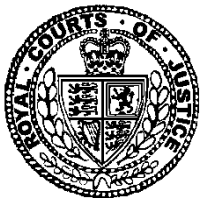

Neutral Citation No. [2025] EWHC 1278 (SCCO)

Case No: T20197191

SCCO Reference: SC-2023-CRI-000105

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 22nd May 2025

Before:

COSTS JUDGE WHALAN

REX
v
ADAM KHAN

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

Appellants: Eldwick Law

The appeal has been successful, in part, for the reasons set out below. The appropriate additional payment, to which should be added the £100 paid on appeal and £300.00 (+any VAT payable) for costs, should accordingly be made to the Appellants.

COSTS JUDGE WHALAN

Introduction

1. Eldwick Law Solicitors ('the Appellants') appeal the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') to reduce the number pages of prosecution evidence ('PPE') forming part of its Litigator's Graduated Fees Scheme ('LGFS') claim. The issue on appeal is whether the total PPE count should be 10,000, as claimed, or 2541, as allowed.

Background

2. The Appellants represented Mr Adam Khan ('the Defendant'), who was charged with two co-defendants at Leeds Crown Court on an indictment alleging one count of possessing a firearm, with intent to cause fear or violence.

3. The case concerned a shooting that took place on 25th June 2019 in Bradford. The weapon used was a double-barrelled sawn-off shotgun. It was alleged that the target of the shooting was Reece Serrant and the context was a dispute between the Defendant and/or his family, and the victim. The incident was captured on CCTV which depicted two young men, one of whom was carrying a gun. The two men left the scene in different vehicles, cars which were subsequently connected to the Defendant and Asin Hussain, one of his co-defendants. The prosecution relied on mobile telephone evidence obtained by 'attribution'. In other words, no mobile phone was recovered from the Defendant, but a number for him was obtained and the relevant datum was obtained from the mobile phone provider. The prosecution relied specifically on cell site evidence which, when reproduced in a series of charts showing the mobile phone traffic between the defendants, identifies the approximate location of the phones at the time each call was made.

4. The Respondent has allowed a PPE count of 2541 pages, comprising 639 statements, 1416 exhibits, 103 transcripts, 58 forensics and 344 for electronic datum relevant to the mobile phone(s), all of which refer to the cell site evidence.

5. The Appellants submit that another 6263 pages should be allowed in respect of the Defendant's phone, plus other datum (20,000+ pages) relating to the co-defendants' phone(s). This total should then be reduced to 10,000 PPE, by reason of the statutory cap imposed by the regulations.

The Regulations

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

7. Paragraph 1 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

> *1. Interpretation*
>
> *…*
>
> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all –*
>
> *(a) witness statements;*
>
> *(b) documentary and pictorial exhibits;*
>
> *(c) records of interviews with the assisted person; and*
>
> *(d) records of interviews with other defendants,*
>
> *which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.*
>
> *(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.*
>
> *(5) A documentary or pictorial exhibit which –*
>
> *(a) has been served by the prosecution in electronic form; and*
>
> *(b) has never existed in paper form,*
>
> *is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances.*

Case Guidance

8. Authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50):

(i) The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.

(ii) In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.

(iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.

(iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispense with the need for service of a notice of additional evidence, before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.

(v) The phrase "served on the court" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. I do not think that "service on the court" is a necessary pre-condition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages could be excluded from the count of PPE merely because the notice had for some reason not reached the court.

(vi) In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE.

(vii) Where the prosecution seek to rely on only part of the data recovered from a particular source, and therefore served an exhibit which contains

only some of the data, issues may arise as to whether all of the data should be exhibited. The resolution of such issues would depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.

(viii) *If – regrettably – the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Office (or, on appeal, the Costs Judge) will have to determine it in the light of the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) will be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE. Again, this will be a case-specific decision. In making that decision, the Determining Officer (or Costs Judge) will be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the Determining Officer (or Costs Judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.*

(ix) *If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures the public funds are not expended inappropriately.*

(x) *If an exhibit is served in electronic form but the Determining Officer (or Costs Judge) considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2.*

(xi) *If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the*

Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be included in the number of PPE. In such circumstances, the discretion under paragraph 1(5) does not apply.

9. I am referred additionally to the decisions in R v. Jalibaghodelezhi [2014] 4 Costs CLR 781, R v. Sereika [2018] SCCO Ref: 168/18, R v. Barrass [2020] SC-2020-CRI-000083, R v. Mucktar Khan [2019], SCCO Ref: 2/13, R v. Lawrence [2022] EWHC 3355, and Lord Chancellor v. Lan and Meerbux Solicitors [2023] EWHC 1186.

The submissions

10. The Respondent's case is set out in Written Reasons dated 16th October 2023 and in Submissions drafted by Mr Jonathan Orde of the Government Legal Department on 11th September 2024. The Appellants' case is set out in the Notice of Appeal and in a Skeleton Argument (undated). Mr Khan, counsel, attended and made oral submissions for the Appellants at the hearing on 13th September 2024. No appearance was made by the Respondent at this hearing.

My analysis and conclusions

11. The Respondent, in summary, states that aside from the cell site evidence, no allowance was made in the PPE count for any other datum relevant to mobile phones as "it did not appear relevant to the case". The Respondent criticises the Appellants for failing to explain why the additional mobile phone datum was included in the PPE count. The Submissions aver that: "The burden is on the appellant to explain why evidence should be remunerated and the Appellants' case is unclear" (para. 7).

12. The Appellants, in summary, submit that the PPE count should include 6263 pages of electronic datum relevant to the Defendant's phone, comprising audio (70), images (1206), MMS (7), SMS (700), Texts (120), videos (312) and uncategorised datum (3968). This material was relevant because the Respondent was "wrong to take a myopic view of the case" (Skeleton Argument, para. 3). This material was relevant in establishing connections and relationships with the co-defendants, insofar as the prosecution relied on an allegation of joint enterprise. The Appellants cite the

prosecution Opening Note (drafted by Benjamin Nolan KC), specifically paragraphs 4 and 9, which refer to the defendants' joint enterprise and the relevance of the telephone evidence. Further, the voluminous datum (20,000+ pages) relevant to the other defendants' mobile phones, particularly one relevant to Zeesham Khan, are relevant to the PPE count as the prosecution made a "bad character/cross admissibility application", meaning that, in effect, the evidence applicable to the other defendants was relevant necessarily to the Defendant. This application, which the trial judge allowed, admitted into evidence other electronic datum, which included photographs of weapons (including a sawn-off shotgun), on the phone of another defendant.

13. I am satisfied, having reviewed the lengthy evidence set out in the Appeal Bundle (pp 1-282) that some of the material rejected by the Respondent should be included in the PPE count. The material that should be included comprises certainly MMS (7), SMS (700) and Text messages (120). I am not persuaded that videos, audio or anything from the uncharacterised section should be included in the PPE count. Clearly, the prosecution made some use of images downloaded from the co-defendants' mobile phones, but it would appear that no relevant datum was obtained from the Defendant's phone. Electronic datum sourced from the co-defendants' phones remains largely uncharacterised, and so it is difficult to reach an accurate approximation for the purposes of PPE count. Given that some images of firearms were relied on specifically, it seems to me that some material should be included in the PPE count, and, doing the best I can, I would allow an additional 75 pages for this material. Nothing, in my view, should be allowed in respect of the images from the Defendant's phone.

14. Accordingly, I would allow on appeal an additional 902 PPE (7 + 700 + 120 + 75), making a total PPE count of 3443. The appeal is allowed to the extent that I direct that this LGFS claim should be re-calculated by reference to a PPE count of 3443.

Costs

15. The appeal has been successful, in part, and I allow £300 (+ any VAT payable) in costs, in addition to the £100 paid on lodging the appeal.

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