



Neutral Citation No. [2024] EWHC 3008 (SCCO)

Case No: T20207145

SCCO Reference: SC-2024-CRI-000058

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 22 November 2024

Before:

COSTS JUDGE ROWLEY

R

v

METAB ISLAM

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

Appellant: Stella Hayden (Counsel)

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

The appropriate additional payment, to which should be added the sum of £410 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Stella Hayden of counsel against the decision of the determining officer to disallow the claim made for special preparation under the Criminal Legal Aid (Remuneration) Regulations 2013 as amended.
2. Metab Islam was charged with four counts of rape concerning events alleged to have taken place between 2005 and 2008 involving one complainant and two other defendants.
3. The disclosure provided by the prosecution totalled 1,714 pages as well as 47 minutes of footage over a number of separate clips. Apparently, this material principally concerned the background and credibility of the complainant and spanned a period approaching 20 years. The material comprised social services documents, police reports and medical records and was a case, according to counsel, in which all of the unused material was potentially relevant to the defendant's case.
4. The complainant continued to make allegations against the defendant well after the relevant period of the four counts on the indictment. Not all of the allegations were sexual in nature but in total they came to 30 allegations from which 11 were drawn for a bad character application.
5. The court heard legal argument over two days concerning the extent to which the complainant's alleged character was admissible in proceedings. I was provided with a copy of the ruling in which the trial judge allowed some of the previous allegations to be put into evidence as to the complainant's character. Counsel made the point that such applications usually take no more than an hour and to have two days in court was unheard of in her experience.
6. Paragraph 17 of the 2013 Regulations deals with special preparation and the relevant passages for this decision are as follows:

“17.—(1) This paragraph applies where, in any case on indictment in the Crown Court in respect of which a graduated fee is payable under Part 2 or Part 3—

(a) it has been necessary for an advocate to do work by way of preparation substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue.”

(2) Where this paragraph applies, a special preparation fee may be paid, in addition to the graduated fee payable under Part 2 or Part 3

(3) The amount of the special preparation fee must be calculated—

(a) where sub-paragraph (1)(a) applies, from the number of hours preparation in excess of the amount the appropriate officer considers reasonable for cases of the same type;”

7. There are therefore two elements that need to be demonstrated by the wording of 17(1)(a). The first is that the work done was “substantially in excess of the amount normally done”. There has been some judicial comment regarding how the phrase “for cases of the same type” ought to be construed and it is clear from those comments that a reasonably broad comparison needs to be considered rather than an overly narrow definition.
8. Secondly, there needs to be a demonstration of a very unusual or novel point of law or factual issue. This phraseology was described by Costs Judge Gordon-Saker as being unhelpful and confusing in his decision in the case of R v Ward-Allen [2005] Costs LR 745. Nonetheless, he wrestled with the wording and produced the definition which has subsequently been employed by determining officers and costs judges in deciding claims under this provision, particularly where there is no point of law. The question is whether there has been a “*factual issue which is outwith the usual professional experience.*”
9. The determining officer, in his written reasons, stated that the number of pages of unused evidence was not unusual in his experience for rape cases. He did not think it satisfied the test of involving a very unusual or novel point of law or factual issue. Nor did he consider the nature of the unused material i.e. the types of records, were anything other than common for this type of case.
10. I would agree with the determining officer that the volume of the documentation does not appear to be sufficient to be described as outwith the usual professional experience.
11. However, I do think the 30 allegations against the defendant by the complainant spanning a 20 year period in addition to the four specific allegations of rape do take this case sufficiently out of the norm for it to satisfy the R v Ward-Allen description of a “*factual issue which is outwith the usual professional experience.*” The length of time that the hearing for the bad character application and the length of the judge’s note in determining which of the allegations could be put to the complainant indicates to me that this was a very unusual factual issue. In my judgment, therefore, counsel has met the first threshold required by paragraph 17 in this case.
12. The determining officer did not consider either that the amount of disclosure meant that it was necessary for counsel to have done substantially more preparation than the amount usually done in cases of the same type. In this respect the determining officer said:

“Regarding the first element, I do not consider 1,714 pages and 47 minutes of unused material across 17 phases (although only phases 1 to 14 have been claimed in the claim) as substantially in excess of the amount normally done for cases of the same type. This is indicated in the fact that you have been paid circa £13,000 for the Graduated Fee whereas the Special Preparation is circa £4,000. This indicates that it is not suggested that the work conducted is not an excessive amount of preparation.”
13. I must confess to being a little unsure as to the determining officer’s reasoning based on this paragraph. First, the number of pages is not the relevant criterion but the work involved in preparation. That is the wording of the regulation and the difference can be

simply demonstrated by the circumstances of this case. One of counsel's reasons for the amount of time spent was the number of phases in which the material was provided. As it was received piecemeal, it had to be compared with documentation previously provided and as such was more time-consuming than if all of the material had been provided at the same time. The number of pages would be the same whether served in one phase or seventeen, but the amount of time in preparation may differ markedly.

14. Secondly, I do not understand how the comparison between the level of the graduated fee and the sum claimed by way of special preparation assists. The double negative also makes comprehension more difficult but I take the view that the comparison is simply inappropriate in any event.
15. Counsel relied upon both the extent of the disclosure provided by the prosecution and the manner in which it was provided. She informed me that the Crown's representation included one junior counsel who was tasked with the disclosure exercise and which had taken three months to review the material. Of the 17 phases of disclosure, the first three or four were the most substantial. Counsel submitted that, in the context of rape cases generally, one or two phases of disclosure would be common and she had experienced three or four phases previously. To have 17 phases, as in this case, was wholly outwith her experience. Counsel recollected that the last three (unclaimed) phases related to the other defendant and against whom the Crown offered no evidence well before the trial.
16. Counsel told me that she would expect to deal with disclosure in 3 to 5 hours generally for this type of case, by which she meant a rape case which did not involve historic allegations. For historic cases there would also be records to consider (as in this case). Counsel referred to the case of R v Jones [2007] 6 Costs LR 873 which cautioned against setting any sort of "normal preparation" period for a particular kind of case. As such, whilst I take note of counsel's comments about the hours she would generally spend, it would be wrong to take that as a starting point as such.
17. The unusual factual issue in this case concerns the extent of the allegations made over a period of decades. In my view, sifting through those allegations contained in the disclosure in order to bring the bad character application easily justifies the carrying out of a significant amount of work in excess of the work usually required to prepare for the trial.
18. Counsel has produced a detailed work log to justify the 64 hours 12 minutes claimed. I bear in mind counsel's comment regarding the preparation time required for a modern rape case and that a historic case would involve consideration of additional records. I also bear in mind the comment regarding one or two phases of disclosure being more likely than additional phases. Furthermore, I take note of the use by the Crown of a junior barrister to deal with the disclosure requirements.
19. By my calculation, counsel spent 37 hours on reviewing the disclosure in phases 1 and 2 and therefore roughly a further 27 hours on the subsequent phases. Taking into account that some preparatory work would always need to be carried out, it seems to me that an appropriate allowance under paragraph 17(1)(a) for the additional work required is 30 hours. I direct the determining officer to make an additional payment to counsel based on this conclusion.

20. Finally, the determining officer appears to have produced an alternative reason for disallowing counsel's claim in the written reasons. This is based on the fact that the material considered by counsel was served as "unused" and therefore falls within the proxies within the graduated fee. In support of this reasoning, the determining officer refers to the Crown Court Fee Guidance which indicates that unused material is one of the main areas of litigation included in the graduated fee. The difficulty with that reasoning, however, is set out at paragraph 17(2) above. If a claim for special preparation under this provision (or indeed under the other reasons for special preparation) is successful, then expressly that claim is paid in addition to the graduated fee.
21. Having been successful on her appeal, counsel is also entitled to her costs of the appeal.