IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Neutral Citation No. [2022] EWHC 1627 (SCCO)

SCCO REFS: SC-2020-BTP- 000458, 000461, 000464,000578, 000580, 000582, 000308, 000459

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 23 June 2022

Before:

COSTS JUDGE JAMES

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Between:

(1) ERISON BALAJ (2) MUBASHAR IRSHAD

(3) MUHAMMAD AAMIR (4) GRETA NDREU

(5) GHULAM FAROOQ (6) HASNAIN AHMED KHAN

(7) UMAR WAQAS (8) QUHYUM HUSSAIN SYED

Claimants/Receiving Party

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant/ Paying Party

JUDGMENT ON CONDUCT ISSUES

Introduction

1. This matter involves the firm of Ashton Ross Solicitors ('AR') whose practice includes acting in immigration matters pertaining to Judicial Review, and who represented the eight claimants named in this Judgment. Their costs, in particular but not solely their Hourly Rates, were being challenged by the Defendant/Paying Party, the Secretary of State for the Home Department, in multiple provisional assessments in the SCCO. As their Bills were below the threshold to be assessed by Costs Officers, and as these challenges were becoming common, it was agreed that a full-time Costs Judge would look at a sample of their Bills.

2. The intention was to reach decisions which might provide useful guidance to the Costs Officers going forward and provide some clarity for AR and the Defendant, as well as providing a decision at Costs Judge level should either side choose to Appeal it. The majority of the Court's rulings were reduced to writing in an Order made shortly after the Oral Hearing in October 2020. However, an issue regarding conduct arose during that Hearing and regrettably, despite both parties having filed and served written Submissions during December 2020 and January 2021, it has taken until now to finalise this Judgment on the conduct issue. As such I apologise sincerely to both parties for that delay.

3. The reason for including my findings on Outer London hourly rates and Grade B fee earner time is that the Costs Officers at the SCCO are now applying those rates (and have been since the Oral Hearing). Having my reasoning (which was given during the Oral Hearing) in writing with relevant case law cited, may be helpful to both sides going forward but to be clear they have had this part of the Judgment on the non-conduct issues, since October 2020.

4. The eight Bills reviewed by me, had already been provisionally assessed, as follows:

ERISON BALAJ SC-2020-BTP-000458

Assessed on 18 June 2020 by Costs Officer Pigott, as drawn this Bill was £17,712.10.

MUBASHAR IRSHAD SC-2020-BTP-000461

Assessed on 24 June 2020 by Costs Officer Pigott, as drawn this Bill was £27,897.00.

MUHAMMAD AAMIR SC-2020-BTP-000464

Assessed on 2 July 2020 by Costs Officer Pigott, as drawn this Bill was £21,352.77.

GRETA NDREU SC-2020-BTP-000578

Assessed on 6 July 2020 by Costs Officer Pigott, as drawn this Bill was £24,188.16.

GHULAM FAROOQ SC-2020-BTP-000580

Assessed on 7 July 2020 by Costs Officer Pigott, as drawn this Bill was £28,458.40.

HASNAIN AHMED KHAN SC-2020-BTP-000582

Assessed on 13 July 2020 by Costs Officer Pigott, as drawn this Bill was £20,894.16.

UMAR WAQAS SC-2020-BTP-000308

Assessed on 22 June 2020 by Costs Officer Kenny, as drawn this Bill was £36,840.76.

QUHYUM HUSSAIN SYED SC-2020-BTP-000459

Assessed on 1 July 2020 by Costs Officer Kenny, as drawn this Bill was £42,504.48.

Non-conduct issues decided on 6 October 2020 and now reduced to writing to assist the parties:

5. The effect of the provisional assessments can be illustrated by the case of Ndreu, in which Costs Office Pigott reduced a Bill as drawn (£24,188.16) by almost 60%, to £10,139.68. The main issues (aside from time spent/work done) involved the hourly rates charged by AR. Mr Zahab Jamali ('ZJ'), described in the Bills as a Senior Lawyer, Registered Foreign Lawyer and having nine years' experience, was claimed at hourly rates of £409 or £490, being Grade A City of London Guideline Hourly Rates.

6. ZJ of AR revealed (in a Witness Statement dated 6 November 2020) that he was at present a pupil Barrister at Imperium Chambers ('IC'), due to complete his training in a few weeks' time. Having been called to the Bar in 2009, ZJ had taken over ten years to complete his qualification as a Barrister by completing pupillage. That is not unusual; there tend to be many more students on the Bar Vocational Course (as it would have been when ZJ took it) than there are pupillages available, and many are left in the position of finding legal employment elsewhere, until such time as an opportunity for pupillage presents itself.

7. What is unusual, however, is for a firm to charge a fee earner who has yet to qualify as a Barrister, acting in immigration matters, at a Grade A City of London (London 1) rate. The Guideline Hourly Rates ('GHR') for Grade A fee earners from 2010 onwards (and in effect at the time the Bills in this case were drawn) were as follows:

London 1 (City)	409.00
London 2 (Holborn/Westminster)	317.00
London 3 (Other London postcodes)	229.00-267.00
National 1 (including urban centres such as Manchester)	217.00
National 2 (everywhere else)	201.00

8. It is right to state that the GHR were, by 2020, a decade old and the fact that ZJ sometimes charged up to £490.00 per hour for his time simply reflects an attempt to include some increase for inflation etc. Noted Costs expert Dr Mark Friston in his practitioner text Friston on Costs, includes a table of 'adjusted' rates from which the higher figure was taken. In 2021 the GHR were changed as follows (rates effective from 1 October 2021):

London 1 (very heavy commercial and corporate work by centrally-based London firms)	512.00
London 2 (City and Central London – EC1 to 4, W1, WC1, WC2 and SW1)	373.00
London 3 (Other London postcodes, Dartford and Gravesend)	282.00
National 1 (including urban centres such as Manchester)	261.00
National 2 (everywhere else)	255.00

9. The above are Grade A rates, for fee earners with over eight years' post-qualification experience; there are then lower GHR for Grade B (four to eight years), Grade C (up to four years) and Grade D (unqualified) fee earners. As was made clear at the Oral Hearing on 6 October 2020 (by telephone due to lockdown) the cases considered by me were emphatically not City of London cases. This is both because of case law regarding what is properly chargeable as City work, which is to say complex Company/Commercial work – see the Judgment of Senior Costs Judge Hurst in *Musa King v Telegraph Group Limited* and the new definition of London 1 in the latest GHR (which was promulgated nearly a year after the Oral Hearing of course) – and because of case law regarding what is reasonable for a Receiving Party to recover if he/she chooses to instruct distant and especially London-based Solicitors – see *Wraith v Sheffield Forgemasters Limited* [1998] 1 WLR 132.

10. It was also made clear at the Hearing that ZJ was not at the relevant time a Grade A fee earner. At the time of acting, in all eight of the matters before me, he was not yet professionally qualified in England and Wales, having undertaken the academic but not the practical element of qualification as a Barrister. He is of course a Registered Foreign Lawyer and his time spent/work done was not reduced to an unqualified/paralegal/trainee Grade D rate.

11. To be clear, even if ZJ had been a Grade A fee earner, these cases would not have warranted a Grade A GHR any more than they warranted a City of London GHR. The rates allowed by Costs Officers Pigott and Kenny on provisional assessment (and upheld by me at the Oral Hearing) were for Outer London (London 3) and equated to London 3 Grade B rates, to reflect the experience ZJ brought to the cases he worked on and, in effect, to allow a 'rate for the job' – see *Paturel v Marble Arch Services Limited* [2006] 4 Costs LR 556.

12. It is not reasonable (nor is it proportionate) to instruct the highest Grade of fee earner in the most expensive area of England and Wales, to undertake work of which a Grade B fee earner in Outer London would be eminently capable. There is an abundant choice of competent immigration law firms in the London 3 area without clients choosing to instruct a firm in the City of London. Indeed, the Defendant has indicated that in appropriate cases it may argue that even London 3 rates are too high, given a client living in an area covered by lower local hourly rates (National 1 or National 2) and the availability of competent local representation for immigration matters countrywide.

Conduct issue raised at the Oral Hearing (ZR instructing Counsel at IC whilst being a pupil there):

13. As to the issue of conduct raised at the Oral Hearing and developed in written submissions from the Defendant and from AR, it is as summarised in the above heading; per the Defendant, ZJ/AR have breached professional conduct standards and may also have breached the indemnity principle.

14. In written submissions dated 23 November 2020, Mr Andrew Lyons (Counsel for the Defendant) referred to the Codes of Conduct for Solicitors and for Barristers. In particular Mr Lyons cited the Solicitors' Code of Conduct 1.2 (not to take unfair advantage of clients or others), 5.1 (to advise clients of any financial or other interest you have in referring the client to another person), 5.3 (only to refer a client elsewhere if you have the client's informed consent to such a referral), 6.1 and 6.2 (to do with conflicts of interest or significant risk thereof).

15. He also cited the Barristers' Code of Conduct Core Duties 4 (maintain independence), 5 (do not act in a way likely to diminish public trust and confidence) and Rules C8 (do not do anything which could reasonably be seen by the public as undermining your honesty, integrity and independence), gC14 (fundamental importance of honesty, integrity and independence), gC16 (explaining the significance of not acting contrary to Rule C8, so as not to diminish public trust and confidence in the Bar) and rC115 (Chambers may not accept payment from a pupil, of their mandatory pupillage award).

16. Mr Lyons asserted that it is a substantial error of judgement for AR to instruct Counsel at IC when ZJ, the main fee earner in the case, is a pupil there. He asserts that there is a clear conflict in ZJ agreeing with Counsel at IC, fees for their work and that he is unlikely to have retained the independence owed to his clients to challenge those fees. He adds that a member of the public could think that this was a way around the rule against a pupil repaying his own pupillage award, and further that, as a pupil at IC, ZJ would not be well-placed to check Counsel's work and advise a client if that work had been conducted negligently. Mr Lyons refers to separation of the Bar and the Solicitors' professions and that working for a firm of Solicitors at the same time as being a pupil at IC (and instructing Counsel – and agreeing fees – at the same set) should not have been permitted.

17. Mr Lyons refers to case law, in particular *McDaniel v Clarke* [2014] EWHC 3826 and *Gempride Limited v Bamrah and Lawlords of London Limited* [2018] EWCA Civ 1367, in submitting that there has been improper conduct by AR and by Counsel and asks for all their costs to be disallowed or (in the alternative) for costs to be reduced by a further percentage to mark the Court's displeasure.

18. Submissions in response were prepared by Dr Friston and Miss Nash and are very clear in stating that there has been no misconduct, nor has there been a proper Application pursuant to CPR 44.11 and that the Application made at the Oral Hearing should be dismissed as entirely without merit and indemnity basis costs awarded to the Claimants.

19. Counsel assert that IC were only involved in three of the cases (Irshad, Syed and Aamir). Balaj, Ndreu, Farooq, Khan and Waqas could not properly be subject to reduction for 'misconduct' which did not occur in them. Indeed, in four of the eight cases before me, there was no involvement by Counsel. Counsel deplore the actions of a senior Minister of the Crown (the Home Secretary) focusing in such a way upon ZJ at the very start of his career at the Bar, describing him as a person of some vulnerability.

20. Counsel for the Claimants have gone through every provision listed by Mr Lyons (for the Defendant) as cited at paragraphs 14 to 17 above, countering them as follows. **Solicitors' Code of Conduct 1.2** (not to take unfair advantage of clients or others); there is nothing to suggest that unfair advantage was taken, Counsel's fees are unremarkable if not modest and have mostly been allowed as drawn, plus which in the cases of *Irshad* and *Syed* Counsel had to be instructed to undertake the Judicial Review Hearing, plus which in four of the eight cases, Counsel was not even involved (and in the rest, ZJ did as much of the work himself, as possible). **Solicitors' Code of Conduct 5.1** (to advise clients of any financial or other interest you have in referring the client to another person); this is directed towards fee-sharing and there is nothing to suggest that ZJ has shared Counsel's fees. **Solicitors' Code of Conduct 5.3** (only to refer a client to a separate business if you have the client's informed consent to such a referral); IC is not a separate business, it is a group of self-employed Barristers and does not meet the definition. **Solicitors' Code of Conduct 6.1 and 6.2** (to do with conflicts of interest or

significant risk thereof); no suggestion has been made that Mr Turner or Mr Gajjar, Barristers at IC, were inappropriate persons to instruct, nor that they acted improperly in accepting instructions.

21. As to the **Barristers' Code of Conduct Core Duties 4** (maintain independence); Counsel for the Claimants ask, where is there any evidence that ZJ, AR, Mr Turner or Mr Gajjar, acted in such a way as to compromise their independence? **Barristers' Code of Conduct Core Duties 5** (do not act in a way likely to diminish public trust and confidence); all they have done is to run their practices and win cases. **Barristers' Code of Conduct Rules C8** (do not do anything which could reasonably be seen by the public as undermining your honesty, integrity and independence); per Counsel for the Claimants an unparticularised allegation of dishonesty, with no proper evidential basis, ought to be withdrawn. **Barristers' Code of Conduct Rules gC14** (fundamental importance of honesty, integrity and independence); this is 'Guidance' and has not been breached by the Claimants or their advisors (**gC16** ditto). Finally, **Barristers' Code of Conduct Rules rC115** (Chambers may not accept payment from a pupil, of their mandatory pupillage award) is something which, per Counsel for the Claimants, ought not to have been alleged; they assert there is no evidence of any improper repayment of any pupillage award and further that there is no jurisdiction within this party and party detailed assessment, for this Court to entertain it as against Counsel, in respect of whom the SCCO has no inherent jurisdiction.

22. As to Mr Lyons' assertion that it is a substantial error of judgement for AR to instruct Counsel at IC when ZJ, the main fee earner in the case, is a pupil there, Counsel for the Claimants cite (again from *Gempride v Bamrah*) the Court's view that mistake or error of judgement or negligence, without more, would not amount to unreasonable or improper conduct, and that conduct (to meet the CPR 44.11 test) would need to amount to a breach of duty owed by the representative to perform his duty to the Court, although it need not be a breach of a specific professional rule (nor would it need to be dishonest).

23. In *Gempride v Bamrah* despite the issues with BTE cover and hourly rates, Ms Bamrah made clear that she had relied upon her Costs Draftsman to advise her upon what she could and could not claim. In that case, the Court found that Ms Bamrah could not escape her duty to the Court by delegating it to her Costs Draftsman. Therefore, her mis-certification of her own Bill, even on Costs Draftsman's advice, was enough to fall foul of CPR 44.11.

24. In contrast, and in substantial agreement with the position as set out by Counsel for the Claimants, I do not find anything in ZJ's (or AR's or, to the extent that it has been alleged, IC's) conduct as raised by the Defendant, which would fall foul of CPR 44.11. The Defendant has suggested that there is an obvious conflict in the ability to agree fees and challenge them, that a member of the public could think that there was a potential circumvention of the rule against repaying a pupillage award and that there is legitimate concern that AR, or more particularly ZJ, might be reluctant to inform the Claimants if someone at IC conducted work negligently. No doubt such a conversation would be difficult but I accept the proposition that AR, ZJ and IC are bound by their Codes of Conduct and would have to have that conversation if the need arose; what the Defendant has put forward is nothing more than a hypothetical scenario with no evidence to suggest it has or would ever come to pass.

25. As a Head of Department at AR, who charges his time out to vulnerable clients at Grade A City of London rates, ZJ cannot in my view pray in aid his junior/pupil status; that would be having his cake and eating it too. However, I do accept Dr Friston and Miss Nash's assertion that the conduct complained of is not such as to engage the Court's powers under CPR 44.11.

26. The reason for this (aside from the lack of a formal Application and the Court's resources which would be used in hearing oral argument on the matter – and to be clear, I agree that on such a serious matter oral argument would be needed were it to be taken any further) is that, in my view, it is a non-issue. ZJ had been working in the law for something like ten years at the time he worked on these eight matters; during that time, despite not yet being qualified to practice at the Bar of England and Wales, ZJ rose to the level of Head of Department at AR.

27. ZJ's interest in taking up a pupillage at IC must in my view be seen in the context of his legal career. He has been permitted to serve an abbreviated pupillage (from May to December 2020) presumably on the basis of his credentials in English legal practice; he is in no way comparable to a neophyte taking up a pupillage at the age of 22 and never having worked in a legal capacity before.

28. The extract from *Gempride v Bamrah* cited by Counsel for the Claimants refers to 'unreasonable' conduct as conduct which permits of no reasonable explanation. ZJ's conduct permits of a reasonable explanation; ZJ wants, understandably, to finish what he started and complete his vocational training. He was within a few months of qualifying and wished to do so; the fact that he would choose a set of Chambers known to him is not sinister in the least. Not every set of Chambers handles immigration work; many sets take on pupils hoping to keep them on as tenants, treating the pupillage as an extended probationary period. Such sets would not be keen to take on and train up a pupil whose career trajectory may lead to him remaining as an employed Barrister with AR. If ZJ intends to give up a remunerative and responsible post as Head of Department at AR for the uncertainty of practice as a newly-qualified Barrister that is a matter for him, but he would not have his pick of Chambers for those reasons alone.

29. The extract from *Gempride v Bamrah* refers to 'improper' conduct as having the hallmark of conduct which the consensus of professional opinion would regard as improper. In Ms Bamrah's case, she asserted that there was no BTE insurance cover for her case when there was (and as she was both the accident victim and the Solicitor acting, Ms Bamrah was fixed with that knowledge). She certified as accurate, a Bill which claimed a higher hourly rate than she was entitled to. She purported to accept an offer based upon that higher hourly rate. Not only were her costs reduced for misconduct but subsequently Ms Bamrah was fined by the Solicitors Disciplinary Tribunal. Clearly, her conduct fell short of propriety even if there was no outright finding of dishonesty.

30. In contrast, and in my judgement, ZJ's conduct does not come anywhere near to conduct which the consensus of professional opinion would regard as improper. Evidently AR and IC did not think there was anything untoward in this arrangement; given their own involvement that by itself would not be persuasive. However, ZJ exhibited to his second Witness Statement, correspondence with the Bar Council and the Solicitors Regulatory Authority; neither of those organisations had any issues with what had taken place and the only issue identified was that, if ZJ accepted an instruction (at IC) in a case where he was involved (at AR), it could be seen as him instructing himself. Mr Adrian Vincent of the Ethical Enquiries Service at the Bar Council made clear that this would not be appropriate (whilst also making clear that it had not happened yet and was not expected to happen in future either).

31. So far, I am in agreement with (or have been persuaded by) the submissions made by Counsel for the Claimants. However, there is one area on which I prefer (at least in part) the submissions made by Mr Lyons, Counsel for the Defendant, and that is in respect of the costs of this exercise. Mr Lyons asserts (in his submissions of 29 January 2021) that it is doubtful whether, even now, the Claimants'

representatives have told them what is happening and whether they have authorised expenditure of an 'astonishing' £32,087.87 on this (conduct) issue.

32. From the N260 submitted by AR, it appears that 48 minutes have been spent on letters/emails to 'client' and 2 hours and 54 minutes on the telephone. That would equate to one, routine letter each, and something like 22 minutes each on the telephone if indeed the calls and letters were to the Claimants. The Claimants are vulnerable clients whose right to enter or to stay in the UK was under threat (hence AR's involvement) and the prospect of them having funds to pay £4,010.98 each (one-eighth of the sum in the N260) is about the same as the prospect of, say, Ms Ndreu being in a position to pay the £24,188.16 main action costs (of her successful challenge to her unlawful detention at the behest of the Defendant) out of her own pocket.

33. As much as it may be to the chagrin of the Defendant, that does not mean that there has been a breach of the indemnity principle. The assessed Bill in Ndreu has been endorsed in manuscript by the Costs Officer to show that the retainer has been viewed and that there is no breach. Having contracted with the Claimants to charge £409 (or £490) per hour for ZJ's services, AR is entitled to certify its Bills to state that they do not seek more than the Claimants are LIABLE to pay; it does not say (and is not required to say) that the Claimants HAVE paid, and if AR is prepared to walk away for what it recovers from the Defendant, and not to seek any, let alone the entire, shortfall, that is entirely normal.

34. If AR seek to pursue the Claimants personally for the shortfall between what the Court has found reasonable between the parties, and their contract rate, they are entitled to try. If they do, recent case law on 'informed consent' may well come into play given the significant gap between reasonable costs and the costs charged by AR, in every case reviewed by me. However, that is not a matter for the Defendant's input in between-the-parties assessment proceedings.

35. From his second Witness Statement (3 December 2020) it is clear that ZJ commenced pupillage with IC on 1 May 2020; they are based at 2, Selkirk Road, Tooting SW17 0ES (which is very firmly in Outer London/London 3). The work in the eight Bills before me predated ZJ's pupillage, but in AR's Statement of Costs (N260) claiming £32,087.87 for their work on conduct, time spent/work done by ZJ (claimed as Head of Department/Registered Foreign Lawyer, at £409.00 per hour) on this issue, between 9 November 2020 and 4 December 2020, is as follows:

Description	**Time (units)**
Attendances on client	37
Attendances on opponents	3
Attendances on others	152
Documents	317
Total:	509
At £409.00 per hour, 50.9 hours equates to	**£20,818.10**

36. The fees of Counsel (Dr Mark Friston and Miss Alice Nash) account for a further £4,250.00 of the N260 and the distinctly odd sum of £2,238.37 is claimed by way of VAT (distinctly odd because £2,238.87 is 20% of £11,194.35 which is not the quantum of Counsel's fees nor the quantum claimed by AR for their time spent/work done). Over 81% of the costs of AR in the N260, represent ZJ's time spent/work done at Grade A City of London rates when his own evidence is that he was in pupillage with a set of Chambers in Tooting, which is sufficiently curious to warrant comment.

37. Be that as it may, the submissions of Mr Lyons (for the Defendant) to the effect that AR did not seek, let alone obtain, permission to put in voluminous Witness Statements and Exhibits, are well made. The 50.9 hours claimed by ZJ includes considering documents and research on relevant case law, researching SRA and BSB codes and looking at case law on CPR 44.11; none of that would be recoverable *Perry v Lord Chancellor* [1994] The Times, 26 May refers. Having sensibly engaged the expertise of Dr Friston and Miss Nash, ZJ and AR should have let them get on with it and the claim for AR's costs in respect of conduct is eye-wateringly high. Another example is the six hours and twenty-four minutes claimed to draft the N260 (at a fee of £1,840.00 excluding VAT) – the N260 is a document of brief gist and ought not to have taken more than thirty minutes to an hour of Grade D time to prepare.

38. I do not regard AR's (or ZJ's) conduct as 'misconduct' so as to warrant disallowance or reduction of their costs in the main actions reviewed by me; those costs should remain as assessed back in 2020. Their conduct in running up the very high costs in the N260, most of which were on irrecoverable legal research or on Witness Statements etc. produced of their own volition, or which represented unreasonably high times and hourly rates, is likewise not 'misconduct' but is conduct which, in exercising my discretion regarding how costs of the conduct issue should fall, I am entitled to and do take into account. Having duly done so, in my view, the appropriate order on costs of the conduct issue, and the order I make, is that there be no Order as to Costs.