Neutral Citation Number: [2022] EWHC 1175 (Admin)

Case No: CO/301/2022

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2022

**Before**:

**MR JUSTICE CHAMBERLAIN**

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**Between:**

**THE QUEEN**

**on the application of**

**(1) RODERICK JOHNSON Q.C.**
**(2) ANU MOHINDRU Q.C.**
**(3) JASON SUGARMAN Q.C.**
**(4) NICHOLAS RHODES Q.C.**
**(5) BEN WAIDHOFER**
**(6) DOMINIC D'SOUZA**
**(7) JESSICA TATE**
**(8) CLEA TOPOLSKI** **Claimants**

**-and-**

**THE LORD CHANCELLOR** **Defendant**

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**John McGuinness QC** (instructed by **Richardson Lissack Ltd**) for the **Claimants**
**Sir James Eadie QC and Melanie Cumberland** (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 4 May 2022

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# Approved Judgment

**Mr Justice Chamberlain:**

## Introduction

1 This is a renewed application for permission to apply for judicial review of a decision of the Lord Chancellor, which was taken on his behalf by the Legal Aid Agency ("LAA"). Permission was refused on the papers by Lieven J on 15 March 2022.

2 When this claim was filed there were eight claimants. The fourth claimant has since indicated that he no longer pursues the claim. The seven remaining claimants are all barristers instructed in a publicly funded criminal case, which is due to commence in September 2022. The details of the case do not matter, but it involves allegations of fraud against four men. Each of these is separately represented by a Queen's Counsel ("QC") and junior and by a firm of solicitors. The allegations on which the prosecution is founded arise from the activities of a company ("the Company") which is said to have promoted an investment in which investors lost more than £5 million. The principal issue in the proceedings is whether any of the accused acted dishonestly.

3 The decisions challenged in the Claim Form are those of the Lord Chancellor on 1 and 30 November 2021 "to the effect that any increase in the previously offered fee to reflect the further prosecution evidence would be based on a 'time spent' approach".

4 The claimants say that the "time spent" approach is, in essence, the approach taken to very high cost cases ("VHCCs") prior to 2014, when the Lord Chancellor introduced a new policy called the Interim Fixed Fee Offer Scheme ("the IFFO Scheme"), which was introduced in order to settle a dispute with the criminal Bar following a reduction in fees for VHCCs. The details of the IFFO Scheme, as currently operated, were set out in a document dated September 2018 ("the Scheme Guidance").

## The IFFO Scheme

5 The Scheme Guidance provided in para 1.1 and 1.2 that advocates could choose to be remunerated under the IFFO Scheme, where the fee is based on the volume of case material (including evidence and disclosure material), case category and length. In para. 1.3 it was said that the aim of the IFFO Scheme was to give advocates greater certainty regarding the overall payment from the outset.

6 Under the IFFO Scheme, a fixed fee is negotiated at as early a stage of the proceedings as possible. This fixed fee is then payable in three instalments, to cover all the work to be carried out in the case by the advocate.

7 Central to the IFFO Scheme is a spreadsheet called the "IFFO model" or "calculator". Information about trial categorisation and length and the volume of served and unused evidence, including the presence of raw digital data, is put into the calculator. The calculator makes certain assumptions when determining the initial fee offer. For used evidence pages (otherwise known as "pages of prosecution evidence" or "PPE"), 100% are included in the fee and the time allowed for the advocate's consideration of each page is 1.25 minutes. For unused evidence pages, 25% are included in the fee and the time allowed for the advocate's consideration of each page is 30 seconds. The calculator assumes that other preparation for the case will require 250 hours in addition to two hours per day during the trial.

8 Para. 2.5 of the Scheme Guidance makes clear that "[i]n certain instances, the senior case manager may make an assessment that the calculation does not produce a fee which properly represents the nature or value of the case". In such cases adjustments may be made. One of the adjustments envisaged is "adjusting figures provided for raw digital material after making an assessment as to its overall likely significance and relevance".

9 Para. 2.6 of the Scheme Guidance provides that if the revised offer is accepted an IFFO contract is offered and signed. Para. 2.7 says that if the offer is not accepted the senior case manager will negotiate with the instructed advocate or advocates to revise the offer or offers based on submissions from the instructed advocate or advocates and further information provided about the case and material "using their experience of assessing the reasonableness of work proposals and making adjustments accordingly".

**The negotiations between the claimants and the LAA**

10 The chronology of the offers and negotiations in this case is long. In essence, it is as follows. On 3 December 2020 the senior case manager at the LAA made the first offer under the IFFO Scheme. This assumed a category 3 case due (at that stage) to last for 70 days. A second offer was made on 15 January 2021 after the senior case manager accepted the claimants' representations that the case fell within category 2. It also took account of the expanded time estimate and additional unused material which had been drawn to his attention.

11 On 21 January 2021, this offer was rejected by the first claimant on behalf of all counsel instructed in the case. On 28 January 2021, the first claimant made a counter-offer for the Queens Counsel instructed. There were further discussions and negotiations. The barristers emphasised the importance of ensuring that the offer was *not* made entirely on the basis of the calculator: other matters were also said to be important. No agreement was reached.

12 On 13 April 2021 the senior case manager sent the claimants a third offer. This was £131,000 for QCs and £66,700 for led juniors. Negotiations continued, unsuccessfully. The claimants expressed their views forcefully.

13 Meanwhile, the shape of the case changed due to the seizure of the Company's hard drive. The hard drive had originally been exhibited to a prosecution witness statement. However, defence counsel applied to the judge for this exhibit (HRW/121) to be served by the prosecution as "used evidence" in other words, primary prosecution material. This application was granted on 25 June 2021. The judge noted that the trial (then fixed to start on 31 August 2021) was unlikely to be vacated because the defendants would be familiar with the material to be served, since it came from the company's computer systems. He said: "They will know what material may assist them and where to locate it on the hard drive."

14 The trial date was, however, adjourned, first to 27 September 2021 and then to 5 September 2022, with a time estimate of 4 months, on the basis that the new exhibit contained a significant amount of further material which would have to be considered.

15 In the meantime, negotiations over the fees continued. The CPS quantified the nominal page count for the new exhibit as between 4,300,000 and 6,450,000 pages of evidence.

On 26 July, the third claimant emailed the LAA saying that, if the lowest of these numbers were put into the IFFO calculator, the resulting figures were £8,529,300 for each of the QCs and £4,240,100 for each of the juniors. In a subsequent email on 13 August 2021, they suggested a pragmatic approach of using 25% of the material in the exhibit to "populate" the IFFO calculator. This approach would have yielded approximately £3 million for each of the QCs and £1.5 million for the juniors. One of the claimants noted that the time needed to consider the evidence was "not a suitable proxy for calculating an IFFO". This compromise proposal was rescinded in an email dated 6 September 2021 on the basis that the 25% figure "may well fall short of the reality of the amount of material… which needs to be perused".

16 On 1 November 2021, Robert Heard, Head of the Criminal Cases Unit of the LAA, issued a detailed decision letter. Mr Heard noted that, if the calculator were used, the total fee it would generate, for the review of this one exhibit alone, would be £51,077,600 (for all eight counsel). The decision letter continued: "That is obviously not a fee which properly represents the nature or value of the case and a departure from the assumptions in the IFFO Guidance (at para. 2.4) is considered to be necessary." Counsels' position is then summarised. Mr Heard noted that the aim of the IFFO Scheme, as summarised in para. 1.3 of the IFFO Guidance, was "to provide reasonable payment according to the individual circumstances of each case (within agreed parameters) and to give advocates greater certainty regarding the overall payment that would be made in a case from the outset". Mr Heard continued as follows:

> "It is implicit in these words (and obvious in the context of publicly funded representation in criminal cases) that fee agreements under the IFFO Scheme should properly reflect work needing to be carried out in a given case. Where the assumptions in §2.4 of the IFFO Guidance have not produced a fee which properly represents the nature or value of the case, a departure from those assumptions may be appropriate (§2.5 of the Guidance). Those assumptions may be displaced so as to increase or to decrease the proposed fee offer. Raw digital material is specifically referred to (also at §2.5) as a category of material justifying a decision by the Case Manager to 'adjust (…) figures provided (...) after making an assessment as to its overall likely significance and relevance. Raw digital data is of course not viewable or readable in the same way as hard copy documentation…
>
> There should be appropriate restraint in the expenditure of public funds and the IFFO Scheme envisages a negotiation on the basis of what is reasonable – not a rigid upwardly sliding scale."

17 Mr Heard then proposed that the only means of identifying a fee which represents the nature and value of this particular case is to allocate a number of hours constituting special preparation. He drew attention to six matters: first, the trial judge's comment that the defendants would know where to locate any material likely to assist them; second, that each of the four firms representing the defendants had been allocated 200 hours to review the exhibit; third that the review of raw digital data on the instructions of clients familiar with that data would appear to be a task more suited to solicitors than counsel; fourth, that counsel had not indicated in their correspondence to date how the fee they proposed was linked to work which is reasonably necessary in the circumstances of the case; fifth, that the trial did not appear to be one of the greatest volume or complexity; sixth, that once further relevant material was identified from the exhibit, it would be

included in the page count as used or unused material and the fee offered would need to take account of that in due course.

18 In the circumstances, Mr Heard proposed as follows:

> "(i) That you and your fellow Defence Counsel provide a schedule detailing the amount of time which has already been spent reviewing HRW/121 (bearing in mind the trial was originally due to commence on 27 September 2021). This will ensure that any past work done may properly be remunerated.
>
> (ii) The allocation of a block of time which realistically reflects the number of hours Counsel will in fact spend reviewing HRW/121. In my view, 50 hours is an appropriate starting point for each Counsel. I am happy to consider representations concerning the amount of work likely to be necessary and the proposed division of labour within teams in order to agree an offer which reflects the number of hours you need to spend reviewing this evidence. For example, it may be envisaged that junior counsel will assume the greater burden of this work."

19 Following receipt of this letter, there was a meeting, followed by an email headed "without prejudice" from the second claimant to the LAA (which it was agreed I could see and rely on). In it, a compromise figure was proposed of 2,600 hours for each of the eight counsel instructed. On 30 November 2021, the Mr Heard reiterated his view that the only means of identifying a fee which represents the nature and value of the case was to allow for the extra time needed to review the exhibit by allocating a number of hours of "special preparation" and invited the counsel to provide detail of the work they had undertaken and proposed to undertake on the exhibit. This would be "in addition to the fee calculation for preparation and trial, where the final figure offered for each of the leading counsel is £131,00 and, for led juniors, £66,700".

20 The letters of 1 and 30 November 2021 together comprise the challenged decision.

**Preliminary observations**

21 At this stage, I make three observations.

22 First, the decision challenged in the Claim Form is <u>not</u> a decision to offer a particular fee. Although a suggestion was made that a fee should be set based on of 50 hours' work per counsel, the LAA have been clear throughout that it would be open to the claimants to show, with evidence, that they had spent, or were reasonably proposing to spend, longer than that reviewing the exhibit. The decision contained in the letters of 1 and 30 November 2021 was the "in principle" decision that the fee for reviewing the exhibit would be based on time actually spent or to be spent. It is only if that "in principle" decision is arguably unlawful that the challenge can get off the ground. If it cannot, the next stage will be for the LAA and the claimants to continue their negotiations with a view to agreeing a fee. Although I do not encourage any further recourse to litigation, there are decisions still to be taken which could in principle be amenable to judicial review.

23 Second, the defendant says that the number of pages in the exhibit have been put into the IFFO calculator. At points in the argument, I understood John McGuinness QC (for the claimants) to dispute this. I found this submission difficult to understand. The decision letter of 1 November 2021 quotes the figure which the calculator yields when the page count from the exhibit is fed into it (£8,529,300 for each QC and £4,240,100 for each junior). There is no dispute that these are the figures given by the calculator. They can only have been generated by putting the figures into the calculator. There can also be no dispute that the LAA was aware of them.

24 Third, Mr McGuinness was at pains to make clear that he was not asking for an order that the Lord Chancellor make an offer in the sums produced by the calculator. The relief sought in the Claim Form (at para. 98) was, instead, a mandatory order that the defendant:

> "within 7 days, issue to each of the Claimants a fee proposal calculated by:
>
> a. Inputting all relevant data (including the pages count from HRW/121) into the IFFOS calculator so as to give a calculated fee.
>
> b. To the extent that there is any adjustment of the calculated fee by reference to 'additional criteria' this should be explained in detail including, to the extent relevant, explaining why specific pages or parts of HRW/121 have been disregarded when calculating the final fee."

25 As I observed at the hearing, if the court were to grant relief in that form, it would be requiring the LAA to make the running by identifying parts of the exhibit which *do not* need to be read. This would be a difficult task to perform for LAA staff in any case. They are unlikely to have the kind of detailed knowledge of the issues in the case that would be required to make judgments of that kind. On a practical level, it is difficult to imagine how the LAA could possibly undertake such a task in a case as complex as this.

## Ground 1

26 Under ground 1, the claimants assert a legitimate expectation that their remuneration would be calculated according to the IFFO Scheme. They say that they accepted their briefs on the basis of this expectation. I am prepared to assume, without deciding, that the terms of the IFFO Guidance gave rise to such an expectation. But, as Mr McGuinness accepts, this expectation would not supply a ground of challenge unless the defendant acted in a way that was contrary to the IFFO Scheme. So, ground 1 is not a free-standing ground of challenge: it would supply a basis for impugning the challenged decision only if one or more of the other grounds succeeds.

## Grounds 2 and 3

27 Under grounds 2 and 3, the claimants say that the defendant failed properly to apply the IFFO Scheme and/or the applicable guidance and acted contrary to legitimate expectations engendered by it and by statements made during the course of the negotiations. The alleged failure consists in (a) refusing to input all of the relevant core data into the IFFO calculator; (b) failing to make any assessment or adequate assessment of whether the fee generated by the calculator properly represented the nature or value of the case; and (c) failing to set out what "additional criteria" have been taken into account when determining the final payment (and, indeed, failing to determine the final payment).

28 Recent Divisional Court authority suggests that not all policies are enforceable as a matter of law: *R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport* [2022] EWHC 960 (Admin), [90]-[127]. I am prepared to "park" this issue in the present case and assume, without deciding, that the IFFO Guidance is enforceable and (which may amount to the same thing) that it is sufficiently clear and unequivocal to give rise to legitimate expectations that it would be followed.

29 Even on that assumption, none of the three respects in which the claimants say the defendant failed to follow the IFFO Guidance gives rise to an arguable ground of challenge.

30 The claimants say, first, that the defendant has refused to input all of the relevant core data into the calculator. The difficulty with this is that the letters of 1 and 30 November 2021 show that the figures had been put into the calculator. Who put them there does not matter. If the IFFO Guidance required the LAA to treat the calculator figures as a "starting point", that is precisely what the LAA did. The real question is whether they were entitled to do what they did next (which was to conclude that the only feasible method of determining the fee was to use a "time spent" basis).

31 Next, the claimants say that the defendant failed to make any assessment or adequate assessment of whether the fee generated by the calculator properly represented the nature or value of the case. The difficulty with this is that para. 2.5 of the IFFO Guidance enables the Senior Case Manager to "make an assessment that the calculation does not produce a fee which properly represents the nature or value of the case" but does not say anything about how this assessment is to be carried out. This means that it is for the decision-maker to decide how to conduct the assessment, subject only to the constraint that the method chosen must be rational. I accept that, in some cases, such an assessment might be quite complicated. The decision-maker would have to consider by what metric it should be made. But in this case, the figures spoke for themselves. Even if all the counsel worked on this case and nothing else for a full three years (and it is not suggested that any of them has), it would result in each of the QCs receiving annual remuneration from public funds of more than £2.8 million and each of the juniors more than £1.4 million. These are astronomical figures. The total cost of counsel would amount to about 10 times the value of the fraud being prosecuted. These figures only had to be stated for it to be obvious that they did not represent "the nature or value of the case".

32 The final respects in which it is said the defendant failed to follow the IFFO Guidance is in failing to set out what "additional criteria" have been taken into account when determining the final payment and in failing to determine the final payment. As to the first of these alleged failings, the defendant *has not* determined either the final payment or the "additional criteria"; it has only determined the "in principle" approach – which is to look at the time that has been and will be spent on the exhibit. Negotiations have stopped because the claimants say this approach is unlawful. They are, of course, entitled to challenge the lawfulness of the defendant's decision. But I do not see how they can also fairly complain that, in the meantime, no final determination has been reached.

33 In my judgment, none of the respects in which the defendant is said to have failed to follow the IFFO Guidance or breached the claimants' legitimate expectations gives rise to an arguable ground of challenge.

## Ground 4

34 Under ground 4, the claimants complain that the approach of asking them for details of time spent and to be spent on the exhibit was irrational because it replicates the old approach to VHCCs which the IFFO Scheme was intended to replace and because the defendant failed to take into account: (a) that the exhibit had been served in its entirety as "used material"; (b) that there was no further "relevance" test to be applied; (c) that the case was listed for 80 days and the served evidence exceeded 4 million pages; and (d) the observations of the claimants, prosecution counsel and the trial judge as to the complexity of the case.

35 As I have said, I accept that the thrust of the IFFO Guidance is that the calculator figures should be used as a starting point. But what to do next depends on the circumstances. In some cases, the LAA might decide to use the calculator figures, subject to a modification to reflect the fact that a particular tranche of evidence would not have to be read, or could be digitally searched. In other cases, the figures might be so wildly unrealistic that another approach would have to be adopted. The LAA determined that this case was in the latter category. So, they asked the claimants for the time they had spent and would spend on the exhibit. I can find nothing in the terms of the IFFO Guidance which precludes such an approach and nothing to suggest that the approach was irrational or arguably so.

36 The complaint that the approach taken replicates the old approach to VHCCs seems to me to fall away once it is recognised that it was in accordance with the IFFO Guidance. That allowed, at para. 2.5, for an approach which departed from the figures produced by the calculator. Nothing in the IFFO Guidance suggests that it was not open to the defendant even to ask the question: "How much time have you spent and how much time to you intend to spend working on the exhibit?" The defendant has not suggested that the answers to these questions will mechanistically determine the offer they are prepared to make. The question for me is simply whether the defendant acted unlawfully in asking it and in declining to proceed further until it was answered. In my judgment, the answer is "No" and the contrary is not arguable.

37 As to the matters which (it is said) the defendant failed to take into account, the defendant says that it has understood from the outset that the entirety of the exhibit was ordered to be served as used material. But this point is in any event of very little significance, given that the defendant accepts that (i) the figures generated by the calculator are obviously inappropriate and (ii) the claimants will need to spend some time reviewing the material. Much of the dispute about the relevance of the material and the complexity of the case seem to me to be irrelevant to the lawfulness of the challenged decision which, to repeat, was simply an "in principle" decision to adopt a "time spent" approach. If that decision was lawful, as I think it was, arguments about the about the relevance of the material and the complexity of the case are for the next stage of the negotiations. The same is true of the argument, pressed by Mr McGuinness at the hearing, that the LAA should now proceed to make an offer based on a suggested notional 295,000 pages. This argument falls outside the scope of the claim.

## Ground 5

38 Ground 5 is that the LAA has failed to propose a fee that is consistent with the IFFO Guidance within a reasonable time.

39 It is regrettable that, so soon before the start of the trial, the negotiations have not proceeded to the point where a final offer has been made. But the reason is that the claimants have chosen to challenge the lawfulness of the "in principle" decision to adopt a "time spent" approach to the new exhibit. In my view, the defendant was entitled to decline to continue negotiations while the challenge was underway. There is, therefore nothing in this complaint.

## Conclusion

40 For these reasons, permission to apply for judicial review is refused.