



15 APR 2014

SENIOR COURTS  
COSTS OFFICE

SCCO Ref: 354/13

Dated: 2<sup>nd</sup> April 2014

**ON APPEAL FROM REDETERMINATION**

**REGINA v JALIBAGHODELEHZI**

CROWN COURT AT MANCHESTER

APPEAL PURSUANT TO ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE  
(FUNDING) ORDER 2007

CASE NO: T2012 7632

LEGAL AID AGENCY CASE

DATE OF REASONS: 27<sup>th</sup> November 2013

DATE OF NOTICE OF APPEAL: 13<sup>th</sup> December 2013

APPLICANT: SOLICITORS CLIFFORD JOHNSTON & CO  
DX 23167 Didsbury  
Ref: NH/JALI0002-1

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

The appropriate additional payment, to which should be added the sum of £2,078.70 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

**ANDREW GORDON-SAKER  
COSTS JUDGE**

## REASONS FOR DECISION

1. This is an appeal by Clifford Johnston & Co, a firm of solicitors in Manchester, against the calculation of a litigator graduated fee by the Legal Aid Agency.
2. The solicitors were instructed to represent Rozhan Jalibaghodehzi who was charged with conspiring to evade the prohibition on the importation of opium. The solicitors submitted their claim for a graduated fee on the basis that there were 123 pages of statements and 1,135 pages of exhibits served by the prosecution. The Agency calculated the fee on the basis that there were 474 pages of prosecution evidence "as it was not clear if CDs amounted to PPE or should have been claimed as special preparation".
3. In their letter accompanying the request for redetermination the solicitors explained that they had printed out all of the pages served on disc as that was necessary for the proper preparation of the case. The material largely consisted of downloads from mobile phones and was crucial evidence in the case, as was clear from the prosecution case summary.
4. By its written reasons dated 27<sup>th</sup> November 2013 the Legal Aid Agency accepted that the evidence on the discs had been served by the prosecution under a notice of additional evidence dated 21<sup>st</sup> February 2013. However the Agency had been in contact with the Crown Prosecution Service who had confirmed that the evidence had only ever existed in electronic format. It was explained that:

Therefore, the electronic evidence cannot be remunerated as PPE. In accordance with Appendix D listed above, documentary and pictorial exhibits that have only ever existed in digital format must be claimed as Special Preparation.

5. The reference to Appendix D is to the Crown Court Fee Guidance published by the Agency on 26<sup>th</sup> April 2013 which suggests that "documentary and pictorial exhibits that have only ever existed in digital format" should be remunerated as "special preparation unless the appropriate [officer] decides that it would be appropriate to include it in the pages of prosecution evidence, ie because it would previously have been served in paper format".
6. The representation order in this case was granted on 22<sup>nd</sup> September 2012 and accordingly the definition of pages of prosecution evidence provided by paragraph 1 of schedule 1 to the Criminal Defence Service (Funding) Order 2007 is that substituted by SI 2012/750 (which applies in respect of proceedings in which a representation order was granted on or after 1<sup>st</sup> April 2012):

(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court shall be determined in accordance with paragraphs (2A) to (2C).

(2A) 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.

(2B) Subject to paragraph (2C), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(2C) 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 into account the nature of the document and any other relevant circumstances.

7. Ms Hall, on behalf of the solicitors, fairly submits that the Agency has not followed its own guidance. It is clear from the wording of both the Funding Order and the guidance that there is a discretion to include in the pages of prosecution evidence exhibits which have never existed in paper form. The guidance suggests that the discretion should be exercised if the evidence would previously have been served in paper format.
8. The material on the discs consisted largely of the telephone evidence used by the prosecution to connect the defendant to the imported drugs. This was the evidence exhibited by the forensic investigator instructed by the prosecution.
9. Ms Hall submitted that this was crucial evidence which would previously have been served on paper. The prosecution printed some of it for the jury and the defence printed all of it so that the client's instructions could be obtained.
10. Clearly this evidence was served by the prosecution. The discs were exhibited to the statements of Mr Jennings. In my view this is the sort of evidence which would previously have been served in paper format. Following the Agency's own guidance it should have been included in the page count.
11. While that is enough to decide this appeal in the solicitors' favour, I would add this, as appeals on this issue are now numerous. The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically "taking into account the nature of the document and any other relevant circumstances". Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have

never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper. So in a case where, for example, thousands of pages of raw telephone data have been served and the task of the defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count.

12. Accordingly the appeal is allowed and the graduated fee recalculated.

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Ref: NH/JALI0002-1

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