Neutral Citation No.[2022] EWHC 1148 (SCCO)

Case No: T20200493

SCCO Reference: SC-2021-CRI-000067

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 04/05/2022

Before:

COSTS JUDGE ROWLEY

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REGINA
v
FRASER

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **DJMS Solicitors**

The appeal has been dismissed for the reasons set out below.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by DJMS solicitors against the number of pages of prosecution evidence ("PPE") allowed by the determining officer when calculating the appropriate fee under the Criminal Legal Aid (Remuneration) Regulations 2013.

2. The solicitors were instructed on behalf of Mr Simon Fraser who faced a two count indictment concerning an allegation that he had in his possession two offensive weapons contrary to the Prevention of Crime Act 1953.

3. Mr Fraser was attending a petrol station on 27 October 2019 when police officers, who also happened to be present at that petrol station, looked into his vehicle and saw a pair of handcuffs. They searched the vehicle and found other items that might have been used by a police officer and in particular a chest rig and two extendable metal batons.

4. Mr Fraser did not dispute that he possessed the batons and nor was it the defendant's case that they did not amount to offensive weapons. As the prosecution's opening note said, at paragraph 29:

> "The issue in the case is primarily whether the Defendant had a reasonable excuse for having the items in the circumstances that he had them on 27 October 2019. So, we are not concerned why he might have purchased or possessed the items generally, but whether on that specific occasion in public he had a reasonable excuse for having them out with him. The defendant states he was transporting them home in his car from his mother's address."

5. In addition to the physical evidence and some brief witness statements from the police officers at the scene, the prosecution relied upon material on the defendant's mobile phone and from which an extraction report running to 1,691 pages was produced. Separately there were 9,322 still photographic images on the phone and a further 1,425 video files.

6. The prosecution relied upon five photographs which appeared to show Mr Fraser wearing the seized items and one video clip showing him miming to a song whilst wearing the chest rig. By the time of the second interview of Mr Fraser, his solicitor, had provided to the police officer involved two video clips, one of which was different from the one relied on by the prosecution, and one further still photograph.

7. It would appear that the defendant did not wish to rely upon the statement given to the police that the materials were simply being transported from his mother's address to his home as constituting a reasonable excuse for having offensive weapons in his car. If he had done so, there would have been no need to rely upon any photographs or videos. Instead, his defence was that he had the materials as part of his performance on Tik Tok videos which he produced for his considerable number of followers. Consequently, the existence of photographs or videos of him in preparation for or carrying out such performances was central to that defence.

8. Mr Fraser was acquitted by the jury and his counsel sought to ensure that the photographic material was to be treated as served evidence. This was confirmed by both the prosecution and the trial judge. The court log suggests that Mr Fraser's counsel sought to obtain further rulings regarding the evidence, but the judge went no further than confirming it was served and relied upon.

9. For the purposes of the graduated fee claim, the solicitors claimed not only the paper evidence which was allowed at 32 pages but also the entirety of the extraction report and the images to seek the maximum PPE of 10,000 pages. The determining officer allowed 77 pages of the electronic evidence and so assessed the PPE at 109 pages in this case. The solicitors' appeal is against that allowance.

10. The solicitors' first challenge to the determining officer's decision refers to the requirement in the 2013 Regulations for the determining officer to consider whether or not the evidence would have been served in paper form prior to the entry into the digital age on 1 April 2012. This is not a threshold requirement that is really pursued by the determining officer any longer since the evidence as to what was and was not originally printed out was inconsistent even when such matters were considered shortly after that date.

11. But in this case matters are further confused by the solicitors' argument appearing to reverse the requirement in any event. The solicitors correctly refer to evidence being served in paper form before being converted to a digital format as potentially remunerated as PPE. But they then refer to a document which must have been provided electronically which they have subsequently printed out in order to work through it more easily. That is electronic evidence which has become a paper document rather than having been served as a paper document. In any event, as I have said the demonstration of evidence have been previously used in paper form is no longer a restriction imposed by determining officers. This is fortunate for the solicitors because to suggest that the solicitors preferred method of working equates in any way to how the prosecution would originally have served the document 10 years ago is not one which has any weight.

12. The determining officer's role under the 2013 Regulations is to consider whether electronic evidence should be treated as being sufficiently important to equate to paper evidence so that it counts as being part of the PPE overall. If it does not reach that threshold, then the solicitors are still able to claim a fee by way of special preparation at an hourly rate for considering the prosecution's served evidence. That is the suggestion of both the determining officer and indeed Mr Michael Rimer of the Legal Aid Agency who appeared at the video hearing of this appeal.

13. It is the Agency's answer to the point made in this case by the solicitors (and by their counsel Mr Halliday on the appeal hearing), as indeed it is made in many other cases, that <u>all</u> of the prosecution's served evidence had to be considered by the solicitors. If the determining officer takes the view that it would not be appropriate to include all of the electronic evidence as PPE "taking into account the nature of the document and any other relevant circumstances" then the remainder can still be paid for via a claim for special preparation. The issue is then whether the determining officer was right to conclude that it would not be appropriate to include all of the evidence as PPE.

14. Reliance is placed by the solicitors on the decision of Costs Judge Nagalingam in R v King where he made the point that the PDF provided by the prosecution may need to be considered in its entirety before deciding whether the evidence was in fact important. As such an element of hindsight was being introduced by the determining officer to a task which the solicitor could do nothing other than look at all of the material.

15. What is not always apparent is that the case of King was unusual in that the PDF report provided by the prosecution did not contain any bookmarks or other method by which the areas of the report could be considered before being reviewed. It was simply a question of starting at the first page and ending at the last. Experience has shown that this is a rare situation, and it does not apply here. The extraction report has been provided to me and I have checked that it does contain the usual bookmarking approach so that the document can be navigated as to the elements which would appear to be important. Consequently, the King approach does not apply here and the determining officer was entirely right to consider the importance of the elements of the report in the usual way.

16. It might be thought that the trial judge's comments about the evidence not only being served but also relied upon would be of assistance to the solicitors in this appeal. I do not read the court clerk's note in that light, but even if the judge was attempting to assist the solicitors regarding the electronic evidence, such assistance stops at the point at which the determining officer has to consider the application of the regulations and the decisions of Costs Judges and High Court judges as to the applicability of those regulations. Purely by way of illustration, it was determined many years ago that moving sound and images (Lord Chancellor v McLarty & Co Solicitors [2011] EWHC 3182 (QB)) e.g. videos did not count as PPE and consequently the pages on the extraction report concerning the videos could not be recovered regardless of any instruction by the trial judge.

17. The extraction report is unusual in that it contains no messaging or communications sections but is simply made up of images and videos together with the technical information regarding the extraction itself. The defence obtained legal aid approval to instruct a telecommunications expert in this case and Mr Rimer made the point that this expert would also have considered the images and that was a relevant circumstance for the determining officer to take into account. He pointed to the fact that the prosecution only relied upon a very limited number of photographs from the download and the defence had not produced very many further photographs which they considered to be relevant either before the second interview or indeed before the trial. Mr Rimer expanded the point by suggesting that the defence could have provided photographs from other sources to bolster the argument that Mr Fraser regularly used the seized materials as props for his performances.

18. This interpretation was opposed by the solicitors on the basis that the role of the expert was mutually exclusive from the work done by the solicitors. I have not seen the expert's report and so do not have any knowledge of the purpose behind it, but I do not think, ultimately, it adds to the consideration of the importance of the images in any event.

19. For some considerable time, the allowance of images under the 2013 Regulations was something of an all or nothing affair. Either the images were considered to be

sufficiently important that they were all part of the PPE or they were too peripheral for any of them to be allowed. That position changed when the Senior Costs Judge, Andrew Gordon-Saker, gave his decision in the case of R v Sereika on 12 December 2018. In that case he said, at paragraph 16:

> "In this particular case, the exercise of that discretion is not easy. On the one hand the prosecution chose to serve this evidence as an exhibit. Given the nature of the defence, that the phone was used by others, it is not difficult to conclude the solicitors would have wished to look for photographs indicating that use. On the other hand, it is unlikely that the vast majority of those photographs would have been relevant to that task. It would seem unlikely that the solicitors would have looked in detail at each of the 20,608 images served on disc. Most will have required a glance or less."

20. It seems to me that that is the situation in this case. The solicitors needed to look at the photographs to see whether there were more pictures of the defendant dressed in the seized materials. However, where there is a picture of someone other than the defendant, for example, the picture cannot possibly be relevant to the search nor can it realistically be said to be of sufficient importance to be one which ought to be treated as if it was the equivalent of paper PPE.

21. The Senior Costs Judge continued in Sereika:

> "17. In short, it is clear that the evidence on the phone was central to the case against Sereika and his assertion that others had used the phone was central to his defence. The solicitors were required to consider the phone evidence carefully. However, much of the evidence on the phone would not require consideration.
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> 18. It seems to me that in these circumstances there is no reason why a Determining Officer (or costs judge on appeal) should not take a broad approach and conclude that as only a proportion of the images may be of real relevance to the case, only that proportion should be included in the page count. Inevitably that will be nothing more than "rough justice, in the sense of being compounded of much sensible approximation": per Russell LJ in *In re Eastwood* [1974] 3 WLR 454 at 458. But that is the nature of the assessment of costs."

22. It is my experience that in PPE appeals, there is regularly a criticism of determining officers moving too quickly to a Sereika percentage approach when the primary decision ought to be whether all of the images should be allowed. Inevitably, any cases where the determining officer has already allowed all of the images will not be ones on which an appeal is brought. Consequently, the ones I see are those where only some of the images, if any, have been allowed. It would be fair to say, that very few of such cases seem to allow a specific number of images rather than a percentage of the total (which then leads to a specific figure).

23. Be that as it may, it seems to me that the Sereika approach is entirely appropriate in a case such as this. I have looked through the pages of the extraction report containing the images and it is plain that most of them are irrelevant and that this would be apparent from "a glance or less." As a result, I uphold the determining officer's decision to take a percentage approach in relation to the images which were clearly central to the case in principle but the contents of the phone were largely irrelevant.

24. The only question seems to me whether the 5% figure used by the determining officer was appropriate in this case. Mr Rimer suggested, at least in his written submissions, that the determining officer was generous to allow any percentage. But, given the centrality of the images, I do not consider that argument to be right.

25. Mr Halliday contended for all of the images to be allowed but I do not think that is the correct position either. The defendant produced barely a single photograph from his own resources prior to a second interview. The solicitors say that over 200 images were in fact relevant from the extraction report albeit that was challenged by Mr Rimer on the basis they simply showed the defendant, for example, in a black T-shirt. My consideration of the images did not suggest that there were very many at all which were actually relevant. There were bound to be some which needed to be considered in more detail to decide upon their relevance and they would be the sort of photographs for which consideration comparable to paper PPE would be appropriate. It seems to me that the figure of 200 images or thereabouts is the high watermark of the solicitors' case.

26. The determining officer allowed 5% of the photographs to be claimed. This represented 77 pages of the report in total. Since there were several pictures to each page, the number of images allowed by the determining officer's decision is 466. It would only be if each image had to be looked at as a full page rather than a thumbnail image for the 200 images to amount to more than has been allowed in any event. Given the discrete nature of the photographs which might be relevant, I have no doubt that the thumbnais were perfectly adequate for deciding upon the (lack of) relevance of the great majority of the images.

27. In short, it seems to me that that the 5% allowance in this case was an entirely reasonable use of the determining officer's discretion in considering all the circumstances and the nature of the documents. Those 77 pages amount to PPE and the viewing of the other pages can be claimed by way of special preparation.

28. Accordingly, this appeal fails but, based upon previous experience, a late application for a special preparation fee can be made as long as it is done so promptly.