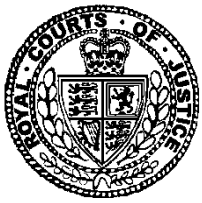

Neutral Citation No. [2025] EWHC 88 (SCCO)

Case No: 23N51064223

SCCO Reference: SC-2024-CRI-000010

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 21st January 2025

Before:

COSTS JUDGE WHALAN

R
v
ARSEN SEJDIA

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

Appellants: Vienna Kang Advocates Ltd

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

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Appellants.

COSTS JUDGE WHALAN

Introduction

1. Vienna Kang Advocates Limited ('the Appellants') appeal the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted under the Litigator's Graduated Fees Scheme ('LGFS'). The issue for determination is whether the fee allowed for the hearing on 29th-30th August 2023 should be paid as a trial, as claimed, or as a 'cracked trial', as allowed.

Background

2. Mr Arsun Sejdia ('the Defendant') was charged with six co-defendants at Warwick Crown Court on an indictment alleging one count of being concerned in the production of a controlled class B drug, namely cannabis. He pleaded not guilty at a Pre-trial Preparation Hearing. He asserted in his defence that he was a victim of modern slavery. The trial was listed on 29th August 2023 with a time estimate of four days.

3. On 29th August 2023, the case was called at approximately 11:30 hours. After some general discussion with the judge about the trial, jury selection began at about 12:22hs. The jury was sworn, put in charge of the defendants, but sent out again at approximately 12:38hs. At that point, the prosecution indicated that they planned to pursue a Bad Character Application based on the fact that the Defendant had been arrested previously at a cannabis factory, whereupon he drove the same defence, namely that he was a victim of modern slavery. The judge then adjourned the hearing briefly to allow the Defendant to give instructions to his counsel. The case was recalled at about 15:02hs when, given the judge's concern that the prosecution had not given sufficient notice or disclosure concerning the application to the defence, the case was adjourned until the next day. It was anticipated that overnight the prosecution would give full disclosure to the defence, who would then be able to take instructions from their client.

4. On 30th August 2023, there was some delay in restarting the case, because the prison van transporting the defendants had not arrived. At 10:05hs, in the absence of the defendants, the Judge heard submissions from counsel, whereupon the prosecution indicated that the Bad Character Application would not be pursued. It seems that material disclosed from the National Referral Mechanism indicated that, following a referral from the Immigration Service, the Defendant had been apprehended at a cannabis farm, but that he had not been arrested, as the authorities had concerns that he was indeed a victim of modern slavery. The Defendant was produced at 11:00hs and the Judge allowed some time for a conference with his counsel. During this discussion, the Defendant indicated that he wanted to change his plea to guilty. Having considered his position overnight, he was apparently concerned that the jury would be unlikely to accept his defence of modern slavery, given the disclosure that he had previously been exploited. At 12:07hs, following further negotiations with the prosecution, the Defendant was re-arraigned and pleaded guilty, albeit on agreed facts that mitigated his involvement to a lesser role. The jury was directed to enter a guilty verdict. At 14:05hs, after further submissions from the advocates as to sentencing, the Judge adjourned the case for the preparation of a Pre-Sentence Report.

5. The case was re-listed on 23rd October 2023 when the Defendant was sentenced to 33 months imprisonment.

The Regulations

6. The applicable regulations are the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended.

7. The Determining Officer cites paragraph 1(1)(a) of Schedule 2 to the 2013 Regulations, which states:

> "*cracked trial" means a case on indictment in which –*
>
> *(a) a plea and case management hearing take places and –*
>
> *(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and*

(ii) either –

(aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the plea and case management hearing; or

(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or

(b) the case is listed for trial without a plea and case management hearing taking place…

Case guidance

8. I was referred by both the Appellant and the Respondent to the guidance in Lord Chancellor v. Ian Henery Solicitors Limited [2011] EWHC 3246 (QB) where Mr Justice Spencer stated (at para. 96) that:

96. I would summarise the relevant principles as follows:

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by the defendant, or a decision by the prosecution not to continue (R v. Maynard, R v. Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v. Secretary of State for Constitutional Affairs).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened the defendant pleads guilty (R v. Brook, R v. Baker and Fowler, R v. Sanghera, Lord Chancellor v. Ian Henery Solicitors Limited (the present appeal)).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence (R v. Dean Smith, R v. Bullingham, R v. Wembo).

(6) If, in accordance with modern practise in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J. did in R v. Dean Smith, in the light of the relevant principles explained in this judgment.

9. I am referred additionally to R v. Jakubczyk [2015] SCCO Ref: 32/15, R v. Kiasuka-Kiakanda [2020] SC-2020-CRI-000253, R v. Coles [2017] SCCO Ref: 51/16, R v. Sallah [2019] SCCO Ref: 281/18, R v. Young [2019] SCCO Ref: 205/18, R v. Shaikh [2020] SC-2019-CRI-000137 and R v. Shabir & Khan [2021] SC-2021-CRI-000124.

The submissions

10. The Respondent's case is set out in Written Reasons dated 17th January 2024 and in Written Submissions dated 6th September 2024. The Appellants' case is set out in Grounds of Appeal and in an undated Note for Taxation. The Defendant's counsel has also produced a helpful Note of Trial, from which much of the information at paragraphs 3 to 5 above is taken. Mr Elvidge, counsel, represented the Appellants at the oral hearing on 13th September 2023.

My analysis and conclusions

11. It is common ground that the jury had been sworn and that the prosecution had not opened the case before the Defendant was re-arraigned. The issue, therefore, was whether or not the court had engaged 'with substantial matters of case management' to the extent 'that the trial had been begun in a meaningful sense'.

12. The Respondent, in summary, submits that the court only dealt with the proposed Bad Character Application which, pursuant to the judgments in R v. Jakubczuk and R v. Kiasuka-Kiakanda (ibid), be considered as effectively a pre-trial application, or otherwise an 'ordinary matter of case management'. As such, in the absence of substantial matters of case management, the trial had not begun in a meaningful sense and a 'cracked trial' fee is payable.

13. The Appellants, in summary, submit that after the jury was sworn, the parties made submissions to the Judge in a contentious Bad Character Application, in circumstances where the issue was not so much the Defendant's character, but the inadequate disclosure provided by the Crown, Thus, when further disclosure was provided overnight from the NRM and the Immigration Service, the application was abandoned. Meanwhile, the Defendant having indicated a willingness to change his plea, counsel for the prosecution and the defence underwent further periods of negotiation whereby the prosecution agreed the Defendant be sentenced in a lesser role, described as the "lower end of Cat 1". All this, submits the Appellants, constitutes substantial case management.

14. I note again – as Spencer J indicated at para. 96(7) of Henery (ibid) – that not every appeal is easy to determine and that many cases will turn on their own specific facts. I find, on the facts of this case, that the Appellants' claim should be paid as a trial and not as a 'cracked trial'. I am satisfied, in other words, that the trial had begun in a meaningful sense, in that the court had engaged in substantial matters of case management. This was not a straightforward Bad Character Application, but rather one which turned on the fact or, rather, the lack of complex disclosure from the Immigration Service via the National Referral Mechanism. It took two (fairly complete) sitting days to resolve this issue. Although each case must necessarily turn on its own facts, I consider it generally undesirable for advocates or litigators to be paid a 'cracked trial'

fee when they have been properly (and fairly fully) engaged for two or more sitting days. The issues concerning the application and, ultimately the basis of the Defendant's guilty plea, were debated repeatedly before the judge, who evidently gave some direction as to progress and procedure, notwithstanding that no substantive judgement as required. Ultimately, I am satisfied that in this case the trial had effectively begun, and that the Appellants' LGFS claim should be paid as a trial.

Costs

15. Counsel appeared before me pro-bono and so the only costs claimed is the £100 paid in lodging the appeal.

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