capable of formulation in a way which is applicable in practice. Material may be served in different software applications (not just PDF and Excel). It is not clear to me that it always possible to define "*sections*" of material; moreover, material may be divided across many different sections or categories in different ways and indeed may frequently be duplicated in different sections.

(5) Even accepting that in many cases it will be appropriate to allow whole sections or categories of material because the general category of communications required the appropriate degree of consideration (for example, not unusually where communications in SMS and WhatsApp messages or such like, are being considered) the approach required is necessarily fact and case specific. It is my understanding that it is not unusual for Costs Judges to allow only part of the material within any given category or section and to do on the basis of sensible approximation (ordinarily a necessary feature of a costs assessment process- see *In Re Eastwood (deceased)* [1974] AER 603 at page 608 per Russell LJ) . Indeed I would not accept that the cases cited by the Appellant on page 6 of the letter demonstrate any "*pattern*" of the sort suggested.

(6) As Master Rowley has pointed out (*R v Mooney* (SCCO Ref, 99/18) the task under para. 1 (5) is to be undertaken without the benefit of hindsight. He stated at [14] that "*[where] a category is clearly reasonable to view in principle, the correct approach ought to be allow all of those entries*". It is clear that he was considering the point in the context of 425 out of 427 documents in a category of documents having been agreed as relevant: in those circumstances it would not assist the Legal Aid Agency to say that with the benefit of hindsight two documents/pages could not be shown to be relevant and that the PPE count should be reduced accordingly. Master Rowley was not, as I read it, indicating a further principle of the sort now advanced. To the extent that he was, I would respectfully disagree that there is any basis in the provisions for such an approach.

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