



Neutral Citation No. [2023] EWHC 271 (SCCO)

Case No: 202002846 B5

SCCO Reference: SC-2022-CRI-000071

**IN THE HIGH COURT OF JUSTICE**  
**SENIOR COURTS COSTS OFFICE**

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

Date: 27<sup>th</sup> January 2023

**Before:**

**COSTS JUDGE WHALAN**

**R**

**v**

**JOHN DOAK**

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

Appellant: Burrell Jenkins Solicitors

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

The appropriate additional payment, to which should be added the sum of £1,575.00 (+ any relevant VAT) for costs, along with the £100 paid on appeal, should accordingly be made to the Applicant.

## Costs Judge Whalan

### Introduction

1. Mr David Emanuel KC ('the Appellant') appeals against the decision of the Determining Officer at the Criminal Appeal Office ('the Respondent').
2. The Appellant represented Mr John Doak ('the Defendant') at the Court of Appeal in his successful appeals against conviction and sentence passed in December 2002 at Southwark Crown Court. The appeals were heard over 18 years later in March 2021.
3. The Appellant submitted a claim for £7,324.25 (net of any VAT), comprising 28.33 hours at £225 an hour plus £1,000 for court attendance. The Respondent allowed £4,845, comprising 28.33 at £150 an hour, plus £575 for court attendance. The issues in these appeals are accordingly: (i) the hourly rate and (ii) the 'brief' to be paid for the appeal hearing.

### Background

4. In 2002, the Defendant assaulted his four-month-old baby son, Jack, by shaking him, causing irreversible and catastrophic brain damage. In 2004, as Basildon Crown Court, he was convicted of causing section 18 GBH and sentenced to 4 years' imprisonment.
5. Upon his release from custody, the Defendant married and had three more children, while working full-time in steady employment.
6. In 2016, Jack died from complications following a chest infection, which was directly related to the injuries he had suffered in 2002. The Defendant was re-arrested and charged with murder. At the start of his trial in 2020, he pleaded guilty to manslaughter and was sentenced to 3 years' imprisonment.
7. The Appellant, while preparing for the murder trial, discovered reasons to challenge the uncontested expert evidence which had been proffered by the prosecution at the GBH trial in 2004. Grounds of appeal against conviction were prepared (16 years out of time) and a separate appeal against sentence was also submitted.

8. On 17<sup>th</sup> December 2020, the Registrar referred the conviction application to the Full Court, and on 1<sup>st</sup> February 2021 a Single Judge also granted leave to appeal against sentence. The appeal hearing was heard on 31<sup>st</sup> March 2021 when Holroyde LJ allowed both appeals, substituting a conviction for unlawfully and maliciously causing GBH, with the reduction in sentence from 4 to 3 years, and also reducing the sentence for manslaughter to 2 years' imprisonment.
9. This was recognised as a high-profile, tragic but complicated case, with serious implications for all involved. The Appellant records that the Defendant suffered a nervous breakdown and lost his job on his re-admission to prison.

### The Regulations

10. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') apply in this appeal. Schedule 3 to the Regulations outlines the following relevant provisions:

#### ***“General Provisions***

1. (i) *The provisions of this Schedule apply to proceedings in the Court of Appeal.*
- (ii) *In determining fees the appropriate officer must, subject to the provisions of this Schedule –*
  - (a) *take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and*
  - (b) *allow a reasonable amount in respect of all work actually and reasonably done.*

...

#### ***Advocate's fees for proceedings in the Court of Appeal***

9. ....
- (iv) *Where it appears to the appropriate officer, taking into account all the relevant circumstances of the case, that owing to the exceptional circumstances of the case the amount payable by way of fees in accordance with the table following sub-paragraph (i) would not*

*provide reasonably remuneration for some or all of the work the appropriate officer has allowed, the appropriate officer may allow such amounts as appear to the appropriate officer to be reasonable remuneration for the relevant work”.*

11. The Taxing Officer’s Notes for Guidance (2002) sets out, at paragraph 1.11, the factors relevant in determining the reasonable amount of counsel fees:
- (i) *the importance of the case, including its importance to each defendant in terms of the consequences to his livelihood, standing or reputation even where his liberty may not be at stake;*
  - (ii) *the complexity of the matter;*
  - (iii) *the skill, labour, specialised knowledge and responsibility involved;*
  - (iv) *the number of documents prepared or perused with due regard to difficulty and length;*
  - (v) *the time expended; and*
  - (vi) *all other relevant circumstances, including hotel and travel expenses, where appropriate.*

This guidance is referred to commonly as ‘the TONG factors’ in various reported cases.

#### Cases

12. In Evans & Others v. The Serious Fraud Office (ibid), Hickinbottom J. considered the reasonable hourly rates to be awarded to leading and junior counsel appearing in “*top end criminal work*”. The four-leading counsel in Evans had claimed rates of between £600 and £750 an hour. Junior counsel had, in turn, claimed £250-£375 an hour. Hickinbottom J., having reviewed all the relevant authorities, approved rates of £480 per hour for leading counsel and £240 an hour for junior counsel. He stated:

*I consider those rates are “top end” rates for criminal work and, whilst I do not say that in another case they might not be exceeded – although, I suspect, not by very much – they take into account the special experience and expertise of particularly eminent leading counsel, from which flows more efficient working than would be the case with less experienced and expert counsel.*

13. I also refer myself to the decision of Master Rowley in R v. Chapman & Others [2017] SCCO Refs: 100/16 et al, and my decisions in a number of recent, analogous cases, including R v. Bryan [2018] SCCO Ref: 123/167, R v. Atkar [2018] SCCO Ref: 124/17, R v. Palmer [2017] SCCO Ref: 1/17, R v. Rafiq [2019] SCCO Ref:

27/19, R v. Younis [2019] SCCO Ref: 64/18 and R v. Veysey [2021] SCCO Ref: SC-2020-CRI-000252.

14. An unusual feature of this case is that the Respondent's Written Reasons dated 17<sup>th</sup> May 2022 dealt with three claims submitted by this Appellant to the Criminal Appeal Office. The Appellant has already (successfully) appealed the decisions in the other two cases, and I am referred to the judgments of Costs Judge Rowley in R v. Jason Lawrence [2022] EWHC 3112 (SCCO) and Costs Judge Browne in R v. Gary Walker [2022] EWHC 2841 (SCCO).

#### The Submissions

15. The Respondent's case is set out in the Written Reasons dated 17<sup>th</sup> May 2022. No appearance was made at the hearing on 6<sup>th</sup> January 2023.
16. The Appellant's submissions are set out in the Notice/Grounds of Appeal, a Note for Taxation dated 20<sup>th</sup> April 2021, a Request for Redetermination dated 13<sup>th</sup> August 2021 and a Note for Costs Hearing (10 pages), dated 30<sup>th</sup> December 2022. The Appellant attended and made oral submissions to the hearing on 6<sup>th</sup> January 2023.

#### Hourly rates

17. The Respondent accepts impliedly that it is reasonable and necessary to depart from the rates described in the 2013 Regulations. The Determining Officer also accepted the Appellant's claim for 28.33 hours. The issue, therefore, is whether the £225 an hour claimed should be preferred to the £150 an hour allowed.
18. It is evident from the written reasons that the Determining Officer relied primarily on three broad reasons for reducing the Appellant's claim to £150 an hour. First, (para 11) he conducted a somewhat ad hoc comparison to the claims submitted in Lawrence and Walker, using these as comparables for his analysis of this claim. Second, he referred (para. 12) to Sir Christopher Bellamy's Independent Review of Criminal Legal Aid published in November 2021, resulting in the conclusion that: "I do not consider the rates I have allowed to be unreasonable given the findings of Sir Christopher's review on fee income". Third, he noted (para. 13) that the Appellant was already familiar with the Defendant's case, insofar as he had represented him

during the substantive murder/manslaughter trial, and that this familiarity was relevant to the hourly rate to be allowed.

19. I am not persuaded that so specific a comparison between Doak, Lawrence and Walker is relevant, or an appropriate methodology when assessing the appropriate hourly rate in any of the individual cases. In Lawrence (ibid), CJ Rowley described this as a ‘flawed approach’ (para. 17), and I agree. The approach, in my view, should centre on a case-specific consideration of the TONG factors, assessed in the context of ‘reasonable remuneration’ at para. 9(iv) of Schedule 3 to the 2013 Regulations.
20. Nor am I satisfied that it is appropriate for the Determining Officer to either cite or place any determinative reliance on Sir Christopher Bellamy’s Report on Criminal Legal Aid. In Walker (ibid), CJ Browne found (at para. 22) that any extrapolation from the 2021 review was unhelpful. CJ Rowley in Lawrence (ibid) stated that the DO was seeking ‘to rely upon completely irrelevant material’ which did ‘not assist in contemplating counsel’s hourly rate’. Again, I agree. I cannot see any reasonable or logical determinative purpose in assessing counsel’s reasonable hourly rate by reference to Sir Christopher Bellamy’s 2021 Report.
21. Similarly, I am not persuaded that counsel’s previous familiarity with the case is an appropriate factor when assessing his/her reasonable hourly rate. Clearly, it might have a substantive bearing on the amount of work (i.e. hours) to be reasonably undertaken but this is not a disputed issue in this appeal. In Walker, CJ Browne commented as follows (para. 21): ‘I am bound to say, however, even on a cursory analysis, it is difficult to see why familiarity should necessarily feed into the hourly rate in a very substantial way if (as appeared here) there as necessary substantial input at a high level, dealing with the issues which arose in this contested appeal’. CJ Rowley agreed with this analysis in Lawrence. For my part, as indicated, I do not consider this to be an appropriate methodology.
22. Counsel’s reasonable hourly rate turns on a case-specific analysis of the TONG factors. Clearly, this was, in the words of Holroyde LJ, an ‘unusual and difficult case’ (para. 2 of [2021] EWCH Crim 536). To portray the case simply as a successful appeal against conviction and sentence for a section 18 GBH would be to underplay notably the complexity, difficulty and importance of this litigation. The appeals were

lodged 16-years out of time, so that the Court of Appeal in 2021 was re-considering matters that occurred almost 20 years before. The conviction appeal turned on complex and voluminous expert evidence which, it was submitted, had been discredited over the intervening period, along with difficult case law on what the Appellant correctly describes as a ‘niche and complex area’. Clearly this was a distressing and sensitive case for all concerned. Jack, the Defendant’s son, died after enduring 14 years of a very poor quality of life. The tragic circumstances of these events understandably had a profound effect on Jack’s family, including the Defendant.

23. It seems to me, on the particular facts of this case, that the Appellant’s claim for £225 an hour (+ any relevant VAT) is reasonable. I am not satisfied that it was reasonable for the Determining Officer to reduce the rate to £150 an hour. Accordingly, I direct that the claim be re-assessed by reference to a rate of £225 an hour.

#### Appeal hearing

24. The Appellant’s claim for £1000 was reduced by the Determining Officer to £575. The DO’s reasoning is not clear from the Written Reasons. Presumably, his assessment relied (albeit broadly) on 3.3 hours at £150 an hour. I have already allowed the appeal on the hourly rate. The Appellant recalls that the appeal hearing lasted over two hours and that his fee included necessarily his preparation, travel and post-hearing attendance upon his solicitor and the Defendant’s family. I agree with CJ Rowley’s reference in Lawrence (ibid) to the fact that the appearance fee ‘is clearly intended to mimic a brief fee’ so that it ‘is meant to include not only preparation but also the fee’ for attendance. Again, I agree. It seems to me, taking all relevant matters into account, the Appellant’s fee of £1000 claimed was a reasonable figure and it should be allowed. Again, I direct that the claim be re-assessed by reference to an appeal hearing fee of £1000.
25. It follows that the Appellant’s appeal is allowed on both points and that his claim should be assessed in the total sum of £7,324.25 (plus any relevant VAT).

#### Costs

26. The Appellant has been successful on both limbs of his appeal and he is entitled to a reasonable award of costs in addition to the £100 paid to lodge the appeal. Bearing in mind the very helpful written Note prepared on 30<sup>th</sup> December 2022, I allow the Appellant £1,575 (plus any relevant VAT), comprising 7 hours x £225 an hour.

TO:

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COPIES TO:

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Determining Officer  
Criminal Appeal Officer

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